

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
 Washington, D.C.

In the Matter of	)	
	)	
Allocation of Spectrum Below	)	ET Docket No. 94-32
5 GHz Transferred from	)	
Federal Government Use	)	

## MEMORANDUM OPINION AND ORDER

**Adopted: August 26, 1998**

**Released: November 25, 1998**

By the Commission:

### I. INTRODUCTION

1. By this action we grant in part a petition for reconsideration of the *Second Report and Order*<sup>1</sup> filed on September 8, 1995 by the Wireless Cable Association International (WCAI). We deny WCAI's request that all General Wireless Communications Service (GWCS) licensees be permitted to partition their service areas because we intend to address this issue in another proceeding. We also amend the Commission's Rules for GWCS to ensure consistency with current antenna structure marking and lighting requirements for other communications services.

2. We deny a request made by WCAI to license GWCS in Basic Trading Areas (BTAs), rather than Economic Areas (EAs). In addition, we deny in part and dismiss in part a petition for reconsideration of the *First Report and Order*<sup>2</sup> filed on April 6, 1995 by the Association for

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<sup>1</sup> Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624 (1995) (*Second Report and Order*).

<sup>2</sup> Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, First Report and Order and Second Notice of Proposed Rulemaking, 10 FCC Rcd 4769 (1995) (*First Report and Order* and *Second NPRM*).

Maximum Service Television, Inc. (MSTV) and several other organizations (Joint Petitioners),<sup>3</sup> and a petition for reconsideration of the *Second Report and Order* filed on September 8, 1995 by MSTV. Both of these petitions claim that the Commission exceeded its statutory authority in creating GWCS and, therefore, that we should revisit the Commission's decision to establish a licensing structure for the service.

3. Furthermore, consistent with the recently adopted Part 1 proceeding,<sup>4</sup> we will determine in a separate rulemaking whether the Part 1 rules will apply to GWCS. We will also delegate to the Wireless Telecommunications Bureau the authority to determine the specific GWCS competitive bidding mechanisms and other procedures.

## II. BACKGROUND

4. The Omnibus Budget Reconciliation Act of 1993<sup>5</sup> (OBRA) required that the Secretary of Commerce identify at least 200 megahertz of spectrum then allocated for use by Federal Government agencies to be transferred to private sector use. All of the 200 megahertz of spectrum recommended for reallocation was required to be located below the 5 gigahertz spectrum band, with at least 100 megahertz of this spectrum required to be below the 3 gigahertz spectrum band.

5. OBRA also required the Secretary of Commerce to issue within six months of enactment a Preliminary Report identifying bands of frequencies for potential reallocation and, furthermore, to issue within 18 months a Final Report recommending the spectrum for reallocation.<sup>6</sup> In its report making a preliminary identification of spectrum, the Department of Commerce

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<sup>3</sup> The Joint Petitioners are the Association for Maximum Service Television, Inc., the Association of America's Public Television Stations, Capital Cities/ABC, Inc., CBS, Inc., the Fox Television Group of Companies, the National Association of Broadcasters, the National Broadcasting Company, Inc., the Public Broadcasting Service, Inc., and the Radio-Television News Directors Association.

<sup>4</sup> See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures and Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use 4660-4685 MHz, ET Docket No. 94-32 and WT Docket No. 97-82, Third Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-413, released Dec. 31, 1997 (*Part 1 Second Further Notice of Proposed Rulemaking*).

<sup>5</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (enacted Aug. 10, 1993) (OBRA).

<sup>6</sup> See OBRA, § 6001(a)(3), as codified at 47 U.S.C. § 923.

was required to identify at least 50 megahertz of spectrum for immediate reallocation.<sup>7</sup> The remaining spectrum was required to be made available over a 10-year period.<sup>8</sup>

6. In accordance with the requirements of OBRA, on February 10, 1994, the Department of Commerce released its Preliminary Report.<sup>9</sup> The frequency bands identified for reallocation in the Preliminary Report are listed in Appendix A of the Preliminary Report. Fifty megahertz of spectrum in three of these frequency bands, 2390-2400 MHz, 2402-2417 MHz, and 4660-4685 MHz, were identified for immediate reallocation and are now available for private sector use.<sup>10</sup>

7. OBRA required that the Commission allocate and propose regulations for the assignment of the 50 megahertz of spectrum that was immediately available no later than 18 months after enactment (*i.e.*, by February 10, 1995).<sup>11</sup> On February 7, 1995, the Commission adopted the *First Report and Order* and *Second NPRM* in this proceeding. In the *First Report and Order*, the Commission (1) made available the 2390-2400 MHz band for use by unlicensed Personal Communications Services (PCS) devices; (2) provided for continued use of the 2402-2417 MHz band by devices operating in accordance with Part 15 of the Commission's Rules;<sup>12</sup> (3) upgraded the allocation of both bands for use by the Amateur Radio Service<sup>13</sup> from secondary to primary; and (4) allocated the 4660-4685 MHz band for use by Fixed and Mobile services. A petition for reconsideration of the Commission's decision was filed by the Joint Petitioners on April 6, 1995.

8. Subsequently, on July 31, 1995, the Commission adopted the *Second Report and Order* in this proceeding. The *Second Report and Order* established GWCS and adopted rules for the licensing of this service in the 4660-4685 MHz band. The Commission found that GWCS should accommodate a wide variety of potential Fixed and Mobile service uses, such as voice,

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<sup>7</sup> At least one-half of the 50 megahertz identified for immediate reallocation was required to be below the 3 gigahertz spectrum band and all of the spectrum was required to be identified for exclusive non-Federal use. OBRA, § 6001(a)(3), as codified at 47 U.S.C. § 923(e)(2).

<sup>8</sup> OBRA, § 6001(a)(3), as codified at 47 U.S.C. § 923(e)(2)(A).

<sup>9</sup> Preliminary Spectrum Reallocation Report, U.S. Department of Commerce, NTIA Special Publication 94-27, Feb. 1994 (Preliminary Report).

<sup>10</sup> By letter dated October 27, 1994, the President notified the Chairman of the Commission that Federal Government frequency assignments in these bands have been withdrawn and that the National Table of Frequency Allocations has been modified to reflect the reallocation of these bands. *See also* Spectrum Reallocation Final Report, U.S. Department of Commerce, NTIA Special Publication 95-32, Feb. 1995.

<sup>11</sup> OBRA, § 6001(a)(3), as codified at 47 U.S.C. § 925(a).

<sup>12</sup> 47 C.F.R. Part 15.

<sup>13</sup> Part 97 of the Commission's Rules, 47 C.F.R. Part 97.

video and data transmission, private microwave, broadcast auxiliary, and ground-to-air voice and video. The Commission also found that GWCS should facilitate the availability of frequencies for new technologies and services, encourage research and investment to invent, develop, and market new technologies, and spur their deployment to serve customers.<sup>14</sup> On September 8, 1995, MSTV filed a Petition for Clarification and Reconsideration of the *Second Report and Order*. MSTV argues that its petition for reconsideration of the *First Report and Order* also should be treated as a petition for reconsideration of the *Second Report and Order*. WCAI also filed a petition for reconsideration of the *Second Report and Order*.

### III. DISCUSSION

#### A. Allocation Issues

##### 1. First Report and Order

9. In their petition for reconsideration of the *First Report and Order*, the Joint Petitioners contend that the general allocation of the 4660-4685 MHz band to the Fixed and Mobile services adopted in the *First Report and Order* is overly broad because it will permit an unidentified mix of services to operate in the band.<sup>15</sup> The Joint Petitioners assert that the Commission had, as of the time the Joint Petitioners filed their petition, allocated spectrum for either Fixed or Mobile uses exclusively.<sup>16</sup> We disagree with the contentions raised by the Joint Petitioners. The Commission addressed this argument in the *First Report and Order*.<sup>17</sup> The claim made by the Joint Petitioners that a “Fixed and Mobile” allocation would neither fulfill the Commission's responsibility under the Communications Act, nor comply with the requirements of the National Telecommunications and Information Administration Organization Act,<sup>18</sup> is merely a restatement of issues that were examined and decided in the *First Report and Order*, and, therefore, does not warrant further reconsideration.<sup>19</sup>

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<sup>14</sup> See *Second Report and Order*, 11 FCC Rcd at 630-31 (para. 12).

<sup>15</sup> See Joint Petition for Reconsideration at 6.

<sup>16</sup> *Id.* at 5-11.

<sup>17</sup> See *First Report and Order*, 10 FCC Rcd at 4790-94 (paras. 42-48).

<sup>18</sup> See 47 U.S.C. §§ 921, 925.

<sup>19</sup> See *WWIZ*, 37 FCC 685 (1965), *aff'd sub nom.* *Lorain Journal v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

10. Moreover, we note that the Table of Frequency Allocations is replete with frequency bands that are allocated for both Fixed and Mobile services.<sup>20</sup> There are several frequency bands allocated for Fixed and Mobile use in the Table of Frequency Allocations, including bands currently used by broadcasters for electronic news gathering operations, *e.g.*, the 6875-7125 MHz band; the 12.75-13.25 GHz band; and the 17.7-18.6 GHz band. We therefore affirm our decision in the *First Report and Order* that a general allocation of a frequency band to both Fixed and Mobile services is consistent with our statutory authority and responsibilities.

11. The Joint Petitioners also argue that the specific allocation of the 4660-4685 MHz band to GWCS is not in the public interest.<sup>21</sup> We find that the attempt made by the Joint Petitioners to raise this argument is procedurally flawed because the Commission had not yet designated the frequency band for use by GWCS at the time the petition was filed. The Commission had not taken final action on proposals made in the *Second NPRM* at the time of the Joint Petitioners' filing and, therefore, the proposal made by the Commission in the *Second NPRM* was not subject to reconsideration at the time the Joint Petition was filed.<sup>22</sup> The Joint Petition is therefore dismissed with respect to this argument. In any event, as set forth in paragraph 15, *infra*, the Commission found in the *Second Report and Order* that the designation to GWCS is in the public interest.

## 2. Second Report and Order

12. In its petition for reconsideration of the *Second Report and Order*, MSTV argues that the Joint Petition should be treated as a petition for reconsideration of the *Second Report and Order*, "which shares the errors" of the *First Report and Order*.<sup>23</sup> The remaining portion of MSTV's reconsideration petition deals with the specific designation of the band for GWCS.<sup>24</sup> MSTV argues that the Commission should suspend this allocation and related assignments pending the resolution of assignment of spectrum to the Broadcast Auxiliary Service (BAS) in other proceedings.

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<sup>20</sup> See 47 C.F.R. § 2.106.

<sup>21</sup> Joint Petition for Reconsideration at 13-15.

<sup>22</sup> See Section 1.429(a) of the Commission's Rules, 47 C.F.R. § 1.429(a) (providing that "any interested person may petition for reconsideration of a *final action*. . .") (emphasis added).

<sup>23</sup> MSTV Petition at 1.

<sup>24</sup> *Id.* at 7-13.

13. We conclude that the Commission thoroughly considered MSTV's arguments and concerns in deciding in the *Second Report and Order* to designate the 4660-4685 MHz band for use by GWCS rather than designating the band for use by BAS. The *Second Report and Order* discussed this decision in detail, including an analysis of the Commission's authority to establish GWCS service and assignment rules.<sup>25</sup> MSTV has provided no new information or arguments that persuade us that the Commission's action in the *Second Report and Order* should be changed or set aside. The comments and petitions filed by parties in support of MSTV's petition suffer from this same defect, since they merely rely on or incorporate by reference MSTV's petition.<sup>26</sup>

14. We also note that, since the Commission issued the *Second Report and Order*, Congress, in the Balanced Budget Act of 1997,<sup>27</sup> added subsection (y) to Section 303 of the Communications Act.<sup>28</sup> Section 303(y) gives the Commission the authority to allocate electromagnetic spectrum so as to provide flexibility of use if:

- (1) such use is consistent with international agreements to which the United States is a party; and
- (2) the Commission finds, after notice and an opportunity for public comment, that—
  - (A) such an allocation would be in the public interest;
  - (B) such use would not deter investment in communications services and systems, or technology development; and
  - (C) such use would not result in harmful interference among users.

Although the provisions of Section 303(y) of the Act did not apply to the decisions made by the Commission in the *Second Report and Order* because those decisions were made before

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<sup>25</sup> See *Second Report and Order*, 11 FCC Rcd at 630-36 (paras. 12-22). The Commission concluded that nothing in the language or legislative history of Section 303 of the Communications Act, 47 U.S.C. § 303, suggests any limitation on the Commission's discretion to prescribe the nature or number of the service or services to be rendered over radio frequencies, and that Commission precedent supports the permissibility of allocating spectrum in a manner that allows for its use by a broadly defined service. 11 FCC Rcd at 634-35 (paras. 20-21).

<sup>26</sup> See National Association of Broadcasters Comments in Support of Petition for Clarification and Reconsideration, filed Oct. 16, 1995; Petition for Clarification and Reconsideration of National Broadcasting Company, filed Oct. 13, 1995; Comments of Capital Cities/ABC in Support of Petition for Clarification and Reconsideration of the Association for Maximum Service Television, filed Oct. 16, 1995.

<sup>27</sup> Pub. L. No. 105-33, 111 Stat. 251 (1997).

<sup>28</sup> 47 U.S.C. § 303(y).

enactment of the statutory provisions, the decisions and findings made by the Commission in the *Second Report and Order* are consistent with the findings required by the statute.

15. In the *Second Report and Order*, the Commission found that the proposed allocation would accommodate a wide variety of potential Fixed and Mobile service uses; would encourage research and investment to invent, market, and develop new technologies; and would foster efficient use of spectrum.<sup>29</sup> The Commission also found that any interference issues can be satisfactorily resolved by general non-interference standards and technical rules.<sup>30</sup> Moreover, the international allocation for Region 2 permits Fixed and Mobile services.<sup>31</sup> As stated in the *Second Report and Order*, the Commission had implied authority under prior law to allocate spectrum for flexible use.<sup>32</sup> Section 303(y) now gives the Commission express authority to allocate spectrum for flexible use based on findings such as the Commission made in the *Second Report and Order*. Therefore, for all the reasons discussed in this section, MSTV's Petition for Reconsideration of the *Second Report and Order* is also denied.

## B. Geographic Service Areas

16. WCAI argues that the Commission should reconsider the use of the Economic Areas (EAs) prescribed in the *Second Report and Order*, and should, instead, use Rand McNally Basic Trading Areas (BTAs). WCAI maintains that the “decision [made in the *Second Report and Order*] will seriously prejudice those service providers (including wireless cable operators) that intend to utilize GWCS in conjunction with other services that are licensed on the basis of BTAs.”<sup>33</sup>

17. We are not persuaded that changing the geographic service area designation to BTAs would be the best means of accomplishing the policy goals we are pursuing in connection with establishment of the GWCS service. GWCS is intended to be flexible and to accommodate a broad range of services and service areas. As PCIA contended,<sup>34</sup> EAs are a compromise between

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<sup>29</sup> *Second Report and Order*, 11 FCC Rcd at 630-31 (paras. 12-15).

<sup>30</sup> *Id.* at 633 (para. 18).

<sup>31</sup> See Section 2.106 of the Commission's Rules, 47 C.F.R. § 2.106.

<sup>32</sup> See note 25, *supra*.

<sup>33</sup> WCAI Petition at 4. In a subsequent filing, WCAI indicated that it had entered into an agreement with Rand McNally that, according to WCAI, would alleviate any copyright concerns that may have led the Commission to utilize EAs as service areas for GWCS. See Letter from P. Sinderbrand to W. Caton, Acting Secretary, FCC, Jan. 11, 1996.

<sup>34</sup> PCIA Comments filed Mar. 20, 1995, at 4.

MTAs, which cover a wider area than most users need, and BTAs, which are too small for some users to construct usable systems, but better approximate the natural radio patterns of many users. Moreover, WCAI has not presented evidence that EAs do not serve the purpose of accommodating a broad range of services and service areas. Instead, WCAI makes the rather narrow argument that the Commission should change the GWCS service areas to BTAs because the service areas would then match service areas of Multipoint Distribution Services and other existing services that are based on BTAs.

18. We are not convinced that the GWCS service areas should be tailored for the exclusive or principal purpose of matching any existing service or group of services. To do so would be counter to the Commission's intention to provide flexibility for a wide range of services without favoring any particular existing service. We think it particularly appropriate to use a geographical service area designation that is capable of accommodating a broad range of services where, as here, we do not have any firm information as to what the uses of the spectrum are likely to be. WCAI makes no persuasive arguments to demonstrate how its suggestions can be viewed as consistent with this policy objective. We also note that our tentative conclusion to allow geographic partitioning for all licenses,<sup>35</sup> if adopted, should facilitate the ability of existing licensees to obtain GWCS licenses that match their existing service areas. WCAI's petition to reconsider the *Second Report and Order* for purposes of changing the service areas to BTAs is therefore denied.

### C. Partitioning

19. WCAI contends that the Commission should expand the partitioning option adopted in the *Second Report and Order* to allow all GWCS licensees, not just rural telephone companies, to partition their service areas. WCAI notes that the Commission has proposed such an approach in the case of Local Multipoint Distribution Service (LMDS)<sup>36</sup> and contends that “[p]ermitt[ing] GWCS licensees to partition their service areas . . . will provide wireless cable operators a mechanism for developing GWCS and MDS service areas with common boundaries.”<sup>37</sup>

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<sup>35</sup> See Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Service Licensees and Implementation of Section 257 of the Communications Act - Elimination of Entry Barriers, WT Docket No. 96-148 and GN Docket No. 96-113, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21831, 21876 (para. 96) (1996) (*Geographic Partitioning and Spectrum Disaggregation Further NPRM*).

<sup>36</sup> WCAI Petition at 7.

<sup>37</sup> *Id.* at 6.



20. In the *Geographic Partitioning and Spectrum Disaggregation Further NPRM*<sup>38</sup> the Commission indicated its tentative agreement with the argument that allowing more open partitioning of GWCS licenses may add flexibility to the service and allow the spectrum to be used more efficiently. The Commission stated that it would examine in that proceeding specific questions that must be resolved before more extensive partitioning of GWCS licenses can be permitted. Therefore, the petition for reconsideration of the *Second Report and Order* filed by WCAI is denied with respect to this partitioning issue. The issue will be resolved in the referenced proceeding.

#### **D. Tower Lighting**

21. WCAI argues that the Commission should amend its rules to permit the mounting of antennas on existing structures that have previously received a “no hazard” determination from the Federal Aviation Administration (FAA), without any additional Commission authorization. WCAI indicates that Section 26.309(a) of the Commission's Rules provides that a GWCS antenna structure may not be 200 feet or more above ground level without prior Commission approval. WCAI asserts that no such prior consent should be required if a GWCS licensee is merely mounting a GWCS antenna below the top of an existing antenna structure (but still more than 200 feet above ground level), if the antenna structure already has received an FAA “no hazard” determination.<sup>39</sup>

22. In November 1995, after the adoption of the *Second Report and Order* in this proceeding, the Commission adopted a Report and Order that streamlined the Commission's antenna structure clearance procedures and revised Part 17 of the Commission's Rules<sup>40</sup> concerning antenna structure marking and lighting requirements.<sup>41</sup> These new rules allow the mounting of antennas on existing structures that have already received a "no hazard" determination from the FAA and have been registered with the Commission. To the extent that a structure has been registered with the Commission or registration is not required, GWCS licensees may mount antennas on the structure without prior Commission approval.

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<sup>38</sup> *Geographic Partitioning and Spectrum Disaggregation Further NPRM*, 11 FCC Rcd at 21876 (para. 96).

<sup>39</sup> WCAI Petition at 8.

<sup>40</sup> 47 C.F.R. Part 17.

<sup>41</sup> Streamlining the Commission's Antenna Structure Clearance Procedure and Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures, WT Docket No. 95-5, Report and Order, 11 FCC Rcd 4272 (1996).

We therefore grant WCAI's request by amending Part 26 of the Commission's Rules<sup>42</sup> to reflect current antenna structure requirements. Appendix A contains a new Rule section that conforms the GWCS requirements to the antenna structure requirements for similar services.

### **E. Competitive Bidding**

23. In the *Part 1 Second Further Notice of Proposed Rulemaking*, the Commission sought further comment on competitive bidding rule changes for GWCS. The Commission tentatively concluded that the Part 1 rules should apply to the auction of GWCS spectrum and specifically supersede the previously-adopted GWCS auction rules and procedures.<sup>43</sup> In a separate Report and Order in response to the *Part 1 Second Further Notice of Proposed Rulemaking*, the Commission will address these issues.

## **IV. PROCEDURAL MATTERS; ORDERING CLAUSES**

24. As required by Section 603 of the Regulatory Flexibility Act,<sup>44</sup> the Commission has prepared a Final Regulatory Flexibility Analysis of the expected impact on small entities of the changes in our rules adopted herein. The Final Regulatory Flexibility Analysis is set forth in Appendix B.

25. This action is taken pursuant to Sections 4(i), 5(c), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 155(c), 302, 303(c), 303(f), 303(g), 303(r).

26. Accordingly, IT IS ORDERED that the petition for reconsideration of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, First Report and Order and Second Notice of Proposed Rulemaking, 10 FCC Rcd 4769 (1995), filed by the Association for Maximum Service Television, Inc., the Association of America's Public Television Stations, Capital Cities/ABC, Inc., CBS, Inc., the Fox Television Group of companies, the National Association of Broadcasters, the National Broadcasting Company, Inc., the Public Broadcasting Service, Inc., and the Radio-Television News Directors Association IS DISMISSED IN PART<sup>45</sup> and otherwise IS DENIED.

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<sup>42</sup> 47 C.F.R. Part 26.

<sup>43</sup> *Part 1 Second Further Notice of Proposed Rulemaking* at para. 193.

<sup>44</sup> 5 U.S.C. § 603.

<sup>45</sup> See para. 11, *supra*.

27. IT IS FURTHER ORDERED that the petition for reconsideration of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, 11 FCC Rcd 624 (1995), filed by Association for Maximum Service Television, Inc., IS DENIED, and the petition for reconsideration filed by Wireless Cable Association International IS GRANTED IN PART to the extent discussed above, and otherwise IS DENIED.

28. IT IS FURTHER ORDERED that Part 26 of the Commission's Rules IS AMENDED as specified in Appendix A, AND WILL BECOME EFFECTIVE 30 days after publication in the Federal Register.

29. IT IS FURTHER ORDERED that the Director, Office of Public Affairs, shall send a copy of this Order, including the Revised Final Regulatory Flexibility Analysis, 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).

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

**Appendix A****FINAL RULES**

Part 26 of Title 47 of the Code of Federal Regulations is amended as follows:

**Part 26 — General Wireless Communications Service**

1. The authority citation for Part 26 continues to read as follows:

**Authority:** 47 U.S.C. 154, 301, 302, 303, 309, and 332, unless otherwise noted.

2. A new Section 26.56 is added to read as follows:

**§ 26.56 Antenna structures; air navigation safety.**

Licensees that own their antenna structures must not allow these antenna structures to become a hazard to air navigation. In general, antenna structure owners are responsible for registering antenna structures with the FCC if required by Part 17 of this chapter, and for installing and maintaining any required marking and lighting. However, in the event of default of this responsibility by an antenna structure owner, each FCC permittee or licensee authorized to use an affected antenna structure will be held responsible by the FCC for ensuring that the antenna structure continues to meet the requirements of Part 17 of this chapter. See § 17.6 of this chapter.

(a) *Marking and lighting.* Antenna structures must be marked, lighted and maintained in accordance with Part 17 of this chapter and all applicable rules and requirements of the Federal Aviation Administration.

(b) *Maintenance contracts.* Antenna structure owners (or licensees and permittees, in the event of default by an antenna structure owner) may enter into contracts with other entities to monitor and carry out necessary maintenance of antenna structures. Antenna structure owners (or licensees and permittees, in the event of default by an antenna structure owner) that make such contractual arrangements continue to be responsible for the maintenance of antenna structures in regard to air navigation safety.

3. Section 26.309 is removed.

## Appendix B

### REVISED FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. § 603 (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *First NPRM*<sup>2</sup> and a Further Initial Regulatory Flexibility Analysis (FIRFA) was incorporated in the *Second NPRM*.<sup>3</sup> The Commission sought written public comments on the proposals in the *First NPRM* and the *Second NPRM*, including on the IRFA and the FIRFA. A Final Regulatory Flexibility Analysis (FRFA) was incorporated in the Commission's *Second Report and Order*<sup>4</sup> in this proceeding. The Commission's Revised Final Regulatory Flexibility Analysis (RFRFA) in this *Memorandum Opinion and Order* conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA).<sup>5</sup>

#### I. Need For and Objective of the Rules

This *Memorandum Opinion and Order* streamlines the antenna structure clearance procedures for General Wireless Communications Services (GWCS) which were adopted in the *Second Report and Order* to conform with the procedures applicable to all wireless services. The new antenna structure clearance procedures eliminate the need for Commission approval of antenna structures that have already been approved by the Federal Aviation Administration (FAA). A petition for reconsideration contended that no Commission approval should be required for the mounting of antennas on existing structures which have received an FAA "no hazard" determination. We conclude that it is in the public interest to apply to GWCS the streamlined antenna structure clearance rules which were adopted for all services subsequent to the adoption of the *Second Report and Order*.

#### II. Summary of Issues Raised by the Public Comments in Response to the Final Regulatory Flexibility Analysis

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<sup>1</sup> Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (enacted Sept. 19, 1980) (Regulatory Flexibility Act).

<sup>2</sup> Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Notice of Proposed Rulemaking, 9 FCC Rcd 6779, 6789-90 (1994) (*First NPRM*).

<sup>3</sup> Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, First Report and Order and Second Notice of Proposed Rulemaking, 10 FCC Rcd 4769, 4837 (*First Report and Order* and *Second NPRM*).

<sup>4</sup> Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order (*Second Report and Order*).

<sup>5</sup> Title II of the CWAAA is "The Small Business Regulatory Enforcement Fairness Act of 1996," (SBREFA), codified at 5 U.S.C. § 601.

No comments were submitted in direct response to the Initial or Final Regulatory Flexibility Analysis. However, Wireless Cable Association International filed a Petition for Reconsideration of the *Second Report and Order* which contended that the Commission should amend its rules to permit the mounting of antennas on existing structures that have previously received a “no hazard” determination from the FAA, without any additional Commission authorization.

### **III. Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule**

None. The rule merely requires that GWCS licensees conform to the applicable antenna structure rules.

### **IV. Description and Estimate of Small Entities Subject to the Rules**

The rule adopted in this *Memorandum Opinion and Order* will apply to prospective GWCS licensees. In the *Second Report and Order*, the Commission established rules for the auction of 875 GWCS licenses, and provided that small businesses would have the benefit of preferential bidding credits and installment payments. In the *Second Report and Order*, the Commission also adopted the small business definition applicable to broadband PCS,<sup>6</sup> *i.e.*, any firm, together with its attributable investors and affiliates, with average gross revenues for the three preceding years not in excess of \$40 million. Since auctions have not been held for GWCS, we cannot estimate the number of licensees that fit within this category. Under the Small Business Administration (SBA) rules applicable to radiotelephone companies, a small entity is a radiotelephone company employing fewer than 1,500 persons.<sup>7</sup>

The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.<sup>8</sup> Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective GWCS licensees can be made, we assume, for purposes of our evaluations and conclusions in this revised FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

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<sup>6</sup> See Implementation of Section 309(j) of the Communications Act-Competitive Bidding, Second Report and Order, PP Docket No. 93-253, 9 FCC Rcd 2348, 2390 (para. 238).

<sup>7</sup> 13 C.F.R. § 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>8</sup> U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-S-1, Subject Series, Establishment and Firm Size, Table 5, Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

**V. Steps Taken To Minimize the Burdens on Small Entities**

The rule adopted in the *Memorandum Opinion and Order* reduces the burdens on small entities placed upon them by the rule adopted in the *Second Report and Order*. The rule adopted in the *Memorandum Opinion and Order* accomplishes this objective by permitting the mounting of antennas on existing structures that have previously received a “no hazard” determination by the FAA, without any additional Commission authorization, and by applying streamlined antenna clearance procedures which have been applied to all services.

**VI. Significant Alternatives Considered and Rejected**

The Commission made this change in the antenna clearance rules in response to a Petition for Reconsideration. The Commission could have retained the original rule, but the Commission found that its new antenna clearance rules minimize burdens on all licensees, without having a negative impact on the public interest or public safety.

**VII. Report to Congress**

The Commission shall send a copy of this Revised Final Regulatory Flexibility Analysis, together with the *Memorandum Opinion and Order*, in a report to Congress pursuant of the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>9</sup> A copy of this Revised Final Regulatory Flexibility Analysis will also be published in the Federal Register.

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<sup>9</sup> 5 U.S.C. § 801(a)(1)(A).