

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

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

MEMORANDUM OPINION AND ORDER

Adopted: October 3, 2005

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By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order (*MO&O*), we address petitions for reconsideration, a request for waiver and a request for declaratory ruling submitted in the 800 MHz Public Safety proceeding, specifically: petitions for reconsideration of the Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order (*800 MHz R&O*), petitions for reconsideration of the Commission’s Supplemental Order and Order on Reconsideration (*Supplemental Order*), a petition for declaratory ruling submitted by Nextel, the Association for Maximum Service Television, Inc., and the National Association of Broadcasters, and a petitions for waiver of ESMR election criteria filed by AIRPEAK Communications, LLC (Airpeak) and Airtel Wireless, LLC.

2. The *800 MHz R&O*, released August 6, 2004, adopted technical and procedural measures to address the ongoing and growing problem of interference to public safety communications in the 800 MHz band.¹ The Commission addressed the ongoing interference problem over the short-term by adopting technical standards defining unacceptable interference in the 800 MHz band and detailing responsibility for interference abatement.² The Commission further determined that solving the interference problem for the long-term necessitated reconfiguring the 800 MHz band to separate generally incompatible technologies whose current proximity to each other is

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

² See *800 MHz R&O*, 19 FCC at Rcd 15021-15045 ¶¶ 88-141 (adopting new technical standards for protecting public safety, critical infrastructure and other 800 MHz “high-site” licensees from “unacceptable” interference).

the identified root cause of unacceptable interference.³ Accordingly, the Commission adopted a new band plan for the 800 MHz band and established a transition mechanism for licensees in the band to relocate to their new spectrum assignments. On December 22, 2004, the Commission issued a *Supplemental Order* making certain clarifications of, and changes to, the provisions of the *800 MHz R&O* and its accompanying rules.⁴

II. EXECUTIVE SUMMARY

3. Specifically, in this *MO&O*, we:

- amend the definition of an Enhanced Specialized Mobile Radio (ESMR) system;
- further delineate the relocation rights of 800 MHz incumbent licensees;
- narrow the Expansion Band in the Atlanta, Georgia region;
- reaffirm the Commission's authority to grant Nextel Communications, Inc. (Nextel) spectrum rights to ten megahertz of spectrum in the 1.9 GHz band;
- permit the Transition Administrator (TA) to follow a calendar year for reporting schedule purposes;
- permit Nextel to receive credit in the 800 MHz 'true-up' process for the relocation of certain additional BAS incumbent licensees whose licenses were issued prior to November 12, 2004; and
- clarify the definitions of "unacceptable interference" and "Critical Infrastructure Industries" (CII).

4. We decline to:

- publish a table of frequency assignments as part of band reconfiguration;
- require frequency coordination for all band reconfiguration applications;
- allow CII licensees to relocate out of the Expansion Band;
- change the Commission's valuation of spectrum rights in the 1.9 GHz and 800 MHz bands;

³ See *id.*, 19 FCC Rcd at 15045-15079 ¶¶ 142-209 (adopting a new 800 MHz band plan spectrally separating public safety and critical infrastructure users and other "high-site" licensees from Enhanced Specialized Mobile Radio (ESMR) systems using "low-site" architecture).

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

- exempt certain public safety licensees from the application freeze;
- extend the mandatory negotiation periods for Broadcast Auxiliary Service (BAS) incumbents in the 1.9 GHz band;
- amend the reimbursement rights of Mobile Satellite Service (MSS) licensees that commenced operation in the 1.9 GHz band subsequent to the BAS relocation deadline but before the 800 MHz true-up period; and
- address 900 MHz interference and spectrum trafficking issues that are outside the scope of this proceeding.

III. BACKGROUND

5. The interference problem in the 800 MHz band is caused by a fundamentally incompatible mix of two types of communications systems: cellular-architecture multi-cell systems, used by ESMR and cellular telephone licensees, and high-site non-cellular systems used by public safety, private wireless, and some SMR licensees.⁵ In 2002, the Commission issued a *Notice of Proposed Rule Making (800 MHz NPRM)* seeking comment on band reconfiguration and on a variety of related issues affecting abatement of interference to 800 MHz public safety systems.⁶ The *800 MHz R&O* was grounded on the extensive record developed in response to the *800 MHz NPRM*. The *Supplemental Order* clarified and modified certain provisions of the *800 MHz R&O* and its accompanying rules.

6. We have before us petitions for reconsideration of the *800 MHz R&O*, oppositions to those petitions and replies to those oppositions, and petitions for reconsideration of the *Supplemental Order* and related oppositions and replies.⁷

⁵ See *800 MHz R&O*, 19 FCC Rcd at 14972-73 ¶ 2.

⁶ See Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, *Notice of Proposed Rule Making*, WT Docket No. 02-55, 17 FCC Rcd 4873, 4482 ¶ 16 (2002), as modified by *Erratum*, 17 FCC Rcd 7169 (PSPWD 2002) (*800 MHz NPRM*).

⁷ Petitions for reconsiderations of the *800 MHz R&O* were due on December 22, 2004. See 69 Fed Reg. 67823 (2004) and 47 C.F.R. § 1.429(d). Petitions for reconsideration of the *Supplemental Order* were due on March 10, 2005. See 70 Fed Reg. 6757 (2005) and 47 C.F.R. § 1.429(d). On February 14, 2005, the Public Safety and Critical Infrastructure Division (Division) of the Wireless Telecommunications Bureau (Bureau) harmonized the opposition and reply periods of the *800 MHz R&O* with those of the *Supplemental Order*. See Improving Public Safety Communications in the 800 MHz Band, WT Docket No. 02-55, *Order*, 20 FCC Rcd 3568 (WTB PSCID 2005).

For short-form citation purposes we refer to petitions for reconsideration of the *800 MHz R&O* as [Party Name] PFR (of R&O) and petitions for reconsideration of the *Supplemental Order* as [Party Name] PFR (of Supplemental Order). Since the pleading schedule created, in essence, a consolidated opposition and reply to oppositions period we refer to oppositions and replies as follows, [Party Name]Opposition; [Party Name] Reply.

Because the *Supplemental Order* revised, in some respects, the provisions of the 800 MHz R&O, some petitions for reconsideration of the 800 MHz R&O, filed before the *Supplemental Order* was released, request relief that was later granted in the *Supplemental Order*. To that extent, some issues raised in petitions for reconsideration were rendered moot.⁸ Accordingly, we do not address those issues further in the instant MO&O except to note that they were addressed and resolved by the *Supplemental Order*.⁹ We now turn to the remaining issues before us.

IV. DISCUSSION

A. Cellular Systems that May Operate in the ESMR Portion of the 800 MHz Band

7. In the 800 MHz R&O, the Commission established a definition of “high-density cellular” to delineate those systems that are precluded from operating in the

⁸ In the *Report and Order* we prohibited non-ESMR (*i.e.* high-site) operations in the ESMR band. That decision was the subject of three petitions for reconsideration seeking to permit non-ESMR Economic Area (EA) licensees to relocate to the ESMR band. See Preferred Communications Systems, Inc. and Silver Palm Communications, Inc. Petition for Reconsideration, filed Dec. 22, 2004 (Preferred PFR (of R&O)) at 32-33; Joint Petition for Partial Reconsideration of Coastal SMR Network L.L.C./A.R.C., Inc. and Scott C. MacIntyre, filed Dec. 22, 2004 (Coastal PFR (of R&O) at 31-32; and Petition for Reconsideration of Charles D. Guskey, filed Dec. 22, 2004 (Guskey PFR (of R&O)) at 10-11. The Commission’s decision in the *Supplemental Order* giving EA licensees not currently operating ESMR systems the option to relocate their EA systems to the ESMR portion of the band moots this aspect of the above-mentioned petitions. See also *Supplemental Order*, 19 FCC Rcd 25153-57 ¶¶ 75-84.

The Commission’s setting out the licensing and construction requirements for ESMR-vacated spectrum moots aspects of petitions for reconsideration filed by Entergy Corporation and Entergy Services, Inc. (Entergy) and American Electric Power Company, Inc. (AEP). See Petition for Reconsideration of Entergy Corporation and Entergy Services, Inc. (Entergy), filed Dec. 22, 2004 (Entergy PFR (of R&O)) at 5-6 and Petition for Clarification of American Electric Power Company, Inc., filed Dec. 21, 2004 (AEP PFR (of R&O)) at 4-6. See also *Supplemental Order*, 19 FCC Rcd 25144-49 ¶¶ 57-68.

The Commission’s clarifying the rights of incumbents operating on former channels 121-150 moots aspects of the petition for reconsideration filed by AEP. See AEP PFR (of R&O) at 7-8; see also *Supplemental Order*, 19 FCC Rcd 25146-47 ¶ 61.

The Commission’s decisions regarding the amount of information licensees submitting interference complaints must provide commercial mobile radio system (CMRS) providers, as well as when an electronic database must be placed into operation, moots portions of a petition for reconsideration filed by CTIA-The Wireless Association. See Petition for Reconsideration, filed Dec. 22, 2004, by CTIA-The Wireless Association (CTIA PFR (of R&O)) at 2-3. See also *Supplemental Order*, 19 FCC Rcd 25141-43 ¶¶ 46-50.

⁹ Additionally, we decline to address the request of Consolidated Edison Company of New York, Inc. (ConEd) seeking clarification on which channels its itinerant operations will be relocated to. See Petition for Clarification and Reconsideration, filed Dec. 22, 2004, by Consolidated Edison Company of New York, Inc. (ConEd PFR (of R&O)) at 3-5. This is a matter for the Transition Administrator. Thus, we will not address it in this MO&O.

non-ESMR portion of the 800 MHz band.¹⁰ Several 800 MHz licensees express concern, however, that this same high-density cellular definition is also being used to limit access to the ESMR portion of the band.¹¹ They note that the Transition Administrator (TA) has required licensees seeking to relocate to the ESMR portion of the band to certify that they meet the high-density cellular definition in the Commission's rules.¹² The potential effect of this, these parties contend, would be to preclude certain incumbent licensees with cellular-architecture systems that do not meet the high-density criteria from relocating to or remaining in the ESMR band. Airpeak, for example, asserts that strictly applying the high-density criteria could exclude its system and other iDEN-based systems from relocating to or remaining in the ESMR portion of the band.¹³

8. We agree that these licensees have raised a legitimate concern that requires clarification of our rules. We intended the term "high density cellular," as defined in our 800 MHz rules, only as a limitation on the kind of cellular system that is prohibited in the non-ESMR portion of the 800 MHz band. It was not our intent that this definition should limit eligibility for operation in or relocation to the ESMR band, or to exclude other

¹⁰ Herein, we refer to the 800 MHz band as being divided into two parts, the "ESMR" and "non-ESMR" portions. The ESMR portion of the band extends from 817 MHz/862 MHz to 824 MHz/869 MHz in most of the country and from 813.5 MHz/858.5 MHz to 824 MHz/869 MHz in the Southeast area. The non-ESMR portion of the band extends from 806/851 MHz to the lower limit of the ESMR portion of the band in all areas of the country. See *800 MHz R&O*, 19 FCC Rcd at 15051-52, 15058 ¶¶ 151, 166.

A cellular system may not operate in the non-ESMR portion of the band if such system is a "high density" system, which is defined as: (1) having more than five overlapping interactive sites featuring hand-off capability; and (2) any one of such sites has an antenna height of less than 30.4 meters (100 feet) above ground level with an antenna height above average terrain (HAAT) of less than 152.4 meters (500 feet) and twenty or more paired frequencies. *800 MHz R&O*, 19 FCC Rcd at 15060 ¶ 172; 47 C.F.R. § 90.7.

¹¹ See *ex parte* letter from Elizabeth Sachs, counsel to Airpeak, to Cathy Seidel, Acting Chief, Wireless Telecommunications Bureau, dated May 12, 2005. See also, *ex parte* letter from Senator Lindsey Graham and Senator Jim DeMint, to Chairman Kevin Martin, Federal Communications Commission, dated May 16, 2005 (advocating allowing SMR licensees that do not meet the high-density cellular criteria to relocate to the ESMR portion of the band); Letter from Robert Ritter, counsel for North Point Communications, Inc., to 800 MHz Transition Administrator, dated May 12, 2005, at 2, n.5 (asserting that North Point's systems are eligible for relocation to the ESMR portion of the band, notwithstanding the fact that they do not employ twenty or more paired frequencies).

¹² See 800 MHz Transition Administrator Accepting EA Licensee Relocation Elections, *Press Release* dated Apr. 21, 2005, stating: "If electing to move to the ESMR Band or remain in the ESMR Band, [a licensee must file] a certification that: (1) the licensee has the spectrum capacity to build and operate an ESMR system pursuant to the definition of ESMR in Section 90.7 of the FCC's rules (which includes having more than five overlapping interactive sites with hand-off capability and one such site with an antenna height of less than 30.4 meters (100 ft.) above ground level and a HAAT of less than 152.4 meters (500 ft.) and 20 or more paired frequencies); and (2) the licensee intends to operate an ESMR system within the ESMR Band."

¹³ See *ex parte* letter from Elizabeth Sachs, counsel to Airpeak, to Cathy Seidel, Acting Chief, Wireless Telecommunications Bureau, dated May 12, 2005.

cellular-architecture systems, e.g., iDEN-based systems, that do not meet the high-density criteria. We recognize, however, that the Commission may have drafted the definition in a way that led the TA and others to interpret its requirements differently. Therefore, we amend and clarify our rules to provide a broader definition of “800 MHz cellular systems” that may operate in the ESMR portion of the band. Specifically we define a “800 MHz cellular system” as a system that uses multiple, interconnected, multi-channel transmit/receive cells capable of frequency reuse and automatic handoff between cell sites to serve a larger number of subscribers than is possible using non-cellular technology. Under this definition, conventional “high site” systems continue to be excluded, but iDEN-based and other cellular systems are not.¹⁴

9. Given our clarification of the rules for operating in the ESMR band, we believe that licensees with cellular-architecture systems who do not meet the definition of high density cellular should be given the opportunity to file ESMR elections. In addition, in light of the rule changes discussed at paragraphs 11-28 *infra*,¹⁵ we believe that licensees who have already selected ESMR status should have the opportunity to modify their previous elections. We therefore direct the TA to open a twenty-day window during which (i) licensees with cellular architecture systems who do not meet the definition of high density cellular may file new elections to relocate to the ESMR portion of the band, and (ii) licensees who have already selected ESMR status can modify their previous elections, consistent with the rules as amended.¹⁶

B. Relocation of Incumbent Licensees into the ESMR Portion of the 800 MHz Band

10. A number of parties seek reconsideration of our rules regarding the rights of incumbent licensees to relocate or operate in the ESMR band.¹⁷ In the paragraphs below, we address the petitions for reconsideration pertaining to these issues and modify and clarify certain aspects of our rules.

1. Relocation Rights of EA-Licensees Operating ESMR Systems in the Non-ESMR Portion of the Band

11. The *800 MHz R&O* provided that 800 MHz EA licensees operating ESMR systems in the non-ESMR portion of the band have the option to relocate into the ESMR

¹⁴ See 47 C.F.R. § 90.7 in Appendix B *infra*.

¹⁵ Among other things, we provide that licensees who move to the ESMR band but who do not construct their licenses will forfeit their licenses. See ¶ 27 *infra*.

¹⁶ While we direct the TA to open an additional twenty-day election window, we commit to the TA’s discretion the date on which such window must open. We do, however, urge the TA to act promptly.

¹⁷ See Petition for Reconsideration, filed Mar. 10, 2005, by AIRPEAK Communications LLC, (Airpeak PFR (of Supplemental Order) at 5-9); Petition for Partial Reconsideration of the Safety and Frequency Equity Competition Coalition, filed Mar. 10, 2005 (SAFE PFR (of Supplemental Order)) at 3-4.

portion of the band.¹⁸ EA licensees who exercise this option to relocate are to receive equivalent, encumbrance-free EA licenses in the ESMR band, and are entitled to relocate their systems at Nextel's expense.¹⁹ The TA has received elections to relocate from four EA licensees (in addition to Nextel and SouthernLINC) that were operating ESMR systems on November 22, 2004, the date of Federal Register publication of the *800 MHz R&O*.²⁰

12. In the *800 MHz R&O*, the Commission also recognized that some EA licensees operating ESMR systems had site-based licenses for base stations that were an integral part of their ESMR systems, but which operated on channels outside the channel block comprising the EA license.²¹ The Commission gave these licensees the option to relocate their site-based licenses, together with their EA licenses, to the ESMR portion of the band, provided that they: (a) currently hold an EA license in the relevant market; and (b) have been using the site-based license as part of a cellular-architecture system in that market as of the Federal Register publication date of the *800 MHz R&O*.²²

13. In the *Supplemental Order*, the Commission specified that a site-based license is integral to an ESMR system if (1) the 40 dB μ V/m coverage contour of the station overlaps the 40 dB μ V/m coverage contour of another cell in the ESMR system, and (2) the station is capable of "hand-off" of calls to and from one or more overlapping cells.²³ The Commission further specified that in order for a site-based license to qualify for relocation, the station must have been operating as part of the EA licensee's ESMR system as of the date the *800 MHz R&O* was published in the Federal Register.²⁴ The Commission also stated that, when a site-based station is moved into the ESMR portion of the band, the associated license will be limited to the station's 40 dB μ V/m coverage contour.²⁵ This was a modification of the *800 MHz R&O*, in which the Commission

¹⁸ See *800 MHz R&O*, 19 FCC Rcd at 15056 ¶ 162; Transition Administrator Press Release, WT Docket 02-55, *Public Notice*, 20 FCC Rcd 668 (WTB 2005).

¹⁹ See *Supplemental Order*, 19 FCC Rcd at 25154 ¶ 77.

²⁰ Elections have been submitted by AIRPEAK Communications, LLC; Airtel Wireless, LLC; Preferred Communications Systems, Inc., and Colorado Callcomm, Inc. See Regional Prioritization Plan of the 800 MHz Transition Administrator at 10-11 (Jan. 31, 2005). The TA also received correspondence from Nextel and SouthernLINC indicating their intent to relocate to the ESMR band. See *id.* at 12-13 (confirming receipt of Nextel, SouthernLINC ESMR elections).

²¹ See *800 MHz R&O*, 19 FCC Rcd at 15057 ¶ 163.

²² *Id.*

²³ *Supplemental Order*, 19 FCC Rcd at 25154-55 ¶ 78.

²⁴ *Id.*

²⁵ *Id.*

provided that integrated site-based licenses would be converted to EA-wide, unencumbered licenses in the ESMR band.²⁶

14. Airpeak seeks reconsideration of certain aspects of the *Supplemental Order* as they pertain to the rights of EA licensees with ESMR systems to relocate to the ESMR band.²⁷ To the extent that the Commission does not grant reconsideration, Airpeak also seeks the same relief on a waiver basis.²⁸ We consider Airpeak's reconsideration and waiver arguments on each issue jointly.

15. *Non-Overlapping Site-Base Stations.* First, Airpeak argues that all site-based cells currently integrated into an ESMR network—not just those having an overlapping 40 dB μ V/m coverage contour with other integral site-based cells—should be eligible for relocation into the ESMR band.²⁹ In support of its argument, Airpeak notes that it has sites that are integrated into its network switch and are able to carry communications among its subscribers even though they do not have contours that overlap with other portions of the network.³⁰ Airpeak contends that this is a common feature of systems that serve rural areas, particularly in the earlier phases of system deployment. We agree with Airpeak that such sites may be regarded as integrated even if they do not have overlapping contours with other sites. Therefore, we grant that portion of Airpeak's petition for reconsideration and will allow licensees to present facts to the TA that may support a finding that non-overlapping stations are, in fact, an integral part of the licensee's EA-based system.³¹ For example, and without limitation, a licensee could satisfy the "integrated communications system" standard by providing documentation establishing that the isolated station is served by the same switch as the EA-based system, and that the station's coverage area is part of the service area for subscribers to the EA-based system. Thus, we grant that portion of Airpeak's petition for reconsideration and direct the TA to evaluate such requests in light of the discussion above.

16. *Leased Stations.* Airpeak also submits that it should be able to relocate site-based facilities that it acquired through the Commission's spectrum lease authority that

²⁶ *Id.*

²⁷ See Petition for Reconsideration, filed Mar. 10, 2005, by AIRPEAK Communications LLC (Airpeak PFR (of Supplemental Order) at 5-9).

²⁸ AIRPEAK Communications, LLC 800 MHz ESMR Election, Request for Waiver, filed March 17, 2005 (Airpeak Waiver Request).

²⁹ Airpeak PFR (of Supplemental Order) at 8-9.

³⁰ *Id.*

³¹ The EA-based systems need not be an ESMR system. See ¶ 25 *infra*.

are integrated into its EA-based system.³² We agree, and grant that portion of Airpeak's waiver request to the extent of directing the TA to consider site-based facilities Airpeak acquired through the spectrum lease process as potentially eligible for relocation to the ESMR portion of the band. However, Airpeak bears the burden of demonstrating to the TA that the leased station it wishes to relocate to the ESMR portion of the band was an integral part of its EA-based system as of the effective date of the *800 MHz R&O*. Airpeak must also provide the consent of the licensee of the leased station. In making these provisions, we are informed by the arguments advanced by Airpeak to the effect that we would otherwise deprive existing subscribers of service from an outlying cell when it relocated to the ESMR band.³³

17. *Conversion of Site-based Licenses to EA-wide Licenses.* Airpeak also seeks reconsideration or waiver of the Commission's decision in the *Supplemental Order* to define relocated site-based licenses associated with an ESMR system based on the station's 40 dB μ V/m coverage contour, instead of the licensee receiving an EA-wide license as provided in the *800 MHz R&O*.³⁴ Airtel Wireless, LLC seeks similar relief.³⁵ Airpeak proposes that a site-based license or licenses eligible for relocation should be converted to an EA-wide license if the 22 dB μ V/m contours of the site-based license or licenses cover at least fifty percent of the population within the EA.³⁶ Airtel argues for similar relief for a site-based license or licenses eligible for relocation whose 22 dB μ V/m contours cover at least thirty-five percent of the population within the EA.³⁷ Airpeak argues that this is consistent with Section 90.685(b) of the Commission's rules whereby one-third population coverage is the first benchmark for demonstrating satisfactory spectrum utilization throughout a geographic area and two-thirds coverage is used to demonstrate conclusive evidence that the spectrum is being used productively.³⁸ Airpeak posits that a station that has already reached a fifty percent penetration level

³² See Airpeak Waiver Request; Opposition of Nextel Communications, Inc. to Airpeak Request for Waiver, filed March 28, 2005 by Nextel Communications, Inc. at 9-10; Reply to Opposition to Request for Waiver, filed April 4, 2005, by AIRPEAK Communications, LLC (Airpeak Waiver Reply) at 8-9.

³³ Airpeak PFR (of Supplemental Order) at 8-9.

³⁴ *Id.* at 7, citing *800 MHz R&O*, 19 FCC Rcd at 15057 ¶ 163, and *Supplemental Order*, 19 FCC Rcd at 25154-55 ¶ 78.

³⁵ Airtel Wireless, LLC, 800 MHz ESMR Election, Request for Waiver, filed March 25, 2005. (Airtel Waiver Request.)

³⁶ Airpeak PFR (of Supplemental Order) at 8.

³⁷ Airtel Waiver Request at 4.

³⁸ *Id.* at 8-9 citing 47 C.F.R. § 90.685(b).

likely has captured the major population areas within the market.³⁹ Airtel argues that the relief it seeks is warranted by considerations of equity and administrative ease.⁴⁰

18. We are not persuaded by Airpeak's argument for reconsideration on this issue, but we conclude that Airpeak and Airtel may be entitled to partial relief on a waiver basis. We will allow Airpeak and Airtel to obtain an EA-wide license in the ESMR band for any site-based license or licenses eligible for relocation, provided that it can demonstrate that the 40 dB μ V/m contours of the site-based license or licenses cover at least fifty percent of the population within the EA. We believe the 40 dB μ V/m contour represents a better metric for arguing coverage equivalency rather than the 22 dB μ V/m contour proposed by Airpeak and Airtel. Section 90.693(b) defines the 40 dB μ V/m contour as a 800 MHz site-based station's service area and the 22 dB μ V/m contour as the area which can not be expanded for purposes of co-channel protection to other stations.⁴¹

19. *Acquired Site-Based Licenses Not Integrated Prior to November 22, 2004.* Airpeak also seeks waiver of the requirement that site-based cells must have been operating as part of an integrated communications system as of the date the *800 MHz R&O* was published in the Federal Register. Airpeak asks that we allow it to relocate certain site-based stations that Airpeak had purchased from other licensees but had not integrated into its ESMR systems by the date the *800 MHz R&O* was published in the Federal Register.⁴² Airpeak notes that it acquired licenses in three transactions after the August 6, 2004 release date of the *800 MHz R&O* but before November 22, 2004, the date the *800 MHz R&O* was published in the Federal Register.⁴³ Airpeak states that it had integrated approximately one-half of the acquired licenses into its ESMR systems by November 22, 2004 and that it intended to integrate the other site-based licenses by that date, but was prevented from doing so by: (1) time required to obtain zoning approvals; (2) delay in obtaining interconnection lines from the site-based cell to the ESMR switch; (3) the need to relocate the licensee sellers' customers to other services, and (4) other logistical difficulties encountered in acquiring site-based licenses and integrating them in a three and one-half month time frame.⁴⁴

³⁹ *Id.* at 9.

⁴⁰ Airtel Waiver Request at 4.

⁴¹ *See* 47 C.F.R. § 90.693(b).

⁴² *See* Airpeak Waiver Request at 12-14. Airpeak lists the relevant stations at Appendix C of the Waiver Request.

⁴³ *See ex parte* letter from Elizabeth R. Sachs, Counsel for Airpeak, to Catherine Seidel, Acting Chief, Wireless Telecommunications Bureau, dated July 6, 2005.

⁴⁴ *See id.*

20. The Commission's underlying purpose of establishing a cutoff date in connection with relocation of site-based licenses into the ESMR band was to discourage licensees from seeking to acquire and relocate large numbers of site-based licenses to the ESMR band for speculative purposes. We believe, however, that Airpeak has presented sufficient facts to demonstrate that it acquired site-based licenses in order to enhance its existing service to subscribers—and not for any speculative purpose. We believe there are several factors meriting the grant of Airpeak's requested waiver: (1) Airpeak was operating an ESMR system in the EAs in which it acquired the site-based licenses; (2) Airpeak has shown that the majority of acquired licenses were needed to meet growing subscriber demand; (3) some of the acquired licenses were on channels lying within Airpeak's EA spectrum block; and (4) Airpeak exercised reasonable diligence in seeking to integrate the licenses into its system, and some of the delays it experienced were not within its control.

21. Moreover, we believe that unique or unusual factual circumstances are present when a licensee must convert site-based licenses to ESMR cells on such short notice. Although Airpeak could have acquired the site-based licenses before the *800 MHz R&O* was released, we credit its representation that negotiations were in progress before that date. We also recognize that, during the time the *800 MHz NPRM* was pending and the time the *800 MHz R&O* was released, sufficient uncertainty about how site-based licenses would be incorporated into the overall band reconfiguration process existed so that a business decision on whether to acquire site-based licenses was problematic.

22. We grant that portion of Airpeak's waiver to the extent of directing the TA to consider the subject site-based facilities as potentially eligible for relocation to the ESMR portion of the band. However, we direct Airpeak to provide additional detail to demonstrate the validity of its contention that the site-based licenses at issue can and will be integrated into Airpeak's ESMR systems. Specifically, with respect to the unconstructed licenses that Airpeak seeks to include for relocation, it must demonstrate to the TA that the 40 dB μ V/m contours of the acquired stations either overlap the EA served by Airpeak's system or overlap the 40 dB μ V/m contours of stations that link back to the EA. Additionally, Airpeak must demonstrate to the TA that the assignment of the subject licenses had been consummated by the date the *800 MHz R&O* was published in the Federal Register.

2. Relocation Rights of EA Licensees Operating Non-ESMR Systems in the Non-ESMR Portion of the Band

23. In the *Supplemental Order*, the Commission extended the option to relocate to the ESMR band to EA licensees that were not operating an ESMR system as of the Federal Register publication date of the *800 MHz R&O*, including those EA licensees

that had not yet constructed any facilities.⁴⁵ The *Supplemental Order* also provided that such EA licensees would not receive unencumbered EA licenses in the ESMR band, but would be limited to a geographical licensing area corresponding to the unencumbered area in which they were entitled to operate before they relocated, *i.e.*, their “white area.”⁴⁶ The *Supplemental Order* also made no provision for non-ESMR EA licensees to relocate associated site-based licenses.

24. In its petition for reconsideration of the *Supplemental Order*, the Safety and Frequency Equity Competition Coalition (SAFE)⁴⁷ urges us to allow non-ESMR EA licensees to relocate site-based as well as EA-based licenses to the ESMR band.⁴⁸ According to SAFE, the *Supplemental Order* does not eliminate the economic harm to SAFE members that acquired spectrum with the intention of constructing ESMR systems on their EA and site-based spectrum holdings, nor does it cure the ultimate harm to competition in the dispatch services market.⁴⁹ If granted access to the ESMR band, SAFE members propose to construct ESMR systems at their own expense.⁵⁰

25. On reconsideration, we conclude that by providing EA licensees the opportunity to relocate their associated site-based licenses in conjunction with their EA licenses if they elect to move to the ESMR band, we are evaluating their systems as a whole (even if portions thereof are licensed on a non-EA basis), and we will thereby achieve more effectively the goal of placing these licensees in a position comparable to that they currently occupy. Therefore, we will allow non-ESMR EA licensees to relocate site-based stations that were part of the licensee’s integrated communications system, as defined below, on the date the *800 MHz R&O* was published in the Federal Register. To qualify as part of an integrated communications system, a site-based station must be:

- located within the geographical boundaries of the relevant EA; or

⁴⁵ *Supplemental Order*, 19 FCC Rcd at 25154-55 ¶ 79. The *Supplemental Order* thus rendered moot those portions of the Preferred PFR (of R&O) and the Guskey PFR (of R&O) that sought the ability to relocate non-ESMR EA licensees to the ESMR band. *See* n. 8, *supra*.

⁴⁶ *Supplemental Order*, 19 FCC Rcd at 25155 ¶ 79.

⁴⁷ SAFE represents Coastal SMR Network, LLC; A.R.C., Inc., d/b/a Antenna Rentals Corp.; Skitronics, LLC; Waccamaw Wireless, LLC; CRSC Holdings, Inc.; and Silver Palm Communications, Inc. *See* Safety and Frequency Equity Competition Coalition, Petition for Reconsideration at 3-4 (Mar. 10, 2005) (SAFE PFR (of Supplemental Order)) at n.1. SAFE does not represent Mobile Relay Associates, a site-based SMR licensee. *See* Erratum filed by Mark Blacknell, Esq., on behalf of SAFE, (Mar. 21, 2005).

⁴⁸ Petition for Partial Reconsideration of the Safety and Frequency Equity Competition Coalition, filed Mar. 10, 2005 (SAFE PFR (of Supplemental Order)) at 3-4, and Joint Reply (May 2, 2005) (SAFE Reply).

⁴⁹ *See* SAFE PFR (of Supplemental Order) 3-4.

⁵⁰ *See id.* *See also* SAFE Reply at 3.

- outside the geographical boundaries of the EA but with a 40 dB μ V/m contour that intersects the EA boundary; or
- outside the geographical boundaries of the EA, but with a 40 dB μ V/m contour that, in combination with other of the licensee's stations with mutually intersecting 40 dB μ V/m contours, forms a contiguous footprint with the EA boundaries.

Alternatively, the licensee may seek to demonstrate to the TA that a non-overlapping site-based station is an integral part of the EA-based system, based on the same criteria discussed in paragraph 15 above. We note that any relocated site-based station is limited to the 40 dB μ V/m service contour it had as of the Federal Register publication date of the *800 MHz R&O*.

3. Obligations of Relocating Licensees

26. We recognize that by allowing greater access to the ESMR portion of the band, we may be providing an incentive for relocating licensees to warehouse ESMR spectrum rather than employing it. As a deterrent to this behavior we now, on our own motion, place the following obligations on EA licensees electing to relocate to the ESMR portion of the band. EA licensees electing to relocate to the ESMR portion of the band must by the end of their license term:

- relocate their systems to the ESMR band (including applying for and receiving any necessary license modifications);⁵¹
- convert their systems, including any associated site-based facilities to ESMR technology;
- provide ESMR service by the end of their EA license term;⁵² and
- no later than the expiration date of their EA license, certify that they have converted their entire system, including site-based stations,⁵³ to ESMR technology and are offering service to customers.⁵⁴

⁵¹ If the site-based station is associated with an EA licensee currently operating a non-ESMR system, the EA licensee must pay all expenses associated with relocating site-based stations to the ESMR Band (*i.e.*, hardware, legal, engineering, etc.). If an EA licensee is operating a site-based station as part of an ESMR system, then Nextel shall pay to relocate the site-based station to the ESMR band.

⁵² See 47 C.F.R. § 90.685(e) in Appendix B *infra*.

⁵³ All relocated site-based stations must act as cells and be interconnected to (be part of) the ESMR system.

⁵⁴ Such certification must be filed with the Commission within fifteen days of EA license expiration. See 47 C.F.R. § 1.946(d). Failure to provide a timely response may result in enforcement action, including monetary forfeiture, pursuant to Section 503(b)(1)(B) of the Communications Act and Section 1.80(a)(2) of the (continued....)

27. Failure to certify the implementation of ESMR technology by the deadline will result in the automatic cancellation of the EA license (and any associated site-based authorizations the licensee has elected to relocate to the ESMR portion of the band) for failure to construct an ESMR system in the ESMR Band.⁵⁵ In such an event, the licensee's spectrum would revert to Nextel. For the reasons explained *supra* there is good reason for expanding the classes of EA licensees eligible to relocate to the ESMR portion of the band—and potentially reducing the amount of ESMR band spectrum available to Nextel in the process. If relocating EA licensees fail to use the spectrum by the end of their license term access to that spectrum shall revert back to Nextel.⁵⁶ We recognize that entities may wish to reconsider their ESMR election in light of this provision. For that reason we have directed the TA to open a twenty-day election window to allow such reconsideration.⁵⁷

28. Our decisions, *supra*, strike an appropriate balance between our goal of ensuring equitable treatment of all licensees and our goal of alleviating unacceptable interference to public safety licensees. Requiring EA licensees located in the ESMR portion of the band to construct ESMR systems by a time certain has a threefold purpose: (1) it avoids replicating, in the ESMR band, the same incompatible mix of technologies that resulted in unacceptable interference to public safety, CII and other "high site" licensees; (2) it allows licensees genuinely interested in competing with existing ESMR operators to have the opportunity to move forward with their business plans; and (3) it requires relocating EA licensees to timely construct an ESMR system, thereby avoiding the "warehousing" of spectrum.

C. Non-ESMR Incumbents Currently Located in the ESMR Portion of the Band

29. In the *Supplemental Order*, the Commission declined to permit non-ESMR operation in the ESMR band segment.⁵⁸ The Commission stated that allowing such

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Commission's Rules. See 47 U.S.C. § 503(b)(1)(B) and 47 C.F.R. § 1.80(a)(2). See also Wireless Telecommunications Bureau to Enhance its Universal Licensing System to More Accurately Reflect Termination of Unconstructed Licenses, *Public Notice*, 20 FCC Rcd 1455 (WTB 2005). The certification, which must be signed by a licensee principal, must be sent to the Chief, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W. Washington, DC 20554.

⁵⁵ See 47 C.F.R. § 1.946(c).

⁵⁶ This is similar to the manner in which the Commission treated additional unencumbered white area available from non-ESMR EA licensees relocating to the ESMR Band. Specifically, in the *Supplemental Order*, the Commission emphasized that the "white area" a non-ESMR EA licensee attains when it relocates to the ESMR portion of the band is strictly limited to the boundaries of the "white area" that existed before it relocated. Thus any additional unencumbered area in the EA which exists after the non-ESMR EA licensee is relocated will be available for use by Nextel. See *Supplemental Order*, 19 FCC Rcd at 25155 ¶ 79.

⁵⁷ See ¶ 8 *supra*.

⁵⁸ See *Supplemental Order*, 19 FCC Rcd 25156 ¶ 81.

operations would undercut the basic tenet of this proceeding: that incompatible “high-site” non-ESMR technology must be segregated from “low-site” ESMR technology if unacceptable interference is to be avoided.⁵⁹ Communications & Industrial Electronics, Inc. (C&I) and North Sight Communications, Inc. (North Sight) have filed a joint request for clarification of the *Supplemental Order* on the status of incumbents that currently operate in the ESMR portion of the band but are currently operating non-ESMR systems.⁶⁰ C&I and North Sight argue that the Commission’s prohibition on non-ESMRs operating in the ESMR band should apply only to entities *relocating* into the ESMR band, and not to current incumbents operating there.⁶¹

30. We deny the C&I/North Sight petition to the extent it asks us to hold that incumbent “high site” systems operating on the Upper 200 channels may remain there and be protected against interference from ESMR systems. Allowing such incumbent high-site systems to remain in the band is inconsistent with the fundamental interference abatement goals of this proceeding, which dictate that incompatible technologies should not operate in the same segment of the 800 MHz band. Accordingly, we clarify that no incumbent licensee in the ESMR band may continue to operate “high site” systems in the ESMR band. We also clarify that, if such licensees wish to continue their “high site” operations, they must relocate to comparable facilities in the non-ESMR band at Nextel’s expense, consistent with the terms of the *800 MHz R&O* and *Supplemental Order*.

31. We note, however, that North Sight is not required to relocate out of the ESMR band under this holding. The petition indicates that North Sight operates an iDEN cellular-architecture technology system on its EA authorizations in the ESMR band, coupled with site-based stations operating below the ESMR band.⁶² Thus, under our clarification of the rules discussed in paragraphs 7-8, *supra*, North Sight’s system qualifies as a cellular system that may operate in the ESMR band.

D. Prohibition on “High Density” Cellular Systems in the Non-ESMR Portion of the 800 MHz Band

32. Coastal and SAFE argue that the initial *800 MHz NPRM* did not provide adequate notice under Section 553 of the Administrative Procedure Act (APA)⁶³ because the *800 MHz NPRM* did not apprise SMR licensees of the impact on current

⁵⁹ *Id.*

⁶⁰ See Request for Clarification of Communications & Industrial Electronics, Inc. and North Sight Communications, Inc. filed May 4, 2005 (C&I/North Sight Clarification Request).

⁶¹ *Id.* at 4-5.

⁶² *Id.* at 2-3.

⁶³ 5 U.S.C. § 553.

service resulting from band reconfiguration, *i.e.*, that limits would be imposed on the type of system architecture that SMR licensees could employ. Specifically, Coastal and SAFE allege that there was not adequate notice that the Commission would eliminate licensee discretion to convert from high-site SMR operations to high-density configurations.⁶⁴ We disagree with their argument. The limitation on use of high-density cellular operations was part of the concept of spectral separation to abate unacceptable interference, a concept that was placed at issue in the original Nextel “White Paper.”⁶⁵ In the *800 MHz NPRM*, in which the Commission addressed many of the issues raised in the Nextel White Paper, parties were put on notice that the imperative to abate unacceptable interference to public safety systems would likely result in substantial changes to the rules affecting the 800 MHz band. In particular, the Commission signaled that reconfiguration of the band into non-ESMR and ESMR segments was a foreseeable outcome of the proceeding.⁶⁶ The Commission also sought comment on a restructuring of the 800 MHz band that would have required some incumbent site-based licensees—such as Coastal and SAFE—to vacate the 800 MHz band entirely and relocate to the 900 MHz band at their own expense.⁶⁷ The Commission also raised the possibility that 800 MHz site-based incumbents might be required to operate on a secondary basis to public safety systems.⁶⁸

33. Thus, both the broad scope of the *800 MHz NPRM* and the specific proposals offered within it made clear that altering what Coastal and SAFE claim are the “rights” of conventional SMR licensees was at issue and ripe for comment in order to achieve the Commission’s goal of resolving unacceptable interference to public safety systems operating in the 800 MHz band.⁶⁹ Moreover, the Commission specifically invited

⁶⁴ See Coastal PFR (of R&O) at 7-12; *see also* SAFE/Coastal Reply at 2-3.

⁶⁵ See Promoting Public Safety Communications – Realigning the 800 MHz Land Mobile Radio Band to Rectify Commercial Mobile Radio – Public Safety Interference and Allocate Additional Spectrum to Meet Public Safety Needs, filed by Nextel Communications, Inc., on Nov. 21, 2001 (Nextel White Paper).

⁶⁶ See *800 MHz NPRM*, 17 FCC Rcd at 4884-89 ¶¶ 20-28.

⁶⁷ *Id.*, 17 FCC Rcd at 4893-95 ¶¶ 34-37.

⁶⁸ *Id.* 17 FCC Rcd at 4893 ¶ 34.

⁶⁹ Federal courts have also held that the APA’s notice requirements are satisfied where the final rule is a “logical outgrowth” of the proposed rule. See 1998 Biennial Regulatory Review - Streamlining of Mass Media Applications, Rules, and Processes Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities, *Memorandum Opinion and Order*, 14 FCC Rcd. 17525 at 17534 ¶24 *citing Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990). A rule is a logical outgrowth of a Notice if “[the party] should have anticipated that such a requirement might be imposed.” See Provision of Aeronautical Services via the Inmarsat System-Aeronautical Radio, Inc. and the Air Transport Association of America Request for Waiver, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, 11 FCC Rcd. 5330 at 5336 ¶ 14 *citing Small Refiner Lead Phase-Down v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983). In order to meet this standard, it has been held that the agency’s notice and the public’s comments must pass the “reasonable specificity” test. This standard can be stated as whether a reasonable person would be put on notice of the final rule. See 1998 Regulatory Review, *Order on Reconsideration*, 15 FCC Rcd 9707 at 9710 ¶ 7 *citing Smaller* (continued....)

comment on the Consensus Parties' proposed division of the 800 MHz band into non-ESMR and ESMR segments.⁷⁰ The Commission also sought further comment on this spectral separation proposal when the Consensus Parties incorporated the proposal in a subsequent filing.⁷¹

34. In fact, the Commission received and considered comments in support of the Consensus Parties' band reconfiguration proposal from, among others, Skitronics—a member of the SAFE Coalition—which said it had “no problems with giving unqualified endorsement to” the Consensus Plan proposal to separate incompatible technologies in the 800 MHz band.⁷² This filing undercuts the SAFE Coalition assertion that its members lacked adequate notice about the possibility that the Commission would adopt a band reconfiguration proposal.⁷³

35. In sum, we believe that the extensive record of this proceeding reflects the fact that the Commission carefully ensured that parties were made aware of the possible outcomes of the proceeding as it progressed. We also note that—the SAFE Coalition's and Coastal's claims of inadequate notice notwithstanding—other conventional SMR licensees recognized, and commented upon, the possibility that cellular architecture would not be allowed to coexist with public safety's “high site”

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Refiner Lead Phase-Down v. EPA, 705 F.2d at 549; *LaMadrid v. Hegstrom*, 830 F.2d 1524, 1530-31 (9th Cir. 1987); and *The Logical Outgrowth Doctrine in Rulemaking*, Phillip M. Kannan, 48 Admin. L. Rev. Spring 1996, at 213.

⁷⁰ The Consensus Parties were comprised of Nextel, the major public safety organizations, and various private wireless organizations. *See 800 MHz R&O*, 19 FCC Rcd at 14974 n. 13. They first submitted the “Consensus Plan” on August 7, 2002, during the reply comment cycle of this rule making proceeding. The Wireless Bureau then sought comment on the Consensus Plan. *See Wireless Telecommunications Bureau Seeks Comment on “Consensus Plan” Filed in the 800 MHz Public Safety Interference Proceeding, Public Notice*, 17 FCC Rcd 16755 (WTB 2002).

⁷¹ On December 24, 2002, the Consensus Parties filed Supplemental Comments. Thereafter, the Commission sought comment on these Supplemental Comments. *See Wireless Telecommunications Bureau Seeks Comment on “Supplemental Comments of the Consensus Parties” Filed in the 800 MHz Public Safety Interference Proceeding*, WT Docket No. 02-55, *Public Notice*, 18 FCC Rcd 30 (WTB 2003). This *Public Notice* was also published in the Federal Register. *See* 68 FR 6687 (Feb. 10, 2003).

⁷² *See* Comments of Skitronics, LLC, filed Feb. 25, 2003. The record also demonstrates that other conventional SMR licensees participated in this round of comments. *See, e.g.*, Comments of Silver Palm filed April 8, 2004.

⁷³ Even after the Commission adopted the *800 MHz R&O*, it released a *Public Notice* seeking comment on *ex parte* requests for clarification of the *800 MHz R&O*, including the conditions under which non-ESMR systems could be retuned to the ESMR band. *See Commission Seeks Comment on Ex Parte Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding*, WT Docket No. 02-55, *Public Notice*, 19 FCC Rcd 21492 (2004). This *Public Notice* was subsequently published in the Federal Register. *See* 69 FR 67880 (2004). In response the Commission received and considered separately filed comments from SAFE coalition members Coastal and Skitronics. *See* Comments of Coastal SMR Network, L.L.C., filed Dec. 2, 2004; Comments of Mobile Relay Associates and Skitronics, LLC, filed Dec. 2, 2004.

architecture in the same portion of the 800 MHz band.⁷⁴ Accordingly, we conclude that the Commission properly discharged its duty to let all interested parties know the possible outcomes of this proceeding, and we find no merit in the SAFE Coalition's and Coastal's claims to the contrary.

E. Comparable Facilities

36. In the *800 MHz R&O*, the Commission declared that relocating licensees would be entitled to "comparable facilities."⁷⁵ However, the SAFE Coalition and Coastal argue that "comparable facilities" should mean more than "comparable equipment," it should guarantee post-reconfiguration replication of a licensee's service area and spectrum capacity.⁷⁶ They contend that in order to achieve service area replication, we must, prior to assigning replacement frequencies, undertake a technical study, analogous to the study the Commission conducted in establishing the Digital Television (DTV) Table of Allotments, and adopt a similar table for the 800 MHz land mobile band.⁷⁷

37. The *800 MHz R&O* did not say that the "comparable facilities" requirement was satisfied merely by providing the relocating licensee with comparable equipment. The *800 MHz R&O* stated that:

Comparable facilities are those that will provide the same level of service as the incumbent's existing facilities, with transition to the new facilities as transparent as possible to the end user. Specifically, (1) equivalent channel capacity; (2) equivalent signaling capability, baud rate and access time; (3) coextensive geographic coverage; and (4) operating costs.⁷⁸

38. Petitioners have failed to present facts that convince us that the comparable facilities standard, which has been successfully used in prior band reconfiguration efforts,⁷⁹ is somehow inappropriate here. Use of the comparable facilities standard in

⁷⁴ For example, the American Mobile Telecommunications Association, a signatory to the Consensus Plan which also represents the interests of trunked and conventional SMR operators in the 800 MHz band, urged the Commission to adopt the Consensus Plan to alleviate interference to public safety but also recommended that the Commission ensure that entities interested in deploying cellular technology are treated equitably. *See* American Mobile Telecommunications Association Comments at 5, filed Sep. 23, 2002. *See also* Mobile Relay Associates Supplemental Comments at 19, filed Feb. 10, 2003 (opposing proposed restriction on conventional SMRs converting to cellular technology).

⁷⁵ *See 800 MHz R&O*, 19 FCC Rcd at 15076-77 ¶ 201.

⁷⁶ *See Coastal PFR (of R&O)* at 3-4; *see also SAFE/Coastal Reply* at 4-5.

⁷⁷ *Id.*

⁷⁸ *See 800 MHz R&O*, 19 FCC Rcd at 15076-77 ¶ 201.

⁷⁹ The comparable facilities standard was applied to a previous reconfiguration of the 800 MHz band when Nextel relocated incumbents from the Upper 200 channels. *See* Amendment of Part 90 of the Commission's (continued....)

connection with 800 MHz band reconfiguration has been endorsed by public safety, CII and private radio interests, and by Nextel, in the *Consensus Parties Proposal*.⁸⁰ The Commission had an extensive record before it when it applied the comparable facilities standard to 800 MHz band reconfiguration, and the standard has been judicially approved in connection with relocation of incumbents in other contexts.⁸¹ Accordingly, we find that the Commission did not act arbitrarily or capriciously when it decided that the comparable facilities standard should apply when incumbents are relocated within the 800 MHz band.

39. While we do not preclude the possibility that an engineering analysis may be appropriate in determining what constitutes comparable facilities in a specific case, we are also not persuaded by petitioners' contention that the Commission must first conduct a market-by-market analysis and derive a Table of Allotments for the 800 MHz band before the TA can assign replacement frequencies.⁸² Petitioners have not identified any deficiencies in the long-standing licensing process for 800 MHz land mobile facilities that would merit changing to a Table of Allotments licensing scheme, and we are unable to see how the cost and delay inherent in making such a fundamental licensing change in this case could be justified. We note that the 800 MHz land mobile band has a far greater number of facilities and channels than the television band, a factor that would make a Table of Allotments far more costly to implement.⁸³ Moreover, compared to the television band, where the channel assignments are relatively static, the 800 MHz land mobile band is highly dynamic, with large numbers of applications for new licenses and modifications of existing licenses filed each day.

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Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, PR Docket 93-144, *Second Report and Order*, 12 FCC Rcd 19079 (1997) (establishing a standard for comparable facilities based on (1) a comparable system; (2) equivalent channel capacity; (2) same quality of service; and (3) comparable operating costs). The standard was also applied in other contexts, e.g. when fixed microwave systems were relocated to make way for Personal Communications Service (PCS) systems. See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket 95-157, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8825 (1996) (establishing a standard for comparable facilities based on throughput, system reliability, and operating costs).

⁸⁰ See Supplemental Comments of the Consensus Parties, *ex parte* filing dated Dec. 24, 2002).

⁸¹ See, e.g., *Teledesic, LLC v. FCC*, 275 F.3d 75, 85-86 (D.C. Cir. 2001); *Small Bus. in Telecomms. v. FCC*, 251 F.3d 1015, 1017, 1026 (D.C. Cir. 2001) (denying in part and dismissing in part petition for review of relocation regime in which displaced incumbents would be given comparable facilities to ensure a seamless transition); *Association of Public Safety Communications Officials-International, Inc., v. FCC*, 76 F.3d 395, 399 (D.C. Cir. 1996) (upholding the elimination of an exemption for public safety incumbents from a relocation regime in which emerging technology licensees would pay all costs associated with relocating incumbents to comparable facilities).

⁸² See Coastal PFR (of R&O) at 4.

⁸³ For example, a search of the Universal Licensing System database shows that over 8100 800 MHz applications were filed during the six months prior to the adoption of the *800 MHz R&O* (January 1, 2004-July 1, 2004).

Thus, any Table of Allotments for the band would require continuous modification to track licensing activity in the band, at a considerable and continuing cost.⁸⁴

40. We also believe that petitioners' apparent primary concern, that incumbent relocating licensees would not receive replication of their previous service areas, has adequately been addressed by the safeguards provided for incumbents in the *800 MHz R&O*. First, a relocating incumbent may conduct an independent technical study to verify that a replacement channel is comparable to its former channel.⁸⁵ Second, if a dispute arises concerning the comparability of a new channel, the licensee has recourse to the TA and alternative dispute resolution to settle the matter.⁸⁶ Third, if an incumbent licensee believes that, despite these protections, it is not being provided with comparable facilities, it may seek *de novo* review from the Commission.⁸⁷ These protections afforded relocating incumbents in the *800 MHz R&O* makes us confident that incumbents will be fairly treated. Accordingly, we are denying the SAFE Coalition and Coastal petitions for reconsideration to the extent petitioners seek revision of that portion of the *800 MHz R&O* that deals with the right of relocating incumbents to receive comparable facilities.

F. Frequency Coordination

41. In the *Supplemental Order*, the Commission held that evidence of frequency coordination, normally required for license modification applications in the 800 MHz band, is not necessary or required for modification applications filed to implement band reconfiguration.⁸⁸ Several parties seek reconsideration of that determination, contending that frequency coordination is essential here because it provides individual licensees an additional layer of protection against "diminished" communications.⁸⁹

⁸⁴ Indeed, were the television Table of Allotments model followed, every 800 MHz licensee desiring to change its assignment would have to file a petition for rule making and the Commission would have to initiate a comment cycle and prepare and issue an order, which then would be subject to petitions for reconsideration, applications for review and judicial appeal. The burden on licensees and the Commission, alike, would be substantial and to no advantageous purpose. *Cf.* 47 C.F.R. §§ 1.401-1.407.

⁸⁵ *See 800 MHz R&O*, 19 FCC Rcd at 15075-77 ¶ 201. The TA must adhere to the Commission's minimum seventy mile co-channel spacing requirements, except when the applicable technical parameters permit a reduced spacing of up to fifty-five miles, or less than fifty-five miles with the consent of the co-channel licensees. As with the rules for applications for new licenses, the TA need not consider adjacent channel stations when specifying a replacement channel. *See* 47 C.F.R. § 90.621(b).

⁸⁶ *See 800 MHz R&O*, 19 FCC Rcd at 15071-72 ¶ 194.

⁸⁷ *Id.*

⁸⁸ *See Supplemental Order*, 19 FCC Rcd at 25146 ¶ 60, 25148 ¶¶ 65-66. Frequency coordination, however, is required for modification applications requesting major modifications other than adding frequencies specified by the TA to implement band reconfiguration. *See id.* 19 FCC Rcd 25146 at n.132.

⁸⁹ *See* Petition for Partial Reconsideration of Supplemental Order and Order on Reconsideration, filed by the Association of Public-Safety Communications Officials International, Inc., International Association of Chiefs (continued....)

These petitioners also argue that the frequency coordinators have efficient application processing systems that can help speed the rebanding process.⁹⁰

42. As an initial matter, we generally agree with these parties' characterization of the benefits of frequency coordination, and we emphasize that the Commission anticipated that frequency coordinators could play an important role in 800 MHz band reconfiguration. Thus, the Commission did not prohibit frequency coordinators from participation in the rebanding process, and the TA is free to use a third party or parties, including Part 90 frequency coordinators, to determine the most appropriate replacement channels.⁹¹ Also, licensees are free to use the services of frequency coordinators or other entities to file applications on their behalf.⁹² However, we do not believe that frequency coordination is a necessity, particularly in the case of the National Public Safety Planning Advisory Committee (NPSPAC) channels where all NPSPAC licensees are being relocated to channels fifteen megahertz below their current operating channels, thus exactly preserving the coverage/interference environment in the old and new NPSPAC bands.⁹³ In that case, we believe that requiring frequency coordination would be unnecessary and might delay band reconfiguration. Additionally, we expect that the TA will make replacement channel assignments in a manner that assures comparable facilities and could utilize the services of frequency coordinators if it desired.⁹⁴ If a licensee is dissatisfied with its channel assignment and contests the TA's comparable facilities determination, it can enlist the services of a frequency coordinator to assist it in reviewing the TA's determination or seek *de novo* review from the Commission. We therefore decline to mandate frequency coordination for all relocation applications.

G. Expansion Band Issues

43. The Commission designated the 815-816 MHz/860-861 MHz segment of the 800 MHz band as an Expansion Band intended to provide public safety licensees spectral separation from the ESMR band segment. Although the Commission provided Expansion Band licensees full protection against unacceptable interference, public safety licensees currently located in the Expansion Band have the option to relocate

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of Police, International Association of Fire Chiefs, International Municipal Signal Association, Inc., Major Cities Chiefs Association, Major County Sheriffs' Association, and National Sheriffs' Association, filed Feb. 1, 2005 (APCO PFR (of Supplemental Order)) at 4.

⁹⁰ *Id.* at 2.

⁹¹ *See 800 MHz R&O*, 19 FCC Rcd at 15071 n.517A.

⁹² *Id.*, 19 FCC Rcd at 15075 n.520.

⁹³ *See Supplemental Order*, 19 FCC Rcd at 25148 ¶ 65. The NPSPAC channels are six megahertz of spectrum designated for exclusive public safety use. *See 800 MHz R&O*, 19 FCC Rcd at 14991 ¶ 37.

⁹⁴ *See id.*, 19 FCC Rcd at 25146 ¶ 60.

below the Expansion Band, at Nextel's expense, and no public safety licensee will be forced to relocate into or remain in the Expansion Band.⁹⁵ The Commission did not extend either relocation option to CII licensees, however.

1. Critical Infrastructure Industry (CII) Relocation

44. Entergy argues that CII entities should be allowed to relocate their facilities out of the Expansion Band on the same basis as public safety licensees and that they should have the same rights as public safety licensees not to be relocated into the Expansion Band. It argues that the Commission intended the Expansion Band to be used as a haven for licensees that employ "campus-type" or similar interference-resistant systems and that the majority of CII licensees do not employ campus-type systems.⁹⁶ Although the Commission stated in the *800 MHz R&O* that certain licensees might wish to activate campus-type systems in the Expansion Band,⁹⁷ it did not limit the use of the band to campus-type systems or suggest that the band was unsuitable for non "campus-type" operations.

45. We do not agree with the argument that, because CII communications may, on occasion, relate to the safety of life and property, CII licensees should have the identical rights in the Expansion Band as public safety licensees.⁹⁸ Because CII licensees in the Expansion Band receive full protection against unacceptable interference after band reconfiguration,⁹⁹ and because the realities of band reconfiguration are such that we cannot guarantee both public safety and CII equivalent spectral separation from the ESMR band without comprising band reconfiguration, we decline to alter the parameters of the Expansion Band as they apply to CII licensees. We note that our decision in this regard is consistent with our decision in the spectrum refarming proceeding to afford public safety and CII licensees certain protections relative to frequency coordination, but not to place them under identical frequency coordination regimes.¹⁰⁰ There, as here, we concluded that differential treatment of

⁹⁵ See *800 MHz R&O*, 19 FCC Rcd at 15053 ¶ 154.

⁹⁶ See Petition for Reconsideration of Entergy Corporation and Entergy Services, Inc. (Entergy), filed Dec. 22, 2004 (Entergy PFR (of R&O)) at 5-6 citing *800 MHz R&O*, 19 FCC Rcd at 15053 ¶ 154.

⁹⁷ See *800 MHz R&O*, 19 FCC Rcd at 15053 ¶ 154.

⁹⁸ See Entergy PFR (of R&O) at 5.

⁹⁹ The full protection is afforded after band reconfiguration is completed in a given NPSPAC region; in the interim, such licensees are provided a lesser level of protection. See ¶ 50, *infra*.

¹⁰⁰ See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignments Policies of the Private Land Mobile Services, PR Docket 92-235, *Second Report and Order*, 12 FCC Rcd 14307 at 14327-29 ¶¶ 37-41 (1997).

public safety and CII was appropriate because CII licensees' communications are not primarily related to the safety of life and property.¹⁰¹ Thus, we deny the Entergy petition.

2. Expansion Band in Atlanta

46. In the *800 MHz R&O*, the Commission found that the ESMR band segment boundaries adopted for most of the United States are too restrictive to accommodate both SouthernLINC and Nextel in the area of the southeastern United States in which SouthernLINC operates, because an inadequate number of channels exist in the 816-824/861-869 MHz band segment to replicate both companies' existing channel capacity.¹⁰² Accordingly, the Commission expanded the ESMR band segment in the southeastern United States to the 813.5-824 MHz/858.5-869 MHz segment.¹⁰³ As a result, there is no Guard Band in this area and the Expansion Band encompasses 812.5-813.5 MHz/857.5-858.5 MHz.¹⁰⁴

47. In its petition for reconsideration, SouthernLINC asks us to eliminate the Expansion Band within a seventy mile radius of Atlanta, Georgia, or, alternatively, to reduce the Expansion Band in Atlanta to one-half megahertz at 813-813.5 MHz/858-858.5 MHz.¹⁰⁵ In support of its petition, SouthernLINC offers evidence that in the Atlanta area, it will be impossible to relocate public safety licensees currently operating in the Expansion Band to channels vacated by B/ILT licensees moving into the Expansion Band because there are too few B/ILT licensees in the interleaved spectrum.¹⁰⁶ SouthernLINC contends that either proposal will accommodate all incumbents, but notes that under its alternative proposal, all non-public safety incumbents operating in the interleaved portion of the band will have to accept relocation to the Expansion Band.¹⁰⁷

¹⁰¹ *Id.*

¹⁰² *See 800 MHz R&O*, 19 FCC Rcd at 15057 ¶ 164.

¹⁰³ *Id.*

¹⁰⁴ *Id.*, 19 FCC Rcd at 15058 ¶ 166.

¹⁰⁵ *See* Petition for Reconsideration of Southern Communications Services, Inc. d/b/a/ SouthernLINC filed December 22, 2004 (SouthernLINC PFR (of R&O)) at 3. *See also* Comments on Petitions for Reconsideration of Southern Communications Services, Inc. d/b/a/ SouthernLINC filed April 21, 2005 (SouthernLINC Comments on PFR) at 3.

¹⁰⁶ *See generally* SouthernLINC PFR (of R&O). Public safety systems represent over eighty-five percent of all incumbent systems that must be relocated in the Atlanta area. Thus a "one-for-one" channel swap that moves public safety incumbents out of the Expansion Band and non-public safety incumbents into the Expansion Band is not possible. *Id.* at 4. *See also* SouthernLINC Comments on PFR at 3.

¹⁰⁷ *Id.* at 4-5.

48. SouthernLINC has not persuaded us that we should eliminate the Expansion Band altogether. We have studied the incumbency situation in Atlanta, however, and find it sufficiently different from the rest of the United States to merit reducing the Expansion Band to one-half megahertz within a seventy mile radius of Atlanta. We believe that retaining a portion of the Expansion Band is important to afford public safety some spectral separation from the ESMR portion of the band, which is particularly important because of the lack of a Guard Band in the Atlanta region.¹⁰⁸ We believe that careful choice of the location of public safety channels in the band may mitigate interference problems. We therefore direct the TA to survey public safety licensees in the affected area and to ascertain which systems, and which channels within those systems, are used primarily to carry mission-critical communications, as opposed to administrative traffic. Based on the information obtained, the TA shall endeavor to relocate the channels carrying mission-critical communications as far as feasible below the Expansion Band. Accordingly, we update Section 90.617 to reflect the distribution of channels between the various pool categories in the SouthernLINC/Nextel counties.¹⁰⁹

49. We realize that under this band plan, some Atlanta-based B/ILT incumbents that would otherwise not be required to change frequencies will be required to relocate to the Expansion Band. We believe this is a necessary concession for maintaining adequate protection of public safety systems against unacceptable interference and that it will not unduly disadvantage B/ILT licensees because the rules guarantee all stations in the Expansion Band full protection against unacceptable interference.¹¹⁰

H. Operational Issues

1. Interim Interference Values

50. In the *800 MHz R&O*, the Commission adopted minimum signal strength threshold values (-101 dBm (portable) and -104 dBm (mobile)) that non-cellular systems must maintain to qualify for full interference protection.¹¹¹ The Commission further provided that if a non-cellular 800 MHz licensee encounters a degradation of carrier to noise ratio below 20 db in areas in which its received power level is at or above the relevant threshold value, the source or sources of the interfering signal are jointly and severally responsible for abating the interference.¹¹² In the *Supplemental Order*, the

¹⁰⁸ See *800 MHz R&O*, 19 FCC Rcd at 15058 ¶ 166. No Guard Band was included in the band plan for the SouthernLINC markets. *Id.*

¹⁰⁹ See § 90.617 (as amended in Appendix B *infra*). We also note that when the Commission updated its rules to reflect the reconfigured band plan in the 800 MHz band it inadvertently omitted the mutual aid channels from § 90.617(a). Therefore, we insert a reference to the mutual aid channels into § 90.617(a)(1) and note their new channel numbers based on the reconfigured band plan.

¹¹⁰ 47 C.F.R. §§ 90.672, 90.673, 90.674.

¹¹¹ See *800 MHz R&O*, 19 FCC Rcd at 15030 ¶ 106.

¹¹² See 47 C.F.R. § 90.673.

Commission modified this interference standard on an interim basis in response to a showing by Nextel that imposing the final standard prior to the completion of band reconfiguration would result in a material restriction in the service afforded to subscribers.¹¹³ Accordingly, the Commission established an interim standard whereby non-cellular systems must achieve signal strength threshold levels of -85 dBm (portable) or -88 dBm (mobile) in order to be entitled to full interference protection. The Commission provided that this interim standard would apply in each NPSPAC region until completion of band reconfiguration in that region, whereupon the more stringent threshold levels would take effect.¹¹⁴

51. The Tri-State Radio Planning Committee (Tri-State) urges us to apply the final rather than the interim standard to stations that will continue operating in the original NPSPAC band (821-824 MHz/866-869 MHz) while band reconfiguration is completed in a given region. Tri-State asserts that the NPSPAC channels will not encounter undue amounts of interference because they are not interleaved with channels used by licensees employing cellular-architecture systems.¹¹⁵ Tri-State submits drive-test data purporting to show that application of the interim standard to its system would reduce the area where Tri-State is eligible for full interference protection from ninety-three percent (under the final standard) to sixty-six percent of its service area (under the interim standard).¹¹⁶

52. We continue to believe that applying the interim standard in the original NPSPAC band during band reconfiguration appropriate. Although, as Tri-State points out, the original NPSPAC block is not interleaved with channels used by cellular architecture systems, there are Part 22 Cellular Radiotelephone systems and ESMR systems operating on adjacent channels above and below the NPSPAC block whose ability to adequately serve their subscribers could be affected during band reconfiguration if the final interference standard, as opposed to the interim standard, were implemented immediately.¹¹⁷ Moreover, pursuant to provisions contained in the *Supplemental Order*, Tri-State's public safety system is entitled to protection from unacceptable interference in areas where its system does not meet the interim signal strength threshold but does meet the final signal strength threshold values adopted in

¹¹³ See *Supplemental Order*, 19 FCC Rcd at 25137 ¶ 38 citing Letter, dated Sep. 28, 2004, from Lawrence R. Krevor, Vice-President Government Affairs, Nextel, to Marlene H. Dortch, Secretary, FCC at 1-5.

¹¹⁴ See *Supplemental Order*, 19 FCC Rcd at 25137-38 ¶ 39. We note that the interim levels were supported by several commercial, private and public safety members of the 800 MHz community. *Id.*

¹¹⁵ See Letter, dated Jan. 20, 2005, from Peter Meade, Chairman, Region 8 to Marlene Dortch, Secretary, Federal Communications Commission (Tri-State PFR (of Supplemental Order)). See also Letter, dated Apr. 28, 2005, from Peter Meade, Chairman, Region 8 to Marlene Dortch, Secretary, Federal Communications Commission (Tri-State Reply).

¹¹⁶ See Attachment to Tri-State PFR (of Supplemental Order).

¹¹⁷ See *800 MHz R&O*, 19 FCC Rcd at 15023-24 ¶ 91.

the *800 MHz R&O*.¹¹⁸ These provisions require CMRS carriers to mitigate unacceptable interference on public safety control channels and exercise best efforts to mitigate CMRS/public safety interference on public safety voice channels.¹¹⁹ Finally, we note that, since Tri-State is located in Wave 1 of the band reconfiguration schedule, it is in one of the first NPSPAC regions to complete band reconfiguration and therefore, will be subject to a rapid transition from the interim standards to the final standards established in the *800 MHz R&O*.¹²⁰ We therefore deny Tri-State's request to make the interim standards inapplicable to stations operating in the current NPSPAC block.

53. The American Petroleum Institute and the United Telecom Council (API/UTC) ask that we extend to all PLMR licensees, or, in the alternative, only to CII licensees, the protections that the Commission provided to public safety systems that do not meet the -85 dBm (portable) or -88 dBm (mobile) interim threshold values but do meet the minimum threshold values adopted in the *800 MHz R&O*.¹²¹ Citing budgetary constraints and unwieldy budget processes, API and UTC argue that non-public safety PLMR licensees should not have to implement costly system upgrades merely to be eligible for transitional interference protection under the interim standards.¹²² After carefully considering API's and UTC's contentions, we continue to find that the balance struck by the Commission in the *Supplemental Order* should be retained. Relative to public safety entities, CII entities have greater financial resources and budgetary latitude to address temporary interference issues that may not be fully addressed by the interim standard used during rebanding. Therefore, we reaffirm that only facilities directly used for police, fire, emergency medical services, and other governmental uses involving safety of life and property will be afforded additional interference protection even if they do not meet the interim threshold values.

54. For similar reasons, we decline to adopt Entergy's proposal that we provide CII entities with an interference "safety valve" analogous to what the Commission established for public safety entities.¹²³ The Commission adopted the "safety valve" to address the infrequent but highly critical circumstance in which a qualified governmental official charged with protection of safety of life and property perceives that interference

¹¹⁸ *Id.*, 19 FCC Rcd 25139-40 ¶ 42.

¹¹⁹ *Id.*

¹²⁰ See Regional Prioritization Plan of the 800 MHz Transition Administrator at 23-24 (Jan. 31, 2005). The Commission charged the TA with developing a relocation schedule on a NPSPAC region-by-region basis, prioritizing the regions on the basis of population and interference. See also *800 MHz R&O*, 19 FCC Rcd 15072 ¶ 195.

¹²¹ See Petition for Reconsideration of the American Petroleum Institute and the United Telecom Council, filed Mar. 10, 2005 (API/UTC PFR (of Supplemental Order)) at 3-9.

¹²² *Id.*

¹²³ See Entergy PFR (of R&O) at 5-7.

poses an imminent threat to life or property.¹²⁴ Under such extraordinary circumstances, the *800 MHz R&O* provides that a CMRS provider may be required to immediately discontinue operation of any suspected interference source. Given the extraordinary nature of this remedy and the potential impact it may have on CMRS providers, we believe it is appropriate to limit its use to public safety officials, whose primary charge is the protection of life and property. We therefore deny the API/UTC petition for reconsideration.

55. On a related matter, we deny CTIA's petition to relieve cellular and ESMR carriers of the obligation to investigate interference complaints or take corrective action if complaining licensees fail to cooperate.¹²⁵ In the *800 MHz R&O*, the Commission stated that all parties involved in an interference incident, including public safety and CII licensees, are under an affirmative duty to act in good faith in resolving an interference dispute. This good faith requirement includes "without limitation, the obligation to timely meet appointments and provide whatever technical assistance is appropriate under the circumstances."¹²⁶ We reaffirm the Commission's commitment that it "will neither hesitate to act when the obligation of good faith is breached nor sanction any disingenuous allegations that the good faith obligation has been breached."¹²⁷ In this connection, we note that whether a party is acting in good faith is necessarily a matter that we will decide on a case-by-case basis. We are unwilling to place the determination of whether a complaining party is cooperating or not in the hands of the party making the allegation of non-cooperation. Thus, until and unless we determine that a licensee is acting in bad faith; both parties to an interference incident remain obliged to take all reasonable measures to cooperate in its resolution.

2. Minimum Receiver Performance Criteria

56. Non-cellular licensees in the 800 MHz band must use receivers with minimum performance standards in order to be entitled to full protection against unacceptable interference.¹²⁸ The performance values the Commission chose in the *800 MHz R&O* were based on the expected performance from affordable public safety and CII radios.¹²⁹ Consolidated Edison Company of New York, Inc. (ConEd) seeks reconsideration of the minimum receiver performance standards, arguing that it purchased approximately 3,300 mobile/portable units for operation on its Motorola iDEN system that fall short of

¹²⁴ See *800 MHz R&O*, 19 FCC Rcd at 15044-45 ¶ 140.

¹²⁵ See CTIA PFR (of R&O) at 4.

¹²⁶ See *800 MHz R&O*, 19 FCC Rcd at 15043 ¶¶ 137-138.

¹²⁷ *Supplemental Order*, 19 FCC Rcd at 25143 ¶ 50.

¹²⁸ See *800 MHz R&O*, 19 FCC Rcd at 15032 ¶¶ 109-110.

¹²⁹ *Id.*

these standards.¹³⁰ ConEd contends that, at the time it purchased its equipment, receivers that satisfied the minimum performance standard were unavailable for its iDEN system.¹³¹

57. As an initial matter, we note that the rules do not regulate receiver performance standards *per se*, but only set a benchmark against which entitlement to interference protection may be measured. Thus, nothing in the rules prohibits ConEd from continuing to use the radios it purchased. Secondly, receiver performance comes into play only in the circumstance in which systems not employing cellular architecture encounter interference.¹³² ConEd's iDEN system, however, is a cellular architecture system. Cellular architecture systems employ frequency reuse and are interference-limited within the system, *i.e.*, the predominant source of interference to a cellular architecture system is cells within the system itself. Thus, typically, before a receiver in such a system becomes affected by interference from another cell on the same frequency—or from an external interference source—it is “handed-off” to another cell on another frequency. In recognition of that fact, the *800 MHz R&O* made no changes to the rules governing interference to cellular architecture systems. Therefore, we see no reason to change the rules for interference protection to non-cellular systems to accommodate the characteristics of cellular architecture receivers and are denying ConEd's petition for reconsideration.

58. We note that our decision not to factor the performance characteristics of cellular architecture receivers into the interference equation does not mean that non-cellular, *e.g.*, public safety, systems using receivers that do not meet the performance standards for obtaining maximum protection against interference are entirely without protection. The Commission recognized that such licensees may employ older radios that fail to conform to the performance threshold standard.¹³³ In such a case, the licensee is afforded interference protection, but subject to a proportionately higher received signal threshold: for each one dB by which the receiver does not meet the performance standard, there is a one dB increase in the -104 dBm (mobile) or -101 dBm (portable) signal strength threshold.¹³⁴

¹³⁰ See Petition for Clarification and Reconsideration, filed Dec. 22, 2004, by Consolidated Edison Company of New York, Inc. (ConEd PFR (of R&O)) at 6. See also Reply to Opposition to Petitions for Clarification and Reconsideration, filed May 2, 2004, by Con Ed (ConEd Reply) at 2 (field testing reveals that their mobile units will actually meet the minimum intermodulation rejection requirements established in the *800 MHz R&O*).

¹³¹ See ConEd PFR (of R&O) at 6-7.

¹³² See 47 C.F.R. § 90.672.

¹³³ See *800 MHz R&O*, 19 FCC Rcd 15033 ¶ 112.

¹³⁴ *Id.*

I. 1.9 GHz Band

59. In the *800 MHz R&O*, the Commission concluded that Nextel should be compensated for the access to spectrum it will surrender and costs it will incur as a result of band reconfiguration by receiving access to operate on ten megahertz of spectrum, nationwide, in the 1910-1915 MHz and 1990-1995 MHz (1.9 GHz) bands.¹³⁵ In order to ensure that this did not result in an undeserved “windfall” to Nextel, the Commission assessed the relative market value of these 1.9 GHz spectrum rights against (a) the value of the 800 MHz spectrum rights surrendered by Nextel, (b) Nextel’s costs in reconfiguring the 800 MHz band and (c) the cost of clearing the 1.9 GHz band of incumbent licenses.¹³⁶

1. Challenges to the Grant of 1.9 GHz Spectrum Rights

60. Several petitioners have challenged the Commission’s decision assigning 1.9 GHz spectrum rights to Nextel,¹³⁷ arguing that:

- the Commission impermissibly relied on Sections 151 and 303 of the Communications Act of 1934, as amended (Act)¹³⁸ in compensating Nextel with 1.9 GHz spectrum rights;¹³⁹
- the Commission’s authority under Section 316 of the Act does not extend to the license modifications ordered in this proceeding;¹⁴⁰
- the Commission’s objectives of promoting competition through competitive bidding, achieving regulatory parity and fostering diversity of ownership pursuant to Sections 309(j), 332 and 257 of the Act¹⁴¹ preclude assigning

¹³⁵ See *800 MHz R&O*, 19 FCC Rcd at 15080-81 ¶¶ 210-212.

¹³⁶ See n.71 *supra*. Several parties—notably the Consensus Parties—averred that band reconfiguration could not be achieved unless Nextel was suitably compensated. *Id.*, 19 FCC Rcd at 15104-12 ¶¶ 277-297. We describe the Consensus Parties at n. 70 *supra*.

¹³⁷ *But see* Opposition and Comments of Nextel Communications, Inc. Regarding Petitions for Reconsideration, filed April 21, 2005 (Nextel Opposition) at 20-22.

¹³⁸ 47 U.S.C. § 151 (listing one of the Act’s central purposes as “promoting safety of life and property through the use of wire and radio communication”). See also 47 U.S.C. § 303 (instructing the Commission to assign frequencies to individual stations as the public convenience, interest or necessity requires).

¹³⁹ See Coastal PFR (of R&O) at 12-17.

¹⁴⁰ See Petition for Partial Reconsideration of James A. Kay, Jr., filed Dec. 22, 2004 (Kay PFR (of R&O)) at 5-10.

¹⁴¹ 47 U.S.C. §§ 309(j), 332 and 257.

spectrum rights to Nextel as part of 800 MHz band reconfiguration plan;¹⁴² and

- assigning 1.9 GHz spectrum to Nextel implicates the Anti-Deficiency Act (ADA) and the Miscellaneous Receipts Act (MRA).¹⁴³

a. The Commission's Authority

61. Coastal argues that the Commission impermissibly relied on Sections 151 and 303 of the Act in compensating Nextel with replacement spectrum and, therefore, that assigning 1.9 GHz spectrum to Nextel exceeded the Commission's statutory authority.¹⁴⁴ Coastal relies on *Motion Pictures Association of America Inc., v. FCC (MPAA)* for the proposition that "[t]he FCC cannot act in the 'public interest' if the [FCC] does not otherwise have the authority to promulgate the regulations at issue."¹⁴⁵ As discussed below, we find Coastal's argument unpersuasive.

62. We disagree with Coastal's assertion that the Commission relied exclusively on Sections 151 and 303 to modify Nextel's licenses to permit operations in the 1.9 GHz band. The Commission found that it had legal authority to implement 800 MHz band reconfiguration, including the authority to modify Nextel's licenses to permit operations in the 1.9 GHz band, under Sections 316,¹⁴⁶ 309(j),¹⁴⁷ 303,¹⁴⁸ 301,¹⁴⁹ and 151,¹⁵⁰ as well as 154(i)¹⁵¹ of the Act.¹⁵²

¹⁴² See Guskey PFR (of R&O) at 3-9; Preferred PFR (of R&O) at 33-46.

¹⁴³ See Coastal PFR (of R&O) at 17 n.36 citing 31 U.S.C. § 1341(a)(1)(B) (the Anti Deficiency Act) and 31 U.S.C. § 3302(b) (the Miscellaneous Receipts Act).

¹⁴⁴ See Coastal PFR (of R&O) at 12-14.

¹⁴⁵ *Id.* at 13-14 citing *Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (MPAA).

¹⁴⁶ 47 U.S.C. § 316(a)(1) (the Commission may modify a station license or construction permit "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this [Act] ... will be more fully complied with.").

¹⁴⁷ 47 U.S.C. § 309(j) (requiring the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, except as otherwise provided).

¹⁴⁸ 47 U.S.C. § 303(f) (the Commission may "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: provided, however, that changes in the frequencies ..., shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with"); 47 U.S.C. § 303(r) (stating that "the Commission may...[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

¹⁴⁹ 47 U.S.C. § 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this [Act]").

63. We find that *MPAA*, the precedent cited by Coastal relative to the Commission's jurisdiction, is inapposite here. In *MPAA*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) specifically bounded the Commission's authority to deal with video description because Congress had only directed the Commission to produce a report on video description—"nothing more, nothing less."¹⁵³ Here, the Commission's authority "to resolve the interference problems that exist in the 800 MHz band" was not similarly limited. As noted in the *800 MHz R&O*, in the Auction Reform Act of 2002, Congress clearly indicated its approval of the Commission considering allocating spectrum outside the 800 MHz band in order to resolve the interference problems in the 800 MHz band.¹⁵⁴

64. We reiterate that the Commission has the legal authority under the Communications Act to modify Nextel's licenses pursuant to Section 316 so long as it serves the public interest.¹⁵⁵ The starting point of the Commission's public interest analysis under Section 316 was Section 1 of the Act, which explicitly directs the Commission to promote safety of life and property through radio communications¹⁵⁶—its exact objective in the instant proceeding. *California Mobile Metro Communications v. FCC (CMMC)*¹⁵⁷ and other cases demonstrate that Section 316 confers on the Commission broad discretion to modify licenses in the public interest.¹⁵⁸ Indeed, the D.C. Circuit has held that license modifications do not have to be entirely consensual,¹⁵⁹ (Continued from previous page) _____

¹⁵⁰ 47 U.S.C. § 151.

¹⁵¹ 47 U.S.C. § 154(i) (stating that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions").

¹⁵² See *800 MHz R&O*, 19 FCC Rcd at 15010-11 ¶ 64.

¹⁵³ See *MPAA*, 309 F.3d at 807.

¹⁵⁴ See *800 MHz R&O*, 19 FCC Rcd at 15010 ¶ 63 citing the Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715, § 2(4) (2002) (*Auction Reform Act*). Congress observed that "[t]he Federal Communications Commission is also in the process of determining how to resolve the interference problems that exist in the 800 megahertz band, especially for public safety. One option being considered for the 800 megahertz band would involve the 700 megahertz band. The Commission should not hold the 700 megahertz auction before the 800 megahertz interference issues are resolved or a tenable plan has been conceived."

¹⁵⁵ See *800 MHz R&O*, 19 FCC Rcd at 15011-12 ¶¶ 65-67.

¹⁵⁶ See 47 U.S.C. § 151; see generally *800 MHz R&O*, 19 FCC Rcd at 15011 ¶ 64.

¹⁵⁷ *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45 (D.C. Cir 2004).

¹⁵⁸ *Id.*

¹⁵⁹ See *Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 288 (D.C. Cir. 1953) (upholding the Commission's authority to modify a television station license without an application by the licensee for such a modification, noting that "if modification of licenses were entirely dependent upon the wishes of existing licensees, a large part of the regulatory power of the Commission would be nullified").

that license holders may be moved on a service-wide basis, without license-by-license consideration,¹⁶⁰ and that eliminating harmful interference is an accepted basis for ordering such wholesale license modifications.¹⁶¹

65. Some parties contend that the license modifications that the Commission ordered to abate interference exceeded the license modification authority conferred on the Commission by Section 316 of the Act. James Kay argues that the Commission's Section 316 public interest finding was flawed because the Commission's goals could have been met otherwise, *i.e.*, that adequate interference abatement could be achieved by enforcement of the Commission's technical rules and reliance on market forces to cause Nextel to cease causing interference.¹⁶² Kay also argues that a generic finding that Nextel's ESMR operations are causing interference does not justify modification of the licenses of non-ESMR licensees that have not caused interference to public safety.¹⁶³ Citing *CMMC*, he further asserts that the Commission may invoke Section 316 only to modify the licenses of stations that actually or potentially cause interference or to correct errors in frequency coordination.¹⁶⁴

66. Neither Kay nor any other party has convinced us that band reconfiguration is not an essential solution for abating interference to public safety systems in the 800 MHz band. As the *800 MHz R&O* discusses in detail, unacceptable interference can result even when all contributors to that interference are operating in accordance with the rules.¹⁶⁵ Although Nextel has been implicated in interference incidents, the record reflects that the interference problem the Commission has sought to remedy in this proceeding is highly complex and has not been "caused" by any single party.¹⁶⁶ The cause is the fact that systems with incompatible technologies operate in spectral proximity to one another.¹⁶⁷ We continue to believe that the only feasible means to protect public safety licensees from unacceptable interference, now and in the future, is

¹⁶⁰ See *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000) (upholding the Commission's rules establishing procedures and a timetable under which television broadcasting would migrate from analog to digital technology).

¹⁶¹ See *CMMC*, 365 F.3d at 41.

¹⁶² See Kay PFR (of R&O) at 4-5.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See *800 MHz R&O*, 19 FCC Rcd at 15034-37 ¶¶ 115-123.

¹⁶⁶ See *id.*, 19 FCC Rcd at 15113 ¶ 300.

¹⁶⁷ See *id.*

the spectral separation the Commission achieved in relocating public safety channels as far in frequency as possible from ESMR and cellular telephone operations.¹⁶⁸

67. As noted in the *800 MHz R&O*, the holding in *CMMC* actually reinforces the Commission's legal authority to order band reconfiguration.¹⁶⁹ At issue in *CMMC* was whether the time limit established by Section 405 of the Act¹⁷⁰ precluded the Commission from modifying a license that had the potential to cause interference to an existing licensee. The *CMMC* court stated that the boundaries of Section 316 are not to be measured relative to the time limits of Section 405, but rather by the public interest standard of Section 316.¹⁷¹ Although the action under review in *CMMC* related to a frequency coordination error, the court did not hold that the Commission's right to invoke Section 316 is limited to modifying licenses of stations that cause interference or correcting technical errors, as Kay argues. Instead, as noted above, the central holding of *CMMC* and other cases affirming the Commission's Section 316 authority is that the Commission has broad discretion in modifying licenses when doing so would serve the public interest.

b. Competitive Bidding Arguments

68. Preferred contends that modifying Nextel's license to afford it access to spectrum at 1.9 GHz is impermissible under *CMCC* because *CMMC* applies to license modifications, not to initial licensing scenarios. According to Preferred, assigning Nextel 1.9 GHz access to spectrum represents a modification that is so different in kind that it constitutes issuance of an initial license under the standards enunciated in *Fresno Mobile Radio*,¹⁷² and by the Commission in the *Competitive Bidding Second R&O*¹⁷³ and as reflected in Section 1.929(a)(6)¹⁷⁴ of the Commission's Rules.¹⁷⁵

¹⁶⁸ See *id.*, 19 FCC Rcd at 15050-15052 ¶¶ 150-153.

¹⁶⁹ See *800 MHz R&O*, 19 FCC Rcd at 15011 ¶ 65 n.214.

¹⁷⁰ 47 U.S.C. § 405.

¹⁷¹ See *CMMC*, 365 F.3d at 45-46.

¹⁷² See *Fresno Mobile Radio, Inc., et al. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (*Fresno*).

¹⁷³ Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second R&O*).

¹⁷⁴ 47 C.F.R. § 1.929(a)(6).

¹⁷⁵ See Preferred PFR (of R&O) at 33-44. Preferred contends that the award of a nationwide license would be considered an initial license under the Commission's rules since it would be a "major modification." *Id.* at 36. Under the Commission's rules, Preferred argues, a licensee's request to add spectrum for which the applicant is not currently authorized is considered a major modification. *Id. citing* 47 C.F.R. § 1.929(a)(6) (application or amendment to application requesting new frequencies for which the applicant is not currently authorized should be classified as a major filing). According to Preferred, the Commission has long-recognized (continued....)

69. We reaffirm our conclusion that the grant to Nextel of access to 1.9 GHz spectrum was well within the scope of the Commission's Section 316 license modification authority and past precedent, and that the Commission was not precluded from granting such rights by license modification as opposed to initial licensing.¹⁷⁶ Contrary to Preferred's contention, the *Fresno* case does not suggest that the Commission exceeded its license modification authority here. As an initial matter, *Fresno* did not even address the scope of the Commission's license modification authority under Section 316, but only the question of whether the Commission properly exercised its initial licensing authority under Section 309(j)(1) of the Communications Act. At issue in that case was a challenge to the Commission's creation and auction of new EA-based geographic overlay licenses in the 800 MHz band for geographic areas in which there were existing site-based SMR incumbents. Because the Commission was creating an entirely new service and licensing rules for the band, with EA licensees receiving significantly expanded spectrum rights and flexibility in comparison to existing site-based licensees, the Commission rejected attempts by some incumbents to obtain EA licenses by "modification" of their existing site-based licenses. The *Fresno* court found that declining to do so was a reasonable exercise of the Commission's initial licensing authority. The court found that in order for a license to be considered "initial" under Section 309(j)(1), "a newly issued license must differ in some significant way from the license it displaces."¹⁷⁷ The court noted that "nothing in the text of [section 309(j)] forecloses [the FCC] from considering a license 'initial' if it is the first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee."¹⁷⁸ However, as the Commission stated in the *800 MHz R&O*, the authorizations that Nextel will hold as a result of the restructuring process do not differ significantly enough—in terms of rights and responsibilities—from Nextel's existing authorizations to warrant their being regarded as the issuance of a new license rather than a modification of license.¹⁷⁹

70. Although the Commission had the authority to auction licenses, it was not required to do so, as Preferred argues. Section 309(j) supports our conclusion that we have the authority to avoid mutual exclusivity in this context when it is in the public interest to do so. The Commission, acting within the discretion afforded it by Section

(Continued from previous page) _____

such a major modification as the equivalent of an initial license that is subject to the competitive bidding provisions of Section 309(j). Preferred's reliance on this rule is misplaced because the standard enunciated in the *Competitive Bidding Second Report & Order*, states that the Commission will consider the nature of the modification among other factors in determining whether a modification should be treated as an initial license. See ¶ 70 *infra*.

¹⁷⁶ See *800 MHz R&O*, 19 FCC Rcd at 15015 ¶ 73, n.236.

¹⁷⁷ See *Fresno*, 165 F.3d at 970.

¹⁷⁸ *Id.*

¹⁷⁹ See *800 MHz R&O*, 19 FCC Rcd at 15015 ¶ 73, n.236.

309(j), declined to auction the 1.9 GHz spectrum and thus did not accept applications that would have been mutually exclusive with the modification of Nextel's license. The plain language of Section 309(j) does not require the Commission to subordinate its duty of promoting safety of life and property in order to generate auction revenues and promote competition. Section 309(j)(6)(E) provides that "[nothing in this subsection shall] be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."¹⁸⁰ Thus, as the Commission stated in the *800 MHz R&O*, in Section 309(j)(6)(E), Congress recognized that the Commission can determine that its public interest obligation warrants action that avoids mutual exclusivity, and that this obligation extends to "applications and licensing proceedings" (which include license modifications), not just initial licensing matters.¹⁸¹ As the Commission found in the *800 MHz R&O*, the conclusion that it has the authority to avoid mutual exclusivity in this context when it is in the public interest to do so is supported by the Act's legislative history,¹⁸² subsequent court and Commission decisions,¹⁸³ and other provisions of the Act.¹⁸⁴

71. The *800 MHz R&O* was faithful to Congress' directive that the Commission consider a variety of public interest objectives when "identifying classes of licenses and permits to be issued by competitive bidding, in specifying the eligibility and other characteristics of such licenses and permits, and in designing methodologies for use under this subsection."¹⁸⁵ The public interest objectives of Section 309(j)(3) apply broadly to the threshold issue of which licenses should be subject to auction. Thus, Section 309(j)(3) of the Act requires us to consider our Title I obligations, pursuant to Section 151 of the Act, which includes promoting safety of life and property through radio communications. In sum, Sections 151 and 303 of the Act and recent Congressional statements buttress the conclusion that assigning Nextel 1.9 GHz spectrum rights as part of the Commission's plan to solve interference is a valid use of spectrum in the public interest.¹⁸⁶

72. Similarly, we reject Kay's argument that assigning spectrum to Nextel undermines the economic purpose of Section 309(j). His economic policy paper

¹⁸⁰ 47 U.S.C. §309(j)(6)(E) (emphasis added).

¹⁸¹ See *800 MHz R&O*, 19 FCC Rcd at 15015 ¶ 73.

¹⁸² *Id.* at 15015 n.237.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 15016 n.238.

¹⁸⁵ 47 U.S.C. § 309(j)(3).

¹⁸⁶ See *800 MHz R&O*, 19 FCC Rcd at 15010 ¶ 63 citing *Auction Reform Act*.

arguing that market based valuations are superior to third-party appraisals in assessing the value of spectrum¹⁸⁷ does not alter our conclusion that assigning the 1.9 GHz spectrum to Nextel in this case is in the public interest. Section 309(j)(7) prohibits the Commission from basing a decision to auction spectrum solely on the expectation of auction revenues.¹⁸⁸ Although the recovery of auction revenue and promoting competition are important purposes of the auction statute,¹⁸⁹ Congress recognized that there may be more important uses for spectrum than generating revenues for the Treasury. We believe that in the instant case the public interest benefit of having reliable interference-free communications for the nation's first responders is paramount.

c. Regulatory Parity

73. We also find unpersuasive claims that considerations of regulatory parity codified in Section 332 of the Act¹⁹⁰ either require the Commission to open access to 1.9 GHz spectrum to non-Nextel EA licensees,¹⁹¹ or prohibit assigning replacement spectrum exclusively to Nextel as compensation for its spectrum and monetary contributions to band reconfiguration.¹⁹² By way of background, in 1993 Congress amended Section 332 of the Act to require the Commission to classify all mobile radio services as either "commercial" or "private."¹⁹³ For certain services classified as Commercial Mobile Radio Services (CMRS), the Commission was required to promulgate "technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar [commercial] services."¹⁹⁴ The Commission subsequently concluded that SMR licensees offering for-profit interconnected services—*i.e.*, those involving both radio and landline telephone communications—are "substantially similar" to cellular telephone and Personal Communication Service (PCS) services and should therefore be subject to comparable

¹⁸⁷ See *Market-Based Valuation vs. Third Party Appraisals as a Means to Ensure Fair Valuation and Efficient Allocation of 1.9 GHz Spectrum*, Lee L. Selwyn and Helen E. Goldberg (Dec. 2004) attached to Kay PFR (of R&O).

¹⁸⁸ 47 C.F.R. § 309(j)(7).

¹⁸⁹ 47 C.F.R. § 309(j)(3).

¹⁹⁰ 47 U.S.C. § 332(c)(8).

¹⁹¹ See Preferred PFR (of R&O) at 38, 40 *citing* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 6002(d)(3)(B), 107 Stat. 397 (1993); Guskey PFR (of R&O) at 3-9.

¹⁹² See Coastal PFR (of R&O) at 14-16.

¹⁹³ See 47 U.S.C. § 332(c).

¹⁹⁴ See Pub.L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312 (1993) (requiring the Commission to determine if a reclassified private land mobile service is "substantially similar" to a common carrier service and, if so, the extent to which it is "necessary and practical" to modify our rules to ensure that the two services are subject to "comparable" technical requirements).

regulatory regimes.¹⁹⁵ However, although achieving regulatory parity is a significant policy goal that can yield important pro-competitive and pro-consumer benefits, the Commission has long recognized that parity for its own sake is not required by Section 332 or any other provision of the Act.¹⁹⁶ In fact, Congress recognized that differential regulatory treatment of CMRS providers is permissible,¹⁹⁷ because Section 332 explicitly authorizes the Commission to distinguish between CMRS providers,¹⁹⁸ and instructs us to look beyond the scope of economic competition when making spectrum management decisions, so that we may consider the effect of our actions on safety of life and property. Indeed, the Commission may not do otherwise: the D.C. Circuit has stated that “[t]he Commission is not at liberty to subordinate the public interest to the interest of ‘equalizing competition among competitors.’”¹⁹⁹ Thus, because the Commission, in the *800 MHz R&O*, provided a reasoned explanation of why Nextel’s unique role in solving the unacceptable interference problem justified differential treatment, it complied with Section 332 and the cases interpreting it.

74. We also disagree with Preferred’s contention that precedent dictates that the Commission could only assign the 1.9 GHz spectrum outside the auction process if it made it available to all EA licensees.²⁰⁰ In support of this claim, Preferred cites language in court cases to the effect that the Commission may not establish a license by rule, *i.e.*, that the Commission, merely by invoking its rulemaking authority, cannot

¹⁹⁵ See Implementation of Sections 3(n) and 332 of the Communications Act, GN 92-235, *Third Report and Order*, 9 FCC Rcd 7988, 8001-8036, 8042 ¶¶ 22-79, 94 (1994). In this connection, we note the Commission previously classified SMR licensees who offer interconnected service as CMRS whereas SMR licensees who do not offer interconnected service were classified as PMRS. See Implementation of Sections 3(n) and 332 of the Communications Act, GN 92-235, *Second Report and Order*, 9 FCC Rcd 1411, 1510 ¶ 269 (1994).

¹⁹⁶ See Year 2000 Biennial Regulatory Review -- Amendment of Part 22 of the Commission’s Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, WT Docket No. 01-108, *Order on Reconsideration*, 19 FCC Rcd 3239 at 3248 ¶ 21 (2004).

¹⁹⁷ See H.R. Rep. No. 111, 103d Cong., 1st Sess., 1993, reprinted in 1993 U.S. Code Cong. & Admin. News 378, 586-89.

¹⁹⁸ See 47 U.S.C. 332(c)(1)(A) (“A person engaged in the provision of a service that is commercial mobile radio service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person.”).

¹⁹⁹ *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995). See *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of “competition not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors”). See also *W.U. Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (“... equalization of competition is not itself a sufficient basis for Commission action”).

²⁰⁰ See Preferred PFR (of R&O) at 37.

avoid the adjudicatory procedures required for granting and modifying individual licenses.²⁰¹ However, the cases cited on this point by Preferred cannot reasonably be read to say that, in the case of modification of Nextel's licenses, the Commission was either obligated to auction the 1.9 GHz spectrum or, if not, to accept mutually exclusive applications for the spectrum.²⁰² For example, in *ARINC*, the D.C. Circuit overturned a Commission decision awarding a license to a consortium of qualified and interested parties rather than a single licensee.²⁰³ The *ARINC* court found only that the Commission's rule making authority did not extend to requiring interested applicants (which had not filed their applications as a consortium) to join a consortium and forego the opportunity to obtain individual licenses.²⁰⁴ The narrow holding in *ARINC* is inapposite here, because, pursuant to Section 309(j) of the Act, the Commission did not—and was not required to—open the 1.9 GHz spectrum to mutually exclusive applicants, much less require such applicants to establish a consortium to serve as the licensee.²⁰⁵

d. Market Entry Barriers

75. We similarly disagree with arguments that Section 257 of the Act requires the Commission to provide spectrum rights in the 1.9 GHz band to non-Nextel EA licensees.²⁰⁶ Section 257 requires the Commission to conduct a proceeding to identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services” within fifteen months of the enactment of the Telecommunications Act of 1996, and periodically to review its regulations and report to Congress regarding the existence of any such barriers.²⁰⁷ The Commission concluded the requisite initial proceeding in 1997²⁰⁸ and has since issued three Section 257 Reports to Congress, the most recent in 2004.²⁰⁹ A Section 257 review does not negate the Commission's Title I mandate to promote safety of life and property through radio communications. Thus, we are not

²⁰¹ See Preferred PFR (of R&O) at 38 citing *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 451 (D.C. Cir. 1991)(*ARINC*); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1313 (D.C. Cir. 1995); *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982).

²⁰² See Preferred PFR (of R&O) at 37-38.

²⁰³ See *ARINC*, 928 F.3d at 428.

²⁰⁴ See *id.*, 928 F.3d at 451-53.

²⁰⁵ See *800 MHz R&O*, 19 FCC Rcd at 15013 ¶ 69.

²⁰⁶ See Preferred PFR (of R&O) at 39.

²⁰⁷ See 47 U.S.C. § 257(a).

²⁰⁸ See Section 257 Proceeding To Identify and Eliminate Market Entry Barriers For Small Businesses, *Report*, GN Docket No. 96-113, 12 FCC Rcd 16802 (1997).

²⁰⁹ See Section 257 Triennial Report to Congress, *Report*, 19 FCC Rcd 3034 (2004).

persuaded that our obligation to report to Congress and to review our regulations concerning market barriers translates to the conclusion, urged by petitioners, that we are foreclosed from providing the nation's first responders with reliable 800 MHz communications systems on account of what they apparently perceive as a barrier against their entry into the telecommunications marketplace.

e. Appropriations Statutes

76. Finally, we disagree with Coastal's contention that the *800 MHz R&O* failed to adequately address concerns that the assignment of 1.9 GHz spectrum to Nextel violates the Anti-Deficiency Act (ADA) or the Miscellaneous Receipts Act (MRA).²¹⁰ The *800 MHz R&O* fully addressed the ADA, the MRA and other other legal issues raised by various commenting parties, and concluded that these statutes did not limit the Commission's authority to reallocate spectrum or to require a licensee to pay others' relocation costs in the manner provided in the *800 MHz R&O*.²¹¹ However, aware that a member of Congress had asked the Government Accountability Office (GAO) to render an opinion on the applicability of those statutes, the Commission committed to revisit the matter should the Comptroller General, the head of the GAO, unambiguously conclude that the Commission's actions violated either the ADA or the MRA.²¹² Subsequently, the GAO analyzed the *800 MHz R&O* and the Comptroller General rendered an opinion consistent with the Commission's analysis. The GAO found that providing Nextel spectrum rights in exchange for its spectral and financial contributions to band reconfiguration does not violate the ADA, because the *800 MHz R&O* does not involve FCC "obligations" or "expenditures" under the ADA.²¹³ Similarly, with regard to the MRA, the GAO found that modification of Nextel's licenses results in no money owed the government, and it deferred to the Commission's interpretation of the Commission's authority to assign Nextel spectrum pursuant to a license modification.²¹⁴ Coastal has failed to address the GAO decision or present any new argument that would suggest a violation of these appropriations statutes. Accordingly we reaffirm the Commission's sound conclusion that the *800 MHz R&O* did not violate the ADA and MRA.

²¹⁰ See Coastal PFR (of R&O) at 17 n.36.

²¹¹ *Id.* at 15020-21 ¶¶ 85-87.

²¹² See *id.* at 15021 ¶ 86.

²¹³ See Letter, dated Nov 8, 2004, from Anthony Gamboa, General Counsel, General Accounting Office to the Honorable Frank R. Lautenberg, U.S. Senate (*GAO Letter*). The ADA, 31 U.S.C. § 1341(a)(1)(B), prohibits federal agencies from obligating or expending funds in excess or in advance of the amount Congress has appropriated. *Id.* at 9-10.

²¹⁴ *GAO Letter* at 18-22. The MRA, 31 U.S.C. 3302(b), requires that money received for the United States be deposited in the Treasury and an agency cannot avoid the statute by changing the form of its transaction to avoid receiving money that would otherwise be owed to it unless so authorized by law.

2. Valuation

77. In the *800 MHz R&O*, the Commission estimated that a fair market value of the 1.9 GHz band replacement spectrum rights was \$1.70 per MHz per person (MHz-pop) or approximately \$4.86 billion,²¹⁵ which it based, in part, on two benchmark secondary market transactions: a December 2002 purchase by Verizon Wireless of fifty Northcoast licenses and a Fall 2003 agreement by Cingular Wireless to purchase NextWave spectrum in thirty-four cities.²¹⁶ One petitioner contends that we must revalue the 1.9 GHz spectrum based on Verizon Wireless's July 8, 2004 purchase of ten megahertz of PCS spectrum in New York for \$930 million instead of the Verizon/Northcoast transaction in which Verizon paid only \$481 million to purchase a ten megahertz New York license.²¹⁷ This substitution, it is argued, would raise the fair market value of the 1.9 GHz band spectrum rights to \$2.19 MHz-pop.²¹⁸

78. We decline to reconsider the valuation performed in the *800 MHz R&O*. As an initial matter, we note that the valuation method used by the Commission is not in dispute, but rather whether we should revalue the 1.9 GHz band spectrum rights based on a more recent transaction. The Commission performed the valuation in the *800 MHz R&O* using the most recent arms-length transactions involving the purchase of large numbers of spectrum licenses.²¹⁹ The Commission found that these transactions most accurately reflected the value of a nationwide license because they involved a large number of licenses spanning a representative range of small to large markets and no assets other than the licenses themselves were involved.²²⁰

79. The Commission recognized that the spectrum value could change after the order was adopted but emphasized that the value of spectrum is seldom static because it hinges on multiple variables, some intangible, which exist at the moment a willing buyer and willing seller agree to a transaction or when an informed bidder places its bid in an auction.²²¹ Thus, the estimate performed by the Commission was a "snapshot" based on the best available data at that time. Although the Verizon transaction occurred on July 8, 2004, the day the *800 MHz R&O* was adopted, it would have been impossible for the Commission to factor this transaction into its valuation without further delay of the order. We see no reason to revisit the valuation based on the Verizon or

²¹⁵ See *800 MHz R&O*, 19 FCC Rcd at 15112 ¶ 297.

²¹⁶ *Id.*, 19 FCC Rcd at 15111 ¶ 293.

²¹⁷ *Guskey PFR (of R&O)* at 4-5.

²¹⁸ *Id.*

²¹⁹ See *800 MHz R&O*, 19 FCC Rcd at 15111 ¶ 294.

²²⁰ See *id.*

²²¹ See *id.*, 19 FCC Rcd at 15107 ¶ 283.

any subsequent transaction. We believe that continuing to alter our valuation based on the latest transactions would create continuing uncertainty, undermine the band reconfiguration process, and violate the cardinal regulatory principal of administrative finality.

3. Effect of the Proposed Sprint/Nextel Merger

80. On December 14, 2004, Sprint Corporation (Sprint) and Nextel announced their intention to merge into a single company, to be called Sprint Nextel.²²² On February 8, 2005, Sprint and Nextel filed joint applications requesting that the Commission approve the transfer of control of licenses and authorizations currently held or controlled, directly or indirectly, by Nextel in connection with their proposed merger.²²³ In their merger application, Sprint and Nextel agree to accept the obligations placed on Nextel in the *800 MHz R&O*.²²⁴ We approved the merger on August 3, 2005.²²⁵

81. Some petitioners claim that we should reevaluate our actions in this proceeding in light of the proposed merger.²²⁶ For example, Duncan contends that the Commission would presumably require the proposed merged entity to divest itself of 1.9 GHz spectrum given the spectral overlaps between Sprint's holdings and 1.9 GHz spectrum to be licensed to Nextel.²²⁷ Our approval of the merger renders Duncan's

²²² See Joint Press Release of Sprint and Nextel, dated Dec. 15, 2004 "Sprint and Nextel to Combine in Merger of Equals" available at http://sprintnextel.mergerannouncement.com/?refurl=uhp_globalnav_merger (Merger Press Release).

²²³ See Applications for the Transfer of Control of Licenses and Authorizations from Nextel Communications, Inc. and its Subsidiaries to Sprint Corporation, WT Docket 05-63, *Order*, DA 05-423, 20 FCC Rcd 3607 (WTB 2005).

²²⁴ See File No. 0002031766, Application, WT Docket No. 05-63 at 62-63. See also Nextel Opposition to PFR at 21. In this connection, we reject the argument that we should refrain from assigning Nextel 1.9 GHz spectrum until completion of band reconfiguration. See Guskey PFR (of R&O) at 4. Such a request is unnecessary given that the R&O imposes several conditions on Nextel's 1.9 GHz licenses, including the requirement to complete band reconfiguration.

²²⁵ See Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 05-148 (rel. Aug. 8, 2005).

²²⁶ See Petition for Reconsideration of Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, filed Dec. 22, 2004 by Richard W. Duncan d/b/a Anderson Communications (Duncan PFR (of R&O)) at 5; Reply to Opposition and Comments of Nextel Ommunicaions[sic], Inc. Regarding Petitions for Reconsideration filed Apr. 28, 2005 by Richard W. Duncan d/b/a Anderson Communications (Duncan Reply) at 3-4. See also Reply to Oppositions to Petitions for Reconsideration, filed May 2, 2005, by Preferred Communication Systems, Inc. (Preferred Reply) at 3-4.

²²⁷ See Duncan PFR (of R&O) at 5-6. As noted below, we herein resolve some of the issues raised in the petition for reconsideration filed by Richard W. Duncan d/b/a Anderson Communications. We subsequently will address any remaining issues raised in that petition.

request to stall the band reconfiguration process pending a Commission ruling on the Nextel Sprint merger moot.

82. Duncan also claims that the Nextel Sprint merger obviates the need for Nextel to use 1.9 GHz to develop a next generation network, and therefore the valuation of spectrum surrendered by Nextel fails to take into account what Duncan describes as \$3 billion in cost-savings if it “flips” the 1.9 GHz spectrum at a profit.²²⁸ Again, Duncan relies solely on speculation about Nextel’s business plans and offers no support for the supposition that Nextel will not use 1.9 GHz spectrum to develop a next-generation network. His claim that Nextel would realize a cost savings as a consequence of the merger is similarly speculative and unsupported. Although there is no assurance that a merged Nextel Sprint entity would be successful, the combination of the two licensees’ financial resources suggests that the merged entity would be better equipped to bear the cost of band reconfiguration. Accordingly, we decline to revisit the fair market value of the 1.9 GHz spectrum based on any alleged “cost savings” Nextel will receive as a consequence of the merger. As noted in paragraph 79 *supra*, considerations of administrative finality preclude our re-evaluating our estimates every time there is a financial event in the wireless industry that could bear on the value of the 1.9 GHz spectrum.²²⁹ We also reject, as speculative and unsupported, Duncan’s claim that the Commission intended to solve the interference problems in the 800 MHz band by having Nextel migrate its current network to the 1.9 GHz band. Neither the *800 MHz R&O* nor the *Supplemental Order* reflect such an intention.

83. Finally, we reject Guskey’s argument that we should refrain from assigning Nextel 1.9 GHz spectrum until completion of band reconfiguration.²³⁰ We believe that the *800 MHz R&O* imposes sufficient conditions on the 1.9 GHz license to ensure that Nextel will perform its band reconfiguration obligations.²³¹

J. 800 MHz Spectrum Rights Valuation

84. As one component of its “value for value” analysis, the Commission estimated the market value of the 800 MHz spectrum rights that Nextel would relinquish as a result of band reconfiguration.²³² Parties ask us to reconsider this valuation, arguing that the Commission overvalued Nextel’s General Category spectrum rights, and should not

²²⁸ See Duncan PFR (of R&O) at 6-7; Duncan Reply at 4-5. Duncan only cites “a recent report in the Wall Street Journal” as the basis for his argument.

²²⁹ See also ¶ 79, *supra*; *800 MHz R&O*, 19 FCC Rcd at 15105-25 ¶¶ 279-332.

²³⁰ See Guskey PFR (of R&O) at 4.

²³¹ See *800 MHz R&O*, 19 FCC Rcd at 15081-82 ¶ 214.

²³² See *id.*, 19 FCC Rcd at 15117-21 ¶¶ 314-323.

have credited Nextel for restricting its use of the 800 MHz band at the ESMR band edge and Nextel's costs for new filters for Nextel cells operating there.²³³

1. General Category Spectrum Rights

85. The Commission established a baseline value of \$1.70 per MHz-pop for contiguous spectrum in the 800 MHz band and applied this value to Nextel's General Category spectrum.²³⁴ It discounted Nextel's interleaved spectrum by 12.5 percent because Nextel would likely experience reduced capacity while operating on interleaved spectrum.²³⁵ The reduced capacity stems from the fact that, on interleaved channels, Nextel must limit its operations to avoid causing out-of-band emission (OOBE) interference to adjacent channel licensees.²³⁶

86. Some parties claim that the Commission, in addition to applying a discount for channels in the interleaved portion of the band, should have applied a similar discount to Nextel's current General Category spectrum rights.²³⁷ We reject these claims because they fail to recognize that there are far fewer site-based incumbents in the General Category than in the interleaved channels, and hence fewer licensees subject to potential interference. Moreover, the Commission specifically accounted for these site-based incumbents when it accepted Nextel's granular data on usable channels in the General Category.²³⁸

2. Credit for Operational Restrictions at the Edge of ESMR Portion of the Band

87. In the *800 MHz R&O*, the Commission granted Nextel a credit for the operational restrictions that Nextel would encounter at the bottom edge of its contiguous 800 MHz ESMR spectrum in the 817-824 MHz/862-869 MHz band segment because of the need to limit out-of-band emissions (OOBE). The Commission concluded that these restrictions would effectively limit Nextel's use of half a megahertz of its ESMR spectrum after rebanding.²³⁹ We disagree with the contention that this credit was

²³³ See Guskey PFR (of R&O) at 7-8. We disagree with Guskey's assertion that the Commission should not have given Nextel credit for spectrum that Nextel Partners will relinquish. *Id.* at 9-10. Nextel Partners and Nextel jointly agreed that this is how the Commission should apportion that credit. See Comments of Nextel Communications, Inc., and Nextel Partners Inc., filed Dec. 2, 2004 at 9-10. We decline to overturn that agreement.

²³⁴ See *800 MHz R&O*, 19 FCC Rcd at 15117 ¶ 315.

²³⁵ See *id.*, 19 FCC Rcd at 15118-19 ¶ 318.

²³⁶ See *id.*

²³⁷ See, e.g., Guskey PFR (of R&O) at 7.

²³⁸ See *Supplemental Order*, 19 FCC Rcd 25134-35 ¶ 31 n.69.

²³⁹ *Id.*, 19 FCC Rcd at 15118 ¶ 316.

inappropriate because Nextel already had been given credit for relinquishing its Guard Band and Expansion Band spectrum below 817/862 MHz.²⁴⁰ This argument fails to take into account that there will be stations operating in the Guard Band and Expansion Band, and that Nextel must afford them interference protection, albeit on a sliding scale starting below the upper portion of the Guard Band.²⁴¹ To achieve this protection, Nextel must avoid the use of certain channels in the lower portion of the ESMR band, or provide filtering equipment for cells operating there. We therefore conclude that the Commission properly took these factors into account when it performed its valuation calculation.

3. Credit for Installing Filters

88. Guskey argues that by crediting Nextel for the cost of filters Nextel will install to protect non-cellular systems operating below 817 MHz/862 MHz, the Commission inappropriately gave Nextel credit for costs it would incur in any event to comply with Commission regulations.²⁴² As the Commission noted in the *800 MHz R&O*, Nextel must extensively modify its systems to accommodate band reconfiguration.²⁴³ When the Commission directed Nextel to confine its ESMR operations to frequencies above 817/862 MHz, it recognized that, at the ESMR/non-ESMR intersection, Nextel would have to install additional filtering at its cell sites if it was to avoid interference to stations in the Guard Band, immediately below.²⁴⁴ Assuming, *arguendo*, that the expenses that Nextel must incur relate to compliance with the Commission's rules, they are actual expenses, nonetheless, that Nextel is incurring as a direct consequence of band reconfiguration. Accordingly, the Commission properly factored the cost of such filtering equipment into its value-for-value analysis. We therefore deny this element of Guskey's petition.

K. EA and Site-Based Vacated Spectrum

89. Pursuant to the *800 MHz R&O*, Nextel will relinquish all of its 800 MHz spectrum holdings below 817/862 MHz as part of band reconfiguration.²⁴⁵ Pursuant to the *Supplemental Order* and the decisions we take in the instant *MO&O*, other EA licensees may also relocate their EA and, in some instances, site-based holdings from the lower portion of the 800 MHz band into the ESMR band segment.²⁴⁶ Should any of

²⁴⁰ Guskey PFR (of R&O) at 8.

²⁴¹ See *800 MHz R&O*, 19 FCC Rcd at 15054-55 ¶ 158.

²⁴² See Guskey PFR (of R&O) at 8; *800 MHz R&O*, 19 FCC Rcd at 15113-14 ¶¶ 301-302.

²⁴³ See *800 MHz R&O*, 19 FCC Rcd at 15113-14 ¶¶ 301-302.

²⁴⁴ *Id.*

²⁴⁵ See *800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

²⁴⁶ See generally ¶¶ 10-28 *supra*.

the vacated spectrum (EA or site-based) consist of public safety pool channels, those channels will remain in the public safety pool and only eligible public safety entities may apply for them. Non-public safety pool vacated spectrum (EA or site-based) will be available for three years only to public safety eligibles, and in the following two years, only public safety and CII eligibles may apply for such channels.²⁴⁷ The three-year and two-year (cumulatively five-year) periods must be measured from the date that band reconfiguration is completed in a given NPSPAC region.²⁴⁸ In response to the requests of several parties,²⁴⁹ we note that the construction requirements of Section 90.155 of our rules continue to apply to these channels, including those pertaining to the ability of public safety licensees to seek extended implementation pursuant to section 90.629 of our rules.²⁵⁰

90. Because of the limitations on public safety entities operating in the Guard Band and the Expansion Band, the foregoing eligibility restriction applies only to vacated spectrum below the Expansion Band.²⁵¹ Vacated spectrum in the Expansion Band or Guard Band will be open to any entity eligible for licensing on these channels. For instance, a B/ILT channel in the Expansion Band which is vacated by a relocating EA licensee will be available after band reconfiguration for licensing to any B/ILT eligible.²⁵²

91. We appreciate the concern raised by the American Electric Power Company that public safety or CII licensees could acquire channels pursuant to the restricted eligibility provisions discussed above and then “flip” the licenses to entities that otherwise would be ineligible, *e.g.*, transferees seeking to use the channels for

²⁴⁷ See 47 C.F.R. § 90.617(g) (as amended in Appendix B *infra*). Limited eligibility will also apply to channels vacated by licensees choosing to relocate to the Guard Band. See 47 C.F.R. § 90.617(h) (as amended in Appendix B *infra*).

²⁴⁸ See *800 MHz R&O*, 19 FCC Rcd at 15052 ¶ 152; 47 C.F.R. §§ 90.615, 90.617(g). While the Commission originally restricted eligibility to this vacated spectrum relative to the effective date of the *800 MHz R&O*, it subsequently modified this date to ensure that all public safety and CII licensees enjoy the same temporal amount of exclusive access to ESMR-vacated spectrum following the conclusion of band reconfiguration in a NPSPAC region. See *Supplemental Order*, 19 FCC Rcd at 25145 ¶58.

²⁴⁹ See Petition for Clarification of American Electric Power Company, Inc., filed Dec. 21, 2004 (AEP PFR (of R&O)) at 6; Opposition to Petition for Clarification of American Electric Power Company, Inc., filed by the Association of Public-Safety Communications Officials-International, Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, International Municipal Signal Association, Inc., Major Cities Chiefs Association, Major County Sheriffs' Association, and National Sheriffs' Association, filed Apr. 21, 2005 (APCO Opposition) at 2.

²⁵⁰ Extended implementation refers to the ability of licensees to request a period of up to five years to place their systems in operation. See 47 C.F.R. § 90.629.

²⁵¹ See 47 C.F.R. §§ 90.617(g), (h).

²⁵² *Cf.* 47 C.F.R. § 90.615.

CMRS.²⁵³ Such conduct would be inconsistent with Commission's intention in this proceeding. While we decline to take a specific action here—such as requiring a holding period—we will monitor developments and stand ready to take action in the future if the public safety/CII access provision is abused.

92. In the *Supplemental Order*, the Commission noted that it will issue a public notice specifying when entities may begin filing for vacated spectrum in a given NPSPAC region.²⁵⁴ We will issue such a public notice when reconfiguration is complete in a given NPSPAC region.²⁵⁵ The release date of the public notice will serve as the start date for the limited five-year eligibility clock, (*i.e.*, three years for public safety and the following two years for public safety and CII). We delegate to the Chief of the Wireless Bureau the authority to issue such public notices.

93. Exelon seeks reconsideration of the Commission's decision not to afford CII entities the same priority for obtaining EA Incumbent-vacated spectrum as public safety entities.²⁵⁶ We decline to do so because the Commission has repeatedly stressed that one of the paramount goals of this proceeding is to provide additional 800 MHz spectrum that can be quickly accessed by public safety agencies and rapidly integrated into their existing systems.²⁵⁷ As noted in paragraph 45, *supra*, the communications of public safety entities and CII entities are readily distinguishable, *i.e.*, the communications of CII licensees relate primarily to their core businesses and only occasionally matters affecting public safety, whereas public safety licensees have, as their central purpose, the use of radio communications to protect life and property.²⁵⁸ Therefore, we deny Exelon's petition.

94. We also decline to require public safety agencies applying for EA incumbent-vacated spectrum to abide by a frequency plan derived by an 800 MHz Regional Planning Committee (RPC).²⁵⁹ We have not been shown that the benefit of such a plan would be commensurate with the cost, complexity, and delay that implementing it would be likely to entail. We note that the Commission assigned the TA the responsibility of

²⁵³ See AEP PFR (of R&O) at 6.

²⁵⁴ See *Supplemental Order*, 19 FCC Rcd 25145 ¶ 58.

²⁵⁵ The determination of whether or not band reconfiguration will be deemed substantially complete is highly fact-dependent and will be determined at the Commission's discretion at the time the *Public Notice* is issued.

²⁵⁶ See Petition for Reconsideration, filed Dec. 22, 2004, by Exelon Corporation (Exelon PFR (of R&O)) at 5.

²⁵⁷ See *800 MHz R&O*, 19 FCC Rcd at 14973 ¶ 2.

²⁵⁸ See 47 U.S.C. §337(f) (definition of public safety services).

²⁵⁹ See APCO Opposition at 2-3.

choosing channel assignments for relocating licensees and we expect the TA to do so in an efficient manner. We also note that the Commission developed RPCs specifically to administer the NPSPAC frequencies, which consisted of large blocks of vacant spectrum. The RPC construct would be of questionable value if applied to EA-vacated channels scattered throughout spectrum occupied by existing B/ILT, public safety and conventional SMR systems.

L. Application Freeze

95. In the *800 MHz R&O*, the Commission stated that it would freeze the processing of applications on a NPSPAC region-by-NPSPAC region basis and that the freeze would correspond to the relocation negotiation schedule.²⁶⁰ Subsequently, the TA provided a proposed two-part relocation schedule that contemplated two separate negotiation periods in each NPSPAC region. The first negotiation period applied to licensees outside the original NPSPAC band segment, and the second schedule applied to licensees currently located within the original NPSPAC band segment. The Bureau concurred in the TA's recommendations.²⁶¹ In a subsequent *Public Notice*, the Bureau explained that under the two-part negotiation schedule, each NPSPAC region would undergo two freeze periods, one affecting licensees operating outside the original NPSPAC band segment and the second affecting licensees within the original NPSPAC band segment.²⁶² The Bureau stated that the two-freeze approach would make band reconfiguration more efficient, and minimize any adverse effect that a longer-term single freeze period would have on incumbent licensees and new applicants.²⁶³

96. In a joint petition for reconsideration filed by a group of public safety organizations, we are requested to further clarify the provision in the *Freeze Clarification PN* concerning which stations must be "frozen."²⁶⁴ Specifically, petitioners maintain that

²⁶⁰ *800 MHz R&O*, 19 FCC Rcd at 15078 ¶ 204.

²⁶¹ See Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan, WT Docket No. 02-55, *Public Notice*, DA 05-619, 70 Fed. Reg. 21786 (2005). The Reconfiguration Schedule filed by the TA is available on the Commission's 800 MHz band reconfiguration web page at <http://www.800MHz.gov>. See also Wireless Telecommunications Bureau Announces That 800 MHz Band Reconfiguration Will Commence June 27, 2005, in the NPSPAC Regions Assigned to Wave 1 and Specifies 800 MHz Reconfiguration Benchmark Compliance Dates, *Public Notice*, DA 05-1546, rel. May 27, 2005 (*Starter PN*).

²⁶² See Wireless Telecommunications Bureau Outlines Applications Freeze Process For Implementation of 800 MHz Band Reconfiguration, *Public Notice*, DA 05-1340 (WTB May 11, 2005) (*Freeze Clarification PN*).

²⁶³ *Id.* at 2.

²⁶⁴ See Petition for Clarification or Partial Reconsideration of Freeze Process for Implementation of 800 MHz Band Reconfiguration, filed by Association of Public-Safety Communications Officials-International-Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, International Municipal Signal Association, Inc., Major Cities Chiefs Association, Major County Sheriff's Association and National Sheriff's Association (Public Safety Organizations Petition) at 2-3 (May 16, 2005).

it is unnecessary to include public safety channels in the interleaved portion of the band (*i.e.*, 809.75-815/854.75-860 MHz) in the freeze, and therefore request that such stations be entirely exempted from the application freeze.²⁶⁵

97. We acknowledge that most of the applications for license modification to be filed by public safety licensees will be for channels in the new NPSPAC band segment at 806-809/851-854 MHz. However, there will also be instances where public safety entities (*e.g.*, public safety systems currently located in the Guard Band and the Expansion Band) will be relocated into channels in the 809-815/854-860 MHz portion of the band.²⁶⁶ In order for the TA to determine the channels to which these systems are to be relocated, the TA must have a stable spectrum environment in which licensees are not allowed to change channels or expand their coverage. Otherwise, for example, if the TA were to select channel “X” for a relocating licensee, mutually exclusive applications could be filed and granted while the relocating licensee is evaluating the suitability of channel X as part of the negotiation process, which then would have to be re-started once the TA selected a new channel. This scenario could be replicated multiple times, particularly in large and heavily populated NPSPAC regions where usable channels are at a premium. The resultant delay and expense would be inconsistent with the Commission’s express goal in this proceeding that band reconfiguration be completed within a thirty-six-month timeframe. Accordingly, we deny the petition for reconsideration. We remain, however, keenly aware of the vital role public safety communications plays in the protection of life and property and are committed to minimize any disruption the freeze could cause to this critical resource. Thus, we will expedite an evaluation of requests for waiver of the freeze filed by public safety entities.

98. We also take this opportunity to restate that we will not accept license modification applications that request more channels than are necessary to effect a given licensee’s relocation.²⁶⁷ We also will not accept modification applications that propose to expand the coverage area of an existing system. This includes, for example, modification applications that seek to correct the operating parameters of existing stations, such as effective radiated power, antenna elevation or geographical coordinates, when to do so would expand the licensee’s currently authorized coverage contours. In short, modification applications are limited to adding the new agreed-upon frequencies (*i.e.*, frequencies consistent with the TA plan) or deleting the “old” frequencies. Thus, licensees are strongly cautioned to carefully verify the accuracy of

²⁶⁵ *Id.* As noted above, the decision to freeze channels was adopted in the *800 MHz R&O*. See *800 MHz R&O*, 19 FCC Rcd at 15078 ¶ 204. Thus, any request to eliminate certain channels from the freeze should have been filed as a petition for reconsideration of the *800 MHz R&O*. Nevertheless, we will address this issue herein.

²⁶⁶ Although most such relocations will be to channels vacated by ESMR licensees, there is no certainty that there will be an adequate number of such channels to accommodate all public safety relocations.

²⁶⁷ *800 MHz R&O*, 19 FCC Rcd at 15078 ¶ 204.

their current authorizations and file any corrective applications prior to the time the band is “frozen” in their NPSPAC regions or after the freeze is lifted.²⁶⁸

M. Cost Reporting and Accounting Issues

99. Pursuant to the *800 MHz R&O*, the TA is required to file quarterly progress reports with the Commission in addition to an annual report to be filed on each anniversary of the effective date of the *800 MHz R&O*. The TA proposes a modification of the schedule to coordinate the reporting process with Securities and Exchange Commission (SEC) financial reporting regulations, applicable to Nextel, that forbid public disclosure of material financial information before Nextel’s quarterly and annual submissions are made to the SEC.²⁶⁹ The TA proposes that it file its quarterly and annual reports, which will contain material financial information concerning Nextel, with the Commission on the first business day following Nextel’s anticipated quarterly and annual filings with the SEC.²⁷⁰ We believe that the TA’s request is reasonable, and amend section 90.676 of our rules accordingly.²⁷¹

N. BAS/MSS Issues

1. NAB/MSTV/SBE and Nextel Petitions for Reconsideration and Nextel/MSTV/NAB Request for Declaratory Ruling

100. The *800 MHz R&O* granted Nextel the use of spectrum at 1.9 GHz and established provisions for Nextel’s clearing the 1990-2025 MHz band segment of Broadcast Auxiliary Service (BAS) incumbents.²⁷² Specifically, Nextel’s licenses are

²⁶⁸ See *Supplemental Order*, 19 FCC Rcd at 25148 ¶ 65. Applications to correct errors in data in the Commission’s licensing database may be filed after reconfiguration has been completed in the relevant NPSPAC region.

²⁶⁹ See Motion of 800 MHz Transition Administrator, LLC to Revise the Annual Progress Reporting Schedule, filed June 17, 2005.

²⁷⁰ *Id.*

²⁷¹ See 47 C.F.R. § 90.676 (as amended in Appendix B *infra*).

²⁷² See *800 MHz R&O*, 19 FCC Rcd at 15095-15100 ¶¶ 251-263. BAS includes mobile TV pickup (TVPU) stations—land mobile stations used for the transmission of TV program material and related communications, including electronic newsgathering (ENG) operations, from scenes of events back to the TV station or studio—and fixed BAS operations such as studio-to-transmitter link (STL) stations, TV relay stations, and TV translator relay stations. The majority of these fixed operations are in higher frequency bands allocated to the BAS. See 47 C.F.R. §§ 74.601(a),(b) (listing classes of TV broadcast auxiliary stations). See generally 47 C.F.R. § 74.600 (Eligibility for license). In addition, BAS spectrum in the 2 GHz band is authorized for use by the Cable Television Relay Service (CARS) and the Local Television Transmission Service (LTTS). See 47 C.F.R. §§ 74.602, 78.18(a)(6) and § 101.801. For convenience, we refer to these services herein under the collective term “BAS.” Thus, decisions herein that refer to BAS also apply to CARS and LTTS operations in the band. The original 2 GHz BAS channel plan, which is still in use, is as follows: Channel 1 (1990-2008 MHz), Channel 2 (continued....)

conditioned on Nextel following a relocation procedure based on a plan submitted to the Commission by Nextel, the Association for Maximum Service Television (MSTV), and the National Association of Broadcasters (NAB).²⁷³

101. Prior to the effective date of the *800 MHz R&O* rules, the Commission had established a plan by which 2 GHz Mobile Satellite Service (MSS) licensees would relocate incumbent BAS operations in the entire 1990-2025 MHz band.²⁷⁴ However, in the *800 MHz R&O*, the Commission found that the best way to ensure the continuity of BAS, a critical part of the broadcasting system by which emergency information and entertainment content is provided to the American public, during the transition was to retain the existing MSS relocation rules but also to overlay procedures by which Nextel may relocate BAS incumbents.²⁷⁵ Therefore, Nextel is also obligated to clear the entire 1990-2025 MHz band of incumbent BAS operations.²⁷⁶ The plan adopted by the Commission calls for Nextel's relocation of all BAS licensees from the 1990-2025 MHz band to comparable facilities within thirty months after the effective date of the *800 MHz R&O*.²⁷⁷ The Commission directed Nextel to clear the 1990-2025 MHz band in two

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(2008-2025 MHz), Channel 3 (2025-2042 MHz), Channel 4 (2042-2059 MHz), Channel 5 (2059-2076 MHz), Channel 6 (2076-2093 MHz), and Channel 7 (2093-2110 MHz).

²⁷³ See *800 MHz R&O*, 19 FCC Rcd at 15131-32 ¶ 353.

²⁷⁴ See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile-Satellite Service, ET Docket No. 95-18, *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd 12315, 12365-66 ¶ 24 (2000) (*MSS Second R&O*). In 2003, the Commission reallocated fifteen megahertz of spectrum from MSS in the 1990-2025 MHz band to support new fixed and mobile services—ten megahertz in the 1990-2000 MHz band and five megahertz in the 2020-2025 MHz band. See 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, *Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, 18 FCC Rcd 2223, 2231-32 ¶15 (2003) (*AWS Third R&O, Third NPRM, and Second MO&O*). Given the need to provide for the rapid introduction of advanced wireless services (AWS) in the 2 GHz BAS band, the Commission modified the plan that 2 GHz MSS licensees were to follow when relocating incumbent BAS licensees in the 1990-2025 MHz band. See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket No. 95-18, *Third Report and Order and Third Memorandum Opinion and Order*, 18 FCC Rcd 23638, 23653-61 ¶¶ 29-44 (2003) (*MSS Third R&O*).

²⁷⁵ See *800 MHz R&O*, 19 FCC Rcd at 15094-95 ¶ 250. In that regard, the Commission further modified the MSS-BAS relocation plan to no longer require BAS licensees in TV markets 31-210 to cease operations on channels 1 and 2 (1990-2008 MHz and 2008-2025 MHz, respectively) until they have been relocated to the new band plan at 2025-2110 MHz. The Commission found that this modification was appropriate to accommodate Nextel's entry into the band under the adopted Nextel-BAS plan, which did not require BAS incumbents in markets 31 and above to cease operations on these two channels without receiving compensation prior to vacating the spectrum. See *id.* at 15102 ¶ 269.

²⁷⁶ See *800 MHz R&O*, 19 FCC Rcd at 15095-15100 ¶¶ 251-263.

²⁷⁷ See *id.*, 19 FCC Rcd at 15096 ¶ 253. The Commission subsequently extended this deadline by forty-five days to September 7, 2007. See Commission Seeks Comment on *Ex Parte* Presentations and Extends Certain (continued....)

stages: during stage one, Nextel will relocate all BAS incumbents in markets where Nextel elects to deploy 1.9 GHz service immediately, and in any adjacent markets that raise BAS inter-market coordination and interference problems, as well as any fixed BAS facilities, regardless of market size; and during stage two, Nextel will relocate BAS incumbents in all remaining markets.²⁷⁸

102. The Commission required Nextel and the BAS licensees to negotiate BAS relocation on two schedules, both tied to Nextel's stage one and stage two implementation.²⁷⁹ The *800 MHz R&O* specified that mandatory negotiations in the stage one markets had to be concluded by July 15, 2005, and the mandatory negotiations in the stage two markets had to be concluded by May 15, 2006.²⁸⁰

103. The NAB, MSTV and the Society of Broadcast Engineers, Inc. (SBE) have jointly requested that the Commission extend the mandatory negotiation period for stage one BAS relocations to March 21, 2006, and for stage two relocations to March 21, 2007.²⁸¹ Nextel filed a petition for reconsideration in support of this request.²⁸² NAB, MSTV and SBE ask that the Commission adjust the schedule for mandatory BAS relocation negotiations by tying the schedule to the effective date of the *800 MHz R&O*,

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Deadlines Regarding the 800 MHz Public Safety Interference Proceeding WT Docket No. 02-55, *Public Notice* (rel. Oct. 22, 2004) (*October 2004 Public Notice*).

²⁷⁸ Stage-one relocations are to be completed within eighteen months and stage two within thirty months after the effective date of the *800 MHz R&O*. See *800 MHz R&O*, 19 FCC Rcd at 15095 ¶ 251. The Commission subsequently extended these deadlines by forty-five days. See *October 2004 Public Notice*. For relocation purposes, BAS markets consist of Nielsen Designated Market Areas (DMAs) as they existed on June 27, 2000. *MSS Second R&O*, 15 FCC Rcd at 12329-30 ¶ 42.

²⁷⁹ The Commission stated that MSS licensees may voluntarily join in these negotiations in order to relocate BAS operations in markets 31 and above and any fixed BAS operations, regardless of market size. We encouraged MSS licensees to work cooperatively with Nextel in these negotiations because all parties would collectively benefit from the expeditious relocation of BAS incumbents to the new band plan. See *800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 258.

²⁸⁰ The original deadlines were May 31, 2005 for stage one relocations and March 31, 2006 for stage two relocations. See *800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 258. The Commission subsequently extended the mandatory negotiation periods to July 15, 2005 for stage one relocations and May 15, 2006 for stage two relocations. See *October 2004 Public Notice*.

²⁸¹ See Letter, dated Dec 2, 2004, from Lawrence A. Walke, National Association of Broadcasters (NAB), David L. Donovan, Association for Maximum Service Television (MSTV) and Christopher D. Imlay, Counsel for Society of Broadcast Engineers, Inc. (SBE) to Marlene H. Dortch, Secretary, Federal Communications Commission (NAB/MSTV/SBE Letter).

²⁸² See Nextel Petition for Clarification and/or Reconsideration dated Dec. 22, 2004 (*Nextel Petition*). We note that Nextel withdrew this petition except for the request to extend the Nextel-BAS mandatory negotiation deadlines as proposed by the broadcast industry parties. See Letter, dated Apr. 21, 2005, from James B. Goldstein, Senior Attorney, Government Affairs, Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission.

as reflected by the dates referenced above, thereby giving incumbent BAS licensees and Nextel sufficient time to negotiate and complete BAS relocation.²⁸³ The parties claim that an extension is necessary because negotiations could only commence “after Nextel has accepted the license modifications and obligations set forth in the [800 MHz R&O]” and because the negotiation “clock” began before the 800 MHz R&O became effective, which shortens the amount of time available for negotiation.²⁸⁴ NAB, MSTV and SBE further claim that extending the mandatory negotiation periods should not affect Nextel’s other deadlines, *i.e.*, the actual completion of the BAS relocation process, filing progress reports, seeking reimbursement from MSS licensees, and filing the BAS relocation plan.²⁸⁵

104. We decline to extend the mandatory negotiation periods as the petitioners request. Nextel’s acceptance of the license modifications, obligations and conditions set forth in the 800 MHz R&O and subsequent decisions has now occurred and thus eliminates uncertainty regarding the timing of Nextel’s BAS relocation obligations.²⁸⁶ The Commission allotted adequate time for incumbent BAS licensees to prepare for relocation negotiations with new entrants (*e.g.*, MSS licensees and Nextel) in the 1990-2025 MHz band, including ample time to inventory their equipment and coordinate their relocation to the new channel plan at 2025-2110 MHz.²⁸⁷ Moreover, since Nextel is required to complete the stage one relocation of BAS licensees by September 7, 2006 and the stage two relocation of BAS licensees by September 7, 2007, extending the mandatory negotiation periods to March 21, 2006 for stage one relocations and March 21, 2007 for stage two relocations would place the negotiation deadlines within six months of the deadlines for the actual completion of BAS relocation itself. We also are concerned that a six-month period may not be sufficient for Nextel to complete BAS relocation prior to Nextel’s 800 MHz “true-up.”²⁸⁸ Absent sufficient time, Nextel could be prejudiced by the inability to claim credit for some BAS relocation expenses because

²⁸³ NAB/MSTV/SBE Letter at 3.

²⁸⁴ *Id.* at 2.

²⁸⁵ *Id.* at 3.

²⁸⁶ See Letter, dated Feb. 7, 2005, from Tim Donahue, President and Chief Executive Officer, Nextel, to Michael K. Powell, Chairman, Federal Communications Commission.

²⁸⁷ Under involuntary relocation, a new MSS entrant may, at its own expense, make necessary modifications to or replace an incumbent licensee’s BAS equipment such that the BAS licensee receives comparable performance from the modified or replaced equipment. However, under the mandatory negotiation periods adopted in the *MSS Third R&O*, the one-year mandatory negotiation period for MSS and BAS licensees in markets 1-30 and all BAS fixed stations, regardless of market size, has already passed. It ended on December 8, 2004. See *MSS Third R&O*, 18 FCC Rcd at 23659-60 ¶ 42.

²⁸⁸ In the “true up” at the conclusion of 800 MHz band reconfiguration, Nextel will be credited for the cost of relocating BAS facilities, less the amount, if any, that MSS licensees reimbursed Nextel. See *800 MHz R&O*, 19 FCC Rcd at 15114 ¶ 304.

those expenses could have occurred after the true-up date had passed. We therefore find that an extension of the mandatory negotiation periods is unnecessary and deny NAB, MSTV, SBE and Nextel's petitions for reconsideration.

105. Nextel, MSTV and NAB also filed a petition seeking a declaratory ruling, or alternately, clarification that Nextel will receive credit in the 800 MHz true-up process for the costs it incurs to relocate BAS operations licensed after June 27, 2000 but before November 22, 2004; and that BAS licensees will not be entitled to reimbursement for the cost of relocating equipment which is purchased to supplement existing facilities and which was acquired after November 22, 2004, with specific exceptions relating to the replacement or repair of malfunctioning equipment.²⁸⁹ SBE and Window to the World Communications, Inc. (WTTW) filed ex parte comments in support.²⁹⁰ As background, the Commission decided in the MSS Second R&O that BAS facilities could continue to operate on a primary basis until relocated by MSS licensees provided that the receipt date of the initial application was prior to June 27, 2000 – the adoption date of the MSS Second R&O.²⁹¹ Initial applications filed after June 27, 2000 have been licensed on a secondary basis and this condition has been noted on the authorization issued by the Commission to the BAS licensee.²⁹² The Commission concluded that new entrants would not be required to relocate these operations because secondary operations, by rule, cannot cause harmful interference to primary operations nor claim protection from harmful interference from primary operations.²⁹³

106. While not required to do so, Nextel has voluntarily agreed to fund the relocation of the secondary BAS incumbents that were licensed after June 27, 2000 but before November 22, 2004, so long as it receives credit for these costs in the 800 MHz

²⁸⁹ See Nextel/MSTV/NAB Request for Declaratory Ruling dated Jun. 20, 2005 (*Nextel/MSTV/NAB Request*).

²⁹⁰ See SBE Jun. 29, 2005 *Ex Parte*; WTTW Jul. 7, 2005 *Ex Parte*. WTTW is the licensee of a noncommercial educational television station in the Chicago area.

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

²⁹² Authorizations granted by the Commission after June 27, 2000 included the following language as a special condition: "In accordance with Paragraph 59 of the Commission's Second Report and Order and Second Memorandum Opinion and Order in ET Docket No. 95-18, and Section 2.106, Table of Frequency Allocations, footnote NG156, as amended, any new frequencies in or overlapping the 2008-2025 MHz frequency band are permitted only on a basis secondary to the Mobile-Satellite Service (MSS) and will be required to cease operation during Phase 2 of the relocation to accommodate MSS. Further, all new frequencies in or overlapping the greater 2008-2110 MHz frequency band will be required to relocate consistent with the Phase 1 and Phase 2 band plans adopted jointly by the BAS Frequency Coordinator and Existing Licensees of their Nielsen Designated Market Area, as described in Section 75.690(e), and will not be eligible for relocation by an MSS entity, but each licensee must prepare for such relocations at its own expense."

²⁹³ 47 C.F.R. § 2.105(c).

true-up process.²⁹⁴ Nextel, MSTV, and NAB argue that, because Nextel is coordinating the BAS relocation on a market-by-market basis, there are public interest benefits to allowing Nextel to relocate these BAS licensees and to obtain credit for the relocation. Specifically, if there are few (or no) BAS incumbents left in a particular market that could interfere with or otherwise complicate the deployment of Nextel's operations in the band, it would help ensure that the BAS relocation is completed without complication by 2007, will minimize disruption to BAS operations, and will simplify negotiations with BAS incumbents.²⁹⁵ Nextel, MSTV, and NAB argue that, because Nextel is coordinating the BAS relocation on a market-by-market basis, there are public interest benefits to allowing Nextel to relocate these BAS licensees and to obtain credit for the relocation. Specifically, if there are few (or no) BAS incumbents left in a particular market that could interfere with or otherwise complicate the deployment of Nextel's operations in the band, it would help ensure that the BAS relocation is completed without complication by 2007, will minimize disruption to BAS operations, and will simplify negotiations with BAS incumbents.²⁹⁶ Nextel, MSTV and NAB also claim the costs of relocating these BAS licensees (which represent 5.5% of all BAS licensees that will be relocated) would be minimal (4.5% of the estimated total cost of BAS relocation).²⁹⁷ In addition, Nextel, MSTV and NAB note that MSS licensees would not be obligated to pay for any relocation of secondary BAS operations and Nextel would not seek reimbursement from MSS licensees for the costs to relocate these secondary BAS operations.²⁹⁸

107. We note that we do not alter the well established principle that secondary licensees are not entitled to relocation or reimbursement. Rather, the only issue we are considering here is whether to allow Nextel to obtain credit for the costs of relocating secondary BAS incumbents licensed before November 22, 2004 in the 800 MHz true-up process based on a voluntary relocation agreement between the parties. We find that the public interest is best served by Nextel's timely clearing of all incumbent operations in the 1990-2025 MHz band, which in turn will facilitate the timely transition of the 800 MHz band as well. Furthermore, the costs associated with relocating these secondary BAS licensees do not significantly alter the total costs associated with implementing the 800 MHz relocation plan. For these reasons, we will allow Nextel to claim credit for the costs to relocate secondary BAS incumbents licensed before November 22, 2004, as the parties have agreed. We note that MSS licensees will not be obligated to reimburse Nextel for the costs to relocate these secondary BAS licensees. Our decision today does not otherwise alter the relocation obligations of MSS licensees with respect to

²⁹⁴ *Nextel/MSTV/NAB Request* at 3.

²⁹⁵ *Nextel/MSTV/NAB Request* at 3.

²⁹⁶ *Id.* at 3-4.

²⁹⁷ *Nextel/MSTV/NAB Request* at 5.

²⁹⁸ *Id.* at 6.

primary BAS incumbents, nor alter our overall relocation policy that secondary operations are not entitled to relocation or reimbursement from new entrants.

108. With respect to Nextel, MSTV and NAB's request for declaratory ruling or clarification that Nextel is not required to reimburse BAS licensees for the costs of "incremental" equipment acquired after November 22, 2004, unless acquired for replacement or repair, we find no action on our part is necessary at this time. The Commission has designed its relocation policy to allow the parties flexibility to negotiate relocation terms during the mandatory negotiation process, subject to the requirement to negotiate in good faith, and disagreements are best addressed on a case-by-case basis.²⁹⁹ Because Nextel, the new entrant, and the various entities representing BAS incumbents have all agreed to interpret the Commission's comparable facility requirement for relocation in this manner, we find that, as a practical matter, there is no need for a resolution by the Commission when no disagreement is present.

2. TMI/TerreStar Petition for Clarification

109. Under the *800 MHz R&O*, Nextel is entitled to seek *pro rata* reimbursement for eligible costs incurred in clearing incumbent BAS licensees in the 1990-2025 MHz band from MSS licensees that commence operation anytime prior to the thirty-six month 800 MHz band reconfiguration period.³⁰⁰ TMI and TerreStar jointly request that the Commission either "(i) relieve an MSS party that enters the market after Nextel's thirty-month BAS relocation period from having any reimbursement obligation to Nextel, or (ii) at a minimum, clarify that the MSS reimbursement obligation ends thirty-six months after the effective date of the [800 MHz R&O] *i.e.*, January 21, 2008."³⁰¹ These parties argue that it would be more equitable to tie the MSS reimbursement obligation to the thirty-month BAS relocation period than to the thirty-six month 800 MHz band reconfiguration period.³⁰² Nextel contends, however, that the public interest is best served by "synchronizing the MSS reimbursement obligation with the completion of 800 MHz reconfiguration and the true-up process established by the [800 MHz R&O]."³⁰³ Nextel also contends that granting TMI and TerreStar's request would give MSS licensees an "incentive to delay the initiation of service simply to avoid the reimbursement obligation."³⁰⁴

²⁹⁹ See 47 C.F.R. § 101.73.

³⁰⁰ See *800 MHz R&O*, 19 FCC Rcd at 15099 ¶ 261.

³⁰¹ See TMI Communications Company (*TMI*) and TerreStar Networks (*TerreStar*) Joint Request for Clarification dated Dec. 22, 2004 at 2 (TMI/TerreStar PFR (of R&O)); see also TMI and TerreStar Reply to Nextel Opposition dated May 2, 2005 (TMI/TerreStar Reply).

³⁰² See TMI/TerreStar PFR (of R&O) at 5-6.

³⁰³ See Nextel Opposition at 22.

³⁰⁴ *Id.*

110. We first address TMI and TerreStar's argument that an MSS licensee that enters after Nextel's thirty-month BAS relocation deadline should be relieved of its reimbursement obligation to Nextel because Nextel would be receiving credit for its relocation costs in the 800 MHz true-up process in any event.³⁰⁵ As noted in the *800 MHz R&O*, under the Nextel-BAS relocation plan, Nextel agreed to pay the upfront BAS relocation costs and requested that the Commission require MSS licensees in the 1990-2025 MHz band thereafter to pay their *pro rata* share of the cost of clearing this spectrum.³⁰⁶ Nextel proposed that the payments by other entrants be made to the U.S. Treasury.³⁰⁷ The Commission declined to adopt that proposal because it was inconsistent with the core objective of relocating BAS licensees to comparable facilities, an objective that is best met by allowing Nextel to relocate incumbent BAS licensees in a manner consistent with the Commission's existing rules that also allow MSS licensees to relocate BAS incumbents.³⁰⁸ We see no benefit in a proposal that would relieve an MSS licensee from paying its established BAS relocation obligation simply because Nextel will be receiving credit for relocation costs at the end of the 800 MHz band reconfiguration process.

111. Further, as described in the *MSS Second R&O*, *800 MHz R&O* and *AWS Sixth R&O*, the Commission has adhered to 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 the accrual of that benefit.³⁰⁹ Thus, the initial entrant may seek reimbursement from subsequent entrants for the proportional share of the initial entrant's costs in clearing BAS spectrum at 1990-2025 MHz, on a *pro rata* basis according to the amount of spectrum other new entrants are assigned. The Commission assigned Nextel rights to five megahertz of spectrum, MSS entities rights to twenty megahertz of spectrum and AWS entities rights to ten megahertz of spectrum.³¹⁰ Under the equitable reimbursement calculus, Nextel, as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from subsequent entrants, including MSS licensees. Therefore: (a) the Nextel *pro rata* share represents the cost to relocate BAS licensees from one-seventh of the spectrum (reflecting that Nextel will have the use of five megahertz, or one-seventh of the thirty-five megahertz being cleared), (b) the MSS licensees' *pro rata* share, collectively, represents the cost to

³⁰⁵ See TMI/TerreStar PFR (of R&O) at 5-6.

³⁰⁶ See *800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 260.

³⁰⁷ See MSTV/NAB/Nextel May 3, 2004 *Ex Parte* at 8, submitted in WT Docket No. 02-55 and ET Docket Nos. 00-258 and 95-18.

³⁰⁸ See *800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 260, n. 628.

³⁰⁹ See *MSS Second R&O*, 15 FCC Rcd at 12336-38 ¶¶ 64-69; *800 MHz R&O*, 19 FCC Rcd at 15098-99 ¶¶ 259-62; *AWS Sixth R&O*, 19 FCC Rcd at 20753-54 ¶¶ 72-73.

³¹⁰ See *AWS Sixth R&O*, 19 FCC Rcd at 20754 ¶ 73.

relocate BAS incumbents from four-sevenths of the spectrum, and (c) the AWS licensees' *pro rata* share, collectively, represents the cost of relocating BAS incumbents from two-sevenths of the spectrum (one-seventh for each five megahertz block).

112. In light of the unique circumstances surrounding Nextel's entry into the band, the Commission confined Nextel's reimbursement obligation so that it applies only to MSS licensees that enter the band prior to the end of the 800 MHz band reconfiguration period.³¹¹ Nextel must pay all upfront costs and will receive credit for BAS relocation as part of the 800 MHz "true-up" process, less any reimbursement it receives from MSS and AWS licensees. However, once the "true-up" is completed, Nextel may not obtain reimbursement from subsequent entrants to the band.³¹² Nextel's right to reimbursement is further constrained by the fact that it may obtain reimbursement only for the expenses it incurs for relocating non-fixed BAS incumbents in the top thirty markets and relocating all BAS incumbents' fixed facilities, regardless of the market size. Moreover, Nextel may only receive reimbursement for an MSS licensee's *pro rata* share of the 1990-2025 MHz spectrum.³¹³ Also, Nextel is obligated to reimburse MSS licensees for Nextel's *pro rata* share of the MSS licensees' relocation expenses, should the MSS licensee trigger involuntary relocation or otherwise participate in the relocation process before Nextel has completed its nationwide clearing of the band.³¹⁴ In limiting the amount of Nextel's reimbursement in this manner, the Commission struck an appropriate balance that is not unreasonably burdensome on either Nextel or the MSS licensees,³¹⁵ and we have not been shown how this equitable apportionment process intrudes on the rights of any affected licensee. We therefore deny that part of the TMI/TerreStar petition for reconsideration that seeks reversal of the reimbursement procedures established in the *800 MHz R&O*.

113. We now address TMI and TerreStar's request to clarify that the MSS reimbursement obligation ends thirty-six months after the effective date of the *800 MHz R&O* and not the end date of the thirty-six month 800 MHz band reconfiguration process.³¹⁶ The Commission decided to end the reimbursement obligations of other entrants to Nextel, and any reimbursement by Nextel to other entrants, at the end of the 800 MHz band true-up period for administrative efficiency in the accounting process and

³¹¹ See *800 MHz R&O*, 19 FCC Rcd at 15099 ¶ 261.

³¹² *Id.*

³¹³ *Id.*

³¹⁴ See *id.*, 19 FCC Rcd at 15099 ¶ 262.

³¹⁵ Under the MSS plan, MSS licensees are required to clear the top thirty BAS markets and all fixed BAS stations, regardless of market size, before beginning operations. However, the accounting among MSS licensees to settle relocation expenditures would not occur until after the end of the MSS relocation process. See *MSS Second R&O*, 15 FCC Rcd at 12338 ¶ 68.

³¹⁶ See TMI/TerreStar PFR (of R&O) at 6-8; TMI/TerreStar Reply at 3-6.

because of the unique circumstances in Nextel's receipt of BAS spectrum. To address potential MSS licensees' concerns of uncertainty regarding their reimbursement obligations to Nextel, the Commission required Nextel to inform the Commission and MSS licensees, twelve months after the effective date of the *800 MHz R&O*, whether or not it will be seeking reimbursement from the MSS licensees.³¹⁷ Further, under traditional reimbursement procedures, including those applied among the MSS licensees and outlined in the *MSS Second R&O*, reimbursement obligations run for a much longer period of time, until the requirement for relocation sunsets.³¹⁸ We therefore deny TMI and TerreStar's request to tie the MSS obligation to reimburse Nextel for the MSS *pro rata* share of BAS clearing costs to Nextel's thirty-month BAS relocation timeframe or, alternatively, to a time period that ends thirty-six months after the effective date of the *800 MHz R&O* and maintain the schedule previously established, *i.e.*, the true-up period.

114. In comments filed in response to Nextel's BAS Relocation Schedule and Implementation Plan,³¹⁹ TMI and TerreStar request that the Commission require Nextel to remedy certain "information deficits in Nextel's relocation plan," such as the lack of detail on the BAS facilities to be relocated, the absence of firm relocation dates by market, and the lack of relevant financial data.³²⁰ While we recognize that an MSS licensee—a co-entrant in the 1990-2025 MHz band with its own relocation and reimbursement obligations to BAS incumbents—may have legitimate concerns on the adequacy of detailed relocation and financial information, we find that TMI and TerreStar's request is too speculative and premature to warrant Commission action at this time. We expect Nextel to work cooperatively with MSS licensees because all parties would collectively benefit from the expeditious relocation of BAS incumbents to the new band plan, and note that TMI and TerreStar offer no evidence that Nextel has denied requests for information from, or has been otherwise uncooperative with, MSS

³¹⁷ This deadline coincides with the date Nextel is required to submit its first status report on its BAS relocation efforts. We note that the *October 2004 Public Notice* extended this deadline by forty-five days.

³¹⁸ As noted above, under the MSS plan, the accounting among MSS licensees to settle relocation expenditures would not occur until after the end of the MSS relocation process. *See* n. 315 *supra*. *See also* *MSS Second R&O*, 15 FCC Rcd at 12338 ¶ 68.

³¹⁹ In the *800 MHz R&O*, the Commission required Nextel to file with the Commission and copy the MSS licensees, within thirty days after the effective date of the *800 MHz R&O*, its plan for the relocation of BAS operations in the markets that will be relocated during stage one (*i.e.*, within eighteen months). MSS licensees had thirty days to review the Nextel plan and identify to Nextel and the Commission those top thirty TV markets and fixed BAS operations, if any, for which they intend to invoke involuntary relocation. *See 800 MHz R&O*, 19 FCC Rcd at 15097-98 ¶ 257. Nextel submitted its BAS relocation schedule and implementation plan on April 6, 2005. *See* Nextel BAS Relocation Schedule and Implementation Plan dated April 6, 2005. TMI and TerreStar submitted joint comments on the Nextel plan on May 6, 2005. *See* Comments of TMI Communications Company (*TMI*) and TerreStar Networks (*TerreStar*) on the Nextel BAS Relocation and Implementation Plan dated May 6, 2005 (TMI/TerreStar Comments).

³²⁰ *See* TMI/TerreStar Comments at 9-13.

licensees. We anticipate that both Nextel and MSS licensees would jointly seek clarification from the Commission on matters that the parties are unable to resolve during such discussions. We note that MSS licensees may voluntarily join in the negotiations between Nextel and BAS incumbents in order to relocate BAS operations in markets 31 and above as well as any fixed BAS operations, regardless of market size.³²¹ Participation in the negotiations by MSS licensees may address some of the concerns raised by TMI and TerreStar. Further, MSS licensees retain the option of accelerating the clearing of those markets so that they could begin operations before Nextel has completed nationwide clearing. The one-year mandatory negotiation period for MSS and BAS licensees in markets 1-30 and all BAS fixed stations, regardless of market size, ended on December 8, 2004. Therefore, any MSS entrant may now involuntarily relocate these incumbent BAS operations.³²² Under involuntary relocation, a new MSS entrant may, at its own expense, make necessary modifications to or replace an incumbent licensee's BAS equipment such that the BAS licensee receives comparable performance from the modified or replaced equipment.³²³ Accordingly, we decline, without prejudice, to provide the relief sought by TMI and TerreStar.

3. Cost Accounting and Reporting

115. In the *800 MHz R&O*, the Commission required Nextel to provide annual audited accounting statements of funds spent on the overall 800 MHz band reconfiguration process, including the determination of Nextel's cost of clearing the 1.9 GHz spectrum, and to provide a final audited report prior to the time the true-up calculations are made.³²⁴ The TA has requested guidance on its role relative to the expenses that Nextel incurs in connection with clearing the 1.9 GHz spectrum and reports to the TA. The TA submits that Nextel is responsible for all administrative, operational and financial aspects of clearing the 1.9 GHz band and that the TA's responsibility therefore extends only to receiving Nextel's financial reports and attaching them to the TA's quarterly and annual reports filed with the Commission and to the final report used to determine the true-up amount, if any. We confirm the TA's understanding, but with two qualifications: (a) the TA should integrate the Nextel data

³²¹ See *800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 258. We also noted that we would entertain requests filed by MSS licensees requesting that their voluntary participation in the negotiations between Nextel and BAS incumbents initiate their mandatory negotiation period. *Id.*

³²² Under the *800 MHz R&O*, if MSS licensees choose not to trigger involuntary relocation, Nextel could proceed under its plan to relocate BAS incumbents. See *800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 257.

³²³ See *MSS Second R&O*, 15 FCC Rcd at 12331 ¶ 48.

³²⁴ The Commission required Nextel to maintain accurate records of all labor and material expenses in connection with clearance of the 1.9 GHz band and to supply an annual independent audit, and a final audit, by an auditing firm satisfactory to the Commission. See *800 MHz R&O*, 19 FCC Rcd at 14989, 15124 ¶¶ 35, 330. Nextel must also submit to the Commission, "progress reports within twelve months and twenty-four months after the effective date of [the *800 MHz R&O*] on the status of the 1.9 GHz transition..." *Id.*, 19 FCC Rcd 15096-97 ¶ 254.

into the TA's required reports, e.g. when it sums up the costs of band reconfiguration, it should include and itemize the data relating to 1.9 GHz band clearance provided by Nextel; and (b) although the *800 MHz R&O* and *Supplemental Order* are silent on whether Nextel must file quarterly reports of 1.9 GHz clearing costs, the TA, at its discretion, may request such quarterly data from Nextel. We also confirm that the TA is under no obligation to analyze, audit or verify the data that Nextel supplies on the cost of clearing the 1.9 GHz spectrum.³²⁵

O. Clarifications

1. Site-Based SMR Facilities

116. ConEd notes that the *800 MHz R&O* established grandfathering rules for EA licensees that operate in the non-cellular portion of the 800 MHz band and seeks clarification that its site-based SMR facilities will also be grandfathered and that it will not be required to change frequency simply because it did not acquire its licenses in a spectrum auction.³²⁶ The *800 MHz R&O* did nothing to change the grandfathering rights of site-based SMR incumbents operating in the non-ESMR portion of the band. Therefore, ConEd and similarly situated licensees may continue to operate under the grandfathering provisions established when the EA licensing scheme was first adopted for SMR channels.³²⁷ However we note that some site-based incumbents, e.g. those operating on some of the current General Category channels are subject to relocation and will be provided with comparable facilities.³²⁸

2. Definition of Unacceptable Interference

117. In the *800 MHz R&O*, the Commission adopted an objective standard for defining what constitutes "unacceptable interference" to public safety and other high-site systems in the 800 MHz band.³²⁹ Entergy requests that we clarify that the "unacceptable interference" standard will apply only to interference created by licensees employing cellular architecture systems.³³⁰ Specifically, Entergy notes that the heading of Section 90.672 states that "unacceptable interference" applies only to interference created by ESMR or Part 22 Cellular Radiotelephone systems.³³¹ Nonetheless, Entergy

³²⁵ See TA Interim Status Report, Appendix 6.

³²⁶ See ConEd PFR (of R&O) at 5.

³²⁷ They may not, however, operate "high-density cellular" systems in the non-ESMR portion of the band. See n. 10 *supra*.

³²⁸ See 47 C.F.R. § 90.693.

³²⁹ See *800 MHz R&O*, 19 FCC Rcd 15024-34 ¶¶ 92-114. See also 47 C.F.R. § 90.672.

³³⁰ Entergy PFR (of R&O) at 3-5.

³³¹ *Id.* at 4.

notes that the language of Section 90.672 implies that “unacceptable interference” could be created by any type of licensee, including non-cellular licensees.³³² Entergy also notes that the text of the notification procedures in Section 90.674 contains a reference to non-cellular licensees receiving “harmful interference.”³³³

118. Although the Commission has used the term “unacceptable interference” in this proceeding in the context of interference created by 800 MHz cellular-architecture systems to 800 MHz non-cellular systems,³³⁴ the Commission did not intend by this usage to limit “unacceptable interference” to that caused by “high density cellular systems” sometimes employed by ESMR and Part 22 Radiotelephone licensees.³³⁵ Therefore, we grant Entergy’s request and amend Section 90.672 to specify that “unacceptable interference” to 800 MHz non-cellular licensees is that which originates from one or a combination of 800 MHz cellular-architecture licensees, regardless of whether the cellular-architecture licensee employs a “high-density” or “low-density” cellular system.³³⁶ We will also amend Section 90.674 to replace the inadvertent use of the term “harmful interference” with the correct phrase “unacceptable” interference.³³⁷

3. Definition of Critical Infrastructure Industry

119. Entergy correctly notes that in the *800 MHz R&O*, the Commission imprecisely defined Critical Infrastructure Industries (CII) in Section 90.7 of its rules as: “Private internal radio services operated by State, local governments and non-government entities, including utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments, and not-for-profit organizations that offer emergency road services, provided these private internal radio services (i) are used to protect safety of life, health, or property; and (ii) are not made commercially available to the public.”³³⁸ Thus, the Commission’s definition incorrectly defined CII as “radio services . . .” rather than as the entities that provide and use such radio services. We therefore amend Section 90.7 to define CII licensees as “entities;” specifically thus: “State, local government and non-government entities, including utilities, railroads, metropolitan transit systems, pipelines, private ambulances, volunteer fire departments,

³³² *Id.* at 3.

³³³ *Id.* at 13 citing 69 Fed Reg, 67823, 67850 to be codified at 47 C.F.R. § 90.674(a).

³³⁴ See *800 MHz R&O*, 19 FCC Rcd 15024-34 ¶¶ 92-114.

³³⁵ As noted in ¶ 7 *supra*, the term “high density cellular systems” was initially coined for the limited purpose of defining which cellular architecture systems may operate below the non-ESMR/ESMR band segment dividing line.

³³⁶ See 47 C.F.R. § 90.672 (as amended in Appendix B *infra*).

³³⁷ See 47 C.F.R. § 90.674(a) (as amended in Appendix B *infra*).

³³⁸ See Entergy PFR (of R&O) at 12-13.

and not-for-profit organizations that provide private internal radio services, provided these private internal radio services (i) are used to protect safety of life, health, or property; and are (ii) are not made commercially available to the public.”³³⁹

4. Dispute Resolution Processes

120. Entergy notes an internal contradiction in section 90.677(d) of the Commission’s rules. Although the rule section requires the TA to resolve any disputed issues remaining at the end of the mandatory negotiation period “within thirty working days,” it, inconsistently, requires the TA to forward any unresolved issues to the Wireless Telecommunications Bureau “within thirty days after the end of the mandatory negotiation period.”³⁴⁰ Additionally, Entergy also notes that, in the text of the *800 MHz R&O*, the Commission established procedures for review of disputed issues that arise during the negotiation period, but did not codify those procedures in the rules.³⁴¹ We agree with Entergy and will modify section 90.677(d) of our rules to codify the dispute resolution procedures set forth in the text of the *800 MHz R&O* and to clarify that the Transition Administrator must forward unresolved disputed issues remaining at the end of the mandatory negotiation period within thirty working days of the end of the mandatory negotiation period.³⁴²

5. Frequency Coordination of EA-based SMR Frequencies

121. In the *Supplemental Order*, the Commission stated that, after band reconfiguration, all applications for site-based SMR channels in the non-cellular portion of the 800 MHz band would be subject to frequency coordination.³⁴³ In making this clarification, a conforming change was not made to Section 90.175 of the rules, which continues to provide that both 800 MHz and 900 MHz SMR licensees are exempt from frequency coordination. Accordingly, we amend section 90.175, herein, to specify that only applicants for EA-based 800 MHz SMR and 900 MHz SMR frequencies will continue to be exempt from the frequency coordination requirements.³⁴⁴

³³⁹ See 47 C.F.R. § 90.7 (as amended in Appendix B *infra*).

³⁴⁰ See Entergy PFR (of R&O) at 9-10 *citing* 47 C.F.R. § 90.677(d).

³⁴¹ See Entergy PFR (of R&O) at 11-12 *citing* *800 MHz R&O*, 19 FCC Rcd 15071-72 ¶ 194.

³⁴² See 47 C.F.R. § 90.677(d) (as amended in Appendix B *infra*).

³⁴³ See *Supplemental Order*, 19 FCC Rcd 25149 ¶ 67. See also 47 C.F.R. § 90.175.

³⁴⁴ See Appendix B, *infra*.

6. Reconfiguration of Areas That Do Not Have Associated NPSPAC Regions

122. In establishing the rules governing 800 MHz band reconfiguration, the Commission stated that relocation will proceed in discrete areas defined by the boundaries of the fifty-five 800 MHz National Public Safety Planning Advisory Committee (NPSPAC) regions. The TA then recommended, and the Commission concurred in, a schedule detailing when band reconfiguration will commence in each of those NPSPAC regions.³⁴⁵ When the TA submitted its plan, it noted that because American Samoa, Guam, the Northern Mariana Islands, and the Gulf of Mexico are not associated with NPSPAC regions, it would defer developing 800 MHz band relocation plans for these areas pending direction from the Commission.³⁴⁶

123. The Commission's 800 MHz rules both prior to and subsequent to the *800 MHz R&O* and the *Supplemental Order* apply to American Samoa, Guam, the Northern Mariana Islands, and to facilities located in the Gulf of Mexico, regardless of whether such areas have an associated NPSPAC region.³⁴⁷ Accordingly, we hereby recommend that the TA include these areas in "Wave 4" of its reconfiguration schedule. Although this will result in these areas being among the last to be reconfigured, we note that there are relatively few 800 MHz systems in the territories, and, in the case of the Gulf of Mexico, few if any public safety facilities, and we therefore anticipate no untoward effects from placing these areas in Wave 4.

7. 900 MHz Interference and Spectrum Trafficking

124. Numerous parties have asked us to apply the 800 MHz interference rules to licensees in the 900 MHz band.³⁴⁸ Although the Commission has addressed in this proceeding, the consolidation of the Business and Industrial/Land Transportation channels in both the 800 MHz and 900 MHz bands, the Commission limited its consideration of 900 MHz matters in the *800 MHz NPRM* and subsequent orders to that

³⁴⁵ See Regional Prioritization Plan of the 800 MHz Transition Administrator, filed January 31, 2005; Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan, WT Docket No. 02-55, *Public Notice*, DA 05-619, 70 Fed. Reg. 21786 WTB (2005).

³⁴⁶ See Regional Prioritization Plan of the 800 MHz Transition Administrator, filed January 31, 2005 at pg 23, n 40.

³⁴⁷ See 47 U.S.C. § 152(a) (giving the FCC authority to regulate all interstate and foreign communication by wire and radio originating in or received by the United States). See also 47 U.S.C. § 153(22) (defining "interstate communication" or "interstate transmission" as communication or transmission from or to any State, Territory, or possession of the United States (other than the Canal Zone) or the District of Columbia.)

³⁴⁸ See Petition for Reconsideration, filed Dec. 17, 2004, by the Association of American Railroads (AAR PRF (of R&O)) at 4-7; Petition for Reconsideration, filed Dec. 22, 2004, by the National Association of Manufacturers and MRFAC, Inc. (NAM/MRFAC PFR (of R&O)) at 4-10; Exelon PFR (of R&O) at 4-5.

specific issue. Accordingly, we decline to address petitioners' requests to address 900 MHz interference issues because they are outside the scope of the instant proceeding.

Petitioners may raise 900 MHz interference issues, and other issues related to the 900 MHz band, in WT Docket No. 05-62, the *900 MHz Flexible Use Proceeding*. The Commission issued a *Notice of Proposed Rulemaking* in that docket on February 16, 2005.³⁴⁹ We will incorporate the comments into the docket in that proceeding.

V. ORDERING CLAUSES

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

126. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4(i), 303(f) and (r), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 1, 154(i), 303(f) and (r), 332, and 405, the Petition for Reconsideration filed by Southern Communications Services, Inc. d/b/a/ SoutherLINC on December 22, 2004, IS GRANTED to the extent described herein.

127. IT IS FURTHER ORDERED that, pursuant to Sections 1, 4(i), 303(f) and (r), 332, and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 1, 154(i), 303(f) and (r), 332, and 405, the Petition for Clarification filed by American Electric Power Company, Inc., on December 21, 2004; the Petition for Reconsideration filed by Entergy Corporation and Entergy Services, Inc. on December 22, 2004; the Petition for Reconsideration filed by AIRPEAK Communications, LLC on March 10, 2005, the Joint Petition for Partial Reconsideration jointly filed by Coastal SMR Network, L.L.C./A.R.C., Inc. and Scott C. MacIntyre on December 22, 2004; and the Petition for Partial Reconsideration filed by the Safety and Frequency Equity Competition Coalition on March 10, 2005 ARE GRANTED to the extent described herein and DENIED in all other respects.

128. IT IS FURTHER ORDERED that the Request for Waiver, filed by AIRPEAK Communications, LLC on March 10, 2005, IS GRANTED to the extent described herein and DENIED to the extent described herein and DISMISSED in all other respects.

129. IT IS FURTHER ORDERED that the Request for Waiver, filed by Airtel Wireless, LLC on March 10, 2005, IS GRANTED to the extent described herein.

130. IT IS FURTHER ORDERED that the Petitions for Reconsideration jointly filed by the National Association of Broadcasters, the Association for Maximum Service

³⁴⁹ See Amendment of Part 90 of the Commission's Rules to Provide For Flexible Use of the 896-901 MHz and 935 and 940 MHz Bands Allotted to the Business and Industrial Land Transportation Pool, WT Docket 05-62, Notice of Proposed Rulemaking, FCC 05-31 (2005).

Television, the Society of Broadcast Engineers on December 2, 2004; the Joint Request for Clarification filed by TMI Communications and Company, a Limited Partnership and TerreStar Networks, Inc. on December 22, 2004; the Petition for Partial Reconsideration filed by James A. Kay, Jr. on December 22, 2004; the Petition for Reconsideration jointly filed by the American Petroleum Institute and the United Telecom Council on Mar. 10, 2005; the Petition for Partial Reconsideration filed by the Association of Public-Safety Communications Officials International, Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, International Municipal Signal Association, Inc., Major Cities Chiefs Association, Major County Sheriffs' Association, and National Sheriffs' Association, on February 1, 2005; the Petition for Clarification and Reconsideration, filed by Consolidated Edison Company of New York, Inc., on December 22, 2004; the Petition for Reconsideration, filed by Consolidated Edison Company of New York, Inc., on March 10, 2005; the Petition for Reconsideration, filed by Peter W. Meade, Chairman, Region 8, on January 21, 2005 and the Petition for Clarification or Partial Reconsideration of Freeze Process for Implementation of 800 MHz Band Reconfiguration, filed by the Association of Public-Safety Communications Officials-International Inc., the International Association of Chiefs of Police, the International Association of Fire Chiefs, the International Municipal Signal Association, Inc., the Major Cities Chiefs Association, Major County Sheriff's Association and the National Sheriff's Association on May 16, 2005, ARE DENIED.

131. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Richard W. Duncan d/b/a Anderson Communications is RESOLVED to the extent indicated herein.

132. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Exelon Corporation on December 22, 2004; the Petition for Reconsideration filed by Charles D. Guskey on December 22, 2004; the Petition for Reconsideration filed by Nextel Communications, Inc. on December 22, 2004 and the Petition for Reconsideration jointly filed by Preferred Communications Systems, Inc. and Silver Palm Communications, Inc., on Dec. 22, 2004 ARE DENIED IN PART AND DISMISSED IN PART to the extent described herein.

133. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by CTIA-the Wireless Association on December 22, 2004; the Petition for Reconsideration filed by the Association of American Railroads on December 17, 2004 and the Petition for Reconsideration filed by the National Association of Manufacturers and MRFAC, Inc. on December 22, 2004 ARE DISMISSED AS MOOT.

134. IT IS FURTHER ORDERED that the Request for Declaratory Ruling, jointly filed by Nextel, the Association for Maximum Service Television, and the National Association of Broadcasters, on June 20, 2005, IS GRANTED to the extent described herein and DISMISSED in all other respects.

135. IT IS FURTHER ORDERED that, pursuant to Sections 309 and 316 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 309, 316, the licenses of all

800 MHz band licensees (including, but not limited to, Nextel Communications, Inc.), are hereby modified as specified in this Memorandum Opinion and Order. Pursuant to Section 316(a)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 316(a)(1), publication of this Memorandum Opinion and Order in the Federal Register shall constitute notification in writing of our Order modifying Nextel's 800 MHz licenses and those of all other 800 MHz licenses, and of the grounds and reasons therefore, and Nextel and these other 800 MHz licensees shall have thirty days from the date of such publication to protest such Order.

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

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

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

FEDERAL COMMUNICATIONS
COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

PROCEDURAL MATTERS

A. Supplemental Final Regulatory Flexibility Analysis

139. The Regulatory Flexibility Act (RFA)³⁵⁰ requires that an agency prepare a regulatory flexibility analysis for notice-and-comment rulemaking proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”³⁵¹ As required by the RFA an Initial Regulatory Flexibility Analysis (“IRFA”) was incorporated in the *Notice of Proposed Rulemaking* (“800 MHz NPRM”) in this proceeding. The Commission sought written public comment on the proposals in the 800 MHz NPRM, including comment on the IRFA. Based upon the comments in response to the 800 MHz NPRM and the IRFA, the Commission included a Final Regulatory Flexibility Analysis (“FRFA”) in the *Report and Order* (800 MHz R&O) in this proceeding. The Commission subsequently sought comment on *ex parte* presentations filed in this proceeding. In the *Supplemental Order and Order on Reconsideration* (*Supplemental Order*), the Commission, on its own motion, amended the rules in a manner that did not significantly affect small entities beyond the terms set forth in the FRFA. Accordingly, the Commission included a Supplemental Regulatory Flexibility Analysis (“Supplemental FRFA”) addressing those amendments consistent with the RFA.

140. This *Memorandum Opinion and Order* (MO&O) clarifies portions of the 800 MHz R&O and companion *Supplemental Order* and addresses petitions for reconsideration of the Commission’s decisions in the 800 MHz R&O and the *Supplemental Order*. Interested parties were afforded notice and opportunity to comment on the petitions for reconsideration of the 800 MHz R&O and *Supplemental Order*. See 70 FR 17327. Several parties filed oppositions to the petitions for reconsideration and replies to the oppositions. The clarifications we make in this MO&O are in response to the various petitions for reconsideration, oppositions and replies that have been filed thus far. Accordingly, this Supplemental Regulatory Flexibility Analysis (“Supplemental FRFA”) addresses those clarifications and conforms to the RFA.

141. ***Need for, and Objectives of, the Order on Reconsideration.*** By way of background the 800 MHz R&O adopted a plan comprised of both long-term and short-term components that the Commission concluded represented the most effective solution to the problem of interference to public safety licensees in the 800 MHz band. The Commission addressed the ongoing interference problem over the short-term by

³⁵⁰ The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

³⁵¹ See 5 U.S.C. § 605(b).

adopting technical standards defining unacceptable interference in the 800 MHz band and detailing responsibility for interference abatement. The long-term component augmented the short-term component by reconfiguring the 800 MHz band to separate generally incompatible technologies whose current proximity to each other is the identified root cause of unacceptable interference.

142. *Enhanced Specialized Mobile Radio Systems.* In this proceeding the Commission divided the 800 MHz band into a cellular portion and non-cellular portion to create spectral separation between incompatible technologies. Section 90.614 provides that the cellular portion would be reserved for licensees that operate cellular high-density systems. Several parties sought reconsideration of the eligibility and operating requirements applicable to the cellular band arguing that these requirements are overly restrictive.

143. On our own motion we clarify the definition of ESMR system in order to resolve an ambiguity between the text of the *800 MHz R&O* and Section 90.7 of the accompanying rules. This clarification is significant to the extent that it defines those licensees that may elect to be relocated into the cellular portion of the band. When the Commission first established the eligibility criteria for relocation into the cellular portion of the band, it spoke to existing “ESMR” systems. The 800 MHz R&O inadvertently defined ESMR systems as those that employ “high density” cellular architecture. However the *800 MHz R&O* had also referred to an “ESMR system,” more generally, as a term to describe systems that use multiple, interconnected, multi-channel transmit/receive cells and employ frequency reuse to serve a larger number of subscribers than is possible using non-cellular technology. We resolve this contradiction by amending rule section 90.7 to eliminate the “high density” qualification for ESMR status. The practical effect of this clarification is to ensure licensees operating in the ESMR band have a fair amount of flexibility in the management of their systems. The purpose of this clarification is to distinguish between high-density systems that may not be operated in the non-ESMR portion of the band not to require EA licensees that relocate to the ESMR band to operate high-density systems should they elect to operate in the ESMR band. To this end we also adopt a definition of “800 MHz high-density cellular system” and “800 MHz cellular system” and revise several Part 22 and 90 rules to incorporate the distinction between 800 MHz cellular systems and high-density cellular systems in order to more efficiently implement our band reconfiguration plan.

144. *Economic Area Licensees.* We also clarify that Economic Area (EA) licensees that elect to relocate to the cellular band may relocate site-based systems so long as they deploy a cellular system on their combined facilities by the end of their EA license term. We also clarify that those incumbent EA licensees that operate non-cellular systems in that portion of the cellular band known as the “Upper 200 band,” must relocate from the cellular band unless they deploy a cellular system. Failure to construct a cellular system will result in automatic cancellation of the relocated EA license and any site-based facilities relocated to the cellular band. The purpose of this clarification is to: (1) avoid replicating in the cellular band the same incompatible mix of

technologies that resulted in this proceeding; (2) ensure that licensees genuinely interested in competing with cellular operators have the opportunity to move forward with their business plans and (3) inhibit the ability of speculative licensees to allow valuable spectrum to lie fallow or under utilized in an attempt to maximize resale value. In this connection, EA licensees, consistent with their existing construction and operational obligations, must notify the Commission whether they have constructed in accordance with the operational rules governing the ESMR band. Overall, this clarification confers upon EA licensees the benefit of added flexibility.

145. *Unacceptable Interference.* In the *800 MHz R&O*, the Commission adopted an objective standard for defining what constitutes “unacceptable interference” to public safety and other non-cellular systems in the 800 MHz band. The purpose of defining unacceptable interference is to determine the rights and responsibilities of parties to alleviate interference. One petitioner requested that we clarify that the “unacceptable interference” standard will apply only to interference created by licensees employing cellular architecture systems. According to this petitioner the heading and text of Section 90.672 implies that “unacceptable interference” could be created by any type of licensee including non-cellular licensees. We clarify the heading and text of Section 90.672 to specify that “unacceptable interference” to 800 MHz non-cellular licensees is that which originates from one or a combination of 800 MHz cellular-architecture licensees, regardless of whether the cellular-architecture licensee employs a “high-density” or “low-density” cellular system. In this connection we replace the reference to harmful interference in Section 90.672 with the term unacceptable interference.

146. *Critical Infrastructure Industry.* One Petitioner pointed out that Section 90.7 imprecisely defined Critical Infrastructure Industries (CII). Accordingly we clarify the definition of CII.

147. *Southeast Region Band Plan.* Section 90.617 is updated to reflect the distribution of channels between the various pool categories in the SouthernLINC/Nextel counties listed in Section 90.614(c). In the *800 MHz R&O* the Commission adopted a band plan for the Southeast Region. Part of this band plan included a 1 MHz Expansion band, designed to create spectral separation between public safety and ESMR operations. Subsequently we have received petitions for reconsideration seeking to eliminate or reduce the size of the Expansion band because there is insufficient amount of spectrum to accommodate Public Safety and cellular operations in the Atlanta market. Accordingly, we reduce the size of the Expansion band in the Atlanta market and up to seventy miles outside Atlanta.

148. *Transition Administrator Reports.* Sections 90.676(b)(3) and (4) are revised to allow the Transition Administrator to choose the date for filing quarterly and annual reports regarding band reconfiguration. Previously Section 90.676 required that the TA submit its reports based on the effective date of the *Report and Order*. We have since learned that this requirement would be complicated by Nextel Communications, Inc.’s obligations to the Securities and Exchange Commission. We therefore modify our

rules to permit the TA to file its quarterly and annual reports with the Commission on the first business day following Nextel's quarterly and annual filings with the Securities and Exchange Commission.

149. *Dispute Resolution.* One petitioner pointed out an ambiguity and inadvertent omission in our 800 MHz band reconfiguration dispute resolution procedures. Accordingly we revise section 90.677(d) of our rules to clarify that the Transition Administrator must forward unresolved disputed issues remaining at the end of the mandatory negotiation period within thirty days of the end of the mandatory negotiation period. We also will modify section 90.674 of our rules to codify the dispute resolution procedures set forth in the text of the *800 MHz R&O*.

150. *Frequency Coordination.* Section 90.175 is revised to clarify that 800 MHz Economic Area licensees and 900 MHz SMR licensees will continue to be exempt from frequency coordination requirements. Previously, in the *Supplemental Order* we provided that 800 MHz site-based SMR licensees will be subject to frequency coordination in the 800 MHz band but inadvertently omitted this requirement from the rules. Accordingly we correct this omission.

151. ***Summary of Significant Issues Raised in Response to the FRFA.*** No parties have addressed the FRFA in any subsequent filings.

152. ***Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.*** The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."³⁵² In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.³⁵³ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).³⁵⁴

153. In this *MO&O*, the Commission is amending the final rules adopted in the *800 MHz R&O* and *Supplemental Order*. In this Further FRFA, we incorporate by reference the description and estimate of the number of small entities from the FRFA in the *800 MHz R&O*, which identifies as potentially affected entities Governmental Licensees, Public Safety Radio Licensees, Wireless Telecommunications, Business,

³⁵² 5 U.S.C. § 601(6).

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

³⁵⁴ 15 U.S.C. § 632.

Industrial and Land Transportation Licensees, and Specialized Mobile Radio Licensees.³⁵⁵

154. A small organization is generally “any not-for-profit enterprise which is independently owned and operates and is not dominant in its field.”³⁵⁶ Nationwide as of 2002, there were approximately 1.6 million small organizations.³⁵⁷ The term “small governmental jurisdiction” is defined as “governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”³⁵⁸ As of 1997, there were approximately 87,453 governmental jurisdictions in the United States.³⁵⁹ This number includes 39,044 county governments, municipalities and townships, of which 37,546 (approximately 96.2%) have populations of fewer than 50,000, and of which 1,498 have populations of 50,000 or more. Thus, we estimate the number of small governmental jurisdictions overall to be 84,098 or fewer. Nationwide, there are a total of approximately 22.4 million small businesses, according to SBA data.³⁶⁰

155. **Description of Projected Reporting, Recordkeeping and other Compliance Requirements.** We do not adopt new reporting, recordkeeping or other compliance requirement in this MO&O.

156. **Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered.** The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

157. As noted above, we reduce the size of the Expansion band in Atlanta, rather than eliminating the Expansion band in the Atlanta area. Although we reduce the Expansion band in Atlanta by .5 MHz, we maintain spectral separation between public safety and ESMR band operations. The purpose of maintaining spectral separation

³⁵⁵ See 800 MHz R&O at Appendix A.

³⁵⁶ 5 U.S.C. § 601(4).

³⁵⁷ Independent Sector, The New Nonprofit Almanac & Desk Reference (2002).

³⁵⁸ 5 U.S.C. § 601(5).

³⁵⁹ U.S. Census Bureau, Statistical Abstract of the United States: 2000, Section 9, pages 299-300, Tables 490 and 492.

³⁶⁰ See SBA, Programs and Services, SBA Pamphlet No. CO-0028, at page 40 (July 2002).

between public safety licensees operating in the non-cellular band and ESMR licensees operating in the cellular band is to reduce the incidence of interference to public safety. In contrast, if we had eliminated the Expansion band, we would have eliminated any spectral separation between public safety and ESMR systems operating in the cellular portion of the band. Further, public safety will continue to be entitled to interference protection from unacceptable interference. As a concession, however, some Atlanta-based B/ILT incumbents who would otherwise not be required to change frequencies will be required to relocate to the Expansion Band in order to accommodate public safety licensees relocating below the Expansion Band.

158. **Report to Congress.** The Commission will send a copy of this *MO&O*, including this Further Final Regulatory Flexibility Analysis (Further FRFA), in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act.³⁶¹ In addition the Commission will send a copy of the *MO&O* including a copy of this Further Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the SBA.³⁶² A summary of this *MO&O* and this analysis will also be published in the Federal Register.³⁶³

159. **Paperwork Reduction Act Analysis.** This document does not contain [new or modified] information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.³⁶⁴

³⁶¹ See 5 U.S.C. § 801(a)(1)(A).

³⁶² See 5 U.S.C. § 605(b).

³⁶³ *Id.*

³⁶⁴ See 44 U.S.C. 3506(c)(4).

APPENDIX B

FINAL RULES

PART 22 – PUBLIC MOBILE SERVICES

160. The authority citation for Part 22 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 222, 303, 309 and 332.

161. The title for Section 22.970 is amended to replace the term “Part 90 ESMR systems” with “Part 90 – 800 MHz cellular systems.” The definition for unacceptable interference in paragraph (a) of Section 22.970 is amended to reference “Part 90 – 800 MHz cellular systems” and “cellular radiotelephone systems.”

§ 22.970 Unacceptable interference to Part 90 non-cellular 800 MHz licensees from cellular radiotelephone or Part 90 – 800 MHz cellular systems.

(a) *Definition.* Except as provided in 47 C.F.R. §90.617(k), unacceptable interference to non-cellular Part 90 licensees in the 800 MHz band from cellular radiotelephone or Part 90 – 800 MHz cellular systems will be deemed to occur when the below conditions are met:

* * * * *

162. In paragraph (a) of Section 22.971 the cross reference to Section 22.972 is replaced with a cross reference to 22.972(c).

§ 22.971 Obligation to abate unacceptable interference.

(a) *Strict Responsibility.* Any licensee who, knowingly or unknowingly, directly or indirectly, causes or contributes to causing unacceptable interference to a non-cellular Part 90 licensee in the 800 MHz band, as defined in § 22.970 of this chapter, shall be strictly accountable to abate the interference, with full cooperation and utmost diligence, in the shortest time practicable. Interfering licensees shall consider all feasible interference abatement measures, including, but not limited to, the remedies specified in the interference resolution procedures set forth in § 22.972(c) of this chapter. This strict responsibility obligation applies to all forms of interference, including out-of-band emissions and intermodulation.

* * * * *

163. In paragraph (c) of Section 22.972 the term “Part 90 ESMR systems” is replaced with the term “Part 90 – 800 MHz cellular systems.”

§ 22.972 Interference resolution procedures.

* * * * *

(c) *Mitigation Steps.* (1) All Cellular Radiotelephone and Part 90 – 800 MHz cellular system licensees who are responsible for causing unacceptable interference shall take all affirmative measures to resolve such interference. Cellular Radiotelephone licensees found to contribute to unacceptable interference, as defined in § 22.970, shall resolve such interference in the shortest time practicable. Cellular Radiotelephone licensees and Part 90 – 800 MHz cellular system licensees must provide all necessary test apparatus and technical personnel skilled in the operation of such equipment as may be necessary to determine the most appropriate means of timely eliminating the interference. However, the means whereby interference is abated or the cell parameters that may need to be adjusted is left to the discretion of the Cellular Radiotelephone and/or Part 90 – 800 MHz cellular system licensees, whose affirmative measures may include, but not be limited to, the following techniques:

* * * * *

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

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

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

165. In Section 90.7, the definition for “800 MHz Cellular System” is changed, a new definition for “800 MHz High Density Cellular System” is added and the definition for “Critical Infrastructure Industry” is modified.

§ 90.7 Definitions.

800 MHz Cellular System. In the 806-824 MHz/ 851-869 MHz band, a system that uses multiple, interconnected, multi-channel transmit/receive cells capable of frequency reuse and automatic handoff between cell sites to serve a larger number of subscribers than is possible using non-cellular technology.

800 MHz High Density Cellular System. In the 806-824 MHz/ 851-869 MHz band, a high density cellular system is defined as a cellular system which:

(1) has more than five overlapping interactive sites featuring hand-off capability; and

(2) any one of such sites has an antenna height of less than 30.4 meters (100 feet) above ground level with an antenna height above average terrain (HAAT) of less than 152.4 meters (500 feet) and twenty or more paired frequencies.

* * * * *

Critical Infrastructure Industry (CII). State, local government and non-government entities, including utilities, railroads, metropolitan transit systems,

pipelines, private ambulances, volunteer fire departments, and not-for-profit organizations that offer emergency road services, providing private internal radio services provided these private internal radio services (i) are used to protect safety of life, health, or property; and (ii) are not made commercially available to the public.

* * * * *

166. Paragraph (j)(8) of Section 90.175 is updated to indicate that—in the 800 MHz band—only EA-based applicants for SMR frequencies will be exempt from frequency coordination. SMR applicants in the 900 MHz band will continue to be exempt from frequency coordination.

*

(j) * * *

(8) Applications for SMR frequencies contained in §§ 90.617(d) Table 4A, 90.617(e), 90.617(f) and 90.619(b)(2).

167. In the title of Section 90.614, the terms “cellular” and “non-cellular” are removed. In paragraphs (a), (b) and (c) of Sections 90.614, the term “800 MHz cellular systems” is replaced by the term “800 MHz high density cellular systems.”

§ 90.614 Segments of the 806-824/851-869 MHz band for non-border areas.

The 806-824/851-869 MHz band (“800 MHz band”) will be divided as follows at locations farther then 110 km (68.4 miles) from the U.S./Mexico border and 140 km (87 miles) from the U.S./Canadian border (“non-border areas”)

(a) 800 MHz high density cellular systems – as defined in § 90.7 – are prohibited from operating on channels 1-550 in non-border areas.

(b) 800 MHz high density cellular systems – as defined in § 90.7 – are permitted to operate on channels 551-830 in non-border areas.

(c) In the following counties and parishes, 800 MHz high density cellular systems – as defined in § 90.7 – are permitted to operate on channels 411-830: ***

168. In paragraph (a) of Section 90.615 the term “ESMR” is replaced with the term “licensee relocating to channels 551-830.”

§ 90.615 Individual channels available in the General Category in 806-824/851-869 MHz band.

* * * * *

(a) In a given 800 MHz NPSPAC region, any channel in the 231-260 range which is vacated by a licensee relocating to channels 551-830 and which remains vacant after band reconfiguration will be available as follows:***

* * * * *

169. In paragraphs (a), (b), (d), (e), (i), (j) and (k) of Section 90.617 the term “800 MHz cellular systems” is replaced by the term “800 MHz high density cellular systems.” In paragraphs (a), (b), (d), (i), and (j) the term “non-cellular” is removed. New paragraphs (a)(2), (a)(3), (b)(1), (b)(2), (d)(1) and (d)(2) are added to Section 90.617 to detail the distribution of channels between the various pool categories in the SouthernLINC/Nextel counties listed in Section 90.614(c). In paragraph (j) of Section 90.617 the term “ESMR systems” is replaced by the term “800 MHz high density cellular systems.” In paragraph (g) and (h) the reference to channel “470” is replaced with a reference to channel “471. In paragraph (g) the reference to “ESMR” is replaced with the term “licensees relocating to channels 511-830.”

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

* * * * *

(a) Unless otherwise specified, the channels listed in Table 1 and paragraph (a)(1) of this section are available for to eligible applicants in the Public Safety Category which consists of licensees eligible in the Public Safety Pool of subpart B of this part. 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These frequencies are available in non-border areas. Specialized Mobile Radio Systems will not be authorized in this category. These channels are available for intercategory sharing as indicated in §90.621(e).

TABLE 1 – PUBLIC SAFETY POOL 806-816/851-861 MHZ BAND CHANNELS (70 CHANNELS)

Group No.	Channel Nos.
269	269-289-311-399-439
270	270-290-312-400-440
279	279-299-319-339-359
280	280-300-320-340-360
309	309-329-349-369-389
310	310-330-350-370-390
313	313-353-393-441-461
314	314-354-394-448-468
321	321-341-361-381-419
328	328-348-368-388-420
351	351-379-409-429-449

332	352-380-410-430-450
Single Channels	391, 392, 401, 408, 421, 428, 459, 460, 469, 470

(1) Channels numbers 1–230 are also available to eligible applicants in the Public Safety Category in non-border areas. The assignment of these channels will be done in accordance with the policies defined in the Report and Order of Gen. Docket No. 87–112 (See §90.16). The following channels are available only for mutual aid purposes as defined in Gen. Docket No. 87-112: channels 1, 39, 77, 115, 153.

(2) Except as provided in paragraph (a)(3), the channels listed in Table 1A are available in the counties listed in § 90.614(c) to eligible applicants in the Public Safety Category. 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These channels are available for intercategory sharing as indicated in §90.621(e).

TABLE 1A – PUBLIC SAFETY POOL 806-816/851-861 MHZ BAND CHANNELS FOR COUNTIES IN SOUTHEASTERN U.S. (70 CHANNELS)

Group No.	Channel Nos.
261	261-313-324-335-353
262	262-314-325-336-354
265	265-285-315-333-351
266	266-286-316-334-352
269	269-289-311-322-357
270	270-290-312-323-355
271	271-328-348-358-368
279	279-299-317-339-359
280	280-300-318-340-360
309	309-319-329-349-369
310	310-320-330-350-370
321	321-331-341-361-372
Single Channels	326, 327, 332, 337, 338, 342, 343, 344, 345, 356,

(3) The channels listed in Table 1B are available within 113 km (70 mi) of the center city coordinates of Atlanta, GA to eligible applicants in the Public Safety Category. The center city coordinates of Atlanta, GA—for the purposes of the rule—are defined as 33° 44' 55" NL, 84° 23' 17" WL. 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These channels are available for intercategory sharing as indicated in §90.621(e).

TABLE 1B – PUBLIC SAFETY POOL 806-816/851-861 MHZ BAND CHANNELS FOR ATLANTA, GA (70 CHANNELS)

Group No.	Channel Nos.
261	261-313-324-335-353
262	262-314-325-336-354
269	269-289-311-322-357
270	270-290-312-323-355
279	279-299-319-339-359
280	280-300-320-340-360
285	285-315-333-351-379
286	286-316-334-352-380
309	309-329-349-369-389
310	310-330-350-370-390
321	321-331-341-361-381
328	328-348-358-368-388
Single Channels	317, 318, 326, 327, 332, 337, 338, 356, 371, 372

(b) Unless otherwise specified, the channels listed in Table 2 are available to applicants eligible in the Industrial/Business Pool of subpart C of this part but exclude Special Mobilized Radio Systems as defined in §90.603(c). 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These frequencies are available in non-border areas. Specialized Mobile Radio (SMR) systems will not be authorized on these frequencies. These channels are available for inter-category sharing as indicated in § 90.621(e).

TABLE 2 – BUSINESS/INDUSTRIAL/LAND TRANSPORTATION POOL 806-816/851-861 MHZ BAND CHANNELS (100 CHANNELS)

Group No.	Channel Nos.
322	322-362-402-442-482
323	323-363-403-443-483
324	324-364-404-444-484
325	325-365-405-445-485
326	326-366-406-446-486
327	327-367-407-447-487
342	342-382-422-462-502
343	343-383-423-463-503
344	344-384-424-464-504
345	345-385-425-465-505
346	346-386-426-466-506
347	347-387-427-467-507

Single Channels	261, 271, 281, 291, 301, 262, 272, 282, 292, 302, 263, 273, 283, 293, 303, 264, 274, 284, 294, 304, 265, 275, 285, 295, 305, 266, 276, 286, 296, 306, 267, 277, 287, 297, 307, 268, 278, 288, 298, 308
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(1) Except as provided in paragraph (b)(2), the channels listed in Table 2A are available in the counties listed in § 90.614(c) to eligible applicants in the Industrial/Business Pool of subpart C of this part but exclude Special Mobilized Radio Systems as defined in §90.603(c). 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These channels are available for intercategory sharing as indicated in §90.621(e).

TABLE 2A – BUSINESS/INDUSTRIAL/LAND TRANSPORTATION POOL 806-816/851-861 MHZ BAND FOR CHANNELS IN SOUTHEASTERN U.S (69 CHANNELS)

Single Channels	Channel Nos.
	263, 264, 267, 268, 272, 273, 274, 275, 276, 277, 278, 281, 282, 283, 284, 287, 288, 291, 292, 293, 294, 295, 296, 297, 298, 301, 302, 303, 304, 305, 306, 307, 308, 346, 347, 362, 363, 364, 365, 366, 367, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410.

(2) The channels listed in Table 2B are available within 113 km (70 mi) of the center city coordinates of Atlanta, GA to eligible applicants in the Industrial/Business Pool of subpart C of this part but exclude Special Mobilized Radio Systems as defined in §90.603(c). The center city coordinates of Atlanta, GA—for the purposes of the rule—are defined as 33° 44' 55" NL, 84° 23' 17" WL. 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These channels are available for intercategory sharing as indicated in §90.621(e).

TABLE 2B – BUSINESS/INDUSTRIAL/LAND TRANSPORTATION POOL 806-816/851-861 MHZ BAND FOR CHANNELS IN ATLANTA, GA (69 CHANNELS)

Single Channels	Channel Nos.
	263, 264, 265, 266, 267, 268, 271, 272, 273, 274, 275, 276, 277, 278, 281, 282, 283, 284, 287, 288, 291, 292, 293, 294, 295, 296, 297, 298, 301, 302, 303, 304, 305, 306, 307, 308, 342, 343, 344, 345, 346, 347, 362, 363, 364, 365, 366, 367, 382, 383, 384, 385, 386, 387, 391, 392, 393, 394, 399, 400, 401, 402, 403, 404, 405, 406, 407, 409, 410

* * * * *

(d) Unless otherwise specified, the channels listed in Tables 4A and 4B are available only to eligibles in the SMR category—which consists of Specialized Mobile Radio (SMR) stations and eligible end users. 800 MHz high density cellular systems, as defined in §90.7, are prohibited on these channels. These frequencies are available in non-border areas. The spectrum blocks listed in Table 4A are available for EA-based services (as defined by §90.681) prior to January 21, 2005. No new EA-based services will be authorized after January 21, 2005. EA-based licensees who operate non-high-density cellular systems prior to January 21, 2005 may choose to remain on these channels in the non-high-density cellular portion of the 800 MHz band (as defined in §90.614). These licensees may continue to operate non-high-density cellular systems and will be grandfathered indefinitely. The channels listed in Table 4B will be available for site-based licensing after January 21, 2005 in any Economic Area where no EA-based licensee is authorized for these channels.

TABLE 4A – EA-BASED SMR CATEGORY 806-816/851-861 MHZ BAND CHANNELS, AVAILABLE PRIOR TO JANUARY 21, 2005 (80 CHANNELS.)

Spectrum Block	Channel Nos.
G	311-351-391-431-471
H	312-352-392-432-472
I	313-353-393-433-473
J	314-354-394-434-474

K	315-355-395-435-475
L	316-356-396-436-476
M	317-357-397-437-477
N	318-358-398-438-478
O	331-371-411-451-491
P	332-372-412-452-492
Q	333-373-413-453-493
R	334-374-414-454-494
S	335-375-415-455-495
T	336-376-416-456-496
U	337-377-417-457-497
V	338-378-418-458-498

TABLE 4B – SMR CATEGORY 806-816/851-861 MHZ BAND CHANNELS, AVAILABLE AFTER JANUARY 21, 2005, FOR SITE-BASED LICENSING (80 CHANNELS.)

Group No.	Channel Nos.
315	315-355-395-435-475
316	316-356-396-436-476
317	317-357-397-437-477
318	318-358-398-438-478
331	331-371-411-451-491
332	332-372-412-452-492
333	333-373-413-453-493
334	334-374-414-454-494
335	335-375-415-455-495
336	336-376-416-456-496
337	337-377-417-457-497
338	338-378-418-458-498
Single Channels	431, 432, 433, 434, 471, 472, 473, 474, 479, 480, 481, 488, 489, 490, 499, 500, 501, 508, 509, 510

(1) Except as provided in paragraph (d)(2), the channels listed in Table 4C are available in the counties listed in § 90.614(c) for non-high-density cellular operations only to eligibles in the SMR category—which consists of Specialized Mobile Radio (SMR) stations and eligible end users. 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These channels are available for intercategory sharing as indicated in §90.621(e).

TABLE 4C – SMR CATEGORY 806-816/851-861 MHZ BAND CHANNELS AVAILABLE FOR SITE-BASED LICENSING IN SOUTHEASTERN U.S. AFTER JANUARY 21, 2005 (11 CHANNELS.)

Single Channels	Channel Nos.
	371, 373, 374, 375, 376, 377, 378, 395, 396, 397, 398

(2) The channels listed in Table 4D are available within 113 km (70 mi) of the center city coordinates of Atlanta, GA only to eligibles in the SMR category—which consists of Specialized Mobile Radio (SMR) stations and eligible end users. The center city coordinates of Atlanta, GA—for the purposes of this rule—are defined as 33° 44' 55" NL, 84° 23' 17" WL. 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These channels are available for intercategory sharing as indicated in §90.621(e). 800 MHz high density cellular systems as defined in § 90.7 are prohibited on these channels. These channels are available for intercategory sharing as indicated in §90.621(e).

TABLE 4D – SMR CATEGORY 806-816/851-861 MHZ BAND CHANNELS AVAILABLE FOR SITE-BASED LICENSING IN ATLANTA, GA AFTER JANUARY 21, 2005 (11 CHANNELS.)

Single Channels	Channel Nos.
	373, 374, 375, 376, 377, 378, 395, 396, 397, 398, 408

(e) The Channels listed in §90.614(b) and (c) are available to eligibles in the SMR category—which consists of Specialized Mobile Radio (SMR) stations and eligible end users. ESMR licensees which employ an 800 MHz high density cellular system, as defined in §90.7, are permitted to operate on these channels in non-border areas. ESMR licensees authorized prior to January 21, 2005 may continue to operate, if they so choose, on the channels listed in Table 5. These licensees will be grandfathered indefinitely.

TABLE 5 – ESMR CATEGORY 816-821/861-866 MHZ BAND CHANNELS FOR CELLULAR OPERATIONS IN NON-BORDER AREAS AVAILABLE PRIOR TO January 21, 2005. (200 CHANNELS)

Spectrum Block	Channel Nos.
A	511 through 530
B	531 through 590

C	591 through 710
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* * * * *

(g) In a given 800 MHz NPSPAC region, channels below 471 listed in Tables 2 and 4B which are vacated by licensees relocating to channels 511-830 and which remain vacant after band reconfiguration will be available as follows: ***

(h) In a given 800 MHz NPSPAC region, channels below 471 listed in Tables 2 and 4B which are vacated by a licensee relocating to channels 511-550 and remain vacant after band reconfiguration will be available as follows: ***

(i) Special Mobilized Radio Systems licensees who operate systems, other than 800 MHz high density cellular systems, on any of the public safety channels listed in Table 1 prior to January 21, 2005 are grandfathered and may continue to operate on these channels indefinitely. These grandfathered licensees will be prohibited from operating 800 MHz high density cellular systems as defined in §90.7. Site-based licensees who are grandfathered on any of the public safety channels listed in Table 1 may modify their license only if they obtain concurrence from a certified public safety coordinator in accordance with §90.175(c). Grandfathered EA-based licensees, however, are exempt from any of the frequency coordination requirements of §90.175 as long as their operations remain within the Economic Area defined by their license in accordance with the requirements of §90.683(a).

(j) Licensees operating 800 MHz high density cellular systems on the channels listed in § 90.614(a), prior to January 21, 2005, may elect to continue operating on these channels and will be permitted to continue operating 800 MHz high density cellular systems (as defined in §90.7) in this portion of the band. These licensees will be grandfathered indefinitely subject to the provisions of §§90.673, 90.674 and 90.675.

(k) Licensees may operate systems other than 800 MHz high density cellular systems (as defined in §90.7) on Channels 511–550 at any location vacated by an EA-based SMR licensee. For operations on these channels, unacceptable interference (as defined in §22.970 of this chapter and §90.672) will be deemed to occur only at sites where the following median desired signals are received (rather than those specified in §22.970(a)(1)(i) of this chapter and §90.672(a)(1)(i)). The minimum required median desired signal, as measured at the R.F. input of the receiver, will be as follows:***

* * * * *

170. In paragraph (d)(2) of Section 90.619 the cross reference to Section 90.619(b)(2) is replaced with a cross reference to Section 90.619(b).

§ 90.619 Frequencies available for use in the U.S./Mexico and U.S. Canada border areas.

* * * * *

(d) * * *

(2) All frequency assignments made pursuant to paragraph (d)(1) of this section shall comply with the requirements of §90.619(b).

171. The title for Section 90.672 is amended to replace the term “ESMR systems” with the term “800 MHz cellular systems.” In paragraph (a) of Section 90.672 a reference to “800 MHz cellular systems” and “Part 22 Cellular Radiotelephone systems” is added.

§ 90.672 Unacceptable interference to non-cellular 800 MHz licensees from 800 MHz cellular systems or Part 22 Cellular Radiotelephone systems.

(a) *Definition.* Except as provided in 47 C.F.R. §90.617(k), unacceptable interference to non-cellular licensees in the 800 MHz band from 800 MHz cellular systems or Part 22 Cellular Radiotelephone systems will be deemed to occur when the below conditions are met: ***

* * * * *

172. In paragraph (a) of Section 90.674 the term “harmful interference” is replaced with the term “unacceptable interference.” In paragraph (c) of Section 90.674 the term “ESMR licensees” is replaced with “800 MHz cellular system licensees”

§ 90.674 Interference resolution procedures before, during and after band reconfiguration.

(a) *Initial Notification.* Any non-cellular licensee operating in the 806-824/851-869 MHz band who reasonably believes it is receiving unacceptable interference, as described in § 90.672, shall provide an initial notification of the interference incident. This initial notification of an interference incident shall be sent to all Part 22 Cellular Radiotelephone licensees and ESMR licensees who operate cellular base stations (“cell sites”) within 1,524 meters (5,000 feet) of the interference incident.

* * * * *

(c) *Mitigation Steps.* (1) All 800 MHz cellular system licensees and Part 22 Cellular Radiotelephone licensees who are responsible for causing unacceptable interference shall take all affirmative measures to resolve such interference. 800 MHz cellular system licensees found to contribute to harmful interference, as defined in § 90.672, shall resolve such interference in the shortest time practicable. 800 MHz cellular system licensees and Part 22 Cellular Radiotelephone licensees must provide all necessary test apparatus and technical personnel skilled in the operation

of such equipment as may be necessary to determine the most appropriate means of timely eliminating the interference. However, the means whereby interference is abated or the cell parameters that may need to be adjusted is left to the discretion of involved 800 MHz cellular system licensees and/or Part 22 Cellular Radiotelephone licensees, whose affirmative measures may include, but not be limited to, the following techniques:

* * * * *

173. In the title of Section 90.676 the term “cellular systems” is replaced by the term “high-density cellular systems.” Paragraphs (b)(3) and (4) of Section 90.676 are updated to allow the Transition Administrator to choose the date for filing quarterly and annual reports. Paragraph (b)(5) of Section 90.676 is updated to clarify the procedures for dispute resolution.

§ 90.676 Transition administrator for reconfiguration of the 806-824/851-869 MHz band in order to separate high-density cellular systems from non-cellular systems.

* * * * *

(b) * * *

(3) Provide quarterly progress reports to the Commission in such detail as the Commission may require and include, with such reports, certifications by Nextel and the relevant licensees that relocation has been completed and that both parties agree on the amount received from the letter of credit proceeds in connection with relocation of the licensees’ facilities. The report shall include description of any disputes that have arisen and the manner in which they were resolved. These quarterly reports need not be audited. The Transition Administrator may select the dates for filing the quarterly progress reports;

(4) Provide to the Public Safety and Critical Infrastructure Division with an annual audited statement of relocation funds expended to date, including salaries and expenses of Transition Administrator. The Transition Administrator may select the date for filing the annual audited statement;

(5) Facilitate resolution of disputes by mediation; or referral of the parties to alternative dispute resolution services as described in §90.677(d).

* * * * *

174. In the title and opening paragraph of Section 90.677 the term “cellular systems” is replaced by the term “high-density cellular systems.” Paragraph (d) in Section 90.677 is amended to remove a reference to the Transition Administrator resolving conflicts within 30-working days.

§ 90.677 Reconfiguration of the 806-824/851-869 MHz band in order to separate high-density cellular systems from non-cellular systems.

In order to facilitate reconfiguration of the 806-824/851-869 MHz band ("800 MHz band") to separate high-density cellular systems from non-cellular systems, Nextel Communications, Inc. (Nextel) may relocate incumbents within the 800 MHz band by providing "comparable facilities." For the limited purpose of band reconfiguration, the provisions of § 90.157 shall not apply and inter-category sharing will be permitted under all circumstances. Such relocation is subject to the following provisions:

* * * * *

(d) *Transition Administrator.*

(1) The Transition Administrator, or other mediator, shall attempt to resolve disputes referred to it before the conclusion of the mandatory negotiation period as described in § 90.677(c) within thirty working days after the Transition Administrator has received a submission by one party and a response from the other party. Any party thereafter may seek expedited non-binding arbitration which must be completed within thirty days of the Transition Administrator's, or other mediator's recommended decision or advice. Should issues still remain unresolved they may be referred to the Chief of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau within thirty days of the Transition Administrator's, or other mediator's recommended decision or advice. When referring an unresolved matter to the Chief of the Public Safety and Critical Infrastructure Division, the Transition Administrator shall forward the entire record on any disputed issues, including such dispositions thereof that the Transition Administrator has considered. Upon receipt of such record and advice, the Commission will decide the disputed issues based on the record submitted. The authority to make such decisions is delegated to the Chief of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau who may decide the disputed issue or designate it for an evidentiary hearing before an Administrative Law Judge. If the Chief of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau decides an issue, any party to the dispute wishing to appeal the decision may do so by filing with the Commission, within ten days of the effective date of the initial decision, a Petition for *de novo* review; whereupon the matter will be set for an evidentiary hearing before an Administrative Law Judge. Any disputes submitted to the Transition Administrator after the conclusion of the mandatory negotiation period as described in § 90.677(c) shall be resolved as described in § 90.677(d)(2).

(2) If no agreement is reached during either the voluntary or mandatory negotiating periods, all disputed issues shall be referred to the Transition Administrator who shall attempt to resolve them. If disputed issues remain thirty working days after the end of the mandatory negotiation period; the Transition

Administrator shall forward the record to the Chief of the Public Safety and Critical Infrastructure Division, together with advice on how the matter(s) may be resolved. The Chief of the Public Safety and Critical Infrastructure Division is hereby delegated the authority to rule on disputed issues, *de novo*. If the Chief of the Public Safety and Critical Infrastructure Division of the Wireless Telecommunications Bureau decides an issue, any party to the dispute wishing to appeal the decision may do so by filing with the Commission, within ten days of the effective date of the initial decision, a Petition for *de novo* review; whereupon the matter will be set for an evidentiary hearing before an Administrative Law Judge.

* * * * *

175. A new paragraph (e) is added to Section 90.685 as follows:

§ 90.685 Authorization, construction and implementation of EA licenses.

* * * * *

(e) EA licensees operating on channels listed in § 90.614 (b) and (c) must implement an Enhanced Specialized Mobile Radio (ESMR) system—as defined in § 90.7—on their EA license and any associated site-based licenses prior to the expiration date of the EA license. EA licensees operating on these channels shall follow the construction notification procedures set forth in § 1.946(d) of this chapter. Failure to implement an ESMR system on their EA and site-based licenses before the expiration date of the EA license will result in termination of the EA license and any associated site-based licenses pursuant to § 1.946(c) of this chapter.