implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This proposed rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings' issued under the executive order. This proposed rule to approve source-specific RACT determinations established and imposed by the Commonwealth of Pennsylvania pursuant to its SIP-approved generic RACT regulations does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: October 18, 2005.

Donald S. Welsh,

Regional Administrator, Region III.

[FR Doc. 05–21372 Filed 10–25–05; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 2

[ET Docket No. 00–258; FCC 05–172]

Advanced Wireless Services

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document seek comment on the specific relocation procedures applicable to Broadband Radio Service (BRS) operations in the 2150–2160/62 MHz band, which the Commission recently decided will be relocated to the newly restructured 2495–2690 MHz band. We also seek comment on the specific relocation procedures applicable to Fixed Microwave Service (FS) operations in the 2160–2175 MHz band. We propose to generally follow our relocation policies delineated in our *Emerging Technologies* proceeding and as modified by subsequent decisions.

DATES: Comments must be filed on or before November 25, 2005, and reply comments must be filed on or before December 12, 2005.

ADDRESSES: You may submit comments, identified by [ET Docket No. 00–258], by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov.* Follow the instructions for submitting comments.
- Federal Communications Commission's Web site: *http://www.fcc.gov/cgb/ecfs/.* Follow the instructions for submitting comments.
- E-mail: [Optional: Include the E-mail address only if you plan to accept comments from the general public]. Include the docket number(s) in the subject line of the message.
- Mail: [Optional: Include the mailing address for paper, disk or CD–ROM submissions needed/requested by your Bureau or Office. Do not include the Office of the Secretary's mailing address here.]
- People with Disabilities: Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Priya Shrinivasan, Office of Engineering and Technology, (202) 418–7005.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *NPRM of Proposed Rule Making,* ET Docket No. 00–258, FCC 05–172, adopted September 23, 2005, and released September 29, 2005. The full text of this 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 Street, SW., Washington, DC 20554. The full text of this document also may 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.*

Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: *http://www.fcc.gov/cgb/ecfs/* or the Federal eRulemaking Portal: *http://www.regulations.gov.* Filers should follow the instructions provided on the Web site for submitting comments.
- For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to *ecfs@fcc.gov,* and include the following words in the body of the message, ''get form.'' A sample form and directions will be sent in response.
- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or

overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of *before* entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Summary of NPRM of Proposed Rulemaking

1. In the *Fifth NPRM of Proposed Rulemaking (Fifth NPRM)*, the Commission seeks to establish a new record, specifically with respect to relocation issues for the 2150–2160 MHz and 2160–2175 MHz bands as proposed in the NPRM. The Commission notes that it has previously sought comment on the use of *Emerging Technologies* policies in this proceeding (ET Docket No. 00–258) in different contexts and asks that parties file new comments on the issues in this *Fifth NPRM*, rather than incorporate by reference previously filed comments in this proceeding.

2. The Commission continues to believe that its relocation policy, with minor modifications to accommodate the type of incumbent operations that are the subject of relocation and to maintain consistency within the entire band at issue, is the best approach to meet its goal of providing an opportunity for early entry to the 2150–2160 MHz and 2160–2175 MHz bands for new Advanced Wireless Service (AWS) licensees, while minimizing the disruption to incumbent Broadband Radio Service (BRS) and Fixed Microwave Service (FS) operations during the transition. The NPRM therefore proposes to generally apply the Commission's relocation policy, as delineated in its *Emerging Technologies* proceeding and subsequent decisions, to the spectrum designated for AWS in this proceeding.

A. Relocation of BRS in the 2150–2160/62 MHz Band

3. This portion of the NPRM seeks comment on the relocation procedures new AWS entrants should follow when relocating BRS incumbent licensees from the 2150–2160/62 MHz band.

4. *Background.* In the *AWS Second R&O* in ET Docket No. 00–258, 68 FR 3455, January 24, 2003, the Commission reallocated and designated a 5 megahertz portion of the BRS band at 2150–2155 MHz for AWS use. Subsequently, in the *AWS Third NPRM*, also in ET Docket No. 00–258, 68 FR 12015, March 13, 2003, the Commission further explored the relocation needs for the BRS licensees in the 2150–2160/62 MHz band. On July 29, 2004, the Commission released the *BRS R&O and FNPRM* in WT Docket No. 03–66, 69 FR 72020 and 69 FR 72048, December 10, 2004, respectively, that initiated a fundamental restructuring of the 2495–2690 MHz band. This decision, which was intended to provide existing and new licensees with enhanced flexibility to provide high-value services, also included provisions by which existing BRS licensees in the 2150–2160/62 MHz band would be included in the newly established band plan, allowing these licensees to be integrated with similar operations. Specifically, the Commission adopted a band plan in which existing BRS channel 1 (2150–2156 MHz) would transition to the new BRS channel 1 at 2496–2502 MHz and existing BRS channel 2/2A (2156–2162 MHz) to the new BRS channel 2 at 2618–2624 MHz. The Commission notes that new entrants for spectrum now occupied by part of BRS channel 1 will be licensed in an upcoming AWS auction of the 2110–2155 MHz band. With respect to the 2155–2160/62 MHz band, which consists of BRS channels 2 and 2A and the upper one megahertz of BRS channel 1, the Commission has not yet established new service rules for this band. In the accompanying *Eighth R&O* in ET Docket No. 00–258, the Commission reallocated and designated the entire 2150–2160 MHz band for AWS use.

5. BRS operations in the 2150–2160/62 MHz band consist of two channels—channel 1 (2150–2156 MHz) and channel 2A (2156–2160 MHz). Licensees may also use channel 2 (2156–2162 MHz) on a limited basis in 50 cities. BRS operations in the band are now regulated under part 27 of the Commission's rules. In 1992, when the 2160–2165 MHz band was reallocated to emerging technologies, the Commission implemented a policy by which incumbent BRS licensees that were using the 2160–2162 MHz band would continue such use on a primary basis. However, any BRS station that applied for use of this band after January 16, 1992, would be granted a license only on a secondary basis to emerging technology use. In 1996, the Commission auctioned licenses for BRS channels on a Basic Trading Area (BTA) basis but noted that BRS channel 2 licenses using the 2160–2162 MHz band were secondary to emerging technology licenses. BRS operators are providing four categories of service offerings today: (1) Downstream analog video; (2) downstream digital video; (3) downstream digital data; and (4) downstream/upstream digital data. Licensees and lessees have deployed or sought to deploy these services via three types of system configuration: high-power video stations, high-power fixed two-way systems, and low-power, cellularized two-way systems. Traditionally, BRS licensees were authorized to operate within a 35-mile-radius protected service area (PSA) and winners of the 1996 MDS auction were authorized to serve Basic Trading Areas (BTAs) consisting of aggregations of counties. In the proceeding that restructured the BRS band at 2495–2690 MHz, the Commission adopted a geographic service area (GSA) licensing scheme for existing BRS incumbents. Therefore, BRS relocation procedures must take into account the unique circumstances faced by the various incumbent operations and the new AWS licensees.

1. Relocation Process

6. *Transition Plan.* The NPRM proposes to require the AWS entrant to relocate BRS operations on a link-by-link basis, based on interference potential as discussed below. The NPRM further proposes to allow the AWS entrant to determine its own schedule for relocating incumbent BRS operations so long as it relocates incumbent BRS licensees before beginning operation in a particular geographic area and subject to any other build-out requirements that may be imposed by the Commission on the AWS entrant. The Commission recognizes that this build-out period may take time because of the large service areas to be built out for new AWS networks but expects that the AWS licensees and the incumbent BRS

licensees will work cooperatively to ensure a smooth transition for incumbent operations.

7. In some instances relocation of BRS operations on a link-by-link basis may be infeasible (*e.g.*, where a transmitter serves numerous receive sites, only some of which may pose an interference issue), and thus in order to meet the comparable facility requirement for relocating BRS operations, it may be necessary for the AWS licensee to relocate more BRS facilities than an interference analysis conducted on a link-by-link basis might indicate as technically necessary. The Commission also recognizes that the AWS licensee is likely to deploy its service in some locations in a manner that does not correspond to the geography of the BRS service areas. For example, a BRS licensee's operations may extend beyond the AWS licensee's service area (*e.g.*, discrete transmit/receive combinations), and thus in order to meet the comparable facility requirement for relocating BRS operations, the AWS licensee may need to relocate BRS operations in the adjacent service area even though an AWS licensee does not have license coverage in that area. The NPRM therefore proposes to require that the AWS licensee relocate all incumbent BRS operations that would be affected by the new AWS operations, in order to provide BRS operators with comparable facilities. The Commission seeks comment on these transition plan proposals.

8. *Comparable Facilities.* In the *AWS Third NPRM*, the Commission proposed that if relocation were deemed necessary, BRS incumbents would be entitled to comparable facilities. In the *Emerging Technologies* proceeding, the Commission allowed new entrants to provide incumbents with comparable facilities using any acceptable technology. Under this policy, incumbents must be provided with replacement facilities that allow them to maintain the same service in terms of: (1) Throughput—the amount of information transferred within the system in a given amount of time; (2) reliability—the degree to which information is transferred accurately and dependably within the system; and (3) operating costs—the cost to operate and maintain the system. Thus, the comparable facilities requirement does not guarantee incumbents superior systems at the expense of new entrants. The Commission continues to believe that, to minimize disruption to existing services and to minimize the economic impact on licensees of those services, a similar approach is warranted for BRS. We note that our relocation policies do not dictate that systems be relocated to spectrum-based facilities or even to the same amount of spectrum as they currently use, only that comparable facilities be provided. Comparable facilities can be provided by upgrading equipment to digital technology and making use of efficient modulation and coding techniques that use less spectrum to provide the same communications capabilities. Given advances in technology, *e.g.*, changing from analog to digital modulation and the flexibility provided by our existing relocation procedures to make incumbents whole, we believe that these differences should be taken into account when providing comparable facilities. The NPRM therefore proposes to require that new AWS entrants provide comparable facilities to incumbents that are relocated, and seeks comment on this proposal.

9. The Commission further notes that under its relocation policies only stations with primary status are entitled to relocation. Because secondary operations, by definition, cannot cause harmful interference to primary operations nor claim protection from harmful interference from primary operations at frequencies already assigned or assigned at a later date, new entrants are not required to relocate secondary operations. As stated above, BRS stations licensed after 1992 to use the 2160–2162 MHz band are on a secondary basis. Thus, in some cases, a portion of BRS channel 2 has secondary status, and this portion would not be entitled to relocation under existing *Emerging Technologies* policies. Stations licensed prior to 1992 for BRS channel 2 (2156–2162 MHz) operate on a primary basis over the entire channel and thus, would be entitled to relocation. The NPRM proposes to apply the current relocation policies regarding stations with primary and secondary status to the BRS and seeks comment on this proposal.

10. The NPRM also seeks comment on how to apply the comparable facilities requirement to unique situations faced by BRS licensees. For example, the Commission recognizes that the incumbent BRS licensee may change the type of services it offers as it transitions to the new BRS band plan (*e.g.*, from 1-way to 2-way service or from fixed to mobile service), and seeks comment on how the comparable facilities policy would be satisfied in such a situation. The NPRM also seeks comment on how the relocation obligation of comparable facilities should be applied to post-1992 licensees operating on a combination of BRS channels 1 and 2/2A (*e.g.*, integrated for downstream 2-way broadband operations), considering these channels will likely transition to new channels in the restructured band at different times. For example, the Commission seeks comment on what the respective relocation obligations should be for AWS licensees in the five megahertz block of BRS channel 1 (2150–2155 MHz) who will be licensed as part of the upcoming AWS auction of the 2110–2155 MHz band and AWS licensees in the remaining one megahertz block (2155–2156 MHz) who will be licensed at a later date. In addition, we seek comment on whether replacement of customer premises equipment (CPE) in use at the time of relocation (*e.g.*, customer equipment that is used and will continue to be used in the provision of 2-way broadband operations) should be part of the comparable facilities requirement.

11. Because the Commission has already identified relocation spectrum in the 2495–2690 MHz band (2.5 GHz band) for BRS licensees currently in the 2150–2160/62 MHz band (2.1 GHz band), we also seek comment on a proposal whereby the Commission would reassign 2.1 GHz BRS licensees, whose facilities have not been constructed or are not in use per § 101.75 of the Commission's rules, to their corresponding frequency assignments in the 2.5 GHz band as part of the overall BRS transition. Specifically, the NPRM proposes to modify the licenses of these 2.1 GHz BRS licensees to assign them 2.5 GHz spectrum in the same geographic areas covered by their licenses upon the effective date of the *Report and Order* in this proceeding. Under this proposal, no subscribers would be harmed by immediately reassigning these licensees to the 2.5 GHz band, consistent with our policy. Further, these BRS licensees could become proponents in the transition of the 2.5 GHz band and avoid delay in initiating new service (they would be limited in initiating or expanding service in the 2.1 GHz band under other proposals put forth in this *Fifth NPRM*), and new AWS entrants in the 2.1 GHz band could focus their efforts on relocating the remaining BRS operations and their subscribers, facilitating their ability to clear the band quickly and provide new service. The NPRM proposes to undertake these license modifications pursuant to our authority under Section 316 of the Communications Act. Specifically, Section 316(a)(1), provides that ''[a]ny station license * * * may be modified by the Commission * * * if in the judgment of the Commission such

action will promote the public interest, convenience and necessity.'' In addition, under the Commission's proposal, these reassigned BRS licensees would not be entitled to ''comparable facilities'' under the relocation policy since no facilities have been constructed or are in use. Accordingly, the Commission seeks comment on this proposal. We ask that commenters consider the impact of this proposal on the 2.5 GHz transition set forth in the *BRS R&O and FNPRM*, as well as the impact on the availability of the 2.1 GHz band for new AWS entrants.

12. *Leasing.* Some BRS licensees of channels 1 and 2 currently lease their spectrum capacity to other commercial operators, and the Commission has determined that future leasing of BRS and EBS spectrum will be allowed under the Secondary Markets policy. Because leasing is prevalent in the BRS bands, the ''comparable facilities'' policy needs to address these arrangements. We recognize that leasing arrangements vary—some BRS licensees may continue to lease their spectrum to third parties when they relocate to the 2.5 GHz band, but others BRS licensees may discontinue leasing arrangements prior to relocation. In all cases, the BRS licensee retains *de jure* control of the license and is the party entitled to negotiate for ''comparable facilities'' in the relocation band. The NPRM proposes to allow incumbent BRS licensees to rely on the throughput, reliability and operating costs of facilities operated by a lessee in negotiating ''comparable facilities.'' In cases where the BRS licensees continue to lease their spectrum to third parties when they relocate to the 2.5 GHz band, the NPRM proposes that the licensee may include the lessee in negotiations but that lessees would not have a separate right of recovery—*i.e.*, the new entrant would not have to reimburse both the licensee and lessee for ''comparable facilities.'' Further, in cases where the BRS licensee discontinues leasing arrangements prior to relocation, the NPRM proposes that the lessee is not entitled to recover lost investments from the new entrant. We believe that this approach is consistent with the purpose of the ''comparable facilities'' policy to provide new facilities in the relocation band so that the public continues to receive service. The Commission seeks comment on these leasing proposals.

13. *Licensee Eligibility.* Consistent with the Commission's findings in earlier proceedings, the Commission proposes to apply the relocation policies discussed in this NPRM to BRS incumbent primary licensees who seek comparable facilities at the time of relocation. Any incumbent licensee, whose license is to be renewed before relocation, would have the right to relocation only if its license is renewed. The Commission further proposes that an assignment or transfer of control would not disqualify a BRS incumbent in the 2150–2160 MHz band from relocation eligibility so long as the facility is not rendered, as a result, more expensive to relocate. In addition, the Commission proposes that if a grandfathered BRS license (*i.e.*, authorized facilities operating with a 35-mile-radius PSA) is cancelled or forfeited, and the right to operate in that area has not automatically reverted to the BRS licensee that holds the corresponding BTA license, no new licenses would be issued for BTA service in the 2150–2160/62 MHz band. The Commission seeks comment on these eligibility proposals.

14. *Future Licensing in the 2150–2160 MHz Band.* In the *Emerging Technologies* proceeding, the Commission recognized two divergent objectives when considering the types of modifications and expansions existing licensees could make without affecting their status with respect to emerging technology licensees—on one hand, existing licensees must be allowed a certain amount of flexibility to operate without devaluing the usefulness of their facilities; on the other hand, the new entrants must be provided with a stable environment in which to plan and implement new services. The Commission decided that the best way to balance these divergent objectives was to establish procedures whereby existing licensees who chose to modify or expand their facilities after a particular date set by the Commission, would do so on a secondary basis to emerging technology licensees. Consistent with this current relocation policy and in order to provide some certainty to new AWS licensees on the scope of their relocation obligation, the NPRM proposes that major modifications to authorized facilities, as discussed in the next paragraph, made by BRS licensees after the effective date of a *Report and Order* in this proceeding will not be eligible for relocation. The NPRM further proposes that major modifications and extensions to existing BRS systems will be authorized on a secondary basis to emerging technology systems in the 2150–2160 MHz band after the effective date of the *Report and Order* in this proceeding. Moreover, all major modifications will render the modified BRS licensee secondary to emerging technology operations, unless the incumbent affirmatively justifies primary status and establishes that the modification would not add to the relocation costs of the emerging technology licensees. In addition, the NPRM proposes that BRS facilities newly authorized in the 2150–2160 MHz band after the effective date of a *Report and Order* in this proceeding would not be eligible for relocation. The Commission seeks comment on these proposals.

15. For purposes of relocation, the NPRM proposes to adopt criteria that would be the basis for determining what qualifies as a major modification for BRS licensees. Adopting major modification criteria for the purposes of relocation is necessary because BRS licensees are now licensed on a geographic area basis, and thus are allowed to place transmitters anywhere within their defined service area without prior authorization so long as the licensee's operations comply with the applicable service rules, do not affect radio-frequency zones, or require environmental review or international coordination. Specifically, the NPRM proposes to adopt criteria that, for example, would classify the additions of new transmit sites or base stations and changes to existing facilities that would increase the size or coverage of the service area or interference potential as types of modifications that are major, and thus not eligible for relocation. Traditionally, these limits have been expressed by identifying the distance by which existing transmit sites can be relocated, limiting increases in emissions, and various other means. Accordingly, the Commission seeks comment on what the criteria should be for major modifications and, in particular, the criteria in the former major modification rule for BRS licensees, codified at 47 CFR 21.23; the former rule for EBS licensees codified at 47 CFR 74.911(a)(2); or the current rule for wireless telecommunications services in § 1.929(d).

2. Negotiation Periods/Relocation Schedule

16. The NPRM generally proposes to require that negotiations for relocation of BRS operations be conducted in accordance with the Commission's *Emerging Technologies* policies, except that we propose to forego a voluntary negotiation period and instead require only a mandatory negotiation period that must expire before an emerging technology licensee could proceed to request involuntary relocation. The BRS transition plan for the new band at 2495–2690 MHz has five stages: (1) The initiation of the transition process—

when a proponent files an initiation plan for a geographic area with the Commission; (2) the transition planning period—where parties can file counterproposals and any disputes would go to arbitration; (3) the reimbursement of costs; (4) the termination of incumbent operations; and (5) the filing of post-transition notification of completion with the Commission. The approximate time needed for the BRS re-banding process at 2495–2690 MHz includes 3–3½ years for the initiation and planning stages and 1½ years for the actual relocation, for a total of approximately five years. Thus, the Commission recognizes that the new band where the BRS incumbents are to be relocated is undergoing its own transition process that may not be completed until at least 2008. In light of these considerations, the NPRM proposes to forego a voluntary negotiation period and institute ''rolling'' mandatory negotiation periods (*i.e.*, separate, individually triggered negotiation periods for each BRS licensee) of three years followed by the involuntary relocation of BRS incumbents. The NPRM proposes that the mandatory negotiation period would be triggered for each BRS licensee when an AWS licensee informs the BRS licensee in writing of its desire to negotiate. Relocation of BRS operations by AWS licensees is more likely to take place in a relatively piecemeal fashion and over an extended period of time. Consequently, it is possible that a uniform mandatory negotiation period applicable to all BRS licensees would expire by the time that many BRS licensees were approached for relocation by an AWS entrant. The Commission seeks comment on this proposal.

17. Under *Emerging Technologies* policies, the mandatory negotiation period is intended as a period of negotiation between the parties on relocation terms resulting in a contractual relocation agreement. The mandatory negotiation period ensures that an incumbent licensee will not be faced with a sudden or unexpected demand for involuntary relocation if an emerging technology provider initiates its relocation request, and provides adequate time to prepare for relocation. During mandatory negotiations, the parties are afforded flexibility in the process except that an incumbent licensee may not refuse to negotiate and all parties are required to negotiate in good faith. If no agreement is reached during negotiations, an AWS licensee may proceed to involuntary relocation of the incumbent. In such a case, the new AWS licensee must guarantee payment of all relocation expenses, and must construct, test, and deliver to the incumbent comparable replacement facilities consistent with *Emerging Technologies* procedures. The Commission notes that under *Emerging Technologies* principles, an AWS licensee would not be required to pay incumbents for internal resources devoted to the relocation process or for fees that cannot be legitimately tied to the provision of comparable facilities, because such expenses are difficult to determine and verify. The NPRM proposes to apply these negotiation/relocation principles to BRS licensees, and seeks comment on doing so. The NPRM also seeks comment on whether to apply a ''right of return'' policy to AWS/BRS relocation negotiations similar to rule 47 CFR 101.75(d) (*i.e.*, if after a 12 month trial period, the new facilities prove not to be comparable to the old facilities, the BRS licensee could return to the old frequency band or otherwise be relocated or reimbursed). The Commission asks parties to take into account the time periods for the transition occurring in the restructured 2495–2690 MHz band when providing comments on this issue.

18. *Sunset Date.* The NPRM proposes to apply the sunset rule of 47 CFR 101.79 to BRS relocation negotiations. This rule provides that new licensees are not required to pay relocation expenses after ten years following the start of the negotiation period for relocation. Consistent with the Commission's proposal to establish rolling mandatory negotiation periods, the NPRM proposes that the ten year sunset date commence from the date the first AWS license is issued in the 2150–2160 MHz band. However, because we anticipate that portions of the spectrum in the 2150–2160 MHz band will be made available for AWS auction at different times, the first AWS license could be issued in one portion of the band earlier than the first AWS license is issued in another portion of the band. We therefore seek comment on whether we should establish different sunset dates that are based on when the first AWS license is issued for each portion of the spectrum. In this case, the commencement dates and subsequent sunset dates are likely to be different for BRS channels 1 and 2/2A. Alternately, should we establish a single sunset date for the entire band? If so, we seek comment as to whether that sunset date should be ten years from the date the first AWS license is issued in whatever portion of the 2150–2160 MHz band is the last to be licensed. Further, we seek comment on when the ten year sunset date should commence if we do not adopt our proposal for rolling mandatory negotiation periods. Finally, commenters should consider that the sunset date proposal we ultimately adopt would apply apart from the restructuring of the 2495–2690 MHz band.

19. *Good Faith Requirement.* Finally, the Commission expects the parties involved in the replacement or retuning of BRS equipment to negotiate in good faith, that is, each party would be required to provide information to the other that is reasonably necessary to facilitate the relocation process. The NPRM therefore proposes to apply the good faith guidelines of 47 CFR 101.73 to BRS negotiations, and seeks comment on this proposal.

3. Interference Issues/Technical Standards

20. The Commission currently provides for the protection of fixed microwave services operating in the 1.9 GHz and 2.1 GHz bands through the provisions of 24.237 of our rules. Under 24.237, PCS licensees operating in the 1850–1990 MHz band and AWS licensees operating in the 2110–2155 MHz band must, prior to commencing operations, perform certain engineering analyses to ensure that their proposed operations do not cause interference to incumbent fixed microwave services. Part of that analyses calls for the use of TIA Telecommunications Systems Bulletin (TSB) 10–F, or its successor standard, to determine when proposed PCS or AWS operations might cause interference to existing fixed microwave stations.

21. The Commission seeks to develop rules that will enable AWS licensees to determine when their proposed operations would cause interference to incumbent BRS systems operating in the 2150–2160 MHz band, such that the relocation of those systems would be necessary before AWS operations could begin. The NPRM therefore seeks comment on whether a rule comparable to § 24.237 should be developed for this purpose. If so, we seek comment as to what procedures and mechanisms should be contained in such a rule (*e.g.*, a ''distance'' table, such as Table 2 in § 24.237, which identifies the distance from an AWS station within which a BRS station must be protected; the use of TIA TSB 10–F, or some comparable document, to determine when interference is expected to occur to BRS stations, *etc.*). Commenters favoring this approach should provide information that would lead to the development of

a distance table applicable to BRS operations; and commenters should also indicate whether and how TIA TSB 10–F could be used to determine the potential for interference to BRS systems. Commenters not favoring the use of a § 24.237 type rule should indicate what procedures the Commission should adopt to enable AWS licensees to determine when their operations will cause interference to incumbent BRS systems.

B. Relocation of FS in the 2160–2175 MHz Band

22. In the *Emerging Technologies* proceeding, the Commission established procedures for the relocation of incumbent operations by new technology licensees in several frequency bands, including the paired bands at 2110–2150 MHz and 2160–2200 MHz. Later, in the *Microwave Cost Sharing* proceeding, the Commission further addressed incumbent relocations by new technology licensees. Together, these proceedings provided for, among other matters, relocation procedures that included both voluntary and mandatory negotiations, as well as relocation sunset periods, as delineated in 47 CFR part 101.

23. In 2000, in the *MSS Second R&O* in ET Docket No. 95–18, the Commission adopted ''modified'' *Emerging Technologies* relocation procedures for FS incumbents in the 2165–2200 MHz band that would be relocated by new MSS licensees in that band. Under these ''modified'' procedures, the Commission eliminated the voluntary negotiation period for relocation of FS incumbents by MSS in the 2165–2200 MHz band and provided instead a single mandatory negotiation period applying to all FS incumbents. This single mandatory negotiation period would be triggered when the first MSS licensee informs, in writing, the first FS incumbent of its desire to negotiate. Furthermore, consistent with its findings in the earlier *Microwave Cost Sharing* proceeding, the Commission established that the FS relocation rules would sunset ten years after the negotiations begin for the first FS licensee.

24. In the *AWS Second R&O* in ET Docket No. 00–258, the Commission addressed the relocation procedures that would apply to the relocation of incumbent FS licensees by new AWS entrants in the paired 2110–2150 MHz band. The Commission concluded that ''the modified [MSS] relocation procedures [for the 2165–2200 MHz band] * * * represent[ed] the best course.'' The Commission reasoned, ''[a] unified approach to our rules and procedures serves the public interest, and can promote the rapid development of AWS, which many commenters support.''

25. In the *AWS Third R&O*, also in ET Docket No. 00–258, the Commission reallocated the 1990–2000/2020–2025 MHz and 2165–2180 MHz bands for Fixed and Mobile services to support AWS. Subsequently in the *AWS Sixth R&O* in ET Docket No. 00–258, the Commission concluded that, given its earlier decision in the *AWS Second R&O* to apply the ''modified'' relocation procedures to AWS relocation of FS in the 2110–2150 MHz band, it would be appropriate to apply the same procedures to the relocation of FS by AWS licensees in the 2175–2180 MHz paired band.

26. In proposing relocation procedures for incumbent FS operations in the 2160–2175 MHz band, the Commission continues to believe that it is desirable to harmonize the FS relocation procedures among the various AWS designated bands to the greatest extent feasible. As the Commission observed in the *AWS Sixth R&O*, 69 FR 62615, October 27, 2004, relocation procedures that are consistent can be expected to foster a more efficient rollout of AWS and minimize confusion among the parties, and thereby serve the public interest.

27. Under the existing ''modified'' *Emerging Technologies* relocation procedures described, there is a single mandatory negotiation period that commences when the first new technology entrant informs the first FS licensee, in writing, of its desire to negotiate. A ten-year sunset period is triggered when the mandatory negotiation period begins. The NPRM seeks comment on whether the Commission should apply these same procedures to FS relocation by AWS in the 2160–2175 MHz band. As noted, this would be consistent with the procedures adopted in the *AWS Second R&O*, 68 FR 3455, January 24, 2003, and *AWS Sixth R&O*, 69 FR 62615, October 27, 2004, for the paired bands 2110–2150 MHz and 2175–2180 MHz, respectively.

28. The NPRM also proposes to clarify that under the single mandatory negotiation periods approach the ten-year sunset would supersede, and thereby terminate, any remaining mandatory negotiation period that had not yet run its course. The NPRM proposes that this ten-year sunset period for the 2160–2175 MHz band should commence with the date the first AWS license is issued in that band. We seek comment on this proposal, particularly whether this trigger event represents the most appropriate date for starting the ten-year sunset period. Because we have not yet determined how we will make this spectrum available for assignment, it is possible that different portions of the band may be licensed at different times. We therefore seek comment as to whether we should establish different sunset periods for FS incumbents in different frequency blocks within the band, based on the date the first AWS license is issued for each subset of the band. We recognize that, in this case, the commencement date and subsequent sunset date may not be uniform across the whole band. We also seek comment on whether we should instead set a uniform sunset date for the entire band and, if so, what trigger date we would use to determine that sunset date.

29. The Commission also seeks comment on an alternative approach. Relocation of FS operations by AWS licensees is more likely to take place in a relatively piecemeal fashion and over an extended period of time. Consequently, it is possible that a single mandatory negotiation period afforded under the existing relocation procedures would expire before the time that many FS licensees were approached for relocation by an AWS entrant. Therefore, we also seek comment on whether each FS incumbent in the 2160–2175 MHz band should be afforded a separate, individually triggered, negotiation period—as contrasted with the across-the-board uniform period for all incumbents under the existing relocation rules. Under this alternative proposal, a mandatory negotiation period would be triggered by an event specific to each FS licensee, which we propose would be when an AWS licensee informs the FS licensee in writing of its desire to negotiate. This would result in a series of independent, or ''rolling,'' negotiation periods, each having its own time frame. One potential benefit of the rolling negotiation period approach is that it could afford a greater opportunity for FS incumbents and AWS licensees to engage in relocation negotiations and could foster a more equitable and expeditious transition to AWS in the band. On the other hand, this approach could result in more complex negotiation timetables. We seek comment on this alternative proposal.

30. *Other Bands.* If we were to adopt the alternative rolling negotiation period approach described for the 2160–2175 MHz band, the Commission seeks comment on whether the same approach should be adopted for corresponding paired segments of the 2110–2150 MHz band. In a similar fashion, if we were to adopt the rolling negotiation approach

for these two bands, we seek comment on whether the relocation procedures adopted for the 2175–2180 MHz band in the *AWS Sixth R&O* should also be changed to afford rolling FS negotiation periods, resulting in a unified rolling negotiation period approach across these bands. We also seek comment on whether the modified sunset rules discussed above should apply in these other bands as well. Finally, we seek comment on whether the relocation/sunset procedures described here would harmonize well with the procedures for other *Emerging Technologies* bands that have been addressed elsewhere in this and other proceedings.

31. *Incumbent Part 22 Services.* The Commission also seeks comment on whether and how to harmonize the *Emerging Technologies* relocation rules for part 22 point-to-point microwave links and part 101 fixed services. When the *Emerging Technologies* relocation rules were first adopted, fixed microwave services in the spectrum were regulated under parts 21, 22, and 94, dealing with Common Carrier fixed point-to-point, fixed services supporting Paging and Radiotelephone, and Private Operational point-to-point, respectively. To address relocation of all of these fixed services, the Commission established separate but identical relocation rules in each Part. In 1996, the Commission merged the rules regulating Common Carrier and Private Operational services in part 101 but left fixed services supporting Paging and Radiotelephone, along with the rules for relocating these links, in part 22.

32. Although initially identical, the *Emerging Technologies* relocation rules in part 22 and in part 101 subsequently diverged. When the Commission determined that FS incumbents in the 2.1 GHz band would be subject to modified relocation procedures, these modifications were reflected in the part 101 relocation rules but inadvertently not included in the part 22 rules, although part 22 point-to-point services also operated in the 2.1 GHz spectrum. Thus, at that point, AWS entrants in the 2.1 GHz band would be required to follow the original *Emerging Technologies* rules to relocate part 22 links, but would use the modified rules to relocate part 101 links.

33. The rules applicable to part 22 and part 101 links further diverged recently, when the Commission determined that it would not renew the part 22 point-to-point licenses in the 2110–2130 and 2160–2180 MHz bands, but instead allow all current part 22 fixed service licenses in these bands to expire at the end of their current term. Commission records indicate that there are 53 active part 22 fixed licenses in these two bands, and that all will have expired by January 3, 2010. Thus, all part 22 fixed services will cease operations in the 2.1 GHz band by 2010. In contrast, part 101 FS licensees in the *Emerging Technologies* spectrum are not currently prohibited from renewing their licenses.

34. The NPRM does not propose to permit renewal of part 22 fixed service licenses in the 2.1 GHz band. The NPRM does seek comment, however, on whether the relocation rules that apply to AWS relocation of part 101 fixed services should otherwise apply to AWS relocation of part 22 services as well.

C. Cost Sharing

35. The Commission's *Emerging Technologies* relocation policies require new licensees who benefit from the clearing of the spectrum of incumbent operations by an earlier entrant to reimburse that entrant for reasonable costs incurred in clearing the spectrum. The Commission has found that adopting cost sharing rules in these circumstances serves the public interest because it (1) distributes relocation costs more equitably among the beneficiaries of the relocation; (2) encourages the simultaneous relocation of multi-link communications systems; and (3) accelerates the relocation process, promoting more rapid deployment of new services. In this section, we discuss cost sharing among new licensees when they relocate incumbent FS operations in the 2110–2150 and 2160–2200 MHz bands and when they relocate BRS operations in the 2150–2160/62 MHz band.

36. *Relocation of Incumbent FS Licensees.* The part 101 relocation rules address, *inter alia,* the cost sharing obligation imposed on new licensees when they relocate FS incumbents in the 2110–2150 MHz and 2160–2200 MHz bands, which currently are used by FS licensees mostly as paired links in the lower and upper bands. Section 101.82 provides that when a new licensee in either of these bands relocates an incumbent paired FS link with one path in one band and the paired path in the other band, the new licensee is entitled to reimbursement of fifty percent of its relocation costs from any subsequently entering new licensee which would have been required to relocate the same FS link, subject to a monetary ''cap.'' We also note that this rule applies to both new AWS licensees in the 2110–2150 MHz and 2160–2180 MHz bands as well as to MSS licensees in the 2180–2200 MHz band, which are discussed separately below.

37. In the *AWS–2 Service Rules NPRM,* the Commission recognized that a single FS path in these bands could cross multiple AWS license areas, and thus multiple AWS licensees could benefit by the relocation of a single FS link. The Commission thus sought comment on whether it should adopt formal procedures for apportioning relocation costs among multiple AWS licensees in the 2110–2150 MHz and 2175–2180 MHz bands, and in particular, whether it should apply the cost sharing rules in part 24 that were used by new PCS licensees when they relocated incumbent FS links in the 1850–1990 MHz band. In this NPRM, the Commission seeks comment on whether we should adopt formal procedures for apportioning relocation costs among multiple AWS licensees in the 2160–2175 MHz band and in particular, whether we should apply the cost sharing rules in part 24. We also seek comment on whether AWS licensees in the 2160–2175 MHz band should be subject to the same cost sharing regime that we adopt for relocation of FS incumbents in the 2110–2150 MHz and 2175–2180 MHz bands.

38. Under the part 24 cost sharing plan, new licensees that incur costs relocating an FS link are eligible to receive reimbursement from subsequent new entrants that also benefited from that relocation. Reimbursement claims are submitted to one of the private non-profit clearinghouses designated by the Wireless Telecommunications Bureau to administer the plan. All new entrants are required to file a prior coordination NPRM with these clearinghouses before beginning operations. Upon receiving such a NPRM, a clearinghouse with a reimbursement claim on file identifies whether the new entrant has benefited from the relevant relocation using a Proximity Threshold Test. This test limits the beneficiaries to those entrants turning on a base station that both operates in the same spectrum that the incumbent link did prior to relocation and is within a specified geographic distance of the link. Having identified a new entrant as a beneficiary, the clearinghouse then determines the amount of the beneficiary's repayment obligation using a rule-specified cost sharing formula. This amount is subject to a cap of $250,000 per relocated link, plus $150,000 if a new or modified tower is required. Once the beneficiary is notified of the amount, it is then responsible for paying reimbursement within 30 days, with an equal share of the total going to each entrant that has previously contributed to the relocation.

FS incumbents that self-relocate are also permitted to obtain reimbursement from benefiting AWS entrants under the plan, subject to the same cap described above. Any disputes over cost sharing obligations under the rules are addressed in the first instance by a clearinghouse, and if still unresolved, by alternatives such as binding arbitration. All of these payment obligations are imposed as a default, and new licensees are permitted to enter into private cost sharing arrangements with each other that supercede the cost sharing plan as it applies to reimbursement between those licensees.

39. The Commission believes that adopting the part 24 cost sharing plan for new AWS licensees that relocate FS incumbents would have many benefits. First, the part 24 plan was devised to accommodate new cellular type systems licensed by geographic areas and incumbent FS point-to-point operations, which are essentially the same circumstances at issue here, and the part 24 plan has a proven record of success. In 2000, the Commission reviewed the operation of the part 24 cost sharing rules and concluded that ''[t]hey generally have served to promote an efficient and equitable relocation process * * *.'' In addition, since the plan went into operation in 1996, the Commission has resolved numerous questions regarding the details of the plan's operation and application. We therefore expect that there will be less need for clarification if we adopt this regime for AWS. For these reasons, we anticipate that adopting these rules will expedite the relocation of FS incumbents and the introduction of new services. The NPRM therefore proposes to adopt a cost sharing plan for relocation of FS incumbents in the 2160–2175 MHz band based on the part 24 plan and seek comment on this proposal.

40. While the part 24 rules could be applied to the relocation of FS incumbents in the 2160–2175 MHz band without substantial changes, the Commission seeks comment on whether some modifications are nevertheless appropriate. For example, PCIA has suggested in response to the *AWS–2 Service Rules NPRM* that, in establishing a cost sharing plan for AWS relocation of FS, we should modify the part 24 plan by (1) establishing a rule requiring licensing data to be filed by all entities; (2) mandating that parties are required to act in good faith in connection with their responsibilities under the cost sharing plan; (3) providing that reasonable interest charges can be applied to cost sharing obligations; (4) creating an explicit mechanism for expedited appeal to the Commission from a disputed clearinghouse determination; and (5) giving weight to the determinations of the clearinghouse in such an appeal. We seek comment on these suggested changes to the part 24 plan.

41. The part 24 plan delegates authority to the Wireless Telecommunications Bureau to assign the administration of the cost sharing rules to one or more private non-profit clearinghouses. Management of the part 24 cost sharing rules by third-party clearinghouses has been highly successful, and two entities have already expressed interest in accepting this responsibility for AWS relocation of FS in the 2110–2150 MHz and 2175–2180 MHz bands. We seek comment on the rules that should govern such a clearinghouse and the procedures and quality criteria we should use to select a clearinghouse administrator.

42. As noted, MSS is allocated to the 2180–2200 MHz band. FS links in this band are paired with FS links in the 2130–2150 MHz band which is designated for AWS. Cost sharing between MSS and AWS licensees in these paired bands is governed by § 101.82, which provides that when a new licensee in either of these bands relocates an incumbent paired FS link with one path in one band and the paired path in the other band, the new licensee is entitled to reimbursement of fifty percent of its relocation costs (*i.e.,* the total cost of relocating both paths) from any subsequently entering new licensee which would have been required to relocate the same FS link, subject to a monetary ''cap.'' The Commission adopted relocation rules for MSS that recognize the unique characteristics of a satellite service. For example, unlike a new terrestrial entrant such as AWS that can clear the band on a link-by-link basis, MSS must clear all incumbent FS operations in the 2180–2200 MHz band within the satellite service area if interference will occur. Thus, the relocation obligations and cost sharing among MSS new entrants in the 2180–2200 MHz is relatively straightforward and can function without a clearinghouse or formal cost sharing procedures. Section 101.82 establishes a sharing obligation between MSS and AWS that is reasonable and relatively easy to implement, and because it does not depreciate cost sharing obligations, it provides MSS licensees with additional assurance of cost recovery. In addition to this consideration, we also do not wish to change the relocation and cost sharing rules applicable to MSS, because MSS licensees are currently in the midst of the implementation and relocation process. Subsequently, the *AWS–2 Service Rules NPRM* has sought comment on how the AWS sharing obligation (*i.e.*, fifty percent for relocating the link) should be apportioned among multiple AWS licensees. In this NPRM, the Commission seeks comment on whether MSS entrants entitled to reimbursement under § 101.82 should submit their reimbursement claims to an AWS clearinghouse, including any procedures we may adopt for filing such claims. The Commission believes that this approach would relieve MSS licensees of the burden of identifying the AWS licensees who would be obligated to pay relocation costs. We seek comment on this proposal.

43. *Relocation of Incumbent BRS Licensees.* The NPRM proposes to require AWS entrants to relocate BRS operations in the 2150–2160/62 MHz band on a link-by-link basis, based on interference potential. We also note certain instances where it may be necessary for the AWS licensee to relocate more BRS facilities than an interference analysis conducted on a link-by-link basis might indicate as technically necessary, in order to provide relocating incumbents with comparable facilities—*e.g.*, where an AWS licensee may be required to relocate BRS operations outside its own service area or where BRS incumbents operate on combinations of BRS channels 1 and 2/2A. Thus, a subsequent AWS licensee who operates co-channel in an adjacent geographic area or who operates on a different frequency than the relocator would benefit from the relocation of certain BRS operations. The relocation of a single BRS link could also have more than one AWS beneficiary if the BRS link uses spectrum that overlaps more than one AWS license block. Consequently, the Commission seeks comment on whether we should establish cost sharing obligations for AWS licensees who benefit from an earlier AWS licensee's relocation of BRS incumbents in the 2150–2160/62 MHz band. For example, we seek comment on whether cost sharing obligations should be imposed on new licensees that receive interference but do not cause it, as is done with the PCS rules, or only on those licensees that cause interference, as is the case for both the current *Emerging Technologies* and MSS rules in part 101.

44. The Commission also seeks comment on what, if any, specific cost sharing obligations are necessary or appropriate, including how costs should be apportioned among AWS licensees.

Although we noted that the part 24 plan could be applied to FS relocation without substantial changes, we believe that this is not the case for BRS operations which are significantly different than point-to-point FS operations. BRS operations are primarily point-to-multipoint, based either on a contour around a fixed transmitter with protected receive sites within the contour or on a wide geographic area with multiple base and receive sites located anywhere within the licensed area. We thus seek comment on what criteria could be used to identify whether a subsequent AWS licensee has an obligation to share the cost of relocating a BRS incumbent and how the reimbursement obligation should be apportioned among AWS licensees. Commenters should consider, for example, whether we should require each AWS licensee to bear this financial responsibility in proportion to the amount of spectrum in the 2150–2160/62 MHz band for which it is licensed, or in proportion to the amount of geographic area cleared within its licensed market, or some other metric, such as MHz/pops. We also seek comment on whether we should apply a ''cap'' or some other limit on the amount a relocator is entitled to receive as reimbursement in order to protect later entrants who did not participate in negotiations; we also seek comment on what the amount of the ''cap'' should be. Moreover, we seek comment on whether formal cost sharing procedures, such as those in the part 24 plan, are necessary or appropriate to implement any cost sharing obligations we may ultimately adopt, and if so, what procedures we should adopt. Finally, we seek comment on whether we should designate a clearinghouse party to administer any cost sharing rules we may adopt, the rules that should govern a clearinghouse and the procedure and quality criteria we should use to select a clearinghouse administrator.

Initial Regulatory Flexibility Analysis

45. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this *Fifth NPRM of Proposed Rule Making* (*Fifth 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 the *Fifth NPRM.* The Commission will send a copy of this *Fifth NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Fifth NPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.[3]

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

46. The *Fifth NPRM* proposes relocation procedures to govern the relocation of: (1) Broadband Radio Service (BRS)[4] licensees in the 2150–2160/62 MHz band; and (2) Fixed Microwave Service (FS) licensees in the 2160–2175 MHz band. The proposed relocation procedures generally follow the Commission's relocation policies delineated in the *Emerging Technologies* proceeding, and as modified by subsequent decisions.[5] These relocation policies are designed to allow early entry for new technology providers by allowing providers of new services to negotiate financial arrangements for reaccommodation of incumbent licensees, and have been tailored to set forth specific relocation schemes appropriate for a variety of different new entrants, including Personal Communications Service (PCS) licensees, Mobile Satellite Service (MSS) licensees, 18 GHz Fixed Satellite Service (FSS) licensees, and Nextel. While these new entrants occupy different frequency bands, each entrant has had to relocate incumbent operations. The relocation procedures we propose in the *Fifth NPRM* are designed to ensure an orderly and expeditious transition of, with minimal disruption to, incumbent BRS and FS operations from the 2150–2160/62 MHz and 2160–2175 MHz bands, respectively, in order to allow early entry for new AWS licensees into these bands.

47. The *Fifth NPRM* seeks comment on what specific relocation procedures are best suited for the incumbent BRS operators in the 2150–2160/62 MHz band. For example, we propose a mandatory negotiation period that must expire before an emerging technology licensee could proceed to request involuntary relocation and, due to the nature of BRS, ask whether we should establish separate, individually triggered negotiation periods for each BRS licensee. We also seek to develop rules that will enable AWS licensees to determine when their proposed operations would cause interference to incumbent BRS systems operating in the 2150–2160 MHz band, such that the relocation of those systems would be necessary before AWS operations could begin. We identified a number of options for setting forth these technical requirements, including implementation of a ''distance'' table that identifies the distance from an AWS station within which a BRS station must be protected, and the use of the TIA TSB 10–F standard to determine when interference is expected to occur to BRS stations. The *Fifth NPRM* similarly seeks comment on specific relocation procedures for incumbent FS operations in the 2160–2175 MHz band, including options for modifying sunset periods to accommodate new AWS entrants in the band. The *Fifth NPRM* recognizes that we have traditionally provided for cost sharing among multiple new entrants that benefit from the relocation of incumbent licensees, and seeks comment on what cost sharing responsibilities should be implemented between the first AWS entrant and other subsequent AWS entrants in the 2150–2160/62 MHz and the 2160–2175 MHz bands. We note that in the *Emerging Technologies* and *Microwave Cost Sharing* proceedings, the Commission established procedures for relocating incumbent operations by new technology licensees in the 2160–2200 MHz band whereby the new licensees that relocate a paired microwave link with one path in the 2110–2150 MHz portion of the band and the other paired path in the 2160–2200 MHz portion of

[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).

[2] *See* 5 U.S.C. 603(a).

[3] *Id.*

[4] The Multipoint Distribution Service (MDS) was renamed the Broadband Radio Service (BRS). *See* Amendment of parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150–2162 MHz Band, WT Docket No. 03–66, *Report and Order and Further NPRM of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004), 69 FR 72020 and 69 FR 72048, December 10, 2004.

[5] *See* Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, ET Docket No. 92–9, *First Report and Order and Third NPRM of Proposed Rule Making*, 7 FCC Rcd 6886 (1992); *Second Report and Order*, 8 FCC Rcd 6495 (1993); *Third Report and Order and Memorandum Opinion and Order*, 8 FCC Rcd 6589 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 1943 (1994); *Second Memorandum Opinion and Order*, 9 FCC Rcd 7797 (1994); *aff'd Association of Public Safety Communications Officials-International, Inc.* v. *FCC*, 76 F.3d 395 (D.C. Cir. 1996) (collectively, ''*Emerging Technologies* proceeding''). *See also Teledesic, LLC* v. *FCC*, 275 F.3d 75 (D.C. Cir. 2001) (affirming modified relocation scheme for new satellite entrants to the 17.7–19.7 GHz band). See also Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, WT Docket No. 95–157, *First Report and Order and Further NPRM of Proposed Rule Making*, 11 FCC Rcd 8825 (1996); *Second Report and Order*, 12 FCC Rcd 2705 (1997) (collectively, *Microwave Cost Sharing* proceeding).

the band are entitled to reimbursement for a portion of their relocation expenses. Because these procedures encompass the 2160–2175 MHz band discussed in the *Fifth NPRM*, we seek comment on the appropriate application of cost sharing requirements. One option is to establish new cost sharing procedures for the band that are based on our existing part 24 cost sharing rules that were used for PCS relocation, while at the same time retaining and integrating the existing cost sharing requirement in part 101.

48. After evaluating comments filed in response to the *Fifth NPRM*, the Commission will examine further the impact of all rule changes on small entities and set forth its findings in the Final Regulatory Flexibility Analysis.

B. Legal Basis

49. The proposed action is authorized under sections 1, 4(i), 7(a), 301, 303(f), 303(g), 303(r), 307, 316, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 157(a), 301, 303(f), 303(g), 303(r), 307, 316, and 332.

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

50. 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.[6] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [7] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[8] 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.[9]

51. *Broadband Radio Service.* The Broadband Radio Service (BRS) consists of Multichannel Multipoint Distribution Service (MMDS) systems, which were originally licensed to transmit video programming to subscribers using the microwave frequencies of Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[10] In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard.[11] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[12] Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate 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 are not more than $40 million and are thus considered small entities.[13]

52. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[14] which includes all such companies generating $12.5 million or less in annual receipts.[15] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category that had operated for the entire year.[16] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[17] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the proposed rules and policies. Because the Commission's proposals only affect BRS operations in the 2155–2160/62 MHz band, the actual number of BRS providers who will be affected by the proposed relocation procedures will only represent a small fraction of these small businesses.

53. *Fixed Microwave Services.* Microwave services include common carrier,[18] private-operational fixed,[19] and broadcast auxiliary radio services.[20] At present, there are approximately 36,708 common carrier fixed licensees and 59,291 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of the FRFA, we will use the SBA's definition applicable to Cellular and other Wireless Telecommunications companies—*i.e.*, an entity with no more than 1,500 persons.[21] According to Census Bureau data for 1997, there were 977 firms in this category, total, that operated for the entire year.[22] Of this total, 965 firms had employment of 999 or fewer employees, and an additional twelve firms had employment of 1,000 employees or more.[23] Thus, under this size standard, majority of firms can be considered small. We note that the number of firms does not necessarily track the number of licensees. We

[6] 5 U.S.C. 603(b)(3).

[7] 5 U.S.C. 601(6).

[8] 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).

[9] Small Business Act, 15 U.S.C. 632 (1996).

[10] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding, *Report and Order*, 10 FCC Rcd 9589, 9593, paragraph 7 (1995) (''*MDS Auction R&O*'').

[11] See Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration (dated Mar. 20, 2003) (noting approval of $40 million size standard for MDS auction).

[12] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See* MDS Auction R&O, 10 FCC Rcd at 9608, paragraph 34.

[13] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for ''other telecommunications'' (annual receipts of $12.5 million or less). *See* 13 CFR 121.201, NAICS code 517910.

[14] 13 CFR 121.201, NAICS code 517510.

[15] *Id.*

[16] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Establishment and Firm Size (Including Legal Form of Organization),'' Table 4 (issued October 2000).

[17] *Id.*

[18] 47 CFR part 101 *et seq.* (formerly, part 21 of the Commission's Rules) for common carrier fixed microwave services (except MDS).

[19] Persons eligible under Parts 80 and 90 of the Commission's rules can use Private-Operational Fixed Microwave services. *See* 47 CFR parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[20] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR Part 74 *et seq.* Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[21] 13 CFR 121.201, NAICS code 517212.

[22] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, ''Employment Size of Firms Subject to Federal Income Tax: 1997,'' Table 5 (issued Oct. 2000).

[23] *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.''

estimate that all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

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

54. The *Fifth NPRM* seeks comment on proposals for relocation procedures applicable to BRS licensees in the 2150–2160/62 MHz band FS licensees in the 2160–2175 MHz band, but does not propose service rules. Thus, the item contains no new reporting, recordkeeping, or other compliance requirements.

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

55. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[24]

56. The proposals contained in the *Fifth NPRM* are designed to provide spectrum to support the introduction of new advanced mobile and fixed terrestrial wireless services. This action is critical to the continuation of technological advancement, furthers the goals of the Telecommunications Act of 1996, and serves the public interest. We are likewise committed to ensuring that the disruption to incumbent operations and the economic impact of this proceeding on incumbent licensees is minimal. As discussed in Section A, *supra*, we have proposed to establish rules based on our existing *Emerging Technologies* relocation procedures to govern the entry of new licensees into the 2150–2160/62 MHz and 2160–2175 MHz bands. An alternative option would be to offer no relocation process, and instead require incumbent licensees to cease use of the band by a date certain and prohibit new licensees from entering the band until that date. We believe that an *Emerging Technologies*-based relocation procedure is preferable, as it draws on established and well known principles (such as time-based negotiation periods and the requirement of negotiating in good faith), benefits small BRS and FS licensees because the proposals would require new AWS licensees to pay for the costs to relocate their incumbent operations to comparable facilities, and—for small AWS licensees—offers a process by which new services can be brought to the market expeditiously. Moreover, we believe that the provision of additional spectrum that can be used to support AWS will directly benefit small business entities by providing new opportunities for the provision of innovative new fixed and mobile wireless services.

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

57. None.

Ordering Clauses

58. Pursuant to Sections 1, 4(i), 7(a), 301, 303(f), 303(g), 303(r), 307, 316, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 157(a), 301, 303(f), 303(g), 303(r), 307, 316, and 332, this Fifth NPRM of proposed rule making *is adopted.*

59. Notice *is hereby given* of the proposed regulatory changes described in this Fifth NPRM of proposed rule making, and that comment is sought on these proposals.

60. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this Eighth Report and Order and Fifth NPRM of proposed rule making, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis to the Chief Counsel for Advocacy of the Small Business Administration.

Federal Communications Commission.

Marlene H. Dortch.

Secretary.

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BILLING CODE 6712–01–P

[24] *See* 5 U.S.C. 603(c).

DEPARTMENT OF TRANSPORTATION

Pipeline and Hazardous Materials Safety Administration

49 CFR Parts 173 and 180

[Docket No. PHMSA–03–14405 (HM–220F)]

RIN 2137–AD78

Hazardous Materials Regulations: Aluminum Cylinders Manufactured of Aluminum Alloy 6351–T6 Used in SCUBA, SCBA, Carbon Dioxide, and Oxygen Service—Revised Requalification and Use Criteria

AGENCY: Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: On September 10, 2003, the Research and Special Programs Administration—the predecessor agency to the Pipeline and Hazardous Materials Safety Administration published a notice of proposed rulemaking (NPRM) to propose an inspection and testing program for early detection of sustained load cracking in certain cylinders manufactured with aluminum alloy 6351–T6. Based on comments received in response to that NPRM, we are proposing to adopt a maximum service life for cylinders manufactured with aluminum alloy 6351–T6 and to prohibit the use of these cylinders after the expiration of their maximum service life.

DATES: Comments must be received by December 27, 2005.

ADDRESSES: You may submit comments to Docket No. PHMSA–03–14405 (HM–220F) by any of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *DOT Web site: http://dms.dot.gov.* To submit comments on the DOT electronic docket site, click ''Comment/Submissions,'' click ''Continue,'' fill in the requested information, click ''Continue,'' enter your comment, then click ''Submit.''
- *Fax:* 202–493–2251.
- *Mail:* Docket Management System; U. S. Department of Transportation, 400 Seventh Street, SW., Nassif Building, Room PL–401, Washington, DC 20590–0001.
- *Hand Delivery:* Docket Management System; Room PL–401 on the plaza level of the Nassif Building, 400 Seventh Street, SW., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.