Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Public Safety Communications in the 800 MHz Band	)	WT Docket 02-55
	)	
Consolidating the 800 and 900 MHz Industrial/Land Transportation and Business Pool Channels	)	
	)	
Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems	)	ET Docket No. 00-258
	)	
Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service	)	RM-9498
	)	
Petition for Rule Making of UT Starcom, Inc., Concerning the Unlicensed Personal Communications Service	)	RM-10024
	)	
Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service	)	ET Docket No. 95-18

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SECOND MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2007 **Released: May 30, 2007**

By the Commission:

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I. INTRODUCTION

1. In the *800 MHz Report & Order*, the Commission adopted technical and procedural measures to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.[1] Specifically, the Commission addressed the ongoing interference problem over the short-term by adopting technical standards defining unacceptable interference in the 800 MHz band and detailing responsibility for interference abatement.[2] The Commission further determined that solving the interference problem for the long-term necessitated reconfiguring the 800 MHz band to separate generally incompatible technologies whose current proximity to each other is the identified root cause of unacceptable interference.[3] Accordingly, the Commission adopted a new band plan for the 800 MHz band and established a transition mechanism for licensees in the band to relocate to their new spectrum assignments. The Commission subsequently issued a *Supplemental Order* making certain clarifications of, and changes to, the provisions of the *800 MHz Report and Order* and its accompanying interference mitigation and band reconfiguration rules.[4] In October 2005, the Commission released a *Memorandum Opinion and Order* (*800 MHz MO&O*) making certain further changes and clarifications to the 800 MHz interference mitigation and band reconfiguration rules.[5]

2. In this Order, we address various petitions for reconsideration and clarification of the Commission's *800 MHz MO&O*, previously unaddressed portions of a petition for reconsideration of the *800 MHz Report and Order* and a petition for partial waiver of the rebanding rules, as well as several petitions dealing with clearing of the 1.9 GHz Broadcast Auxiliary Services (BAS) band, including a joint

[1] *See generally* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969(2004) *as amended by Erratum*, 19 FCC Rcd 19651 (WTB PSCID 2004) and *Erratum*, 19 FCC Rcd 21818 (WTB PSCID 2004) (*800 MHz Report and Order*).

[2] *See id.* at 15021-15045 ¶¶ 88-141.

[3] *See id.* at 15045-15079 ¶¶ 142-209.

[4] *See generally* Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, WT Docket No. 02-55, 19 FCC Rcd 25120 (2004) (*800 MHz Supplemental Order*).

[5] *See* Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, *Memorandum Opinion and Order*, WT Docket No. 02-55, 20 FCC Rcd 16015 (2005), as amended by *Erratum* 20 FCC Rcd 18970 (PSCID, WTB 2005) (*800 MHz MO&O*).

petition for declaratory ruling and several petitions for clarification or reconsideration.[6] We defer consideration of the portion of Sprint's petition for reconsideration addressing the eighteen-month rebanding benchmark established by the Commission in the 800 MHz Report and Order and modified in the *800 MHz Supplemental Order.*[7] We will address this portion of the petition, and Sprint's compliance with the benchmark, at a later date.

II. EXECUTIVE SUMMARY

3. We take the following actions in this Order:

- We affirm the eligibility criteria established in the *800 MHz MO&O* for relocation to the ESMR band.
- We clarify costs that must be paid by Sprint to non-ESMRs relocating to the ESMR band.
- We deny MRA's Petition for Partial Waiver of Rebanding Rules.
- We clarify the procedures to be used in the event of a spectrum shortfall in the ESMR band.
- We provide for the development of a revised band plan and timetable for the Puerto Rico market.

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[6] Specifically, we address the following petitions: Petition for Reconsideration, filed by Sprint Nextel Corporation on January 27, 2006 (Sprint Petition); Second Petition for Reconsideration, filed by Charles D. Guskey, on January 27, 2006 (Guskey Petition); Petition for Clarification, filed by Chair of the NPSPAC Region 8 Regional Planning Committee on March 3, 2006 (NPSPAC Region 8 Petition); Request for Clarification, jointly filed by Communications & Industrial Electronics, Inc., North Sight Communications, Inc. and Ragan Communications, Inc., on January 27, 2006 at 5-8. (C&I - North Sight - Ragan Clarification Request); Petition for Reconsideration of Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, filed by Richard W. Duncan d/b/a Anderson Communications, filed Dec. 22, 2004 (Duncan Petition); *See* Petition for Partial Waiver of Rebanding Rules, filed by Mobile Relay Associates on January 24, 2006 (MRA Waiver Request); *See* Request for Declaratory ruling, filed jointly on June 20, 2005 by Nextel, The Association for Maximum Service Television, and National Association of Broadcasters (Nextel/MSTV/NAB Request); Petition for Clarification or Reconsideration, filed January 27, 2006 by Mohave County Bd. Of Supervisors, (Mohave Petition); Petition for Clarification or Reconsideration, filed January 27, 2006 by Scripps Howard Broadcasting Co., Petition for Clarification or Reconsideration, filed January 27, 2006 by Meredith Corp., Petition for Clarification or Reconsideration, filed January 27, 2006 by, Multimedia Holdings Corp., Petition for Clarification or Reconsideration, filed January 27, 2006 by Fox Television Stations, Inc., Petition for Clarification or Reconsideration, filed January 27, 2006 by KTVK, Inc, and Petition for Clarification, filed January 27, 2006 by Association for Maximum Service Television. We note that the Petitions for Reconsideration of the *800 MHz Report and Order, 800 MHz Supplemental Order* and *800 MHz Memorandum Opinion and Order* were placed on Public Notice. *See Public Notice*, Report No. 2687 (Jan. 19, 2005), 70 Fed. Reg. 5449 (Feb. 2, 2005) (petitions for reconsideration of the *800 MHz Report and Order*; *Public Notice*, Report No. 2697 (Mar. 23, 2005), 70 Fed. Reg. 17458 (Apr. 6, 2005) (petitions for reconsideration of the *800 MHz Supplemental Order*); *Public Notice*, Report No. 2761 (Feb. 16, 2006), 71 Fed. Reg. 11658 (Mar. 8, 2006) (petitions for reconsideration of the *800 MHz MO&O*). The SAFE Coalition also filed a petition for reconsideration, but on December 15, 2006, it requested voluntary dismissal of the petition as part of a settlement agreement with Sprint. *See* Letter, dated December 15, 2006 from Julian L. Shepard, Esq. Counsel to SAFE to Marlene Dortch, Secretary, FCC. We grant the SAFE Coalition's request for voluntary dismissal and do not consider its petition in this order. In addition, as part of the same settlement agreement, Sprint has agreed to relocate SAFE Coalition licensees to the ESMR band, and requests that its reconsideration petition on the ESMR relocation issue be treated as moot with respect to the SAFE Coalition licensees. *See* Letter, dated December 15, 2006 from James B. Goldstein, Director – Spectrum Reconfiguration, Sprint Nextel Corporation to Marlene Dortch, Secretary, FCC. We confirm that our decision in this order does not preclude Sprint and the SAFE Coalition from providing by negotiated agreement for relocation of the SAFE Coalition licensees to the ESMR band, provided that the terms of the agreement are approved by the TA and are otherwise consistent with our rules and orders in this proceeding.

[7] *See* Sprint Petition at 15-17.

- We address rebanding in Guam, the Northern Mariana Islands, American Samoa, and the Gulf of Mexico.
- We clarify the impact of the 800 MHz application freeze on modification applications.
- We deny petitions to require Sprint to pay other licensees' post-mediation litigation costs.
- We define limits on Sprint operations in proximity to NPSPAC operations prior to the conclusion of rebanding.
- We dismiss the Charles Guskey petition as repetitive and untimely.
- We partially grant petitions to require Sprint to relocate BAS facilities associated with translator television stations or operated by full-power television stations on a short-term basis by permitting, but not requiring, Sprint to pay and claim credit for the costs incurred in relocating these BAS facilities.
- We delegate specific authority to the Public Safety and Homeland Security Bureau to propose and adopt new 800 MHz band plan rules for U.S. primary spectrum in the Canadian and Mexican border regions once the relevant agreements with Canada and Mexico are finalized.

III. DISCUSSION

A. Eligibility for Relocation to the ESMR Band

4. Sprint seeks reconsideration of the provisions of the *800 MHz MO&O* that clarified and expanded the rights of certain licensees other than Sprint and SouthernLINC to relocate to the ESMR band.[8] After careful analysis, we find no reason to upset the Commission's balancing of interests that led to the revised eligibility criteria for the ESMR band contained in the *800 MHz MO&O*.

1. Low-Density Cellular Systems

5. *Background.* In the *800 MHz MO&O*, the Commission clarified that "low-density" as well as "high-density" cellular systems could operate in the ESMR band.[9] The Commission explained that its use of the term "high density cellular" was intended only to define the type of cellular system that is prohibited in the non-ESMR portion of the 800 MHz band, and was not intended to limit eligibility for the ESMR portion.[10] To ensure that the rules accurately reflected the intent of the *800 MHz Report and Order*, the Commission amended the rules to state that all "cellular systems" may operate in the ESMR

[8] *800 MHz MO&O*, 20 FCC Rcd 16021-28 ¶¶ 10-28. The ESMR band is the upper segment of the reconfigured 800 MHz band that will be used by "Enhanced SMR" system. ESMR is a term coined by industry to describe SMR systems, such as Nextel's, that use cellular architecture, *i.e.*, systems that use multiple, interconnected, multi-channel transmit/receive cells and employ frequency reuse to serve a larger number of subscribers than is possible using non-cellular technology. Although the term "ESMR" does not appear in the Commission's rules, it has appeared in the Commission's case law. *See* Request of Fleet Call, Inc. *Memorandum Opinion and Order*, FCC 91-56, 6 FCC Rcd 1533 ¶ 13(1991). In most of the country the ESMR band extends from 816-824 MHz / 861-869 MHz. However, the Commission may adjust the lower boundaries of the ESMR band, as need arises, as it did in the Southeastern United States. *See* para. 28 *infra*.

[9] *See 800 MHz MO&O* 20 FCC Rcd at 16021 ¶ 8. The Commission defines a "cellular system" as "a system that uses multiple, interconnected, multi-channel transmit/receive cells capable of frequency reuse and automatic handoff between cell sites to serve a larger number of subscribers than is possible using non-cellular technology." *Id.* A high-density cellular system is a "cellular system which has more than five overlapping interactive sites featuring hand-off capability" and "any one of such sites has an antenna height of less than 30.4 meters (100 feet) above ground level with an antenna height above average terrain (HAAT) of less than 152.4 meters (500 feet) and twenty or more paired frequencies." *See* 47 C.F.R. §§ 90.7; 90.614. A low-density cellular system is a cellular system that does not meet the high-density specifications.

[10] *See 800 MO&O*, 20 FCC Rcd at 16021 ¶ 8.

band.[11]

6. Sprint contends that the Commission's decision to allow low-density cellular systems into the ESMR band is a fundamental departure from the Commission's original decision, is inconsistent with the Commission's public interest objectives in this proceeding, and is therefore arbitrary and capricious.[12] Specifically, Sprint argues that in the *800 MHz Report and Order*, the Commission found low-density cellular systems to pose no significant interference risk to non-cellular systems, and that there is therefore no reason that they should be eligible to relocate to the ESMR band.

7. *Discussion.* We are not persuaded by Sprint's argument. As we explained in the *800 MHz MO&O*, the Commission's decision to exclude high-density cellular systems from the non-ESMR band was never intended to exclude low-density cellular systems from the ESMR band.[13] We further pointed out that interpreting our rules to prohibit relocation of low-density cellular systems to the ESMR band would have prevented relocation of large iDEN-based cellular systems such as SouthernLINC's that did not meet the high-density criteria.[14] Thus, the clarification to the rules in the *800 MHz MO&O* was not a fundamental change, but was completely consistent with the Commission's prior orders.

8. We also do not agree with Sprint's argument that the lower interference risk posed by low-density cellular systems to non-cellular systems is a reason to keep them out of the ESMR band. Sprint suggests that the ESMR band should be reserved only for high-density systems that are required to relocate there.[15] While it is true that the Commission did not require low-density cellular systems to relocate to the ESMR band, relocation of such systems has significant public interest benefits. Even if low-density cellular systems pose a lower risk of interference to non-cellular systems than high-density cellular systems, spectral separation of cellular from non-cellular systems remains the preferred option and has been a fundamental goal of this proceeding from the outset.[16] Moreover, relocation of low-density systems to the ESMR band will make additional non-ESMR spectrum available for public safety and critical infrastructure use, another major goal of this proceeding.[17] Thus, we have provided for relocation of commercial systems such as SouthernLINC to the ESMR band and we have limited introduction of new low-density cellular operations in the non-ESMR band solely to non-ESMR systems—and then only on a strict non-interference basis.[18] Against this background, we believe it would be anomalous to allow Sprint and SouthernLINC to relocate their systems to the ESMR band and deny that option to other ESMR licensees.

2. Relocation of Non-ESMR EA Licensees and Associated Site-Based Stations

9. *Background.* In the *800 MHz Supplemental Order*, the Commission gave non-ESMR Economic Area (EA) licensees the option of relocating their geographic licenses to the ESMR band and converting to ESMR operation, but did not allow them to relocate associated site-based licenses.[19] In the *800 MHz MO&O*, the Commission permitted EA licensees to also relocate associated site-based licenses

[11] 47 C.F.R. § 90.7.

[12] *See* Sprint Petition at 8-10.

[13] *See 800 MHz MO&O*, 20 FCC Rcd at 16021 ¶ 8.

[14] *Id.*

[15] Opposition of Sprint Nextel Corporation, filed March 23, 2006 (Sprint Opposition) at 3-4.

[16] *See 800 MHz Report and Order*, 19 FCC Rcd at 14973 ¶ 3.

[17] *Id.* at 14972-73 ¶ 2.

[18] *Id.*, at 15060-61 ¶¶ 172-174.

[19] *See 800 MHz Supplemental Order*, 19 FCC Rcd at 25155 ¶ 79; *800 MHz MO&O*, 20 FCC Rcd at 16026 ¶ 23.

if they were part of their "integrated communications system" as of November 22, 2004, the 800 MHz *Report and Order* Federal Register publication date.[20] Sprint argues that the Commission has failed to provide a reasoned basis for this latter decision and that there is no "rational connection" to the Commission's public interest objective of remedying interference in the 800 MHz band.[21]

10. *Discussion.* Contrary to Sprint's claims, the Commission's decision furthers both the goal of ensuring equitable treatment of all 800 MHz licensees and alleviating unacceptable interference to public safety licensees.[22] After the *800 MHz Supplemental Order*, some non-ESMR EA licensees argued that the Commission had unnecessarily constrained their ability to implement ESMR systems on their combined EA and site-based spectrum.[23] In providing relief to these licensees in the *800 MHz MO&O*, the Commission acknowledged the importance of "evaluating their systems as a whole (even if portions thereof are licensed on a non-EA basis)," so as to place them "in a position comparable to that they currently occupy."[24] Moreover, we believe that allowing EA licensees to relocate site-based licenses to the ESMR band makes it substantially less likely that the site-based portions of their systems would interfere with public safety and other high-site systems. We note that we did not prohibit SouthernLINC from relocating its site-based licenses to the ESMR band and see no reason to treat other ESMR licensees differently. We also note that since the inception of this proceeding, Sprint has urged recognition that the mixing of incompatible technologies in the 800 MHz band is the "root cause" of interference to public safety and other 800 MHz high-site systems.[25] A consensus of commenting parties supported Sprint's analysis. Spectral separation of incompatible technologies being the essence of 800 MHz band reconfiguration, allowing EA licensees to relocate their site-based systems to the ESMR band unquestionably furthers the spectral separation goal.

11. These strong public safety considerations outweigh Sprint's concern that migrating the site-based portions of EA licensees' systems to the ESMR band could affect Sprint's private interests. Sprint's argument that the value of its spectrum rights will be significantly compromised as a result of our action in is entirely speculative. Sprint has not shown that a reduction in value, if it did occur, would be other than minimal or of such magnitude that it would have significant public interest consequences, *e.g.*, that it would affect the availability to the public of competitive wireless communications service. Accordingly, we deny Sprint's request for reconsideration of the *800 MHz Supplemental Order's* provisions concerning relocation of site-based licenses to the ESMR band.[26]

12. Sprint also objects to the Commission's decision to allow EA licensees relocating to the ESMR band to also relocate associated site-based stations even if the service contour of such stations does not overlap another portion of the system.[27] The Commission's determination in that regard was informed by Airpeak's filing, in which Airpeak reported that its existing systems had site-based licenses "that are integrated into its network switch and are able to carry communications among its subscribers even though they do not have contours that overlap with other portions of the network" and that "this is a common feature of systems that serve rural areas, particularly in the earlier phases of system

[20] *See 800 MHz MO&O*, 20 FCC Rcd at 16026-27 ¶ 25.

[21] *See* Sprint Petition at 8.

[22] *See 800 MHz MO&O*, 20 FCC Rcd at 16028 ¶ 28.

[23] *Id.* at 16026 ¶ 24.

[24] *Id.* at 16026-27 ¶ 25.

[25] *800 MHz Report and Order*, 19 FCC Rcd at 14973 ¶ 3.

[26] *See* paragraphs 18-19, *infra*.

[27] *See* Sprint Petition at 3.

deployment."[28] Based on this representation, which Sprint has not challenged, the Commission reasonably concluded that it would not be in the public interest to require a licensee to discontinue existing service to subscribers, particularly in small rural areas, merely because they received service from a cell whose coverage contour did not overlap other cells in the system. Moreover, the Commission provided protection against abuse of this provision by requiring the licensee to establish to the satisfaction of the TA that any non-overlapping cell is, in fact, part of its integrated system.[29] Sprint contends that it will be difficult for the TA to make this assessment, and that a bright-line exclusion of non-overlapping sites would be preferable.[30] We do not find this argument persuasive: the criteria established by the Commission are clear and the TA has the technical expertise to apply them.

13. Identical considerations cause us to reject Sprint's claim that a cell operating pursuant to a spectrum lease, or cells that had been acquired but not yet integrated into a licensee's system, should be ineligible to relocate to the ESMR band with the "parent" system. We note that Airpeak showed to the Commission's satisfaction that a waiver to permit it to relocate cells acquired after the cutoff date would not frustrate the underlying purpose of the cutoff rule—foreclosing speculative acquisition of licenses.[31] The facts attendant on Airpeak's acquisition of stations after the cutoff date do not suggest speculative intent and Sprint has provided no countervailing facts that would justify our revisiting the Commission's determination in the *800 MHz MO&O*.

3. Site-based Licensees

14. We dismiss the previously unresolved issue raised on reconsideration of the *800 MHz Report and Order* by Richard W. Duncan (Duncan). Duncan, who operates a conventional site-based SMR system in Charlotte, North Carolina, and has no EA license in the area, argues that he should be allowed to relocate his system to the ESMR band so that he can deploy cellular technology.[32] Duncan submits that otherwise, he will be barred from deploying cellular technology, and that, as a consequence, his license "will have virtually no market value." Duncan argues that the diminution in value to his license resulting from band reconfiguration represents an unlawful taking.[33] As discussed below, we deny Duncan's petition.

15. The fundamental purpose of band reconfiguration is to remove systems from the non-ESMR portion of the 800 MHz band that have the potential to cause interference to public safety systems. Unlike an ESMR system, Duncan's conventional high-site system does not pose such an interference threat. Moreover, requiring conventional site-based high-site systems such as Duncan's to remain in the non-ESMR band is not inequitable because site-based licensees with high-site systems will have the same ability to operate in the post-rebanding environment as they had before. Moreover site-based licensees such as Duncan are readily distinguishable from non-ESMR EA licensees that have sufficient spectrum and geographic coverage to provide EA-wide ESMR service, even if they currently do not operate ESMR systems. Conversely, site-based, high-site licensees such as Duncan are constrained by limited geographic coverage and channel capacity, making it highly unlikely that they could implement a viable

[28] *800 MHz MO&O*, 20 FCC Rcd at 16023 ¶ 15, *citing* Petition for Reconsideration, filed Mar. 10, 2005 by AIRPEAK Communications LLC (Airpeak Petition of Supplemental Order) at 5-9.

[29] *800 MHz MO&O*, 20 FCC Rcd at 16023 ¶ 15.

[30] Sprint Petition at 3-4.

[31] *800 MHz MO&O*, 20 FCC Rcd at 16025 ¶¶ 20-22.

[32] Duncan Petition at 4. In the *800 MHz MO&O*, the Commission addressed certain issues raised in Duncan's petition, but deferred consideration of this issue. *See 800 MHz MO&O*, 20 FCC Rcd 16052 n.227.

[33] *Id.* at 3.

ESMR service.[34] The probability of such a venture being competitive is so slight that it is more likely that the licensee's ESMR spectrum would remain fallow unless it was acquired by a larger ESMR operator.

16. We also reject Duncan's contention that the impact of band reconfiguration on the value of his license constitutes an unlawful taking. First, as noted above, courts have held that under the *Communications Act, licensees have no property rights in radio licenses.*[35] *Second, it is well established* that the Commission has the authority to alter the terms of an existing license by rulemaking.[36] Thus, even assuming that Duncan's license might be more attractive to potential buyers if it were relocated to the ESMR band, that is a matter of private, not public, interest. Here, the public interest lies in the abatement of unacceptable interference to public safety systems and the provision of additional public safety spectrum. Allowing Duncan and similarly situated non-EA, non-ESMR licensees to relocate to the ESMR band would meet neither of those public interest goals.

17. Duncan also argues that the Commission has unreasonably discriminated against him by providing Nextel and SouthernLINC with "value for value" compensation in the form of spectrum in the ESMR band, while providing Duncan with only "megahertz for megahertz" compensation, *i.e.*, the ability to relocate to comparable facilities in the non-ESMR portion of the 800 MHz band.[37] We find this argument without merit. As an initial matter, contrary to Duncan's belief, the *800 MHz Report and Order* makes it clear that the value for value analysis related only to Sprint, not SouthernLINC. That analysis was necessary in Sprint's case because it was the sole licensee that assumed uncapped liability for relocating incumbents in the 800 MHz and 1.9 GHz band and the only licensee that is obliged to provide public safety with additional spectrum by surrendering all of its 800 MHz channels below the ESMR band. Duncan has not proposed to assume such liability or to surrender a portion of his spectrum holdings for public safety use. Thus, Duncan has not shown that application of "value for value" analysis is even possible in his case, or that it would yield a different result in his case than the "megahertz for megahertz" approach. We reject Duncan's claim of unreasonably discriminatory treatment. Duncan's arguments also cannot be reconciled with the fundamental technical premise of this proceeding: that incompatible technologies in the 800 MHz band—in this case, Duncan's high-site operations and Sprint and SouthernLINC's ESMR operations—must be spectrally separated if unacceptable interference is to be avoided. Accordingly, Duncan's attempt to equate his circumstances with those of Sprint and SouthernLINC is unavailing and we deny his petition for reconsideration.

18. *Sprint Petition.* As noted above, Sprint seeks to reverse the modifications to the ESMR band relocation rules adopted in the *800 MHz MO&O* that enable relocating site-based ESMR licensees to obtain EA-wide licenses in the ESMR band based on a fifty-percent population coverage showing. Sprint contends that expanding the rights of licensees in this manner diminishes the spectrum available to Sprint, thereby lowering the value of Sprint's ESMR licenses.[38] However, we find Sprint's claim deficient on at

[34] Duncan's license for station WPXQ626 authorizes only five frequency pairs. While it is theoretically possible to operate a cellular architecture system with as few as two channels—a two-cell system in which a single subscriber could be "handed off" from one cell to another, the cost of the equipment and infrastructure necessary to operate a cellular architecture system make it unlikely that Duncan (or any other conventional SMR licensee operating from a single site) could serve sufficient subscribers to support an economically-viable cellular architecture system given his limited number of channels and the fact that he cannot add facilities that would extend the coverage of their base stations. *See* 47 C.F.R. § 90.693(b).

[35] *See, e.g. Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 331(1945) (stating that "[n]o licensee obtains any vested interest in any frequency."). *See also* 47 U.S.C. § 301. *See generally, FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 805-06 n.25 (1978).

[36] *See e.g. United States v. Storer Broadcasting*, 351 U.S. 192, 205 (1956); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1319-20 (D.C. Cir. 1995).

[37] *See* Duncan Petition at 4-5.

[38] Sprint Petition at 6-7.

least two grounds. First, Sprint has failed to show, or even estimate, the amount of its spectrum holdings that would be affected by application of the rule. Second, it has not quantified the effect, if any, that application of the rule would have on the value of that spectrum. If we were to reconsider the rule based on such a speculative and insubstantial claim, we would upset the balancing of interests that the Commission achieved by determining, in its expert judgment and analysis of the record, that a licensee whose pre-relocation coverage contours encompass fifty percent or more of the population of an EA will likely expand the benefits of ESMR service to the remainder of the EA. Accordingly, we decline to reconsider the rule as Sprint requests.

19. We also reject Sprint's argument that the Commission's adjustments to ESMR eligibility in the *800 MHz MO&O* compromised the "value for value" economic analysis that the Commission used in the *800 MHz Report and Order* to assess the worth of 800 MHz spectrum surrendered by Sprint and the 800 MHz ESMR and 1.9 GHz spectrum it acquired.[39] Sprint has not quantified its claims or otherwise shown that the ESMR eligibility adjustments it complains of would result in more than a *de minimis* change to the amount of ESMR spectrum that Sprint will hold at the conclusion of rebanding. Moreover, as the Commission noted in the *800 MHz Report and Order*, its valuations of 800 MHz spectrum surrendered and acquired by Sprint were nationwide estimates that relied on numerous "approximations and limitations."[40] Thus, minor changes in the amount of spectrum held in particular EAs would be unlikely to affect the Commission's spectrum valuation in any event.

4. Petition for Partial Waiver of Mobile Relay Associates

20. *Background.* Mobile Relay Associates (MRA) seeks a waiver of the requirement that only holders of 800 MHz EA licenses may relocate their systems to the ESMR band.[41] MRA operates twelve site-based non-ESMR stations that cover a small part of the Denver-Boulder-Greeley, Colorado EA, but does not hold an EA license or operate ESMR facilities. Specifically, MRA asks us to declare that its site-specific stations should be eligible for relocation to the ESMR portion of the 800 MHz band instead of remaining on their current non-ESMR spectrum. MRA acknowledges that the rules do not permit licensees that hold only site-based licenses to relocate to the ESMR band, but submits that a waiver is warranted in its specific case. As discussed below, we find that MRA has failed to meet the waiver standard set out in Section 1.925 of the Commission's rules and we deny its waiver request.[42]

21. In support of its waiver request, MRA claims that it has sufficient channel capacity to develop a viable ESMR system even though it does not hold an EA license.[43] MRA also claims that it developed its business plan in reliance on a 1997 Commission order giving 800 MHz EA and site-based licensees the same rights to develop new technologies. Finally, MRA contends that denial of the waiver would disserve the public interest by removing a competitor to Sprint in the Denver market.[44]

22. Sprint alleges that MRA's waiver request is procedurally defective because it seeks the same relief that MRA was seeking contemporaneously before the D.C. Circuit. Further, Sprint contends that granting MRA's waiver request would undermine the public interest and frustrate the purpose of the Commission's reconfiguration plan.[45] Sprint also argues that MRA's limited site-based spectrum

[39] *Id.* at 5-6.

[40] *800 MHz Report and Order*, 19 FCC Rcd at 15107 ¶ 283.

[41] *See* MRA Waiver Request.

[42] *See* 47 C.F.R. § 1.925(b)(3).

[43] MRA Waiver Request at 4.

[44] *Id.*

[45] Opposition of Sprint Nextel Corporation to MRA Petition for Partial Waiver, filed February 3, 2006 (Sprint MRA Opposition) at 2.

holdings are inadequate to sustain a viable ESMR system.[46] If MRA were allowed in the ESMR band, Sprint contends, it would have to continue high-site operation, thereby perpetuating the incompatible mix of high-site and low-site systems that gave rise to the 800 MHz interference problem in the first place.[47]

23. *Discussion. As an initial matter, we reject Sprint's claim that MRA's then-pending* judicial appeal bars our consideration of MRA's waiver request.[48] Sprint has cited no authority for this estoppel theory and we are unaware of any precedent that prevents a party from seeking judicial review of a rule of general applicability and, in the alternative, seeking waiver of the rule in its particular case. Moreover, since the D.C. Circuit has now ruled on the underlying case in *Mobile Relay Associates and Skitronics vs. FCC*[49], Sprint's request that we summarily dismiss MRA's waiver request based on the pendency of the judicial appeal is moot and we dismiss it as such. We also find that Sprint has not supported its claim that MRA's simultaneous pursuit of its judicial appeal and its waiver request is "litigation posturing" or an abuse of process.[50]

24. We reject MRA's waiver request for the reasons discussed below. In reviewing MRA's waiver request, we have applied the waiver criteria set forth in Section 1.925 of the Commission's rules, and the case law interpreting application of those criteria.[51] Specifically, we must determine whether MRA has shown that absent a waiver, the underlying purpose of the rules allowing only EA licensees to relocate to the ESMR band will be frustrated or that the public interest will be harmed, or that MRA has demonstrated unique circumstances that would cause strict application of the rule to MRA to be inequitable, unduly burdensome, and contrary to the public interest.[52]

25. MRA claims that its system has as much channel capacity as most EA licensees in the United States, and therefore that the underlying purpose of the rule that only EA licensees may relocate to the ESMR band would be frustrated if applied to MRA.[53] We note, however, that while MRA may have the ability to operate on a similar number of channels as an EA licensee, MRA's ability to use its channels does not extend to the entire EA and, in fact, is limited to a much smaller geographic area in metropolitan Denver.[54] The difference is significant: MRA's coverage contours encompass a population of 550,000 people out of an EA population of close to four million that can be served by an EA licensee.[55] Moreover, while MRA claims to have two megahertz of channel capacity in Denver, due to the presence of other licensees in the Denver market, there is no location within MRA's coverage area where it can use

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[46] *Id.* at 4.

[47] *Id.* at 2.

[48] *Id.*

[49] *Mobile Relay Associates v. FCC,* 457 F.3d 1 (D.C. Cir. 2006) (*MRA*).

[50] Sprint MRA Opposition at 3.

[51] 47 C.F.R. § 1.925.

[52] *Id.*

[53] MRA excepts Sprint Nextel and SouthernLINC. *See* MRA Waiver Request at 3.

[54] BEA 141 consists of forty Colorado counties (Adams, Arapahoe, Boulder, Chaffee, Clear Creek, Custer, Delta, Denver, Douglas, Eagle, Elbert, El Paso, Fremont, Garfield, Gilpin, Grand, Gunnison, Hinsdale, Jackson, Jefferson, Kit Carson, Lake, Larimer, Lincoln, Logan, Mesa, Moffat, Montrose, Morgan, Ouray, Park, Phillips, Pitkin, Rio Blanco, Routt, San Miguel, Summit, Teller, Washington, Weld and Yuma), seven counties in Kansas (Cheyenne, Gove, Logan, Sheridan, Sherman, Thomas, Wallace) and Dundy County, Nebraska. *See* http://wireless.fcc.gov/auctions/data/crossreferences/beacnty1990.xls

[55] *See* http://quickfacts.census.gov/qfd/states/08/0820000.html (Denver population) and http://wireless.fcc.gov/auctions/data/maps/cntysv2000_census.xls (EA population).

all, or even most, of this capacity.[56] This significantly limits MRA's ability to deploy a high-density cellularized system that reuses frequencies to enhance capacity. Because an EA-licensee can reuse its channels anywhere in the EA whereas MRA's channels are limited to a portion of the Denver market, and even there, cannot be used throughout the market, we find that MRA has not succeeded in showing that it should be treated similarly to an EA licensee for rebanding purposes.

26. MRA cites a 1997 Commission order for the proposition that site-based incumbents would have future rights to develop cellular technologies.[57] MRA contends that in reliance on this order, it developed a business plan that did not include obtaining an EA license in Denver but instead contemplated first building a site-based high-site dispatch system and then, at some undefined future date, converting to ESMR technology. MRA claims that when the Commission changed the rules to allow only ESMR operators and EA licensees to migrate to the ESMR band, MRA lacked an EA license "through no fault of its own" and unfairly was denied access to the ESMR band. We find this argument to be merely an attempt to shift responsibility to the Commission for the consequences of MRA's own business decisions. We agree with MRA that it had the right in 1997 to convert its site-based facilities to cellular technology—indeed, all site-based SMR licensees had this flexibility well before 1997, and some incumbents did implement ESMR systems on site-based channels, the most notable example being Sprint.[58] But when the Commission established EA-based licensing of 800 MHz SMR spectrum to give SMR licensees greater access to spectrum to deploy cellular technology and to expand their existing systems,[59] MRA chose neither to deploy an ESMR system nor to acquire an EA license in Denver to expand its spectrum capacity. Having made that choice, MRA now complains that the Commission's rebanding decision seven years later limits its options to relocate to the ESMR band. However, MRA cannot insulate itself from regulatory change, nor does the fact that it now dislikes the consequences of its business decision entitle it to a waiver.

27. MRA also contends that denying the waiver frustrates the underlying purpose of the rule because MRA will not be left in a "comparable position" after rebanding to the position it occupied before rebanding was implemented.[60] In fact, MRA is guaranteed that it will receive comparable facilities, at Sprint's expense, on the same number of channels it was licensed for previously. Finally, we reject MRA's speculative argument that denial of the waiver will disserve the public interest by removing a competitor to Sprint in the Denver market. MRA hypothesizes that its presence in Denver constrains Sprint's ability to exert market power in the Denver fleet dispatch market and that absent that constraint, the pricing and service quality of Sprint's service would change to the public's detriment.[61] However, rebanding will not it any way constrain MRA's ability to continue to provide fleet dispatch service as a competitive alternative to Sprint's service.

B. Process for Accommodating all Eligible Licensees in the ESMR Band

28. *Background.* Sprint argues that in any market where a "shortfall" of ESMR spectrum occurs, *i.e.*, where the ESMR band is not large enough to accommodate all ESMR and ESMR-eligible

[56] *See* Sprint MRA Opposition at 6-7.

[57] MRA Waiver Request at 5 *citing* Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MH Frequency Band, PR Docket 93-44, *Second Report and Order*, 12 FCC Rcd 19079 (1997) (*SMR Second Report and Order*) at 19105 ¶67.

[58] *See* Request of Fleet Call, Inc. for Waiver and Other Relief to Permit Creation of Enhanced Specialized Mobile Radio Systems in Six Markets, *Memorandum Opinion and Order*, FCC 91-56, 6 FCC Rcd 1533 (1991); *recon. den.* 6 FCC Rcd 6989 (no waiver required for the use of cellular architecture in the 800 MHz band).

[59] *SMR Second Report and Order*, 19 FCC Rcd 19082 ¶ 2.

[60] MRA Waiver Request at 4.

[61] *Id.* at 5.

licensees, the Commission should expand the size of the ESMR band and/or reduce each licensee's share of ESMR spectrum on a *pro rata* basis.[62] This was the approach adopted in the *800 MHz Report and Order* for the area of the Southeast United States served by SouthernLINC as well as Sprint. However, Sprint requests clarification that by creating an expanded ESMR band in the Southeast, the Commission did not intend to preclude adoption of this approach in other markets. Sprint contends that the *800 MHz Report and Order* "adopted two remedies in the event there is insufficient spectrum in the ESMR segment to accommodate all eligible licensees in a market: (1) expanding the ESMR segment and, in the event a channel shortfall remained (2) distributing the available channels on a pro rata basis among licensees." Sprint also contends that these remedies may be invoked in any market so long as the affected licensees agree.[63] Sprint contends that it should not be required to accept the full burden of a shortage of ESMR spectrum in any market. To do so, Sprint argues, would contravene the "value for value" concept that underlies the Commission's orders.[64]

29. *Discussion.* We disagree with Sprint's interpretation of the *800 MHz Report and Order* with respect to expansion of the ESMR band. Although we agree with Sprint that the Commission has the discretion to apportion ESMR spectrum, we find no support for Sprint's contention that licensees themselves have similar discretion. In that order, the Commission expanded the ESMR band only in SouthernLINC's territory, and did so because the presence of two major ESMR providers caused the distribution of cellular and non-cellular systems in that area to be atypical.[65] The Commission made no comparable finding for other areas and did not say it envisioned doing so in the future, much less that it was giving licensees discretion to determine whether and to what extent the ESMR band could be expanded in the event of an ESMR channel shortfall. Accordingly, we reaffirm that the ESMR band in all markets other than the Southeast, except as specifically discussed with respect to Puerto Rico in Section C *infra*, is limited to the 817-824/862-869 MHz band as specified in Section 90.614(b) of the Commission's rules.[66]

30. We also clarify that under limited circumstances, the Commission may apportion the ESMR band *pro rata* to licensees eligible to operate there. Sprint points to language in the *800 MHz Report and Order* stating that "disputed matters concerning ESMR channels in any area of the country including [SouthernLINC markets] may be resolved by the Commission making a *pro rata* distribution of ESMR channels."[67] While the Commission did reserve the ability to resolve disputes in this way, we emphasize that the presumption is that licensees other than Sprint who relocate to the ESMR band should be able to replicate their existing channel capacity to the degree specified in the Commission's orders, and will not be required to reduce their capacity on a *pro rata* basis. We recognize that in some cases, this may result in diminishing the amount of ESMR spectrum available to Sprint. However, Sprint is uniquely positioned to address such shortfalls in most markets because 1) it will receive credit for construction of additional 800 MHz capacity sites, and 2) its existing system is configured to operate in the 900 MHz band as well as the 800 MHz band.[68] We will consider further *pro rata* apportionment of the ESMR band only in unusual cases where parties can demonstrate that the above mechanisms are insufficient to address shortfall issues.

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[62] Sprint Petition at 12-14.

[63] *Id.* at 12-13.

[64] *Id.* at 13.

[65] *800 MHz Report and Order*, 19 FCC Rcd 15057-58 ¶ 164.

[66] 47 C.F.R. § 90.614(b).

[67] Sprint Petition at 12-13 *quoting 800 MHz Report and Order*, 19 FCC Rcd 15058-59 ¶ 168.

[68] *800 MHz Report and Order,* 19 FCC Rcd 15127 ¶ 336.

C. ESMR Band in Puerto Rico

31. *Background.* Two Puerto Rico licensees, C&I Electronics and North Sight Communications, request that the Commission modify the band plan and relocation timetable for the Puerto Rico/US Virgin Islands EA (Puerto Rico/USVI).[69] Specifically, they argue that in Puerto Rico, Sprint does not hold enough spectrum to accommodate relocation of existing ESMRs and entities that are eligible to convert to ESMR operation. North Sight identifies itself as an ESMR system that holds 120 channels of "Upper 200" EA spectrum in the ESMR block,[70] as well as associated site-based licenses on lower channels that it is entitled to relocate. In light of these factors, North Sight and C&I request that the Commission: (1) clarify that in the event of a *pro rata* apportionment of ESMR spectrum in Puerto Rico/USVI, North Sight is entitled to retain all of its EA spectrum in the ESMR block, because unlike Sprint, it will not receive compensation for giving up spectrum to support rebanding; (2) expand the ESMR band in Puerto Rico/USVI to accommodate ESMR relocation by other licensees; and (3) delay rebanding in Puerto Rico/USVI (currently a Wave 3 market) until these band plan issues have been resolved and relocation channels identified for all Puerto Rico/USVI licensees.[71]

32. *Discussion.* We agree with petitioners that the nature of incumbency in the Puerto Rico market presents a unique situation that is distinct from other markets.[72] Sprint holds considerably less spectrum in Puerto Rico than it does elsewhere, and there are several other licensees that have acquired significant EA license holdings in Puerto Rico at auction and seek to operate as ESMRs.[73] In addition, Puerto Rico has numerous site-based incumbents (including C&I, other non-public safety licensees, and some public safety licensees) that will need to be relocated to the non-ESMR block. Thus, it appears that an alternative band plan is appropriate here.

33. Rather than specify a band plan for Puerto Rico in this Order, we direct the TA to propose an alternative band plan and negotiation timetable for Puerto Rico within sixty days from the effective date of the Order. We further delegate authority to the Public Safety and Homeland Security Bureau to approve or modify the proposed band plan and timetable, subject to the guidance provided below. In the interim, we will suspend the rebanding timetable for Puerto Rico until a new band plan is adopted. The revised band plan must comply with the following criteria:

- First, while we do not specify the size of the non-ESMR band for Puerto Rico, the revised band plan must ensure that the non-ESMR band fully accommodates all non-ESMR licensees, including those such as C&I that need to be relocated from the Upper 200 channels. The remaining spectrum will be allocated for the ESMR band. The TA's band plan shall include a

[69] C&I-North Sight-Ragan Petition at 5-8. Ragan Communications is also a party to this reconsideration petition on other issues, but it has no license holdings in Puerto Rico or USVI.

[70] The "Upper 200" channels are the 200 800 MHz SMR channel pairs at 816-821 MHz/861-866 MHz, the Commission designated for geographic area licensing in December 1995. *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, *First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making*, 11 FCC Rcd 1463 (1995).

[71] C&I-North Sight-Ragan Petition at 5-8.

[72] No party has identified any comparable ESMR channel shortage in the Virgin Islands. Accordingly, we confine our discussion here to Puerto Rico. The 800 MHz band plan in the Virgin Islands and the reconfiguration schedule there is not affected by this Order.

[73] In Puerto Rico Sprint holds 60 channels (EA Block B), High Tech holds 20 channels, (EA Block A) and North Sight holds 120 channels (EA Block C) in the ESMR band for a total of 200 channels. Additionally, Preferred Communications holds 125 channels (EA Blocks D through F) in the former General Category while Sprint holds 25 channels in the former General Category (EA Block FF) and 80 channels (EA Blocks G through V) in the interleaved portion of the band. *See* C&I-North Sight-Ragan Petition at 6.

guard band between the ESMR and non-ESMR bands; however, if there is insufficient spectrum to accommodate a guard band, the TA shall take such measures as are necessary to protect public safety systems from interference, *e.g.*, by separating mission-critical public safety systems as far as feasible from the ESMR band.

- *Replacement spectrum in the ESMR band is to be assigned to ESMR licensees and ESMR-*eligibles in accordance with the Commission's rules governing EA and site-based licensees. Because of the relatively small amount of spectrum that Sprint holds in Puerto Rico, Sprint is to be assigned replacement spectrum on the same basis as other ESMR licensees, *i.e.*, Sprint will receive no more spectrum in the ESMR band than it holds currently.
- If there is insufficient spectrum in the ESMR band to accommodate all ESMRs and ESMR-eligibles, Sprint must surrender spectrum on a *pro rata* basis to the other licensees to meet the shortfall. If insufficient spectrum remains after Sprint has surrendered spectrum, *pro rata* apportionment may be used to determine each licensee's share of the ESMR band. All ESMR and ESMR-eligible licensees must participate in such apportionment.

34. We reject North Sight's petition to be exempted from *pro rata* apportionment should that be required. North Sight suggests that it should not be required to reduce its spectrum holdings because its EA licenses are in the Upper 200 EA blocks that will form part of the ESMR band, and therefore will not need to be relocated.[74] We find this to be a distinction without a difference. North Sight has cited no case or Commission decision for the proposition that licensees in the Upper 200 channel portion of the band, such as North Sight, have rights superior to those of licensees in other 800 MHz band segments, including rights that would exempt Upper 200 channel licensees from having their ESMR band spectrum apportioned, if necessary, when the 800 MHz band is reconfigured. Indeed, it would be inequitable to relocating licensees if the Commission gave North Sight undeserved primacy and required relocating licensees to accept less ESMR spectrum on that account.

35. We disagree with North Sight's claim that the Commission may not apportion the North Sight spectrum currently in the ESMR band because "to do so would deprive North Sight of spectrum, purchased at auction, with absolutely no reimbursement to North Sight for the value of that spectrum."[75] Neither North Sight nor any other Commission licensee has a property interest in the market value of a spectrum license.[76] The *MRA* court rejected similar claims that the Commission had engaged in an unconstitutional taking by reducing the value of petitioners' auctioned licenses.[77] The court held that licenses granted by the Commission "confer the right to use the spectrum for a duration expressly limited by statute subject to the Commission's considerable regulatory power and authority. This right does not constitute a property interest protected by the Fifth Amendment."[78] Moreover, North Sight has failed to show that if its spectrum were apportioned, there would be a consequent public interest detriment, *e.g.* that it would so affect North Sight's ability to offer a viable service or that competition in the market for ESMR services in Puerto Rico would be compromised. We note that reductions in ESMR spectrum availability can be accommodated when a licensee engages in more extensive frequency reuse, implements smaller cell sites, uses sectored antennas, and other capacity enhancing measures inherent in

[74] *Id.* at 7.

[75] *Id.* at 7-8.

[76] *See* 47 U.S.C. § 301 ("It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof,...under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license").

[77] *See MRA*, 457 F.3d at 12.

[78] *Id.*

cellular-architecture technology. To the extent that North Sight asserts that a reduction in spectrum inherently has adverse financial effects, experience shows otherwise. For example, the BAS licensees relocating from the 1.9 GHz band to make it available for use by Sprint, the Mobile Satellite Service and Advanced Wireless Service will have less spectrum post-relocation but will accommodate the reduction by employing more spectrum-efficient and higher-quality digital technologies.[79] Finally, we note that North Sight's arguments about spectrum value ignore that its spectrum value could be enhanced as a consequence of 800 MHz band reconfiguration because it will be able to relocate EA and site-based facilities to the ESMR band that are currently located below the ESMR band. If these facilities are relocated and integrated into a North Sight ESMR band system, North Sight will be relieved of the cost and limitations associated with abating interference created by ESMR stations being interleaved with high-site systems used by public safety and others in the non-ESMR portion of the band, while taking advantage of spectrally efficient technologies.

36. We also note that nothing in this Order precludes licensees from agreeing voluntarily on the disposition of ESMR spectrum in Puerto Rico. We would consider such an agreement provided it is consistent with the Commission's orders and rules in this proceeding and does not encroach on the non-ESMR band as defined in the revised band plan to be submitted by the TA and approved by the Public Safety and Homeland Security Bureau. Specifically, all licensees eligible to remain in, or eligible to relocate to, the ESMR band may recommend a channel distribution that equitably reflects the interests of all 800 MHz licensees in Puerto Rico. The agreement shall also include a proposed band reconfiguration schedule consistent with Sprint's obligation to complete band reconfiguration within thirty-six months. We delegate authority to the Public Safety and Homeland Security Bureau to review any such agreement for consistency with the terms of this Order. Any such agreement must be completed and submitted to the Bureau for review no later than sixty days from the effective date of the Order.

D. Reconfiguration of Areas With No Associated NPSPAC Regions

37. *Background.* Sprint asks that we reconsider the Commission's decision in the *800 MHz MO&O* to require band reconfiguration in areas that have no associated NPSPAC region.[80] These areas include American Samoa, Guam, the Northern Mariana Islands, and the Gulf of Mexico.[81] Sprint contends that the Commission failed to consider the full facts and circumstances regarding these territories.[82] Specifically, Sprint notes that because the Commission never conducted an SMR auction for the Gulf of Mexico, Sprint holds no spectrum rights in the Gulf.[83] Furthermore, Sprint states that it believes few, if any, public safety licensees operate in the Gulf of Mexico.[84] Choice Phone, LLC (Choice) opposes Sprint's petition with respect to Guam and the Northern Mariana Islands.[85] Choice points out that Sprint holds SMR licenses for the Guam/Northern Mariana market that it obtained at

[79] *See* Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile Satellite Service, ET Docket No. 95-18, *First Report and Order an Further Notice of Proposed Rulemaking*, 12 FCC Rcd 7388, 7402 Para. 32 (1997); *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd. 12315, 12324 Para. 20-21 (2000) (concluding that the best solution for BAS relocation is to reduce the BAS band at 2 GHz from 120 to 85 megahertz, (from 1990-2110 MHz to 2025-2110 MHz). The Commission determined that BAS, under the reduced spectrum, would migrate to digital technologies. *Id.*

[80] Sprint Petition at 20. *See 800 MHz MO&O*, 20 FCC Rcd 16070 ¶¶ 122-123.

[81] *See 800 MHz MO&O*, 20 FCC Rcd 16070 ¶¶ 122-123.

[82] Sprint Petition at 20.

[83] *Id.*

[84] *Id.*

[85] *See* Opposition of Choice Phone LLC to Petition for Reconsideration of Sprint Nextel Corporation, filed February 10, 2006 at 1-2 (Choice Phone Opposition).

auction.[86] Furthermore, Choice notes that there are a number of 800 MHz public safety licensees operating in Guam and the Northern Mariana Islands.[87] In addition, the Resident Representative of the United States Commonwealth of the Northern Mariana Islands has asked that we deny Sprint's request in part because it fears granting the request could result in a lack of interoperability between public safety equipment in the Commonwealth and equipment used in the rest of the United States.[88]

38. *Discussion.* We agree with Sprint's argument that it should not be required to reconfigure the 800 MHz band in the Gulf of Mexico. Sprint holds no spectrum rights in the Gulf of Mexico and our licensing records indicate that no public safety licenses operate there. We therefore see no risk in the Gulf of the type of interference to public safety systems that would require rebanding.

39. However, we deny Sprint's request as it relates to Guam, the Northern Mariana Islands, and American Samoa. We believe that funding band reconfiguration in these markets does not pose an inequitable burden on Sprint. Sprint holds SMR spectrum in all three markets that it obtained at auction, and has also received 1.9 GHz spectrum rights in these markets as a result of the *800 MHz Report and Order*. Moreover, we find that rebanding in these markets will benefit public safety. Although there are no NSPAC licensees in Guam and the Northern Mariana Islands, there are non-NPSPAC 800 MHz public safety licensees operating in these markets who will benefit by being spectrally separated from ESMR operations.[89] Similarly, while there currently are no public safety licensees operating in the 800 MHz band in American Samoa, America Samoa, unlike the Gulf of Mexico region, has public safety agencies that are eligible to operate on 800 MHz public safety spectrum and that may require facilities in the future. We anticipate such public safety facilities would operate in the non-ESMR band and thus would require spectral separation from ESMR operations. We therefore will preserve the benefits that band reconfiguration could confer on the residents of American Samoa in the future and hold that the Sprint must reconfigure the 800 MHz band there.[90]

E. Effect of the Application Freeze on License Modifications

40. *Background.* In the *800 MHz Report and Order*, the Commission imposed a freeze on the acceptance of 800 MHz applications in order to maintain a stable spectral landscape during the band relocation process.[91] The Commission stated, however, that *de minimis* modifications to a currently authorized system are not subject to the application freeze so long as the modifications are necessary to effectuate band reconfiguration.[92] Sprint requests that we broaden this exception to the freeze to "permit certain license modifications . . . provided they do not materially diminish public safety's spectral or operational expectancies."[93]

41. *Discussion.* We grant Sprint's request in part and dismiss it in part. We agree with Sprint that an overly restrictive freeze could deprive it and incumbent licensees of the flexibility

[86] *Id.* at 2-3.

[87] *Id.* at 3.

[88] Letter, dated August 30, 2006, from Pedro A. Tenorio, Resident Representative, United States Commonwealth of the Northern Mariana Islands to Marlene H. Dortch, Secretary, FCC.

[89] *See* licenses WPCG201, WPDA554 and WPTY944.

[90] In American Samoa, reconfiguration may merely entail Sprint vacating the non-ESMR portion of the 800 MHz band.

[91] *See 800 MHz Report and Order,* 19 FCC Rcd 15078 ¶ 204; *see also 800 MHz MO&O*, 20 FCC Rcd 16057 ¶ 97.

[92] *See 800 MHz Report and Order,* 19 FCC Rcd at 15078 ¶ 204. *See also* Wireless Telecommunications Bureau Outlines Applications Freeze Process For Implementation of 800 MHz Band Reconfiguration, *Public Notice*, 20 FCC Rcd 8905 (2005); *800 MHz MO&O*, 20 FCC Rcd 16015.

[93] *See* Sprint Petition at 19-20.

necessary to make marginal changes in their coverage areas in order to reach mutually acceptable relocation agreements.[94] Given the importance of band reconfiguration and the dispatch with which it must be accomplished, we will consider waiving the freeze when to do so will not undercut the purpose for which it was established.[95] However, we decline Sprint's request that we direct the TA to "permit certain license modifications . . . provided they do not materially diminish public safety's spectral or operational expectancies." Sprint has not specified what the "spectral or operational expectancies" of public safety might be, and we are concerned that our use of such general and subjective language could be misinterpreted to allow license modifications that would impede the TA in the prompt implementation of band reconfiguration. Moreover, the language could be construed to permit licensees to "fix" errors in their licenses in a manner that would substantially affect their coverage and interference contours, *e.g.* significant errors in geographical coordinates, effective radiated power, or height above average terrain of their base station transmitting antennas.

42. We believe that this approach strikes the proper balance between allowing *de minimis* modifications and ensuring that rebanding moves forward. The Commission placed all licensees on notice that they should validate the data in their licenses and correct any errors before the freeze took effect.[96] Modifications to correct errors involving substantial change of coverage contours or frequency could delay and increase the cost of the TA's implementation of band reconfiguration in a given NPSPAC region and burden the Commission's resources. Accordingly, licensees must await the end of the freeze to file modification applications to correct errors if, post-reconfiguration, those modifications can be accomplished consistent with the rules governing interference to other stations. In the exceptional case, the Commission will evaluate requests for waiver when a licensee can show good cause why correcting errors or other substantial license modifications should be permitted before the end of the freeze.

F. Post-Mediation Litigation Costs

43. *Background.* We consider a Petition for Reconsideration filed by Schwaninger & Associates, P.C.[97] and a Petition for Clarification filed jointly by Communications and Industrial Electronics, Inc., North Sight Communications, Inc., and Ragan Communications Inc. (collectively, Petitioners).[98] The petitions address a *Public Notice* released by the Wireless Telecommunications Bureau (Wireless Bureau) on December 30, 2005 (*Wave 1 Reminder PN*),[99] concerning procedures for mediation of rebanding disputes between Sprint and other 800 MHz licensees, and the *de novo* review of disputed issues by the Commission if they are not resolved by mediation.

44. In the *Wave 1 Reminder PN*, the Wireless Bureau reiterated that licensees are responsible for their own costs of filing and prosecuting requests for *de novo* review of disputed issues and the costs of pursuing any subsequent administrative or judicial review.[100] Specifically, the *Wave 1 Reminder PN* stated: "Licensees that enter mediation with Sprint Nextel are entitled to reimbursement of 'reasonable, prudent and necessary costs and expenses' associated with reaching a mediated frequency reconfiguration agreement. However, licensees who fail to reach a mediated agreement must bear their own costs

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[94] *Id.*

[95] *See* 47 C.F.R. § 1.925.

[96] *See 800 MHz MO&O*, 20 FCC Rcd at 16057-8 ¶ 98.

[97] Petition for Reconsideration, filed January 3, 2006, by Schwaninger & Associates, P.C. (Schwaninger Petition).

[98] C&I-North Sight-Ragan Petition at 9-11.

[99] *See* Wireless Telecommunications Bureau Reminds 800 MHz "Wave One" Channel 1-120 Licensees of Band Reconfiguration and Mediation Obligations, *Public Notice*, 20 FCC Rcd 20561 (WTB 2005) (*Wave 1 Reminder PN*).

[100] *Id.* at 20562.

associated [with] all further administrative or judicial appeals of band reconfiguration issues, including *de novo* review...and appeal of any such review before an A[dministrative] L[aw] J[udge]."[101] Petitioners challenge this aspect of the *Wave 1 Reminder PN*, contending that the *800 MHz Report and Order* and subsequent orders in this proceeding require Sprint to pay all costs incurred by licensees when they litigate rebanding disputes before the Commission and in subsequent appeals.

45. Petitioners argue that this statement in the *Wave 1 Reminder PN* conflicts with the Commission's orders stating that Sprint must pay all reasonable and prudent relocation costs incurred by licensees.[102] Petitioners claim that the *800 MHz Report and Order* and the *800 MHz Supplemental Order* required Sprint Nextel to pay all licensees' costs including those incurred in the course of any administrative or judicial action related to 800 MHz rebanding disputes.[103] They also contend that requiring licensees to bear their own costs in bringing disputed issues before the Commission gives Sprint unfair leverage to force unfavorable terms in negotiation or mediation with licensees who have limited resources to pursue litigation.[104] The Enterprise Wireless Association supports the petitioners' position in reply comments.[105]

46. Sprint opposes the petitions, arguing that requiring it to bear all the legal costs of post-mediation litigation is unfair because Sprint is already bearing the legal and other costs that licensees incur through the course of the mediation.[106] Furthermore, Sprint contends that requiring it to pay licensees' post-mediation litigation costs would remove an incentive for licensees to reach agreement during the mediation period, an effect that could frustrate and retard the relocation process.[107]

47. *Discussion*. We deny Petitioners' requests and find that the Wireless Bureau correctly interpreted the Commission's orders on this issue. In addition, to the extent that Petitioners ask us to change the rules to require Sprint to pay licensees' post-mediation litigation costs, we decline to do so, both because the Commission is statutorily barred from granting such relief and on policy grounds. In the *800 MHz Report and Order*, the Commission required Sprint to pay the "full cost of relocation of all 800 MHz band . . . incumbents to their new spectrum assignments with comparable facilities."[108] The Commission specified that this included the obligation to pay licensees' reasonable transactional costs in connection with band reconfiguration, as well as the services of the Transition Administrator and staff in connection with band reconfiguration.[109] These transactional costs include the costs of mediation. However, these provisions do not entitle licensees to recovery of their post-mediation litigation expenses in the event that parties choose to bring unresolved issues before the Commission. To the contrary, the Commission distinguished between mediation and post-mediation expenses in identifying the cost burden on licensees. First, it stated that parties could elect to enter non-binding arbitration after mediation, but that such arbitration costs would be shared by the parties.[110] Second, it warned licensees of the potential

[101] *Id., citing 800 MHz Report and Order,* 19 FCC Rcd 15071-72 ¶194.

[102] Schwaninger Petition at 2-3; C&I-North Sight-Ragan Petition at 9-11.

[103] Schwaninger Petition at 3, *citing 800 MHz Report and Order*, 19 FCC Rcd 15071-72 ¶194; and *800 MHz Supplemental Order*, 19 FCC Rcd at 25129 ¶ 15.

[104] C&I-North Sight-Ragan Petition at 11.

[105] *See* Reply Comments of the Enterprise Wireless Association to the Opposition of Sprint Nextel Corporation, filed April 3, 2006.

[106] Sprint Opposition at 7.

[107] *Id.*

[108] *800 MHz Report and Order*, 19 FCC Rcd 14977 ¶ 11.

[109] *Id.* at 19 FCC Rcd 15070-71 ¶ 191.

[110] *Id.* at 19 FCC Rcd 15071-72 ¶ 194.

cost of litigating rebanding disputes before the Commission, and therefore recommended that parties "consider possibly less burdensome and expensive resolution of their disputes through means of alternative dispute resolution."[111]

48. Petitioners place particular reliance on language in the *800 MHz Supplemental Order* stating that "incumbents should incur no costs for band reconfiguration, and that the sole responsibility for paying all band reconfiguration costs—including the costs of preparing the estimate, negotiating the retuning agreement, and resolving any disputes—lies with Nextel . . ."[112] We find Petitioners' reliance on this language to be misplaced. This particular statement was made in support of the principle that licensees are entitled to payment of their relocation costs in advance, *i.e.*, they are not required to pay the expense and then seek reimbursement from Sprint. We also clarify that the language regarding "resolving any disputes" refers to private resolution of disputes by the parties through negotiation and TA-sponsored mediation. The Commission did not intend by this language to create an unlimited right to recovery of litigation costs.

49. We also decline to change the rules to require Sprint to pay licensees' post-mediation litigation costs, to the extent that Petitioners ask us to do so.[113] As a threshold matter, we lack the statutory authority to impose such a requirement. The Commission has consistently held that in the absence of specific statutory authorization, it lacks the authority to require one party to pay another party's costs in litigation before it.[114] The Commission has specifically found such authority to be lacking in the context of Section 208 complaints, and we find that no greater authority exists here.[115]

50. Even if we had the statutory authority to grant Petitioners' request, we conclude that the Commission's prior orders strike the appropriate balance between licensee rebanding costs that must be borne by Sprint and licensee litigation costs that must be borne by the licensee. The Commission's intent was to enable 800 MHz licensees to take full advantage of the negotiation and mediation mechanisms established in the *800 MHz Report and Order* at no cost to themselves, thereby encouraging resolution of issues by negotiated agreement rather than litigation. In addition, we have recently clarified that Sprint's obligation to pay the "minimum necessary" cost for licensee relocation allows "reasonable and prudent"

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[111] *Id.*

[112] *See* Schwaninger Petition at 3, *citing Supplemental Order,* 19 FCC Rcd 25129 ¶ 15.

[113] Petitioners have not sought formal reconsideration of the Commission's rules regarding the cost responsibility provisions established in this proceeding. The Schwaninger Petition is directed to the Wireless Bureau, and solely seeks reconsideration of the *Wave I Reminder PN* on the grounds that it is inconsistent with the Commission's rules. The Joint Petition is styled as a request for clarification of the rules, not a request to reconsider the rules. We note that any request at this stage to reconsider rules adopted in the *800 MHz Report and Order* or the *800 MHz Supplemental Order* would be time-barred because the thirty-day period for seeking reconsideration of these orders has long since elapsed. *See* 47 C.F.R. § 1.106. Nevertheless, we have discretion to consider the Petitioners' pleadings as informal requests for Commission action pursuant to Section 1.4 of our rules. *See* 47 C.F.R. § 1.4.

[114] Multimedia Cablevision, Inc. v. Southwestern Bell Telephone Co., *Memorandum Opinion and Hearing Designation Order*, 11 FCC Rcd 11202, 11208 ¶ 16.(1996); Allnet Communications Services, Inc., *Memorandum Opinion and Order*, 8 FCC Rcd 3087, 3095 ¶ 36 (1993). This is consistent with the "American Rule" whereby litigants must bear their own costs of litigation. It is well established that an agency may not deviate from this rule without explicit statutory authorization. *See Alyeska Pipeline Service Company v. Wilderness Society*, 421 U.S. 240 (1975); *Turner v. FCC*, 514 F.2d 1354 (D.C. Cir. 1975); and *Greene County Planning Board v. FPC*, 455 F.2d 412 (2d Cir. 1972).

[115] Allnet Communications Services, Inc., *supra*; *Turner v. FCC*, *supra*. We note that the Commission does not face a similar issue of statutory authority when requiring Sprint to pay the costs of the negotiation and mediation process. Here, however, mediation is not being conducted before the Commission, and, in any event, mediation is not "litigation," but rather a vehicle for reaching a negotiated settlement with assistance of a third party whose opinion is not controlling.

expenditures above the minimum to achieve the overall goals of this proceeding, including timely and efficient completion of rebanding and minimizing the burden rebanding imposes on public safety licensees.[116] We expect this clarification to result in more agreements being reached through negotiation and mediation, and to reduce the likelihood of litigation. However, requiring Sprint to pay the costs of post-mediation litigation before the Commission and beyond would only increase the likelihood of litigation and add cost and delay to the rebanding process. Moreover, because Sprint is entitled to credit its relocation expenditures against its potential obligation to the U.S. Treasury, Petitioners' position would in essence result in the U.S. taxpayer paying their litigation costs, a result we regard as contrary to public policy.[117] We also disagree with Petitioners' contention that requiring licensees to pay their own litigation costs tips the balance in favor of Sprint. Sprint is already responsible for the costs of all negotiation and TA-sponsored mediation, regardless of the outcome.[118] Furthermore, to the extent that rebanding disputes are brought before the Commission or the courts, Sprint bears the unique burden of litigating multiple cases.

G. NPSPAC Band Operational Restrictions (NPSPAC Region 8 Petition)

51. *Background.* The Tri-State Radio Planning Committee, FCC Region 8, serving Northern New Jersey, Southern New York, and Southwestern Connecticut (Region 8) asks us to impose operational restrictions on Sprint in two distinct situations: (1) when a NPSPAC licensee has moved one or more of its channels to the new NPSPAC frequencies and Sprint has not yet completely vacated the former General Category channels and (2) when Sprint wishes to commence operations in the ESMR band, but has not fully cleared the ESMR band of NPSPAC incumbents.[119] Region 8 is concerned that these situations, though temporary, could create the very risk of harmful interference through interleaving of incompatible technologies that was the genesis of this proceeding. To address this risk, Region 8 requests that: (a) we require Sprint to cease current operation on any channel 1-120 frequency within 25 kHz of relocated NPSPAC stations within 88 kilometers (km), and (b) Sprint not be allowed to begin operations on any former NPSPAC channel within 88 kilometers of the site of any current NPSPAC station which has not been relocated to the new NPSPAC frequencies.[120] Region 8 asks that we maintain these limitations in place until the entire NPSPAC band has been relocated and all relocated licensees have finalized the relocation process.[121]

52. *Discussion.* Given that NPSPAC communications primarily involve the safety of life and property and because interference with these communications could have tragic results, we agree with Region 8's concerns. We further note that no party opposed Region 8's request. Therefore, we grant Region 8's petition.

H. Charles Guskey Petition

53. *Background.* Charles Guskey, a principal of Preferred Communications, contends that the *800 MHz MO&O* failed to adequately address his prior petition for reconsideration of the *800 MHz Supplemental Order.* Guskey contends that: (1) the Commission undervalued the 1.9 GHz spectrum by at least a billion dollars, giving Nextel a windfall; (2) Preferred be allowed to relocate its General Category

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[116] *See* Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, FCC 07-92 ¶ 10 (rel. May 18, 2007).

[117] *See 800 MHz Report and Order*, 19 FCC Rcd 15124 ¶ 330. We note that, for the same reason, Sprint will not receive credit for its own post-mediation litigation costs.

[118] This includes the reasonable costs of mediation when the time period for mediation is extended.

[119] Region 8 Petition at 1-2.

[120] *Id.* at 3.

[121] *Id.*

EA channels (encumbered or not) to clean spectrum in the ESMR band; and (3) Puerto Rico needs to be treated as a unique market, and Preferred awarded the 1.9 GHz spectrum in Puerto Rico in exchange for relocating public safety systems in that market.[122] Sprint opposes the Guskey petition as untimely, because it raises issues that have already been fully addressed by the Commission.[123]

54. *Discussion.* We dismiss the Guskey Petition.[124] The petition raises no new facts or issues and is repetitive of his earlier filing. The petition, by its own terms, requests the Commission to "carefully re-examine each of the items in [Guskey's August, 2004] petition for reconsideration," which items Guskey alleges "prove inequitable treatment of non-Nextel licensees . . ."[125] These issues were fully addressed in the *800 MHz MO&O*, in which the Commission declined to revisit the valuation of the 1.9 GHz spectrum,[126] gave non-ESMR EA licensees, such as Preferred, the ability to relocate their "white areas" to the ESMR band,[127] and declined to open access to the 1.9 GHz band to all EA licensees.[128] It is well established that the Commission does not grant reconsideration for the purpose of allowing a petitioner to reargue matters already presented, considered, and disposed of by the Commission.[129] Otherwise, the Commission "would be involved in a never-ending process of review that would frustrate the Commission's ability to conduct its business in an orderly fashion."[130]

I. BAS/MSS Issues

55. *Background.* In the *800 MHz Report and Order* the Commission granted Sprint the use of spectrum at 1990-1995 GHz (1.9 GHz) and established provisions for Sprint's clearing the 1990-2025 MHz band segment of Broadcast Auxiliary Service (BAS) incumbents by September, 2007.[131]

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[122] Guskey Petition at 2-4.

[123] Sprint Opposition at 7-8.

[124] 47 C.F.R. § 1.429(i). Section 1.429(i) reflects a policy of favoring administrative finality in the rulemaking process. *See* In the Matter of MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, *Memorandum Opinion and Order*, 5 Rad. Reg. 2d (P & F) 785, 97 F.C.C.2d 834 ¶ 140 (1984).

[125] *See* Petition for Reconsideration of Charles D. Guskey, filed Dec. 22, 2004.

[126] *800 MHz MO&O*, 20 FCC Rcd 16051 ¶ 79.

[127] *800 MHz Supplemental Order*, 19 FCC Rcd 25155-56 ¶¶ 79-80.

[128] *800 MHz MO&O*, 20 FCC Rcd 16047-49 ¶¶ 73-74.

[129] *See* Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, *Memorandum Opinion and Order*, 4 FCC Rcd 2276, 2277 (WTB 1989); Simplification of the Licensing and Call Sign Assignment Systems for Stations in the Amateur Radio Service, *Memorandum Opinion and Order*, 87 FCC 2d 50, 505 (1981) (*citing* WWIZ, Inc., 37 FCC 685 (1964)). In order to bring finality to our decision making process and to eliminate uncertainty, the Commission adopted Section 1.429(i) of our rules. 47 C.F.R. §1.429(i) ("any order disposing of a petition for reconsideration which modifies rules adopted by the original order is, to the extent of such modification, subject to reconsideration in the same manner as the original order. Except in such circumstances, a second petition for reconsideration may be dismissed by the staff as repetitious.").

[130] *See* Applications of Warren Price Communications, Inc. Bay Shore, New York et al., For a Construction Permit for a new FM Station on Channel 276 at Bay Shore, New York, *Memorandum Opinion and Order*, 7 FCC Rcd 6850 (1992) (stating that a second petition for reconsideration is not contemplated by the rules and may be dismissed as repetitious) (*citing* VHF Drop-Ins, 3 Rad. Reg. 2d 1549, 1551 n.3 (1964)).

[131] *See 800 MHz Report and Order,* 19 FCC Rcd 14969, 15095-15100 ¶¶ 251-263. BAS includes mobile TV pickup (TVPU) stations—land mobile stations used for the transmission of TV program material and related communications, including electronic newsgathering (ENG) operations, from scenes of events back to the TV station or studio—and fixed BAS operations such as studio-to-transmitter link (STL) stations, TV relay stations, and TV translator relay stations. The majority of these fixed operations are in higher frequency bands allocated to the BAS. *See* 47 C.F.R. §§ 74.601(a),(b) (listing classes of TV broadcast auxiliary stations). *See generally* 47 C.F.R. § (continued....)

Specifically, the Commission conditioned Sprint's licenses on Sprint following a relocation procedure that was based on a plan submitted to the Commission by Sprint, the Association for Maximum Service Television (MSTV), and the National Association of Broadcasters (NAB).[132]

56. Prior to the effective date of the *800 MHz Report and Order* rules, the Commission had established a plan based on relocation policies adopted in the earlier Emerging Technologies proceeding[133] by which 2 GHz Mobile Satellite Service (MSS) licensees would relocate incumbent BAS operations in the 1990-2025 MHz band.[134] Subsequently, the Commission reallocated fifteen megahertz of this spectrum to support advanced wireless services,[135] and as part of the *800 MHz Report and Order* assigned a five-megahertz block from 1990-1995 MHz to Sprint.[136] In the *800 MHz Report and Order*, the Commission found that the best way to ensure the continuity of BAS during the transition was to retain the relocation rules already established for MSS relocation of BAS incumbents but also to provide similar procedures by which Sprint may relocate BAS incumbents.[137] As a result, Sprint's obligation

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74.600 (Eligibility for license). In addition, BAS spectrum in the 2 GHz band is authorized for use by the Cable Television Relay Service (CARS) and the Local Television Transmission Service (LTTS). *See* 47 C.F.R. §§ 74.602, 78.18(a)(6) and § 101.803(b). For convenience, we refer to these services herein under the collective term "BAS." Thus, decisions herein that refer to BAS also apply to CARS and LTTS operations in the band. The original 2 GHz BAS channel plan, which is still in use, is as follows: Channel 1 (1990-2008 MHz), Channel 2 (2008-2025 MHz), Channel 3 (2025-2042 MHz), Channel 4 (2042-2059 MHz), Channel 5 (2059-2076 MHz), Channel 6 (2076-2093 MHz), and Channel 7 (2093-2110 MHz).

[132] *See 800 MHz Report and Order*, 19 FCC Rcd at 15095-96, 15131-32 ¶¶ 251-52, 353.

[133] *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92-9, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994); *aff'd Association of Public Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996) (collectively, "*Emerging Technologies* proceeding").

[134] *See* Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile-Satellite Service, ET Docket 95-18, *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd 12315, 12326-27 ¶¶ 27-35 (2000) *(MSS Second Report and Order)*.

[135] Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, ET Docket 00-258, *Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, 18 FCC Rcd 2223, 2225, 2238 ¶¶ 3, 28 (2003) *(AWS Third Report and Order, Third NPRM, and Second MO&O)*. The fifteen megahertz of spectrum consists of ten megahertz in the 1990-2000 MHz band and five megahertz in the 2020-2025 MHz band. Given the need to provide for the rapid introduction of advanced wireless services (AWS) in the 2 GHz BAS band, the Commission modified the plan that 2 GHz MSS licensees were to follow when relocating incumbent BAS licensees in the 1990-2025 MHz band. *See* Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket 95-18, *Third Report and Order and Third Memorandum Opinion and Order*, 18 FCC Rcd 23638, 23653-61 ¶¶ 29-44 (2003) (*MSS Third Report and Order*).

[136] *800 MHz Report and Order*, 19 FCC Rcd at 15085 ¶ 223.

[137] *See id.* at 15094-95 ¶ 250; 47 C.F.R. § 74.690(a). The existing MSS relocation rules were amended to allow either MSS entrants or Sprint to relocate BAS incumbents. In addition, the Commission further modified the MSS-BAS relocation plan to no longer require BAS licensees in TV markets 31-210 to cease operations on channels 1 and 2 (1990-2008 MHz and 2008-2025 MHz, respectively) until they have been relocated to the new band plan at 2025-2110 MHz. The Commission found that this modification was appropriate to accommodate Sprint's entry into the band under the adopted Sprint-BAS plan, which did not require BAS incumbents in markets 31 and above to cease operations on these two channels without receiving compensation prior to vacating the spectrum. *See id.* at 15102 ¶ 269.

extends to the entire 1990-2025 MHz band even though Sprint will ultimately operate in only a five megahertz portion of the band.[138] The *800 MHz Report and Order* provided Sprint with the opportunity, under certain circumstances, to recover a *pro rata* share of the relocation cost from MSS licensees that subsequently enter the 1990-2025 MHz band.[139] The plan adopted by the Commission requires Sprint to *relocate licensees from the 1990-2025 MHz band to comparable facilities within thirty months of the* effective date of the *800 MHz Report and Order*.[140] The Commission also concluded that Sprint should be compensated for the 800 MHz band spectrum rights that it is surrendering, and the costs it incurs in reconfiguration of both the 800 MHz band and the BAS bands. Thus, the *800 MHz Report and Order* established a financial reconciliation process in which the Commission will subtract the combined value of Sprint's surrendered 800 MHz spectrum rights and 800 MHz and 1.9 GHz band reconfiguration costs from the relative market value of the 1.9 GHz band segment in which Sprint will acquire spectrum rights. To avoid an unintended "windfall," Sprint will be required to pay the difference to the U.S. Treasury.[141]

57. In June 2005, Sprint, MSTV, and NAB filed a petition seeking a declaratory ruling, or alternately, a clarification that Sprint will receive credit in the 800 MHz financial reconciliation process for the costs it incurs to relocate BAS operations licensed after June 27, 2000, but before November 22, 2004.[142] By way of background, the Commission decided in the *MSS Second Report and Order* that BAS facilities could continue to operate on a primary basis until relocated by MSS licensees provided that the initial BAS application was received before June 27, 2000, the adoption date of the *MSS Second Report and Order*.[143] Initial BAS applications filed after June 27, 2000 have been licensed on a secondary basis and this condition has been noted on the authorization issued by the Commission to the BAS licensee. Subsequently, Sprint and the broadcasters agreed that that the cost of relocating these secondary BAS licensees should be paid by Sprint and requested the Commission allow Sprint to receive credit for relocating these secondary BAS facilities in the "true-up" that follows completion of band reconfiguration. *In the 800 MHz MO&O,* the Commission granted the petition filed by Sprint and the broadcasters and stated that Sprint would receive credit for voluntarily reimbursing the relocation costs of BAS licensees licensed after June 27, 2000 but before November 22, 2004.[144] The Commission allowed, rather than required, Sprint to relocate the facilities of these secondary BAS licensees and explicitly noted that its ruling on the BAS licensing matter did not alter the well established principle that secondary licensees are not entitled to relocation reimbursement, a principle which applied to the relocation procedures for the 1.9 GHz band.[145] The Commission took this action because "the public interest is best

[138] *See 800 MHz Report and Order, 19 FCC Rcd* at 15095-96 ¶¶ 251-52.

[139] *See id.* at 15099 ¶ 261.

[140] *See id.* at 15096, 15131-32 ¶¶ 253, 353. The Commission subsequently extended this deadline by forty-five days to September 7, 2007. *See* Commission Seeks Comment on *Ex Parte* Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice* (rel. Oct. 22, 2004) (*October 2004 Public Notice*).

[141] *800 MHz Report and Order*, 19 FCC Rcd at 15123-24 ¶¶ 329-330.

[142] *See* Nextel/MSTV/NAB Request. November 22, 2004 is the date that the *800 MHz Report and Order* was published in the Federal Register.

[143] 47 C.F.R. § 2.106 Footnote NG 156. *See also MSS Second Report and Order*, 15 FCC Rcd at 12335 ¶ 59. This relocation process also applies to those BAS licenses meeting the cut-off date for which licensees filed subsequent facilities modification applications.

[144] *See generally 800 MHz MO&O.*

[145] The relocation procedures for the 1.9 GHz band were based on the *Emerging Technologies* relocation policies which do not require relocation reimbursement for secondary licensees. As noted above, the underlying MSS BAS relocation procedure was based on the relocation policies of the *Emerging Technologies* proceeding. The (continued....)

served by Sprint's timely clearing of all incumbent operations in the 1990-2025 MHz band, which in turn will facilitate the timely transition of the 800 MHz band as well. Furthermore, the costs associated with relocating these secondary BAS licenses do not significantly alter the total cost associated with implementing the 800 MHz relocation plan."[146]

58. *The Mohave County Board of Supervisors (Mohave), which operates a number of* television translators, has filed a petition asking the Commission to clarify or reconsider the *800 MHz MO&O* in a manner that would require Sprint to pay all 2 GHz BAS licensees for relocating their BAS facilities including those BAS facilities that are associated with Mohave's translator stations.[147] Mohave alleges that Sprint has refused to relocate Mohave's BAS facilities because they have secondary status and thus are not eligible for relocation. Mohave states that it had no notice before the *800 MHz MO&O* was issued that reimbursement of translator BAS licensees was a disputed issue, and therefore lacked the opportunity to comment before that order was issued.[148]

59. Additionally, Mohave argues that if the Commission fails to clarify the secondary BAS issue in Mohave's favor, the Commission would be acting arbitrarily and capriciously. Specifically it observes that Sprint was allowed reimbursement credit for relocating some secondary BAS licensees even though the licensees were on notice that they were subject to relocation without reimbursement (*i.e.,* the BAS licenses issued after the *MSS Second Report and Order* in 2000 specifically stated, in the license documents, that the licenses were secondary and therefore not eligible for relocation payment.). However, no credit would be allowed for relocating secondary BAS licensees who received no such notice (such as Mohave).[149] Mohave also argues that denying it compensation for relocation would be inconsistent with the Commission's statement in the *800 MHz Report and Order* concerning avoidance of disruption to BAS incumbents. If we elect not to clarify the *800 MHz MO&O* in the manner urged by Mohave, it submits that we should reconsider the *800 MHz MO&O* BAS provisions as a matter of policy. In support of that request, Mohave notes that its translator stations provide service to a remote area served by only a single broadcast television station, and therefore that that there are strong public interest considerations for requiring Sprint to compensate Mohave for relocating its BAS facilities.[150]

60. A number of Phoenix area broadcasters whose signals are retransmitted by Mohave's BAS translator facilities have also filed petitions for clarification or reconsideration on the same grounds as Mohave.[151] Additional comments in support of Mohave's petition were filed by broadcast groups and

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Commission subsequently amended its MSS BAS relocation procedure to allow Sprint to relocate BAS incumbents as part of Sprint's entry into a portion of the 1.9 GHz band.

[146] *800 MHz MO&O*, 20 FCC Rcd at 16063 ¶ 107.

[147] Mohave County Bd. Of Supervisors, *Petition for Clarification or Reconsideration*, WT Docket 02-55, dated January 27, 2006 (Mohave Petition). There are four different types of television stations: television broadcast stations, translator stations, low-power television stations (LPTV), and Class A stations. Television broadcast stations are full-power television stations. Translator stations retransmit the programs of a television broadcast station without significant alteration. 47 C.F.R. § 74.701(a). LPTV stations may either retransmit the programs of a television broadcast station or originate programming. 47 C.R.R. § 74.701(f). Class A stations are LPTV stations that have been granted interference protection rights similar, but not identical to, a television broadcast station. 47 C.F.R. § 74.708; Establishment of a Class A Television Service, *Report and Order*, MM Docket 00-10, 15 FCC Rcd 6355, 6370-71 ¶¶ 37-38 (2000). The broadcast auxiliary service (BAS) is used by all four types of television stations for transmitting point-to-point signals. 47 C.F.R. § 74.600.

[148] Mohave Petition at 9.

[149] *Id.* at 11-12.

[150] *Id.* at 12-14.

[151] Petition for Clarification or Reconsideration, filed January 27, 2006 by Scripps Howard Broadcasting Co., Petition for Clarification or Reconsideration, filed January 27, 2006 by Meredith Corp., Petition for Clarification or (continued....)

public officials.[152] Independently of Mohave's filing, the Association for Maximum Service Television (MSTV) filed a petition for clarification in which it claims that the plan jointly proposed by Sprint, MSTV, and NAB, on which the 800 MHz *Report and Order* BAS relocation plan was based, clearly contemplated that no category of affected BAS equipment -- including BAS equipment used by television translators --would be excluded from reimbursement.[153]

61. More recently, Fox Television Stations, Inc. (Fox) and Gray Television Licensee, Inc. (Gray) have filed a similar petition for clarification asking that Sprint be required to relocate and receive credit for relocating BAS licensees operating under Section 74.24 of the Commission's rules.[154] Section 74.24 allows full-power television station licensees to operate BAS facilities on a short-term basis for up to 720 hours a year without obtaining a separate BAS license. Fox and Gray argue that the *800 MHz Report and Order* and *800 MHz MO&O* clearly require that Sprint relocate "all BAS operations" and that such a reading is necessary to ensure that the Commission's goal of minimizing disruption to BAS operations is satisfied. Fox and Gray note that relocating short-term BAS would minimize the number of BAS operations that could interfere with or delay deployment of Sprint's future 1.9 GHz services since some broadcasters may be disinclined to cease short-term BAS operations.[155] Entravision Holdings has filed comments in support of Fox and Gray noting that there is no indication that the Commission intended to exclude short-term BAS operations from relocation reimbursement.[156]

62. In its opposition to Mohave's petition, Sprint asserts that the Commission's 2 GHz BAS relocation rule excludes secondary BAS licensees from relocation reimbursement and that the *800 MHz MO&O* did not alter this rule or address the relocation requirements for BAS facilities associated with translator stations.[157] Similarly, in an opposition to Fox/Gray's petition, Sprint argues that "short-term" BAS are secondary and hence not eligible for relocation reimbursement and that in the *800 MHz MO&O* the Commission reiterated the "well-established principle" that secondary operations are not entitled to relocation reimbursement.[158]

63. *Discussion*. We will grant the petitions of Mohave, MSTV, Fox and Gray, and the

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Reconsideration, filed January 27, 2006 by, Multimedia Holdings Corp., Petition for Clarification or Reconsideration, filed January 27, 2006 by Fox Television Stations, Inc., and Petition for Clarification or Reconsideration, filed January 27, 2006 by KTVK, Inc.

[152] By joint letter, dated March 22, 2006, which they requested be included in the docket of this proceeding, Senators John McCain and Jon Kyl filed comments in support of the Mohave petition. *See* Letter from Senators John McCain and Jon Kyl to Kevin A. Martin, Chairman, Federal Communications Commission, WT Dkt. No. 02-55 (dated Mar. 22, 2006). A number of other parties have filed comments supporting Mohave. The Arizona Broadcasters Association. Two non-commercial BAS licensees whose facilities share similar status to Mohave have filed comments in support of Mohave (Dutchess Community College and Oregon Public Television). Hubbard Broadcasting has filed reply comments supporting Mohave. The Community Broadcasters Association and Congressman Franks have filed *ex parte* comments supporting Mohave.

[153] Petition for Clarification, filed January 27, 2006 by Association for Maximum Service Television (AMST Petition), at 3-4. Reply to Opposition of Sprint Nextel Corporation, filed April 5, 2006 by Association for Maximum Service Television at 4-5.

[154] Petition for Clarification, filed March 20, 2007 by Fox Television Stations, Inc. and Gray Television Licensee, Inc. 47 C.F.R. § 74.24.

[155] Petition for Clarification, filed March 20, 2007 by Fox Television Stations, Inc. and Gray Television Licensee, Inc., 4-5.

[156] Comments in Support of Petition for Clarification, filed March 29, 2007 by Entravision Holdings, LLC.

[157] Opposition of Sprint Nextel Corp., filed March 23, 2006, 8-9.

[158] Opposition of Sprint Nextel Corporation, filed March 30, 2007, 3.

Phoenix area broadcasters in part. Specifically, we will permit, but not require, Sprint to pay and claim credit for the cost of relocation of BAS facilities associated with translator television stations and short-term BAS facilities operating under Section 74.24. We see no basis for treating these BAS licensees differently than the secondary BAS licensees in the *800 MHz MO&O* where we permitted Sprint to obtain credit for relocation of such secondary BAS licensees to facilitate the timely clearing of all incumbent operations in the 2 GHz BAS band.[159] We believe that allowing Sprint this flexibility will further the goals of this proceeding by helping to ensure that the BAS relocation proceeds in a timely fashion with minimal disruption to BAS operations. If there are few (or no) BAS incumbents left in a particular market that could interfere with or otherwise complicate the deployment of Nextel's operations in the band, it would help ensure that the BAS relocation is completed without complication, will minimize disruption to BAS operations, and will simplify negotiations with BAS incumbents.[160] Accordingly we find that it is appropriate to allow Sprint to claim credit at the final "true-up" if it elects to pay the reasonable relocation costs of secondary BAS facilities associated with translator or LPTV stations or the secondary short-term BAS facilities operating under Section 74.24.[161]

64. While we will permit Sprint to claim credit for the cost of relocating BAS facilities associated with translator stations and short-term BAS facilities, we will not require that Sprint pay such BAS relocation cost, and the petitions are denied in that respect. The Commission's rules state that BAS operations associated with translator and LPTV stations are secondary to BAS operations associated with television broadcasting stations.[162] Similarly, BAS facilities operating under Section 74.24 are secondary to licensed BAS stations.[163] A licensee with a secondary authorization may not cause interference to primary operations or claim protection from harmful interference from primary operations.[164] Because secondary BAS operations can be displaced at any time by primary operations, under well-established Commission policy the licensees of such facilities are not eligible for mandatory relocation reimbursement. The Commission's rules for BAS relocation, as amended by the *800 MHz Report and Order*, require new entrants to the 2 GHz BAS band, such as Sprint, to negotiate the relocation of BAS stations "operating on a primary basis" but confer no comparable obligations for secondary BAS

[159] *See 800 MHz MO&O*, 20 FCC Rcd at 16063 ¶ 107.

[160] We also recognize that television translators and LPTV stations interconnected with BAS facilities can bring needed service to rural communities that are unserved or underserved by television broadcast stations and that licensees of translator and LPTV stations, such as Mohave, may lack the resources to relocate their BAS facilities and therefore could be forced to discontinue this valuable service. For example, Mohave's translator stations rebroadcast Phoenix area television stations to a remote area. The cost of replacing the BAS point-to-point links used to relay the signals from Phoenix to Mohave County is estimated at $353,000. Mohave Petition at 14 n. 28. Oregon Public Television would have to spend $900,000 to replace BAS facilities used to relay public television signals to translators in remote areas of Oregon. Comments of Oregon Public Television, filed March 3, 2006, 3. Local governments and non-profit corporations may have difficulty finding money to replace these BAS facilities. LPTV stations air "niche" programming, often locally produced, to residents of specific ethnic, racial, and interest communities and may sometimes be the only television station in an area providing local news, weather, and public affairs programming. Establishment of a Class A Television Service, MM Docket No. 00-10, *Report and Order*, 15 FCC Rcd 6355, 6357-58 ¶ 2 (2000).

[161] This action is consistent with the Commission's advancement of the BAS relocation process when it allowed Sprint to claim credit for relocating certain BAS facilities that were licensed before November 22, 2004. *See 800 MHz MO&O*, 20 FCC Rcd 16063 ¶ 107. Sprint may claim credit for the relocation of only those BAS facilities associated with translator and LPTV stations or short-term BAS facilities which where in operation before November 22, 2004.

[162] 47 C.F.R. § 74.602(f); 47 C.F.R. § 2.106 NG118. Translator and LPTV television broadcast stations are similarly prohibited from causing interference to full-power television stations. 47 C.F.R. § 74.703(b).

[163] 47 C.F.R. § 74.24(c).

[164] 47 C.F.R. § 2.105(c)(2); 47 C.F.R. § 74.602(f).

stations.[165] The *800 MHz MO&O* did not change how our rules treat the relocation status of BAS operations associated with translator and LPTV stations or short-term BAS facilities, but instead only addressed BAS licenses issued after June 27, 2000 but before November 22, 2004.[166] To the extent that the petitioners seek a change in the Commission's BAS relocation rules as amended by the *800 MHz Report and Order*, such a request is untimely.[167] Consequently, our rules do not require us to grant the petitions of Mohave, MSTV, the Phoenix area broadcasters, or Fox and Gray.

65. We find no merit in the argument that MSTV has made to support requiring Sprint to pay the costs of retuning all BAS facilities including those BAS facilities used with television translators. MSTV argues that the 2 GHz BAS relocation plan jointly proposed by Sprint, MSTV, and NAB made no distinction between secondary and primary BAS licensees and that the Commission, in adopting the plan, agreed that it would make no such distinctions.[168] MSTV is incorrect to the extent it claims that the Commission is bound by the Sprint/MSTV/NAB plan. The Commission did not adopt the plan or otherwise approve its provisions. Although the Commission drew heavily on the filings of Nextel, MSTV and NAB when it established BAS relocation procedures for Sprint in the *800 MHz Report and Order*, it adopted specific relocation rules instead of codifying the industries' relocation plan or any related agreements made between the parties.[169] Because the text of the *800 MHz Report and Order* does not explicitly discuss the primary/secondary distinction for BAS facilities, MSTV looks to other language in the decision to support its claim that Sprint is required to pay for the relocation of all BAS facilities, whether primary or secondary.[170] Thus, it points to the statements in the *800 MHz Report and Order* that Sprint must "relocate all BAS licensees in the 1990-2025 MHz band" and that the Commission's definition of BAS includes TV translator relay stations.[171] MSTV's claim ignores the fact that the BAS relocation compensation rules adopted in the *800 MHz Report and Order* explicitly state they apply only to BAS operations "operating on a primary basis[.]"[172] It is the Commission's rules that govern Sprint's obligation to the BAS licenses and not MSTV's interpretation of the Commission's intent. Accordingly, considering all of the foregoing factors we will not require Sprint to compensate licensees to relocate their secondary BAS facilities.

66. We emphasize that our decision to allow Sprint to claim credit for the relocation of such

[165] 47 C.F.R. § 74.690(a).

[166] *800 MHz MO&O*, 20 FCC Rcd at 16061-63 ¶¶ 105-107.

[167] 47 U.S.C. § 405(a); Petitions for reconsideration must be filed within 30 days from the date of public notice of the final Commission action. 47 C.F.R. § 1.106(f).

[168] AMST Petition at 3-4 (discussing the joint proposed BAS relocation plan of MSTV/NAB/Nextel, *Ex Parte* filing of May 3, 2004 in WT Docket 02-55).

[169] 47 C.F.R. § 74.690. The *800 MHz Report and Order* stated that "[w]e will require Nextel, as a condition on Nextel's 1.9 GHz licenses, to follow a relocation procedure *based on* its proposed BAS relocation plan." *800 MHz Report and Order*, 19 FCC Rcd, at 15095-96 ¶ 252 (emphasis added). For example, the *800 MHz Report and Order* recognized and retained procedures by which 2 GHz MSS entrants – who are not required to relocate secondary BAS licensees – could enter the band and, under certain circumstances, participate in relocation cost sharing with Sprint Nextel. *See 800 MHz Report and Order*, 19 FCC Rcd at 15099 ¶ 261-62 (discussing cost sharing); *see also* Nextel/MSTV/NAB Request at 3 (acknowledging that the *800 MHz Report and Order* generally retained the BAS relocation rules of the MSS proceeding).

[170] AMST Petition at 3-4. *See also 800 MHz Report and Order*, 19 FCC Rcd at 15095-96 ¶ 252.

[171] AMST Petition at 3; *800 MHz Report and Order*, 19 FCC Rcd at 15499 ¶ 55 n.144, 15096 ¶ 252.

[172] *800 MHz Report and Order*, 19 FCC Rcd at 15155-57 Appx C, §§ 74.690, 78.40; 47 C.F.R. § 74.690(a); 47 C.F.R. § 78.40(a). Fox and Gray have made a similar argument regarding short-term BAS facilities, noting that the *800 MHz Report and Order* and *800 MHz MO&O* require relocation of "all BAS licensees". We find this argument unconvincing for the same reason.

BAS facilities confers no right on the licensees of these facilities to require Sprint to pay their relocation expenses -- such payments are discretionary with Sprint. Moreover, our narrow decision to permit Sprint to pay for relocation of secondary BAS facilities associated with translator and LPTV stations and short-term BAS facilities operating under Section 74.24 is limited to the facts present here and may not be construed in other contexts as a revision of Commission rules and policies affecting stations operating pursuant to secondary authorizations. Also, allowing Sprint to pay for relocation of these secondary BAS facilities does not in any way alter MSS licensees' obligations concerning the relocation of BAS incumbents with primary authorizations. MSS licensees will not be required to reimburse Sprint for any BAS relocation expenses that Sprint incurs when it voluntarily pays for the relocation of secondary BAS facilities associated with translator or LPTV stations or short-term BAS facilities. Finally, we are confident that permitting Sprint to pay for the relocation of BAS facilities associated with translator and LPTV stations and short-term BAS facilities will give Sprint the flexibility necessary to tailor its BAS relocation plans to ensure that it meets its important obligation to ensure that BAS relocation is complete by September 7, 2007.[173]

J. Border Regions

67. On our own motion, we address several procedural issues relating to the implementation of specific 800 MHz band plan rules for the Canadian and Mexican border regions. In the *800 MHz NPRM*, the Commission sought comment on "how any relocation plan would be implemented consistent with international agreements, in those areas of the United States that are adjacent to the Canadian and Mexican borders."[174] In the *800 MHz Report and Order*, the Commission deferred consideration of the border area band plan issue, noting that "implementing the band plan in areas of the United States bordering Mexico and Canada will require modifications to international agreements for use of the 800 MHz band in the border areas."[175] The Commission stated that "the details of the border plans will be determined in our ongoing discussions with the Mexican and Canadian governments."[176] Those international discussions are currently ongoing. Once those discussions are completed, and any necessary modifications to our international agreements have been made, we will need to amend our rules to implement the agreements and identify the portions of the 800 MHz band that will be available to U.S. licensees on a primary basis. In addition, we will need to adopt a band plan for the border regions that specifies the ESMR and non-ESMR portions of the band and the distribution of channels to public safety, B/ILT, and SMR licensees.[177] In order to expedite the completion of the band reconfiguration process, pursuant to Section 5(c)(1) of the Communications Act, we delegate authority to the Public Safety & Homeland Security Bureau (PSHSB) to take these steps once agreements are finalized with Canada and Mexico.

68. First, as a general matter, we amend our rules to provide a mechanism for PSHSB to implement ministerial rule changes to conform our rules to international agreements. This is similar to authority that has been previously delegated to the Wireless Telecommunications Bureau, which authorizes the Chief of the Wireless Bureau to issue "orders involving ministerial conforming amendments to rule parts, or orders conforming any of the applicable rules to formally adopted

[173] *800 MHz Report and Order*, 19 FCC Rcd, at 15131-32 ¶ 353; Commission Seeks Comment on *Ex Parte* Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding, WT Docket No. 02-55, *Public Notice*, 19 FCC Rcd 21492 (2004).

[174] *800 MHz NPRM*, 17 FCC Rcd at 4892-93 ¶ 33.

[175] *800 MHz Report and Order*, 19 FCC Rcd at 14895-96 ¶ 25.

[176] *Id.* at 15063 ¶ 176.

[177] 47 C.F.R. § 90.617(d).

international conventions or agreements where novel questions of fact, law, or policy are not involved."[178] We amend Section 0.392(e) of our rules to provide the Chief of the Public Safety and Homeland Security Bureau with the same delegated authority.[179] The amendments adopted herein relative to Section 0.392 pertain to agency organization, procedure and practice. Consequently, the notice and comment provisions of the Administrative Procedure Act contained in 5 U.S.C. § 553(b) are inapplicable.[180] In addition, to promote the timely completion of the 800 MHz band reconfiguration process, we delegate specific authority to PSHSB to propose and adopt new 800 MHz band rules consistent with the Commission's orders in this proceeding for U.S. primary spectrum in the Canadian and Mexican border regions once the relevant agreements with Canada and Mexico are finalized.

K. Rule Clarifications

69. *Background.* In the *800 MHz MO&O*, the Commission updated Sections 90.617(a), (b) and (d) to reflect the distribution of channels between the various pool categories in the SouthernLINC/Sprint markets.[181] Specifically, the Commission modified the band plan for the SouthernLINC/Sprint markets to reflect a reduced Expansion Band of one-half megahertz for those locations within a seventy mile radius of Atlanta, Georgia.[182] As a result of this change, there are now two different band plans for the SouthernLINC/Sprint markets—one band plan for locations outside the seventy mile radius and one band plan for locations within a seventy mile radius of Atlanta, Georgia.[183]

70. *Discussion.* In making these changes, the Commission inadvertently failed to update Sections 90.617(g) and (h) to reflect that as in all other markets, vacated spectrum in these SouthernLINC/Sprint markets will be reserved for exclusive use by public safety licensees for 3 years and public safety and CII licensees for an additional 2 years. Therefore, on our own motion, we revise Section 90.617(g) and (h) to add a reference to vacated spectrum in the SouthernLINC/Sprint markets, identifying the particular spectrum that will be available within a 70-mile radius of Atlanta and the spectrum that will be available outside that radius. We also remove all language from Section 90.617 which indicates that the agreement between SouthernLINC and Sprint still needs to be approved by the Wireless Telecommunications Bureau.

71. In addition, on our own motion, we modify Section 90.203(i)—pertaining to equipment certification—to reflect the location of the NPSPAC band after band reconfiguration. The Commission inadvertently failed to update this section in the *800 MHz Report and Order*. Finally, we correct the base frequency for one of the frequencies listed in the table in Section 90.613.[184]

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act Certification

72. A Final Regulatory Flexibility Certification with respect to the *Second Memorandum Opinion and Order* has been prepared and is included in Appendix A.

B. Paperwork Reduction Act Analysis

73. The actions taken in the *Second Memorandum Opinion and Order* have been analyzed

[178] 47 C.F.R. § 0.331(d)

[179] *See* 47 C.F.R. § 0.392(e)

[180] 5 U.S.C. § 553(b).

[181] *See 800 MHz MO&O*, 20 FCC Rcd 16036 ¶ 48.

[182] *Id.*

[183] *Id.*, 20 FCC Rcd 16082-16088.

[184] 47 C.F.R. § 90.613.

with respect to the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, and found to impose no new or modified recordkeeping requirements or burdens on the public.

V. *ORDERING CLAUSES*

74. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(f), 332, 337 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(f), 332, 337 and 405, this Second Memorandum Opinion and Order IS HEREBY ADOPTED.

75. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4(i), 303(f) and (r), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 1, 154(i), 303(f) and (r), 332, and 405, the Request for Clarification of Communications & Industrial Electronics, Inc., North Sight Communications, Inc. and Ragan Communications, Inc. on January 27, 2006 IS GRANTED to the extent described herein and DENIED in all other respects.

76. IT IS FURTHER ORDERED that the Petition for Reconsideration of *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, filed by Richard W. Duncan d/b/a Anderson Communications, filed Dec. 22, 2004 IS DENIED to the extent described herein.

77. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Charles D. Guskey on January 27, 2006, the Petition for Partial Reconsideration and Clarification filed by the Safety and Frequency Equity Competition Coalition on January 27, 2006; and the Petition for Reconsideration filed by Schwaninger & Associates ARE DISMISSED.

78. IT IS FURTHER ORDERED that the Petition for Clarification filed by Chair of the NPSPAC Region 8 Regional Planning Committee on March 3, 2006 IS GRANTED.

79. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Sprint Nextel Corporation, on January 27, 2006 IS GRANTED IN PART, DENIED IN PART, DISMISSED IN PART and DEFERRED IN PART to the extent described herein.

80. IT IS FURTHER ORDERED that the Petitions for Clarification and/or Reconsideration filed by the Mohave County Board of Supervisors, the Association for Maximum Service Television, Fox Television Stations Inc., KTVK Inc., Multimedia Holdings Corporation, Meredith Corporation, and Scripps Howard Broadcasting Company on January 27, 2006 ARE GRANTED IN PART AND DENIED IN PART to the extent described herein.

81. IT IS FURTHER ORDERED that the Petition for Clarification filed by Fox Television Stations Inc. and Gray Television Licensee Inc. on March 20, 2007 IS GRANTED IN PART AND DENIED IN PART to the extent described herein.

82. IT IS FURTHER ORDERED pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and sections 1.925 of the Commission's Rules, 47 C.F.R. § 1.925 that the Request for Waiver submitted by Mobile Relay Associates in the above-captioned proceeding on January 24, 2006 IS DENIED.

83. IT IS FURTHER ORDERED that the amendments of the Commission's Rules as set forth in Appendix B ARE ADOPTED, effective thirty days from the date of publication in the Federal Register.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

Appendix A
Procedural Matters

A. Final Regulatory Flexibility Certification

86. The Regulatory Flexibility Act of 1980, as amended (RFA),[185] requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[186] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[187] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[188] 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).[189] In sum, we certify that the rule changes and actions in this *Second Memorandum Opinion and Order* will not have a significant economic impact on a substantial number of small entities.

87. *ESMR Band Eligibility*. In this proceeding the Commission divided the 800 MHz band into a cellular portion (ESMR band) and non-cellular portion to create spectral separation between incompatible technologies. Section 90.614 provides that the cellular portion would be reserved for licensees that operate cellular high density systems. Several parties sought reconsideration of the eligibility and operating requirements applicable to the cellular band arguing that these requirements are overly restrictive. In the *800 MHz Memorandum Opinion and Order*, we clarified eligibility of licensees to relocate to the ESMR band to include low-density cellular operations and deferred consideration of a petition for reconsideration filed by Richard M. Duncan seeking to permit site-based Specialized Mobile Radio (SMR) licensees to relocate to the ESMR band. Sprint Nextel Corporation sought reconsideration of the provisions of the *800 MHz MO&O* that clarified and expanded the rights of certain licensees other than Sprint and SouthernLINC to relocate to the ESMR band. After careful analysis, we find no reason to upset the Commission's balancing of interests that led to the revised eligibility criteria for the ESMR band contained in the *800 MHz MO&O*. Those criteria are designed to eliminate potential interference between incompatible technologies and to provide ESMR licensees flexibility in managing their systems. Here, we affirm the eligibility criteria established in the *800 MHz MO&O* for relocation to the ESMR band and are taking no action with respect to any entity. Therefore, we certify that our decision to deny the Sprint and Duncan petitions will not have a significant economic impact on a substantial number of small entities.

88. *ESMR Band Plan*. In some Southeastern markets where both Southern LINC and Sprint offer ESMR service, insufficient spectrum exists in the 816-824/861-869 MHz band segment to accommodate existing ESMR systems. To accommodate Sprint and SouthernLINC, the Commission created an expanded ESMR band in the Southeast. Sprint sought clarification that the *800 MHz Report*

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185 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).

186 5 U.S.C. § 605(b).

187 5 U.S.C. § 601(6).

188 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."

189 15 U.S.C. § 632.

and Order "adopted two remedies in the event there is insufficient spectrum in the ESMR segment to *accommodate all eligible licensees in a market: (1) expanding the ESMR segment and, in the event a* channel shortfall remained (2) distributing the available channels on a pro rata basis among licensees." Although we agree with Sprint that the Commission has the discretion to apportion ESMR spectrum, we find no support for Sprint's contention that licensees themselves have similar discretion. We also clarify that under limited circumstances, the Commission may apportion the ESMR band *pro rata* to licensees eligible to operate there. Because our decision merely clarifies pre-existing rules applicable to the ESMR Band, we have adopted no new rule and have taken no other action that affects any entity. Therefore, we certify that our decision will not have a significant economic impact on a substantial number of small entities.

89. *Puerto Rico.* The Puerto Rico market presents a unique situation that is distinct from other markets. Sprint holds considerably less spectrum in Puerto Rico than it does elsewhere, and there are several other licensees who have acquired significant EA license holdings in Puerto Rico at auction and seek to operate as ESMRs. In addition, Puerto Rico has numerous site-based incumbents that will need to be relocated to the non-ESMR block. Thus, an alternative band plan is appropriate here. Accordingly we provide the 800 MHz Transition Administrator (TA) with specific criteria and direct the TA to propose an alternative band plan within 60 days of the release of this order, including, if necessary, a pro rata distribution of ESMR spectrum. At this time, we have no basis for anticipating that any future decision by the TA in either proposing an alternative band plan or proposing a *pro rata* distribution would adversely affect any small entities. Accordingly, at this time, we certify that our decision will not have a significant economic impact on a substantial number of small entities.

90. Furthermore, to the extent that any action taken in the future might impose an adverse economic impact in Puerto Rico, that impact will be borne by Sprint because Sprint must pay the costs of 800 MHz band reconfiguration. Under Small Business Administration criteria, Sprint is a large entity.[190] Further, there is no evidence in the record that non-Sprint licensees in the Puerto Rico market, including small wireless cellular, public safety, governmental entities or other wireless entities, would suffer adverse economic consequences.

91. *Guam, the Northern Mariana Islands, American Samoa, and the Gulf of Mexico.* Sprint asks that we reconsider the Commission's decision in the *800 MHz MO&O* to require band reconfiguration in areas that have no associated NPSPAC region. These areas include American Samoa, Guam, the Northern Mariana Islands, and the Gulf of Mexico. Because there are no public safety entities in the Gulf of Mexico and Sprint does not hold spectrum rights in the Gulf of Mexico, we see no risk in the Gulf of the type of interference to public safety systems that would require rebanding. However, we deny Sprint's request as it relates to Guam, the Northern Mariana Islands, and American Samoa. We believe that funding band reconfiguration in these markets does not pose an inequitable burden on Sprint. We take this position because Sprint alone will bear the cost of band reconfiguration in Guam, the Northern Mariana Islands, and American Samoa. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small entities.

92. *Application Freeze.* In the *800 MHz Report and Order*, the Commission imposed a freeze on the acceptance of 800 MHz applications in order to maintain a stable spectral landscape during the band relocation process. The Commission stated, however, that *de minimis* modifications to a currently authorized system are not subject to the application freeze so long as the modifications are necessary to effectuate band reconfiguration. Sprint requests that we broaden this exception to the freeze to "permit certain license modifications . . . provided they do not materially diminish public safety's spectral or operational expectancies." While Sprint fails to define "spectral or operational expectancies" we agree that some flexibility may be appropriate. In this connection, we clarify that licensees may seek

[190] 13 C.F.R. § 121.201, NICS Code 517212 (the standard for determining whether a wireless telecommunications entity qualifies as a large entity depends on whether it has more than 1500 employees).

a waiver of the application freeze. Because grant of such a waiver would provide benefits to public safety service providers and to the public through improved public safety communications, we believe that only benefits will result. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small entities.

93. *Post-litigation costs.* Under the *800 MHz Report and Order*, Sprint is required to pay the costs of mediation to resolve disputes associated with a frequency reconfiguration agreement. The Wireless Telecommunications Bureau issued a *Public Notice* that stated: "Licensees that enter mediation with Sprint Nextel are entitled to reimbursement of 'reasonable, prudent and necessary costs and expenses' associated with reaching a mediated frequency reconfiguration agreement. However, licensees who fail to reach a mediated agreement must bear their own costs associated [with] all further administrative or judicial appeals of band reconfiguration issues, including *de novo* review...and appeal of any such review before an A[dministrative] L[aw] J[udge]." Some parties have filed petitions for reconsideration suggesting that the Commission require Sprint to pay opposing parties' litigation costs when they seek *de novo* review before the Commission of issues that have not been resolved by negotiation or TA-sponsored mediation. We deny those petitions. Under the Commission's orders in this proceeding, Sprint must pay all licensees' reasonable costs of negotiation and TA-sponsored mediation, regardless of outcome. This ensures that licensees can take full advantage of these mechanisms at no cost to themselves, while at the same time encouraging resolution of issues by negotiated agreement and mediation rather than litigation. However, requiring Sprint to pay its opponents' litigation costs before the Commission and beyond would increase the likelihood of litigation and add cost and delay to the rebanding process. Moreover, the Commission lacks statutory authority to award such costs in cases that come before it. While parties that pursue administrative or judicial appeals may incur some cost, such cost would be undertaken voluntarily. Further, there is no evidence in the record that a substantial number of parties will pursue such legal challenges. Therefore, we certify that this action will not have a significant economic impact on a substantial number of small entities.

94. *NPSPAC Band Operational Restrictions.* The Tri-State Radio Planning Committee, FCC Region 8 (Region 8) asks us to impose operational restrictions on Sprint in two distinct situations: (1) when a NPSPAC licensee has moved one or more of its channels to the new NPSPAC frequencies and Sprint has not yet completely vacated the former General Category channels and (2) when Sprint wishes to commence operations in the ESMR band, but has not fully cleared the ESMR band of NPSPAC incumbents. Region 8 is concerned that these situations, though temporary, could create the risk of harmful interference through the interleaving of incompatible technologies that was the genesis of this proceeding. To address this risk, Region 8 requests that: (a) we require Sprint to cease current operation on any channel 1-120 frequency within 25 kHz of relocated NPSPAC stations within 88 kilometers (km), and (b) Sprint not be allowed to begin operations on any former NPSPAC channel within 88 kilometers of the site of any current NPSPAC station which has not been relocated to the new NPSPAC frequencies. Region 8 asks that we maintain these limitations in place until the entire NPSPAC band has been relocated and all relocated licensees have finalized the relocation process. Given that NPSPAC communications primarily involve the safety of life and property and because interference with these communications could have tragic results, we agree with Region 8's concerns. Because these operational restrictions apply only to Sprint, a large entity,[191] we certify that this action will not have a significant economic impact on a substantial number of small entities.

95. *Charles Guskey Petition.* Charles Guskey, a principal of Preferred Communications, contends that the *800 MHz MO&O* failed to adequately address his prior petition for reconsideration of the *800 MHz Supplemental Order.* Guskey contends that: (1) the Commission undervalued the 1.9 GHz spectrum by at least a billion dollars, giving Nextel a windfall; (2) Preferred be allowed to relocate its General Category EA channels (encumbered or not) to clean spectrum in the ESMR band; and (3) Puerto

[191] *Id.*

Rico needs to be treated as a unique market, and Preferred awarded the 1.9 GHz spectrum in Puerto Rico in exchange for relocating public safety systems in that market. Because we dismiss the Petition as repetitive and untimely, we certify that this action will not have a significant economic impact on a *substantial number of small entities.*

96. *Broadcast Auxiliary Service Facilities.* We partially grant petitions to require Sprint to relocate BAS facilities associated with translator television stations or operated by full-power television stations on a short-term basis by permitting, but not requiring, Sprint to pay and claim credit for the costs incurred in relocating these BAS facilities. Some parties have filed petitions for reconsideration and clarification urging the Commission to require Sprint to relocate secondary BAS translator facilities. We instead permit, but not require, Sprint to relocate such facilities and to receive credit for such relocations at the "true-up," consistent with Commission precedent regarding other secondary BAS stations. Because secondary BAS operations can be displaced at any time by primary operations, under well-established Commission policy the licensees of such facilities are not eligible for mandatory relocation reimbursement. Further, our narrow decision to permit Sprint to pay for relocation of secondary BAS facilities associated with translator and LPTV stations and short-term BAS facilities operating under Section 74.24 is limited to the facts present here and may not be construed in other contexts as a revision of Commission rules and policies affecting stations operating pursuant to secondary authorizations. Also, allowing Sprint to pay for relocation of these secondary BAS facilities does not in any way alter Mobile Satellite Service licensees' obligations concerning the relocation of BAS incumbents with primary authorizations. Therefore, because our decision to permit such relocation affects only Sprint, a large entity, we certify that our decision to provide Sprint flexibility in managing BAS relocation will not have a significant economic impact on a substantial number of small entities.

97. *Southeast Band Plan.* In the *800 MHz MO&O*, the Commission updated Sections 90.617(a), (b) and (d) to reflect the distribution of channels between the various categories in the SouthernLINC/Sprint markets located in the Southeastern part of the United States. Specifically, the Commission modified the band plan for the SouthernLINC/Sprint markets to reflect a reduced Expansion Band of one-half megahertz for those locations within a seventy mile radius of Atlanta, Georgia. As a result of this change, there are now two different band plans for the SouthernLINC/Sprint markets—one band plan for locations outside the seventy mile radius and one band plan for locations within a seventy mile radius of Atlanta, Georgia. The Commission inadvertently omitted this rule change. In this *Second Memorandum Opinion and Order*, the Commission on its own motion revises Section 90.617(g) and (h) to add a reference to vacated spectrum in the Atlanta market. This rule change is necessary to identify the particular spectrum that will be available for public safety and critical infrastructure industry use within a 70-mile radius of Atlanta and the spectrum that will be available outside that radius. We also remove all language from Section 90.617 which indicates that the agreement between SouthernLINC and Sprint still needs to be approved by the Wireless Telecommunications Bureau. Responsibility over the 800 MHz band reconfiguration proceeding has been delegated to the Public Safety and Homeland Security Bureau. Because these rule changes are procedural in nature and are intended to correct an inadvertent omission and reflect organizational changes, we certify that these changes will not have a significant economic impact on a substantial number of small entities.

98. *Band Plan.* On our own motion, we modify Section 90.203(i)—pertaining to equipment certification—to reflect the location of the NPSPAC band after band reconfiguration. We also correct the base frequency for one of the frequencies listed in the table in Section 90.613. The Commission inadvertently failed to update these sections in the *800 MHz Report and Order*. Therefore, we correct these inadvertent omissions and certify that these changes will not have a significant economic impact on a substantial number of small entities.

99. *Border Area.* Finally, on our own motion, we address implementation of 800 MHz band plan rules for the Canadian and Mexican border regions. We delegate specific authority to the Public Safety and Homeland Security Bureau to propose and adopt new 800 MHz band plan rules for U.S. primary spectrum in the Canadian and Mexican border regions once the relevant agreements with Canada

and Mexico are finalized. This is similar to authority that has been previously delegated to the Wireless Telecommunications Bureau. We amend therefore Section 0.392(e) of our rules to provide the Chief of the Public Safety and Homeland Security Bureau with the same delegated authority. Thus this rule change is purely procedural in nature and therefore we certify that these changes will not have a significant economic impact on a substantial number of small entities. Therefore, we certify that the requirements of the *Second Memorandum Opinion and Order* will not have a significant economic impact on a substantial number of small entities.

100. The Commission will send a copy of the *Second Memorandum Opinion and Order*, including a copy of this Final Regulatory Flexibility Certification, in a report to Congress pursuant to the Congressional Review Act.[192] In addition, the *Second Memorandum Opinion and Order* and this final certification will be sent to the Chief Counsel for Advocacy of the SBA, and will be published in the Federal Register.[193]

192 *See* 5 U.S.C. § 801(a)(1)(A).

193 *See* 5 U.S.C. § 605(b).

Appendix B
Final Rules

PART 0 – COMMISSION ORGANIZATION

The authority citation for Part 0 continues to read as follows:

AUTHORITY: Secs. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225, unless otherwise noted.

Section 0.392(e) is amended to read as follows:

PUBLIC SAFETY AND HOMELAND SECURITY BUREAU

§ 0.392 Authority delegated.

* * * * *

(e) The Chief, Public Safety and Homeland Security Bureau shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either of the foregoing except such orders involving ministerial conforming amendments to rule parts, or orders conforming any of the applicable rules to formally adopted international conventions or agreements where novel questions of fact, law, or policy are not involved.

* * * * *

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

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

AUTHORITY: 4(i), 11, 303(g), 303(r), and 302(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

Section 90.203(i) is modified to specify the new location of the NPSPAC band.

§ 90.203 Certification Required.

* * * * *

(i) Equipment certificated after February 16, 1988 and marketed for public safety operation in the 806–809/851–854 MHz bands must have the capability to be programmed for operation on the mutual aid channels as designated in §90.617(a)(1) of the rules.

The frequency table in Section 90.613 is amended to correct a typo to the base frequency listed for channel 169. The frequency should be listed as 853.2250 MHz.

§ 90.613 Frequencies available.

* * * * *

Channel No.	Base Frequency (MHz)
* * * * *	* * * * *
169	.2250
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The text below the heading to Section 90.617 is amended to remove any statement which infers that the agreement between Southern LINC and Nextel is still pending before the Wireless Bureau. In addition, paragraphs (g) and (h) of Section 90.617 are updated to clarify which channels vacated in the *counties listed in Section 90.614(c) will be available for exclusive use for licensing to entities in the* public safety and CII categories.

§ 90.617 Frequencies in the 809.750–824/854.750–869 MHz, and 896–901/935–940 MHz bands available for trunked, conventional or cellular system use in non-border areas.

The following channels will be available at locations farther then 110 km (68.4 miles) from the U.S./Mexico border and 140 km (87 miles) from the U.S./Canadian border ("non-border areas").

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(g) In a given NPSPAC region, channels below 471 listed in Tables 2 and 4B which are vacated by licensees relocating to channels 551–830 and which remain vacant after band reconfiguration will be available as indicated below. The only exception will be for the counties listed in § 90.614(c). At locations greater then 113 km (70 mi) from the center city coordinates of Atlanta, GA within the counties listed in § 90.614(c), the channels listed in Tables 2A and 4C which are vacated by licensees relocating to channels 411–830 and which remain vacant after band reconfiguration will be available as indicated below. At locations within 113 km (70 mi) of the center city coordinates of Atlanta, GA, the channels listed in Tables 2B and 4D which are vacated by licensees relocating to channels 411–830 and which remain vacant after band reconfiguration will be available as indicated below.

(1) Only to eligible applicants in the Public Safety Category until three years after the release of a public notice announcing the completion of band reconfiguration in that region;

(2) Only to eligible applicants in the Public Safety or Critical Infrastructure Industry Categories from three to five years after the release of a public notice announcing the completion of band reconfiguration in that region;

(3) Five years after the release of a public notice announcing the completion of band reconfiguration in that region, these channels revert back to their original pool categories.

(h) In a given 800 MHz NPSPAC region – except for the counties listed in § 90.614(c) – channels below 471 listed in Tables 2 and 4B which are vacated by a licensee relocating to channels 511–550 and remain vacant after band reconfiguration will be available as indicated below.

(1) Only to eligible applicants in the Public Safety Category until three years after the release of a public notice announcing the completion of band reconfiguration in that region;

(2) Only to eligible applicants in the Public Safety or Critical Infrastructure Industry Categories from three to five years after the release of a public notice announcing the completion of band reconfiguration in that region;

(3) Five years after the release of a public notice announcing the completion of band reconfiguration in that region, these channels revert back to their original pool categories.