

that applicants must provide in their domestic section 214 applications, whether filed separately or in combination with an international section 214 application. Moreover, the Order defines pro forma transactions in a manner that is consistent with the definition used by the Commission in other contexts, and harmonizes the treatment of asset acquisitions with the treatment of acquisitions of corporate control. A summary of the Order was published in the **Federal Register**. See 67 FR 18827, April 17, 2002. The new rules entail new information collection requirements that required OMB approval. On June 4, 2002, OMB approved the information collection requirements. See OMB No. 3060-0989. Sections 63.01, 63.03 and 63.04, published at 67 FR 18827, April 17, 2002, takes effect on June 14, 2002. This publication satisfies the statement in the April 17, 2000 **Federal Register** notice that the Commission would publish a document in the **Federal Register** announcing the effective date of the rules.

Federal Communications Commission.

**Marlene H. Dortch,**  
*Secretary.*

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## DEPARTMENT OF COMMERCE

### National Telecommunications and Information Administration

#### 47 CFR Part 301

[001206341-2027-02]

RIN 0660-AA14

#### Mandatory Reimbursement Rules for Frequency Band or Geographic Relocation of Federal Spectrum-Dependent Systems

**AGENCY:** National Telecommunications and Information Administration, Commerce.

**ACTION:** Final rule.

**SUMMARY:** In this document, the National Telecommunications and Information Administration (NTIA) adopts rules governing reimbursement to Federal entities by the private sector as a result of reallocation of frequency spectrum. This rule implements provisions of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (NDAA 99) which authorized Federal entities to accept compensation payments when they relocate or modify their frequency use to accommodate non-Federal users of the

spectrum. By this action, spectrum that has been identified for reallocation can be provided to the private sector for future commercial wireless service, and the Federal Government will be compensated for the costs incurred in making that reallocated spectrum available.

**DATES:** These rules become effective July 17, 2002.

**ADDRESSES:** A complete set of comments filed in response to the Notice of Proposed Rulemaking<sup>1</sup> is available for public inspection at the Office of the Chief Counsel, National Telecommunications and Information Administration, Room 4713, U.S. Department of Commerce, 1401 Constitution Avenue, NW., Washington, DC. The responses can also be viewed electronically at <http://www.ntia.doc.gov>.

**FOR FURTHER INFORMATION CONTACT:** Milton Brown, NTIA, (202) 482-1816.

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#### Background

1. NTIA is the executive branch agency principally responsible for developing and articulating U.S. domestic and international

<sup>1</sup> See Mandatory Reimbursement Rules for Frequency Band or Geographic Relocation of Federal Spectrum-Dependent Systems, National Telecommunications and Information Administration, Docket No. 001206341-0341-01, *Notice of Proposed Rule Making*, 66 FR 4771 (Jan. 18, 2001) (NPRM).

telecommunications policy. NTIA is the principal advisor to the President on telecommunications policies pertaining to the Nation's economic and technological advancement and to the regulation of the telecommunications industry. NTIA also manages the Federal Government's use of the radio spectrum.

2. On August 10, 1993, Title VI of the Omnibus Budget Reconciliation Act of 1993 (OBRA-93) was signed into law.<sup>2</sup> OBRA-93 authorized the Federal Communications Commission (FCC or Commission) to use competitive bidding (auctions) for the reassignment and licensing of spectrum frequencies for certain commercial services. OBRA-93 also directed the Secretary of Commerce to transfer at least 200 megahertz (MHz) of spectrum below 5 gigahertz (GHz) from Federal agencies to the FCC for licensing to the private sector. Pursuant to OBRA-93, NTIA identified Federal bands for reallocation totaling 235 MHz from the Federal Government to non-Government use in its February 1995 Spectrum Reallocation Final Report.<sup>3</sup>

3. Title III of the Balanced Budget Act of 1997 (BBA-97) required the Secretary of Commerce to identify an additional 20 MHz below 3 GHz for reallocation to non-Government users.<sup>4</sup> In response to this directive, NTIA issued a Spectrum Reallocation Report in February 1998 which identified the additional bands for reallocation.<sup>5</sup> BBA-97 directed the FCC to auction the 20 MHz by 2002 and the 1710-1755 MHz band identified in the 1995 Spectrum Reallocation Final Report after January 1, 2001.<sup>6</sup> Finally, BBA-97 authorized Federal entities to accept cash or in-kind payment as compensation for costs associated with vacating spectrum transferred from Federal to non-Federal use.

4. In 1998, Congress passed the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (NDAA-99).<sup>7</sup> This legislation sought to

<sup>2</sup> Pub. L. No. 103-66, 107 Stat. 312 (1993).

<sup>3</sup> See National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA Special Publication 95-32, *Spectrum Reallocation Final Report* (Feb. 1995).

<sup>4</sup> Pub. L. No. 105-33, 111 Stat. 251 (1997).

<sup>5</sup> See National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA Special Publication 98-36, *Spectrum Reallocation Report* (Feb. 1998).

<sup>6</sup> Pub. L. No. 105-33, Sec. 3002(b), *codified at* 47 U.S.C. 925 note (2001). Of the 20 MHz of spectrum, eight (8) MHz (i.e., 139-140.5 MHz, 141.5-143 MHz and 1385-1390 MHz bands) were subsequently reclaimed by the Federal Government in accordance with the National Defense Authorization Act for Fiscal Year 2000. Pub. L. No. 106-65, 113 Stat. 512, 768 (1999).

<sup>7</sup> Pub. L. No. 105-261, 112 Stat. 1920 (1998) (*amending* section 113(g) of the NTIA Organization Act (*codified at* 47 U.S.C. 923(g)).

encourage the transfer of electromagnetic spectrum from Federal Government to private use by authorizing mandatory compensation payments for Federal entities when they relocate or modify their frequency use to accommodate non-Federal users of the spectrum.<sup>8</sup> Specifically, the Act requires “[a]ny person on whose behalf a Federal entity incurs costs” pursuant to frequency spectrum relocation or modification “to compensate the Federal entity in advance” for the entity’s modification or relocation expenses.<sup>9</sup> The Act also references various expenses associated with frequency relocation or modification that qualify for reimbursement including “the costs of any modification, replacement, or re-issuance of equipment, facilities, operating manuals, or regulations incurred by that entity.”<sup>10</sup> Moreover, the Act requires the Federal entity to notify NTIA prior to an auction<sup>11</sup> of the “marginal costs anticipated to be associated with such relocation or with modifications necessary to accommodate prospective licensees.”<sup>12</sup>

## Discussion

5. The Act directs NTIA and the FCC to “develop procedures for the implementation of [relocation], which \* \* \* shall include a process for resolving any differences that arise between the Federal Government and commercial licensees regarding estimates of relocation or modification costs.”<sup>13</sup> On January 18, 2001, NTIA issued a Notice of Proposed Rule Making (NPRM) regarding these procedures. The NPRM sets out proposed rules to implement the process by which Federal entities are reimbursed for marginal costs incurred in relocating or modifying facilities as a result of reallocation. The NPRM raised a number of questions and sought public comment on the reimbursement process. The public comments received in response to the NPRM present a wide range of interests that are summarized and discussed below.

<sup>8</sup> See 47 U.S.C. 923(g)(1)(A) (2001). “Federal entity” is defined as “any department, agency, or other instrumentality of the Federal Government that utilizes a Government station license obtained under section 305 of the 1934 Act (47 U.S.C. 305).” 47 U.S.C. 923(i).

<sup>9</sup> See 47 U.S.C. 923(g)(1)(B).

<sup>10</sup> See *Id.* Sec. 923(g)(1)(A).

<sup>11</sup> Generally, the FCC’s auction authority is codified in Section 309(j) of the Communications Act as amended, 47 U.S.C. 309(j).

<sup>12</sup> See 47 U.S.C. 923(g)(1)(A).

<sup>13</sup> See 47 U.S.C. 923(g)(1)(E).

## Affected Bands

6. The NPRM identified the following bands that currently qualify for reimbursement: 216–220 MHz; 1432–1435 MHz; 1710–1755 MHz; and 2385–2390 MHz. These bands are Federal Government spectrum that was previously identified by NTIA for transfer to the private sector pursuant to OBRA–93 and BBA–97. The NPRM sought comment on the bands that qualified for reimbursement, and stated that future bands that qualify for reimbursement would be identified via a public notice and request for comment. Few comments were received with respect to the bands that qualify for reimbursement. We note that the Commission recently released its Report and Order regarding the reallocation of three of these bands, as well as an additional Report and Order adopting service and competitive bidding rules for these bands.<sup>14</sup> A discussion of the particular bands that currently qualify for reimbursement is provided below.

### a. 216–220 MHz Band

7. Federal assignments within the 216–220 MHz band are eligible for reimbursement for relocation or modification costs pursuant to BBA–97 and NDAA–99.

8. Mobex, an Automated Telecommunications Systems (AMTS) operator, states that it presently operates on a secondary basis to the United States Navy’s SPASUR system in the 216.880 MHz to 217.080 MHz band.<sup>15</sup> Mobex maintains that in more than 15 years of operation, it has encountered no difficulty in sharing use of the band with the SPASUR system and does not anticipate any difficulty if it obtains additional AMTS licenses.<sup>16</sup> Mobex states that there may be no other spectrum suitable for the SPASUR purpose. Thus, Mobex submits that if the Navy has no intention of relocating the SPASUR system, the Navy should so inform the Administration so that the 216–220 MHz can be severed from this proceeding.<sup>17</sup> We anticipate that SPASUR will remain in the band at

<sup>14</sup> See Reallocation of the 216–220 MHz, 1390–1395 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz Government Transfer Bands, ET Docket No. 00–221, *Report and Order and Memorandum Opinion and Order*, 17 FCC Rcd 368 at ¶¶ 19, 22 (2002); Amendments to Parts 1, 2, 27 and 90 of the Commission’s Rules to License Services in the 216–220 MHz, 1390–1395 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz Government Transfer Bands, *Report and Order*, FCC No. 02–152 (released May 24, 2002).

<sup>15</sup> Mobex Comments at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

specified locations on a primary basis, and we anticipate that other Federal systems will maintain secondary status in the band and not seek reimbursement costs. As noted in paragraph 6 above, the FCC recently released a Report and Order adopting service and competitive bidding rules for these bands to accommodate new licensees. Accordingly, the 216–220 MHz band will not be severed from this proceeding as Mobex suggests.

### b. 1432–1435 MHz Band

9. Federal assignments within the 1432–1435 MHz band are eligible for reimbursement for relocation or modification costs pursuant to BBA–97 and NDAA–99.

### c. 1710–1755 MHz Band<sup>18</sup>

10. Federal assignments within this band are eligible for reimbursement costs for relocation or modification pursuant to BBA–97 and NDAA–99. Affected Federal agencies will submit estimated relocation or modification costs to NTIA pursuant to these rules.

11. The Federal Aviation Administration (FAA) asked whether agencies that are located in the 1710–1755 MHz band would be required to relocate by January 2004 if no private entities bid on the particular frequencies.<sup>19</sup> January 2004 is not a statutory driven date. To the extent that no non-Government entities have been licensed in the 1710–1755 MHz band, we see no reason why the Federal entities would be required to relocate by that date. Accordingly, Federal agencies within the 1710–1755 MHz band will submit estimated costs to relocate pursuant to these final rules.

### d. 2385–2390 MHz Band

12. Federal assignments within this band are eligible for reimbursement of relocation or modification costs pursuant to BBA–97 and NDAA–99. Affected Federal agencies will submit estimated relocation or modification costs to NTIA pursuant to these rules.

### e. Future Bands

13. Future bands that qualify for reimbursement will be identified via a public notice and request for comments.

<sup>18</sup> We note that this band is part of an ongoing proceeding whereby NTIA and the Commission are developing a plan for the assessment of spectrum for advanced wireless services (3G). See *In the Matter of Amendment of the Commission’s Rules to Allocate Spectrum Below 3GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, ET Docket No. 00–258.

<sup>19</sup> FAA Comments at 1.

### Sharing

14. The NPRM sought comment on whether Federal entities should be required to relocate in those cases where sharing is technically possible.<sup>20</sup> Most of the commenters supported the idea of the non-Government licensee sharing with the incumbent Federal entity, under certain conditions. The Industrial Telecommunications Association, Inc. (ITA), for example, stated that sharing, as well as voluntary relocation, would expedite the auction process by reducing uncertainty, and avoiding the costly process of unnecessarily relocating Federal incumbents.<sup>21</sup> ITA further noted that relocation may not be necessary because licensees could deploy systems around incumbent Federal users without overlapping contours.<sup>22</sup> Other commenters, however, contended that certain conditions should accompany any sharing arrangement. For example, some commenters noted that the decision about whether the Federal entity should relocate or be permitted to share should be made by the new licensee as opposed to the Federal entity.<sup>23</sup> Motorola supported the sharing of spectrum provided that it does not hamper the deployment of services.<sup>24</sup> AT&T stated that sharing would be a superior option to full relocation in terms of cost, time and convenience, and might be appropriate where the Government's use is restricted to a small geographic area or an off-use time period.<sup>25</sup> AT&T maintained that a licensee's choice between relocation and sharing, retuning or modification (as discussed below) should govern unless the Government demonstrates that the licensee's choice is impracticable.<sup>26</sup>

15. The Department of Defense (DoD) stated that if sharing is technically possible, the private entity would be required to pay for any modification required by the Federal entity.<sup>27</sup> DoD further maintained that it is the Federal entity that must first determine how to achieve comparability of operations, and that "permitting" DoD to remain on a non-interference basis is not likely to be sufficient to achieve comparability.<sup>28</sup> DoD also argued that to leave sharing as a potentially feasible option, no requirement should be established that

would serve to limit the possibility of achieving comparability.

16. Commenters also offered suggestions and recommendations with respect to establishing sharing as an option. Motorola stated that clear rules need to be established to ensure that deployed systems are compatible and will not affect non-Government operations or mission critical Government facilities.<sup>29</sup> Motorola further stated that costs required for system modification to support sharing must be provided prior to an auction of the reallocated spectrum so that a new entrant can consider the costs as part of a spectrum acquisition strategy.<sup>30</sup> Securicor commented that NTIA should clarify that relocation of incumbent Federal entities is a right that is at the option of the auction winners.<sup>31</sup> AT&T similarly commented that new licensees should have the ultimate choice among sharing, retuning, or full relocation of the Federal incumbents.<sup>32</sup> ITA recommended that NTIA allow licensees to "rely upon resources such as frequency advisors to evaluate proposed systems and either: (1) Ensure that there will be no prohibited overlap with incumbent, Governmental entities; or (2) begin a relocation negotiation process with the Federal incumbent licensee."<sup>33</sup> DoD stated that sharing should be considered on a case-by-case basis, and that NTIA should make the clarification in the final rule that sharing is to be made available only if the incumbent Federal entities believe that it would meet their needs.<sup>34</sup>

17. Although sharing appears to be an option that private sector parties favor, OBRA-93, BBA-97, and NDAA-99 require non-exempt Federal entities to relocate from bands reallocated to non-Government uses in order to exercise their rights to reimbursement. Therefore sharing by non-exempt Federal systems will not be permitted once the requirements of OBRA-93, BBA-97, and NDAA-99 have been met. To the extent that a non-exempt Federal entity decides to remain in a reallocated band, the Federal entity would remain in the band on a non-interference basis and would not be entitled to reimbursement for any modification costs under these rules.

18. We recognize that as a practical matter, however, during relocation of Federal Government stations from these bands, Federal agencies and private

sector licensees may find it efficient for both entities to operate in these bands for a period of time. It may take a number of years for the relocation process to be completed in some of the subject bands depending upon the number of Government systems that must be relocated. We anticipate that the negotiation process, addressed below, will provide the new licensee and the Federal Government incumbent with a framework within which to negotiate an efficient transition of facilities. During the transition period, all incumbent Government systems will remain on a primary basis and must be protected by the non-Government licensee.

### Equipment/System Modification

19. The NPRM discussed circumstances where radiocommunication systems in certain bands can be modified to tune outside of the reallocated band to the upper or lower portion of the incumbent system's tuning capability. We noted that retuning is oftentimes less expensive to implement, assuming that there is no congestion in the upper or lower portion of the band as a result of the migration and assuming the transmitter-receiver frequency separation can be met. To the extent that a Federal entity is able to retune or modify its equipment in these circumstances, we proposed to limit reimbursement to the costs associated with retuning. AT&T supported our proposed limitation of reimbursement costs for retuning or modification in those situations where it is a technically feasible alternative to relocation.<sup>35</sup> Thus, to the extent that a Federal entity that is required to relocate is able to modify/re-tune its equipment with the result that the modified equipment provides operational capabilities comparable with the original system, reimbursement will be limited to the marginal costs associated with modification/re-tuning.

### Landline System and Commercial Services

20. The NPRM sought comment on whether a Federal entity should be entitled to reimbursement of relocation costs if it relocates to a landline communications system or a commercial radio service.<sup>36</sup> Commenters overwhelmingly agreed that agencies should be reimbursed for relocation costs if they choose to relocate to a landline or commercial service. DoD stated that moving to a commercial service or landline system

<sup>20</sup> NPRM at ¶ 13.

<sup>21</sup> ITA Reply Comments at 5.

<sup>22</sup> *Id.* at 4.

<sup>23</sup> AT&T Comments at 3; Securicor Comments at 2.

<sup>24</sup> Motorola Comments at 7.

<sup>25</sup> AT&T Comments at 3.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> DOD Comments at 3.

<sup>28</sup> *Id.* at 3.

<sup>29</sup> Motorola Comments at 7.

<sup>30</sup> *Id.*

<sup>31</sup> Securicor Comments at 2-3.

<sup>32</sup> AT&T Comments at 4.

<sup>33</sup> ITA Reply Comments at 5.

<sup>34</sup> DOD Comments at 3.

<sup>35</sup> AT&T Comments at 3.

<sup>36</sup> NPRM at ¶ 14.

would qualify as "modification," and moving to a commercial radio service would certainly be considered "relocation to another frequency."<sup>37</sup>

21. We agree with the commenters and find that Federal entities are entitled to reimbursement of relocation costs if they relocate to landline communications systems or commercial radio systems. For Federal entities that choose to relocate to landline communications systems or commercial radio systems, reimbursement will be limited to the marginal costs associated with such a relocation.

#### *Reimbursement of Relocation Costs*

22. Private industry commenters overwhelmingly recommended that auction proceeds be used to pay for expenses incurred by the Federal entities as a result of relocation.<sup>38</sup> Several commenters stated that this process would be more efficient and cost effective, eliminating the need for extensive negotiations, discussions and cost sharing considerations, thus permitting new licensees to rapidly deploy networks.<sup>39</sup> Commenters also stated that using auction proceeds to compensate Federal entities would provide certainty on the part of the Federal entities that they would be fully and timely paid because of the guaranteed source of funds.<sup>40</sup> Likewise, commenters noted that this approach would provide certainty on the part of potential bidders who would be free to value the licenses solely on the basis of the value of unencumbered spectrum, thereby reducing the risks associated with bidding on the spectrum and decreasing the likelihood of lengthy post-auction disputes.<sup>41</sup>

23. Commenters provided other benefits of reimbursing Federal entities from auction revenues. AT&T, for example, stated that reducing the overall financial obligations of potential bidders would increase the number of bidders and thus promote competition.<sup>42</sup> MicroTrax argued that using auction revenues to pay for relocation would encourage participation from smaller firms because they would not face any uncertainty about total spectrum costs and would be able to bid the full amount they judge

the spectrum to be worth.<sup>43</sup> Cingular noted that this approach is better because potential and winning bidders would not need information regarding classified or sensitive facilities, and because auction revenues would likely be higher.<sup>44</sup>

24. We appreciate the arguments advanced by commenters on this issue however, as several commenters have acknowledged,<sup>45</sup> existing law requires that new non-Government licensees reimburse the Federal entity for relocation costs and it does not allow for reimbursement through auction proceeds.<sup>46</sup> In fact, PCIA stated that several entities have been actively pursuing legislative relief.<sup>47</sup> Accordingly, in the absence of a statutory change, auction proceeds will not be used to reimburse Federal entities for relocation costs.

#### *Notification of Marginal Costs*

25. The NPRM proposes a rule that requires Federal entities to provide NTIA with the marginal costs anticipated to be associated with relocation or modification at least 240 days prior to an FCC auction.<sup>48</sup> Pursuant to the NPRM, NTIA would forward that information to the FCC within 180 days prior to an auction.<sup>49</sup>

26. Mobex stated that the time line proposed in the NPRM is unduly long and would impair the Commission's objective of bringing new, competitive services to the public expeditiously.<sup>50</sup> Mobex further stated that the time periods in the NPRM could prevent an auction from occurring for as much as two years from the present time. Mobex suggested that because all Federal entities can be "deemed to have notice of the Administration's proposals now, they should be planning now, and NTIA should require the submission of the agencies' marginal cost data 30 days after the effective date of the NTIA order \* \* \* [and] NTIA should then provide that cost information to the FCC within 15 days after receiving it."<sup>51</sup>

27. DOD noted that the requirement for agencies to notify NTIA of the marginal costs 240 days prior to an auction does not allow Federal entities

the ability to provide the most up-to-date and accurate cost data.<sup>52</sup> DOD believes that the rules must reflect the complexity of the processes each Executive branch agency and the FCC must take in order to successfully auction Federal spectrum.<sup>53</sup> DOD requested that NTIA work with the Commission and its companion rules to provide agencies a more reasonable time frame to provide cost data.<sup>54</sup> In response to Mobex's proposal that Federal entities present their cost data to NTIA 30 days after the effective date of the rules, DOD argued that 30 days will be insufficient for DOD to undertake the complex task of developing marginal costs.<sup>55</sup> DOD stated that it is important for costs to be developed as close to the auction date as feasible and that, in some circumstances, identification of replacement spectrum will be a condition precedent for the estimation of marginal costs to relocate.<sup>56</sup>

28. The timeframe established in the NPRM was established to give NTIA a sufficient amount of time to gather pertinent information from the Federal entities and to put that information into a relevant format to forward to the FCC. More importantly, the time frame gives the FCC a reasonable amount of time to provide potential bidders with "sufficient time to develop business plans, assess market conditions, and evaluate availability of equipment for the relevant services."<sup>57</sup> Many of the comments received in this proceeding have expressed the importance and necessity of bidders being well informed of potential costs so that they can form bidding strategies. Hence, the time frame proposed is also an attempt to give bidders as much time as possible to consider potential costs associated with bidding on licenses.

29. Mobex argued that the proposed time period established for Federal entities to submit costs could prevent an auction from occurring for as much as two years. It is the auction date that drives the time that Federal entities must submit costs and not the other way around. With respect to DOD's argument that the proposed time-period would not allow the Federal entities to provide

<sup>52</sup> DOD Comments at 12.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 13.

<sup>55</sup> DOD Reply Comments at 6.

<sup>56</sup> *Id.* The 240-day requirement is based on two assumptions: (1) the FCC has issued an allocation order and service rules with respect to certain bands sufficiently in advance of the auction of such spectrum; and (2) comparable spectrum has been identified in those limited cases in which comparable spectrum must be identified to accommodate DOD in accordance with Pub. L. 106-65, 113 Stat. 768 (1999).

<sup>57</sup> See 47 U.S.C. 309(j)(3)(E)(ii).

<sup>37</sup> DOD Comments at 4.

<sup>38</sup> AT&T Comments at 12; Motorola Comments at 1; Cingular Comments at 1; PCIA Comments at 2; MicroTrax Reply Comments at 1.

<sup>39</sup> Motorola Comments at 6-7; AT&T Comments at 12.

<sup>40</sup> Motorola Comments at 5-6; AT&T Comments at 12.

<sup>41</sup> Cingular Comments at 2; PCIA Comments at 2.

<sup>42</sup> AT&T Comments at 12.

<sup>43</sup> MicroTrax Comments at 2.

<sup>44</sup> Cingular Comments at 2.

<sup>45</sup> PCIA Comments at 2; Motorola Comments at 6; Cingular Comments at 6.

<sup>46</sup> The statute provides that "[a]ny person on whose behalf a Federal entity incurs costs...shall compensate the Federal entity in advance for such costs." 47 U.S.C. 923(g)(1)(B).

<sup>47</sup> PCIA Comments at 6.

<sup>48</sup> NPRM at ¶ 35.

<sup>49</sup> *Id.*

<sup>50</sup> Mobex Comments at 3.

<sup>51</sup> *Id.* at 4.

up-to-date cost information, we note that any cost information provided prior to an auction and prior to actual relocation would necessarily not be up-to-date. In fact, DOD noted that costs submitted prior to an auction may have to be modified post-auction.<sup>58</sup> We note also that DOD did not suggest a time prior to an auction that would be suitable or reasonable for it to provide up-to-date estimated cost information. Accordingly, we adopt as final the time frames set forth in the proposed rules.

### Cap

30. Mobex asserted that “[p]ursuant to the Act, NTIA has proposed to establish a Relocation Cost Cap, beyond which a non-Federal licensee would not be required to compensate a Federal user for frequency relocation.”<sup>59</sup> Mobex supported the establishment of a relocation cap, and a cap on the costs to be imposed on a non-Federal user in the event that the Federal user decides to reclaim the spectrum.<sup>60</sup> Mobex asserted that a cap is necessary to determine whether to participate in competitive bidding and to establish a bidding strategy.<sup>61</sup>

31. Securicor recommended that total relocation costs provided by Federal entities be set as the ceiling in post-auction negotiation and mediation to prevent “new” costs from being introduced after the bidders have relied on the cost valuation in the bid calculation.<sup>62</sup> MicroTrax agreed that a cap would give more certainty to potential bidders prior to an auction, and thus more confidence leading them to participate in the auction.<sup>63</sup> AT&T argued that the Federal entity should have no reimbursement rights to cost overruns ten percent or more over the initial pre-auction estimate.<sup>64</sup>

32. DOD stated that it is unable to locate any rule or discussion regarding a relocation cost cap in the proposed rules.<sup>65</sup> DOD further stated that the Act does not authorize a cap on relocation costs or the right to reclaim.<sup>66</sup> DOD maintained that because circumstances change, good faith estimates can be low or high.<sup>67</sup> Finally, DOD stated that there is no suggestion in the statute that estimates cannot be modified post-

auction, and thus NTIA has correctly not made such a proposal.<sup>68</sup>

33. We agree with DOD that a relocation cap costs cannot be imposed on the Federal agencies. The statute requires any person on whose behalf a Federal entity incurs costs as a result of reallocation shall compensate the Federal entity in advance for such costs.<sup>69</sup> Nothing in the statute indicates that Congress intended to limit or cap the reimbursement of costs incurred by the Federal entity in relocating or modifying their facilities. As a result, the NPRM neither recommended nor discussed a cap on relocation costs. Moreover, we find AT&T’s recommendation to limit cost overruns to ten percent over estimated costs to essentially constitute a cap.

### Exempted Federal Facilities

34. The NPRM noted that there were Federal power agencies and other Government agencies that were statutorily exempt from the requirements to relocate.<sup>70</sup> We sought comment on whether these agencies could voluntarily relocate, and, if so, whether they would be subject to the proposed rules or left exclusively to voluntary negotiations. Motorola stated that permitting the operation of exempted operations within certain spectrum bands threatens the viability of the use of these bands by non-Government entities.<sup>71</sup> For example, Motorola argued that the usefulness of the 1710 to 1755 MHz band for third generation wireless services would be severely threatened if exempted Federal operations are permitted to operate in that band.<sup>72</sup> Thus, Motorola recommended relocating these exempted Federal users, and requiring that these users submit potential relocation costs at the same time as other Federal users who are subject to mandatory relocation.<sup>73</sup>

35. By statute, exempted Federal assignments/facilities are not required to relocate, therefore Federal entities operating on these exempted assignments/facilities are not obligated to provide estimated relocation costs. The final rules, however, permit exempted Federal entities to accept reimbursement for relocation costs in cases of voluntary relocation. In cases where exempt Federal entities wish to relocate, they may negotiate the marginal cost to relocate with the new

non-Government licensee in the same manner as non-exempt entities.

### Marginal Costs

36. The NPRM identified the marginal relocation and modification costs that are reimbursable, and proposed to define “marginal costs” as those that would be incurred by a Federal entity to achieve comparable capability of systems relocated to a new frequency assignment or band or otherwise modified.<sup>74</sup> We also stated that marginal costs would include all engineering, equipment, software, site acquisition and construction costs, as well as any legitimate and prudent transaction expenses, including outside consultants, and reasonable additional costs incurred by the Federal entity that are attributable to relocation, including increased recurring costs associated with the replacement facilities.

37. The FAA stated that Federal agencies should be reimbursed for the money spent in developing the estimated costs that the Federal entity must submit to NTIA 240 days in advance of an auction.<sup>75</sup> We note that the definition of marginal costs in the Final rules would permit Federal agencies to recover such costs so long as they could reasonably be attributed to the relocation. Under the current definition of marginal costs, however, Federal agencies would not be permitted to recover costs associated with any estimates prepared as part of a reallocation assessment.

38. DOD noted that the elements that define marginal costs are included in the proposed rule, section 301.110(a), which is not definitional but operational.<sup>76</sup> DOD recommended that these elements be incorporated into the definition of marginal costs found in the proposed “Definitions” section 301.20(l). We agree and will modify the rules accordingly.

### Comparable Facilities

39. The NPRM does not require a Federal entity to relocate until a comparable facility is available to it for a reasonable time to make adjustments, determine compatibility, and ensure a seamless transition from an existing facility or frequency band(s) to the new or modified facility or frequency band(s).<sup>77</sup> We proposed to define “comparable facility” to mean that the replacement facility restores the operational capabilities of the original facility to an equal or superior level. We

<sup>58</sup> DOD Comments at 10.

<sup>59</sup> Mobex Comments at 4.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 4–5.

<sup>62</sup> Securicor Comments at 3.

<sup>63</sup> MicroTrax Comments at 2.

<sup>64</sup> AT&T Comments at 14.

<sup>65</sup> DOD Reply Comments at 3.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> 47 U.S.C. 923(g)(1)(B).

<sup>70</sup> NPRM at ¶¶ 26–27.

<sup>71</sup> Motorola Comments at 9.

<sup>72</sup> *Id.*; Motorola Reply Comments at 5.

<sup>73</sup> Motorola Comments at 10.

<sup>74</sup> NPRM at ¶ 33.

<sup>75</sup> FAA Comments at 1.

<sup>76</sup> DOD Comments at 9.

<sup>77</sup> NPRM at ¶ 13.

also proposed to use four basic factors to determine comparability of replacement facility: communications throughput, system reliability, operating costs, and operational capability.<sup>78</sup> We noted in the NPRM that these four factors may not be appropriate measures for all Federal Government stations required to relocate, and noted that radar systems, in particular, may require other measurements.<sup>79</sup>

40. We further proposed to define the four factors to determine comparability. "Communications throughput" is defined as the amount of information transferred within the system for a given amount of time. For digital systems, communications throughput is measured in bits per second (bps); for analog systems, the communications throughput is measured by the number of voice, video or data channels. "System reliability" is defined in the NPRM as the percentage of time information is accurately transferred within a system. The reliability of a system is a function of equipment failures and the availability of the frequency channel given the propagation characteristics and equipment sensitivity. System reliability also includes the ability of a radio-communications station to perform required functions under stated conditions for a stated period of time. System reliability may involve three distinct concepts: attaining a specified level of performance; the probability of achieving that level; and maintaining that level for a specified time. For digital systems, this would be measured by the percentage of time the bit error rate (BER) exceeds a desired value; for analog transmissions, this would be measured by the percentage of time the receiver carrier-to-noise ratio exceeds the receiver threshold. We noted in the NPRM that, for many DOD systems, performance is defined by sophisticated system specifications as related to specific mission requirements. In measuring/assessing DOD systems, these specific system specifications must be used. "Operating costs" is defined as the costs to operate and maintain the Federal entity's replacement system. New licensees would compensate Federal entities for any increased recurring costs associated with the replacement facilities for five years after relocation. "Operational capability" is defined as the measure of a system's ability to perform its validated functions within doctrinal requirements, including service, joint

service, and allied interoperability requirements with related systems.

41. Securicor noted that the totality of costs proposed are, in general, consistent with the notion of comparable facilities.<sup>80</sup> Securicor expressed concern, however, that the NPRM could be interpreted to provide better facilities than those the Federal entities currently use and that relocation should simply put them in a comparable place. Thus, Securicor argued, the Federal entities should not have increased value in their facilities as a result of relocation. We believe that Securicor's concern was addressed in the NPRM. We proposed that marginal costs include costs related to the need to achieve comparable capability when replacing, modifying or reissuing equipment in order to relocate when the systems that must be procured or developed have increased functionality due to technological growth. Marginal costs would not include costs related to optional increased functionality that is independent of the need to achieve comparable capability.<sup>81</sup>

42. The FAA stated that Federal agencies should be reimbursed for operating costs for a minimum of five years, with costs for the years thereafter subject to negotiation between the parties.<sup>82</sup> The FAA believes that a five-year limit may not fully reimburse Federal entities for the costs of relocation.<sup>83</sup> We believe that the parties are free to negotiate on any aspect of relocation, including operating costs. We will not, however, dictate the terms of negotiations between the parties. We believe that five years is a sufficient amount of time for a licensee to compensate a Federal agency for increased recurring costs as described herein. To the extent that the parties wish to extend that period, it may be addressed in the negotiation/mediation period as described herein, but it will not be a mandatory requirement of these rules.

#### *Cost Sharing*

43. In the NPRM, we proposed to adopt a cost-sharing plan in those situations where the requirement to reimburse a Federal entity could disproportionately fall upon one licensee or a small number of licensees. Such a cost-sharing plan would also ensure that a Federal entity is compensated in those circumstances where a portion of the spectrum is not licensed or acquired by any particular

licensee. As part of this proposal, we sought comment on the appropriate entity to serve as a clearinghouse to administer a cost-sharing plan.

44. The commenters were supportive of the proposal for a cost-sharing plan and recommended that NTIA adopt an industry-run clearinghouse similar to the one adopted by the Commission in the relocation of microwave incumbents.<sup>84</sup> Specifically, PCIA and ITA recommended that NTIA follow the Commission's example and request interested parties to submit business plans with certain minimum criteria including financial data, timing, accounting methods, confidentiality, neutrality and dispute resolution.<sup>85</sup> PCIA noted that it has prior and continuing experience as a Commission-certified cost-sharing clearinghouse and has recommendations for selecting a qualified clearinghouse.<sup>86</sup> PCIA also offered that it would be fully qualified to serve as a cost-sharing clearinghouse in this matter and relayed its experience in providing clearinghouse functions for the relocation of fixed microwave licensees.<sup>87</sup> AT&T suggested that although the cost-sharing rules in the microwave relocation process have generally worked well, more detailed guidance regarding problem areas and some modification to the rules would speed relocation, increase the fairness and efficiency of reimbursement, and reduce conflict.<sup>88</sup> AT&T also stated that any clearinghouse should be funded by auction proceeds throughout the life cycle of the clearinghouse, which could last beyond the sunset date.<sup>89</sup>

45. DOD did not take a position on any particular plan with respect to a cost-sharing plan, but states that it will work with the private sector to address this complex issue.<sup>90</sup> DOD provided examples of the complexity of its systems and the possible difficulties that would burden one successful bidder to cover the full cost of relocation.<sup>91</sup> DOD believes that it would be helpful to establish a framework whereby each Federal agency could request that all licensees of frequency assignments affecting a Federal agency participate in a single negotiation process.<sup>92</sup> DOD warned that relocation

<sup>84</sup> PCIA Comments at 8; AT&T Comments at 12-14; Securicor Comments at 6-7; ITA Comments at 6.

<sup>85</sup> PCIA Comments at 8-9; ITA Comments at 6.

<sup>86</sup> PCIA Comments at 7.

<sup>87</sup> *Id.*

<sup>88</sup> AT&T Comments at 12-13.

<sup>89</sup> *Id.* at 14.

<sup>90</sup> DOD Comments at 8.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 10-11.

<sup>80</sup> Securicor Comments at 4.

<sup>81</sup> NPRM at ¶33.

<sup>82</sup> FAA Comments at 2.

<sup>83</sup> *Id.*

<sup>78</sup> *Id.* at ¶ 16.

<sup>79</sup> *Id.* at ¶ 21.

implementation will not be easy and that successful bidders may need to compensate DOD for multiple systems that are likely to be geographically dispersed throughout the world.<sup>93</sup> Moreover, DOD stated that technical solutions to achieve comparability are likely to be different for different systems.<sup>94</sup>

46. We agree with commenters that a cost-sharing plan may be appropriate in certain circumstances. At the present time, however, we decline to adopt rules to establish such a plan. Instead, we intend, in the near future through a further notice of proposed rulemaking, to develop a cost-sharing plan and seek proposals for a clearinghouse or some other mechanism for administering a cost-sharing plan. At that time, we would make any modifications to our reimbursement rules that are necessary to implement such a cost-sharing plan. The absence of a cost-sharing plan does not adversely affect the scheduled auction of the 2385–2390 MHz band because the FCC has adopted a nationwide licensing plan for that band. However, we recognize that addressing the cost-sharing question would be necessary prior to the auction of bands that are licensed in smaller geographic areas or multiple spectrum bands.

#### Information Provided to Potential Bidders

47. The NPRM identifies the type of information that NTIA proposes to provide the FCC regarding unclassified, classified and sensitive Government assignments.<sup>95</sup> Commenters generally argued that more information was needed and that the information proposed was not specific. AT&T submits that the proposed rules do not recognize the potential bidders' need for specific information prior to an auction, and that further disclosure of specific information is essential so that bidders can formulate bidding strategies that take into account likely reimbursement costs or whether to participate in the auction at all.<sup>96</sup> AT&T further states that a lack of necessary information may have the effect of luring bidders into auctions that they otherwise might have not entered, had they fully realized the costs of relocation.<sup>97</sup> Such uninformed participation in the auction could lead to bankruptcy or a default on the awarded licenses.<sup>98</sup>

<sup>93</sup> *Id.* at 11.

<sup>94</sup> *Id.*

<sup>95</sup> NPRM at ¶¶ 42–46.

<sup>96</sup> AT&T Comments at 7.

<sup>97</sup> *Id.* at 10–11.

<sup>98</sup> *Id.* at 11.

48. Motorola and PCIA noted that Government use of spectrum is inherently different from non-Government use and, as such, non-Government users have limited experience with the systems and face difficulty ascertaining relocation costs for Government equipments.<sup>99</sup> Thus, Motorola argued, it is difficult for non-Government licensees to negotiate in a meaningful way to determine relocation costs after an auction.<sup>100</sup> Motorola recommended that OMB and NTIA, working in conjunction with the Commission, would be in the best position to work with Government users to accurately determine relocation costs prior to an auction.<sup>101</sup> PCIA likewise argued that NTIA should develop procedures that provide final technical cost information to be made available to auction participants well in advance of the auction.<sup>102</sup> PCIA argued that for the relocation/reimbursement process to be effective, the pre-auction cost estimate must be sufficiently definitive.<sup>103</sup>

49. Securicor stated that potential bidders should be informed about whether the incumbent facilities can be relocated on a single, local or regional basis, or whether an entire system can be relocated.<sup>104</sup> PCIA noted that information provided should be sufficiently complete to permit bidders to assess relative relocation costs of spectrum blocks within each geographic area.<sup>105</sup>

#### a. Unclassified Assignments

50. With respect to unclassified Government assignments, the NPRM provided the following list of information that we propose to provide to the FCC prior to an auction of the affected bands:<sup>106</sup>

- (1) List of Government facilities;
- (2) Government agency operating each facility;
- (3) Location of each facility;
- (4) General type of operation and equipments (e.g. fixed microwave tactical mobile radio, etc.);
- (5) Whether the facility can be retuned, modified, or must be relocated;
- (6) Estimated marginal cost of retuning, modification, or relocation;
- (7) Whether the facility overlaps to one or more license areas or spectrum blocks; and
- (8) Total estimated costs for all assignments.

<sup>99</sup> Motorola Comments at 4; PCIA Comments at 6.

<sup>100</sup> Motorola Comments at 4.

<sup>101</sup> *Id.*

<sup>102</sup> PCIA Comments at 2.

<sup>103</sup> *Id.* at 7.

<sup>104</sup> Securicor Comments at 5.

<sup>105</sup> PCIA Comments at 7.

<sup>106</sup> NPRM at ¶ 42.

51. Commenters maintained that the proposed rules for the release of information regarding unclassified facilities is too broadly defined and more details should be provided. They argued that our proposal to provide information regarding “location of each facility” does not clarify what data would fall within that disclosure requirement, e.g., the general geographical area, the licensed area, specific geographical coordinates such as latitude or longitude, or other information.<sup>107</sup> As an example, AT&T stated that when a microwave or similar facility is being relocated, a potential bidder would need to know, at a minimum, the number of microwave paths for the applicable license area that would need to be relocated.<sup>108</sup> Moreover, AT&T and Securicor maintained that bidders need more detailed information regarding the type, amount, condition and functions of the current equipment being replaced.<sup>109</sup> Finally, AT&T submitted that a simple “yes or no” regarding whether equipment can be retuned is insufficient.<sup>110</sup> According to AT&T, the bidder would need detailed information regarding the agency's analysis in order to determine if the agency's plan is viable or cost-efficient, or whether the bidder should propose a superior plan of its own.<sup>111</sup> AT&T stated that “NTIA's anemic disclosure requirements in the unclassified context would hinder the ability of bidders to evaluate the true costs of their participation in the auction while serving no compelling countervailing purpose such as the protection of important national security information.”<sup>112</sup>

52. DOD maintained that NTIA's proposed rules regarding the release of information for unclassified assignments are adequate.<sup>113</sup> DOD argued that its systems are unique and a general mandate of more information will not be helpful.<sup>114</sup> Thus, DOD stated that it will attempt to present information relating to its systems in a meaningful fashion to bidders, and feels it can do more to reach that result on a case-by-case basis.<sup>115</sup> DOD maintained that information regarding whether a facility can be retuned, modified or relocated is an operational decision that can only be made by the Federal entity

<sup>107</sup> AT&T Comments at 7; Cingular Comments at 6; *see also* Motorola Reply Comments at 2.

<sup>108</sup> AT&T Comments at 8.

<sup>109</sup> *Id.*; Securicor Comments at 5.

<sup>110</sup> AT&T Comments at 8.

<sup>111</sup> *Id.*; *see also* MicroTrax Comments at 2.

<sup>112</sup> AT&T Comments at 9.

<sup>113</sup> DOD Reply Comments at 3.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

before it can estimate its marginal costs.<sup>116</sup> DOD further stated that the Federal entity cannot provide information as to whether the facility overlaps one or more licensed areas or spectrum blocks and notes that, while it would know that a nationwide system would overlap licensed areas, it would not be able to make that determination for systems serving smaller areas.<sup>117</sup> DOD stated that it would provide its best estimate of marginal costs taking into account the solution it deems appropriate (e.g., retuning, modification, relocation) on a pre-auction basis.<sup>118</sup> This estimate, DOD maintained, may not include all relocation costs incurred, and may have to be modified post-auction.<sup>119</sup> DOD noted that neither the licensee nor the Federal entity can know until after negotiation if, for example, "in kind" reimbursement is possible.<sup>120</sup> Thus, DOD maintained that it may not be possible for a Federal entity to provide all relocation costs that would be included in a petition for relocation on a pre-auction basis to NTIA.<sup>121</sup>

53. The comments here appear to be two-fold: (1) Commenters want a total and final cost for relocation prior to the auction or; (2) commenters want a validation of the Federal entities' cost estimates. The statute *only* requires that potential bidders be notified of the *estimated* relocation or modification costs prior to an auction.<sup>122</sup> Despite this sole requirement, we proposed to provide the estimated cost of relocation, retuning or modification as well as other information related to the Government facility. We understand the commenters' desire for certainty in the actual costs associated with acquiring a license at an auction, but it is unlikely that a Federal entity, prior to an auction, would be able to state unequivocally its total costs to relocate at that time. Congress apparently recognized this difficulty when it required Federal users to submit *estimated* costs. We encourage the Federal entities to put forth their best estimates, and leave the parties to negotiation and mediation in order to come to an agreement on the actual costs. Commenters also listed additional information that they needed, but gave no compelling reasons for requiring that information. Costs should be the only information that potential bidders require to form a bidding strategy. To the extent that an agency provides a cost

estimate, the only reason that a potential bidder would need more information (e.g., age, condition, type of equipment) would be to validate or challenge the Federal agency's cost estimate. We believe that the parties will have ample opportunity during post-auction negotiations to discuss estimated and actual costs to relocate, retune, or modify.

54. Accordingly, the final rule reflects the list of information contained in the NPRM regarding unclassified Federal assignments with one exception. NTIA will not be able to provide the FCC with information as to whether the facility overlaps into one or more license areas (no.7, para. 50). The proposed licensed area for an auction is determined by the FCC, and without prior knowledge of the licensing scheme to be used in a particular auction, NTIA is not able to make a determination of overlapping facilities. The FCC, however, may be able to make this determination based on other information provided by NTIA, particularly the location of each facility (no. 3, para. 50).

#### b. Classified and Sensitive Assignments

55. The NPRM took a different approach with respect to the treatment of classified Government facilities and sensitive assignments. We proposed that the information that would ultimately be provided to bidders with respect to classified facilities would be a single, consolidated and unclassified figure for the cost of relocating, retuning or modifying.<sup>123</sup> This information would be provided to the bidder with the following condition: to the extent that it is consistent with national security considerations, this figure would be broken down by geographical location and spectrum block.<sup>124</sup> After the auction, the winner would be able to apply for a facility clearance pursuant to the National Industrial Security Program Operating Manual and related individual security clearances.<sup>125</sup> With respect to sensitive assignments, we proposed to provide information in the same manner as classified assignments, except that following the auction, we proposed that the Government agency release the sensitive information to the winning bidder pursuant to a non-disclosure agreement.

56. Cingular stated that under the proposal for sensitive and classified information, potential bidders may lack crucial information concerning the relocation costs associated with a given

band of spectrum.<sup>126</sup> Thus, Cingular argued, the risk posed by acquiring encumbered spectrum with unknown liabilities could serve to depress the prices bidders are willing to pay for licenses.<sup>127</sup> Moreover, Cingular maintained that such a procedure could exacerbate disputes between Federal incumbents and winning bidders insofar as winning bidders are saddled with a price tag that is significantly higher than what was anticipated.<sup>128</sup> Cingular warned that endless litigation and delay would likely result as licensees attempt to verify relocation expenses.<sup>129</sup>

57. AT&T stated that NTIA's proposal with respect to the release of classified information would place bidders in the untenable position of "relying entirely on an unverifiable estimate of costs created by a unknown methodology by a financially-interested Government entity with no real-world cost pressures informing its calculation."<sup>130</sup> AT&T maintained that far less restrictive methods are available, such as disclosing essential bidding information to company representatives who have the proper security clearances.<sup>131</sup> AT&T also suggested that a neutral panel or an independent consultant with the proper security clearances could review the submitted information.<sup>132</sup>

58. Mobex supported NTIA's proposal for dealing with classified and sensitive Government assignments because it would provide the Government with the necessary security while providing non-Government licensees with sufficient information to conduct business in a reasonable manner.<sup>133</sup>

59. DOD maintained that the process set forth for releasable classified systems reflect the requirements of Executive Order 12958<sup>134</sup> and related Federal law and regulations regarding the release of or access to classified information.<sup>135</sup> DOD stated that the proposal requiring successful bidders to apply for a security clearance to gain access to classified material as necessary to reach resolution of reimbursement costs, strikes a reasonable balance between national security interests and the bidder's commercial interests.<sup>136</sup>

60. We believe that the proposed rule regarding classified assignments strikes

<sup>116</sup> DOD Comments at 13.

<sup>117</sup> *Id.* at 13-14.

<sup>118</sup> *Id.* at 14.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 15.

<sup>121</sup> *Id.*

<sup>122</sup> 47 U.S.C. 923(g)(1)(A).

<sup>123</sup> NPRM at ¶ 44.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> Cingular Comments at 4.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> AT&T Comments at 10.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Mobex Comments at 5.

<sup>134</sup> Exec. Order No. 12958, 60 FR 19,825 (Apr. 17, 1995).

<sup>135</sup> DOD Comments at 15.

<sup>136</sup> DOD Reply Comments at 2.

a reasonable balance between protecting national security interests and providing auction participants with the necessary information to bid for licenses. Again, commenters have not made a convincing argument for needing more information than that related to cost in order to formulate a bidding strategy. Post-auction, the auction winner or the licensee, with proper security clearances, can have access to classified information consistent with the National Industrial Security Program Operating Manual. With respect to sensitive assignments, NTIA will request that Federal entities review sensitive assignments and consider the releasability of those assignments to the extent possible. Otherwise, we will provide a single, consolidated and unclassified figure for the cost of relocating, retuning or modifying sensitive assignments, and require that the winning bidder or licensee sign a non-disclosure agreement regarding sensitive information pertaining to the Federal assignment, if required. The consolidated figure would be broken down by geographical location and spectrum block to the extent possible.

#### *Negotiation and Mediation*

61. The NPRM sets out proposed rules regarding negotiation and/or mediation between the Federal entities and the winning bidders and licensees. DOD objects to the proposed rules as they relate to issues other than costs.<sup>137</sup> Proposed rule 301.120(a) provides in part that “parties are encouraged to resolve any differences with respect to relocation or modification costs **or any other related issues** \* \* \*”<sup>138</sup>

According to DOD, 47 U.S.C. section 923(g)(1)(E) only permits NTIA and the FCC to develop rules resolving differences between the Federal Government and licensees with respect to estimates of relocation or modification costs. Thus, DOD believes that the mediation and negotiation process should not include issues other than cost.<sup>139</sup>

62. We believe that DOD’s interpretation of the statute is too restrictive. Initially, we note that costs, or issues closely related to costs, will be the primary focus of any negotiation or mediation. We believe, however, that issues other than costs will arise in these negotiations and that these rules are intended to incorporate those issues. For example, the Petition for Relocation clearly gives NTIA the authority to make determinations on a number of issues

other than costs. Pursuant to the statute, when NTIA is presented with a Petition for Relocation, it must make a determination on whether the person seeking relocation has guaranteed to pay all relocation costs, whether all activities necessary for relocation have been implemented, and whether replacement facilities, equipments modifications or other changes have been implemented.<sup>140</sup> Thus, the statute gives NTIA authority to make determinations on issues other than costs. More importantly DOD admits in this proceeding that NTIA has the authority to make a determination “that the proposed use of the spectrum frequency band to which the Federal entity will relocate its operations is (i) consistent with obligations undertaken by the United States in international agreements and with United States national security and public safety interests; and (ii) suitable for the technical characteristics of the system and consistent with other uses of the band.”<sup>141</sup> This issue, which DOD admits NTIA can make a determination on, does not relate to cost. We believe that the statute provides authority for NTIA to promulgate rules that permit the parties to negotiate and/or mediate about relocation or modification costs “or any related issues.” The rules that we adopt in this proceeding are intended to afford parties enough flexibility in their negotiations to ensure that the Federal agencies are fully reimbursed and that the spectrum is made available to the private sector in an expeditious manner. We see no benefit in limiting the issues that the parties wish to negotiate. Thus, we adopt the proposed rules regarding negotiation and mediation.

#### *Petition for Relocation*

63. The NPRM discusses the Petition for Relocation, which a licensee seeking to relocate a Federal entity must submit to NTIA in order for NTIA to eventually limit or terminate the Federal entity’s license.<sup>142</sup> The statute requires NTIA to limit or terminate the Federal entity’s licenses within six months after receiving the petition if the following requirements are met:

(A) The person seeking relocation of the Federal Government station has guaranteed to pay all relocation or modification costs incurred by the Federal entity, including all engineering, equipment, site acquisition

and construction, and regulatory fee costs;

(B) All activities necessary for implementing the relocation or modification have been completed, including construction of replacement facilities (if necessary and appropriate) and identifying and obtaining new frequencies for use by the relocated Federal Government station;

(C) Any necessary replacement facilities, equipment modifications, or other changes have been implemented and tested to ensure that the Federal Government’s station is able to accomplish its purpose; and

(D) NTIA has determined that the proposed use of the spectrum frequency band to which the Federal entity will relocate is:

(i) Consistent with obligations undertaken by the United States in international agreements and United States national security and public safety interests; and

(ii) Suitable for the technical characteristics of the system and consistent with other uses of the band.<sup>143</sup>

64. According to DOD’s comments, NTIA is only required to make a determination on the fourth condition, *i.e.*, “the proposed use of the spectrum frequency band to which the Federal entity will relocate is consistent with \* \* \*”<sup>144</sup> With respect to the other three conditions, DOD maintained that NTIA should defer to the Federal entity. DOD recommended that the proposed rules that reference NTIA’s determination on a Petition for Relocation be changed to reflect that interpretation.<sup>145</sup> Moreover, DOD recommended that the proposed rule be amended to require NTIA to serve a copy of the Petition to Relocate on the affected Federal entity.<sup>146</sup> DOD also claimed that the proposed rule stating that NTIA may consult with the Office of Management and Budget and other executive branch agencies in making its determination, is not necessary because “NTIA can always consult with OMB or other agencies.”<sup>147</sup>

65. DOD’s view is overly narrow in this area. If the statute did not contemplate that NTIA would make a determination on all of the factors surrounding a Petition for Relocation, then there would have been no need for a party to submit a Petition for Relocation to NTIA. Moreover, Congress clearly identified that portion of the

<sup>143</sup> *Id.* at ¶ 39; *see also* 47 U.S.C. 923 (g)(2)(D).

<sup>144</sup> DOD Comments at 16–17.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 17.

<sup>147</sup> *Id.* at 18.

<sup>137</sup> DOD Comments at 18.

<sup>138</sup> NPRM at p. 4781 (emphasis added).

<sup>139</sup> DOD Comments at 18.

<sup>140</sup> 47 U.S.C. 923(g)(2)(A)–(C).

<sup>141</sup> *Id.* 923(g)(2)(D); *see also* DOD Comments at 16–17.

<sup>142</sup> NPRM at ¶ 39–41.

Petition for Relocation upon which NTIA could not solely make a determination. Subsection 2(D) provides that NTIA must consult with the Secretary of Defense, the Secretary of State, or other appropriate officers of the Federal Government when determining whether the Petition for Relocation is consistent with obligations undertaken by the United States in international agreements and with United States national security and public safety interest.<sup>148</sup> If NTIA was required to consult with or defer to other agencies on other Petition for Relocation factors, Congress would have expressly made that clear, as it did in section 2(D). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."<sup>149</sup> Accordingly, DOD's proposal that NTIA defer to the Federal entity on a Petition for Relocation is rejected, and NTIA will make its own determination on the factors presented in a Petition for Relocation.

#### Arbitration

66. The NPRM sought comments on the requirement that parties enter into non-binding arbitration if they have not reached agreement after the negotiation/mediation period and have not agreed to extend such period, or if the time on a prior extended negotiation/mediation period has expired. The arbitrator's non-binding decision may then be requested by NTIA as part of the record in a petition for relocation. The American Arbitration Association (AAA) noted that the disputes likely to arise from these proceedings would be well suited for resolution through arbitration. In fact, the AAA suggested using binding arbitration in disputes related to cost sharing.<sup>150</sup> DOD supported the use of non-binding arbitration when the parties do not come to an agreement and notes that it is not able to engage in binding arbitration at this time.<sup>151</sup>

67. As mentioned, Congress authorized NTIA and the FCC to develop procedures for the implementation of relocation of Federal Government stations, including a process for resolving any differences that may arise between the Federal Government and commercial licensees regarding estimates of relocation or

modification costs.<sup>152</sup> The Administrative Dispute Resolution Act (ADRA),<sup>153</sup> as amended, was enacted to authorize and encourage the use of alternative means of dispute resolution by Federal agencies. Congress recognized that the use of prompt and informal methods of dispute resolution, such as conciliation, mediation and arbitration, yields significant cost-savings and efficiencies, among other advantages, and results in outcomes that are more stable and less contentious.<sup>154</sup> We note DOD's comments regarding its inability to engage in binding arbitration pursuant to the ADRA, and because other agencies may likewise be prohibited from engaging in binding arbitration, we will not include it in our rules as the AAA recommends. Accordingly, we adopt with minor changes the proposed rule with respect to non-binding arbitration.

#### Reclamation

68. AT&T recommended that NTIA narrowly construe the Government's right to reclamation under title 47 U.S.C. section 923(g)(3), which requires the non-Government licensee to take reasonable steps to remedy defects or to move a Federal entity back to its original spectrum if that entity demonstrates that the new facility is not comparable to the original facility.<sup>155</sup> AT&T argued that the imposition of such burdens on licensees is inappropriate when Federal entities have failed to raise such comparability issues with the auction winners.<sup>156</sup> We noted in the NPRM that a Federal entity must demonstrate "to the FCC" that its new facilities are not comparable in order to reclaim previously held facilities.<sup>157</sup> We also noted that the FCC would be promulgating rules regarding a Federal entity's right to reclaim.<sup>158</sup>

#### Regulatory Flexibility Act

69. As required by the Regulatory Flexibility Act,<sup>159</sup> an Initial Regulatory Flexibility (IRFA) was prepared for the NPRM. Written comments were requested but none were submitted that directly addressed the issues raised in the IRFA. There was very little mention of small businesses in the comments submitted in response to the NPRM. The comments that addressed small

businesses are discussed in the text of the final rules, and repeated below. None of the comments received raised issues with respect to the impact of these rules on small businesses. NTIA has prepared a Final Regulatory Flexibility Analysis of the expected impact on small entities of this rule. NTIA's final regulatory flexibility analysis, in accordance with the Regulatory Flexibility Act<sup>160</sup> is as follows:

70. *Need for, and Objectives of, the Rules:* This rulemaking proceeding implements procedures pursuant to NDAA-99 for the reimbursement of relocation costs to Federal entities by the private sector as a result of reallocation of frequency spectrum. NDAA-99 requires the private sector to reimburse Federal entities for the costs that are incurred as a result of the reallocation of radio spectrum mandated by OBRA-93 and BBA-97 and future reallocations. Moreover, NDAA-99 requires NTIA and the Commission to "develop procedures for the implementation of [relocation] which \* \* \* shall include a process for resolving any differences that arise between the Federal Government and commercial licensees regarding estimates of relocation and modification costs."<sup>161</sup> These rules provide relevant information regarding reimbursement, such as: identification of frequency assignments eligible for reimbursement; a definition of marginal costs that are reimbursable; a description of the dispute resolution process; and criteria for determining a comparable facility.

71. *Issues Raised in Response to the IRFA:* Although requested, there were no comments that raised issues directly in response to the IRFA. There were, however, comments submitted in response to the NPRM that addressed the economic impact of these rules. As noted in the discussion of the the final rules, commenters recommended that, if relocation costs were to be paid from auction proceeds, the overall financial burden associated with these rules would be reduced. AT&T, for example, argued that reducing the overall financial obligations of potential bidders to payment for the spectrum would increase the number of bidders that could participate in the auction."<sup>162</sup> MicroTrax states that paying relocation costs from auction revenues would encourage participation from smaller firms because such firms would not face uncertainty about total spectrum

<sup>148</sup> 47 U.S.C. 923(g)(2)(D).

<sup>149</sup> *Rusello v. United States*, 464 U.S. 16, 23 (1983).

<sup>150</sup> American Arbitration Association Comments at 1.

<sup>151</sup> DOD Reply Comments at 3.

<sup>152</sup> 47 U.S.C. 923(g)(1)(E).

<sup>153</sup> Pub. L. No. 101-552, 104 Stat. 2736 (1990), amended by Pub. L. No. 104-320, 110 Stat. 3870 (1996), codified at 5 U.S.C. 571, et seq. (2001).

<sup>154</sup> H.R. Rep. No. 101-513, 1 (1990).

<sup>155</sup> AT&T Comments at 16.

<sup>156</sup> *Id.* at 17.

<sup>157</sup> NPRM at n. 29.

<sup>158</sup> *Id.*

<sup>159</sup> See 5 U.S.C. 603.

<sup>160</sup> See 5 U.S.C. 604.

<sup>161</sup> See 47 U.S.C. 923(g)(1)(E).

<sup>162</sup> AT&T Comments at 12.

costs.<sup>163</sup> Motorola likewise argues that paying relocation costs from auction revenues would provide a level of certainty and, in turn, enable new entrants faster access to encumbered spectrum.<sup>164</sup>

72. Although there may be some merit in the arguments made by commenters, the legislation does not permit auction proceeds to be used to pay for relocation costs. Although reimbursement from auction proceeds may be a less expensive alternative and one that could possibly lessen the economic impact on small businesses, that is not an alternative that is legally permissible at this time. We note, however, that the President's Budget for Fiscal Year 2003 included a proposal to amend the current statute to streamline the reimbursement process by creating a central spectrum relocation fund in which auction receipts sufficient to cover agencies' relocation costs would be deposited, and from which Federal agencies would be reimbursed.<sup>165</sup> Legislative action would be necessary to implement this proposal. We do not believe that we have the statutory authority under the current law to pursue this alternative at this time.

73. *Description and Estimate of the Number of Small Entities to Which the Rule Will Apply:* None of the comments submitted in response to the NPRM addressed the number of small entities to which these rules will apply. As noted in the IRFA, it is difficult, if not impossible to estimate the number of small entities, if any, to which these rules will apply. Although NTIA makes reallocated spectrum available to the FCC for auction to the private sector, NTIA has no control over: (1) The auction participants; (2) the auction winners; or (3) the service for which the spectrum will be used. A determination of those factors is critical to providing a description or estimate of the number of small entities to which these rules will apply. There is no way, at this time, to predict the types of entities that will be potential bidders for spectrum that the FCC makes available in the future. In fact, entities that are not even in existence at this time may be participating in future auctions for particular spectrum frequencies and be subject to these rules. We note, however, that the FCC promulgates service rules prior to auctions that provide a description and estimate of

the number of small entities that are affected by that particular auction.

74. *Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered:* The NPRM proposed and solicited a number of alternatives to minimize the economic impact on small entities. For example, the NPRM solicited comments on whether a Federal entity could retune or modify its equipment outside of the upper or lower portion of the incumbent band. Retuning is usually less expensive to implement and can save an agency a considerable amount of money, thereby reducing the reimbursement obligation of the private sector. We received comments supportive of this alternative and, therefore, we will permit Federal agencies to retune or modify their equipment when feasible. This alternative will minimize the economic impact of small entities to the extent that they bid on licenses subject to reimbursement.

75. Another alternative suggested in the NPRM was to permit Federal entities to relocate to a landline communications system or a commercial radio service. As stated in the text of the final rules, commenters overwhelmingly agreed that agencies should be reimbursed for relocation costs if they choose to relocate to a landline or commercial service. This option may be a cost-effective alternative to the Federal entity relocating to another frequency, and thus may reduce the reimbursement obligation borne by the private sector and, perhaps, small entities.

76. The proposed rules address those circumstances where one auction winner could be made to pay for the entire spectrum allocation held by a Federal entity despite the fact that only a portion of the bandwidth may be needed. For example, there may be multiple bidders in a geographic area for a small bandwidth that may result in division of a Federal entity's bandwidth. Because there is no mechanism in place to compensate the Federal entity for that portion of the spectrum that is not licensed or acquired by a particular licensee, relocation costs could disproportionately fall upon one auction winner. In the NPRM, we proposed establishing a clearinghouse to administer a cost-sharing plan. The comments received in response to the NPRM were supportive of the proposal, and recommended that NTIA adopt an industry-run clearinghouse similar to the one adopted by the FCC in the relocation of microwave incumbents. In the text of the final rules, we note our intention to seek proposals for a

clearinghouse or some other entity to administer a cost-sharing plan. A cost-sharing plan would spread the financial burdens among the auction participants, thereby reducing the overall financial obligation on an individual licensee.

77. The NPRM solicited proposals on other alternatives that may reduce reimbursement expenses and thus reduce the economic impact on small entities. As stated above, the only alternative suggestion that we received from the comments was to pay for reimbursement from auction proceeds. As noted above, the current legislation does not permit us to pursue this alternative.

78. *Description of Projected Reporting, Recordkeeping and Other Compliance Requirements:* These rules do not impose reporting, recordkeeping or other compliance requirements on the private sector, small entities or otherwise.

#### *Summary of Cost/Benefit Analysis*

79. NTIA prepared an Analysis of Benefits and Costs of the Mandatory Reimbursement Rules (Analysis). To view the complete analysis, please contact Milton Brown at the address and telephone number provided above. In summary, the analysis reveals the difficulty in performing a realistic cost-benefit analysis because of the number of factors that cannot be foreseen at this stage that would weigh heavily into such an analysis. Although NTIA makes reallocated spectrum available to the Federal Communications Commission (FCC) for auction to the private sector, NTIA has no control over: (1) The auction participants; (2) the auction winners; or (3) the service for which the spectrum will be used. Those determinations are all within the authority of the FCC and play a significant role in any analysis of benefits or costs. We note in the analysis that this rulemaking examined a number of alternatives to accomplish the statutory directive. For example, we determined that allowing Federal entities to retune equipment, and to relocate to landline or commercial systems may be a cost-effective alternative to relocating to another set of frequencies. This rulemaking also explored the option of cost-sharing in those situations where relocation costs could disproportionately fall upon one auction winner. We note also that the benefits of the rule include the addition of commercial wireless services for consumers. Without the rules, there would be a cloud of uncertainty over the auction, the relocation process, and the reimbursement obligations. These issues are discussed in greater detail in the full

<sup>163</sup> MicroTrax Comments at 2.

<sup>164</sup> Motorola Comments at 6.

<sup>165</sup> Budget of the United States Government, Fiscal Year 2003, Appendix, at 241 (Department of Commerce, National Telecommunications and Information Administration).

analysis, as well as in the text of the discussion section of the final rules.

#### List of Subjects in 47 CFR Part 301

Classified information,  
Communications common carriers,  
Communications equipment, Defense  
communications, Federal buildings and  
facilities, Radio, Satellites,  
Telecommunications.

Nancy J. Victory,

Assistant Secretary for Communications and  
Information.

#### Rules

Accordingly, NTIA amends 47 CFR  
chapter III by adding part 301 to read as  
follows:

### PART 301—MANDATORY REIMBURSEMENT FOR FREQUENCY BAND OR GEOGRAPHIC RELOCATION OF SPECTRUM-DEPENDENT SYSTEMS

#### Subpart A—General Information

Sec.

301.1 Purpose.

301.10 Applicability.

301.20 Definitions.

#### Subpart B—Procedure for Reimbursement for Relocations and Dispute Resolution

301.100 Costs to relocate.

301.110 Notification of marginal costs.

301.120 Negotiations and mediation.

301.130 Non-binding arbitration.

301.140 Petition for relocation.

301.150 Request for withdrawal.

**Authority:** 47 U.S.C. 921, *et seq.*; Pub. L.  
105–261, 112 Stat. 1920.

#### Subpart A—General Information

##### § 301.1 Purpose.

Pursuant to Public Law 105–261 (112  
Stat. 1920), private sector entities are  
required to reimburse Federal users for  
relocation of Federal Government  
stations from one or more frequencies  
due to reallocation. Reimbursement  
costs are in addition to funds paid by  
the non-Government licensee in  
connection with grant of the license by  
the Federal Communications  
Commission.

##### § 301.10 Applicability.

(a) *Affected bands.* (1) These  
provisions apply to Government  
assignments in the following bands of  
frequencies located below 3 GHz:

(i) 216 to 220 MHz.

(ii) 1432 to 1435 MHz.

(iii) 1710 to 1755 MHz.

(iv) 2385 to 2390 MHz.

(2) NTIA will identify additional  
bands that may become subject to this  
part in a public notice and request for  
comments published in the **Federal  
Register**.

(b) *Availability of comparable facility.*  
The Federal entity will not be required  
to relocate until a comparable facility, or  
modification to an existing facility, is  
available in enough time to determine  
comparability, make adjustments, and  
ensure a seamless handoff. The factors  
to be considered in determining  
comparability include at least  
communications throughput, system  
reliability, operating costs, and  
operational capability as defined in this  
part. These factors may not be  
appropriate to determine comparable  
facility for certain Federal Government  
stations required to relocate, such as  
radar systems.

(c) *Frequency assignments eligible for  
reimbursement.* (1) *Equipment  
modification/Retuning.* To the extent  
that a Federal entity that is required to  
relocate is able to modify/retune its  
equipment with the result that the  
modified equipment provides  
operational capabilities comparable  
with the original system, reimbursement  
will be limited to the marginal costs  
associated with modification/retuning.

(2) *Old assignments/new assignments.*  
Old assignments are those that were  
authorized prior to October 17, 1998  
(i.e., 216–220 MHz, 1432–1435 MHz,  
1710–1755 MHz, 2385–2390 MHz). New  
assignments are those assignments in  
the affected bands that were authorized  
after October 17, 1998. New assignments  
in the affected bands are not eligible for  
reimbursement under these rules.

(3) *Exempted Federal power agencies  
and other exempted assignment.*  
Frequency assignments in the 1710–  
1755 MHz band that are exempt from  
reallocation requirements are not  
required to relocate and therefore are  
not entitled to reimbursement under  
these rules. Federal agencies may accept  
reimbursement for relocation costs of  
exempted assignments in cases of  
voluntary relocation.

(4) *Experimental stations.* Frequency  
assignments for experimental stations or  
experimental testing stations are not  
entitled to reimbursement under this  
part. Reimbursement shall apply to  
experimental stations that have been  
certified for spectrum support prior to  
October 17, 1998 by NTIA for stage 3  
developmental tests under section  
10.3.1. of the NTIA Manual of Federal  
Regulations and Procedures for Federal  
Radio Frequency Management. This  
manual is available on NTIA's website  
at [http://www.ntia.doc.gov/osmhome/  
redbook/redbook.html](http://www.ntia.doc.gov/osmhome/redbook/redbook.html). The manual is  
also available from the U.S. Government  
Printing Office (S/N: 903–008–0025–3).

(5) *Certain other government stations.*  
Other exempted stations identified  
under the 1995 Spectrum Reallocation

Final Report and the 1998 Spectrum  
Reallocation Report are not required to  
relocate and therefore are not entitled to  
reimbursement under these rules. These  
agencies may, however, accept  
reimbursement for relocation costs in  
cases of voluntary relocation.

(d) *Sunset of reimbursement rights.*  
There is no sunset of reimbursement  
rights for affected agencies.

(e) *Authority.* The rules set forth in  
this subpart in no way affect what  
authority, if any, has been delegated to  
the Federal entity to negotiate or  
contract on behalf of the United States.

#### § 301.20 Definitions.

As used in this part:

(a) The term *allocation* means an  
entry in the National Table of Frequency  
Allocations (47 CFR 2.105) of a given  
frequency band for the purpose of its  
use by one or more radiocommunication  
services, or the radio astronomy service  
under specified conditions.

(b) The term *assignment* means  
authorization for a Government radio  
station to use a radio frequency or  
frequencies or radio frequency channel  
or channels under specified conditions.

(c) The term *auction* means the  
competitive bidding process that  
Congress authorized the Federal  
Communication Commission to use in  
Title VI of the Omnibus Budget  
Reconciliation Act of 1993 and the  
Balanced Budget Act of 1997 for the  
reassignment and licensing of spectrum  
identified in § 301.10(a) for certain  
commercial radio-based services.

(d) The term *classified assignment*  
means a frequency assignment and  
information related to a frequency  
assignment that has been determined  
pursuant to Executive Order 12958 or  
any predecessor order or successor  
executive order to require protection  
against unauthorized disclosure and  
that is marked as “confidential,”  
“secret,” or “top secret” to indicate its  
classified status when in documentary  
form.

(e) The term *Commission or FCC*  
means the Federal Communications  
Commission.

(f) The term *communications  
throughput* means the amount of  
information transferred within the  
system for a given amount of time. For  
digital systems, the communications  
throughput is measured in bits per  
second (bps); for analog systems, the  
communications throughput is  
measured by the number of voice, video  
or data channels.

(g) The term *comparable facility*  
means that the replacement facility  
restores the operational capabilities of  
the original facility to an equal or

superior level taking into account at least four factors: Communications throughput, system reliability, operating costs, and operational capability.

(h) The term *experimental station* means a station utilizing radio waves in experiments with a view to the development of science or technique.

(i) The term *experimental testing station* refers to an experimental station used for the evaluating or testing of electronics equipment or systems, including site selection and transmission path surveys.

(j) The term *Federal entity* means any department, agency or other instrumentality of the Federal Government that utilizes a Government station authorization obtained under section 305 of the Communications Act of 1934 (47 U.S.C. 305).

(k) The term *in-kind* means the value of non-cash contributions provided by non-Federal private parties. In-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefitting and specifically identifiable to the project or program.

(l) The term *licensee* refers to a person awarded a license by the Federal Communications Commission for use of the bands identified in § 301.10. The transfer or assignment of a license does not change the time periods established in these rules.

(m) The term *marginal costs* means the costs that will be incurred by a Federal entity to achieve comparable capability of systems relocated to a new frequency assignment or band or otherwise modified. Specifically, marginal costs would include all engineering, equipment, software, site acquisition and construction costs, as well as any legitimate and prudent transaction expenses, including outside consultants, and reasonable additional costs incurred by the Federal entity that are attributable to relocation, including increased recurring costs associated with the replacement facilities. Marginal costs would include costs related to the need to achieve comparable capability when replacing, modifying or reissuing equipment in order to relocate when the systems that must be procured or developed have increased functionality due to technological growth. Marginal costs do not include costs related to optional increased functionality that is independent of the need to achieve comparable capability. To the extent that a Federal entity needs to accelerate the introduction of systems and equipment to allow for relocation earlier than the Federal entity had planned, replacement costs of the accelerated

systems and equipment shall be included in marginal costs. Marginal costs would also include the costs of any modification or replacement of equipment, software, facilities, operating manuals, training costs, or regulations that are attributable to relocation. Marginal costs would not include costs related to routine upgrades and operating costs and lifecycle replacements that would have occurred absent the need to relocate pursuant to these rules.

(n) The term *mediation* means a flexible and voluntary dispute resolution procedure in which a specially trained mediator facilitates negotiations to reach a mutually agreeable resolution. The mediator may not dictate a settlement. The mediation process involves one or more sessions in which counsel, parties and the mediator participates, and may continue over the period of time specified in this part. The mediator can help the parties improve communication, clarify interests, and probe the strengths and weaknesses of positions. The mediator can also identify areas of agreement and help generate options that lead to a settlement.

(o) The term *NTIA* means the National Telecommunications and Information Administration.

(p) The term *operational costs* means the cost to operate and maintain the Federal entity's replacement facility. New licensees would compensate Federal entities for any increased recurring costs associated with the replacement facilities for five years after relocation. Such costs shall include, but not be limited to, additional rental payments and increased utility fees.

(q) The term *operational capability* means the measure of a system's ability to perform its validated functions within doctrinal requirements, including service, joint service, and allied interoperability requirements with related systems.

(r) The term *relocation* refers to the process of moving a system that is displaced as a result of reallocation.

(s) The term *sensitive assignment* refers to those assignments whose operations or technical parameters are not releasable to the public under the Freedom of Information Act.

(t) The term *system reliability* means the percentage of time information is accurately transmitted within a system. The reliability of a system is a function of equipment failures (e.g., transmitters, feed lines, antennas, receivers and battery back-up power), the availability of the frequency channel given the propagation characteristics (e.g., frequency, terrain, atmospheric

condition and noise), and equipment sensitivity. System reliability also includes the ability of a radio-communications station to perform a required function under stated conditions for a stated period of time. System reliability may involve three concepts: Attaining a specified level of performance; the probability of achieving that level; and maintaining that level for a specified time. For digital systems, system reliability shall be measured by the percentage of time the bit error rate (BER) exceeds a desired value; and for analog transmissions, this would be measured by the percentage of time that the received carrier-to-noise ratio exceeds the receiver threshold.

### Subpart B—Procedure for Reimbursement for Relocations and Dispute Resolution

#### § 301.100 Costs to relocate.

(a) Relocation costs. The licensee is required to reimburse the Federal entity for all costs incurred as a result of modification, retuning and/or relocation.

(b) Method of reimbursement. Reimbursement payments shall be made in advance of relocation and may be in cash or in-kind as agreed to by the affected Federal entity. Any such payment in cash shall be deposited in the account of such Federal entity in the Treasury of the United States or in a separate account as authorized by law. If actual costs are less than the payments made, the Federal entity shall refund the difference.

#### § 301.110 Notification of marginal costs.

(a) NTIA shall provide the Federal entity's estimated marginal cost information to the FCC at least 180 days prior to the date on which the FCC schedules an auction to commence. Marginal costs, as defined in § 301.20(l), are the costs that will be incurred by a Federal entity to achieve comparable capability of systems relocated to a new frequency assignment or band or otherwise modified. Any Federal entity that proposes to relocate, modify or retune shall notify NTIA at least 240 days before the auction of the marginal costs anticipated to be associated with relocation or with modifications necessary to accommodate prospective licensees. The information provided to NTIA must also include the name and telephone number of a person within the Federal entity that can be contacted by the auction winner or licensee.

(b) *Unclassified assignments*. NTIA will provide the following information to the FCC prior to the date on which the FCC scheduled the auction to

commence with respect to unclassified Government facilities:

- (1) List of Government facilities.
- (2) Government agency operating each facility.
- (3) Location of each facility.
- (4) General type of operation and equipment.
- (5) Whether the facility can be retuned, modified, or must be relocated.
- (6) Estimated marginal cost of retuning, modification, or relocation.
- (7) Total estimated costs for all assignments.

(c) *Classified assignments.* Prior to the date on which the FCC has scheduled an auction to commence, Federal entities located on the spectrum to be auctioned will provide a single, consolidated and unclassified figure to NTIA for the cost of relocating, retuning, or modifying all such classified systems. NTIA will provide this information to the FCC which in turn will provide the figure to bidders with the following conditions: To the extent it is consistent with national security considerations, the figure may be broken down by geographical location and spectrum block to give those bidding on a geographic basis the best indication possible of the cost they may have to pay to relocate, retune or modify the systems at issue. Following the auction, the winner may apply for a facility clearance pursuant to the National Industrial Security Program Operating Manual and related individual security clearances. If those clearances and accesses are granted, classified information may be made available with regard to certain Government systems in accordance with the terms and conditions prescribed in the clearances and accesses provided, and subject to the overall rules and authorities found in Executive Order 12958, Executive Order 12968, and related Federal laws, rules and regulations.

(d) *Sensitive assignments.* Prior to the date on which the FCC has scheduled an auction to commence, Federal entities will provide a single, consolidated and unclassified figure to NTIA for the cost of relocating, retuning, or modifying all such sensitive systems. NTIA will provide this information to the FCC which in turn will provide the figure to bidders with the following conditions: To the extent it is consistent with the sensitive nature of the assignment, the figure may be broken down by geographical location and spectrum block to give those bidding on a geographic basis the best indication possible of the cost they may have to pay to relocate, retune or modify the systems at issue. Following the auction, the Government agency shall release the

sensitive information to the winning licensee pursuant to a non-disclosure agreement, if required.

#### **§ 301.120 Negotiations and mediation.**

(a) Within 30 days after public notice of the grant of a license for use of the bands identified in § 301.10, the licensee is required to provide the Federal entity that occupies the band with written notification of such event. Public notice of the grant commences the 135-day period for negotiation or mediation. During this period, parties are encouraged to resolve any differences with respect to relocation or modification costs or any other related issues, either through party-to-party negotiations and/or a third party mediator. Each party shall pay its own costs for negotiation and mediation. If, at the end of the 135-day period, the parties have not reached an agreement with respect to relocation, the parties may agree to extend the negotiation period.

(b) *Good faith obligation.* The parties are required to negotiate in good faith. Good faith means that:

- (1) Neither party may refuse to negotiate; and
- (2) Each party must behave in a manner necessary to facilitate the relocation process in a timely manner. Classified or sensitive information will be treated in accordance with § 301.110.

#### **§ 301.130 Non-binding arbitration.**

If the parties have not reached agreement to extend the negotiation/mediation period, or if a previously extended negotiation/mediation period expires, the parties shall enter into non-binding arbitration. The parties shall agree on an arbitrator, and the arbitrator may not be the same person as the mediator if mediation has been used by the parties and failed. The parties may design such rules for arbitration as deemed appropriate. The arbitrator's non-binding written decision may be requested by NTIA as part of the record in its determination on a petition for relocation under § 301.140. The decision may be a factor, among other things, in the NTIA determination on a petition for relocation. Each party shall pay its own costs for arbitration and share equally the cost of the arbitrator.

#### **§ 301.140 Petition for relocation.**

(a) *In general.* A licensee seeking to relocate a Federal Government station must submit a petition for relocation to NTIA. A copy of the petition must also be simultaneously provided to the FCC. NTIA's determination shall be set forth in writing within six months after the petition for relocation has been filed,

and be provided to the auction winner and the Federal entity. NTIA shall limit or terminate the Federal entity's operating license within six months after receiving the petition if the following requirements are met:

(1) The person seeking relocation of the Federal Government station has guaranteed to pay all modification and relocation costs incurred by the Federal entity, including all engineering, equipment, site acquisition and construction, and regulatory fees;

(2) All activities necessary for implementing the relocation or modification have been completed, including construction of replacement facilities (if necessary and appropriate) and identifying and obtaining new frequencies for use by the relocated Federal Government station (where such station is not relocating to spectrum reserved exclusively for Federal use);

(3) Any necessary replacement facilities, equipment modifications, or other changes have been implemented and tested to ensure that the Federal Government station is able to accomplish its purposes; and

(4)(i) NTIA has determined that the proposed use of the spectrum frequency band to which the Federal entity will relocate its operations is

(A) Consistent with obligations undertaken by the United States in international agreements and with United States national security and public safety interests; and

(B) Suitable for the technical characteristics of the system band and consistent with other uses of the band.

(ii) In exercising its authority, NTIA shall consult with the Secretary of Defense, the Secretary of State, or other appropriate officers of the Federal Government.

(5) If these requirements are not met, NTIA shall notify the petitioner that the request is declined and the reasons for denial.

(6) If NTIA does not issue a determination under this section within 6 months of the filing of a Petition for Relocation, the Petition for Relocation is deemed to be denied.

(7) In making its determination under this section, NTIA shall consult with the affected Federal entity and the Office of Management and Budget and other executive branch agencies.

(b) *Petition after agreement between the parties.* The licensee may file a petition for relocation pursuant to § 301.140 at anytime after the parties have reached agreement on relocation in negotiations or mediation as provided in § 301.120 and submit the agreement as evidence of having met the

requirements of the Petition for Relocation.

(c) *Petition after failure to reach an agreement.* If the parties fail to reach an agreement as provided in § 301.120 and non-binding arbitration has occurred pursuant to § 301.130, the licensee may file a petition for relocation with NTIA after a decision has been rendered by the arbitrator. Any recommended decision by the arbitrator may be requested by NTIA as part of the record in a petition for relocation under § 301.140. The recommended decision may be a factor, among others, in the NTIA determination on the Petition for Relocation.

#### § 301.150 Request for withdrawal.

As an alternative to a Petition for Relocation, if the parties reach an agreement in negotiations or mediation or agree with the decision of the arbitrator, the Federal entity may seek voluntary withdrawal of the assignments that are the subject of the relocation.

[FR Doc. 02-15118 Filed 6-14-02; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Parts 350 and 385

[Docket No. FMCSA-2001-11060]

RIN 2126-AA64

#### Certification of Safety Auditors, Safety Investigators, and Safety Inspectors; Delay of Effective Date

**AGENCY:** Federal Motor Carrier Safety Administration (FMCSA), DOT.

**ACTION:** Interim final rule; delay of effective date.

**SUMMARY:** The FMCSA delays for 30 days the effective date of the interim final rule titled "Certification of Safety Auditors, Safety Investigators, and Safety Inspectors," published in the *Federal Register* on March 19, 2002 at 67 FR 12776. That rule establishes procedures to certify and maintain certification for auditors and investigators. It also requires certification for State or local government Motor Carrier Safety Assistance Program (MCSAP) employees performing driver/vehicle roadside inspections. The FMCSA needs more time to review all of the comments received on this rulemaking.

**DATES:** The effective date of the interim final rule amending 49 CFR parts 350

and 385 published at 67 FR 12776, March 19, 2002, is delayed for 30 days from June 17, 2002 until July 17, 2002.

**FOR FURTHER INFORMATION CONTACT:** Mr. Larry Minor, 202-366-4009, Acting Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, 400 Seventh Street, SW., MC-PSD, Washington, DC 20590-0001. Office hours are from 7:45 a.m. to 4:15 p.m. EST, Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:** The FMCSA believes that an additional 30 days are necessary to fully consider all of the comments received on the rule, including those related to potential environmental impacts of this action. The FMCSA's implementation of this action without opportunity for public comment, effective immediately upon publication today in the *Federal Register*, is based on the good cause exceptions in 5 U.S.C. 553(b)(B) and 553(d)(3). Seeking public comment is impracticable, unnecessary, and contrary to the public interest. The brief 30-day delay in effective date is necessary to give agency officials the opportunity to do further analysis in response to the comments. Given the imminence of the effective date, seeking prior public comment on this brief delay would have been impracticable, as well as contrary to the public interest in the orderly promulgation and implementation of regulations. The imminence of the effective date is also good cause for making this action effective immediately upon publication.

Dated: June 12, 2002.

**Joseph M. Clapp,**  
Administrator.

[FR Doc. 02-15272 Filed 6-13-02; 11:55 am]

BILLING CODE 4910-EX-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 222 and 223

[Docket No. 020319061-2122-02; I.D. 031402B]

RIN 0648-AP81

#### Sea Turtle Conservation Measures for the Pound Net Fishery in Virginia Waters

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Interim final rule; request for comments.

**SUMMARY:** NMFS is prohibiting the use of all pound net leaders measuring 12 inches (30.5 cm) and greater stretched mesh and all pound net leaders with stringers in the Virginia waters of the mainstem Chesapeake Bay effective immediately through June 30 and then from May 8 to June 30 each year. The affected area includes all Chesapeake Bay waters between the Maryland and Virginia state line (approximately 38° N. lat.) and the COLREGS line at the mouth of the Chesapeake Bay, and the waters of the James River, York River, and Rappahannock River downstream of the first bridge in each tributary. NMFS is also imposing year round reporting and, when requested, monitoring requirements for the Virginia pound net fishery. This action, taken under the Endangered Species Act of 1973 (ESA), is necessary to conserve sea turtles listed as threatened or endangered and to enable the agency to gather further information about sea turtle interactions in the pound net fishery.

**DATES:** Effective June 12, 2002, with the exception of 50 CFR 223.206(d)(2)(v)(C), which requires approval by the Office of Management and Budget pursuant to the Paperwork Reduction Act. The effective date of 50 CFR 223.206(d)(2)(v)(C) will be announced in the *Federal Register*.

Comments on this interim final rule are requested, and must be received at the appropriate address or fax number (**ADDRESSES**) by no later than 5 p.m., eastern daylight time, on July 17, 2002.

**ADDRESSES:** Written comments on this action or requests for copies of the literature cited, the Environmental Assessment (EA), or Regulatory Impact Review (RIR) should be addressed to the Assistant Regional Administrator for Protected Resources, NMFS, One Blackburn Drive, Gloucester, MA 01930. Comments and requests for supporting documents may also be sent via fax to 978-281-9394. Comments will not be accepted if submitted via e-mail or the Internet.

**FOR FURTHER INFORMATION CONTACT:** Mary A. Colligan (ph. 978-281-9116, fax 978-281-9394), or Barbara A. Schroeder (ph. 301-713-1401, fax 301-713-0376).

#### SUPPLEMENTARY INFORMATION:

##### Background

Pound net leaders with greater than or equal to 12 inches (30.5 cm) stretched mesh and leaders with stringers have been documented to incidentally take sea turtles (Bellmund *et al.*, 1987). High strandings of threatened and endangered sea turtles are documented on Virginia beaches each spring, and the magnitude of the stranding event has