

published in the **Federal Register**. We note that interlocutory procedural rulings in rulemaking proceedings, such as orders granting extensions of time or other miscellaneous procedural orders that directly pertain to a rulemaking itself, are governed by amended section 1.4(b)(1), because these procedural orders in rulemaking dockets are required to be published in the **Federal Register**.

4. We also clarify that proceedings that do not fall within the class of rulemaking decisions that must be published in the **Federal Register**, such as adjudicatory matters, e.g. individual licensing decisions and waivers as to specific parties, do not come within the scope of section 1.4(b)(1), even if the decisions happen to be related to, or issued in, an on-going rule making docket. In so doing, we expressly depart from the interpretation of our computation of time rule that was announced in *Adams Telcom, Inc. v. FCC*, 997 F.2d 955 (D.C. Cir. 1993). The date of public notice for decisions in such non-rulemaking matters is the release date of the document that contains the Commission's decision, not the date of publication in the **Federal Register**.

5. Finally, we are amending section 1.4(b)(2) to make clear that "public notice" for section 271 determinations is the date of release of the Commission's decision. Section 271(d)(5) of the Communications Act, 47 U.S.C. 271(d)(5), adopted as part of the Telecommunications Act of 1996, requires the Commission, not later than 10 days after issuing a determination approving or denying an authorization request from a Bell Operating Company to provide interLATA services pursuant to section 271, to publish a brief description of its written determination in the **Federal Register**. Although the statute requires their publication in the **Federal Register**, decisions with respect to section 271 applications are adjudications, not rulemakings. The brief summaries of the Commission's section 271 determinations thus appear in the notices category of the **Federal Register**, not the rules category. Consistent with their adjudicatory status, the date of public notice for section 271 decisions is properly the date of release, and the rules are amended to state this explicitly.

6. The rule amendments adopted herein involve rules of agency organization, procedure, or practice, and the notice and comment and effective date provisions of the Administrative Procedure Act are therefore inapplicable. 5 U.S.C. 553(b)(A), (d).

7. Because members of the public relied on the prior interpretation of our rules announced in *Adams Telcom, Inc.*, the amended rule as it applies with respect to these adjudicatory decisions (and which is explained in a new note to amended section 1.4(b)(1)), applies only to Commission decisions released on or after the effective date of the amended rule. The other clarifications to the computation of time rules contained in this order are, however, applicable to all Commission decisions, whether released before or after the effective date of the new rules, as they merely codify existing interpretations and practice.

8. Pursuant to sections 4(i), 4(j), 303(r), 47 U.S.C. 4(i), 4(j), 303(r), 47 CFR Part I is amended as set forth below, effective July 27, 2000.

List of Subjects 47 CFR Part 1

Practice and procedure.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

Rule Change

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. Section 1.4 is amended by revising the introductory text of paragraphs (b)(1) and (b)(2) and by adding a note to paragraph (b)(1) to read as follows:

§ 1.4 Computation of time.

* * * * *

(b) * * *

(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the **Federal Register**, including summaries thereof, the date of publication in the **Federal Register**.

Note to paragraph (b)(1): Licensing and other adjudicatory decisions with respect to specific parties that may be associated with or contained in rulemaking documents are governed by the provisions of § 1.4(b)(2).

(2) For non-rulemaking documents released by the Commission or staff, including the Commission's section 271

determinations, 47 U.S.C. 271, the release date.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 24

[WT Docket No. 95-157, RM-8643; FCC 00-123]

Amendment of the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation; Petitions for Reconsideration

AGENCY: Federal Communications Commission.

ACTION: Final rule; petition for reconsideration.

SUMMARY: In this document, the Commission clarifies certain aspects of its rules governing the relocation of microwave facilities from the 1850-1990 Megahertz (MHz) band. These rule clarifications are consistent with the Commission's goal of ensuring the efficient relocation of fixed microwave incumbents from the 1850-1990 MHz band to higher bands and the efficient rollout of broadband PCS service in the 1850-1990 MHz band.

DATES: Effective August 28, 2000.

FOR FURTHER INFORMATION CONTACT: Joel Taubenblatt, Wireless Telecommunications Bureau, Commercial Wireless Division, at (202) 418-1513.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Memorandum Opinion and Order on Reconsideration (MO&O) in WT Docket No. 95-157, adopted April 5, 2000, and released July 19, 2000. In this document, the Commission addresses petitions for reconsideration and/or clarification of, and a petition for declaratory ruling concerning, the Commission's rules governing the relocation of microwave facilities from the 1850-1990 Megahertz (MHz) band. The Commission clarifies certain aspects of these rules, as discussed below, and denied the remaining requests in the petitions.

2. In 1992, the Commission reserved 220 megahertz of spectrum, including the 1850-1990 MHz band, for reallocation from private and common carrier fixed microwave services (microwave incumbents) to services using emerging technologies. The Commission also established procedures for microwave incumbents to be

relocated to available frequencies in higher bands or to other media, including procedures governing the compensation of microwave incumbents by providers of emerging technology services. In 1994, the Commission allocated the 1850–1990 MHz band to broadband Personal Communications Services (PCS), one of the emerging technology services.

3. In the *First Report and Order* in this proceeding, 61 FR 29679 (June 12, 1996), the Commission changed and clarified certain aspects of its microwave relocation procedures and adopted a plan for sharing the costs of relocating microwave facilities operating in the broadband PCS band (the “cost-sharing plan”). Under the Commission’s cost-sharing plan, PCS licensees and manufacturers of unlicensed PCS devices that incur costs for relocating an interfering microwave link (together, “PCS relocators”) are eligible to receive reimbursement from later-entrant PCS licensees and later-entrant manufacturers of unlicensed PCS devices that benefit from the clearing of their spectrum (together, “later-entrant PCS entities”). The cost-sharing plan is administered by two private clearinghouses designated by the Wireless Telecommunications Bureau (WTB)—the Personal Communications Industry Association (PCIA) and the Industrial Telecommunications Associations, Inc. (ITA)—using the cost-sharing formula adopted by the Commission.

4. In the *Second Report and Order* in this proceeding, 62 FR 12752 (March 18, 1997), the Commission, among other things, modified its cost-sharing rules to permit microwave incumbents who relocate their own microwave links and pay their own relocation expenses (“self-relocating microwave incumbents”) to collect reimbursement in accordance with the cost-sharing plan adopted in the *First Report and Order*, subject to certain conditions.

5. Ten parties filed petitions for reconsideration or clarification of the *First Report and Order*, one party filed a petition for declaratory ruling concerning the *First Report and Order*, and three parties filed petitions for reconsideration and clarification of the *Second Report and Order*.

6. This document denies the petitions for reconsideration and/or clarification of the *First Report and Order* because it finds that: (1) with respect to the MSS Coalition petition, the concerns raised by the petitioner regarding the applicability of the microwave relocation and cost-sharing rules to the 2 GHz non-PCS bands were raised and considered in another Commission

rulemaking; (2) with respect to the other petitions, any potential benefit of the suggested changes to the Commission’s cost-sharing rules is outweighed by the risk of undermining the integrity of the relocation process by altering rules relied upon by the parties involved in the process.

7. This document also declines to make a declaratory ruling that a later-entrant PCS licensee is not obligated to reimburse a PCS relocater for the cost of relocating a link that is entirely within the PCS relocater’s MTA or BTA, as requested by Powertel, because it finds that § 24.247 of the Commission’s rules dictates a different result.

8. In addition, with respect to the petitions for reconsideration and/or clarification of the *Second Report and Order*, this document clarifies that: (1) microwave incumbents that self-relocated links between April 5, 1995 and May 19, 1997 are not entitled to reimbursement; (2) microwave incumbents are permitted to relocate to leased facilities, as well as purchased facilities; (3) the date that the depreciation factor begins to apply to the amount reimbursable to a microwave incumbent for its self-relocated links is the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to § 101.305 of the Commission’s rules; (4) the deadline for self-relocating microwave incumbents to file documentation of the relocation with the clearinghouse shall be within ten business days of the date referred to in the preceding clause; and (5) under the cost-sharing formula as applied to self-relocating microwave incumbents, the variable N equals 1 for the first PCS entity that would have interfered with the relocated link. This document denies the remaining requests in the petitions for reconsideration and/or clarification of the *First Report and Order* and *Second Report and Order* in this proceeding.

9. The complete text of this *MO&O* is available for inspection and copying during normal business hours in the Commission’s Reference Center, Room CY–A257, 445 12th Street SW, Washington, DC. The complete text is also available through the Internet at <http://www.fcc.gov/Bureaus/Wireless/Orders/2000/fcc00123.doc>. In addition, the complete text may be purchased from the Commission’s duplicating contractor, International Transcription Service, Inc. (ITS, Inc.) at 1231 20th Street NW, Washington, DC 10036, (202) 857–3800.

Supplemental Final Regulatory Flexibility Analysis

10. As required by the Regulatory Flexibility Act (RFA), *see* 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (NPRM) in WT Docket No. 95–157, 60 FR 55529 (November 1, 1995). The Commission sought written public comment on the proposals in the *NPRM*, including the IRFA. A Final Regulatory Flexibility Analysis (FRFA) was incorporated in the *First Report and Order* in WT Docket No. 95–157, 61 FR 29679 (June 12, 1996). The *First Report and Order* also included a Further Notice of Proposed Rulemaking (Further Notice), and thus incorporated an IRFA on the additional proposals in the *Further Notice*, 61 FR 29679 (June 12, 1996). The Commission sought written public comment on the additional proposals in the *Further Notice*, including the IRFA. A FRFA on the additional proposals in the *Further Notice* was incorporated in the *Second Report and Order* in WT Docket No. 95–157, 62 FR 12752 (March 18, 1997). The present Supplemental Final Regulatory Flexibility Analysis in this document supplements the FRFAs in the *First Report and Order* and *Second Report and Order*, and conforms to the RFA, as amended.

A. Need for, and Objectives of, the Rules

10. This document addresses petitions for reconsideration and/or clarification of, and a petition for declaratory ruling, concerning the Commission’s plan for PCS market entrants to share the costs of relocating microwave facilities from the 1850–1990 MHz band. Under the Commission’s cost-sharing plan, PCS licensees and manufacturers of unlicensed PCS devices that incur costs for relocating an interfering microwave link (together, “PCS relocators”) are eligible to receive reimbursement from later-entrant PCS licensees or later-entrant manufacturers of unlicensed PCS devices that benefit from the clearing of their spectrum (together, “later-entrant PCS entities”). In addition, the cost-sharing plan permits microwave incumbents who relocate their own microwave links and pay their own relocation expenses (“self-relocating microwave incumbents”) to collect reimbursement from later-entrant PCS entities that benefit from the clearing of the spectrum, subject to certain conditions. This document clarifies certain aspects of this cost-sharing plan, as discussed below, and denies the remaining requests in the petitions, including a request to eliminate the installment payment plan

for designated entity reimbursement obligations. These clarifications will facilitate the efficient relocation of fixed microwave incumbents from the 1850–1990 MHz band in order to clear the band for the provision of PCS service.

11. In particular, the document clarifies that: (1) the Proximity Threshold test set forth in § 24.247 of the Commission's rules, 47 CFR 24.247, controls when a reimbursement obligation exists for a later-entrant PCS licensee; (2) microwave incumbents that self-relocated links between April 5, 1995 and May 19, 1997 are not entitled to reimbursement; (3) microwave incumbents are permitted to relocate to leased facilities, as well as purchased facilities; (4) the date that the depreciation factor begins to apply to the amount reimbursable to a microwave incumbent for its self-relocated links is the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of these links, pursuant to § 101.305 of the Commission's rules, 47 CFR 101.305; (5) the deadline for self-relocating microwave incumbents to file documentation of the relocation with the clearinghouse shall be within ten business days of the date referred to in the preceding clause; and (6) under the cost-sharing formula as applied to self-relocating microwave incumbents, the variable N equals 1 for the first PCS entity that would have interfered with the relocated link.

B. Summary of Issues Raised in Response to the FRFAs

12. None of the petitions filed on the *First Report and Order* and *Second Report and Order*, or comments filed on these petitions, were specifically in response to the FRFAs in those orders. Several of the petitions and comments regarding the *First Report and Order*, though, raised issues that may impact small entities, and were considered by the Commission, as discussed in Section E below. In particular, Tenneco Energy argues that the Commission should eliminate the payment plan that permits PCS providers that are designated entities (a small business classification used for Commission spectrum auctions) to make reimbursement payments in installments over time, as set forth in § 24.249(b) of the Commission's rules, 24 CFR 24.249(b). Omnipoint and PCIA oppose Tenneco's argument. Moreover, Omnipoint contends that, although it does not qualify as a designated entity under the Commission's rules, it should be permitted to make reimbursement

payments according to the installment plan schedule set forth in § 24.249(b).

13. Small Business in Telecommunications (SBT) argues that the Commission should refine its definitions of communications throughput and network reliability in evaluating whether a microwave incumbent's new system is comparable to the old one, and that the Commission should require PCS providers to compensate microwave incumbent's for internal resources devoted to the relocation process. Other fixed microwave incumbents, such as the Association of American Railroads, support a refinement of the definitions of throughput and reliability, whereas PCS providers such as AT&T, Omnipoint, and Pacific Bell, oppose such a refinement. In addition, AT&T opposes SBT's suggested modification to include internal resources in compensation.

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

14. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. 5 U.S.C. 603(b)(3). The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 15 U.S.C. 632. 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). *Id.* A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." 5 U.S.C. 601(4). Nationwide, as of 1992, there were approximately 275,801 small organizations. "Small governmental jurisdiction" generally means "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 50,000." 5 U.S.C. 601(5). As of 1992, there were approximately 85,006 such jurisdictions in the United States. This number includes 38,978 counties, cities, and towns; of these, 37,566, or 96 percent, have populations of fewer than 50,000. The Census Bureau estimates that this ratio is approximately accurate for all governmental entities. Thus, of the 85,006 governmental entities, we

estimate that 81,600 (96 percent) are small entities. Below, we further describe and estimate the number of small entity licensees and regulatees that will be affected by the rule clarifications adopted in this document.

15. The rule clarifications adopted in this document will affect small entities that participate in the microwave relocation process in the 1850 MHz to 1990 MHz band: providers of broadband personal communications service (PCS); providers of fixed microwave services; and manufacturers of unlicensed PCS devices.

16. *Broadband Personal Communications Service (PCS)*. The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the 1,479 licenses for Blocks D, E, and F. However, licenses for Blocks C through F have not been awarded fully; therefore, there are few, if any, small businesses currently providing PCS services. Based on this information, we estimate that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

17. *Fixed Microwave Services*. The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, we will utilize the SBA's definition applicable to radiotelephone companies—*i.e.*, an entity with no more than 1,500 persons. 13 CFR 121.201, Standard Industrial Classification (SIC) 4812. The Commission's Office of Engineering and Technology developed a study in 1992 that provides statistical data for all microwave incumbents in 1850 to 1990 MHz band. Specifically,

the study finds that in the 1850 MHz to 1990 MHz band, local governments, including public safety entities, have 168 licenses; petroleum companies have 67 licenses; power companies have 164 licenses; railroad companies have 18 licenses; and all other microwave incumbents in this band have 143 licenses. However, the Commission does not have specific statistics that determine how many of these companies are small businesses. We therefore are unable to estimate the number of fixed microwave service providers that qualify under the SBA's definition.

18. *Manufacturers of Unlicensed PCS Devices.* The Commission has not yet developed a definition of small entities applicable to manufacturers of unlicensed PCS devices. Therefore, the applicable definition of small entity is the definition under the SBA applicable to the "Communications Services, Not Elsewhere" category—an entity with less than \$11.0 million in annual receipts. 13 CFR 121.201, SIC Code 4899. The Census Bureau estimate indicate that of the 848 firms in the "Communications Services, Not Elsewhere" category, 775 are small businesses. The Commission does not have specific statistics, though, on how many of these 775 small businesses are manufacturers of unlicensed PCS devices.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

19. This document does not contain any additional reporting or recordkeeping requirements. The document does clarify several aspects of the Commission's cost-sharing plan for microwave relocation, as discussed in Section A above, but these clarifications do not create new compliance obligations.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

20. This document clarifies certain aspects of the Commission's plan for PCS market entrants to share the costs of relocating microwave facilities from the 1850–1990 MHz band, as discussed in Section A above. Under the Commission's cost-sharing plan, PCS relocators and self-relocating fixed microwave incumbents that pay for the relocation of microwave links are entitled to reimbursement from later-entrant PCS entities that benefit from the clearing of the spectrum. A number of the clarifications set forth in this document will affect the amount of reimbursement that a PCS relocator or

self-relocating microwave incumbent is entitled to receive under the plan and, conversely, the amount of reimbursement that a later-entrant PCS entity is obligated to pay. In some cases, the clarifications will result in an increase in reimbursement, to the benefit of the PCS relocator or self-relocating microwave incumbent; in other cases, the clarifications will result in a decrease in reimbursement, to the benefit of the later-entrant PCS entity. Because some entities on both sides of the reimbursement equation are small businesses, we do not believe that, on the whole, these clarifications to the cost-sharing plan will have a significant economic impact on small businesses. We do believe that these clarifications will make it easier for the affected regulated entities to comply with our cost-sharing rules and, to some extent, reduce the staff resources needed to handle compliance, a result that is especially beneficial for small businesses.

21. This document also denies the remaining requests in the petitions (retaining the status quo), including the requests by Tenneco, Omnipoint, and SBT set forth in Section B above. We believe that the remaining requests would require changes in the cost-sharing rules that might undermine the integrity of the rules that PCS relocators, later-entrant PCS entities, and microwave incumbents have relied on since 1996 to effect the relocation from these bands. Thus, as discussed in paragraph 8 of the document, we conclude that granting these remaining requests would not significantly advance our goal of promoting an efficient and equitable relocation process as to outweigh the risks associated with such rule changes.

F. Report to Congress

22. The Commission will send a copy of this document, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. 801(a)(1)(A). In addition, the Commission will send a copy of this document, including this Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this document and this Supplemental FRFA (or summaries thereof) will also be published in the **Federal Register**. *See* 5 U.S.C. 604(b).

G. Ordering Clauses

23. Accordingly, pursuant to the authority of § 1.106 of the Commission's rules, 47 CFR 1.106, the petitions for

reconsideration and/or clarification of the First Report and Order filed by the American Petroleum Institute, the Association of American Railroads, the Association of Public-Safety Communications Officials-International, Inc., AT&T Wireless Services, Inc. (jointly with GTE Mobilnet, PCS PrimeCo, L.P., Pocket Communications, Inc., Western PCS Corporation and the Cellular Telecommunications Industry Association), the MSS Coalition, Omnipoint Communications, Inc., the Personal Communications Industry Association, Small Business in Telecommunications, Tenneco Energy, and UTC/The Telecommunications Association are denied, as discussed in paragraph 6 *supra*.

24. Pursuant to the authority of § 1.2 of the Commission's rules, 47 CFR § 1.2, the petition for declaratory ruling concerning the First Report and Order filed by Powertel PCS, Inc. is denied, as discussed in paragraph 7 *supra*.

25. Pursuant to the authority of § 1.106 of the Commission's rules, 47 CFR 1.106, the petitions for reconsideration and/or clarification of the Second Report and Order filed by American Petroleum Institute, UTC/The Telecommunications Association, and the South Carolina Public Service Authority are granted in part and denied in part, as discussed in paragraph 8 *supra*.

26. Pursuant to the authority of §§ 24.243 and 24.245 of the Commission's rules, 47 CFR 24.243, 24.245, are amended as set forth in the rule changes which are to become August 28, 2000.

27. It is further ordered that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Memorandum Opinion and Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 24

Personal communications services, Radio.

Federal Communications Commission.

Magalie Roman Salas,
Secretary.

Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 24 as follows:

PART 24—PERSONAL COMMUNICATIONS SERVICES

1. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309, and 332.

2. Section 24.243 is amended by revising paragraphs (c) and (d) to read as follows:

§ 24.243 The cost-sharing formula.

* * * * *

(c) *N* equals the number of PCS entities that would have interfered with the link. For the PCS relocater, *N*=1. For the next PCS entity that would have interfered with the link, *N*=2, and so on. In the case of a voluntarily relocating microwave incumbent, *N*=1 for the first PCS entity that would have interfered with the link. For the next PCS entity

that would have interfered with the link, *N*=2, and so on.

(d) *Tm* equals the number of months that have elapsed between the month the PCS relocater or voluntarily relocating microwave incumbent obtains reimbursement rights for the link and the month that the clearinghouse notifies a later-entrant of its reimbursement obligation for the link. A PCS relocater obtains reimbursement rights for the link on the date that it signs a relocation agreement with a microwave incumbent. A voluntarily relocating microwave incumbent obtains reimbursement rights for the link on the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of the link, pursuant to § 101.305 of the Commission's rules.

3. Section 24.245 is amended by revising paragraph (a)(2) to read as follows:

§ 24.245 Reimbursement under the cost-sharing plan.

(a) * * *

(2) To obtain reimbursement, a voluntarily relocating microwave incumbent must submit documentation of the relocation of the link to the clearinghouse within ten business days of the date that the incumbent notifies the Commission that it intends to discontinue, or has discontinued, the use of the link, pursuant to § 101.305 of the Commission's rules.

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