

limitations exist!), the property owner relinquishes its right to control the use of its property when it leases the property"); id. (noting "that (absent a valid restriction) a tenant may put the leased premises to whatever lawful purpose it so desires") (citation omitted). In fact, use restrictions on property that tenants have the exclusive right to occupy and possess are commonplace. For example, I may possess the exclusive right to occupy the patio adjacent to my apartment, and I may also have an exclusive right generally to use it. But the landlord can, by power of private contract, restrict my use of the balcony: that is, notwithstanding my exclusive right to occupy and generally use the balcony, I may not be legally entitled to, say, hang laundry on its rails or store my bicycle there. The landlord has chosen not to bargain away those aspects of his right to use the property and thus retains them.

I do not think that section 207 authorizes us to deprive landlords of their right to retain aspects of the right to use their property. Conversely, I do not think that section 207 authorizes us to bestow new property rights upon tenants—here, the right to use property for certain purposes—at the expense of landlords. Although the item reasons that the statute does not "direct the Commission to impose affirmative duties on" non-viewers "to grant access to restricted areas to permit the installation of" reception devices, *supra*, that is exactly what the rules governing rental property do. They require landlords to transfer certain usage rights to tenants in order to allow them to attach devices; that is surely an affirmative act and, now, a federal obligation.

To be sure, the language of section 207 is exceedingly broad, obliging us to adopt regulations "to prohibit restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception" of services. But we should always read these kinds of statutes against the backdrop of the Takings Clause, as *Bell Atlantic Co. v. FCC* teaches. See 24 F.3d 1441 (D.C. Cir. 1994). Because of the Takings issues that are at least arguably raised here, I would stop short of extending these rules to viewers who lack an ownership interest in the property to which they wish to affix reception devices. There is no question but that the Commission met its obligation under section 207 in the first R&O by outlawing governmental and homeowners' association rules that impair viewers' abilities to employ reception devices. There is no statutory need to go further and create constitutional problems by extending the rules to property in which viewers lack any ownership interest.

To sum up, it is not clear to me that there is a significant difference, for purposes of Takings Clause analysis, between lease provisions that prohibit the installation of reception devices in common/restricted access areas and lease provisions that do so in other rental property areas. Under *Florida Power*, the constitutionality of the OTARD rules in either context turns on the question of consent and, thus, on the terms of the particular agreement between the landlord and the tenant. It seems to me that if one of these situations presents Takings problems,

as this item concludes, then so does the other. Moreover, the circularity of the standard adopted today suggests that section 207 was never meant to apply outside the context of property in which the viewer has an ownership interest. For these reasons, and because the decision to extend OTARD rules to leased property is a generally unnecessary incursion on private property rights, I respectfully dissent.

[FR Doc. 98-33869 Filed 12-22-98; 8:45 am]

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 26

[ET Docket No. 94-32; FCC 98-212]

### Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule; petitions for reconsideration.

**SUMMARY:** The Federal Communications Commission has adopted a Memorandum Opinion and Order (MO&O) responding to petitions for reconsideration of the First Report and Order and Second Report and Order regarding the General Wireless Communications Service (GWCS). The MO&O grants in part a petition for reconsideration of the Second Report and Order filed by the Wireless Cable Association International (WCAI), to the extent that it modifies the rule on antenna structure clearance procedures to conform with streamlined rules applicable to all services. The MO&O dismisses in part and denies in part a petition for reconsideration of the First Report and Order filed by several organizations (Joint Petitioners), and a petition for reconsideration of the Second Report and Order filed by the Association for Maximum Service Television, Inc. (MSTV).

**EFFECTIVE DATE:** January 22, 1999.

**FOR FURTHER INFORMATION CONTACT:** Peter G. Wolfe, Policy Division, Wireless Telecommunications Bureau, (202) 418-1310.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Memorandum Opinion and Order in ET Docket No. 94-32, FCC 98-212, adopted on August 26, 1998, and released on November 25, 1998. The complete text of this decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C., and also may be purchased from the

Commission's copy contractor, International Transcription Service, (202) 857-3800, 1231 20th Street, N.W., Washington, DC 20036.

### Synopsis of Memorandum Opinion and Order

1. The Commission adopts a Memorandum Opinion and Order (MO&O) which grants in part a petition for reconsideration of the Second Report and Order (Second R&O) in this proceeding (60 FR 40712, August 9, 1998), filed by the Wireless Cable Association International (WCAI). The MO&O denies WCAI's request that all GWCS licensees be permitted to partition their service areas because the Commission intends to address this issue in another proceeding. The MO&O denies a request by WCAI to license GWCS in Basic Trading Areas (BTAs) rather than Economic Areas (EAs), and denies in part and dismisses in part a petition for reconsideration of the First Report and Order (First R&O) (60 FR 13071, March 10, 1995) filed by the Association for Maximum Service Television Inc. (MSTV) and several other organizations (Joint Petitioners) and a petition for reconsideration of the Second R&O filed by MSTV. The latter two petitions both claim that the Commission exceeded its statutory authority in creating GWCS and therefore that the Commission should revisit its decision to establish a licensing structure for the service.

2. The MO&O first considers a petition for reconsideration of the First R&O filed by the Joint Petitioners, claiming that the general allocation of the 4660-4685 MHz band to the Fixed and Mobile services is overly broad because it will permit an unidentified mix of services to operate in the band. The Commission disagrees with this argument, finding that the petitioners merely restate the issues examined and decided in the First R&O. The MO&O also dismisses the Joint Petitioners' argument that the specific allocation of the 4660-4685 MHz band to GWCS is not in the public interest, because the Commission had not designated the frequency band for GWCS at the time the petition was filed, and that the Commission subsequently found in the Second R&O that the designation to GWCS is in the public interest.

3. The MO&O also denies MSTV's petition for reconsideration of the Second R&O dealing with the specific designation of the band for GWCS. MSTV contends that the Commission should suspend this allocation and related assignments pending the resolution of assignment of spectrum to the Broadcast Auxiliary Service in other

proceedings. The Commission determines that the arguments and concerns raised by MSTV were considered and decided in the Second R&O and that MSTV petition and comments and petitions filed by parties in support of MSTV provide no new information or arguments that persuade the Commission that the actions taken in the Second R&O should be changed or set aside.

4. The MO&O denies a request made by WCAI to license GWCS using geographic areas known as BTAs rather than EAs. WCAI argues that the decision made in the Second R&O will seriously prejudice those service providers (including wireless cable operators) that intend to utilize GWCS in conjunction with other services that are licensed on the basis of BTAs. The Commission in denying the request stresses the importance of providing flexibility for a wide range of services without favoring any particular existing service. The Commission finds it particularly appropriate to use a geographical service area designation that is capable of accommodating a broad range of services where, as here, the Commission does not have any firm information as to what the uses of the services are likely to be.

5. WCAI also requests that the Commission should expand the partitioning option adopted in the Second R&O to allow all GWCS licensees, not just rural telephone companies, to partition their service area. The Commission dismisses this request noting that the issue will be resolved in the Geographic Partitioning and Spectrum Disaggregation proceeding, WT Docket 96-148 (Report and Order at 62 FR 00653, January 6, 1997, and Further Notice of Proposed Rule Making at 62 FR 00696, January 6, 1997).

6. The MO&O grants the portion of WCAI's petition which asks that the Commission amend its rules to permit the mounting of antennas on existing structures that have previously received a "no hazard" determination from the Federal Aviation Administration (FAA) without any additional Commission authorization.<sup>1</sup> The Commission finds that it amended its antenna structure clearance procedures after the adoption of the Second R & O, and that these amended rules allow mounting of antennas on existing structures that have already received a "no hazard" determination from the FAA and have

been registered with the Commission without prior Commission approval. Therefore, the Commission grants WCAI's request by amending part 26 of the rules to reflect current antenna structure requirements.

### Revised Final Regulatory Flexibility Analysis

7. As required by Section 603 of the Regulatory Flexibility Act, 5 U.S.C. 603 (RFA),<sup>2</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the First Notice of Proposed Rulemaking (First NPRM)<sup>3</sup> and a Further Initial Regulatory Flexibility Analysis (FIRFA) was incorporated in the Second Notice of Proposed Rulemaking (Second NPRM).<sup>4</sup> The Commission sought written public comments on the proposals in the First NPRM and the Second NPRM, including on the IRFA and the FIRFA. A Final Regulatory Flexibility Analysis (FRFA) was incorporated in the Commission's First R&O in this proceeding and in the Commission's Second R&O. The Commission's Revised Final Regulatory Flexibility Analysis (RFRFA) in this MO&O conforms to the RFA, as amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) (CWAAA).<sup>5</sup>

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

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

<sup>2</sup> Regulatory Flexibility Act, Public Law No. 96-354, 94 Stat. 1164 (enacted Sept. 19, 1980) (Regulatory Flexibility Act).

<sup>3</sup> 59 FR 59292, November 17, 1994.

<sup>4</sup> 60 FR 13102, March 10, 1995.

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

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

9. No comments were submitted in direct response to the Initial or Final Regulatory Flexibility Analyses. However, WCAI filed a Petition for Reconsideration of the Second R&O which contended that the Commission should amend its rules to permit the mounting of antennas on existing structures that have previously received a "no hazard" determination from the FAA, without any additional Commission authorization.

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

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

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

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

12. The 1992 Census of Transportation, Communications, and Utilities, conducted by the Bureau of the Census, which is the most recent information available, shows that only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees.<sup>8</sup>

<sup>6</sup> In the Fourth Report and Order in this proceeding ( 63 FR 56573, October 22, 1998), the Commission revised the rules applicable to GWCS to provide that, in calculating gross revenues for the purposes of small business eligibility, applicants will be required to count the gross revenues of the de facto and de jure controlling interests of the applicant and its affiliates.

<sup>7</sup> 13 CFR 121.201, Standard Industrial Classification (SIC) Code 4812.

<sup>8</sup> U.S. Bureau of the Census, U.S. Department of Commerce, 1992 Census of Transportation, Communications, and Utilities, UC92-2S-1, Subject Series, Establishment and Firm Size, Table 5,

<sup>1</sup> WCAI indicates that 47 CFR 26.309(a) provides that a GWCS antenna structure may not be 200 feet or more above ground level without prior Commission approval.

Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective GWCS licensees can be made, we assume, for purposes of our evaluations and conclusions in this revised FRFA, that all of the licenses will be awarded to small entities, as that term is defined by the SBA.

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

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

#### VI. Significant Alternatives Considered and Rejected

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

#### VII. Report to Congress

15. The Commission shall send a copy of this Revised Final Regulatory Flexibility Analysis, together with the MO&O, in a report to Congress pursuant of the Small Business Regulatory Enforcement Fairness Act of 1996.<sup>9</sup> A copy of the MO&O and this RFRFA (or summary thereof) shall be sent to the Chief Counsel for Advocacy for the Small business Administration.

#### Ordering Clauses

16. As required by Section 603 of the Regulatory Flexibility Act,<sup>10</sup> the Commission has prepared a Revised Final Regulatory Flexibility Analysis of the expected impact on small entities of the changes in our rules adopted herein. The Revised Final Regulatory Flexibility Analysis is in this document and in Appendix B of the full text of the MO&O.

17. This action is taken pursuant to sections 4(i), 5(c), 302, 303(c), 303(f),

303(g), and 303(r) of the Communications Act of 1934, 47 U.S.C. 154(i), 155(c), 302, 303(c), 303(f), 303(g), 303(r).

18. Accordingly, it is ordered that the petition for reconsideration of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, First Report and Order and Second Notice of Proposed Rulemaking, filed by the Association for Maximum Service Television, Inc., the Association of America's Public Television Stations, Capital Cities/ABC, Inc., CBS, Inc., the Fox Television Group of companies, the National Association of Broadcasters, the National Broadcasting Company, Inc., the Public Broadcasting Service, Inc., and the Radio-Television News Directors Association is dismissed in part and otherwise is denied.

19. It is further ordered that the petition for reconsideration of Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32, Second Report and Order, filed by Association for Maximum Service Television, Inc., is denied, and the petition for reconsideration filed by Wireless Cable Association International is granted in part to the extent discussed, and otherwise is denied.

20. It is further ordered that Part 26 of the Commission's Rules is amended and will become effective January 22, 1999.

21. It is further ordered that the Director, Office of Public Affairs, shall send a copy of this Order, including the Revised Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. 603(a).

#### List of Subjects in 47 CFR Part 26

Radio, General wireless communications service.

Federal Communications Commission.

**Magalie Roman Salas,**

*Secretary.*

#### Rule Changes

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

#### PART 26—GENERAL WIRELESS COMMUNICATIONS SERVICE

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

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

2. Add a new section 26.56 to read as follows:

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

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

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

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

#### § 26.309 [Removed]

3. Section 26.309 is removed.

[FR Doc. 98-33979 Filed 12-22-98; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 970129015-8287-08; I.D. 042597B]

RIN 0648-A184

#### Taking of Marine Mammals Incidental to Commercial Fishing Operations; Harbor Porpoise Take Reduction Plan Regulations; Correction

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

Employment Size of Firms: 1992, SIC Code 4812 (issued May 1995).

<sup>9</sup> 5 U.S.C. 801(a)(1)(A).

<sup>10</sup> 5 U.S.C. 603.