

(b) The exhibit areas in the National Archives Building are closed on Thanksgiving and December 25.

(c) The Presidential library museums are open every day except Thanksgiving, December 25, and January 1 (with the exception of the Lyndon Baines Johnson Library which is only closed December 25).

§ 1253.10 Notification process for changes in hours.

(a) NARA will follow the procedure outlined below when proposing to change hours of operations for research rooms, exhibit areas and museums, except as noted in § 1253.10(d).

(b) Changing hours of operations for research rooms, exhibit areas and museums may not be arbitrary. Proposed changes must be documented by evidence of a business need to change the hours of operation.

(c) The notification process must proceed as follows:

(1) Post a notice on <http://www.archives.gov>.

(2) Post notices in areas visible to the public in their research room, exhibit areas or museum.

(3) Issue a press release, e-mail notification, or other means normally used by that unit to notify the public of events at their location.

(4) These notices will provide written determination justifying the change in hours.

(d) In the event that emergency changes to hours of operations for research rooms, exhibit areas and museums are necessary, including but not limited to inclement weather, NARA units will give as much advance notice to the public as possible. Emergency notification will be posted at <http://www.archives.gov>.

PART 1254—USING RECORDS AND DONATED HISTORICAL MATERIALS

2. The authority citation for part 1254 continues to read as follows:

Authority: 44 U.S.C. 2104(a).

3. Amend § 1254.4 by revising paragraph (b) to read as follows:

§ 1254.4 Where and when are documents available to me for research?

* * * * *

(b) The locations of NARA's research rooms are shown in part 1253 of this chapter. Hours for research rooms are posted at <http://www.archives.gov>. Contact our facilities directly for information about their particular holdings. A facility or unit director may authorize that documents be made available at times other than the times specified.

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PART 1280—USE OF NARA FACILITIES

4. The authority citation for part 1280 continues to read as follows:

Authority: 44 U.S.C. 2104(a).

5. Revise § 1280.62 to read as follows:

§ 1280.62 When are the exhibit areas in the National Archives Building open?

The exhibit areas' hours of operation are posted at <http://www.archives.gov>. Last admission to the exhibit areas of the building will be no later than 30 minutes before the stated closing hour. The Archivist of the United States reserves the authority to close the exhibit areas to the public at any time for special events or other purposes. The building is closed on Thanksgiving and December 25.

6. Revise § 1280.92 to read as follows:

§ 1280.92 When are the Presidential library museums open to the public?

The Presidential library museums are open every day except Thanksgiving, December 25, and January 1 (with the exception of the Lyndon Baines Johnson Library which is only closed December 25). For more specific information about museum hours, please contact the libraries directly or visit the NARA Web site at <http://www.archives.gov>. Hours for the Presidential libraries' research rooms are also posted at <http://www.archives.gov>.

Dated: August 31, 2010.

David S. Ferriero,

Archivist of the United States.

[FR Doc. 2010-22336 Filed 9-7-10; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 20

[WT Docket No. 07-250; FCC 10-145]

Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Commission seeks comment on revisions to the Commission's wireless hearing aid compatibility rules. The Commission initiates this proceeding to ensure that consumers with hearing loss are able to access wireless communications services through a wide selection of devices without experiencing disabling interference or other technical obstacles.

DATES: Interested parties may file comments on or before October 25, 2010, and reply comments on or before November 22, 2010.

ADDRESSES: You may submit comments, identified by WT Docket No. 07-250; FCC 10-145, 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.

- **Mail:** 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 the Commission continues 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.

- **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: John Borkowski, Wireless Telecommunications Bureau, (202) 418-0626, e-mail John.Borkowski@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking (FNPRM) in WT Docket No. 07-250; FCC 10-145, adopted August 5, 2010, and released on August 5, 2010. This summary should be read with its companion document, the Policy Statement and Second Report and Order summary published elsewhere in this issue of the **Federal Register**. The full text of the FNPRM is available for public inspection and copying during business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. It also may be purchased from the Commission's duplicating contractor at Portals II, 445 12th Street SW., Room CY-B402, Washington, DC 20554; the contractor's Web site, <http://www.bcpiweb.com>; or by calling (800) 378-3160, facsimile (202) 488-5563, or e-mail FCC@BCPIWEB.com. Copies of the Further Notice also may be obtained via the Commission's Electronic Comment

Filing System (ECFS) by entering the docket number WT Docket No. 07–250. Additionally, the complete item is available on the Federal Communications Commission's Web site at <http://www.fcc.gov>.

Synopsis of the Further Notice of Proposed Rulemaking

I. Introduction

In this FNPRM the Commission seeks comment on potential changes to its hearing aid compatibility rules in three respects. First, the Commission proposes to extend the scope of the rules beyond the current category of Commercial Mobile Radio Service (CMRS) to include handsets used to provide wireless voice communications over any type of network among members of the public or a substantial portion of the public. The Commission seeks comment on this proposal, on whether considerations of technological feasibility or marketability prevent application of its hearing aid compatibility requirements to any class of these handsets, and on what transition period is appropriate for applying the requirements to newly covered handsets. Second, the Commission seeks further comment on whether to extend its in-store testing requirement beyond retail stores owned or operated by service providers to some or all other retail outlets. Third, the Commission seeks comment on whether to extend to all circumstances the ability to meet hearing aid compatibility standards for radio frequency (RF) interference reduction for GSM operations in the 1900 MHz band through software that enables the user to reduce maximum power output by up to 2.5 decibels (dB).

II. Discussion

A. Extension of Hearing Aid Compatibility Rules to New Technologies and Networks

2. The Commission has concluded that its wireless hearing aid compatibility rules must provide people who use hearing aids and cochlear implants with continuing access to the most advanced and innovative communications technologies as they develop, while at the same time maximizing the conditions for innovation and investment. Consistent with this principle, the Commission proposes that its hearing aid compatibility requirements should apply to all customer equipment used to provide wireless voice communications over any type of network among members of the public or a substantial portion of the public via a built-in

speaker where the equipment is typically held to the ear, so long as meeting hearing aid compatibility standards is technologically feasible and would not increase costs to an extent that would preclude successful marketing.

3. *Statutory Scope.* First, the Commission proposes to find that the scope of the Hearing Aid Compatibility Act broadly encompasses devices used to provide voice communications. The Hearing Aid Compatibility Act, 47 U.S.C. 610, directs the Commission to establish regulations to ensure reasonable access by persons with hearing loss to “telephone service.” To achieve this end, the Act directs that the Commission require “telephones” to meet hearing aid compatibility standards. The Act provides exemptions for, among other things, “telephones used with public mobile services” and “telephones used with private radio services,” but stipulates, that the Commission should periodically review these exemptions and revoke or limit them if necessary to reflect developments over time in technology and usage patterns. The Commission modified the exemption for wireless phones in 2003.

4. Neither the Hearing Aid Compatibility Act nor the broader Communications Act defines the terms “telephone” or “telephone service.” In view of the other provisions in the Act, however, the Commission proposes to interpret the term “telephone,” as used in the Hearing Aid Compatibility Act, to encompass anything that is commonly understood to be a telephone or to provide telephone service, as that understanding may evolve over time, regardless of regulatory classifications evoked elsewhere in the Communications Act. The Commission seeks comment on this proposed finding and whether such a reading best fulfills the Congressional intent that “all persons should have available the best telephone service which is technologically and economically feasible.” Moreover, the Commission seeks comment on whether an evolving definition of “telephone,” for purposes of the Hearing Aid Compatibility Act, is consistent with the directive that the Commission revoke or limit the exemptions for public mobile services and private radio services over time to reflect developments in technology and usage patterns.

5. Through the Hearing Aid Compatibility Act, Congress charged the Commission with the responsibility of establishing regulations as necessary to ensure access to telephone service by persons with hearing loss. As cell phone

use became integrated into everyday American life, the Commission lifted the prior exemption for digital wireless telephones and subjected them to hearing aid compatibility requirements under its rules. The Commission proposes to find that to carry out Congress's mandate to ensure access to telephone service by persons with hearing loss, it would serve the public interest to interpret the definition of telephone to include wireless handsets that are used for voice communications among members of the public or a substantial portion of the public, regardless of whether the services provisioned through the handset may fall beyond the currently covered category of CMRS. The Commission seeks comment on this proposed finding.

6. In addition, the Commission proposes to find that this broad interpretation of the definition of telephone should include multi-use devices that can function as traditional telephones typically used by being held to the ear, but which may have other capabilities and serve additional purposes. While the Commission recognizes that rendering the telephone feature of such a device hearing aid-compatible may require adjustments to other features over which the Commission might otherwise not have jurisdiction, the Commission proposes to find that under these circumstances, the Commission nevertheless would have authority to require adjustments to both telephone features and other aspects of the device in order to render the device hearing aid-compatible. Under the Hearing Aid Compatibility Act, the Commission is specifically directed to establish such regulations as are necessary to ensure access to telephone service by persons with hearing loss. To the extent achievement of this goal may require imposing hearing aid compatibility requirements on multi-use devices with telephonic capabilities, as described above, the Commission proposes to find that it has jurisdiction to require hearing aid compatibility for such devices, and the Commission seeks comment on this proposed finding.

7. *Scope of Proposed Rule.* The Commission's proposal herein to extend the scope of the hearing aid compatibility rules is limited to wireless handsets that afford an opportunity to communicate by voice with members of the public or with users of a network that is open to the public or a substantial portion of the public. Thus, in a manner broadly consistent with the distinction drawn in the Hearing Aid Compatibility Act between “public

mobile services” and “private radio services,” the Commission proposes not to extend the rules to certain non-interconnected systems that are used solely for internal communications, such as public safety or dispatch networks. While the Commission recognizes that there may be important interests in affording access to these systems to employees who use hearing aids, the Commission tentatively concludes that given the very different circumstances of the market for these handsets, and in the absence of an existing universe of handsets meeting hearing aid compatibility standards, the burdens on manufacturers and system operators of satisfying hearing aid compatibility requirements would outweigh the public benefits. The Commission seeks comment on this analysis, and in particular on whether the four criteria for revoking or limiting the wireless exemption are satisfied for any such internal systems.

8. At the same time, the Commission’s proposal would include all otherwise covered handsets that are used for voice communication with members of the public or a substantial portion of the public, including those that may not be interconnected with the public switched telephone network but can access another network that is open to members of the public. To the extent a handset otherwise used for internal communications can also be used for voice communications with members of the public outside the internal network, it would also be covered under this proposal. In addition, this proposal would cover handsets used for Mobile Satellite Service (MSS) that otherwise fall within the scope of the rule. In addressing the four criteria set forth below, commenters should consider whether the circumstances surrounding these or any other classes of handset should cause such handsets to be excluded from the rule.

9. *Statutory Criteria.* Under the Hearing Aid Compatibility Act, the Commission is to revoke or limit the wireless exemption if four criteria are satisfied: (1) Such revocation or limitation is in the public interest; (2) continuation of the exemption without such revocation or limitation would have an adverse effect on individuals with hearing loss; (3) compliance with the requirements adopted is technologically feasible for the telephones to which the exemption applies; and (4) compliance with the requirements adopted would not increase costs to such an extent that the telephones to which the exemption applies could not be successfully marketed. The Commission seeks

comment on whether these criteria are met with respect to handsets used for voice communications with members of the public or a substantial portion of the public.

10. *Adverse Effect on People with Hearing Loss.* The Commission proposes to find that failure to extend hearing aid compatibility requirements broadly to handsets used for voice communications with members of the public or a substantial portion of the public would have an adverse effect on people with hearing loss. In the *2003 Hearing Aid Compatibility Order*,¹ the Commission determined that continuing to exempt handsets providing certain CMRS from hearing aid compatibility requirements would have an adverse effect on individuals with hearing loss because the lack of hearing aid-compatible digital phones rendered them unable to take advantage of features of these phones that were becoming increasingly central to American life. The Commission proposes to find that this is now true broadly for the range of handsets used to provide wireless voice communications, including those operating over new and developing technologies. If these new handsets are not made hearing aid-compatible, consumers with hearing loss would be largely denied the opportunity to use advanced functionalities and services that are rapidly becoming commonplace in our society. Given the rapid pace of technological innovation and the development of new modes of wireless voice communication, the Commission is concerned about the consequences of waiting until a particular technology is in widespread use before beginning a proceeding to determine that lack of access to that technology adversely affects individuals with hearing loss. Rather, the Commission suggests that it is the inability to access innovative technologies as they develop that has an adverse effect. The Commission therefore proposes, in order to encourage manufacturers to consider hearing aid compatibility at the earliest stages of the product design process, to establish a broad scope for hearing aid compatibility obligations that is not dependent on particular forms of network technology. The Commission proposes to find that this broad scope is necessary to fulfill the goal of the Hearing Aid Compatibility Act that people who use hearing aids and cochlear implants have access to the

fullest feasible extent to all means of voice communication. The Commission seeks comment on this analysis.

11. *Public Interest.* The Commission also proposes to find that expanding the scope of its hearing aid compatibility requirements as described would serve the public interest. In 2003, the Commission found that modifying the wireless hearing aid compatibility exemption promoted the public interest because, among other reasons, it enabled people with hearing loss to enjoy the public safety and other benefits of digital wireless phones and it enabled all consumers to communicate more easily with those who have hearing loss. The Hearing Aid Compatibility Act makes clear that consumers with hearing loss should be afforded equal access to communications networks to the fullest extent feasible. To ensure the public interest is served in such fashion, the Commission’s stated policy is to encourage manufacturers to consider hearing aid compatibility at the earliest stages of the product design process. Commenters should address the Commission’s proposed finding that further modification of the exemption to reach handsets using new technologies is in the public interest today.

12. In addition, the Commission is unconvinced to date by arguments that applying hearing aid compatibility requirements to MSS would not confer significant public benefits. To the contrary, even if MSS has relatively few consumer users, both users who subscribe as individuals and those who are provided access to MSS by their employers would benefit from the option to obtain hearing aid-compatible telephones. Furthermore, the usage of MSS may increase. Indeed, due to its ubiquitous coverage and its resistance to disruption from terrestrial disasters, in some situations MSS has important advantages over terrestrial wireless service. Therefore, the Commission proposes to find that failure to apply hearing aid compatibility requirements to MSS handsets would adversely affect individuals with hearing loss, and that it would serve the public interest to ensure that individuals with hearing loss have access to hearing aid-compatible MSS handsets. The Commission seeks comment on this analysis.

13. *Technological Feasibility.* In the *2003 Hearing Aid Compatibility Order*, the Commission found that meeting hearing aid compatibility standards was technologically feasible for the telephones covered by that order in large part because several handsets were already on the market that met those

¹ The Commission’s Rules Governing Hearing Aid-Compatible Telephones, WT Docket 01–309, Report and Order, 18 FCC Rcd 16753 (2003) (*2003 Hearing Aid Compatibility Order*).

standards. To the extent that handsets are currently on the market or are planned for introduction that fall within the rule coverage that the Commission proposes today, but that are not covered by the existing rule, the Commission seeks comment on whether they would meet the existing American National Standards Institute (ANSI) standard (or a similar performance standard, for frequency bands and air interfaces that are not addressed by the existing standard). Moreover, because the hearing aid compatibility standards are already being met for handsets that operate on a variety of 2G and 3G air interfaces over two well separated frequency bands, the Commission considers it likely, in the absence of evidence to the contrary, that the same standards could also be met for handsets used for similar services that are not within the class of currently covered CMRS. While the Commission recognizes that technological feasibility cannot be predicted with certainty for future handsets, the Commission notes that the Hearing Aid Compatibility Act expressly provides for waivers for new telephones or telephones associated with a new technology or service in cases of technological infeasibility. Therefore, absent evidence that meeting hearing aid compatibility standards is not technologically feasible for any class of handsets or service, the Commission anticipates that compliance will be technologically feasible. Commenters arguing that compliance is not technologically feasible should provide specific engineering evidence related to a defined class of handsets.

14. The Commission seeks comment on how its hearing aid compatibility rules should address circumstances where voice capability may be enabled on a handset by a party other than the manufacturer, particularly where adding the new voice capability may affect operating parameters of the handset such as the frequency range, modulation type, maximum output power, or other parameters specified in the Commission's rules. The Commission's rules for equipment authorization hold the grantee to be the responsible party to ensure continued compliance of the handset and require the grantee to inform the Commission if these parameters change. The Commission seeks comment on the proper procedures for a manufacturer to test the hearing aid compatibility of voice functions that are not initially installed into the phone but may be enabled, for example, by the installation of a software program that affects the circumstances under which the

transmitter operates. The Commission seeks comment on whether there are other ways to ascertain and regulate the hearing aid compatibility of such functions, for example, at the time the service provider or applications store enables that software. The Commission also seeks comment on the appropriate regulatory treatment if the hearing aid compatibility of these functions cannot be tested; in particular, whether a handset that meets hearing aid compatibility standards for all voice operations built into the phone but can also accommodate software-added voice operations that cannot be tested may be counted as hearing aid-compatible. Commenters should consider handsets that can provide additional voice capabilities to those already available in the off-the-shelf handset via the installation of software, as well as handsets whose only, or initial, voice capability is not incorporated off the shelf but is instead available through commercial sources. In addressing these issues, commenters should consider how voice services may be offered over new technologies such as WiMax and LTE interfaces and who may manage these capabilities.

15. *Marketability.* The Commission previously found that the costs of compliance would not preclude successful marketing for phones covered under the current rules because some phones meeting the standard for acoustic coupling compliance were already being marketed, the modifications needed to achieve inductive coupling capability did not appear unduly costly, and increased demand was anticipated to drive down production costs. Based on the number of hearing aid-compatible models that are already being successfully marketed across multiple air interfaces and frequency bands, the Commission anticipates, in the absence of convincing evidence to the contrary, that other telephones offering similar capabilities and meeting the same or comparable compliance standards could also be successfully marketed. The Commission seeks comment, supported by evidence, on whether this is so, and whether there is any class of handsets for which the cost of achieving compliance would preclude successful marketing. Again, the Commission notes the availability of waivers in the event future new telephones or telephones used with new technologies could not be successfully marketed due to hearing aid compatibility compliance costs.

16. Absent convincing evidence of technological infeasibility or costs that preclude marketability, the Commission intends to apply to all handsets that will

be covered under its broadened rule, after an appropriate transition period, the same hearing aid compatibility requirements that apply to currently covered handsets. The Commission seeks comment on whether, for reasons of technological infeasibility or prohibitive costs, these numerical benchmarks or other rule provisions cannot be applied to any class of handsets. Again, the Commission seeks specific evidence as to why particular requirements cannot be met and what alternative requirements would be feasible and appropriate.

17. *Transition Period.* Ever since the Commission adopted the first wireless hearing aid compatibility rules in 2003, the Commission has consistently recognized that it takes time for handsets with new specifications to be designed, produced, and brought to market, and accordingly the Commission has afforded meaningful transition periods before new hearing aid-compatible handset deployment benchmarks and other requirements have become effective. The Commission seeks comment on the appropriate transition period for applying hearing aid compatibility benchmarks and other requirements to lines of handsets that are outside the subset of CMRS that is currently covered by Section 20.19(a). Would a two-year transition be appropriate, consistent with the lead time the Commission afforded to comply with the original requirements for acoustic coupling compatibility? Would a shorter period, such as one year, be reasonable given that manufacturers are already meeting hearing aid compatibility requirements for currently covered classes of handsets, and many of the engineering solutions reached for those handsets may be transferrable to others? Is it likely that many handsets will already meet hearing aid compatibility standards either as already marketed or as currently planned, and therefore all that will be required is testing of existing handsets rather than introduction of new products? On the other hand, are there special design difficulties that may render a longer transition period necessary for some classes of handsets? For example, are there any special characteristics of satellite transmission that may require particular transition rules for MSS? In consideration of the time needed for phones to progress from the production line to service providers' offerings, should the transition period be longer for service providers than for manufacturers, and should it be longer for smaller service providers than for

nationwide carriers? Parties are invited to comment on these and any other transition issues, either for all newly covered handsets or some subset of those handsets.

B. In-Store Testing Requirement for Independent Retailers

18. Section 20.19(c) and (d) of the Commission's rules requires that wireless service providers make their hearing aid-compatible handset models available for consumer testing in each retail store that they own or operate. This testing requirement does not apply to non-service providers, such as individuals, independent retailers, importers, or manufacturers.

19. The Commission seeks targeted comment on whether the in-store testing requirement should be extended to some or all retail outlets other than those owned or operated by service providers. Given the growth of new channels of distribution, extension of the in-store testing requirement would help to ensure that consumers have the information they need to choose a handset that will operate correctly with their hearing aid or cochlear implant. The Commission seeks comment as to whether, if the Commission does extend the in-store testing requirement to some retail stores other than those owned or operated by service providers, the Commission should extend it to all entities that sell handsets to consumers through physical locations or whether some of these retailers should be excluded from the requirement based on their general customer service practices, the types or numbers of handsets that they sell, their size, or other considerations.

20. In addition to allowing consumers to test handsets, the Commission seeks comment on whether it should require independent retailers to allow a customer with hearing loss to return a handset without penalty, either instead of or in addition to an in-store testing requirement. The Commission notes that the Commission previously encouraged wireless service providers to provide a 30 day trial period or otherwise be flexible on their return policies for consumers seeking access to compliant phones. The Commission reiterates that a flexible return policy could help consumers with hearing loss by providing them with additional time and opportunity to ensure that their handset is compatible with their hearing aid.

21. The Commission also seeks comment on the Commission's authority to extend the in-store testing requirement beyond service providers. First, the Commission seeks comment

on interpreting Sections 1 and 2 of the Communications Act, coupled with that Act's Section 3 definition of "radio communications," to cover retail operations that have become enmeshed in the provision of wireless service. The Commission seeks comment on whether a retailer engaged in the sale of wireless handsets is subject to the Commission's general jurisdictional grant because it is engaged in providing "services," including the sale of "instrumentalities, facilities, [and] apparatus * * * incidental to * * * transmission, within the meaning of Section 3."

22. Further, Section 302a of the Act authorizes the Commission to "make reasonable regulations * * * governing the interference potential of handsets which in their operation are capable of emitting radio frequency energy * * * in sufficient degree to cause harmful interference to radio communications * * *" Section 302a further provides that "[n]o person shall * * * sell, offer for sale, * * *, or use devices, which fail to comply with regulations promulgated pursuant to this section." The Commission seeks comment on whether expanding in-store testing requirements to help consumers operate equipment in a manner that does not cause interference to their hearing aids would fall within its jurisdiction under these provisions. In addition, the language of the Hearing Aid Compatibility Act itself is expansive, and it clearly envisions that the Commission should exercise its mandate broadly by "establish[ing] such regulations as are necessary" to ensure access to telephone service by persons with hearing loss. The Commission seeks comment on whether this language provides a basis for exercising its jurisdiction over additional parties so that the Commission may continue to fulfill the mandate of the Hearing Aid Compatibility Act.

C. GSM Operations at 1900 MHz

23. In the accompanying Second Report and Order, the Commission amends its rules so that a manufacturer or service provider that offers one or two handset models over the GSM air interface, which would not have to offer any hearing aid-compatible GSM models but for its size, may meet its hearing aid compatibility deployment obligation by offering one handset that allows consumers to reduce the maximum transmit power only for operations over the GSM air interface in the 1900 MHz band by up to 2.5 decibels and that meets the criteria for an M3 rating for RF interference reduction after such power reduction. The Commission here seeks comment

on whether it should treat such handsets as hearing aid-compatible for all purposes.

24. Section 20.19(b) of the Commission's rules provides that a newly certified handset is hearing aid-compatible if it meets the standard set forth in the 2007 revision of ANSI Standard C63.19, and that standard states that the handset must be tested using its maximum rated RF output power. The requirement to test for hearing aid compatibility at full power serves the important goal of ensuring that people with hearing loss have equal access to all of the service quality and performance that a given wireless phone provides. At the same time, meeting the RF interference reduction standard for phones operating over the GSM air interface in the 1900 MHz band poses significant technical challenges, particularly for phones with certain desirable form factors. Moreover, as a legacy 2G network, GSM is in the process of being supplanted by newer and more powerful technologies. Under these circumstances, the Commission seeks comment on whether it is in the public interest to relax the requirement to test handsets for hearing aid compatibility at full power in order to facilitate the near-term availability of desirable handsets to consumers. The Commission welcomes data on the effects that a 2.5 dB reduction in maximum power output will have on coverage, as well as any other effects on consumers with or without hearing loss. In addition, the Commission asks commenters to address how the proposed revision of ANSI Standard C63.19, which would make it approximately 2.2 dB easier for a GSM phone to achieve an M3 rating, should affect the Commission's analysis. Does the expected revision, by making it likely that many handsets will no longer need to reduce their power to meet the M3 criteria, ameliorate any negative effects of a rule change by rendering it less likely that companies will use that rule change beyond the near term? Or does the imminent prospect of a standards change that may largely eliminate the apparent problem counsel against further adjustments to the Commission's rules to address that problem?

25. The Commission proposes to find that if the Commission were to extend the ability to meet hearing aid compatibility standards by allowing the user to reduce the maximum power for GSM operations in the 1900 MHz band, the Commission would do so subject to the same conditions that it has imposed in the context of the *de minimis* rule. Thus, the handset would have to

operate at full power when calling 911, and the manufacturer or service provider would have to disclose that activation of a special mode is required to meet the hearing aid compatibility standard and must explain how to activate the special mode and the possibility of a loss of coverage in the device manual or product insert. The Commission seeks comment on these and any other possible conditions.

III. Procedural Matters

A. Initial Regulatory Flexibility Analysis

26. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),² the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities of the policies and rules proposed in this Further Notice of Proposed Rule Making (FNPRM). 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 FNPRM provided in Section III.C.2. of this summary. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).³

27. Although Section 213 of the Consolidated Appropriations Act of 2000 provides that the RFA shall not apply to the rules and competitive bidding procedures for frequencies in the 746–806 MHz Band,⁴ the Commission believes that it would serve the public interest to analyze the possible significant economic impact of the proposed policy and rule changes in this band on small entities. Accordingly, this IRFA contains an analysis of this impact in connection with all spectrum that falls within the scope of this Further Notice, including spectrum in the 746–806 MHz Band.

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

28. The FNPRM proposes to find that the scope of the Commission's hearing aid compatibility rules should be

extended so as to cover all customer equipment used to provide wireless communications among members of the public or a substantial portion of the public via a built-in speaker where the equipment is typically held to the ear, so long as meeting hearing aid compatibility standards is technologically feasible and would not raise costs to an extent that would preclude successful marketing of the equipment. The FNPRM seeks comment on: (1) Whether considerations of technological feasibility or marketability prevent application of the hearing aid compatibility requirements, or require modification of those requirements, as to any class of handsets; and (2) what transition period is appropriate for applying the requirements to newly covered handsets. This proposed rule change would ensure that people with hearing loss will have access to new and advanced handsets regardless of the frequency over which they operate or the voice technology mode deployed, while maintaining consistency with the technological feasibility and marketability criteria set forth in the Hearing Aid Compatibility Act.⁵

29. The FNPRM also seeks comment on whether the current requirement to make hearing aid-compatible handsets available in-store for consumer testing should be extended to some or all retail outlets other than those owned or operated by service providers. The Commission seeks comment on how to define the class of independent retailers that would be required to make hearing aid-compatible handsets available for in-store testing. This rule change would ensure that consumers have the information they need to choose a handset that will operate correctly with their hearing aid or cochlear implant.

30. Additionally, the FNPRM seeks comment on whether the Commission should treat handsets that allow consumers to reduce the maximum transmit power only for operations over the GSM air interface in the 1900 MHz band by up to 2.5 decibels, except for calls to 911, and that meet the criteria for an M3 rating after such power reduction, as hearing aid-compatible for all purposes. This rule change would help ensure the near-term availability of desirable handsets over the legacy GSM air interface while still affording substantial access to people with hearing loss. The Commission also proposes, for all such handsets, that the manufacturer or service provider would have to disclose that activation of a special mode is required to meet the hearing aid compatibility standard, how

to activate the special mode, and the possibility of a loss of coverage if the special mode is activated. This rule change would ensure that consumers have the information they need to choose and operate a handset that will best function with their hearing aid or cochlear implant.

2. Legal Basis

31. The potential actions about which comment is sought in this FNPRM would be authorized pursuant to the authority contained in Sections 4(i), 303(r), and 710 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 610.

3. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Would Apply

32. 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 proposed rules.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 Small Business Administration ("SBA").⁹ To assist the Commission in analyzing the total number of potentially affected small entities, the Commission requests commenters to estimate the number of small entities that may be affected by any rule changes that might result from this FNPRM.

33. *Small Businesses.* Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.¹⁰

34. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the

² 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), Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

³ See 5 U.S.C. 603(a).

⁴ In particular, this exemption extends to the requirements imposed by Chapter 6 of Title 5, United States Code, Section 3 of the Small Business Act (15 U.S.C. 632) and Section 3507 and 3512 of Title 44, United States Code. Consolidated Appropriations Act 2000, Pub. L. 106–113, 113 Stat. 2502, App. E, Sec. 213(a)(4)(A)–(B); see 145 Cong. Rec. H12493–94 (Nov. 17, 1999); 47 U.S.C.A. 337 note at Section 213(a)(4)(A)–(B).

⁵ 47 U.S.C. 610.

⁶ 5 U.S.C. 604(a)(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 the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), 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."

⁹ 15 U.S.C. 632.

¹⁰ See SBA, Office of Advocacy, "Frequently Asked Questions," <http://web.sba.gov/faqs> (last visited Jan. 2009).

category "Wireless Telecommunications Carriers (except satellite)." ¹¹ Under that SBA category, a business is small if it has 1,500 or fewer employees.¹² The census category of "Cellular and Other Wireless Telecommunications" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite)". However, since currently available data was gathered when "Cellular and Other Wireless Telecommunications" was the relevant category, earlier Census Bureau data collected under the category of "Cellular and Other Wireless Telecommunications" will be used here. Census Bureau data for 2002 show that there were 1,397 firms in this category that operated for the entire year.¹³ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹⁴ Thus, under this category and size standard, the majority of firms can be considered small.

35. *Broadband Personal Communications Service.* The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.¹⁵ For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.¹⁶ These small business size standards, in the context of broadband PCS auctions, have been

approved by the SBA.¹⁷ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.¹⁸ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.¹⁹

36. On January 26, 2001, the Commission completed the auction of 422 C and F Block PCS licenses in Auction 35.²⁰ Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses.²¹ Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71.²² Of the 14 winning bidders, six were designated entities.²³ In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F Block licenses in Auction 78.²⁴

37. *Specialized Mobile Radio.* The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz

and 900 MHz bands to firms that had revenues of no more than \$15 million in each of the three previous calendar years.²⁵ The Commission awards "very small entity" bidding credits to firms that had revenues of no more than \$3 million in each of the three previous calendar years.²⁶ The SBA has approved these small business size standards for the 900 MHz Service.²⁷ The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the \$15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the \$15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.²⁸ A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 licenses. One bidder claiming small business status won five licenses.²⁹

38. The auction of the 1,053 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders that won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the \$15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

39. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended

¹¹ 13 CFR 121.201, North American Industry Classification System (NAICS) code 517210.

¹² *Id.*

¹³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517212 (issued Nov. 2005).

¹⁴ *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 for firms with "1000 employees or more."

¹⁵ See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850–7852 paras. 57–60 (1996); see also 47 CFR 24.720(b).

¹⁶ See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7852 para. 60.

¹⁷ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 2, 1998.

¹⁸ FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. Jan. 14, 1997).

¹⁹ See "C, D, E, and F Block Broadband PCS Auction Closes," *Public Notice*, 14 FCC Rcd 6688 (WTB 1999).

²⁰ See "C and F Block Broadband PCS Auction Closes; Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 2339 (2001).

²¹ See "Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58," *Public Notice*, 20 FCC Rcd 3703 (2005).

²² See "Auction of Broadband PCS Spectrum License Closes; Winning Bidders Announced for Auction No. 71," *Public Notice*, 22 FCC Rcd 9247 (2007).

²³ *Id.*

²⁴ See Auction of AWS-1 and Broadband PCS Licenses Rescheduled For August 13, 2008, Notice of Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures For Auction 78, *Public Notice*, 23 FCC Rcd 7496 (2008) (AWS-1 and Broadband PCS Procedures *Public Notice*).

²⁵ 47 CFR 90.814(b)(1).

²⁶ *Id.*

²⁷ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

²⁸ See "Correction to Public Notice DA 96-586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,'" *Public Notice*, 18 FCC Rcd 18367 (WTB 1996).

²⁹ See "Multi-Radio Service Auction Closes," *Public Notice*, 17 FCC Rcd 1446 (WTB 2002).

implementation authorizations in the 800 and 900 MHz bands. The Commission does not know how many firms provide 800 MHz or 900 MHz geographic area SMR services pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than \$15 million. One firm has over \$15 million in revenues. In addition, the Commission does not know how many of these firms have 1,500 or fewer employees. The Commission assumes, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities.

40. *Advanced Wireless Services.* In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses.³⁰ This auction, which was designated as Auction 78, offered 35 licenses in the AWS 1710–1755 MHz and 2110–2155 MHz bands ("AWS-1"). The AWS-1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded \$15 million and did not exceed \$40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed \$15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had a combined total assets of less than \$500 million and combined gross revenues of less than \$125 million in each of the last two years qualified for entrepreneur status.³¹ Four winning bidders that identified themselves as very small businesses won 17 licenses.³² Three of the winning bidders that identified themselves as small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

41. *Rural Radiotelephone Service.* The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.³³ A

significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS").³⁴ In the present context, the Commission will use the SBA small business size standard applicable to Wireless Telecommunication Carriers (except satellite), *i.e.*, an entity employing no more than 1,500 persons.³⁵ There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

42. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305–2320 MHz and 2345–2360 MHz bands. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million or less for each of the three preceding years, and a "very small business" as an entity with average gross revenues of \$15 million or less for each of the three preceding years.³⁶ The SBA has approved these definitions.³⁷ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997, and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

43. *700 MHz Guard Bands Licenses.* In the *700 MHz Guard Bands Order*, the Commission adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³⁸ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.³⁹ Additionally, a "very

small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.⁴⁰ SBA approval of these definitions is not required.⁴¹ An auction of 52 Major Economic Area (MEA) licenses for each of two spectrum blocks commenced on September 6, 2000, and closed on September 21, 2000.⁴² Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of remaining 700 MHz Guard Bands licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.⁴³ Subsequently, in the *700 MHz Second Report and Order*, the Commission reorganized the licenses pursuant to an agreement among most of the licensees, resulting in a spectral relocation of the first set of paired spectrum block licenses, and an elimination of the second set of paired spectrum block licenses (many of which were already vacant, reclaimed by the Commission from Nextel).⁴⁴ A single licensee that did not participate in the agreement was grandfathered in the initial spectral location for its two licenses in the second set of paired spectrum blocks.⁴⁵ Accordingly, at this time there are 54 licenses in the 700 MHz Guard Bands.

44. *700 MHz Band Commercial Licenses.* There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698–757, 758–763, 776–787, and 788–793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) "Small business," which is defined as an entity with attributed average annual

⁴⁰ *Id.*

⁴¹ *Id.* at 5343 para. 108 n.246 (for the 746–764 MHz and 776–704 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

⁴² See "700 MHz Guard Bands Auction Closes: Winning Bidders Announced," *Public Notice*, 15 FCC Rcd 18026 (WTB 2000).

⁴³ See "700 MHz Guard Bands Auctions Closes: Winning Bidders Announced," *Public Notice*, 16 FCC Rcd 4590 (WTB 2001).

⁴⁴ See *In the Matter of Service Rules for the 698–746, 747–762 and 777–792 MHz Bands*, WT Docket 06–150, *Second Report and Order*, 22 FCC Rcd 15289, 15339–15344 paras. 118–134 (2007) (*700 MHz Second Report and Order*).

⁴⁵ *Id.*

³⁰ See AWS-1 and Broadband PCS Procedures Public Notice, 23 FCC Rcd 7496. Auction 78 also included an auction of Broadband PCS licenses.

³¹ *Id.* at 7521–22.

³² See "Auction of AWS-1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period", *Public Notice*, 23 FCC Rcd 12749 (2008).

³³ The service is defined in § 22.99 of the Commission's rules, 47 CFR 22.99.

³⁴ BETRS is defined in §§ 22.757 and 22.759 of the Commission's rules, 47 CFR 22.757 and 22.759.

³⁵ 13 CFR 121.201, NAICS code 517210.

³⁶ Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS), *Report and Order*, 12 FCC Rcd 10785, 10879 para. 194 (1997).

³⁷ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated December 2, 1998.

³⁸ See Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000).

³⁹ *Id.* at 5343 para. 108.

gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years; and (2) "very small business," which is defined as an entity with attributed average annual gross revenues that do not exceed \$15 million for the preceding three years.⁴⁶ In Block C of the Lower 700 MHz Band (710–716 MHz and 740–746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: an "entrepreneur," which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁴⁷ The SBA has approved these small size standards.⁴⁸

45. An auction of 740 licenses for Blocks C (710–716 MHz and 740–746 MHz) and D (716–722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.⁴⁹ A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: Five EAG licenses and 251 CMA licenses.⁵⁰ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.⁵¹

46. The remaining 62 megahertz of commercial spectrum was auctioned on January 24 through March 18, 2008. As explained above, bidding credits for all of these licenses were available to "small businesses" and "very small businesses." Auction 73 concluded with 1090 provisionally winning bids covering 1091 licenses and totaling \$19,592,420,000. The provisionally

winning bids for the A, B, C, and E Block licenses exceeded the aggregate reserve prices for those blocks. The provisionally winning bid for the D Block license, however, did not meet the applicable reserve price and thus did not become a winning bid. Approximately 55 small businesses had winning bids.⁵² Currently, the 10 remaining megahertz associated with the D block have not yet been assigned.⁵³

47. *Offshore Radiotelephone Service.* This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.⁵⁴ There is presently one licensee in this service. The Commission does not have information whether that licensee would qualify as small under the SBA's small business size standard for Wireless Telecommunications Carriers (except Satellite) services.⁵⁵ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁵⁶

48. *Broadband Radio Service and Educational Broadband Service.* The Broadband Radio Service ("BRS"), formerly known as the Multipoint Distribution Service ("MDS"),⁵⁷ and the Educational Broadband Service ("EBS"), formerly known as the Instructional Television Fixed Service ("ITFS"),⁵⁸ use 2 GHz band frequencies to transmit video programming and provide broadband services to residential subscribers.⁵⁹ These services, collectively referred to as "wireless

cable," were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.⁶⁰ The Commission estimates that the number of wireless cable subscribers is approximately 100,000, as of March 2005. The SBA small business size standard for the broad census category of Cable and Other Program Distribution, which consists of such entities generating \$13.5 million or less in annual receipts, appears applicable to MDS and ITFS.⁶¹ Note that the census category of "Cable and Other Program Distribution" is no longer used and has been superseded by the larger category "Wireless Telecommunications Carriers (except satellite). This category provides that a small business is a wireless company employing no more than 1,500 persons.⁶² However, since currently available data was gathered when "Cable and Other Program Distribution" was the relevant category, earlier Census Bureau data collected under the category of "Cable and Other Program Distribution" will be used here. Other standards also apply, as described.

49. The Commission has defined small MDS (now BRS) entities in the context of Commission license auctions. In the 1996 MDS auction,⁶³ the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.⁶⁴ This definition of a small entity in the context of MDS auctions has been approved by the SBA.⁶⁵ In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are hundreds of MDS licensees and wireless cable operators that did not receive their licenses as a result of the MDS auction

⁴⁶ See Auction of 700 MHz Band Licenses Scheduled for Jan. 24, 2008, AU Docket No. 07–157, Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76, DA 07–4171 at para. 70 (WTB rel. Oct. 5, 2007); Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59), Report and Order, 17 FCC Rcd 1022, 1087–88 (2002).

⁴⁷ *Id.* at 1088.

⁴⁸ See Letter from Aida Alvarez, Administrator, Small Business Administration, to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, dated August 10, 1999.

⁴⁹ See "Lower 700 MHz Band Auction Closes," Public Notice, 17 FCC Rcd 17272 (WTB 2002).

⁵⁰ See "Lower 700 MHz Band Auction Closes," Public Notice, 18 FCC Rcd 11873 (WTB 2003).

⁵¹ *Id.*

⁵² See "Auction of 700 MHz Band Licenses Closes," Public Notice, 23 FCC Rcd 4572 (WTB 2008).

⁵³ See fcc.gov website at http://wireless.fcc.gov/auctions/default.htm?job=auction_summary&id=73.

⁵⁴ This service is governed by subpart I of part 22 of the Commission's rules. See 47 CFR 22.1001–22.1037.

⁵⁵ 13 CFR 121.201, NAICS code 517210.

⁵⁶ *Id.*

⁵⁷ See 47 CFR part 21, subpart K; 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 and 2500–2690 MHz Bands; Part 1 of the Commission's Rules—Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico, 19 FCC Rcd 14165 (2004).

⁵⁸ See 47 CFR part 74, subpart I; MDS/ITFS Order, 19 FCC Rcd 14165 (2004).

⁵⁹ See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eleventh Annual Report, 20 FCC Rcd 2507, 2565 para. 131 (2006).

⁶⁰ *Id.*

⁶¹ 13 CFR 121.201, NAICS code 515210.

⁶² 13 CFR 121.201, NAICS code 517210.

⁶³ MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

⁶⁴ 47 CFR 21.961(b)(1).

⁶⁵ See 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, Docket No. 94–131, Report and Order, 10 FCC Rcd 9589 (1995).

and that fall under the former SBA small business size standard for Cable and Other Program Distribution.⁶⁶ Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, the Commission estimates that there are approximately 850 of these small entity MDS (or BRS) providers, as defined by the SBA and the Commission's auction rules.

50. Educational institutions are included in this analysis as small entities; however, the Commission has not created a specific small business size standard for ITFS (now EBS).⁶⁷ The Commission estimates that there are currently 2,452 EBS licenses, held by 1,524 EBS licensees, and all but 100 of the licenses are held by educational institutions. Thus, the Commission estimates that at least 1,424 EBS licensees are small entities.

51. *Government Transfer Bands.* The Commission adopted small business size standards for the unpaired 1390–1392 MHz, 1670–1675 MHz, and the paired 1392–1395 MHz and 1432–1435 MHz bands.⁶⁸ Specifically, with respect to these bands, the Commission defined an entity with average annual gross revenues for the three preceding years not exceeding \$40 million as a “small business,” and an entity with average annual gross revenues for the three preceding years not exceeding \$15 million as a “very small business.”⁶⁹

⁶⁶ 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 “Cable and Other Program Distribution” (annual receipts of \$13.5 million or less). See 13 CFR 121.201, NAICS code 515210.

⁶⁷ In addition, the term “small entity” under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). The Commission does not collect annual revenue data on EBS licensees.

⁶⁸ See Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216–220 MHz, 1390–1395 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz Government Transfer Bands, 17 FCC Rcd 9980 (2002) (*Government Transfer Bands Service Rules Report and Order*).

⁶⁹ See Reallocation of the 216–220 MHz, 1390–1395 MHz, 1427–1429 MHz, 1429–1432 MHz, 1432–1435 MHz, 1670–1675 MHz, and 2385–2390 MHz Government Transfer Bands, WT Docket No. 02–8, *Notice of Proposed Rulemaking*, 17 FCC Rcd 2500, 2550–51 paras. 144–146 (2002). To be consistent with the size standard of “very small business” proposed for the 1427–1432 MHz band for those entities with average gross revenues for the three preceding years not exceeding \$3 million, the *Service Rules Notice* proposed to use the terms

SBA has approved these small business size standards for the aforementioned bands.⁷⁰ Correspondingly, the Commission adopted a bidding credit of 15 percent for “small businesses” and a bidding credit of 25 percent for “very small businesses.”⁷¹ This bidding credit structure was found to have been consistent with the Commission's schedule of bidding credits, which may be found at Section 1.2110(f)(2) of the Commission's rules.⁷² The Commission found that these two definitions will provide a variety of businesses seeking to provide a variety of services with opportunities to participate in the auction of licenses for this spectrum and will afford such licensees, who may have varying capital costs, substantial flexibility for the provision of services.⁷³ The Commission noted that it had long recognized that bidding preferences for qualifying bidders provide such bidders with an opportunity to compete successfully against large, well-financed entities.⁷⁴ The Commission also noted that it had found that the use of tiered or graduated small business definitions is useful in furthering its mandate under Section 309(j) to promote opportunities for and disseminate licenses to a wide variety of applicants.⁷⁵ An auction for one license

“entrepreneur” and “small business” to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively. Because the Commission is not adopting small business size standards for the 1427–1432 MHz band, it instead uses the terms “small business” and “very small business” to define entities with average gross revenues for the three preceding years not exceeding \$40 million and \$15 million, respectively.

⁷⁰ See Letter from Hector V. Barreto, Administrator, Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, dated Jan. 18, 2002.

⁷¹ Such bidding credits are codified for the unpaired 1390–1392 MHz, paired 1392–1395 MHz, and the paired 1432–1435 MHz bands in 47 CFR 27.807. Such bidding credits are codified for the unpaired 1670–1675 MHz band in 47 CFR 27.906.

⁷² In the *Part 1 Third Report and Order*, the Commission adopted a standard schedule of bidding credits, the levels of which were developed based on its auction experience. *Part 1 Third Report and Order*, 13 FCC Rcd at 403–04 para. 47; see also 47 CFR 1.2110(f)(2).

⁷³ See *Service Rules Notice*, 17 FCC Rcd at 2550–51 para. 145.

⁷⁴ See, e.g., Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems; Implementation of Section 309(j) of the Communications Act—Competitive Bidding, WT Docket No. 96–18, PR Docket No. 93–253, *Memorandum Opinion and Order on Reconsideration and Third Report and Order*, 14 FCC Rcd 10030, 10091 para. 112 (1999).

⁷⁵ 47 U.S.C. 309(j)(3)(B), (4)(C)–(D). The Commission will also not adopt special preferences for entities owned by minorities or women, and rural telephone companies. The Commission did not receive any comments on this issue, and it does

in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

52. *Mobile Satellite Service Carriers.* Neither the Commission nor the U.S. Small Business Administration has developed a small business size standard specifically for mobile satellite service licensees. The appropriate size standard is therefore the SBA standard for Satellite Telecommunications. The category of Satellite Telecommunications “comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”⁷⁶ The category has a small business size standard of \$15 million or less in average annual receipts, under SBA rules.⁷⁷ For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year.⁷⁸ Of this total, 307 firms had annual receipts of under \$10 million, and 26 firms had receipts of \$10 million to \$24,999,999.⁷⁹ Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by its action.

53. *Internet Service Providers.* In the Notice, the Commission seeks comment on whether to extend hearing aid compatibility requirements to entities offering access to Voice over Internet Protocol (VoIP) applications over Wi-Fi⁸⁰ and other wireless technologies that may fall outside the definition of CMRS and/or the criteria in Section 20.19(a), such as those operating on networks that do not employ “an in-network switching facility that enables

not have an adequate record to support such special provisions under the current standards of judicial review. See *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) (requiring a strict scrutiny standard of review for government mandated race-conscious measures); *United States v. Virginia*, 518 U.S. 515 (1996) (applying an intermediate standard of review to a state program based on gender classification).

⁷⁶ U.S. Census Bureau, 2007 NAICS Definitions, “517410 Satellite Telecommunications”; <http://www.census.gov/naics/2007/def/ND517410.HTM>.

⁷⁷ 13 CFR 121.201, NAICS code 517410.

⁷⁸ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 517410 (issued Nov. 2005).

⁷⁹ *Id.* An additional 38 firms had annual receipts of \$25 million or more.

⁸⁰ Wi-Fi (Wireless Fidelity) is a wireless technology that is based on the Institute of Electrical and Electronics Engineers 802.11 standards.

the provider to reuse frequencies and accomplish seamless hand-offs.” Such applications may be provided, for example, by Internet Service Providers (ISPs). ISPs are Internet Publishing and Broadcasting and Web Search Portals⁸¹ that provide clients access to the Internet and generally provide related services such as web hosting, web page designing, and hardware or software consulting related to Internet connectivity. To gauge small business prevalence for these Internet Publishing and Broadcasting and Web Search Portals, the Commission must, however, use current census data that are based on the previous category of Internet Service Providers and its associated size standard. That standard was: All such firms having \$23.5 million or less in annual receipts. Accordingly, to use data available to us under the old standard and Census Bureau data for 2002, there were 2,529 firms in this category that operated for the entire year.⁸² Of these, 2,437 firms had annual receipts of under \$10 million, and an additional 47 firms had receipts of between \$10 million and \$24,999,999. Consequently, the Commission estimates that the majority of these firms are small entities that may be affected by its action.

54. *All Other Information Services.* “This industry comprises establishments primarily engaged in providing other information services (except new syndicates and libraries and archives).”⁸³ VoIP services over wireless technologies could be provided by entities that provide other services such as email, online gaming, web browsing, video conferencing, instant messaging, and other, similar IP-enabled services. The SBA has developed a small business size standard for this category; that size standard is \$6.5 million or less in average annual receipts.⁸⁴ According to Census Bureau data for 1997, there were 195 firms in this category that

operated for the entire year.⁸⁵ Of these, 172 had annual receipts of under \$5 million, and an additional nine firms had receipts of between \$5 million and \$9,999,999. Consequently, the Commission estimates that the majority of these firms are small entities that may be affected by its action.

55. *Part 15 Handset Manufacturers.* Manufacturers of unlicensed wireless handsets may also become subject to requirements in this proceeding for their handsets used to provide VoIP applications. The Commission has not developed a definition of small entities applicable to unlicensed communications handset manufacturers. Therefore, the Commission will utilize the SBA definition applicable to Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”⁸⁶ The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: All such firms having 750 or fewer employees.⁸⁷ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.⁸⁸ Of this

total, 1,010 had employment of less than 500, and an additional 13 had employment of 500 to 999.⁸⁹ Thus, under this size standard, the majority of firms can be considered small.

56. *Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: Transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has developed a small business size standard for firms in this category, which is: All such firms having 750 or fewer employees.⁹⁰ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of less than 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.

57. *Radio, Television, and Other Electronics Stores.* The Census Bureau defines this economic census category as follows: “This U.S. industry comprises: (1) Establishments known as consumer electronics stores primarily engaged in retailing a general line of new consumer-type electronic products; (2) establishments specializing in retailing a single line of consumer-type electronic products (except computers); or (3) establishments primarily engaged in retailing these new electronic products in combination with repair services.”⁹¹ The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: All such firms having \$9 million or less in annual receipts.⁹² According to Census Bureau data for 2002, there were 10,380 firms in this category that operated for the entire

businesses in this category, including the numbers of small businesses. In this category, the Census breaks out data for firms or companies only to give the total number of such entities for 2002, which was 929.

⁸⁹ *Id.* An additional 18 establishments had employment of 1,000 or more.

⁹⁰ 13 CFR 121.201, NAICS code 334220.

⁹¹ U.S. Census Bureau, 2002 NAICS Definitions, “443112 Radio, Television, and Other Electronics Stores”; <http://www.census.gov/epcd/naics02/def/NDEF443.HTM>.

⁹² 13 CFR 121.201, NAICS code 443112.

⁸¹ U.S. Census Bureau, “Internet Publishing and Broadcasting and Web Search Portals,” NAICS code 519130.

⁸² U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 518111 (issued Nov. 2005).

⁸³ U.S. Census Bureau, “2002 NAICS Definitions: 519190 All Other Information Services” (Feb. 2004) <http://www.census.gov>. The Commission notes that the Commission has not reached conclusions as to whether, or under what conditions, VoIP services constitute communications or information services under the Communications Act, and our identification of this group of small entities as providers of “information services” under the Census Bureau definition is not intended to indicate any conclusions in this regard.

⁸⁴ 13 CFR 121.201, NAICS code 519190.

⁸⁵ U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization),” Table 4, NAICS code 514199 (issued Oct. 2000). This category was created for the 2002 Economic Census by taking a portion of the superseded 1997 category, “All Other Information Services,” NAICS code 514199. The data cited in the text above are derived from the superseded category.

⁸⁶ U.S. Census Bureau, 2002 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

⁸⁷ 13 CFR 121.201, NAICS code 334220.

⁸⁸ U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (rel. May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of

year.⁹³ Of this total, 10,080 firms had annual sales of under \$5 million, and 177 firms had sales of \$5 million or more but less than \$10 million.⁹⁴ Thus, the majority of firms in this category can be considered small.

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

58. The Commission proposes to extend broadly to providers of wireless communications among members of the public or a substantial portion of the public using equipment that contains a built-in speaker and is typically held to the ear, and to the manufacturers of such equipment, the same hearing aid compatibility rules that currently apply to a defined category of commercial mobile radio service (CMRS). These regulations include: (1) Requirements to deploy a certain number or percentage of handset models that meet hearing aid compatibility standards, (2) “refresh” requirements on manufacturers to meet their hearing aid-compatible handset deployment benchmarks in part using new models, (3) a requirement that service providers offer hearing aid-compatible handsets with varying levels of functionality, (4) a requirement that service providers make their hearing aid-compatible models available to consumers for testing at their owned or operated stores, (5) point of sale disclosure requirements, (6) requirements to make consumer information available on the manufacturer’s or service provider’s Web site, and (7) annual reporting requirements. There is a *de minimis* exception from all of the requirements except reporting for small entities, and for all entities during their first two years of offering handsets, that offer two or fewer handset models over an air interface. The Commission seeks comment on whether there are any classes of handsets for which either it is technically infeasible to meet the hearing aid compatibility requirements or satisfying those requirements would increase costs to the point where the handsets could not be successfully marketed. The Commission also seeks comment on the appropriate transition period for applying hearing aid compatibility requirements to

telephones that are outside the currently covered subset of CMRS.

59. The Commission’s rules require that wireless service providers make their hearing aid-compatible handset models available for consumer testing in each retail store that they own or operate. The Commission seeks comment on whether it should extend the in-store testing requirement to some or all entities that sell handsets to consumers through physical locations. In addition, the Commission seeks comment about whether it should adopt a rule providing that a return policy allowing a customer with hearing loss to return a handset without penalty would qualify as an alternative means of satisfying the in-store testing requirement.

60. Under the Commission’s rules, handsets must be tested for hearing aid compatibility at their maximum output power. The Commission seeks comment on whether it should treat as hearing aid-compatible for all purposes handsets that allow consumers to reduce the maximum transmit power only for operations over the GSM air interface in the 1900 MHz band by up to 2.5 decibels and that meet the criteria for an M3 rating after such power reduction. The Commission proposes that if it were to extend the ability to meet hearing aid compatibility standards in this manner, it should require the handset to operate at full power when calling 911, the manufacturer or service provider would have to disclose that activation of a special mode is required to meet the hearing aid compatibility standard, and the device manual or product insert would have to explain how to activate the special mode and the possibility of a loss of coverage. The Commission seeks comment on these and any other possible conditions on this rule change.

5. Steps Proposed To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

61. The RFA requires an agency to describe any significant, specifically small business 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) exemption from

coverage of the rule, or any part thereof, for small entities.”⁹⁵

62. The Commission seeks comment generally on the effect the rule changes considered in this FNPRM would have on small entities, on whether alternative rules should be adopted for small entities in particular, and on what effect such alternative rules would have on those entities. The Commission invites comment on ways in which it can achieve its goals while minimizing the burden on small wireless service providers, equipment manufacturers, and other entities.

63. More specifically, the Commission seeks comment on whether there are any classes of handsets that provide wireless communications among members of the public or a substantial portion of the public via a built-in speaker where the equipment is typically held to the ear for which either it is technologically infeasible to meet hearing aid compatibility requirements or satisfying those requirements would increase costs to the point where the handsets could not be successfully marketed. The Commission seeks comment on whether, for reasons of technological infeasibility or prohibitive costs, the specific numerical benchmarks set forth in the Commission’s rules or other rule provisions cannot be applied to any class of handsets. The Commission seeks specific evidence as to why particular requirements cannot be met and what alternative requirements would be feasible and appropriate. The Commission also asks commenters to suggest alternatives that may further reduce possible burdens on small entities regarding meeting the hearing aid compatibility requirements.

64. The Commission recognizes that it takes time for handsets with new specifications to be designed, produced, and brought to market. The Commission therefore seeks comment on the appropriate transition period for applying hearing aid compatibility requirements to telephones that are outside the subset of CMRS that is currently covered by Section 20.19(a). In recognition that smaller service providers may encounter delays in obtaining new model handsets from manufacturers and vendors, the Commission specifically asks whether smaller service providers should have a longer transition period than Tier I carriers. The Commission also asks commenters to suggest other alternative transition periods that could further lessen the burden on small businesses.

⁹³ U.S. Census Bureau, 2002 Economic Census, Industry Series: Retail Trade, Table 4, Sales Size of Firms for the United States: 2002, NAICS code 443112 (issued Nov. 2005).

⁹⁴ *Id.* An additional 123 firms had annual sales of \$10 million or more. As a measure of small business prevalence, the data on annual sales are roughly equivalent to what one would expect from data on annual receipts.

⁹⁵ 5 U.S.C. 603(c)(1)–(c)(4).

65. The Commission also seeks comment as to whether the Commission should extend the in-store testing requirement to some or all entities other than those owned or operated by service providers that sell handsets to consumers through physical locations. The Commission further seeks comment, if it decides to extend this requirement to some but not all retail outlets, on how the scope of the requirement should be defined. Among other things, the Commission asks whether the size of an entity should be a factor in this definition. The Commission's goal is to arrive at a definition that is clear and easy to apply, and at the same time closely identifies those retailers for which the benefits of the rule outweigh the burdens while reducing the burden on small entities. The Commission also seeks comment on alternatives to extending the in-store testing requirement, including whether a return policy allowing a customer with hearing loss to return a handset without penalty should qualify as an alternative means of satisfying the requirement. The Commission asks commenters to suggest alternatives that may further reduce the impact on small entities.

66. Additionally, the FNPRM seeks comment on whether the Commission should treat handsets that allow consumers to reduce the maximum transmit power only for operations over the GSM air interface in the 1900 MHz band by up to 2.5 decibels and that meet criteria for an M3 rating after such power reduction as hearing aid-compatible for all purposes. This rule change would ease the burden on small entities by making it easier to satisfy hearing aid compatibility requirements for this class of handsets.

67. Finally, if the Commission were to extend the ability to meet hearing aid compatibility standards by allowing the user to reduce the maximum power for GSM operations in the 1900 MHz band, it proposes to do so subject to the same conditions that it has imposed in the context of the *de minimis* rule. Thus, the handset would have to operate at full power when calling 911, the manufacturer or service provider would have to disclose that activation of a special mode is required to meet the hearing aid compatibility standard, and the device manual or product insert would have to explain how to activate the special mode and the possibility of a loss of coverage. This rule change would ensure that consumers have the information they need to choose and operate a handset that will best function with their hearing aid or cochlear implant. The Commission seeks to

receive alternative proposals that would achieve this goal while further reducing the burdens on small business.

68. For each of the proposals in the FNPRM, the Commission seeks discussion, and where relevant, alternative proposals, on the effect that each prospective new requirement, or alternative rules, might have on small entities. For each proposed rule or alternative, the Commission seeks discussion about the burden that the prospective regulation would impose on small entities and how the Commission could impose such regulations while minimizing the burdens on small entities. For each proposed rule, the Commission asks whether there are any alternatives the Commission could implement that could achieve the Commission's goals while at the same time minimizing the burdens on small entities. For the duration of this docketed proceeding, the Commission will continue to examine alternatives with the objectives of eliminating unnecessary regulations and minimizing any significant economic impact on small entities.

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

69. None.

B. Initial Paperwork Reduction Act Analysis

70. The FNPRM does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4).

C. Other Procedural Matters

1. Ex Parte Presentations

71. The rulemaking shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. Other requirements pertaining to oral and written presentations are set forth in Section 1.1206(b) of the Commission's rules.

2. Comment Filing Procedures

72. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before October 25, 2010, and reply comments on or before November 22, 2010. All filings related to this Further Notice of Proposed Rulemaking should refer to WT Docket No. 07-250. 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.

- **ECFS filers** must transmit one electronic copy of the comments for WT Docket No. 07-250. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket 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. 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 the Commission continues to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW., Washington, DC 20554.

- **All hand-delivered or messenger-delivered paper filings** for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW., Room TW-A325, Washington, DC 20554. 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 must be addressed to 445 12th Street, SW., Washington, DC 20554.

73. Parties should send a copy of their filings to John Borkowski, Federal Communications Commission, Room 6404, 445 12th Street, SW., Washington, DC 20554, or by e-mail to John.Borkowski@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

74. Documents in WT Docket No. 07-250 will be available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com.

3. Accessible Formats

75. 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) or 202-418-0432 (TTY).

IV. Ordering Clauses

76. Accordingly, *It is ordered* that, pursuant to the authority of sections 4(i), 303(r), and 710 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), and 610, this Further Notice of Proposed Rulemaking is hereby adopted.

77. *It is further ordered* that pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 CFR 1.415, 1.419, interested parties may file comments on this Further Notice of Proposed Rulemaking on or before October 25, 2010, and reply comments on or before November 22, 2010.

78. *It is further ordered* that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, shall send a copy of this FNPRM, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 20

Communications common carriers, Communications equipment, Incorporation by reference, and Radio.

Federal Communications Commission.

Bulah P. Wheeler,
Deputy Manager.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 20 as follows:

PART 20—COMMERCIAL MOBILE RADIO SERVICES

1. The authority citation for part 20 continues to read as follows:

Authority: 47 U.S.C. 154, 160, 201, 251-254, 303, 332, and 710 unless otherwise noted.

§ 20.19 [Amended]

2. Amend § 20.19 as follows:
 - a. Revise paragraph (a)(1);
 - b. Redesignate paragraph (a)(3) as (a)(4);
 - c. Add new paragraph (a)(3);
 - d. Revise newly designated paragraph (a)(4)(iv);
 - e. Add paragraph (a)(4)(v);
 - f. Revise paragraph (b) introductory text;
 - g. Add paragraph (b)(1)(iii);
 - h. Revise paragraph (c)(4);
 - i. Revise paragraph (d)(4);
 - j. Add paragraph (f)(3); and
 - k. Add paragraph (l).

§ 20.19 Hearing aid-compatible mobile handsets.

(a) *Scope of section; definitions.* (1) The hearing aid compatibility requirements of this section apply to providers of wireless service that can be used for voice communications among members of the public or a substantial portion of the public, where such service is provided over frequencies in the 800-950 MHz or 1.6-2.5 GHz bands using any air interface for which technical standards are stated in the standard document "American National Standard Methods of Measurement of Compatibility Between Wireless Communication Devices and Hearing Aids," American National Standards Institute (ANSI) C63.19-2007 (June 8, 2007).

(3) The requirements of paragraph (l) of this section apply to all entities that sell wireless handsets that are used in delivery of the services specified in paragraph (a)(1) of this section to consumers through a physical location, whether or not those entities are included in paragraph (a)(1) or (a)(2) of this section.

(iv) Service provider refers to a provider of wireless service to which the requirements of this section apply.

(v) Tier I carrier refers to a service provider that offers commercial mobile radio service nationwide.

(b) Hearing aid compatibility; technical standards. A wireless handset used only over the frequency bands and air interfaces referenced in paragraph (a)(1) of this section is hearing aid-compatible with regard to radio frequency interference or inductive coupling if it meets the applicable technical standard(s) set forth in paragraphs (b)(1) and (b)(2) of this section for all frequency bands and air interfaces over which it operates, and the handset has been certified as compliant with the test requirements for the applicable standard pursuant to § 2.1033(d) of this chapter. A wireless handset that incorporates an air interface or operates over a frequency band for which no technical standards are stated in ANSI C63.19-2007 (June 8, 2007) is hearing aid-compatible if the handset otherwise satisfies the requirements of this paragraph.

(1) * * *

(iii) GSM operations at 1900 MHz. Notwithstanding paragraphs (b)(1)(i) and (ii) of this section, a wireless handset that operates over the GSM air interface in the 1900 MHz frequency band is hearing aid-compatible for radio frequency interference if;

(A) The handset enables the user optionally to reduce the maximum power at which the handset will operate by no more than 2.5 decibels, except for emergency calls to 911, only for GSM operations in the 1900 MHz band;

(B) The handset would meet, at a minimum, the M3 rating associated with the technical standard set forth in ANSI C63.19-2007 (June 8, 2007) if the power as so reduced were the maximum power at which the handset could operate; and

(C) Customers are informed of the power reduction mode as provided in paragraph (f)(3) of this section.

* * * * *

(c) * * *

(4) All service providers. Each Tier I carrier and other service provider must offer its customers a range of hearing aid-compatible models with differing levels of functionality (e.g., operating capabilities, features offered, prices). Each provider may determine the criteria for determining these differing levels of functionality, and must disclose its methodology to the Commission pursuant to paragraph (i)(3)(vii) of this section.

(d) * * *

(4) All service providers. Each Tier I carrier and other service provider must offer its customers a range of hearing aid-compatible models with differing

levels of functionality (e.g., operating capabilities, features offered, prices). Each provider may determine the criteria for determining these differing levels of functionality, and must disclose its methodology to the Commission pursuant to paragraph (i)(3)(vii) of this section.

* * * * *

(f) * * *

(3) Disclosure requirement relating to handsets that allow the user to reduce the maximum power for GSM operation in the 1900 MHz band. Handsets that meet the technical standard for radio frequency interference pursuant to paragraph (b)(1)(iii) of this section shall be labeled as meeting an M3 rating.

* * * * *

(l) *In-store testing.* Any entity that sells wireless handsets to consumers through a physical location must make available for consumers to test, in each retail store that it owns or operates, all of its handset models that comply with paragraph (b)(1) or (b)(2) of this section.

[FR Doc. 2010-22254 Filed 9-7-10; 8:45 am]

BILLING CODE 6712-01-P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 53

[FAR Case 2009-029; Docket 2010-0096, Sequence 1]

RIN 9000-AL72

Federal Acquisition Regulation; Clarification of Standard Form 26— Award/Contract

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to revise (a) the header for blocks 17 and 18 and (b) block 18 of the Standard Form (SF) 26 to clarify that block 18 should not be used when awarding a negotiated procurement and should only be checked when awarding a sealed-bid contract.

DATES: Interested parties should submit written comments to the Regulatory

Secretariat on or before November 8, 2010 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAR Case 2009-029 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2009-029” under the heading “Enter Keyword or ID” and selecting “Search”. Select the link “Submit a Comment” that corresponds with “FAR Case 2009-029”. Follow the instructions provided at the “Submit a Comment” screen. Please include your name, company name (if any), and “FAR Case 2009-029” on your attached document.

- Fax: 202-501-4067.

- Mail: General Services

Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1800 F Street, NW., Room 4041, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR Case 2009-029, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Michael O. Jackson, Procurement Analyst, at (202) 208-4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAR Case 2009-029.

SUPPLEMENTARY INFORMATION:

A. Background

This case was initiated after an agency identified an inconsistency in the use of the SF 26 by contracting officers. Although block 18 of the form is intended for use only with sealed-bid procurements, contracting officers have used block 18 with negotiated procurements, which has had unintended negative consequences in certain contract disputes.

FAR 53.214(a) prescribes the SF 26 for use in contracting for supplies and services by sealed bidding (except for construction and architect-engineer services). The SF 26 is used to award sealed-bid contracts after obtaining bids using a SF 33, Solicitation, Offer, and Award. FAR 14.408-1(d)(1) specifies that, if an offer made using a SF 33 leads to further changes, the resulting contract must be prepared as a bilateral document using the SF 26.

This case is based on instances where contracting officers have mistakenly

checked block 18 when awarding negotiated, not sealed bid, contracts. Such use has created the potential for disputes in situations where the Government's intent was not to accept the terms of the offer in its entirety, as the current wording of block 18 may imply.

The Councils believe that revising the header for blocks 17 and 18 and block 18 of the form will eliminate the issue. In addition to the recent enhancements to the instructions for use of the form, at FAR 53.214 and 53.215-1, the Councils propose to add “sealed bid” to the title of block 18, change “offer” to “bid” each time it occurs in block 18, and add a new sentence at the end of the block stating that block 18 should only be checked when awarding a sealed-bid contract.

These changes will not prohibit the use of the SF 26 for awarding negotiated procurements; it will only prohibit the use of block 18 of the SF 26 when awarding negotiated procurements.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6 of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses, but rather clarifies an area open to confusion. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR part 53 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR Case 2009-029), in all correspondence. The Councils will also consider comments from small entities concerning the existing regulations in parts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2009-029), in all correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management