DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

47 CFR Part 301

[Docket No. 001206341–0341–01]

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: Notice of proposed rulemaking.

SUMMARY: The National Telecommunications and Information Administration (NTIA) proposes to amend its regulations to set forth the rules governing reimbursement to Federal entities by the private sector as a result of reallocation of frequency spectrum. This action is necessary to provide spectrum for future commercial wireless communications service and to compensate the Federal Government for the costs incurred in making that spectrum available.

DATES: Submit comments on or before March 19, 2001. Reply comments are due April 18, 2001.

ADDRESSES: The public is invited to submit written comments in paper or electronic form. Comments may be mailed to Milton Brown, Office of the Chief Counsel, National Telecommunications and Information Administration (NTIA), Room 4713, U.S. Department of Commerce, 1401 Constitution Avenue, N.W., Washington, DC 20230. Paper submissions should include a version on diskette in ASCII, Word Perfect (please specify version), or Microsoft Word (please specify version) format. Comments may be viewed on NTIA's website at http://www.ntia.doc.gov.

Comments submitted in electronic form may be sent to reimbursement@ntia.doc.gov. Electronic comments should be submitted in the formats specified above.

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

SUPPLEMENTARY INFORMATION:

Authority: 47 U.S.C. 921, *et seq.* (Supp. V. 1993); Strom Thurmond National Defense Authorization Act for FY 1999, Pub. L. No. 105–261, 112 Stat. 1920 (1998); 47 U.S.C. 923(g).

I. Introduction

1. NTIA is the executive branch agency principally responsible for developing and articulating domestic and international telecommunications policy. NTIA acts as 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 is also responsible for managing the Federal Government's use of the radio spectrum. The Federal Communications Commission (FCC), an independent agency of the Federal Government, manages electromagnetic spectrum used by the private sector, including state and local governments. With the proliferation of radio-based technologies, management and use of the radio spectrum has become increasingly complex. Federal agencies are extremely dependent on spectrum access to provide a wide variety of critical services to the American people. Congress has found that telecommunications and information are vital to the public welfare, national security, and competitiveness of the United States, and that technological advances in the telecommunications and information fields make it imperative that the United States maintain effective national and international policies and programs capable of taking advantage of these continued advancements.[1]

II. Background

2. On August 10, 1993, Title VI of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93) was signed into law.[2] OBRA 93 authorized the FCC 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.[3]

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-Federal users.[4] In response to this directive, NTIA issued a Spectrum Reallocation Report in February 1998 which identified the additional bands for reallocation.[5] BBA 97 directed the FCC to auction the 20 MHz by 2002 and the 1710–1755 band identified in the 1995 Spectrum Reallocation Final Report after January 1, 2001.[6]

4. In 1998, Congress passed the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 (the Act).[7] This legislation sought to encourage the transfer of electromagnetic spectrum from Federal government to private use by authorizing Federal entities to accept compensation payments when they relocate or modify their frequency use to accommodate non-Federal users of the spectrum.[8] Indeed the Act requires ''any 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.[9] 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.''[10] Moreover, the Act requires the Federal entity to notify NTIA of the ''marginal costs anticipated to be associated with such relocation or with the modifications necessary to accommodate prospective licensees.''[11]

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

[1] See National Telecommunications and Information Administration Organization Act, 47 U.S.C. 901 (b)(1)–(2).

[2] Pub. L. 103–66, 107 Stat. 31 (1993).

[3] See National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA Special Publication 94–27, *Spectrum Reallocation Final Report* (Feb. 1995).

[4] Pub. L. 105–33, 111 Stat. 251 (1997).

[5] See National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA Special Publication 98–36, Spectrum Reallocation Report (Feb. 1998).

[6] *See* note 4 *supra* at section 3002(b). 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, See Pub. L. 106–65, 113 Stat. 512 (1999).

[7] Pub. L. 105–261, 112 Stat. 1920 (1998) (amending section 113(g) of the NTIA Organization Act (codified at 47 U.S.C. 923(g)).

[8] See 47 U.S.C. 923(g)(1)(A). ''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).

[9] See 47 U.S.C. 923(g)(1)(B).

[10] See 47 U.S.C. 923(g)(1)(A).

[11] Id.

estimates of relocation or modification costs.'' [12]

6. These proposed rules provide a procedure for Federal entities to receive reimbursement for the relocation or modification expenses that they incur as a result of the reallocation of radio spectrum mandated by OBRA 93, BBA 97, and future reallocations. As such, these proposed rules address reimbursement issues associated with the relocation or modification of frequency spectrum that have been reallocated. The proposed rules do not apply to issues involving the reallocation of frequency spectrum. These proposed rules provide a mechanism for the Federal entities to submit estimates of the costs to relocate. The proposed rules direct NTIA to solicit estimates of the costs of relocation from the affected Federal entities, and provide that information to the FCC at least 180 days prior to an auction.[13]

7. The proposed rules also provide procedures for the successful bidder to make payment to the Federal entity after an auction. Pursuant to direction from Congress, the proposed rules also include a process for resolving differences that arise between the Federal Government and the successful bidder regarding estimates of relocation or modification of costs. To the extent that a successful bidder disagrees with a Federal entity's estimated relocation costs, the proposed rules provide for a mandatory negotiation and/or third-party mediation period. If the parties do not agree to relocation costs within the mandatory negotiation period, the parties must enter into a non-binding arbitration program.

8. As required by section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603, NTIA has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Regulatory Flexibility Analysis section of these proposed rules. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments filed in this Notice of Proposed Rulemaking (NPRM), but they must have a separate and distinct heading designating them as responses to the IRFA. NTIA shall send a copy of this NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a).

III. Discussion

9. These proposed rules have been developed to ensure that the Federal Government is fully reimbursed for the expenses it incurs in retuning, modifying or relocating a system as a result of reallocation. To the extent that there are other ways to accomplish this goal, NTIA will entertain comments from interested parties.

Affected Bands

10. Pursuant to OBRA 93, NTIA identified 235 MHz of Federal Government spectrum for transfer to the private sector.[14] Similarly, NTIA identified another 20 MHz of spectrum for reallocation to the private sector as mandated by the BBA 97.[15] The table below shows the specific frequency bands reallocated from Federal Government use to the private sector as a result of the legislation and Federal Government action.

REALLOCATED FREQUENCY BANDS FROM THE FEDERAL GOVERNMENT TO THE PRIVATE SECTOR

Freq. band (MHz)	Legislation	Bandwidth (MHz)	Schedule
1390–1400	OBRA–93	10	January 1999
1427–1432	OBRA–93	5	January 1999
1670–1675	OBRA–93	5	January 1999
1710–1755	OBRA–93	45	January 2004 [16]
2300–2310	OBRA–93	10	August 1995
2390–2400	OBRA–93	10	February 1995
2400–2402	OBRA–93	2	August 1995
2402–2417	OBRA–93	15	February 1995
2417–2450	OBRA–93	33	August 1995
3650–3700	OBRA–93	50	January 1999
4940–4990	OBRA–93 [17]	50	January 1997
216–220	BBA–97	4	January 2002
1432–1435	BBA–97	3	January 1999
2385–2390	BBA–97	5	January 2005

11. On October 17, 1998, the President signed into law the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, which among other things, amended the NTIA Organization Act to require private sector entities to reimburse Federal users for relocations due to reallocation of spectrum assignments.[18] The Act also sets forth which spectrum would be the subject of the mandatory reimbursement rules: the 1710–1755 MHz band from the first reallocation report, the 20 MHz identified in the second reallocation report, and any future reallocations.[19] The affected frequency bands that currently qualify for reimbursement under the proposed rule include the following:

[12] See 47 U.S.C. 923(g)(1)(E).

[13] We note that the FCC will notify potential bidders prior to the auction of the estimated relocation costs submitted by the Federal entities for the affected bands.

[14] See note 3, supra. The Federal Government, however, later reclaimed fifty (50) MHz of this spectrum (*i.e.*, 4635–4685 MHz) and substituted 4940–4990 MHz in its place. See 47 U.S.C. 924(b), 926; see also Letter from Larry Irving, Assistant Secretary for Communications and Information, U.S. Department of Commerce, to William E. Kennard, Chairman, Federal Communications Commission (March 30, 1999) (notifying FCC of reclamation and substitutiuon of spectrum).

[15] See note 5, supra.

[16] The NTIA Spectrum Reallocation Final Report provided for early reallocation band (*i.e.*, 1999) for the top 25 major cities in the United States with the private sector reimbursing the Federal users. Subsequently, Title III of BBA 97 (entitled ''Communications and Spectrum Allocation Provisions'') provides for the reallocation of this band for competitive bidding commencing after January 1, 2001.

[17] See note 14, supra.

[18] See note 7, supra.

[19] See note 6, supra.

Bands That Qualify for Reimbursement

216–220 MHz
1432–1435 MHz
1710–1755 MHz
2385–2390 MHz

12. We seek comment on the affected bands identified above. Future bands that qualify for reimbursement will be identified via a public notice and request for comment.

Mandatory Relocation

13. DOBRA 93 and BBA 97 require NTIA to identify spectrum for reallocation to exclusive non-Government uses. Moreover, Section 3002 of BBA 97 amended the NTIA Organization Act to add a subsection to encourage Federal entities to relocate Government stations from the bands identified in any reallocation report through means of these reimbursement requirements or any other provision of law to ''maximize[ ] the spectrum available for non-Federal use.'' [20] Nevertheless, in some cases, it may be technically possible for incumbent Federal entities to continue to share the reallocated spectrum with the new commercial licensees. We seek comment on whether these Federal entities should be required to relocate in those cases where sharing is technically possible. If not, we seek comment on the conditions whereby such Federal entities should be permitted to remain in the band and who would pay for any system modification that would enhance spectrum sharing. For example, because the spectrum will be reallocated to exclusive non-Government uses as required by DOBRA 93 or BBA 97, should such a Federal entity be permitted to remain in the band only on a non-interference basis after the appropriate regulatory approvals have been obtained?

14. We also solicit comment on whether a Federal entity should be entitled to reimbursement of relocation costs if it relocates to a landline communications system or commercial radio services.[21] We note that such an option may provide the most spectrum efficient and cost-effective alternative to a government-exclusive radio frequency system consistent with policy directive set forth in the NTIA Organization Act. For example, section 104 of the NTIA Organization Act provides that the Secretary of Commerce, in assigning frequencies for mobile radio services and other radio services ''shall promote efficient and cost-effective use of the spectrum to the maximum extent feasible.'' 47 U.S.C. 903(d)(1). Moreover, the NTIA Organization Act provides that any Federal Government station identified for reallocation shall ''to the maximum extent practicable * * * relocate its spectrum use to other frequencies that are reserved for Federal use or to consolidate its spectrum use with other Federal Government stations in a manner that maximizes the spectrum available for non-Federal use.'' Id. at section 923(h). There may also be other circumstances where no other frequency is available and a landline or other commercial service is a viable alternative available to the Federal entity that is required to relocate.

Availability of a Comparable Facility

15. The proposed rules do 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). NTIA defines the term ''comparable facility'' to mean that the replacement facility restores the operational capabilities of the original facility to an equal or superior level. For example, in the 1710–1755 MHz band, the vast majority of Non-DoD Federal Government facilities are fixed point-to-point microwave networks, and may be replaced by fixed microwave facilities in other bands. On the other hand, DoD operates a number of systems, including highly mobile, non-communications systems. These military systems must operate within the limits of established doctrine.

16. NTIA will consider four basic factors to determine comparability of replacement communications facility, although there may be other factors to consider. These four basic factors are communications throughput, system reliability, operating costs, and operational capability. A replacement facility will be considered comparable if the new system's operational capability, communications throughput and reliability are equal to or greater than that of the system being replaced, taking into account the operating costs.

17. Communications throughput, for the purposes of this proceeding, means 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.

18. System reliability means the percentage of time information is accurately transferred 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) and 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 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 percent 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 receiver carrier-to-noise ratio exceeds the receiver threshold. It should be noted 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.

19. Operating costs are 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 (*e.g.*, additional rental payments and increased utility fees) for five years after relocation.

20. Operational capability is 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.

21. These four factors, however, may not be appropriate measures for all Federal Government stations required to relocate. For example, to measure comparability for radar systems it may be more accurate to compare the minimum required radar target cross section able to be detected at a given range with a specified probability of false alarm under mission-required conditions. Other measures of radar system comparability may include target resolution and the ability to meet performance specifications under adverse conditions such as weather and hostile jamming. Radar and other spectrum-dependent systems may require access to specific frequency bands to perform their missions in an

[20] See 47 U.S.C. 923(h).

[21] We note, however, that the statute provides reimbursement to Federal entities that relocate to ''another frequency or frequencies.'' 47 U.S.C. 923(g).

optimal manner. For example, long range surveillance functions relatively free of weather effects are optimized at low frequencies and weapon control at higher frequencies. The use of higher frequencies, however, may limit the useful range of some spectrum-dependent systems, such as radar or data links. Such limitations could affect mission performance.

22. NTIA seeks comments on this proposed definition and whether the factors described above are sufficient to determine comparability of facilities. If not, NTIA seeks comment on what other factors should be considered, and whether such factors should be tailored to specific Federal Government systems to be relocated.

Frequency Assignments Eligible for Reimbursement

23. The proposed rules outline the conditions, limitations and eligibility requirements for reimbursement of the costs associated with relocation as a result of reallocation.

24. *Equipment/system modification:* Sometimes radiocommunication systems in certain bands can be modified to tune outside of the reallocated band to the upper or lower portion of the incumbent band. Re-tuning is oftentimes less expensive to implement, assuming there is no congestion in the upper portion of the band as a result of the migration and assuming the transmitter-receiver frequency separation can be met. Re-tuning could save an agency a considerable amount of money because it does not require additional towers or stations, new feed lines or associated equipment. Thus, to the extent that a Federal entity that is required to relocate is able to modify its equipment, with the result that the retuned equipment provides operational capabilities comparable with its original system, NTIA proposes to limit reimbursement to the costs associated with re-tuning. We note, however, that modification/retuning may not be possible when taking into consideration the factor of ''operational comparability'' as noted above. We seek comment on this proposed limitation.

25. *Old Assignments versus new assignments:* NTIA identified the Federal bands for reallocation from the Federal Government to non-Government use in the February 1995 Spectrum Reallocation Final Report, as well as the February 1998 Spectrum Reallocation Report. On October 17, 1998, the President subsequently signed into law the National Defense Authorization Act for Fiscal Year 1999 that requires the private sector to reimburse Federal entities for the cost of relocation or modification of systems as a result of reallocation. Thus, for purposes of these proposed rules, we propose to characterize an old assignment to a Federal entity as one that was authorized before October 17, 1998, and a new assignment as one that was authorized after October 17, 1998. With respect to reimbursement under these rules, we propose that only old assignments within the affected bands (*i.e.,* 216–220 MHz, 143–1435 MHz, 1710–1755 MHz, 2385–2390 MHz) would be entitled to reimbursement. NTIA believes that the costs associated with any new assignment requested by Federal entities after the respective dates of reallocation reports in the affected bands should be borne by that Federal entity rather than a new commercial licensee to prevent unjust enrichment. We seek comment on this limitation.

26. *Exempted Federal power agencies:* Assignments made to Federal power agencies (FPAs) are statutorily exempt from the requirements to relocate under the reallocation reports.[22] Thus, the 1995 Spectrum Reallocation Final Report provides a list of frequency assignments in the 1710–1755 MHz band that support the FPAs and that are not required to relocate.[23] NTIA believes, however, that Section 923(g)(1)(A) of Title 47 of the U.S. Code can be read to permit an FPA to accept reimbursement for relocations undertaken on a voluntary basis. We seek comment on whether an FPA that wishes to relocate from a band of spectrum identified for reallocation can accept voluntary reimbursement from a commercial licensee. If so, should the parties be subject to these proposed rules or be left exclusively to voluntary negotiations?

27. *Other government stations:* Under the 1995 Spectrum Reallocation Final Report and the 1998 Spectrum Reallocation Report, NTIA also exempted other Federal Government assignments from the requirement to relocate from the bands identified for reallocation either indefinitely or for a longer terms of years.[24] We seek comment on whether these Federal entities can accept reimbursement for voluntarily relocating these stations to a commercial licensee, and if so, whether such negotiations should be subject to these proposed rules.

28. *Experimental Stations:* In general, the proposed rules do not permit reimbursement for relocated frequency assignments for experimental stations or experimental testing stations. An ''experimental station'' means a station utilizing radio waves in experiments with a view to the development of science or technique. An ''experimental testing station'' is used for the evaluation or testing of electronics, equipment or systems, including site selection and transmission path surveys. These stations are oftentimes temporary use stations and are operated on a non-interference basis. NTIA believes that most experimental stations not be entitled to reimbursement under the statute. Reimbursement, however, would still be required for frequency assignments to experimental stations for systems that are in the developmental stage that have been certified for spectrum support by NTIA for Stage 3 developmental testing.[25] Because systems at the Stage 3 are certified for testing of proposed operational hardware and potential equipment configurations, we believe that these systems are entitled to reimbursement. We seek comment on our treatment of experimental stations in the proposed rules.

Cost Sharing

29. NTIA proposes to adopt a cost-sharing plan where the potential requirement to reimburse a Federal entity for relocation costs could disproportionately fall upon one potential bidder or licensee or a small number of potential bidders or licensees. For example, there may be multiple bidders in a geographic area for small bandwidth that may result in division of a Federal entity's bandwidth. There is no mechanism in place to compensate the Federal entity for that portion of the spectrum that is not licensed or acquired by any particular auction winner. In these circumstances, one auction winner could be made to pay for the entire spectrum allocation held by the Federal entity, despite the

[22] See 47 U.S.C. § 923(c)(4)(C). The term Federal power agency refers to the Tennessee Valley Authority, the Bonneville Power Administration, the Western Area Power Administration, the Southwestern Power Administration, the Southeastern Power Administration, and the Alaska Power Administration.

[23] See Spectrum Reallocation Final Report, NTIA Special Publication 95–32, Appendix E, Tables 1and 2.

[24] See id. at Appendix E (Exempted Safety-of-Life Fixed Microwave Stations in the 1710–1755 MHz band); see also 1998 Spectrum Reallocation Report at 3–18 (Table 3–2), 3–38 (Table 3–4), 3–48 (Table 3–6), 4–1 (Table 4–1) (setting forth the sites exempt from relocation or with special relocation dates in the 216–220 MHz, 1432–1435 MHz, and 2385–2390 MHz bands).

[25] NTIA Manual of Regulations and Procedures for Federal Radio Frequency Management, Section 10.3.1 (September 1995). Stage 3 certification is required for testing proposed operational hardware and potential equipment configurations.

fact that only a portion of the bandwidth is needed. On the other hand, auction bidders that need only a portion of the bandwidth may perceive the cost of relocating a Federal entity too expensive in the absence of a cost-sharing plan, and thus may forgo providing a particular service to a geographic area.[26] To ensure that no private entity bears the full cost burden of relocating a government entity and to ensure that a geographic area is not denied service because the costs of reimbursement are disproportionate, we seek comment on whether a cost sharing plan, among auction winners, should be implemented. We also seek comment on what measures might reasonably be implemented to assure that the federal entity is guaranteed full payment from multiple licensees. We also seek comment on whether a band manager or some other entity that licensees may establish would be appropriate to serve as a clearinghouse to administer the cost-sharing plan. Although we contemplate developing a cost-sharing plan and criteria for identifying a clearinghouse for each auction, NTIA proposes to determine on a case-by-case basis whether a cost-sharing plan is needed for each auction. We seek comment on whether this case-by-case approach is appropriate.

30. If the proposed cost-sharing plan is adopted, NTIA proposes and seeks comment on whether it should be administered by an industry-supported organization or the government. NTIA does not propose at this time to designate any particular organization as the representative of the industry that will benefit from the auction of government spectrum, nor does NTIA propose any particular form that such an organization might take. NTIA seeks comment on the criteria it should use in designating a clearinghouse, and on whether it should be an existing organization or a new entity created for this purpose. NTIA also seeks comment on how the clearinghouse would be funded. If a clearinghouse is established receipts from expenses already incurred would be submitted to the clearinghouse for accounting purposes. We propose to sunset the cost-sharing plan to five years after any auction of a government spectrum subject to reimbursement rules. We believe that it is important to set a date certain on which any clearinghouse will be dissolved, and adopt a cost-sharing plan with the fewest possible variables so that it will be easy to administer.

31. We also seek comment on how a negotiation framework can best be established so as to minimize the personnel and other budgetary costs to the Government. For example, should NTIA establish a negotiation framework that will permit relocation of each Government system on a system-wide basis? Under such a framework, a Federal agency could request that all auction winners with frequency assignments that require that the agency relocate its system, participate in a single negotiation process so that a system-wide relocation solution can be achieved. Each Federal entity would provide a single point of contact for such consolidated negotiations. NTIA believes that such a negotiation mechanism could benefit both affected agencies and the private sector by streamlining administrative processes and reducing negotiating costs for both parties.

Sunset of Reimbursement Rights

32. The Defense Authorization Act of 1999 mandated reimbursement to Federal agencies and did not limit the time period for reimbursement. Thus, these proposed rules do not provide a sunset provision with respect to the reimbursement rights of Federal entities. We seek comments on our proposal not to include a sunset provision in these rules. Specifically, we seek comment on whether the statute precludes a sunset date.

Costs to Relocate

33. The proposed rules identify the marginal relocation and modification costs that are reimbursable. NTIA proposes to define ''marginal costs'' as 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, but would 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 prior to the date of the required relocation. The costs identified as reimbursable in these proposed rules conform to those identified by Congress in 47 U.S.C. § 923(g)(1)(A) and 923 (g)(2)(A). We seek comment on this definition of marginal costs.

34. Consistent with the statute, the proposed rules would require reimbursement payments to be made in advance of relocation. The proposed rules would also require the successful bidder to guarantee to pay all marginal costs as a precondition of NTIA's withdrawal of the relevant Federal license. The proposed rules also would permit payments to be made in cash or in kind, as agreed to by the affected Federal entity. The proposed rules further require that cash payments be made in the account of the Federal entity in the Treasury of the United States, or in a separate account as authorized by law.

Notification of Marginal Costs

35. Under 47 U.S.C. 923(g)(1)(A), NTIA must provide information to the FCC so that the FCC can advise potential bidders of the marginal costs of relocation or modification. This statute also requires Federal entities that propose to relocate to notify NTIA of the marginal costs anticipated to be associated with such relocation or with modifications necessary to accommodate a prospective licensee. NTIA's proposed rules thus require Federal entities that propose to relocate, modify or retune systems to provide such marginal cost information to NTIA at least 240 days prior to an FCC

[26] There also may be circumstances where the national nature of federal systems is such that the requirement to reimburse a federal entity for relocation costs may disproportionately fall on a small number of successful bidders. Thus, a particular licensee's geographic area may cover a critical element of a much larger national system, such as a system where a small number of satellite uplink transmitter terminals, each located at a specific site, communicates to many satellites. In other situations, there are highly mobile systems (e.g., airborne telemetry or data link systems) that are not related to any specific geographic area.

auction.[27] In turn, NTIA intends to provide this information to the FCC at least 180 days prior to such auction so that the FCC will have a sufficient amount of time to notify potential bidders.[28]

Negotiation and Mediation

36. Under the proposed rules, within 30 days after the license is granted, the auction winner would be required to contact the Federal entity that is required to relocate. Under the proposed rules, receipt of the notification by the Federal entity would trigger a 135-day negotiation and/or third-party mediation period between the Federal entity and the auction winner. During the mandatory negotiation period, parties are encouraged to resolve any differences with respect to relocation or modification costs or any other related issues. If, at the end of the 135-day period, the parties have not reached an agreement with respect to relocation, under the proposed rules, the parties may agree, by mutual consent, to extend the mandatory negotiation period. We believe that this mandatory negotiation period affords the parties an opportunity to freely, and without constraints, negotiate the terms relative to relocation. To the extent that the 135-day period is insufficient, we believe that the extension of time provision gives the party additional time that may be necessary to come to an agreement. This provision would also allow the parties to take advantage of a neutral third party to help facilitate the negotiation process without rendering a decision. We solicit comments on the proposed rule to require mandatory party-to-party negotiations and/or third-party mediation.

37. Under the proposed rules, the parties would be required to negotiate relocation or modification costs in good faith during the mandatory negotiation period. Good faith requires each party to provide information to the other that is reasonably necessary to facilitate the relocation process. Good faith means that (1) neither party may refuse to negotiate; and (2) each party must behave in a manner necessary to facilitate negotiation in a timely manner. We seek comments on these good faith obligations.

Non-Binding Arbitration

38. If the parties have not reached agreement and do not agree to extend the negotiation/mediation period, or if a previously extended negotiation/mediation period expires, the proposed rules would require the parties to enter into non-binding arbitration. The parties would have to agree on the arbitrator, and to prevent bias, the arbitrator would not be the same person as the mediator if mediation has been used by the parties and failed. Each party would pay its own costs for arbitration and share equally the cost of the arbitrator. The arbitrator's non-binding decision may be requested by NTIA as part of the record in a petition for relocation, as described below. The recommended decision may be a factor, among others, in NTIA's determination on a petition for relocation. We seek comments on the proposed requirement that parties enter into non-binding arbitration. We also seek comments on any alternative proposal for the resolution of disputes between the parties.

Petition for Relocation

39. Under 47 U.S.C. 923(g)(2), an auction winner seeking to relocate a Federal Government station must submit a petition for relocation to NTIA. Under the proposed rules, NTIA requires that a copy of the petition also be simultaneously provided to the FCC.[29] Moreover, under the proposed rule, NTIA's determination on the petition would be set forth in writing within six months after the petition has been filed and be provided to the auction winner and the Federal entity. The statute requires NTIA to limit or terminate the Federal entity's license 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 station is able to accomplish its purposes; and

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

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

(ii) The technical characteristics of the band and other uses of the band.

If NTIA does not act within 6 months after the Petition for Relocation is filed, the Petition is deemed denied. NTIA's determination, or failure to act on a Petition within 6 months, would be final and conclusive upon the parties.

40. The proposed rules would permit an auction winner to file a petition for relocation anytime after an agreement has been reached on marginal costs. The proposed rules also permit an auction winner to file a petition for relocation if the parties fail to reach agreement and non-binding arbitration has occurred. In that case, the auction winner 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 determination. The recommended decision may be a factor, among others, in the NTIA determination on the petition for relocation. In making its determination, NTIA will consult with the affected Federal entity and, as appropriate, may also consult with the Office of Management and Budget and other executive branch agencies. We seek comment on these proposed rules as they relate to the Petition for Relocation.

41. In certain circumstances, it may be beneficial for the Federal entity to seek voluntary withdrawal of an assignment after the parties reach an agreement through negotiation, mediation, or non-binding arbitration. NTIA anticipates the vast majority of relocations to occur under agreements reached between the parties, thus permitting voluntary withdrawals of assignments would greatly streamline the administrative process of making the spectrum available to auction winners. NTIA

[27] The marginal costs submitted on behalf of the Federal agencies as part of the notification process may be subject to review and approval by the Office of Management and Budget (OMB). OMB's review would assure the accuracy of the costs. See also Section 1064(d) of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105–261, 112 Stat. 1920 (1998).

[28] For example, we anticipate that the first FCC auction for spectrum frequency subject to these rules will occur in December 2001. In that case, NTIA would provide cost information to the FCC no later than June 1, 2001. Therefore, the Federal entities would have to provide estimated cost information to NTIA by April 1, 2001.

[29] We note that the statute permits the Federal entity to reclaim its facilities if it demonstrates to the FCC that the new facilities are not comparable. See 47 U.S.C. 923(g)(3). Rules regarding the Federal entity's right to reclaim will be promulgated by the FCC. See also 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, Notice of Proposed Rule Making, FCC 00–395, at ¶ 64 (November 20, 2000).

seeks comment on permitting such voluntary requests for assignment withdrawal as an alternative to the petition for relocation in cases in which the parties have reached agreement.

Unclassified, Classified and Sensitive Assignments

42. *Unclassified government facilities.* With respect to unclassified government facilities, we propose to provide the following information to the FCC prior to an auction of the affected bands:

(1) List of Government facilities.

(2) Government agency operating each facility.

(3) Location of each facility.

(4) General type of operation and equipment (*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.

(8) Total estimated costs of relocation for all assignments.

43. *Classified government facilities.* These proposed rules would permit reimbursement to the Federal entity, even if an assignment is classified. As defined in the proposed rule and consistent with Executive Order 12958,[30] a ''classified assignment'' would be a frequency assignment and information related to a frequency assignment that has been determined pursuant to Executive Order 12958 or any predecessor 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. As directed by Executive Order 12958, Executive Order 12968 [31] and related national security regulations, classified assignment can only be made available to individuals with the appropriate clearances and with a ''need to know'' (need for access) in order to perform or assist in performing a lawful and authorized government function.

44. Prior to an auction, Federal entities 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 license service area 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.

45. *Sensitive assignments.* As defined in the proposed rule, a ''sensitive assignment'' would be a frequency assignment and information related to a frequency assignment (e.g. operations or technical parameters) that are not releasable to the public under the Freedom of Information Act or relevant laws or regulations.[32] Prior to an auction, 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 license service area 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, we propose that the government agency release the sensitive information to the winning licensee pursuant to a non-disclosure agreement.

46. We seek comment on our proposed treatment of these assignments.

Other Information

Executive Order 12866

47. This proposed rule has been determined to be significant under section 3(f) of Executive Order 12866.

Executive Order 13312

48. This rule does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism assessment under Executive Order 12612.

Regulatory Flexibility Act

49. As required by the Regulatory Flexibility Act (RFA) [33] NTIA has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact that this proposed rule, if adopted, would have on small entities. Written public comments are requested on the IRFA. Comment must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM.

Initial Regulatory Flexibility Analysis

50. As required by the Regulatory Flexibility Act (RFA), NTIA has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on this NPRM.

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

51. The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 authorized Federal entities to accept compensation payments when they relocate or modify their frequency use to accommodate non-Federal users of the spectrum.[34] In essence, the Act 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 Title VI of the Omnibus Budget Reconciliation Act of 1993 (OBRA 93),[35] the Balanced Budget Act of 1997 (BBA 97) and future reallocations. The Act also directs NTIA and the Federal Communications Commission (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 and modification costs.'' [36]

52. This initial regulatory flexibility analysis provides, to the extent possible, relevant information regarding reimbursement such as the Federal frequency assignments for reallocation and the estimated relocation costs that will ultimately be borne by the private sector. As stated above Congress directed NTIA and the FCC to develop procedures for the implementation of the reimbursement process. Pursuant to

[30] Exec. Order No. 12958, 3 CFR 333 (1995).

[31] Exec. Order No. 12968, 3 C.F.R. 391 (1995).

[32] Many of these assignments involve federal public safety and law enforcement activities.

[33] *See* 5 U.S.C. 603.

[34] 47 U.S.C. 923(g)(1).

[35] Pub. L. 103–66, 107 Stat. 31 (1993).

[36] *See* 47 U.S.C. 923(g)(1)(E).

this direction from Congress, NTIA prepared this NPRM. NTIA is not able to determine the type of entities that will be potential bidders for the particular spectrum frequencies at issue here, thus NTIA is unable to fully describe the effect that the proposed rules will have on small entities. However, significant economic impacts are unlikely because it is expected that bidders in an auction for the eligible spectrum, including small entities, will factor in the estimated relocation costs and adjust their bids accordingly.

B. Federal Frequency Assignments Subject to Reallocation

53. On August 10, 1993 OBRA 93 was signed into law. OBRA 93 authorized the FCC 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.[37] Subsequently, BBA–97 required the Secretary of Commerce to identify an additional 20 MHz below 3 Ghz for reallocation to non-Federal users.[38] In response to this directive, NTIA issued a Spectrum Reallocation Report in February 1998 which identified the additional bands for reallocation.[39] The specific frequency bands that currently qualify for reimbursement pursuant to the proposed rules are: 216–220 MHz; 1432–1435 MHz; 1710–1755 MHz; and 2385–2390 MHz.

C. Estimated Relocation Costs

54. At this point, NTIA does not have the final estimated costs of relocation for all of the bands identified in the NPRM. In fact, the NPRM proposes dates for the Federal entities to provide that information to NTIA. The final spectrum reallocation reports prepared by NTIA in response to OBRA 93 and BBA 97 identified estimates of implementation costs to Federal agencies of approximately $1.5 billion based on data provided by major Federal agencies. Subsequent modifications to these estimates have been made based on a report to Congress from the Department of Defense (DoD), and changes to the reallocation plan as directed by the National Defense Authorization Act for FY 2000. Taking these factors into account, the current reimbursable long-term cost estimates to the Federal agencies of implementing the spectrum reallocations under OBRA 93 and BBA 97 is between $460–$810 million.

Although NTIA identifies spectrum to reallocate from the Federal government to the private sector, NTIA does not determine how the spectrum will be used by the private sector. The Federal Communications Commission, through its regulations identifies options for making use of bands transferred from Government to non-Government use pursuant to OBRA 93 and BBA 97. In fact, the FCC recently issued an NPRM on the allocation of 27 megahertz of spectrum from the 216–220 MHz, 1390–135 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz bands.[40] In that NPRM, the FCC proposes general Fixed Service and Mobile Service allocation for these bands, and solicits comments on other possible allocations and potential service rules for the services to which the bands may be allocated. The FCC also solicits comments on its Initial Regulatory Flexibility Analysis of the NPRM which describes the number of small entities to which its proposed rules would apply.

In accordance with 5 U.S.C. 603, the following information is provided to conduct the necessary initial regulatory flexibility analysis:

D. Legal Basis

55. The objective of the proposed rule is to establish procedures to compensate the Federal Government for expenses it incurs in relocating to a new frequency as a result of a reallocation of spectrum. Congress determined that the Federal Government should be reimbursed by commercial licensees that are awarded spectrum previously held by the Federal Government. The legal basis for the proposed rule is the Defense Authorization Act for Fiscal Year 1999 which directs NTIA and the FCC to develop procedures to implement reimbursement, including a process for resolving differences that arise between the parties regarding estimates of relocation or modification costs.

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

56. It is difficult, if not impossible, to estimate the number of small entities, if any, to which the proposed rule would apply. The rule applies to winners of a competitive bidding (auction) that the FCC will hold at an undetermined date after January 2001. There is no way to predict, at this point in time, the type of entities that will be potential bidders for the spectrum that the FCC makes available. In fact, entities that are not even in existence at this time may be participating in a future auction for the particular spectrum frequency at issue. The FCC may impose eligibility requirements, however the auctions are usually open to any type of entity. Any estimate of the number of small entities to which this proposed rule will apply should be made after the FCC makes a determination of the type of service that the FCC allocates for these bands of spectrum. The proposed rules, however, require the FCC to provide the estimated cost of reimbursement to potential bidders. Thus, to the extent that a small entity is a potential bidder, it will be able to calculate its costs to bid on the particular spectrum frequency, taking into account the estimated cost to reimburse the Federal Government. As stated above the estimated costs of relocation at this time is between $460–$810 million. Because these costs are only estimates and bids may be adjusted to reflect these costs, it is difficult at this time to determine the impact that these costs will have on small entities. We solicit public comment on this IRFA as to the impact that the proposed rule will have on small entities as well as any alternative ways to alleviate such an impact.

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

57. The proposed rules do not impose reporting, record keeping or other compliance requirements on the private sector, small entities or otherwise.

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

58. It does not appear that any other Federal rule duplicates, overlaps or conflicts with the proposed rule. The proposed rules are focused on reimbursement to Federal entities for relocation costs from specific spectrum frequencies. No other Federal rule requires the private sector to reimburse

[37] *See* National Telecommunications and Information Administration, U.S. Department of Commerce, NTIA Special Publication 94–27, *Spectrum Reallocation Final Report* (Feb. 1995).

[38] Pub. L. 105–33, 111 Stat. 251 (1997).

[39] Of the 20 MHz of spectrum, eight (8) MHz were subsequently reclaimed by the Federal Government in accordance with the National Defense Authorization Act for Fiscal Year 2000. *See* Pub. L. 106–65, 113 Stat. 512 (1999).

[40] 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, Notice of Proposed Rule Making, FCC 00–395, at ¶ 64 (November 20, 2000).

Federal entities for relocation costs of the specific radio spectrum frequencies identified in the proposed rules. The FCC, however, will promulgate service rules regarding these spectrum frequencies, however, we do not anticipate that the FCC's rules will duplicate, overlap or conflict with this proposed rule.

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

59. As stated above, the applicable statute requires NTIA to develop rules to implement the reimbursement process.[41] The NPRM, proposes and solicits comment on a number of alternatives which would minimize economic impact on small entities. For example, the proposed rules solicit comments on whether a Federal entity could retune or modify its equipment outside of the reallocated band to the upper or lower portion of the incumbent band. Re-tuning is usually less expensive to implement and can save an agency a considerable amount of money thus lessening the reimbursement obligation of the private sector. Another alternative in the proposed rule which could minimize the economic impact on small entities is the proposal to permit Federal entities to relocate to a landline communications system or a commercial radio service. Such an option may be a cost-effective alternative to the Federal entity relocating to another frequency. Again, this alternative may reduce reimbursement expenses that would be borne by the private sector and, perhaps, small entities. To the extent that there are other ways to accomplish the stated objectives of Congress, the proposed rule states that ''[t]hese proposed rules have been developed to ensure that the Federal Government is fully reimbursed for the expenses it incurs in retuning, modifying or relocating a system as a result of reallocation. To the extent that there are other ways to accomplish this goal, NTIA will entertain comments from interested parties. Comments received addressing alternatives to the proposed rules will be discussed in a more thorough analysis in the Final Rule.

List of Subjects in 40 CFR Part 301

Administrative practice and procedure, Classified information, Communications, Communications equipment, Government procurement, Government property, Radio, Satellites, Telecommunications, Telephone.

[41] See 47 U.S.C. 923(g)(1)(E).

Proposed 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 Nonbinding 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 any costs paid by the successful bidder for the frequency spectrum at the FCC auction.

301.10 Applicability.

(a) *Affected bands.*

(1) These provisions apply to the following bands of frequencies located below 3 gigahertz:

(i) 216 to 220 MHz

(ii) 1432 to 1435 MHz

(iii) 1710 to 1755 MHz

(iv) 2385 to 2390 MHz

(2) NTIA may periodically identify additional bands that are subject to this part in a notice published in the **Federal Register**.

(b) *Availability of comparable facility.* The Federal entity will not relocate until a comparable facility, or modification to an existing facility, is available for enough time to determine comparability, make adjustments, and ensure a seamless handoff. The factors to be considered in determining comparability are communications throughput, system reliability, operating costs, and operational capability as defined in this part.

(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/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/retuning.

(2) *Old assignments/new assignments.* Old assignments are those that were authorized prior to October 17, 1998 (i.e., 216–220 MHz, 143–1435 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.* Frequency assignments in the 1710—1755 MHz band that support the Federal power agencies that are exempt from reallocation requirements are not entitled to reimbursement under these rules.

(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 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.* 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 entitled to reimbursement under these rules. These reports are available at http://www.ntia.doc.gov.

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

§ 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 given for a radio station to use a radio frequency or radio frequency channel 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) of this subpart 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 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) and 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, which have been developed for operational use.

(j) The term *Federal entity* means any department, agency or other instrumentality of the Federal Government that utilizes a Government station license 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 *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.

(m) 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.

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

(o) 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.

(p) 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.

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

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

(s) 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 auction winner 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 before to an auction. Marginal costs 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. 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, but would 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 prior to the date of the required relocation. Any Federal entity that proposes to relocate 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.

(b) Unclassified assignments. NTIA will provide the following information to the FCC prior to the auction with repect 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) Whether the facility overlaps to one or more license areas or spectrum blocks.

(8) Total estimated costs of relocation for all assignments.

(c) Classified assignments. Prior to an auction, Federal entities 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 license service area 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. The manual is available throught the Defense Security Service at http://www.dss.mil/isec/nistom.htm or the Government Printing Office (ISBN 0-16–045560–X). 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 an auction, 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 license service area 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.

§ 301.120 Negotiations and mediation.

(a) Within 30 days after the license is granted, the auction winner is required to contact the Federal entity that occupies the band that the FCC has awarded to the auction winner. Receipt of this notification by the Federal entity triggers the 135-day period for negotiation or mediation between the Federal entity and the auction winner. 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. 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 of this subpart.

§ 301.130 Nonbinding 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 nonbinding 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 nonbinding 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.

301.140 Petition for relocation.

(a) In general. An auction winner 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 6 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 6 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 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 why.

(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, as appropriate, the Office of Management and Budget and other executive branch agencies.

(b) *Petition after agreement between the parties.* The auction winner may file a petition for relocation pursuant to § 301.140 of this subpart at anytime after the parties have reached agreement on relocation in negotiations or mediation as provided in § 301.120 of this subpart 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 auction winner 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.

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.

Dated: January 11, 2001.

Gregory L. Rohde,

Assistant Secretary for Communications and Information.

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AG71

Endangered and Threatened Wildlife and Plants; Determinations of Whether Designation of Critical Habitat is Prudent for 81 Plants and Proposed Designations for 76 Plants From the Islands of Kauai and Niihau, Hawaii

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; reopening of comment period and public hearing.

SUMMARY: The U.S. Fish and Wildlife Service (Service) gives notice of a public hearing on the prudency determinations for 81 plants and the proposed critical habitat designations for 76 plants from the islands of Kauai and Niihau, Hawaii. In addition, the comment period which originally closed on January 8, 2001, will be reopened. The new comment period and hearing will allow all interested parties to submit oral or written comments on the proposal. We are seeking comments or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested parties concerning the proposed rule. Comments already submitted on the proposed rule need not be resubmitted as they will be fully considered in the final determination.

DATES: The comment period for this proposal now closes on February 19, 2001. Any comments received by the closing date will be considered in the final decision on this proposal. The public hearing will be held from 1:00 p.m. to 3:00 p.m. and 6:00 p.m. to 8:00 p.m. on Tuesday, February 6, 2001, on the island of Kauai, Hawaii. Prior to the public hearing, the Service will be available from 12:30 to 1:00 p.m. and from 5:30 to 6:00 p.m. to provide information and to answer questions.

ADDRESSES: The public hearing will be held at the Radisson Kauai Beach Resort, Pakalana Room, 4331 Kauai Beach Drive, Lihue, Kauai. Comments and materials concerning this proposal should be sent to the Field Supervisor, U.S. Fish and Wildlife Service, Pacific Islands Ecoregion Office, 300 Ala Moana Boulevard, Room 3–122, P.O. Box 50088, Honolulu, Hawaii 96850. Comments and materials received will be available for public inspection, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Paul Henson, at the above address, phone 808–541–3441, facsimile 808–541–3470.

SUPPLEMENTARY INFORMATION:

Background

On November 7, 2000, the Service published a notice of prudency determinations for 81 plants species and proposed designations of critical habitat for 76 plant species from the islands of Kauai and Niihau, Hawaii, pursuant to the Endangered Species Act of 1973, as amended (Act) in the **Federal Register** (65 FR 66808). The original comment period closed on January 8, 2001. The comment period now closes on February 19, 2001. Written comments should be submitted to the Service (see **ADDRESSES** section).

A total of 95 species historically found on Kauai and Niihau were listed as endangered or threatened species under the Act, between 1991 and 1996. Some of these species may also occur on other Hawaiian islands. At the time each plant was listed, we determined that designation of critical habitat was not prudent because designation would increase the degree of threat to the species and/or would not benefit the species.

Due to litigation, we reconsidered our previous prudency determinations for the 95 plants. From this review, we are proposing that critical habitat is prudent for 76 of these species because the potential benefits of designating critical habitat essential for the conservation of these species outweigh the risks of designation. We are proposing that the designation of critical habitat is not prudent for five species. The remaining 14 species historically found on Kauai and/or Niihau, no longer occur on these islands. However, these species do occur on other islands, so proposed prudency determinations will be made in future rules addressing plants on those islands.

This proposed rule also proposes designation of critical habitat for the 76 species. Twenty-three critical habitat units, covering a total of 24,539.23 hectares (60,636.42 acres), are proposed for designation on the islands of Kauai and Niihau.

Section 4(b)(5)(E) of the Act (16 U.S.C. 1531 *et seq.*), requires that a public hearing be held if it is requested within 45 days of the publication of a proposed rule. In response to a request from a government agency of the State of Hawaii, the Service will hold a public hearing on the date and at the address described in the **DATES** and **ADDRESSES** sections above.

Anyone wishing to make an oral statement for the record is encouraged