

TABLE 2A TO SUBPART E OF PART 59—REACTIVITY FACTORS—Continued

| Compound | CAS No. | Reactivity factor |
|--------------------------------|-------------|-------------------|
| 2-tert-Butoxy-1-Propanol | 94023-15-1 | 1.81 |
| Oxo-Octyl Acetate | 108419-32-5 | 0.96 |

[FR Doc. E9-14580 Filed 6-22-09; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 74 and 78

[WT Docket No. 02-55; ET Docket Nos. 00-258, 95-18; FCC 09-49]

Relocation of 2 GHz Broadcast Auxiliary Service

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document the Commission waives the deadline by which Sprint Nextel must complete relocation of the broadcast auxiliary service (BAS) to frequencies above 2025 MHz until February 8, 2010. The Commission also eliminates the requirement that MSS entrants to the 2000-2020 MHz band may not begin operations until the BAS incumbents in the top 30 markets by population and all fixed BAS links in the 1990-2025 MHz band have been relocated. MSS entrants will be allowed to conduct operations in markets where the BAS incumbents have not been relocated only if they successfully coordinate with the BAS incumbents. In addition, the Commission waives the requirement that New ICO Satellite Services G.P. must first make available to the public commercial satellite service throughout its satellite's coverage area before it may commercially operate Ancillary Terrestrial Service (ATC) in conjunction with its satellite system.

DATES: Effective July 23, 2009.

FOR FURTHER INFORMATION CONTACT: Nicholas Oros, (202) 418-0636, e-mail Nicholas.Oros@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order and Order, WT Docket No. 02-55, ET Docket Nos. 00-258 and 95-18, FCC 09-49, adopted June 10, 2009, and released June 12, 2009. The full text of the document is available on the Commission's Internet site at <http://www.fcc.gov>. It is also available for inspection and copying during regular business hours in the FCC Reference

Center (Room CY-A257), 445 12th St., SW., Washington, DC 20554. The full text may also be purchased from the Commission's duplication contractor, Best Copy and Printing Inc., Portals II, 445 12th St., SW., Room CY-B402, Washington, DC 20554, telephone (202) 488-5300; fax (202) 488-5563; e-mail FCC@BCPIWEB.com.

Summary of the Report and Order and Order

1. In this Report and Order and Order, the Commission waives the deadline by which Sprint Nextel must complete relocation of the broadcast auxiliary service (BAS) to frequencies above 2025 MHz until February 8, 2010. The BAS incumbents are being relocated so that new entrants such as the Mobile Satellite Service (MSS), Advanced Wireless Service (AWS), and Sprint Nextel can provide new and innovative services. In 2004, Sprint Nextel undertook the obligation to relocate the BAS incumbents within 30 months—i.e. by September 7, 2007. In March 2008 the Commission waived the BAS transition deadline until March 5, 2009. On February 12, 2009, Sprint Nextel, the Association for Maximum Service Television (MSTV), the National Association of Broadcasters (NAB), and the Society of Broadcast Engineers (SBE) filed a supplemental request that the BAS transition deadline be waived until February 7, 2010.

2. The Commission concludes that waiver of the BAS relocation deadline until February 8, 2010 is in the public interest for a number of reasons. The timely relocation of BAS licensees remains a necessary step for the full introduction of new services in the 1990-2025 MHz band, and Sprint Nextel remains the sole entity actively undertaking such relocations. No commenter has suggested an alternate plan by which BAS licensees can be relocated quicker in order to give new entrants full and complete access to the band. The pace of the BAS transition is constrained by the small number of manufacturers who make the BAS equipment, a shortage of qualified equipment installers and tower climbers, and coordination problems between the new radio equipment and preexisting controllers. The Commission concludes that a fair reading of the

overall record indicates that Sprint Nextel has made considerable progress in the BAS relocation process that has proven to be a more complex undertaking than any party may have initially anticipated.

3. Further delays in BAS transition will frustrate our goal of providing opportunity for new entrants to begin offering service in the band and the Commission fully intends to take all necessary steps to ensure that the BAS licensees, Sprint Nextel, and the MSS operators act to complete the BAS relocation process in a timely manner. While the Commission intends to exercise appropriate enforcement action if Sprint Nextel is not able to complete the BAS transition by February 8, 2010 for reasons it could have reasonably avoided, we also believe that there should be appropriate consequences for BAS licensees for failure to complete the relocation by the new deadline. In the accompanying Further Notice, the Commission considers further modifying the BAS relocation rules to allow new entrants to begin unencumbered operations in the band before all BAS operations are relocated. The Commission also emphasize that, under existing relocation rules, MSS operators have an absolute responsibility to protect incumbent BAS licensees, and that it will consider taking vigorous enforcement action against any violations of this rule. Furthermore, the Commission reminds BAS licensees that under the Commission's rules they have an obligation to negotiate in good faith with Sprint Nextel and the other new entrants relocation agreements for the 1990-2025 MHz band. If a party believes that another party, whether a BAS licensee or a new entrant, is not negotiating in good faith, it may petition the Commission for a declaratory ruling.

4. As proposed in a March 2008 Further Notice of Proposed Rulemaking in this docket, in this Report and Order and Order the Commission also eliminates the requirements in §§ 74.690(e)(1)(i) and 78.40(f)(1)(i) of the Commission's Rules that MSS entrants relocate all BAS licensees in Nielsen Designated Market areas 1-30, as they existed on September 6, 2000, and all fixed BAS stations operating in the band on a primary basis prior to beginning

operations. Eliminating these requirements will allow the benefits of MSS—such as public safety service during disasters when terrestrial communications networks may be compromised and increased competition in wireless communications through the provision of new and unique mobile services—to be provided to the public sooner than what the rules currently allow. The delays in the relocation of BAS have increased the importance of finding opportunities that can allow MSS operators to begin to deploy robust commercial services.

5. The Commission recognizes that allowing the MSS entrants to operate on cleared spectrum before they have satisfied their cost sharing obligations to Sprint Nextel is a departure from prior Commission decisions on this issue. Nonetheless, the Commission concludes that, given the unique circumstances in this case, our decision to allow the MSS entrants to begin operations in the near term, before they may have satisfied their cost sharing reimbursement obligations, best serves the public interest. The Commission wants to be clear, though, that our decision to allow the MSS entrants to begin operations before they may have satisfied their cost sharing obligations to Sprint Nextel in no way relieves them of these obligations. A guiding principle for relocation is that those entrants that benefit from cleared spectrum have an obligation to shoulder their portion of the costs to relocate incumbent operations. The Commission fully intends to apply that principle here, as set forth in the accompanying Further Notice.

6. The Commission also retains the rule that BAS licensees maintain primary status until they are relocated, decline relocation, or the BAS relocation rules sunset on December 13, 2013. The Commission also has not modified the requirement for MSS entrants to relocate the incumbent BAS licensees in markets 31–100 within three years of beginning operations and the remaining BAS licensees within five years.

7. The Commission's decision to modify §§ 74.690(e)(1)(i) and 78.40(f)(1)(i) makes it vital for us to effectively manage the interference environment during the period in which both MSS entrants and incumbent BAS licensees occupy the band. During the pendency of the BAS transition, BAS incumbents are primary in the band until they are relocated, they refuse relocation, or the relocation rules sunset on December 9, 2013. The Commission imposes the following requirements to

protect the primary BAS operations: First, MSS entrants will be required to successfully coordinate any operations in nonrelocated markets with BAS incumbents in those markets prior to beginning service. Second, MSS entrants are prohibited from marketing their services to customers in markets where the BAS transition has not been completed. Third, the Commission prohibits MSS entrants from operating ATC networks in markets where the BAS transition is not complete.

8. Interference may also occur to BAS incumbents from MSS mobile terminals operating adjacent to markets where the BAS transition has not been completed. To address this possibility, the Commission has determined that MSS mobile terminals may not operate within line-of-sight of BAS receiver sites in markets where the BAS transition has not been completed, unless such use has been coordinated between the MSS operator and BAS licensee. In addition, the Commission will not allow the MSS entrants to operate ATC equipment within line-of-sight of a BAS receiver site for a market which has not been transitioned. MSS transponders must also accept any interference caused by BAS operations in uncleared markets.

9. The Commission expects BAS incumbents to act cooperatively to accommodate good faith proposals for MSS operation in markets where the BAS incumbents have not been relocated. Because not all BAS receive site information is available in the Commission's licensing databases, it expects BAS licensees to disclose to MSS the locations of these sites upon request in order to facilitate coordination. While the Commission believes that there may be instances where individual BAS licensees may be able to adjust the channels or bandwidth on which they operate or make other adjustments to accommodate MSS operations, the Commission emphasizes that BAS incumbents are not expected to agree to coordination proposals that would impair their ability to meet the electronic newsgathering needs of a particular market at a particular time or that would delay the scheduled relocation of BAS. To a certain extent, the Commission disagrees with MSTV and NAB that BAS operations should never reduce bandwidth or cease channel operation, if doing so is agreed to as part of coordination. However, the Commission does not expect broadcasters to retune or modify equipment to accommodate MSS when that equipment is already scheduled to be replaced, unless it will not divert resources from the BAS transition. The

Commission will not permit an MSS entrant to approach the BAS incumbents in a particular market to coordinate operations until sixty days before the MSS entrant expects to provide commercial service in that market.

10. The Commission also determined that an MSS entrant will be required to coordinate with fixed BAS links that overlap the spectrum it will be using. Where the MSS entrant and BAS licensee determine by mutual agreement that harmful interference to the BAS fixed link will not occur, the MSS entrant will be able to operate in that market. It may not be possible in some cases for the MSS entrant to operate without causing interference to the fixed BAS link. In these situations, the MSS entrant will have to relocate the fixed BAS link before it may operate in that market.

11. New ICO Satellite Services G.P. (ICO), which has recently changed its name to New DBSD Satellite Services G.P., has been granted authority to operate ATC in conjunction with its satellite system conditioned on its commercial satellite service being available to the public throughout its satellite's coverage area, as required by § 25.149(b)(3). However, ICO can not satisfy this requirement until the BAS transition is complete because it may not market MSS where the BAS incumbents have not been relocated. ICO has requested a waiver of this requirement to allow it to begin ATC operations prior to the end of the BAS transition. The Commission grants ICO a limited waiver of this requirement, pending completion of the BAS transition. Once ICO begins to commercially offer satellite service in a market in which the BAS transition has been completed, ICO will be permitted to operate ATC in that market. Once the BAS transition has been completed, ICO may operate ATC service throughout its coverage area, provided that it is also offering commercial satellite service throughout its coverage area. The Commission also delegated authority to the Commission's International Bureau to grant a similar waiver to MSS operator TerreStar Networks Inc., if such a waiver is necessary.

Final Regulatory Flexibility Analysis

12. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the

¹ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104–121, Title II, 110 Stat. 857 (1996).

Further Notice of Proposed Rule Making (FNPRM).² The Commission sought written public comment on the proposals in the FNPRM, including comment on the IRFA.³ No commenting parties specifically addressed the IRFA.⁴ This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.⁵

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

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

14. Because BAS is a critical part of the broadcasting system by which information and entertainment is provided to the American public, the Report and Order and Order implements a number of requirements to help prevent interference to nonrelocated BAS incumbents from MSS until the

transition is complete. The MSS entrants will only be permitted to operate in markets where the BAS incumbents have not been relocated if the MSS entrants successfully coordinate with the BAS incumbents. This coordination requirement also applies to MSS operations in a market where BAS has been relocated that are within line-of-sight of BAS receiver sites in adjacent markets that have not yet been transitioned. Furthermore, to simplify the coordination process, MSS will not be able to operate ATC systems or market services to customers in markets where the BAS incumbents have not been relocated.⁷

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

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

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

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

17. The proposed rule modifications may affect the interest of BAS, LTTS, and CARS licensees (which we have been referring to throughout this document generically as “BAS”) because these licensees are being

relocated from the 1990–2025 MHz band by the new entrants. In addition, the rule modifications will affect the interest of the new entrants to the 1990–2025 MHz band: MSS, Sprint Nextel, and future AWS entrants to the band.

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

19. The Commission has not developed a definition of small entities specific to BAS licensees. However, the U.S. Small Business Administration (SBA) has developed small business size standards. For BAS, we use the size standard for Television Broadcasting.¹² The SBA has developed a size standard for firms in this category, which is all firms having revenues less than \$14 million. The only data which we have available for this category are for when the SBA size standard was for firms having revenues of less than \$13.5 million. According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations¹³ (or approximately 72 percent) have revenues of \$13.5 million or less and thus qualify as small entities under the SBA definition. Thus, under this standard, the majority of firms can be considered small.

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

21. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired

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

³ See *id.* at 4920 ¶ 93.

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

⁵ See 5 U.S.C. 604.

⁶ The Report and Order and Order also waive the deadline by which Sprint Nextel must relocate the BAS incumbents until February 8, 2010.

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

⁸ 5 U.S.C. 603(b)(3).

⁹ 5 U.S.C. 601(6).

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

¹¹ Small Business Act, 15 U.S.C. 632 (1996).

¹² 13 CFR 121.201, NAICS code 515120.

¹³ Although we are using BIA’s estimate for purposes of this revenue comparison, the Commission has estimated the number of licensed commercial television stations to be 1,374. See News Release, “Broadcast Station Totals as of December 31, 2006” (dated Jan. 26, 2007); see <http://www.fcc.gov/mb/audio/totals/bt061231.html>.

¹⁴ 47 CFR 78.13.

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

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

subscribers.²² Industry data indicate that, of 7,208 systems nationwide, 6,139 systems have under 10,000 subscribers, and an additional 379 systems have 10,000–19,999 subscribers.²³ Thus, under this second size standard, most cable systems are small.

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

24. *Wireless Telecommunications Carriers (except satellite).* Wireless Telecommunications Carriers (except satellite), is a SBA standard which has a size standard of fewer than 1,500 employees.²⁸ Wireless cable systems use 2 GHz band frequencies of the Broadband Radio Service ("BRS"),

formerly Multipoint Distribution Service ("MDS"), and the Educational Broadband Service ("EBS"), formerly Instructional Television Fixed Service ("ITFS"), to transmit video programming and provide broadband services to residential subscribers. These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services. We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. As noted, within the category of Wireless Telecommunications Carriers (except satellite), such firms with fewer than 1,500 employees are considered to be small.²⁹ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.³⁰ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.³¹ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.³² The SBA small business size standard for the broad census category of Wireless Telecommunications Carriers, which consists of such entities with fewer than 1,500 employees, appears applicable to MDS and ITFS.

25. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction, the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years. This definition of a small entity in the context of MDS auctions has been approved by the SBA. In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that

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

¹⁶ 13 CFR 121.201, NAICS code 517110.

¹⁷ 13 CFR 121.201, NAICS code 517110.

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

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

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

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

²² 47 CFR 76.901(c).

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

²⁴ 47 U.S.C. 543(m)(2) *see* 47 CFR § 76.901(f) & nn. 1-3.

²⁵ 47 CFR 76.901(f); *see* Public Notice, *FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, DA 01-158 (Cable Services Bureau, Jan. 24, 2001).

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

²⁷ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission's rules. *See* 47 CFR 76.909(b).

²⁸ 13 CFR 121.201, NAICS Code 517210. Standard for small business is 1,500 employees or fewer.

²⁹ 13 CFR 121.201, NAICS Code 517210.

³⁰ 13 CFR 121.201, NAICS Code 517110.

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

³² *Id.* An additional 61 firms had annual receipts of \$25 million or more.

are not more than \$40 million and are thus considered small entities. MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction fall under the SBA small business size standard for Wireless Telecommunications Carriers (except satellite).³³ As noted, within the category of Wireless Telecommunications Carriers, such firms with fewer than 1,500 employees are considered to be small.³⁴ The data presented were acquired when the applicable SBA small business size standard was called Cable and Other Program Distribution, and which referred to all such firms having \$13.5 million or less in annual receipts.³⁵ According to Census Bureau data for 2002, there were a total of 1,191 firms in this category that operated for the entire year.³⁶ Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million.³⁷ Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

26. *Educational* institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS). We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of the licenses are held by educational institutions. Thus, we estimate that at least 1,932 ITFS licensees are small entities.

27. *LTTS*. The Local Television Transmission Service (LTTS) in the 1990–2110 MHz band is used by communications common carriers to provide service to television broadcast stations, television broadcast networks, cable system operations, and cable network entities.³⁸ There are 45 LTTS licensees in the 1990–2110 MHz band, and these licensees will ultimately be required to use only the 2025–2110 MHz portion of that band. It is unclear how many of these will be affected by our new rules. The Commission has not

yet defined a small business with respect to local television transmission services. For purposes of this IRFA, we will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite). As noted, within the category of Wireless Telecommunications Carriers, (except satellite), such firms with fewer than 1,500 employees are considered to be small.³⁹ The data presented were acquired when the applicable SBA small business size standard was called Cellular and Other Wireless Telecommunications—which referred to all such firms having no more than 1,500 persons. According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.⁴⁰ Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more.⁴¹ Thus, under this size standard, the majority of firms can be considered small.

28. *MSS*. There are two MSS operators in the 1990–2110 MHz band. These operators will provide services using the 2000–2020 MHz portion of the band. The SBA has developed a small business size for Satellite Telecommunications, which consist of all companies having annual revenues of less than \$15 million.⁴² Neither of the two MSS operators currently has revenues because one has not launched a satellite yet and the other is unable to provide service with its satellite because of the delays in the BAS transition. However, given that as of December 31, 2008, these MSS operators had assets of \$1.341 billion and \$664 million, respectively, we expect that both of these companies will have annual revenue of over \$15 million once they are able to offer commercial services.⁴³ Consequently, we find that neither MSS operator is a small business. Small businesses often do not have the financial ability to become MSS system

operators due to high implementation costs associated with launching and operating satellite systems and services.

29. *AWS*. The AWS licensees have not been issued and the Commission has no definite plans to issue these licensees. Presumably, some of the businesses which will eventually obtain AWS licensees will be small businesses. However, we have no means to estimate how many of these licensees will be small businesses.

30. *Sprint Nextel*. Sprint Nextel as a new entrant to the band will occupy spectrum from 1990–1995 MHz. The Report and Order and Order grants Sprint Nextel a waiver of the deadline by which it must relocate the BAS, CARS, and LTTS incumbents from the 1990–2025 MHz portion of the band. Sprint Nextel belongs to the SBA category Wireless Telecommunications Carriers (except satellite).⁴⁴ Businesses in this category are considered small if they have fewer than 1,500 employees.⁴⁵ As of December 31, 2008 Sprint Nextel had about 56,000 employees.⁴⁶ Consequently, we find that Sprint Nextel is not a small business.

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

31. MSS entrants are required to coordinate their operations within line-of-sight of BAS receiver sites for those BAS licensees who have not yet been relocated. In addition, the MSS entrants may not operate ATC networks within line-of-sight of BAS receiver sites which have not yet been relocated. Because the locations of the BAS receiver sites are not in the Commission's databases, the BAS licensees are required to notify the MSS entrants of the location of the receiver sites upon request.

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

32. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements

³⁹ 13 CFR 121.201, NAICS Code 517210.

⁴⁰ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Employment Size of Firms Subject to Federal Income Tax: 1997," Table 5, NAICS code 517212 (issued Oct. 2000).

⁴¹ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

⁴² 13 CFR 121.201, NAICS Code 517410.

⁴³ TerreStar Corp., SEC Form 10-K 2008 Annual Report, filed March 12, 2009 at F2; ICO Global Communications (Holdings) Limited, SEC Form 10-K 2008 Annual Report, filed March 31, 2009 at 52. ICO's subsidiary which controls its satellite covering the United States has recently filed for bankruptcy. ICO Global Communications (Holdings) Limited, SEC Form 8-K, filed May 15, 2009.

⁴⁴ 13 CFR 121.201, NAICS Code 517210.

⁴⁵ *Id.*

⁴⁶ Sprint Nextel Corp., SEC Form 10-K 2008 Annual Report, filed Feb. 27, 2009 at 14.

³³ 13 CFR 121.201, NAICS Code 517210.

³⁴ 13 CFR 121.201, NAICS Code 517210.

³⁵ 13 CFR 121.201, NAICS Code 517110.

³⁶ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, Table 4, Receipts Size of Firms for the United States: 2002, NAICS code 517510 (issued November 2005).

³⁷ *Id.* An additional 61 firms had annual receipts of \$25 million or more.

³⁸ 47 CFR 101.803(b).

under the rule for small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁴⁷

33. No parties have submitted comments indicating that there will be a disparate impact on small entities because of these rule changes. Because we have no evidence that small businesses will suffer disparate harm based on the rules we adopt today, based on the record now before us, we do not perceive a need for the Commission to take steps to minimize the adverse economic impact on small entities or consider alternatives to the rule amendments in the Report and Order and Order. In general, the BAS, CARS, and LTTS licensees may suffer harm in two ways from our amended rules: By suffering harmful interference to their transmissions from MSS entrants to the band or by having to expend resources to coordinate operations with the MSS entrants prior to completion of the BAS transition.⁴⁸

34. The interest of BAS, CARS, and LTTS licensees would be affected by the proposed rule changes by either subjecting them to the threat of increased interference from MSS or by requiring MSS entrants to coordinate with the incumbents in order to operate in markets where the BAS incumbents have not yet been relocated to the new channel plan.⁴⁹ After the elimination of the top 30 market rule the nonrelocated BAS, CARS, and LTTS incumbents have primary status in the band until the band sunset date of December 9, 2013, while the new entrants will be secondary. As such, the new entrants will be required to avoid causing harmful interference to the nonrelocated BAS, CARS, and LTTS incumbents and will have to accept

interference from the incumbents. Despite this requirement, there may be instances where the BAS, CARS, LTTS incumbents will experience harmful interference. Furthermore, the Commission expects the BAS, CARS, LTTS incumbents to act cooperatively to accommodate the MSS operators in nonrelocated markets to the greatest extent possible while not impairing their ability to make use of the spectrum.

35. The Commission notes that because the time period for exposure to potential interference is very short in duration, the potential of harmful interference actually occurring to BAS, CARS, and LTTS incumbents is small. All BAS, CARS, and LTTS incumbents are expected to be relocated by Sprint Nextel before the February 8, 2010 transition deadline. ICO has stated that they do not intend to offer commercial services during 2009.⁵⁰ TerreStar's operational milestone is not until August 30, 2009. The Commission expects that TerreStar will need a significant amount of time after its satellite is operational to begin providing commercial service. As a result, the amount of time that MSS will share spectrum with nonrelocated incumbents should be brief. As the transition progresses, fewer and fewer incumbents will remain unrelocated. Those BAS, CARS, and LTTS incumbents who have not been relocated are unlikely to receive harmful interference from MSS because of the coordination and non-interference requirements. Furthermore, any interference that does occur to incumbents will affect small entities in the same way that it affects large entities.

36. As for the coexistence of unrelocated BAS, CARS, and LTTS incumbents with MSS entrants until the incumbents are relocated, the unrelocated BAS, CARS, and LTTS incumbents may have to expend some resources to coordinate operations with the MSS entrants. However, we do not expect that this coordination will be any more burdensome than the coordination that BAS licensees commonly do with other BAS incumbents. The requirement to coordinate with MSS entrants will affect all the BAS, CARS, and LTTS licensees equally, regardless of the size of these entities. We do not expect that BAS, CARS, and LTTS incumbents to suffer significant harm because they will not have to impair their use of the

spectrum as a result of the coordination with the MSS entrants. Furthermore, if the MSS entrants can not successfully coordinate their use of the spectrum with the unrelocated incumbents, they will have to avoid use of the spectrum in markets where the incumbents have not been relocated.

37. Our primary concern in this proceeding continues to be balancing the needs of incumbent BAS licensees to provide service without suffering harmful interference and the introduction of new MSS in a timely manner. The Commission believes the slight hardship that may occur to BAS entities is justified by the benefit to the public of receiving MSS services earlier than they might have without the changes we are making to our rules.

38. However, because of our ongoing concern with avoiding arbitrary and unfair burdens on small entities, we considered a number of alternatives to the rules we are adopting. The Commission considered not eliminating the top 30 market rule. Because Sprint Nextel is not expected to relocate the last of the top 30 markets until the end of the BAS transition, this would have likely required MSS to wait until the BAS transition is complete before offering service to the public. In the meantime, a large amount of spectrum would have remained unused in the markets where the BAS incumbents have been relocated. The Commission believes it would not be in the public interest to allow this valuable spectrum to lie fallow. It also considered allowing BAS to operate only in those markets where the BAS incumbents had been relocated. The Commission concluded that allowing MSS operations in unrelocated markets with successful coordination was preferable to this approach because there will be instances in which coordination will permit sharing of the spectrum in markets where the BAS transition has not been completed.

F. Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rules

39. None.

Ordering Clauses

40. Pursuant to Sections 4(i), 5(c), 303(f), 332, 337 and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(c), 303(f), 332, 337 and 405, this Report and Order and Order *is adopted*. Parts 74 and 78 of the Commission's Rules are *amended* as specified in the Final Rules, effective July 23, 2009.

41. Pursuant to Sections 4(i), 5(c), 303(f), 332, 337 and 405 of the

⁴⁷ See 5 U.S.C. 603(c)(1-4).

⁴⁸ We do not believe that the BAS, CARS, and LTTS licensee will suffer a disparate impact from the two waivers we grant in the Report and Order and Order. The waiver of the deadline by which Sprint Nextel must relocate the BAS incumbents will benefit the BAS, CARS and LTTS licensees by making it more likely they will be relocated above 2025 MHz. If they are not relocated, the BAS, CARS, and LTTS will become secondary after the December 2013 sunset date. The waiver of the commercial availability ATC requirement for ICO will not affect the interest of BAS, CARS, and LTTS licensees because ICO is prohibited from operation ATC in markets where the incumbents have not been relocated and must avoid operating ATC networks within line-of-sight of BAS receiver sites that have not been relocated.

⁴⁹ We do not believe the interest of future AWS licensees will be negatively affected by the actions of the Report and Order and Order. However, because there are no definite plans to issue the AWS licenses, any consideration of the effects of the Report and Order and Order on the AWS licensees is necessarily speculative.

⁵⁰ ICO Global Communications (Holdings) Limited, SEC Form 10-K 2008 Annual Report, filed March 3, 2009 at 3; Grant of FCC Application for Space and Earth Station: Mod or AMD, File No. Sat-Mod-20080718-00143, granted Nov. 12, 2008.

Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(c), 303(f), 332, 337 and 405, this Further Notice of Proposed Rulemaking is *adopted*.

42. Pursuant to Sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 CFR 154(i) and (j), and § 1.3 of the Commission's Rules, 47 CFR 1.3, that the waiver of the deadline by which Sprint Nextel must complete relocation of the broadcast auxiliary service to frequencies above 2025 MHz adopted in FCC 08-73, is extended until February 8, 2010.

43. The Supplemental Request is granted.

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

45. Pursuant to §§ 0.201, 0.203, 0.204, and 0.261 of the Commission's Rules, 47 CFR 0.201, 0.203, 0.204, 0.261, that authority to waive Section 25.149(b)(3) of the Commission rules, 47 CFR 25.149(b)(3) for TerreStar Networks Inc. is hereby *delegated* to the Commission's International Bureau.

46. Pursuant to Sections 4(i) and (j) of the Communications Act of 1934, as amended, 47 CFR 154(i) and (j), and Section 1.3 of the Commission's Rules, 47 CFR 1.3, that the Application for Review filed by Sprint Nextel of the grant of ATC authority to New ICO Satellite Services G.P. (New DBSD Satellite Services G.P.) is *dismissed*.

47. New ICO Satellite Services G.P.'s (New DBSD Satellite Services G.P.'s) request that we waive 47 CFR 74.690(e)(1)(i) of the Commission's rules is *dismissed*.

48. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of

this *Report and Order and Order and Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

49. The Commission shall send a copy of this *Report and Order and Order and Further Notice of Proposed Rulemaking* in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

List of Subjects

47 CFR Part 74

Communications equipment, Reporting and recordkeeping requirements, and Television.

47 CFR Part 78

Cable television, Communications equipment, and Reporting and recordkeeping requirements.

Federal Communications Commission.

Marlene H. Dortch,
Secretary.

Final Rules

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

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

■ 1. The authority citation for part 74 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 307, 336(f), 336(h) and 554.

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

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

* * * * *
(e) * * *
(1) * * *

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

* * * * *

PART 78—CABLE TELEVISION RELAY SERVICE

■ 3. The authority citation for part 78 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

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

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

* * * * *
(f) * * *
(1) * * *

(i) MSS licensees may relocate all Existing Licensees in Nielsen Designated Market Areas (DMAs) 1–30, as such DMAs existed on September 6, 2000, except those Existing Licensees that decline relocation. Such relocation negotiations shall be conducted as “mandatory negotiations,” as that term is used in § 101.73 of this chapter. If these parties are unable to reach a negotiated agreement, MSS Licensees may involuntarily relocate such Existing Licensees after December 8, 2004.

* * * * *

[FR Doc. E9–14760 Filed 6–22–09; 8:45 am]

BILLING CODE 6712–01–P