

spectrum Sprint Nextel was vacating (\$2.059 billion); (ii) the costs paid by Sprint Nextel to realign the 800 MHz band; and (iii) the costs paid by Sprint Nextel to clear incumbent users from the BAS spectrum (as well as the paired 1910-1915 MHz band).<sup>140</sup> The Commission required Sprint Nextel to pay any monies owed to the U.S. Treasury under this calculation as part of a “true-up” that was originally scheduled to be accomplished within six months of the end of the 36 month 800 MHz transition period.<sup>141</sup> The 36 month 800 MHz transition deadline was later established as June 26, 2008 with the true-up to occur by December 26, 2008. We note that Sprint Nextel was to complete the relocation of the BAS incumbents by September 7, 2007, prior to both the 800 MHz transition date and the subsequent true-up date.

68. In the 2004 800 MHz R&O, the Commission provided that the earlier entrant to the band who relocated BAS, whether Sprint Nextel or MSS, could receive reimbursement from a later entrant for the band clearing costs consistent with the *Emerging Technology* relocation principles.<sup>142</sup> However, the unique situation that led to the assignment of the 1.9 GHz spectrum to Sprint Nextel required the Commission to establish additional procedures for the band. Specifically, the Commission established in the 800 MHz R&O that Sprint Nextel is “entitled to seek *pro rata* reimbursement . . . from MSS licensees that enter the band” prior to the end of the 800 MHz 36-month reconfiguration period, and it required Sprint Nextel to notify the MSS entrants of its intention to seek cost sharing.<sup>143</sup> The Commission provided that if Sprint Nextel receives a cost sharing reimbursement from the MSS entrants, the amount is to be deducted from the costs it can claim credit for as BAS relocation expenses in the 800 MHz true-up.<sup>144</sup> Sprint Nextel’s right to receive reimbursement from MSS was limited to the costs of clearing the top thirty markets and all fixed BAS facilities, regardless of market size, based on an MSS entrant’s *pro rata* share of the 1990-2025 MHz spectrum involved.<sup>145</sup> We note that when Sprint Nextel undertook its commitment to relocate the BAS licensees, the Commission did not, as discussed above, remove the obligation of the MSS entrants to relocate the BAS licensees, nor did it eliminate the procedures that had already been put in place for doing so. Indeed, the Commission provided an opportunity for the MSS entrants to relocate BAS incumbents, particularly in the top 30 markets, so that they would not be delayed in satisfying their entry requirements. Sprint Nextel, in turn, is required to reimburse MSS entrants for a *pro rata* share of any relocation costs MSS entrants incur if they participate in the relocation of BAS before Sprint Nextel has completed its clearing of the BAS band.<sup>146</sup> When the decision was made to permit Sprint Nextel to use the 1990-1995 MHz band, no BAS licensees had been relocated by the MSS entrants, and there is no evidence that the MSS entrants exercised their right to relocate any BAS incumbents subsequent to the Commission’s decision.

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<sup>140</sup> 800 MHz R&O at ¶¶ 240, 249, 261, 297, 329-330, 357; Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 at ¶ 36 (2004). Specifically, these relocation costs encompass the clearing of the 1910-1915 MHz band plus the costs of relocating the 1990-2110 MHz BAS licensees.

<sup>141</sup> *Id.* at ¶ 12, 330.

<sup>142</sup> 800 MHz R&O at 252, 259-262; *see also* 47 C.F.R. §§ 27.1160-1190; 47 C.F.R. § 101.82.

<sup>143</sup> 800 MHz R&O at ¶ 261.

<sup>144</sup> *Id.*

<sup>145</sup> Because there are two authorized MSS systems in the 2000-2020 MHz MSS band, each MSS operator is assigned 10 megahertz of spectrum. Thus, of the total 35 megahertz of spectrum that Sprint Nextel is clearing of BAS incumbents, 5 megahertz will be occupied by Sprint Nextel, 10 megahertz by AWS entrants, and 20 megahertz by the two MSS operators (10 megahertz each). The *pro rata* share of each MSS operator will be 2/7 of the total 35 megahertz of spectrum.

<sup>146</sup> 800 MHz R&O at ¶ 262. Any reimbursement by Sprint Nextel to the MSS entrants must occur before the conclusion of the 800 MHz true-up.

69. In the *800 MHz MO&O* adopted in October 2005, the Commission affirmed its decision regarding the obligations of the MSS entrants to reimburse Sprint Nextel.<sup>147</sup> The Commission pointed out that “[Sprint] Nextel, as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from subsequent entrants, including MSS licensees.”<sup>148</sup> The Commission explained that “it decided to end the reimbursement obligations of other entrants to [Sprint] Nextel, and any reimbursement by [Sprint] Nextel to other entrants, at the end of the 800 MHz band true-up period for administrative efficiency in the accounting process and because of the unique circumstances in [Sprint] Nextel’s receipt of BAS spectrum.”<sup>149</sup> Finally, the Commission rejected a request that it move up the date by which MSS entrants had to “enter the band” in order for Sprint Nextel to obtain cost sharing from them, and instead decided to “maintain the schedule previously established, *i.e.*, the true-up period.”<sup>150</sup>

70. As noted above, ten megahertz of the 2 GHz BAS spectrum (1995-2000 MHz and 2020-2025 MHz) has been reallocated for use by future AWS-2 licensees. In the *AWS Sixth R&O*, the Commission established obligations for the future AWS licensees to reimburse Sprint Nextel for the BAS transition costs. As with the MSS entrants, Sprint Nextel “is entitled to seek *pro rata* reimbursement of eligible clearing costs incurred during its 36-month 800 MHz reconfiguration period from AWS licensees that enter the band prior to the end of that period.”<sup>151</sup> Sprint Nextel “is not entitled to reimbursement” from the AWS licensees “after receiving credit for its relocation cost at the 800 MHz true-up.”<sup>152</sup> The *AWS-2 Notice of Proposed Rulemaking (AWS-2 Service Rules NPRM)* for service rules for the AWS-2 licensees was issued concurrently with the *AWS Sixth R&O*. The *AWS-2 Service Rules NPRM* states that “we also note that if [Sprint] Nextel has received credit for BAS relocation costs in the 800 MHz true-up, late-entering AWS licensees will not have any reimbursement obligation to Nextel for such costs.”<sup>153</sup> The *AWS-2 Service Rules NPRM* sought comment on a number of issues regarding cost-sharing between the AWS entrants and other new entrants to the band. These issues include whether a timetable should be adopted for AWS entrants to relocate BAS; how the reimbursement rights and obligations of each AWS licensee could be most efficiently and equitably allocated, whether on the basis of the geographic area or population covered by each license, or the value of each license as indicated by the winning auction bid, or by some other means; how the relocation costs should be allocated if not all AWS licenses are issued; how later arriving AWS licensees should be treated; and how an accounting between MSS and AWS

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<sup>147</sup> Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, *Memorandum Opinion and Order*, 20 FCC Rcd 16015 ¶¶ 109-114 (2005) (*800 MHz MO&O*). The *800 MHz MO&O* denied a petition filed by TerreStar and TMI that requested that the date for determining if MSS operators incur a reimbursement obligation to Sprint be changed to the end of the 30-month BAS relocation deadline instead of the end of the 800 MHz 36-month reconfiguration period or, alternately, that the MSS obligation end 36-months after the effective date of the *800 MHz R&O* (January 21, 2008 instead of June 26, 2008).

<sup>148</sup> *800 MHz MO&O* at ¶ 111.

<sup>149</sup> *Id.* at ¶ 113.

<sup>150</sup> *Id.*

<sup>151</sup> 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, ET Docket No. 95-18, *Sixth Report and Order, Third Memorandum Opinion and Order, and Fifth Memorandum Opinion and Order*, 19 FCC Rcd 20720 ¶ 72 (2004) (*AWS Sixth R&O*).

<sup>152</sup> *Id.* The Commission noted that AWS licensees who do not begin operation until after the spectrum is cleared “will not have any reimbursement obligation to [Sprint] Nextel, if [Sprint] Nextel has received credit for BAS relocation costs in the 800 MHz true-up.” *Id.* at ¶ 68. The Commission did not address what the AWS licensees’ liability to Sprint Nextel would be if Sprint Nextel does not receive credit for the BAS clearing cost at the true-up.

<sup>153</sup> Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, WT Docket No. 04-356, WT Docket No. 02-353, *Notice of Proposed Rulemaking*, 19 FCC Rcd 19263 ¶ 59 (2004) (*AWS-2 Service Rules NPRM*). See also ¶¶ 50, 58, 61.

licensees should occur.<sup>154</sup>

71. Since the time the Commission adopted or proposed cost sharing procedures for Sprint Nextel, MSS, and AWS-2 in the 2 GHz BAS band, many of the assumptions underlying those procedures have not occurred. The 800 MHz transition, which was to be completed within 36 months (June 26, 2008) is not yet complete. The Commission has granted individual 800 MHz licensees waivers of the rebanding deadline, but has not modified the completion date itself.<sup>155</sup> The original “true-up date” for calculating the anti-windfall payment, which was linked to the completion of 800 MHz rebanding and set to occur by December 26, 2008, was modified by the Commission in December 2008.<sup>156</sup> The true-up is currently scheduled to occur by July 1, 2009, but it may be delayed further and could occur before 800 MHz rebanding is completed.<sup>157</sup> Sprint Nextel has not completed the BAS relocation, and the BAS transition deadline has been modified several times, most recently to June 10, 2009.<sup>158</sup>

72. In a letter filed June 25, 2008, Sprint Nextel asks the Commission to make a number of adjustments in deadlines and procedures that are tied to the June 26, 2008 end date of the 36-month 800 MHz reconfiguration period.<sup>159</sup> Sprint Nextel posits that these deadlines should be adjusted due to the extension of the BAS relocation deadline and the grant of a large number of waivers of the 800 MHz rebanding deadline to public safety licensees. In particular, Sprint Nextel notes that the *800 MHz R&O* contains references relating the June 26, 2008 rebanding date to the MSS reimbursement obligation to Sprint Nextel for BAS relocation costs, and it requests that these references be harmonized with the postponed true-up date.<sup>160</sup> On the same date, Sprint Nextel filed a lawsuit against ICO and TerreStar in the Eastern District of Virginia seeking *pro rata* reimbursement of its BAS relocation costs.<sup>161</sup> On August 29, 2008, the court referred the case to the Commission and stayed all proceedings pending further

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<sup>154</sup> *Id.* at ¶¶ 57, 60-63. In 2008, a Further Notice of Proposed Rulemaking (*FNPRM*) for service rules for the AWS licensees made no specific proposals regarding cost sharing between the AWS entrants and the other new entrants to the band. Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands, WT Docket No. 07-195, WT Docket No. 04-356, *Further Notice of Proposed Rulemaking*, 23 FCC Rcd 9859 (2008).

<sup>155</sup> See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Order*, 23 FCC Rcd 9421 (PSSHB 2008); *Order*, 23 FCC Rcd 9430 (PSSHB 2008); *Order*, 23 FCC Rcd 9443 (PSSHB 2008); *Order*, 23 FCC Rcd 9454 (PSSHB 2008); *Order*, 23 FCC Rcd 9464 (PSSHB 2008); *Order*, 23 FCC Rcd 9476 (PSSHB 2008); *Order*, 23 FCC Rcd 9485 (PSSHB 2008); *Order*, 23 FCC Rcd 9491 (PSSHB 2008).

<sup>156</sup> *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Fourth Memorandum Opinion and Order*, 23 FCC Rcd 18512 ¶ 12 (2008) (*800 MHz Fourth MO&O*).

<sup>157</sup> The Commission declined to postpone the true-up until the conclusion of all rebanding as Sprint had requested. The Commission stated that in light of the fact that Sprint believes that it will avoid the need to make any windfall payment because of the extent of the relocation costs it will have expended (*i.e.*, since these costs will exceed the value by which its holdings increased as a result of the exchange of spectrum in the rebanding proceeding), Sprint could reach the break-even point before rebanding is complete, at which time there would presumably be no need delay the true-up. *Id.* at ¶ 11.

<sup>158</sup> *BAS Relocation MO&O* at ¶ 34; *Improving Public Safety Communications in the 800 MHz Band*, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, *Order*, 24 FCC Rcd 3340 (2009); *Order*, 24 FCC Rcd 5281 (2009); *Order*, FCC 09-48 (June 3, 2009).

<sup>159</sup> Letter from Sprint Nextel, WT Docket 02-55, filed June 25, 2008 at 1.

<sup>160</sup> Sprint cryptically explains in a footnote that the MSS licensees have privately disputed certain aspects of their reimbursement obligations, but that such disputes are outside the scope of the letter. *Id.* at 8 n.27.

<sup>161</sup> *Complaint to Enforce Orders of the Federal Communications Commission*, Sprint Nextel v. New ICO Satellite Services, Civil Action No. 1:08cv651 (E.D. Va. filed June 25, 2008).

decision by the Commission.<sup>162</sup>

73. TerreStar responded to Sprint Nextel's June 25, 2008 letter on September 8, 2008,<sup>163</sup> and ICO responded on September 9, 2008.<sup>164</sup> TerreStar and ICO both argue that the MSS entrants' reimbursement obligation to Sprint Nextel terminated on June 26, 2008. TerreStar and ICO also argue that the Commission limited Sprint Nextel's ability to recover costs from MSS as part of striking "an appropriate balance" between Sprint Nextel and the MSS entrants' interests.<sup>165</sup> ICO states that the Commission expected Sprint Nextel to complete the BAS relocation and MSS to begin operations long before reimbursement to Sprint Nextel was due on June 26, 2008. With the long delay in BAS relocation, ICO claims that MSS has no ability to earn revenue prior to the reimbursement due date or the certainty needed to plan to do so. TerreStar argues that, when the *800 MHz R&O* was adopted, Sprint Nextel could not have had a reasonable expectation of recouping expenses from TerreStar and TerreStar had a justifiable expectation that it would not have to pay these expenses because TerreStar's satellite operational milestone was after June 26, 2008; thus, it did not "enter the band" before the cost sharing obligation terminated. TerreStar claims that establishing a new date to terminate the cost sharing obligation would upset its settled expectations, reward Sprint Nextel for not completing the 800 MHz reconfiguration on time, and jeopardize TerreStar's initiation of service. ICO claims that because Sprint Nextel has delayed in completing the BAS relocation by the original date, the requirement that BAS in the top 30 markets be relocated before MSS can begin operations has not been satisfied, and thus ICO can not "enter the band" and incur a cost sharing obligation even though its satellite was successfully launched and found operational in May 2008.<sup>166</sup>

74. On October 8, 2008, Sprint Nextel filed a letter asking for a declaratory ruling affirming that TerreStar and ICO must reimburse Sprint Nextel for a *pro rata* share of the eligible BAS relocation costs.<sup>167</sup> Sprint Nextel argues that the reimbursement obligation did not end or "sunset" on June 26, 2008, as TerreStar and ICO claim, but extends at least through the end of the BAS and 800 MHz relocation projects. Sprint Nextel claims that the cost sharing obligation was connected to the end of the 800 MHz reconfiguration to avoid a windfall to Sprint Nextel and facilitate the accounting in the true-up, which has been extended, and the relevance of the June 26, 2008 date has been superseded by the extended BAS and 800 MHz deadlines.<sup>168</sup> Sprint Nextel points out that TerreStar and ICO have been on notice of their obligations for years and cannot have reasonably expected that they would be able to circumvent the Commission's long-standing cost sharing principles. Even if one assumed that the reimbursement obligation sunset on June 26, 2008, Sprint Nextel claims that both ICO and TerreStar have entered the band by that date: ICO by transmissions from its satellite and TerreStar through its licensing activities, system build out, testing, satellite construction, and ATC operations.<sup>169</sup> Sprint Nextel also requests that if it does not owe any payment to the U.S. treasury for the spectrum it is receiving, the Commission should

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<sup>162</sup> *Order*, Sprint Nextel v. New ICO Satellite Services, Civil Action No. 1:08cv651 (E.D.Va. issued August 29, 2008).

<sup>163</sup> Letter from TerreStar Networks, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed September 8, 2008.

<sup>164</sup> Letter from New ICO Satellite Services G.P., WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed Sept. 9, 2008.

<sup>165</sup> *Id.* at 3 (quoting the *800 MHz R&O* at ¶ 261).

<sup>166</sup> *Id.* at 3 n.11.

<sup>167</sup> Letter from Sprint Nextel, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed October 8, 2008, 13 (*Sprint Oct. 2008 Letter*).

<sup>168</sup> *Id.* at 6-7.

<sup>169</sup> *Id.* at 8.

establish 2015 as the BAS relocation reimbursement sunset date.<sup>170</sup>

75. *Discussion.* The requirements that the Commission adopted for cost sharing among Sprint Nextel, MSS and AWS-2 entrants were based on a number of assumptions regarding the transition of the 2 GHz and 800 MHz bands, MSS and AWS-2 entry, and the true-up. As reflected in the current requirements, the BAS relocation was contemplated to be complete within thirty months, and thus the Commission expected the BAS relocation to be finished by September 7, 2007, well before the end of the 800 MHz 36-month reconfiguration period, which was ultimately slated to end on June 26, 2008.<sup>171</sup> Because ICO's satellite operational milestone was July 2007 and TerreStar's was November 2008 when the requirements were adopted, the Commission also expected that one and possibly both MSS operators would participate in the BAS relocation process, especially in clearing the top 30 markets, so that they would be able to commence service quickly once their satellites were successfully launched, possibly before the end of the 800 MHz reconfiguration period.<sup>172</sup> Indeed, the Commission's requirements provided an opportunity for the MSS entrants to relocate BAS incumbents even while ordering Sprint Nextel to undertake the same task, and required that Sprint Nextel reimburse the MSS entrants for any relocation expenses they incurred. For its band clearing efforts, Sprint Nextel would have been able to seek reimbursement for a portion of the relocation costs from the MSS and AWS-2 entrants who entered the band prior to the end of the 800 MHz thirty-six month reconfiguration period on June 26, 2008. The Commission also expected that the total cost of the BAS relocation, 1910-1915 MHz band clearing, and 800 MHz transition would be such that Sprint Nextel would have to make an anti-windfall payment to the United States Treasury even after receiving credit for all of its band clearing and transition costs.<sup>173</sup> Consequently, even if the MSS entrants and AWS-2 licensees did not have to reimburse Sprint Nextel for BAS clearing costs because of delayed entry into the band, the Commission would have anticipated that Sprint Nextel would suffer no adverse financial consequence because the amount of the anti-windfall payment that Sprint Nextel would have to make would be reduced by the amount of any BAS relocation cost not reimbursed by the MSS entrants.

76. The circumstances now surrounding the 2 GHz band BAS transition are very different than what the Commission expected when the cost sharing requirements were adopted and explained in the *800 MHz R&O*. Neither the 800 MHz transition nor the BAS relocation has yet been completed. While the 800 MHz thirty-six month reconfiguration date of June 26, 2008 has never officially been extended, Sprint Nextel and numerous 800 MHz licensees have received waivers of that date.<sup>174</sup> Moreover, the 800 MHz true-up date, which was set to occur within six months after the 800 MHz reconfiguration date, has been extended to July 1, 2009 and may be delayed further. The expected relocation costs for the 800 MHz transition is so large that Sprint Nextel does not now expect to make an anti-windfall payment.<sup>175</sup>

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<sup>170</sup> *Id.* at 9-10. 2015 is ten years after Sprint's BAS relocation began. In past spectrum relocations, the relocation obligations have sunset either ten or fifteen years after the beginning of the relocation period.

<sup>171</sup> When the *800 MHz R&O* adopted the Sprint Nextel BAS relocation scheme, the actual start and end dates of the 800 MHz thirty-six month transition period were not known. Instead, the thirty-six month period was to begin with the release of a public notice announcing the start of the negotiation period in the first NPSAC region.

<sup>172</sup> When the order was adopted it was within the realm of possibilities that this period would have ended after TerreStar's operational milestone date.

<sup>173</sup> The Commission noted in the *800 MHz R&O* that Sprint estimated that its combined band clearing and relocation costs would be \$2.184 billion. *800 MHz R&O* at ¶ 306. This amount plus the \$2.059 billion attributed to the value of the spectrum Sprint is giving up is less than the \$4.86 billion that the Commission valued the 1.9 GHz spectrum that Sprint is receiving.

<sup>174</sup> See *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, *Order*, 23 FCC Rcd 15966 ¶¶ 1, 13, 15 (2008); see note 155, *supra*.

<sup>175</sup> Letter from Sprint Nextel, WT Docket 02-55, filed June 25, 2008, at 7 n.24.

77. In this context, the underlying assumptions of the approach taken by the Commission in the *800 MHz R&O* did not occur, such that a narrow, literal interpretation of certain language in the Commission's decision would not correspond to the stated purposes and structure of the cost sharing principles set forth in the *800 MHz R&O* and other decisions regarding the shared responsibilities of new entrants for BAS relocation. Certain specific language cannot be reasonably applied to the current circumstances.

78. On the one hand, a narrow literal interpretation of certain language in the *800 MHz R&O* could be argued as suggesting that Sprint Nextel may only be entitled to seek *pro rata* reimbursement to the extent that the MSS and AWS-2 licensees entered the 2 GHz band before the then-contemplated 36-month 800 MHz rebanding period ended,<sup>176</sup> a date later established to be June 26, 2008.<sup>177</sup> Moreover, because the Commission has never defined what "entered the band" means, applying this interpretation is problematic.

79. On the other hand, such an interpretation of the deadline would arguably undermine the stated purposes of the BAS cost-sharing regime set up by the Commission in the *800 MHz R&O*, where it discussed its decision as generally consistent with the cost-sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for that benefit, though modified to fit the particular concerns raised in the 800 MHz Rebanding proceeding.<sup>178</sup> Specifically, as stated in the 2005 *800 MHz MO&O*, the Commission modified the traditional *Emerging Technologies* cost-sharing policy that new entrants who ultimately benefit from having the spectrum cleared should pay their share of band-clearing costs only to the extent necessary to provide "administrative efficiency in the accounting process" and to take into account "the unique circumstances in Nextel's receipt of the BAS spectrum."<sup>179</sup> In other words, the Commission limited the time that Sprint Nextel could receive reimbursements from MSS entrants so that Sprint Nextel could not get a double benefit, *i.e.*, receive reimbursements from MSS after it had received credit for these expenses in the true up. The Commission clearly allowed for the possibility that the MSS entrants would incur a cost-sharing obligation, and Sprint Nextel was explicitly allowed to pursue cost sharing from the MSS entrants by giving them notice within one year of adoption of the *800 MHz R&O*.<sup>180</sup>

80. Nothing in the text of the relevant orders suggests that the Commission limited the time in which Sprint Nextel could seek reimbursements from MSS entrants to provide an independent benefit to MSS entrants, *e.g.*, to subsidize them or provide them certainty about their business costs.<sup>181</sup> Thus, we find that the MSS entrants' cost sharing obligations must be interpreted in light of the unanticipated changed circumstances, and these obligations should not be tied to a deadline that is no longer relevant. In short, MSS entrants should pay a *pro rata* share of the BAS relocation costs unless doing so would

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<sup>176</sup> *800 MHz R&O* at ¶ 261.

<sup>177</sup> The Commission has not extended the original 36-month rebanding period; rather, it has found that the 36-month rebanding period has "expired" and is granting waivers for licensees who make a "good cause" showing. See *800 MHz Fourth MO&O* at ¶¶ 5, 13.

<sup>178</sup> *800 MHz R&O* at ¶ 261. The Commission noted that it sought to adopt a reimbursement approach for the BAS relocation that struck an appropriate balance Sprint Nextel and the MSS entrants that was not unreasonably burdensome to either. *Id.*

<sup>179</sup> See *800 MHz MO&O* at ¶ 113; See note 4, *supra*.

<sup>180</sup> *800 MHz R&O* at ¶ 261.

<sup>181</sup> In fact, the Commission refused to shorten the reimbursement schedule after TerreStar requested the reimbursement cutoff date be moved up because it was "open-ended" and "unfair." Joint Request for Clarification, TMI Communications Co. and TerreStar Networks, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed Dec. 22, 2004 at 6-7; *800 MHz MO&O* at ¶ 113.

allow Sprint Nextel to be reimbursed twice (by both the Treasury and the MSS and AWS-2 licensees). Accordingly, the most logical and appropriate interpretation of the language in the 800 MHz orders is that the MSS entrants must pay their *pro rata* share of BAS relocation costs to the extent that they enter the band before the 800 MHz rebanding or true up is complete. The difficulty with applying this interpretation is that there is no future date certain for completing either the 800 MHz rebanding or the true up.

81. We thus decline to resolve the conflict between Sprint Nextel and the MSS entrants by issuing a declaratory ruling. We conclude that, given the changed circumstances surrounding the 2 GHz BAS relocation and the ambiguity between certain language in the *800 MHz R&O* and the overall purposes and structure of the BAS cost-sharing regime caused by the changed circumstances, the best course of action is to propose clearly delineated cost sharing requirements reflecting these changed circumstances to balance the responsibilities for and benefits of relocating incumbent BAS operations among Sprint Nextel, MSS, and AWS-2 based on the Commission's relocation policies set forth in the *Emerging Technologies* proceeding.<sup>182</sup>

82. This Further Notice provides an opportunity for us to address issues that are ambiguous or not specifically addressed by the current requirements. In particular, we reach the following tentative conclusions:

- Sprint Nextel may either obtain cost sharing for an eligible expense from MSS or AWS-2 entrants when those licensees "enter the band" or take credit for that expense against the anti-windfall payment to the Treasury (true-up) for the 5 megahertz of BAS spectrum (1990-1995 MHz) it obtained as part of the 800 MHz band realignment.<sup>183</sup>
- The attachment of the cost sharing obligation between Sprint Nextel and MSS and AWS-2 would follow traditional *Emerging Technologies* policies, *i.e.*, the obligation to share costs among new entrants would continue to the BAS sunset date (December 9, 2013); any entity that "enters the band" prior to that date would be obligated to reimburse the earlier entrant that incurred the relocation expense a proportional share of cost based on the amount of spectrum assigned to it.
- As in the current requirements, the MSS cost sharing obligation to Sprint Nextel would be limited to the top 30 markets by population and all fixed BAS links.<sup>184</sup>
- An MSS entrant would be deemed to have "entered the band" for incurring a cost sharing obligation when its satellite is found operational under its authorization milestone.
- For cost sharing purposes, Sprint Nextel would be required to share with other new entrants information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses and as provided to the 800 MHz Transition Administrator, as required by the *800 MHz R&O*.

83. The overall approach we propose seeks to balance the BAS relocation costs among all new entrants based on the benefit each receives of the total of 35 megahertz of cleared spectrum, consistent with our *Emerging Technologies* policies. Following BAS relocation, MSS will have access to 20 megahertz in the 2000-2020 MHz band (4/7), AWS-2 will have 10 megahertz in the 1995-2000 and 2020-

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<sup>182</sup> See *supra* note 4.

<sup>183</sup> Sprint Nextel may obtain credit against the anti-windfall payment for the cost of relocating certain secondary BAS licensees, but may not obtain cost sharing from other new entrants for these costs. *800 MHz MO&O* at ¶ 107; Improving Public Safety Communications in the 800 MHz Band, WT Docket 02-55, ET Docket 00-258, ET Docket 95-18, *Second Memorandum Opinion and Order*, 22 FCC Rcd 10467 at ¶¶ 63-66 (2007).

<sup>184</sup> As discussed below, however, given the unique circumstances in this case we do not propose a tentative conclusion regarding precisely when this reimbursement must be paid, but instead seek comment on various alternatives.

2025 MHz bands (2/7), and Sprint Nextel will have 5 megahertz in the 1990-1995 MHz band (1/7). These basic proportions inform our proposals below. As the Commission decided in the *800 MHz R&O*, this approach will follow the traditional relocation principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit.<sup>185</sup>

84. As is the case with our current requirements, we tentatively conclude that Sprint Nextel may not both receive reimbursement from another new entrant and take credit for the same BAS relocation cost at the 800 MHz true-up. If another new entrant enters the band before the true-up and Sprint Nextel obtains reimbursement for relocation costs from the new entrant, Sprint Nextel may not obtain credit against the anti-windfall payment for the reimbursed costs. Further, we tentatively conclude that any new entrant to the band who incurs relocation cost will be able to obtain *pro rata* reimbursement from other new entrants who enter the band prior to the BAS band sunset date of December 9, 2013.<sup>186</sup> In other words, the cost-sharing obligation will no longer be linked to the 800 MHz thirty-six month reconfiguration period or the 800 MHz true-up date. Extending the relocation obligation to the BAS sunset date provides certainty to all new entrants, rather than linking the obligation to the 800 MHz thirty-six month reconfiguration period or the 800 MHz true-up date, since the timing of both of these events is less certain. Thus, we tentatively conclude that the attachment of the cost sharing obligation between Sprint Nextel and MSS and AWS-2 should follow the traditional *Emerging Technologies* policies in obligating new entrants to share the costs of relocating the BAS incumbents. A later entrant's cost-sharing obligation to the earlier entrant who cleared the spectrum shall be in proportion to the spectrum assigned to the later entrant. For example, if a future AWS licensee is assigned 5 megahertz of spectrum in the band on a nationwide basis, the licensee will be responsible for 1/7 of the total spectrum clearing costs if it enters the band before the sunset date.

85. In the *800 MHz R&O*, the MSS entrants' cost sharing obligation to Sprint Nextel was limited to the cost of clearing the thirty largest markets (by population) and all fixed BAS links. This was done because the MSS entrants were required to clear the thirty largest markets and all fixed BAS links before they could begin operations, but were not required to relocate BAS in the other markets until later.<sup>187</sup> Because this exception to the general cost-sharing principle was clearly established in the *800 MHz R&O* in 2004, we propose to continue to limit the MSS entrants' cost-sharing obligation in this way even though we are now eliminating the top 30 market rule.

86. Consequently, we tentatively conclude that Sprint Nextel's right to seek reimbursement from any MSS entrant entering before the sunset date will be limited to the costs Sprint Nextel incurred for clearing the top thirty markets and for relocating all fixed BAS facilities, regardless of market size,<sup>188</sup> and to an MSS entrant's *pro rata* share of the 1990-2025 MHz spectrum. Sprint Nextel claims that under this approach MSS would only be responsible for approximately 27 percent of the total BAS relocation expenses, which is substantially less than the 57 percent of the cleared BAS spectrum assigned to the two MSS entrants.<sup>189</sup> We also seek comment on whether we should require MSS entrants to pay a *pro rata* share of all BAS relocation costs, regardless of market size.

87. In addition, regarding MSS-to-MSS cost sharing, under the original requirements for MSS

<sup>185</sup> *800 MHz R&O* at ¶ 261.

<sup>186</sup> 47 CFR §§ 74.690(e)(6), 78.40(f)(6).

<sup>187</sup> 47 CFR §§ 74.690(e)(1)(i); 74.690(e)(5); 78.40(f)(1)(i); 78.40(f)(5).

<sup>188</sup> As with the current rules, the top thirty markets will be Nielson Designated Market Areas 1-30 as they existed on September 6, 2000.

<sup>189</sup> See Notice of *Ex Parte* Communication, Sprint Nextel, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed Apr. 29, 2009 at 2.

entrants to relocate the BAS incumbents, all MSS entrants share in the relocation costs on a *pro rata* basis depending on the amount of spectrum each is assigned.<sup>190</sup> Later entering MSS operators are required to reimburse the earlier MSS entrants who clear the spectrum a *pro rata* share of the earlier MSS entrants' band clearing costs.<sup>191</sup> After the BAS transition is completed, all of the MSS entrants are to "true-up" their costs to ensure that each MSS entrant pays a *pro rata* share of the relocation costs based on the amount of spectrum assigned.<sup>192</sup> We propose to retain these MSS-to-MSS cost sharing requirements. We note that these inter-service and intra-service cost sharing requirements can work in tandem. For example, if Sprint Nextel was reimbursed from only one MSS entrant, that entrant could in turn seek reimbursement of what it owed Sprint Nextel from another MSS entrant. It appears that Sprint Nextel has asked both ICO and TerreStar to pay equal amounts of relocation costs based on their equal amount of assigned spectrum (*i.e.*, ten megahertz each), consistent with current requirements. We seek comment on whether Sprint Nextel should be allowed to request relocation costs for BAS operations in all of the 20 megahertz of spectrum allocated for MSS from a single MSS entrant that may, in turn, seek reimbursement from another MSS entrant.<sup>193</sup>

88. We also tentatively conclude that AWS-2 licensees will be responsible for reimbursing earlier entrants for relocating BAS operations in their assigned geographic areas, but determining how to apportion a licensee's *pro rata* share will depend on future Commission action to adopt service rules for the AWS licensees in the 1995-2000 MHz and 2020-2025 MHz band. These licenses may be issued either on a nationwide basis or for geographic areas, and could include all or only a portion of the allocated bandwidth. If licenses are issued for geographic areas, the geographic areas are not likely to coincide with the BAS market boundaries and licenses for geographic areas may be issued at different times.<sup>194</sup> Another factor that our service rules will have to address is apportioning the reimbursement costs fairly among AWS licensees. For example, some licensees' service areas cover cleared spectrum for which Sprint Nextel may claim a credit at the true-up, thus preventing Sprint from seeking cost sharing from those AWS licensees. Other AWS licensees' service areas may cover cleared spectrum not claimed by Sprint for a true up credit and thus subject to cost sharing. These factors will complicate the calculation of cost sharing for the AWS entrants to the band. In the 2004 AWS-2 *Notice of Proposed Rulemaking* (NPRM) on service rules for the AWS entrants to the band, the Commission sought comment on a number of issues regarding the licensing scheme for the AWS entrants and the cost-sharing obligations between the AWS entrants and other new entrants to the band.<sup>195</sup> Because the licensing scheme for the AWS entrants to the band has not yet been determined, we are not making proposals here

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<sup>190</sup> *MSS Second R&O* at ¶¶ 67-68

<sup>191</sup> *MSS Second R&O* at ¶ 67.

<sup>192</sup> *Id.* at ¶ 68.

<sup>193</sup> This approach also would allow Sprint Nextel to recover relocation costs for clearing all of the spectrum that could be used by MSS entrants, regardless of how many MSS entrants there are. We observe that originally there were eight MSS entrants, and the Commission redistributed the spectrum that was returned among the remaining MSS entrants. See *In the Matter of Use of Returned Spectrum in the 2 GHz Mobile Satellite Service Frequency Bands*, IB Docket Nos. 05-220 and 05-221, 20 FCC Rcd 19696 (2005).

<sup>194</sup> If not all of the AWS-2 licenses are issued, the cost sharing rules will have to address whether Sprint Nextel can obtain cost sharing for the entire AWS-2 *pro rata* share of the BAS relocation costs from the issued licensees—*i.e.* would the licensees have to make up for the share of the cost for the unissued AWS-2 licenses. This issue would become especially complicated if some of the AWS-2 licenses are issued before the 800 MHz true-up. Sprint Nextel may try to take credit in the 800 MHz true-up for BAS relocation in areas where no AWS-2 licenses are issued while pursuing cost sharing for the issued licenses.

<sup>195</sup> *Service Rules for Advanced Wireless Services in the 1915-1920 MHz, 1995-2000 MHz, 2020-2025 MHz and 2175-2180 MHz Bands*, WT Docket No. 04-356, WT Docket No. 02-353, *Notice of Proposed Rulemaking*, 19 FCC Rcd 19263 ¶¶ 58-62 (2004).

for apportioning an AWS licensee's *pro rata* share for cost-sharing with other new service entrants or between AWS-2 entrants beyond those made in the 2004 AWS-2 *Service Rules NPRM*. We intend to adopt specific cost-sharing procedures for the AWS entrants when service rules are adopted for the 1995-2000 MHz and 2020-2025 MHz bands.

89. The cost sharing scheme that the Commission adopted in 2004 required that MSS and AWS entrants reimburse Sprint Nextel for the BAS relocation costs after they "enter the band," but did not define the term. For clearing other bands under our *Emerging Technologies* policies, the Commission's rules usually make a distinction between determining when a new entrant must relocate an incumbent operation before it can operate and when a new entrant incurs a cost sharing obligation to an earlier entrant who relocated an incumbent. Generally, Commission rules rely on an interference analysis to determine when a new entrant must relocate an incumbent. On the other hand, a later entrant is generally required to share in the cost that an earlier entrant has incurred in relocating an incumbent if the subsequent entrant would have been in a position to have caused interference to the incumbent. Because the incumbent has already been relocated, the cost sharing determination is not usually based on a rigorous interference analysis but often on a simplified proximity test for ease in administration.<sup>196</sup> The rules may vary from these general principles depending on the technical characteristics of the specific services involved in the relocation.<sup>197</sup>

90. Because the Commission has already determined that MSS and AWS-2 entry in the 2 GHz band requires that all BAS operations in the band be relocated to avoid interference between the new and incumbent services, we only need to determine here when a new entrant "enters the band" for purposes of the attachment of the cost sharing obligation. In this regard, we are mindful that in other bands a new entrant incurs a cost sharing obligation at the time the subsequent entrant would be in a position to have caused interference to the now relocated incumbent.

91. With this principle in mind, we tentatively conclude to adopt the following requirements for determining when the MSS entrants have "entered the band." We propose that an MSS entrant will have

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<sup>196</sup> In the relocation of fixed microwave licensees by Personal Communications Service (PCS) licensees, whether relocation of an incumbent licensee was required was determined by an engineering analysis while cost sharing for later entrants was triggered using a proximity test (*i.e.* was the later entrant's base station close enough to the incumbent's fixed microwave path). 47 C.F.R. §§ 24.237, 24.239, 24.247. See also Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN. Docket No. 90-314, *Second Report and Order*, 8 FCC Rcd 7700 ¶¶ 141-174 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 4957 ¶ 186 (1994); Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95-157, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825 at App. A ¶¶ 29-34 (1996). The same is true for the relocation of fixed microwave links by AWS licensees in the 2110-2150 MHz band. 47 CFR §§ 27.1131, 27.1160, 27.1168. 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, IB Docket No. 99-81, *Ninth Report and Order and Order*, 21 FCC Rcd 4473 at ¶ 79 (2006) (*AWS 9th R&O*).

<sup>197</sup> For example, for the MSS satellite operations in the 2180-2200 MHz band (this is the paired downlink band for the MSS at issue in this proceeding), an engineering analysis is used for both determining when relocation of fixed microwave incumbents is required and for determining whether later entrants are required to share the relocation cost with the earlier entrant who relocated the incumbent operations. 47 CFR § 101.82(b-c); *MSS Second R&O* at ¶¶ 78, 97. However, for MSS ATC operations in the same 2180-2200 MHz band, an engineering analysis is used for determining when a fixed microwave incumbent must be relocated while a proximity test is used to determine if there is a cost sharing obligation for an earlier entrant's relocation of incumbents. 47 CFR 27.1160, 27.1168, 101.82(d); *MSS Third R&O* at ¶¶ 70-71. For the relocation of incumbent BRS licensees in the 2150-2162 MHz band by AWS licensees, both an obligation to relocate an incumbent BRS system and a cost sharing obligation to an earlier AWS licensee who had relocated a BRS system are triggered when a new entrant constructs a base station within line-of-sight of an incumbent's BRS base station. 47 CFR §§ 27.1184, 27.1255; *AWS 9th R&O* at ¶¶ 51-54, 108-111.

entered the band and incurred a cost sharing obligation when it certifies that its satellite is operational for purposes of meeting its operational milestone.<sup>198</sup> For the 2000-2020 MHz band, a satellite is considered operational based upon the occurrence of transmissions between the satellite and an authorized earth station using the 2000-2020 MHz and 2180-2200 MHz bands.<sup>199</sup> The satellite systems which the MSS entrants are deploying are capable of providing nationwide coverage. The customer equipment transmitting to the satellites in this band are therefore capable of causing interference to any of the BAS incumbents in the local area in which that equipment is used. The MSS entrants having an operational satellite is therefore analogous to the Personal Communications Service (PCS) or AWS entrants building a base station in proximity to the incumbent fixed microwave links in the prior spectrum clearings.<sup>200</sup> Like the PCS and AWS entrants, an MSS entrant with an operational satellite is in a position to cause interference to the incumbents and therefore should incur a cost sharing obligation to an earlier entrant who has relocated the incumbents.<sup>201</sup> Simplicity of administration is especially important in the case of BAS because there is no clearinghouse to determine when a party has “entered the band” or to parse out the relocation costs on a BAS receiver site-by-site basis.

92. The AWS entrants will operate terrestrial networks and thus the definition of “enter the band” which we propose for the MSS entrants would not be appropriate for AWS. Although no service rules have been adopted for the AWS portions of the 1990-2025 MHz band, we expect that the AWS entrants will deploy terrestrial networks wherein fixed base stations communicate with mobile radios. Because both the AWS entrants and BAS incumbents will employ mobile radios, the interference scenarios will be more complicated than with the fixed point-to-point microwave incumbents being relocated in the PCS, AWS, and MSS downlink bands addressed by other relocation rules. Furthermore, there is no clearinghouse for the BAS relocation that will be able to determine when interference between the AWS entrants and previously relocated BAS incumbents would likely occur. These two facts—the complicated interference scenarios and lack of clearinghouse—require that the test for determining when AWS entrants incur a cost sharing obligation be simple and easy to apply.

93. As one option, we propose to specify that AWS entrants in the 1990-2025 MHz band be found to have “entered the band” and incur a cost sharing obligation upon grant of the long form applications for their licenses. This would provide a clear and easy-to-administer standard and provide certainty for all parties involved. While this proposed requirement does depart somewhat from other relocation rules, it is not entirely inconsistent. Because of the mobile nature of BAS, once the AWS entrant is licensed any deployment of its services could potentially have resulted in interference to mobile BAS incumbents.

94. We also seek comment on an alternate approach for when AWS entrants should be found to

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<sup>198</sup> Under this proposal, an MSS entrant will incur a cost sharing obligation prior to any commencement of ATC operations. This is because, under the ATC gating criteria, an MSS entrant can not commence ATC operations until after commencing commercial satellite service (which we propose as the trigger for cost sharing obligations). If a different test for an MSS entrant “entering the band” and incurring a cost sharing obligation is adopted, we seek comment on whether ATC operations should cause an MSS entrant to incur a cost sharing obligation.

<sup>199</sup> See *BAS Relocation MO&O* at ¶ 48 n.140 (discussing the different types of earth stations that ICO and TerreStar plan to operate with their satellite systems). In its final milestone certification, ICO indicated that it had completed two-way voice and data sessions using its satellite, North Las Vegas gateway, and mobile terminals. Final Milestone Certification and Selected Assignment Notification, New ICO Satellite Services G.P., filed May 9, 2008.

<sup>200</sup> See *supra* notes 196, 197.

<sup>201</sup> Under this approach, the fact that ICO has an operational satellite will mean that it has entered the band. We also note that ICO has objected that they can not have entered the band and incurred a cost sharing obligation to Sprint Nextel because the top 30 market rule has prevented them from beginning operations. Letter from New ICO Satellite Services G.P., WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed Sept. 9, 2008 at 3 n.11. We note that when the top 30 market rule is being eliminated, ICO’s objection will become moot.

“enter the band.” An AWS entrant in the 1990-2025 MHz band could be found to “enter the band” and incur a cost sharing obligation when it activates a base station in an AWS-2 license area that overlaps a cleared DMA. We note that this alternate approach presents a number of issues that could make it difficult to implement. Because there is no clearinghouse for the 1990-2025 MHz band, there currently is no entity that is responsible for tracking when the AWS-2 licensee activates a base station and for determining which DMA’s are overlapped by the base station. Each DMA will potentially have a separate “enter the band” date, and it is likely that, whatever service rules we ultimately adopt for this band, any given AWS-2 licensee would trigger numerous “enter the band” dates. Consequently, we seek comment on whether, under this approach, an AWS-2 licensee that activates a first base station should incur a cost sharing obligation only for relocating BAS in that DMA or should it incur its entire cost sharing obligation for all DMAs that overlap its service area. Also, under this approach AWS-2 licensees could potentially delay the initiation of service, and thus seek to avoid incurring a cost sharing obligation, until after the BAS sunset date of December 9, 2013, making it more difficult for Sprint Nextel to decide whether to take credit for BAS relocation cost in the 800 MHz true-up because of the uncertainty as to whether AWS-2 licensees will share in the cost of the BAS relocation. We seek comment on how, if we adopt this alternative approach, we could prevent AWS-2 licensees from avoiding their cost sharing obligation through delay. If AWS-2 licensee’s are able to avoid incurring a cost sharing obligation through delay, we also seek comment on how to make it easier for Sprint Nextel to determine whether to take credit for BAS relocation cost in the 800 MHz true-up despite the uncertainty as to whether the AWS-2 will share in the BAS relocation cost.

95. When we adopted the requirements allowing Sprint Nextel to pursue reimbursement of BAS relocation costs from MSS and AWS entrants, we did not specify when the MSS and AWS entrants would owe reimbursement to Sprint Nextel. Generally, in other band clearings the later new entrant has to pay its reimbursement costs when beginning operations or shortly thereafter. For example, in the relocation of fixed microwave links by AWS entrants in the 2110-2150 MHz band and by MSS entrants in the 2180-2200 MHz band (this is the paired downlink band for the MSS at issue in this proceeding), the AWS and MSS entrant must notify a clearinghouse prior to initiating operations.<sup>202</sup> The clearinghouse determines if the AWS or MSS entrant must reimburse a prior new entrant for moving an incumbent licensee, and the AWS or MSS entrant has 30 days to pay the reimbursement costs. Similar rules are followed for the relocation of BRS incumbents in the 2150-2162 MHz band by AWS entrants.<sup>203</sup>

96. As we discussed above, however, there are unique circumstances in this case that require additional consideration. We have already determined to permit MSS entrants to begin operations in the near term, even if this were to occur before they have actually satisfied the cost sharing reimbursement obligations that would attach under our proposals here. Here, we seek comment on various approaches that the Commission might take concerning when such reimbursements are owed.

97. If we were to apply a similar scheme as that followed by our relocation rules in other bands with the BAS transition in the 2 GHz band, once the later entrant has entered the band, it may not begin operations until it has reimbursed the earlier entrant that relocated BAS incumbents for the later entrant’s *pro rata* share of the relocation costs for all BAS markets that have been transitioned as of the date that the later entrant entered the band (or, in the case of MSS, the later of these two dates: the date MSS is determined to have entered the band or the earliest date MSS is permitted to begin operations under our rules). Thereafter, as the BAS relocation continues and each additional BAS market is transitioned to the new channel plan, the new entrant would have to pay its share of the cost of transitioning that market within thirty days of being notified of the market transitioning or cease operations in that band. Under this approach, it may be more reasonable to expect an MSS entrant to pay reimbursement costs only when a BAS market is cleared and it can operate on a primary basis, rather than to pay these costs on a per station

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<sup>202</sup> 47 C.F.R. § 27.1170.

<sup>203</sup> 47 CFR § 27.1186.

basis in nonrelocated BAS markets where it may operate only on a secondary basis. The entrant who is relocating the BAS incumbents could have the responsibility of notifying the other new entrants and the Commission of the transition of each BAS market. We seek comment generally on this approach, or variations to it.

98. We also seek comment, given the unique circumstances in this case, on alternative approaches for when MSS entrants should be required to reimburse Sprint Nextel for their *pro rata* share of the BAS relocation costs. Because the MSS entrants have not yet begun to provide commercial services, they do not have an established revenue stream. Consequently, it may be difficult for the MSS entrants to reimburse Sprint Nextel immediately for their *pro rata* share of costs for all of the markets that have transitioned when the MSS entrant enters the band or begins service, as proposed above. Rather than require that, when an MSS entrant is ready to begin operations, it pay its reimbursement share for all markets cleared when it either entered the band or was permitted to begin operations under the rules, should MSS entrants only initially have to pay reimbursement costs for those markets in which they choose to operate? If so, what schedule should they follow for reimbursing costs associated with the remaining markets – when they start providing service in those markets, or under a different timetable? We also seek comment on establishing a reimbursement scheme that is not specifically tied to MSS entry in each market. For example, should MSS entrants be allowed to delay payment of some portion of their *pro rata* share of reimbursement costs until the BAS relocation is complete, or some other date? Would this provide some needed certainty to MSS entrants that they could begin operating? Should the MSS entrants' payments be linked to the pace of the BAS transition — *e.g.*, as additional BAS markets are transitioned, should MSS entrants be required to make additional payments? We also seek comment how any of these approaches would affect the true-up, particularly if Sprint Nextel is owed monies that MSS entrants have not yet paid when the true-up occurs. More generally, we also seek comment on whether any of these approaches would undermine our goal of ensuring that later entrants reimburse, on a *pro rata* basis, the first entrant that paid for relocation, and on what actions we should take if MSS entrants fail to pay.

99. Finally, we tentatively conclude that, for cost sharing purposes, Sprint Nextel would be required to share with other new entrants information on the relocation costs it has incurred as documented in its annual external audit of 2 GHz band clearing expenses and as provided to the 800 MHz Transition Administrator, as required by the *800 MHz R&O*. As part of the financial reconciliation process in the 800 MHz true-up, Sprint Nextel is required to conduct an annual external audit of its 2 GHz band clearing expenses and to provide this audit to the Transition Administrator for the 800 MHz rebanding and true-up. Sprint Nextel also is to report to the Transition Administrator the amount of reimbursement it receives from other entrants to the band.<sup>204</sup> With this information, the Transition Administrator will be able to ensure that Sprint Nextel receives the proper amount of credit against the anti-windfall payment for BAS relocation. However, the annual external audit provides data on total expenses, rather than by market,<sup>205</sup> and the Transition Administrator is under no obligation to analyze, audit or verify the data that Sprint Nextel supplies on the cost of clearing the 2 GHz spectrum.<sup>206</sup> Furthermore, if an MSS or AWS licensee enters the band after the true-up occurs, the Transition Administrator will not be present to calculate the amount that Sprint Nextel claims the new entrant owes. To facilitate the cost sharing process, we propose to require that Sprint Nextel share with any other new entrant who owes it relocation reimbursement information about its relocation costs as documented in its annual external audit and as provided to the Transition Administrator. Similarly, if a new entrant other than Sprint Nextel relocates a BAS incumbent and seeks cost sharing from later entrants, the first entrant would be required to provide the later entrants with documented relocation costs. We seek comment.

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<sup>204</sup> *800 MHz R&O* at ¶ 330.

<sup>205</sup> See, *e.g.*, Sprint *Ex Parte* Letter, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed Jan. 5, 2009.

<sup>206</sup> See *800 MHz MO&O* at ¶ 115.

100. We seek comment on all of the proposed changes to the cost-sharing requirements for the 1990-2025 MHz BAS relocation. We seek comment on this proposal as well as alternative proposals.

### B. BAS-MSS Spectrum Sharing

101. In the accompanying Report and Order and Order, we eliminated the top 30 market rule which prevented the MSS entrants from beginning operations before the BAS incumbents in the thirty largest markets by population and fixed BAS links in all markets had been relocated. The MSS entrants are now able to operate with primary status in those markets where the BAS incumbents have been relocated to the new channel plan and with secondary status in nonrelocated markets subject to coordination.

102. We concluded that coordination was necessary in nonrelocated markets because we were not persuaded by the record that MSS could conduct unrestricted operations in these markets without causing interference to the BAS incumbents.<sup>207</sup> TerreStar asserts that, based on its probabilistic analysis, interference from MSS handsets to BAS operations is unlikely to occur, and thus suggests that coordination may not be necessary. Rather, it would cease operations if a BAS incumbent experiences interference. MSTV disputes these claims. We are concerned that if interference occurs to BAS licensees in nonrelocated markets, that interference will harm BAS operations and could prove difficult to resolve because the location of the handset which is the source of the interference may not be easily determined. Such interference could have a significant impact given the number of major markets that will transition toward the end of Sprint Nextel's relocation schedule. Nonetheless, we invite additional analysis on whether MSS can operate on an unrestricted and secondary basis in nonrelocated BAS markets. Commenters should include evidence on the likelihood of harmful interference occurring to the nonrelocated BAS incumbents from MSS operations.

103. In the Report and Order and Order we also recognize that interference could occur to BAS incumbents in a nonrelocated market from MSS operations in an adjacent market where BAS has been relocated. Consequently, we require that MSS may not operate mobile terminals within line-of-sight of BAS receive sites in markets where the BAS transition has not been completed, absent coordination.<sup>208</sup> We seek comment on whether this requirement continues to be necessary.

### C. MSS Relocation Obligations

104. *Background.* Our current rules provide that the MSS entrants may not begin operations until BAS in the top 30 markets and all fixed BAS links have been relocated.<sup>209</sup> Once an MSS entrant begins operations, all of the MSS entrants jointly have the responsibility to relocate the BAS incumbents in markets 31-100 within three years and the remaining markets (*i.e.*, 101 and above) within five years. The rule establishes a relocation obligation on MSS that is independent of other new entrants' relocation activity in the band, and provides a market tier approach for completing the BAS relocation that is pegged to beginning operations when the top 30 markets and fixed links are relocated.

105. The accompanying Report and Order and Order removes the requirement that BAS in the top 30 markets and all fixed BAS links must be relocated before MSS can begin operations, but maintains the obligation for the MSS entrants to relocate the BAS incumbents once an MSS entrant begins operations. Thus, this rule needs further modification to specify when an MSS entrant "begins operations" for purposes of completing BAS relocation and to account for the relocation of markets 1-30 along with markets 31-100.

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<sup>207</sup> See paragraphs 51-53, *supra*.

<sup>208</sup> See paragraph 54, *supra*.

<sup>209</sup> 47 CFR §§ 74.690(e)(1)(i), 78.40(f)(1)(i).

106. *Discussion.* We propose to trigger the obligation of an individual MSS operator to relocate BAS incumbents within three or five years, depending on market size—*i.e.*, markets 1-100 within three years, and the remaining markets within five years – on the later of these two dates: when the MSS operator certifies, prior to the BAS sunset date of December 9, 2013, that its satellite system is operational for purposes of meeting its operational milestone; or the date when the top 30 market rule is eliminated.<sup>210</sup> We believe that this is appropriate because once the satellite system is certified operational and the top 30 market rule has been eliminated, an MSS entrant will be in the position to make use of the spectrum.<sup>211</sup> Furthermore, the criteria will be easy to apply because the MSS entrant must notify the Commission when it accomplishes its operational milestone and the elimination of the top 30 market rule will be effective thirty days after publication of the Report and Order and Order in the *Federal Register*. We note that the obligation to relocate the BAS incumbents within three and five years, depending on market size, is a joint obligation of all the MSS entrants and not just the entrant who has begun operations.<sup>212</sup> Consequently, both MSS entrants will have an obligation to relocate the BAS incumbents in markets 1-100 within three years and the remaining markets within five years.

107. We also propose to specify that once the MSS entrants have incurred an obligation to relocate the BAS incumbents within the three and five year periods, the occurrence of the December 9, 2013 sunset date will not serve to terminate that obligation. We view this approach as appropriate to ensure that all eligible BAS incumbents who are entitled to relocation are fairly compensated.

108. Finally, we note that our rules currently are silent on what consequences the MSS entrants face for not meeting the three and five year relocation deadlines.<sup>213</sup> We seek comment on what consequences, if any, should be applied for failure to meet these deadlines.

#### D. BAS Relocation Process

109. *Background.* The bimonthly status reports which Sprint Nextel has filed on the progress of the BAS transition show that BAS relocation activity slows between the time when replacement equipment is ordered for installation by individual licensees, and when all licensees in a market return to the new channel plan. The reports have cited a number of different reasons for the delays in completing relocation, such as weather conditions, the availability and scheduling of installers, and so on. However, some market delays are due to a single BAS licensee in a market that has lagged in cooperating with the BAS transition and a handful of BAS licensees that have failed to execute frequency relocation agreements.<sup>214</sup>

110. *Discussion.* We are concerned that some BAS licensees may not be making a good faith effort to complete the BAS transition in a timely manner. Because of the integrated nature of BAS, all BAS licensees in a market must transition as a group. Consequently, the failure of one BAS licensee to cooperate in the transition can delay many other BAS incumbents from completing the transition. Given

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<sup>210</sup> The top 30 market rule will be eliminated thirty days after publication of the accompanying Report and Order and Order in the *Federal Register*. See ¶ 45, *supra*.

<sup>211</sup> Although ICO certified that its satellite was operational starting in May 2008, it has not yet been able to begin operations due to the top 30 market rule.

<sup>212</sup> 47 CFR §§ 74.690(e)(5), 78.40(f)(5).

<sup>213</sup> One of the objections that MSTV has made to eliminating the top 30 market rule is that it would remove the MSS entrants independent obligation to relocate BAS—presumably because there is no consequence specified for MSS failing to relocate the BAS incumbents. MSTV *ex parte* Letter, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed April 8, 2009 at 3.

<sup>214</sup> Sprint Nextel *ex parte* Filing, WT Docket No. 02-55, ET Docket No. 00-258, ET Docket No. 95-18, filed June 1, 2009 at Appendix D and E.

that the BAS transition has taken far longer than anyone has expected, we seek comment on incentives we might apply to encourage all BAS incumbents to diligently work toward completing the BAS transition so as not to delay further the introduction of new services in the band.

111. Under our current rules, the BAS incumbents are primary until they are relocated, they refuse relocation, or the BAS relocation rules sunset on December 9, 2013.<sup>215</sup> Because individual BAS licensees may delay the transition, we seek comment on the following proposal. If a BAS licensee has not completed relocation by February 9, 2010, we could change its status for interference purposes, as discussed below, but continue to require that new entrants who incur a relocation and cost sharing obligation fulfill this obligation. Thus, Sprint Nextel, MSS and AWS-2 entrants would continue to have an obligation to relocate those BAS incumbents whose initial applications were filed prior to June 27, 2000 and who have primary status in the band.<sup>216</sup>

112. The interference status between a nonrelocated BAS licensee and a new entrant, whether Sprint Nextel, MSS, or AWS-2, could be modified in one of several different ways. First, nonrelocated BAS incumbents could become secondary in the 1990-2025 MHz band and Sprint Nextel, MSS and AWS-2 entrants primary as of February 9, 2010. This would allow Sprint Nextel, MSS and AWS-2 entrants to provide unimpeded commercial service. The nonrelocated BAS incumbent would be able to continue operations in the band if the new entrants are not ready to begin using the band or if the BAS incumbent can operate without causing harmful interference to the new entrants. Second, we could require the nonrelocated BAS incumbent to cease operations in the 1990-2025 MHz band as of February 9, 2010. This proposal has similarities to the BAS relocation rules prior to 2004.<sup>217</sup> Third, we could make the nonrelocated BAS licensee and the new entrants co-primary in the 1990-2025 MHz band as of February 9, 2010. Because a later arriving co-primary licensee must protect the operations of an existing co-primary licensee, the new entrants, whether Sprint Nextel, MSS, or AWS-2, would have to avoid causing interference to the existing BAS systems and accept interference from the BAS licensee. We seek comment on these approaches, or possible alternative approaches.<sup>218</sup>

113. If we adopt either the first or second of the procedures described above, we seek comment on whether we should look favorably upon waiver request from individual nonrelocated BAS licensees to allow them to maintain their primary status and continue operations if enforcing the rule would cause

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<sup>215</sup> 47 C.F.R. §§ 74.690(b), 74.690(e)(6); 78.40(b), 78.40(f)(6).

<sup>216</sup> BAS licenses issued after June 27, 2000 are secondary in the 1990-2025 MHz band. 47 C.F.R. § 2.106 Footnote NG 156. *MSS Second R&O* at ¶ 59. Certain BAS licensees are secondary regardless of date of issuance and thus the new entrants have no obligation to relocate them. These include BAS licensed to low power TV and translator stations and short-term BAS facilities operating under Section 74.24 of our rules. See 47 C.F.R. §§ 74.24(c), 74.602(f).

<sup>217</sup> *800 MHz R&O* at ¶ 269; *MSS Second R&O* at ¶¶ 31-32. Under those rules, the MSS entrants were required to relocate BAS in the top 30 markets and all fixed BAS links before beginning operations. Once the top 30 markets were cleared the BAS incumbents in the remaining markets had to stop operating in a portion of the spectrum while the BAS relocation continued. In the accompanying Report and Order and Order, we have eliminated the requirement that MSS clear the top 30 markets and all fixed BAS links before beginning operations. Because MSS may now begin operations, requiring BAS to discontinue operations would be consistent with the previous rules.

<sup>218</sup> Under all of these proposals the BAS incumbents who have not been relocated would remain primary in the 2025-2110 MHz portion of the band. However, other BAS incumbents may have new equipment and desire to transition to the new band plan. Consequently, we seek comment on how the nonrelocated BAS licensees can coexist with relocated BAS licensees in the same market after the transition date. One possible approach is that nonrelocated BAS licensees operating on the "old" channel plan would be secondary to BAS operating on the "new" channel plan.

hardship or otherwise not serve the public interest.<sup>219</sup> The BAS licensee could, for example show that the BAS spectrum in its market is so heavily used that there is no other available channel or that circumstances beyond the incumbent's control have prevented the incumbent from completing the transition by the deadline.

## V. PROCEDURAL MATTERS

### A. Filing Requirements

114. *Ex Parte Rules.* The *Further Notice of Proposed Rulemaking* in this proceeding will be treated as a "permit-but-disclose" subject to the "permit-but-disclose" requirements under Section 1.1206(b) of the Rules.<sup>220</sup> *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance of the presentation and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented is generally required.<sup>221</sup> Additional rules pertaining to oral and written presentations are set forth in Section 1.1206(b).

115. *Comments and Reply Comments.* Pursuant to sections 1.415 and 1.419 of the Rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.<sup>222</sup>

- **Electronic Filers:** Comments may be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal: <http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.
  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to [ecfs@fcc.gov](mailto:ecfs@fcc.gov), and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.
- **Paper Filers:** Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in

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<sup>219</sup> We will waive our rules if "[i]n view of unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest ..." *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>220</sup> See 47 C.F.R. § 1.1206(b), as revised.

<sup>221</sup> See *id.* § 1.1206(b)(2).

<sup>222</sup> See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

**People with Disabilities:** To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

116. *Paperwork Reduction Analysis:* This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

#### **B. Final Regulatory Flexibility Analysis**

117. The Final Regulatory Flexibility Analysis, required by the Regulatory Flexibility Act, *see* 5 U.S.C. § 604, is contained in Appendix B.

#### **C. Initial Regulatory Flexibility Analysis**

118. The actions taken in the *Further Notice of Proposed Rule Making (NPRM)* may have a significant economic impact on a number of small entities. An Initial Regulatory Flexibility Analysis is included in Appendix C.

### **VI. ORDERING CLAUSES**

119. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i), 5(c), 303(f), 332, 337 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303(f), 332, 337 and 405, this Report and Order and Order IS ADOPTED. Parts 74 and 78 of the Commission's Rules are AMENDED as specified in Appendix A, effective 30 days after publication in the Federal Register.

120. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i), 5(c), 303(f), 332, 337 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 303(f), 332, 337 and 405, this Further Notice of Proposed Rulemaking IS ADOPTED.

121. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and (j), and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, that the waiver of the deadline by which Sprint Nextel must complete relocation of the broadcast auxiliary service to frequencies above 2025 MHz adopted in FCC 08-73, IS EXTENDED until February 8, 2010.

122. IT IS FURTHER ORDERED that the Supplemental Request is GRANTED.

123. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and (j), and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, that the waiver of the requirement under 47 C.F.R. § 25.149(b)(3) that New ICO Satellite Services G.P. (New DBSD Satellite Services G.P.) have commercially available satellite service in accordance with its coverage requirements as a prerequisite to offering ATC services is GRANTED consistent with the terms of this order.

124. IT IS FURTHER ORDERED, pursuant to Sections 0.201, 0.203, 0.204, and 0.261 of the Commission's Rules, 47 C.F.R. §§ 0.201, 0.203, 0.204, 0.261, that authority to waive Section 25.149(b)(3) of the Commission rules, 47 C.F.R. 25.149(b)(3) for TerreStar Networks Inc. is hereby DELEGATED to the Commission's International Bureau.

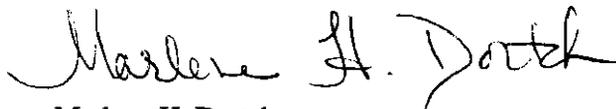
125. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and (j), and Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, that the Application for Review filed by Sprint Nextel of the grant of ATC authority to New ICO Satellite Services G.P. (New DBSD Satellite Services G.P.) is DISMISSED.

126. IT IS FURTHER ORDERED that New ICO Satellite Services G.P.'s (New DBSD Satellite Services G.P.'s) request that we waive 47 C.F.R. § 74.690(e)(1)(i) of the Commission's rules IS DISMISSED.

127. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Order and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

128. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this *Report and Order and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Parts 74 and 78 to read as follows:

**PART 74 -- EXPERIMENTAL RADIO, AUXILIARY, SPECIAL BROADCAST AND OTHER PROGRAM DISTRIBUTION SERVICES**

1. Section 74.690 is amended by revising paragraph (e)(1) and (i) to read as follows:

**§ 74.690 Transition of the 1990-2025 MHz band from the Broadcast Auxiliary Service to emerging technologies.**

\* \* \* \* \*

(e) Subject to the terms of this paragraph (e), the relocation of Existing Licensees will be carried out by MSS licensees in the following manner:

(1) Existing Licensees and MSS licensees may negotiate individually or collectively for relocation of Existing Licensees to one of the channel plans specified in § 74.602(a)(3) of this chapter. Parties may not decline to negotiate, though Existing Licensees may decline to be relocated.

(i) MSS licensees may relocate all Existing Licensees in Nielsen Designated Market Areas (DMAs) 1-30, as such DMAs existed on September 6, 2000, and all fixed stations operating in the 1990-2025 MHz band on a primary basis, except those Existing Licensees that decline relocation. Such relocation negotiations shall be conducted as "mandatory negotiations," as that term is used in § 101.73 of this chapter. If these parties are unable to reach a negotiated agreement, MSS Licensees may involuntarily relocate such Existing Licensees and fixed stations after December 8, 2004.

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**PART 78 -- CABLE TELEVISION RELAY SERVICE**

Section 78.40 is amended by revising paragraph (f)(1) and (i) to read as follows:

**§ 78.40 Transition of the 1990-2025 MHz band from the Cable Television Relay Service to emerging technologies.**

\* \* \* \* \*

(f) Subject to the terms of this paragraph (f), the relocation of Existing Licensees will be carried out by MSS licensees in the following manner:

(1) Existing Licensees and MSS licensees may negotiate individually or collectively for relocation of Existing Licensees to one of the channel plans specified in § 74.602(a)(3) of this part. Parties may not decline to negotiate, though Existing Licensees may decline to be relocated.

(i) MSS licensees may relocate all Existing Licensees in Nielsen Designated Market Areas (DMAs) 1-30, as such DMAs existed on September 6, 2000, except those Existing Licensees that decline relocation. Such relocation negotiations shall be conducted as "mandatory negotiations," as that term

is used in § 101.73 of this chapter. If these parties are unable to reach a negotiated agreement, MSS Licensees may involuntarily relocate such Existing Licensees after December 8, 2004.

\* \* \* \* \*

## APPENDIX B

## Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice of Proposed Rule Making (FNPRM)*.<sup>2</sup> The Commission sought written public comment on the proposals in the *FNPRM*, including comment on the IRFA.<sup>3</sup> No commenting parties specifically addressed the IRFA.<sup>4</sup> This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>5</sup>

**A. Need for, and Objectives of, the Proposed Rules.**

2. In this Report and Order and Order, we eliminate the rule requiring that BAS in the top 30 markets by population and all fixed BAS links be transitioned before 2 GHz MSS operators may begin operations.<sup>6</sup> This rule change is necessary because of the changed circumstances since the rule was first adopted. When the rule was adopted the MSS entrants were the only new entrants to the band and were expected to relocate BAS in the top 30 markets before they could begin operations. Sprint Nextel and future AWS licensees have subsequently been allocated spectrum in the band. Sprint Nextel was expected to relocate the BAS incumbents by September 7, 2007. However, the BAS transition has been delayed and Sprint Nextel is now required to relocate BAS by February 8, 2010. Despite the fact that BAS incumbents have been relocated in many markets, the top 30 market rule continues to prevent the MSS entrants from beginning operations anywhere—even in markets where the spectrum is currently not being used. Elimination of the top 30 market rule will allow the benefits from MSS—such as public safety service during disasters when terrestrial networks may be compromised and increased competition wireless services – to be provided sooner.

3. Because BAS is a critical part of the broadcasting system by which information and entertainment is provided to the American public, the Report and Order and Order implements a number of requirements to help prevent interference to nonrelocated BAS incumbents from MSS until the transition is complete. The MSS entrants will only be permitted to operate in markets where the BAS incumbents have not been relocated if the MSS entrants successfully coordinate with the BAS incumbents. This coordination requirement also applies to MSS operations in a market where BAS has been relocated that are within line-of-sight of BAS receiver sites in adjacent markets that have not yet been transitioned. Furthermore, to simplify the coordination process, MSS will not be able to operate ATC systems or market services to customers in markets where the BAS incumbents have not been

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> See *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, WT Docket No. 02-55, *Notice of Proposed Rulemaking*, 17 FCC Rcd 4873, 4927 (2002) (*NPRM*).

<sup>3</sup> See *id.* at 4920 ¶ 93.

<sup>4</sup> Business Autophones, Inc., Comments on IRFA (May 6, 2002) Skitronics, LLC, Comments on IRFA (May 6, 2002); Small Business in Telecommunications, Comments on IRFA (May 6, 2002).

<sup>5</sup> See 5 U.S.C. § 604.

<sup>6</sup> The Report and Order and Order also waives the deadline by which Sprint Nextel must relocate the BAS incumbents until February 8, 2010.

relocated.<sup>7</sup>

#### **B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA.**

4. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA.

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

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>8</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."<sup>9</sup> In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.<sup>10</sup> A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>11</sup>

6. The proposed rule modifications may affect the interest of BAS, LTTS, and CARS licensees (which we have been referring to throughout this document generically as "BAS") because these licensees are being relocated from the 1990-2025 MHz band by the new entrants. In addition, the rule modifications will affect the interest of the new entrants to the 1990-2025 MHz band: MSS, Sprint Nextel, and future AWS entrants to the band.

7. **BAS.** This service uses a variety of transmitters to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the stations). The BAS licensees in the 1990-2110 MHz band will ultimately be required to use only the 2020-2110 MHz portion of that band. It is unclear how many of the BAS licensees will be affected by our new rules.

8. The Commission has not developed a definition of small entities specific to BAS licensees. However, the U.S. Small Business Administration (SBA) has developed small business size standards. For BAS, we use the size standard for Television Broadcasting.<sup>12</sup> The SBA has developed a size standard for firms in this category, which is all firms having revenues less than \$14 million. The only data which we have available for this category are for when the SBA size standard was for firms having revenues of less than \$13.5 million. According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374

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<sup>7</sup> The Report and Order and Order does waive the commercial availability ATC gating requirement for ICO. This will allow ICO to operate ATC systems in transitioned BAS markets prior to its satellite service being available throughout its coverage area.

<sup>8</sup> 5 U.S.C. § 603(b)(3).

<sup>9</sup> 5 U.S.C. § 601(6).

<sup>10</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

<sup>11</sup> Small Business Act, 15 U.S.C. § 632 (1996).

<sup>12</sup> 13 C.F.R. §§ 121.201, NAICS code 515120.

commercial television stations<sup>13</sup> (or approximately 72 percent) have revenues of \$13.5 million or less and thus qualify as small entities under the SBA definition. Thus, under this standard, the majority of firms can be considered small.

9. *CARS*. The CARS licensees in the 1990-2110 MHz band will ultimately be required to use only the 2020-2110 MHz portion of that band. CARS licenses are issued to the owners or operators of cable television systems, cable networks, licensees of the BRS/EBS band, and private cable operators or other multichannel video programming distributors.<sup>14</sup> It is unclear how many of these will be affected by our new rules.

10. *Cable Television Distribution Services*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies."<sup>15</sup> The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>16</sup> To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts.<sup>17</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year.<sup>18</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.<sup>19</sup> Thus, the majority of these firms can be considered small.

11. *Cable Companies and Systems*. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide.<sup>20</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard.<sup>21</sup> In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>22</sup> Industry

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<sup>13</sup> Although we are using BIA's estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1374. See News Release, "Broadcast Station Totals as of December 31, 2006" (dated Jan. 26, 2007); see <http://www.fcc.gov/mb/audio/totals/bt061231.html>.

<sup>14</sup> 47 C.F.R. § 78.13.

<sup>15</sup> U.S. Census Bureau, 2007 NAICS Definitions, "517110 Wired Telecommunications Carriers" (partial definition); <http://www.census.gov/naics/2007/def/ND517110.HTM#N517110>.

<sup>16</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>17</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>18</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

<sup>19</sup> *Id.* An additional 61 firms had annual receipts of \$25 million or more.

<sup>20</sup> 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. Implementation of Sections of the 1992 Cable Act: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393, 7408 (1995).

<sup>21</sup> These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, "Top 25 Cable/Satellite Operators," pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, "Ownership of Cable Systems in the United States," pages D-1805 to D-1857.

<sup>22</sup> 47 C.F.R. § 76.901(c).

data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000-19,999 subscribers.<sup>23</sup> Thus, under this second size standard, most cable systems are small.

12. *Cable System Operators.* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>24</sup> The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>25</sup> Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard.<sup>26</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>27</sup> and therefore we are unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

13. *Wireless Telecommunications Carriers (except satellite).* Wireless Telecommunications Carriers (except satellite), is a SBA standard which has a size standard of fewer than 1500 employees.<sup>28</sup> Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service (“BRS”), formerly Multipoint Distribution Service (“MDS”), and the Educational Broadband Service (“EBS”), formerly Instructional Television Fixed Service (“ITFS”), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As noted, within the category of Wireless Telecommunications Carriers (except satellite), such firms with fewer than 1500 employees are considered to be small.<sup>29</sup> The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.<sup>30</sup> According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.<sup>31</sup> Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had

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<sup>23</sup> Warren Communications News, *Television & Cable Factbook 2006*, “U.S. Cable Systems by Subscriber Size,” page F-2 (data current as of Oct. 2005). The data do not include 718 systems for which classifying data were not available.

<sup>24</sup> 47 U.S.C. § 543(m)(2); see 47 C.F.R. § 76.901(f) & nn. 1-3.

<sup>25</sup> 47 C.F.R. § 76.901(f); see Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

<sup>26</sup> These data are derived from: R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857.

<sup>27</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

<sup>28</sup> 13 C.F.R. § 121.201, NAICS Code 517210. Standard for small business is 1500 employees or fewer.

<sup>29</sup> 13 C.F.R. § 121.201, NAICS Code 517210.

<sup>30</sup> 13 C.F.R. § 121.201, NAICS Code 517110.

<sup>31</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).