

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Service Rules Governing Public Safety)	WT Docket No. 96-86
Narrowband Operations in the 769-775/799-805)	
MHz Bands)	

ORDER

Adopted: December 3, 2012

Released: December 3, 2012

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. By this Order, the Federal Communications Commission's Public Safety and Homeland Security Bureau ("Bureau"), on delegated authority, conforms section 90.529(b) of the Commission's rules¹ regarding the "substantial service" deadlines for state-licensed 700 MHz public safety narrowband channels to comport with the deadlines specified in the Commission's July 2011 *Declaratory Ruling*.² Specifically, in the *Declaratory Ruling*, the Commission clarified that the five- and ten-year substantial service deadlines set forth in section 90.529 run from the June 12, 2009, completion date of the DTV transition, and thus occur on June 13, 2014, and June 13, 2019, respectively.³ This Order revises the language in section 90.529(b) to reflect this clarification.

II. BACKGROUND

2. In 1998, the Commission established the initial band plan and service rules for the 24 megahertz of public safety spectrum in the 700 MHz band that was reallocated from television broadcast use as a result of the DTV transition.⁴ In 2000, the Commission designated 2.4 megahertz of the 700 MHz narrowband spectrum for statewide geographic licensing.⁵ The Commission also established "substantial service" performance requirements for the statewide licenses, including five- and ten-year

¹ See 47 C.F.R. §§ 90.529(b)(1) and (2).

² See Service Rules Governing Public Safety Narrowband Operations in the 769-775/799-805 MHz Bands, WT Docket No. 06-86, *Declaratory Ruling*, 26 FCC Rcd 10895 (2011) ("*Declaratory Ruling*").

³ See *id.* at 10895 ¶ 1.

⁴ See *id.* at ¶ 2 (citing Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *First Report and Order and Third Notice of Proposed Rulemaking*, 14 FCC Rcd 152 (1998)).

⁵ See *id.* (citing Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, WT Docket No. 96-86, *Third Memorandum Opinion and Order and Third Report and Order*, 15 FCC Rcd 19844, 19864 ¶ 48 (2000) ("*Third Report and Order*").

benchmarks for state licensees to establish specified levels of substantial service within their statewide license areas.⁶

3. Because the continued presence of incumbent TV broadcasters in the 700 MHz band could limit state licensees' ability to deploy systems on statewide narrowband channels, the Commission determined that the five- and ten-year benchmarks would be calculated from the date that incumbent broadcasters were required to vacate the 700 MHz band – *i.e.*, the DTV transition deadline.⁷ At the time the Commission made this determination, the anticipated DTV transition date for incumbent broadcasters was December 31, 2006.⁸ Accordingly, for purposes of the rules the Commission calculated the substantial service benchmarks using January 1, 2007, as the starting date, causing the five-year benchmark (provision of substantial service to one-third of the statewide population or territory) to fall on January 1, 2012, and the ten-year benchmark (provision of substantial service to two-thirds of the statewide population or territory) to fall on January 1, 2017.⁹ The Commission codified these specific dates in Section 90.529.¹⁰

4. After the Commission adopted the substantial service requirements for statewide narrowband licensees, Congress twice extended the deadline for completing the DTV transition, which was completed on June 12, 2009.¹¹ However, the Commission did not update section 90.529 to reflect these extensions.¹² The language of the rule, therefore, continues to specify January 1, 2012, and January 1, 2017, respectively, as the five- and ten-year benchmark dates, while also stating that these benchmark dates occur within five and ten years “of the date that incumbent broadcasters are required to relocate to other portions of the spectrum.”¹³

5. To provide clarity to state public safety licensees regarding the correct substantial services deadlines that apply under section 90.529(b), the Commission adopted the *Declaratory Ruling*, which clarified that the five- and ten-year substantial service deadlines therein run from the June 12, 2009, completion date of the DTV transition, and thus occur on June 13, 2014, and June 13, 2019, respectively.¹⁴ While the *Declaratory Ruling* provided clarity on this matter, it did not revise the actual language of section 90.529(b) to reflect the correct five- and ten-year benchmark dates.

III. DISCUSSION

6. By this Order, we revise the five- and ten-year substantial service deadlines specified in section 90.529(b) for state licensees to comply with substantial service requirements on their statewide narrowband channels so that they run from the actual DTV transition date of June 12, 2009. Specifically, we revise the language of section 90.529(b)(1) to specify that the five-year benchmark date falls on June 13, 2014, five years after the June 12, 2009, final DTV transition date. Similarly, we revise the language

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See id.* at 10896 ¶ 3 (citing *Third Report and Order*, 15 FCC Rcd 19844, 19871 ¶ 62).

¹⁰ *See* 47 C.F.R. §§ 90.529(b)(1) and (2).

¹¹ In 2006, Congress established a “hard” DTV transition date of February 17, 2009. *See* Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006). In 2009, Congress extended the DTV transition deadline from February 17, 2009, to June 12, 2009. *See* DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

¹² *See* 47 C.F.R. §§ 90.529(b)(1) and (2).

¹³ *Id.*

¹⁴ *See Declaratory Ruling*, 26 FCC Rcd at 10895 ¶ 1.

of section 90.529(b)(2) to specify that the ten-year benchmark date falls on June 13, 2019, ten years after the final DTV transition date.

7. As the Commission explained in the *Declaratory Ruling*, it has always been the Commission's intent that the five- and ten-year substantial service periods for the statewide narrowband channels would commence upon the actual DTV transition date.¹⁵ The language of section 90.529(b) indicates as much, expressly describing the deadlines as occurring five and ten years from "the date that incumbent broadcasters are required to relocate to other portions of the spectrum."¹⁶ As the Commission further explained in the *Declaratory Ruling*, the failure to update the numerical five- and ten-year dates set forth in section 90.529(b) to reflect the extension of the DTV transition date to June 12, 2009, was an inadvertent omission.¹⁷ Because the *Declaratory Ruling* clarified but did not revise the language of section 90.529(b) to correct that administrative oversight, we are issuing this Order to revise the language of section 90.529(b) consistent with its established parameters, as specified by the Commission in the *Declaratory Ruling*.¹⁸

8. We further conclude that the notice and comment requirements of section 553 of the Administrative Procedure Act (APA) do not apply to the rule revisions adopted herein.¹⁹ Section 553(b)(3)(B) of the APA permits implementation of rules without public notice and comment "when the agency for good cause finds ... that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."²⁰ As described above, our revisions to section 90.529 merely conform the rule's language to its established parameters, rendering it internally consistent, and do not in any way affect the substantive content of the rule.²¹ Prior notice and opportunity for comment is therefore unnecessary. We also find good cause for making the rule revisions to section 90.529 adopted in the instant Order effective as soon as possible – *i.e.*, upon publication in the Federal Register.²² The delay in making the ministerial correction to the rule in its codified form would needlessly prolong the risk of confusion caused by the presence of erroneous language in a codification. In addition, because the subject rule change does not alter the obligations of any party, there is no need to provide time for preparation before the rule becomes effective.

¹⁵ See *id.* at 10896 ¶ 6.

¹⁶ 47 C.F.R. §§ 90.529(b)(1) and (2).

¹⁷ See *Declaratory Ruling*, 26 FCC Rcd at 10896 ¶ 6.

¹⁸ Section 0.392 of the Commission's rules delegates authority to the Chief, Public Safety and Homeland Security Bureau to, among other things, issue orders involving ministerial conforming amendments to rule parts. See 47 C.F.R. § 0.392(e). As the Commission explained in the *Declaratory Ruling*, and as the language in section 90.529(b) itself specifies, the five- and ten-year benchmark dates set forth in section 90.529(b) run from the DTV transition date, which was June 12, 2009. See *Declaratory Ruling*, 26 FCC Rcd at 10896 ¶ 6; 47 C.F.R. §§ 90.529(b)(1) and (2).

¹⁹ 5 U.S.C. §§ 551, *et seq.*

²⁰ 5 U.S.C. § 553(b)(3)(B).

²¹ See, e.g., Schools and Libraries Universal Service Support Mechanism, *Second Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 9202, 9232 ¶ 89 (2003) ("Because the new provisions [adopted without notice and comment] are substantively the same as the original definitions, we conclude that all of these rule changes are minor and technical, and we therefore find good cause to conclude that notice and comment procedures of the Administrative Procedure Act (APA) are unnecessary" (citing 5 U.S.C. § 553(b)(3)(B))). See also Schools and Libraries Universal Service Support Mechanism, *Fifth Report and Order and Order*, 19 FCC Rcd 15808, 15830 n.120 (2004); Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220–222 MHz Band by the Private Land Mobile Radio Services, *Order*, 8 FCC Rcd 4161, 4164 ¶ 12 (1993).

²² See 5 U.S.C. § 553(d)(3) (allowing for effective date of rule amendments to occur prior to 30 days after publication where good cause is found and published with the rule).

IV. PROCEDURAL MATTERS**A. Regulatory Flexibility Act Analysis**

9. Section 213 of the Consolidated Appropriations Act of 2000 provides that the Regulatory Flexibility Act (RFA), 5 U.S.C. § 603, does not apply to rules that are not adopted in notice and comment rulemaking proceedings.²³ Accordingly, we have not performed an Initial or Final Regulatory Flexibility Analysis in connection with the instant Order.²⁴

10. The Commission will send a copy of this Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

B. Paperwork Reduction Act Analysis

11. This document does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. We are therefore not inviting comment pursuant to the Paperwork Reduction Act on any information collections associated with this document.

V. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to the authority contained in sections 1, 2, 4(i), 303(r), 332 and 337 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i), 303(r), 332 and 337, this Order in WT Docket No. 96-86 IS hereby ADOPTED.

13. IT IS FURTHER ORDERED that, pursuant to 5 U.S.C. § 553(d)(3), the rules adopted herein WILL BECOME EFFECTIVE upon publication in the Federal Register.

14. We take this action under delegated authority pursuant to sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

David S. Turetsky
Chief, Public Safety and Homeland Security Bureau

²³ *See* 5 U.S.C. § 603(a).

²⁴ *Id.*

APPENDIX**Final Rules**

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR Part 90 to read as follows:

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

2. Amend § 90.529 by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 90.529 State License.

* * * * *

(b) * * *

(1) providing or prepared to provide “substantial service” to one-third of their population or territory by June 13, 2014, i.e., within five years of the date that incumbent broadcasters are required to relocate to other portions of the spectrum;

(2) providing or prepared to provide “substantial service” to two-thirds of their population or territory by June 13, 2019, i.e., within ten years of the date that incumbent broadcasters are required to relocate to other portions of the spectrum.

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