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DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

47 CFR Part 301

[Docket No. 110627357-2209-03]

RIN 0660-AA26

Relocation of and Spectrum Sharing by Federal Government Stations – Technical Panel and Dispute Resolution Board

AGENCY: National Telecommunications and Information Administration, Commerce.

ACTION: Notice of proposed rulemaking.

SUMMARY: The National Telecommunications and Information Administration (NTIA) proposes to adopt regulations governing the Technical Panel and dispute resolution boards established by Congress to facilitate the relocation of, and spectrum sharing with, U.S. Government stations in spectrum bands reallocated from Federal use to non-Federal use or to shared use. This action is necessary to ensure the timely relocation of Federal entities' spectrum-related operations and, where applicable, the timely implementation of arrangements for the sharing of radio frequencies. Specifically, this action would implement certain additions and modifications to the NTIA Organization Act through the recent enactment of the Middle Class Tax Relief and Job Creation Act of 2012.

DATES: Submit comments on or before [insert date 15 days after publication in the Federal Register].

ADDRESSES: The public is invited to submit written comments in paper or electronic form.

Written comments may be submitted by email to CSEChanges@ntia.doc.gov.

Comments submitted by should be machine searchable and should not be copy-protected. Written comments also may be submitted by mail to Milton Brown, Office of Chief Counsel, National Telecommunications and Information Administration, U.S. Department of Commerce, Herbert C. Hoover Building, 1401 Constitution Avenue NW, Room 4713, Washington, DC 20230. Each commenter should include the name of the person or organization filing the comment as well as a page number on each page of the submission. All comments received will be made a part of the public record in this proceeding and will be posted to NTIA's website (<http://www.ntia.doc.gov>) without change. All personal identifying information (*e.g.*, name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Milton Brown, NTIA, (202) 482-1816.

SUPPLEMENTARY INFORMATION:

Authority: National Telecommunications and Information Administration Organization Act, 47 U.S.C. 901 *et seq.*, as amended by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, Subtitle G, 126 Stat. 245 (Feb. 22, 2012) (47 U.S.C. 923(g)-(i), 928).

I. Introduction

To maintain America's leadership in technological innovation and promote economic

growth, President Obama unveiled an initiative (Spectrum Initiative) in 2010 to reform spectrum policy and improve America's wireless infrastructure.¹ The broad vision outlined in the President's Spectrum Initiative is to attract public and private sector investment in emerging wireless broadband services and to promote the more efficient use of spectrum. One of the key themes of the President's Spectrum Initiative is the need for the U.S. Government to develop new tools and provide new incentives to free up spectrum from both Federal Government users and non-Federal licensees.² To that end, the Administration supported much-needed changes to the Commercial Spectrum Enhancement Act (CSEA) to provide additional incentives for Federal users.³

Consistent with this goal, the Middle Class Tax Relief and Job Creation Act of 2012 (Tax Relief Act) amended the CSEA to expand the types of costs for which Federal agencies can be reimbursed from the Spectrum Relocation Fund (Fund).⁴ Among other things, the changes made by the Tax Relief Act now permit Federal agencies to receive funds for costs associated with the planning for Federal Communications Commission (FCC) auctions and relocations, spectrum sharing, the use of alternative technologies, the replacement of existing government-owned

¹ Presidential Memorandum: Unleashing the Wireless Broadband Revolution, 75 FR 38387 (June 28, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution>.

² *Id.*; see Plan and Timetable to Make Available 500 Megahertz of Spectrum for Wireless Broadband (Ten-Year Plan) at 16-17 (Oct. 29, 2010), available at http://www.ntia.doc.gov/files/ntia/publications/tenyearplan_11152010.pdf.

³ Commercial Spectrum Enhancement Act (CSEA), Pub. L. No. 108-494, sections 201-209, 118 Stat. 3986 (codified at 47 U.S.C. 923, 928). The CSEA amended the NTIA Organization Act to provide, among other things, for the costs associated with relocation of Federal agencies' spectrum-dependent operations to be reimbursed from the proceeds of spectrum auctions held by the Federal Communications Commission (FCC).

⁴ Middle Class Tax Relief and Jobs Creation Act of 2012 (Tax Relief Act), Pub. L. No. 112-96, sections 6701-6703, 126 Stat. 245 (Feb. 22, 2012) (amending, among other provisions, sections 113(g)-(i) and 118 of the NTIA Organization Act). Statutory references hereinafter will refer to sections of the NTIA Organization Act, 47 U.S.C. 901 *et seq.*, also referred to generally as "the statute," unless otherwise indicated.

equipment with state-of-the-art systems, and the research, engineering studies and economic analyses conducted in connection with spectrum sharing arrangements, including coordination with auction winners.⁵ Other improvements in the new law are aimed at facilitating better transparency, coordination, and predictability for bidders in FCC spectrum auctions and the ultimate winners of those auctions through, for example, a new requirement that NTIA publish agencies' spectrum transition plans on NTIA's website at least 120 days before the commencement of the corresponding FCC auction, with the exception of classified information.⁶

Most pertinent to the purpose of this Notice, the Tax Relief Act: (1) specified the content of transition plans, following a "common format," for Federal agencies seeking compensation from the Fund for their spectrum relocation or sharing costs, including pre-auction costs; (2) established a mechanism to review the sufficiency of such plans by an expert Technical Panel; and (3) created a dispute resolution process through which any disagreements that may arise over the execution, timing, or cost of transition plans can be resolved within 30 days after the request was made to NTIA.⁷ This action proposes regulations to govern the operation of the Technical Panel established by the Tax Relief Act and the workings of any dispute resolution boards that would be called on to adjudicate disputes, should any arise, between non-Federal users and Federal entities during the transition period.

II. Background

⁵ See NTIA Organization Act section 113(g)(3) (defining the relocation or sharing costs permitted).

⁶ See *id.* at section 113(h)(5)-(6).

⁷ See *id.* at sections 113(h)(2), (h)(3), (i), 118(d)(3). Another new provision NTIA is implementing separately relates to the consideration and protection of classified and other sensitive information contained in agency transition plans. See *id.* at section 113(h)(7).

In connection with the new agency transition plans required by the Tax Relief Act, new deadlines tied to the FCC’s auction start date are imposed upon Federal agencies anticipating transfers from the Fund, upon NTIA, and upon the new Technical Panel. These new, pre-auction deadlines include the following:

(1) Federal entities authorized to use eligible frequencies must submit a transition plan “for the implementation by such entity of the relocation or sharing arrangement” to NTIA and the Technical Panel no later than 240 days (*i.e.*, eight months) prior to the auction start date;⁸

(2) The Technical Panel must submit to NTIA and to the applying Federal entity a report on the sufficiency of the transition plan no later than 30 days after the submission of the plan (*i.e.*, seven months, or 210 days, prior to the auction start date);⁹ and

(3) NTIA must make the transition plans publicly available on its website, with the exception of classified information, no later than 120 days (*i.e.*, four months) before the auction start date.¹⁰

In Section III.B. below, NTIA addresses the impact on these deadlines in the event the Technical Panel determines that an agency’s transition plan is “insufficient.”

Each agency transition plan must include the information called for by paragraph (h)(2) of section 113 of the NTIA Organization Act, as well as other related provisions.¹¹ In particular, each plan must contain basic operational and technical data, including: (1) the current use by the Federal entity of the eligible frequencies to be auctioned; (2) the geographic location of the

⁸ *Id.* at section 113(h)(1).

⁹ *Id.* at section 113(h)(4)(A).

¹⁰ *Id.* at section 113(h)(5).

¹¹ *Id.* at section 113(h)(2); *see also id.* at section 118(d)(3)(B)(ii).

Federal entity's facilities or systems; and (3) the frequency bands used by such facilities or systems.¹² The plan must also set forth the “steps to be taken by the Federal entity to relocate its spectrum use from such frequencies or to share such frequencies, including timelines for specific geographic locations in sufficient detail to indicate when use of such frequencies at such locations will be discontinued by the Federal entity or shared between the Federal entity and non-Federal users.”¹³ It will provide the name of the officer or employee from each agency who is responsible for relocation or sharing efforts and who is authorized to meet and negotiate with non-Federal users regarding the transition.¹⁴

In addition, each transition plan must describe the agency's specific plans and timelines for using the amounts from the Fund for procuring, testing, and deploying new equipment and for covering the broad range of other allowable relocation or sharing costs to be incurred to achieve “comparable capability of systems as before the relocation or sharing arrangement.”¹⁵ The plan must also identify any factors that could “hinder fulfillment of the transition plan,”¹⁶ such as the extent to which any classified information will affect “the implementation of the relocation or sharing arrangement.”¹⁷

¹² *Id.* at section 113(h)(2)(A)-(C).

¹³ *Id.* at section 113(h)(2)(D).

¹⁴ *Id.* at section 113(h)(2)(F).

¹⁵ *Id.* at section 113(h)(2)(G), (g)(3). Under the statute, “comparable capability of systems” may be achieved by several means, including but not limited to the following: (1) relocation of a Federal Government station to a new frequency assignment or to a different geographic location; (2) modification of equipment to mitigate interference or use less spectrum to enable spectrum sharing among Federal entities; and (3) utilizing “alternative technology” and “state-of-the-art replacement systems intended to meet comparable operational scope, which may include incidental increases in functionality.” *Id.* at section 113(g)(3)(B).

¹⁶ *Id.* at section 113(h)(2)(H).

¹⁷ *Id.* at § 113(h)(7)(A).

For any Federal entity seeking payments for certain pre-auction costs, its transition plan must also provide for sharing, coordination, and reasonable accommodations for the use of eligible frequencies by non-Federal users during the transition period.¹⁸ A plan identifying pre-auction costs must also provide that (1) the eligible Federal entity will, during the transition period, make itself available for negotiation and discussion with non-Federal users; and that (2) the eligible Federal entity will assist the non-Federal user during the transition period by making available relevant classified information to those with appropriate security clearances.¹⁹

III. Discussion

Pursuant to new paragraphs (h)(3)(D) and (i)(8) of section 113 of the NTIA Organization Act, NTIA seeks comment on these proposed regulations. These proposed regulations would govern the operation of the Technical Panel established by the Tax Relief Act and the workings of any dispute resolution boards. NTIA's implementation of the relevant stipulations of the CSEA, as amended by the Tax Relief Act, is aimed at ensuring that (1) NTIA can reliably and accurately compile and report estimated relocation costs and timelines; (2) agencies are adequately compensated for all qualified costs and incentivized to plan accordingly; and (3) to provide as much clarity as possible in the transition plans so prospective and winning bidders can depend on the available information to reduce risk and uncertainty at FCC auctions and when licensees are deploying new systems or leasing the spectrum while ensuring that Federal agencies are given the necessary time to transition as not to compromise their critical operations.

¹⁸ *Id.* at section 118(d)(3)(B)(ii)(I). The "transition period" under this clause refers to the period over which the Federal entity is "relocating its spectrum uses." *Id.* These qualified pre-auction costs include research, engineering studies, economic analyses or other planning expenses. *Id.* at section 113(g)(3)(A)(iii).

¹⁹ *Id.* at section 118(d)(3)(B)(ii)(II)-(III).

NTIA proposes to restore Part 301 of its regulations, which is currently reserved, in Chapter III of the Code of Federal Regulations (CFR).²⁰ The proposed rules are organized into three subparts. Subpart A would set forth the overall purpose for the new regulations, include a cross-reference for informational purposes, and define certain terminology used throughout the regulation. Subpart B would contain the regulations governing the operations of the Technical Panel established by the Tax Relief Act. Finally, Subpart C would provide a basic framework under which fair and rapid resolution of any disputes may take place.

A. Purpose, Cross-Reference to NTIA Manual and Definitions

Subpart A of the proposed rules would state that the purpose of Part 301 is to implement the particular statutory provisions that mandate the adoption of such regulations, after public notice and comment, including the regulations proposed herein governing Technical Panels and dispute resolution boards. This subpart would also include a cross-reference to § 300.1 of NTIA's current rules, which in turn incorporates by reference the "Manual of Regulations and Procedures for Federal Radio Frequency Management," also known as the "NTIA Manual" or the "Redbook." The NTIA Manual governs the Federal agencies' use of the radio frequency spectrum and NTIA's regulation thereof pursuant to the NTIA Organization Act.²¹ This cross-reference is intended for informational purposes because the NTIA Manual applies only to Federal agencies.

²⁰ NTIA promulgated a previous version of Part 301 in 2002, which governed the reimbursement to Federal entities by the private sector as a result of reallocation of Federal spectrum bands. *See* Mandatory Reimbursement Rules for Frequency Band or Geographic Relocation of Federal Spectrum-Dependent Systems, 67 FR 41182 (June 17, 2002); *see* Repeal of Mandatory Reimbursement Rules for Frequency Band or Geographic Relocation of Federal Spectrum-Dependent Systems, 70 FR 6776 (Feb. 9, 2005).

²¹ *See* 47 CFR 300.1 (2011); *see also* NTIA Organization Act §102(b)(2)(A) (47 U.S.C. 902(b)(2)(A)). The NTIA Manual is the compilation of policies and procedures that govern the use of the radio frequency spectrum by the U.S. Government. Federal government agencies are required to follow these policies and procedures in their use of the spectrum. The NTIA Manual is available online at <http://www.ntia.doc.gov/osmhome/redbook/redbook.html>.

NTIA, in consultation with the Interdepartment Radio Advisory Committee (IRAC) and the Policy and Plans Steering Group (PPSG), is revising Annex O of the NTIA Manual to implement the changes to the CSEA from the Tax Relief Act.²² The revisions to Annex O will implement, for example, the relevant provisions related to the contents of agency transition plans, and the publication and protection thereof.²³ Annex O will specify the procedures and required content for agency Transition Plans based on the new statutory provisions so that the agencies will provide all relevant information and that information will be available to stakeholders according to the statutory requirements and timelines. As with the regulations proposed in this Notice, NTIA's objective in updating Annex O is to make sure that the information requested and provided is accurate and sufficient so that estimated costs and timelines will reduce risk and uncertainty throughout the auction and transition process while ensuring that Federal agencies' mission operations are not interrupted or otherwise adversely impacted during the transition.

Section 301.20 of the regulations would include certain terminology used throughout Part 301. Most of the proposed definitions reflect the terminology in applicable statutory provisions. Slight nomenclature adjustments would be made for purposes of clarification or context. Additional proposed definitions are provided to give further clarity to the regulations in the other subparts. Where necessary, these terms are discussed below in connection with the particular rules in which they are used.

²² The IRAC assists NTIA in assigning frequencies to U.S. Government radio stations and in developing and executing policies, programs, procedures, and technical criteria pertaining to the allocation, management, and use of the spectrum. It is made up of representatives appointed by their respective Federal departments and agencies. *See* <http://www.ntia.doc.gov/category/irac>. The PPSG is a high-level interagency group of senior Federal officials that was established to help NTIA resolve major spectrum policy issues that affect the use of spectrum by Federal and non-Federal users. *See* Ten-Year Plan, *supra* note 2 at Appendix A.

²³ *See* NTIA Organization Act at section 113(h)(2), (5), (7); *see also id.* at section 118(d)(3)(B)(ii) (stating additional information that must be in transition plans if Federal entity seeks transfers for pre-auction costs).

B. Technical Panel

Overview. Subpart B of the proposed regulations would govern the operations of the Technical Panel established by the Tax Relief Act. Specifically, pursuant to the statute, these regulations would cover matters related to the membership, organization, and basic functions of the standing three-member panel.

Membership. As required by the new law, the respective agency heads of NTIA, the FCC, and the Office of Management and Budget (OMB) will appoint the initial members of the Technical Panel not later than August 20, 2012.²⁴ Each member serves a non-consecutive, 18-month term.²⁵ The members must be either “radio engineer[s]” or “technical expert[s].”²⁶

NTIA proposes that the Assistant Secretary, in consultation with the OMB Director and the FCC Chairman, have the discretion to require additional qualifications for one or more members of the Technical Panel to ensure their timely appointment, committed service, and efficient dispatch of business. For example, depending on the nature of the Federal systems likely to be subject of agency transition plans, NTIA may require that the members have appropriate and up-to-date security clearances to enable access to any classified or sensitive information. In addition, NTIA proposes that the initial members of the panel, as well as subsequent members, be Federal employees, but not necessarily be employed by the appointing

²⁴ *Id.* at section 113(h)(3)(B)(iii).

²⁵ *Id.* at section 113(h)(3)(B)(iv).

²⁶ *Id.* at section 113(h)(3)(B)(ii). Technical Panel members may not receive any additional compensation for service on the Technical Panel. *Id.* at section 113(h)(3)(B)(vi). If any member is also an employee of one of the respective appointing agencies, his or her regular compensation in that capacity is not considered compensation for service on the Technical Panel. *Id.*

agency.²⁷ The Chair of the Technical Panel would be the member appointed by the Assistant Secretary. NTIA seeks comment on these proposals.

Review of Transition Plans. The primary role of the Technical Panel is to review each Federal agency's transition plan and to deliver a report on its sufficiency to NTIA and the agency. As noted above, the panel's reports must be submitted within 30 days after an agency submits its plan. This statutory time frame provides a relatively short period for the panel to conduct its assessment. The deadline could present greater challenges if multiple Federal agencies are submitting transition plans covering multiple Federal systems at the same time. Accordingly, NTIA proposes measures in the regulations that would help meet the objectives set forth above while ensuring the timely and successful review of these plans. For example, NTIA seeks comment on whether the rules should confine the scope and content of the Technical Panel's initial report (and, if necessary, subsequent reports) to those assessments and findings most relevant to NTIA's ability to compile estimated relocation costs and timelines for purposes of the notifications required under the CSEA. As discussed next, these and other measures intended to assist in the preparation of the agency transition plans are necessary to avoid the potential procedural dilemma presented when the Technical Panel concludes that a plan is not sufficient.

Meeting the pre-auction milestones set forth above assumes that (1) the Technical Panel finds that the initial transition plan is sufficient within 30 days; and (2) NTIA can reliably compile the estimated relocation and sharing costs and timelines for the notifications at the six-month point before an auction start date. However, under the statute, if the Technical Panel finds

²⁷ If a member is employed by another agency, this individual would not likely be able to review the transition plans submitted by his or her own agency unless the heads of the other appointing agencies have no objections. *See infra* Section III.C. for a discussion of potential restrictions on membership eligibility for dispute resolution boards in certain situations involving current and former Technical Panel members.

the plan insufficient, the applying Federal entity has up to 90 days to submit to the Technical Panel a revised plan.²⁸ In turn, the Technical Panel would have another 30 days in which to determine whether the revised plan is sufficient.²⁹ This additional 120-day (*i.e.*, four-month) process following an “insufficient” plan could mean that such a plan’s estimated costs and timelines may not be available or reliable enough to be included in the notifications to the FCC, Congress, and the Government Accountability Office, which are otherwise due approximately 30 days (*i.e.*, one month) after the Technical Panel report on the initial transition plan is due to NTIA. Moreover, inasmuch as this additional time would potentially result in a revised plan being resubmitted to the Technical Panel four months before the auction start date, NTIA may not be able to publish the plan on its web site by the 120-day deadline set forth in the new law.³⁰

Under the circumstances discussed above in which the delay presented by the insufficient transition plan potentially puts at risk NTIA’s ability to meet the two deadlines leading up to the FCC’s auction start date, NTIA and the FCC could consider any number of options. Under one option, NTIA would provide the FCC a timely notification of the estimated costs and timelines on behalf of the Federal entities by submitting the information compiled from sufficient transition plans, but noting that information from insufficient plans are excluded. Alternatively, if an insufficiency finding would not substantially impact or impair the reliability and accuracy of NTIA’s compilation of agency costs and timelines, then NTIA could still provide a timely

²⁸ NTIA Organization Act section 113 (h)(4)(B).

²⁹ *Id.* (stating that “[s]uch revised plan shall be treated as a plan submitted under paragraph (1),” which suggests that the Technical Panel’s 30-day deadline in subparagraph (4)(A) of section 113(j)(h) would apply again pursuant to the similar cross-reference to “the submission of the plan under paragraph (1)”).

³⁰ The new law does not specify whether NTIA must make available on the its website only a transition plan that is found sufficient by the Technical Panel. *See id.* at section 113(h)(5).

notification with information from insufficient plans included. NTIA seeks comment on these options.

Another option for dealing with this dilemma, especially if the panel's insufficiency finding would reduce the reliability of the estimated costs and timelines, is for NTIA to recommend that the FCC delay the auction start date until the agency can submit, and the Technical Panel can review, a revised transition plan. However, this alternative may not be feasible, especially in light of the statutory deadlines related to the auctions and licensing for particular spectrum bands identified in Subtitle D of the Tax Relief Act.³¹ NTIA intends to provide guidance to the Federal agencies in the revised Annex O of the NTIA Manual and through other assistance to help ensure that each initial plan is complete and contains "reasonable" timelines and estimated relocation or sharing costs. Although NTIA will be seeking public input on "a common format for all Federal entities to follow in preparing transition plans" in accordance with the new law, NTIA seeks comment on further steps that would help in ensuring the proper regulations are in place to govern the Technical Panel.³²

Technical Assistance to Dispute Resolution Boards. Finally, the new law requires the Technical Panel to furnish technical assistance to a dispute resolution board convened to resolve disputes among Federal and non-Federal parties. The proposed regulations would require that the Technical Panel provide such assistance upon request of any board convened pursuant to

³¹ Tax Relief Act section 6401(a)-(b).

³² In addition to compiling estimated costs and timelines, NTIA expects that the transition plans' contents will provide valuable information to prospective bidders preparing for an auction, to winning bidders planning for their system deployments or leasing strategies, to NTIA in making its findings related to "comparable capability" under section 113(g)(6) of the statute, and to OMB in determining the "appropriateness" of the costs and timelines pursuant to section 118(d)(2)(B) of the statute.

Subpart C of the regulations. NTIA notes, however, that circumstances may arise where effective implementation of the statute and resource constraints may result in the overlap among the current or former membership of the Technical Panel and a dispute resolution board. While NTIA proposes to restrict membership eligibility for dispute resolution boards in certain overlap situations, NTIA does not believe it is necessary to prevent any otherwise qualified person from serving on the Technical Panel. NTIA seeks comment on these proposals.

C. Dispute Resolution Boards

Overview. Subpart C of the proposed regulations would govern workings of any dispute resolution boards upon which parties would call to facilitate the resolution of disputes, should any arise, between non-Federal users and Federal entities during the transition period regarding the “execution, timing, or cost” of the Federal entity’s transition plan. Pursuant to the new law, these regulations would cover matters related to the workings of a board, including the content of any request to establish a board, the associated procedures for convening it, and the dispute resolution process itself.

Membership of a dispute resolution board shall be comprised of a representative of OMB, NTIA, and the FCC, each appointed by the head of his or her respective agency.³³ According to the new law, the OMB representative serves as the Chair of any board.³⁴ With respect to the resolution of any such disputes that may arise, the statute (and the proposed rules) require a board to “meet simultaneously with representatives of the Federal entity and the non-Federal

³³ NTIA Organization Act section 113(i)(2)(B).

³⁴ *Id.* at section 113(i)(2)(C). Board members are prohibited from receiving compensation for their service on a board other than their regular compensation as Federal employees. *Id.* at section 113(i)(2)(E).

user to discuss the dispute.”³⁵ A board is required to rule on the dispute within 30 days after a party has requested NTIA to convene a board.³⁶

In light of the tight statutory deadline for resolving any disputes, as well as NTIA’s general obligation to ensure timely relocations and implementation of sharing arrangements, NTIA proposes a streamlined, practical approach to process legitimate dispute resolution requests, to set up dispute resolution boards, and to facilitate the resolution of any dispute as quickly as possible.

Eligibility. As noted above, the statute provides that either a “Federal entity” or a “non-Federal user” engaged in a dispute over the Federal entity’s Transition Plan may request the establishment of a dispute resolution board. NTIA proposes to define these terms in the regulations. Section 113(*l*) of the NTIA Organization Act already defines the term “Federal entity” as any “department, agency, or other instrumentality of the Federal Government that utilizes a Government station license obtained under section 305 of the [Communications Act of 1934, as amended (47 U.S.C. 305)].”³⁷ NTIA’s proposed regulation incorporates that definition. However, there is no statutory definition of “non-Federal user.” NTIA proposes to define this term as “a Commission licensee authorized to use eligible frequencies or a winning bidder in a Commission auction for eligible frequencies that has fulfilled the Commission’s requirements for filing a long-form license application and remitting its final bid payment.”

For both non-Federal and Federal requests, the proposed rules would require that the requests explain how the dispute pertains to the execution, timing, or cost of the Federal entity’s

³⁵ *Id.* at section 113(i)(3). A board may require the parties to make written submissions to it. *Id.*

³⁶ *Id.* at section 113(i)(4). A board shall terminate after it rules on the dispute and the time for appeal (30 days) has expired. *Id.* at section 113(i)(2)(F). If a board’s decision is appealed, the board will terminate after the appeal process has been exhausted and the board has completed any action required by a court hearing the appeal. *Id.*

³⁷ *Id.* at section 113(*l*).

particular transition plan that is associated with the non-Federal user's new license(s) won at auction or authorization to use eligible frequencies. For any non-Federal party bringing a dispute, NTIA proposes that its request clearly demonstrate, at a minimum, that the entity is a winning bidder at an FCC auction involving the frequencies at issue in the dispute. NTIA notes that the FCC announces a list of winning bidders via a Public Notice subsequent to the end each FCC auction. Accordingly, a self-certification from the non-Federal entity is sufficient. NTIA seeks comment on these proposals.

Informal and Alternative Dispute Resolution Efforts. The statute's 30-day deadline for responding to formal dispute resolution requests will likely impact a board's ability to convene, meet with the parties, and adequately address complex cases. At the same time, however, the statute encourages cooperation to assure timely transitions between Federal and non-Federal use of the spectrum. For example, the transition plans to be reviewed by the Technical Panel and published by NTIA on its website will set forth "[t]he name of the officer or employee of the Federal entity who is responsible for the relocation or sharing efforts of the entity and who is authorized to meet and negotiate with non-Federal users regarding the transition."³⁸ In addition, where pre-auction costs are involved, the plans must provide that the Federal entity "will, during the transition period, make itself available for negotiation and discussion with non-Federal users not later than 30 days after a written request therefor" and "make available to a non-Federal user with appropriate security clearances any classified information . . . , on a need-to-know basis, to assist the non-Federal user in the [transition] process with such eligible Federal entity or other eligible Federal entities."³⁹

³⁸ *Id.* at section 113(h)(2)(F).

³⁹ *Id.* at section 118(d)(3)(B)(ii)(III), (IV).

Given the incentives created by the new law, NTIA expects only a minimal number of serious conflicts to arise, if any. If such differences do surface, however, NTIA expects the parties to make good faith efforts to solve these problems.⁴⁰ Accordingly, NTIA proposes that any disputes arising out of the execution, timing, or cost of a transition plan must be raised, in the first instance, with the officers or employees of the other party identified as being responsible for relocation or sharing efforts and who are authorized to meet and negotiate regarding the transition. NTIA further proposes that any such request must include a summary of the parties' prior efforts and attempts to resolve the dispute. NTIA seeks comment on these proposals.

Other Contents of Dispute Resolution Requests. NTIA also proposes that dispute resolution requests provide sufficient information to enable a fair and timely decision by a dispute resolution board. This information would include, for example, a concise and specific statement of the factual allegations sufficient to support the relief or action requested. The requests would also include the requestor's contact information and a certificate of service showing to whom and when an identical copy of the request was provided to the other entity. Finally, NTIA also believes that it would further expedite resolution of the matter if the requester provides a meeting proposal, setting forth a proposed date, time, and place (including suggested alternatives) for a meeting with the other party and the board, if established, and has proposed requiring meeting proposals be part of the requests. NTIA seeks comment on these proposals as well as the other provisions set forth in § 301.200 of the proposed rules.

⁴⁰ To the extent that such disputes cannot be resolved by the parties on an informal basis or through good faith negotiation, NTIA would strongly encourage the parties to use expedited alternative dispute resolution procedures, such as non-binding arbitration or mediation, before submitting a written request to establish a dispute resolution board. The Administrative Dispute Resolution Act, as amended, was enacted to authorize and encourage the use of alternative means of dispute resolution by Federal agencies. Congress recognized that the use of prompt and informal methods of dispute resolution, such as conciliation, mediation and arbitration, yields significant cost-savings and efficiencies, among other advantages, and results in outcomes that are more stable and less contentious and tailored to meet the particular needs of the parties. *See* Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990), *amended by* Pub. L. No. 104-320, 110 Stat. 3870 (1996) (codified at 5 U.S.C. 571 *et seq.* (2011)).

Establishment of the Dispute Resolution Board. The accelerated deadlines set forth in the new law require NTIA to establish dispute resolution boards quickly in order to make a recommendation not later than 30 days after the request was made to NTIA. NTIA proposes to create a slate of qualified representatives from each of the respective agencies well in advance of the likely submission of any request to convene a board and to maintain this candidate pool throughout the transition process. NTIA notes that, unlike the Technical Panel members discussed above, the statute does not contain any specific qualifications for members of a dispute resolution board. Nevertheless, NTIA proposes that the Assistant Secretary, in consultation with the OMB Director and the FCC Chairman, have the discretion to require certain minimal qualifications for one or more members of a particular dispute resolution panel, or for the slate of representatives generally, to facilitate their timely appointment, effective service, and capable dispute resolution. For example, these qualifications could include certain levels and types of security clearance and expertise. NTIA also proposes that the slate of potential board members be composed of only Federal employees, but notes that an individual representative on each board need not necessarily be employed by the appointing agency.

As discussed above, there may be overlap among the current or former membership of the Technical Panel and a dispute resolution board. NTIA proposes to restrict membership eligibility for boards in certain limited circumstances that present a potential conflict of interest, especially in a dispute involving specific parties where a board member candidate previously served as a member the Technical Panel that reviewed the particular transition plan that is the subject of the dispute. NTIA seeks comment on these proposals.

Dispute Resolution Process and Decision. If and when NTIA receives a formal request to convene a dispute resolution board, it will immediately notify three available members from the

slate of eligible representatives from each appointing agency to establish a board. Taking into account the meeting proposal submitted with the request, the Chair of the board (*i.e.*, the OMB representative) will call a meeting of the board to be held, pursuant to the statute, simultaneously with representatives of the parties to the dispute. These meetings may be via teleconference or other electronic means. The board may require the parties to provide any additional written materials and may request technical assistance, as necessary, from the Technical Panel.

Although the new law requires the board to rule on the dispute not later than 30 days from the date the request was received, NTIA proposes to permit the parties and board to mutually agree under certain circumstances to extend this period for a specified number of days.

The scope of a dispute resolution request and, consequently, a board's decision, is limited by the statute to matters "regarding the execution, timing, or cost of the transition plan submitted by the Federal entity."⁴¹ Consistent with this condition, the proposed rules would require that the board's ruling be based only on the record before it, including any input from the Technical Panel and other material of which it may take official notice. NTIA also seeks comment on whether a board's assessment of the execution, timing, and costs of the plan must be based on a "reasonableness" standard similar to the provisions applicable to the Technical Panel's standard of review.⁴² Because the new law does not confer independent authority on the board to bind the parties, NTIA proposes that the board's decision take the form of specific written recommendations to NTIA, OMB, the Commission, or the parties, as applicable, to take the suitable steps or remedial actions related to the execution, timing, or cost of the Federal entity's transition plan. Accordingly, NTIA seeks comment on these proposals.

We note that the Act provides that decisions of the dispute resolution board may be

⁴¹ See NTIA Organization Act section 113(i)(1).

⁴² See *id.* section 113(h)(4)(A).

appealed to the United States Court of Appeals for the District of Columbia Circuit.⁴³

Executive Order 12866

This rule has been determined to be not significant under section 3(f) of Executive Order 12866.

Executive Order 12372

No intergovernmental consultation with State and local officials is required because this rule is not subject to the provisions of Executive Order 12372, Intergovernmental Consultation.

Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, Civil Justice Reform, as amended by Executive Order 13175. NTIA has determined that the rule meets the applicable standards provided in section 3 of the Executive Order, to minimize litigation, eliminate ambiguity, and reduce burden.

Executive Order 13132

This proposed rule does not contain policies having federalism implications requiring preparations of a Federalism Summary Impact Statement.

Executive Order 12630

This proposed rule does not contain policies that have takings implications.

Administrative Procedure Act

The Administrative Procedure Act requires NTIA to provide the public with advance notice and an opportunity to comment on all regulations. Generally, the comment period lasts at least thirty days. However, because of the statutory requirement to have implementing regulations in place no later than 180 days after enactment of the Middle Class Tax Relief and Job Creation Act of 2012, NTIA is offering the public a slightly shorter comment period of 15

⁴³ *Id.* at section 113(i)(7).

days. NTIA is committed to allowing public comment, as required by the statute, and the shorter time period should allow sufficient time for review and comment on the regulations while maintaining the Act's schedule.

Regulatory Flexibility Act

The Chief Council for Regulation of the Department of Commerce certified to the Chief Council for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act (RFA) requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. 605(b), that the action will not have a significant economic impact on a substantial number of small entities. For purposes of assessing the impact of a proposed rule on small entities, "small entity" is defined as: (1) A small business that meets the definition of a small business found in the Small Business Act and codified at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school, district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. Under regulations issued by the Small Business Administration (SBA), a determination of a "small entity" is based on the number of employees or the annual receipts. The type of entities that would be affected by these proposed regulations would be wireless telecommunications carriers who are winners of an FCC competitive bidding (auction) process. The winners would become licensees of radio frequency spectrum previously assigned to Federal entities. The SBA regulations provide that for a

wireless telecommunications carrier to be considered a small entity, it must have 1,500 employees or less.

The proposed regulations outline the operation of a Technical Panel that is charged with reviewing a Federal agency's transition plan regarding the relocation or sharing of frequencies to be auctioned. The regulations also establish a dispute resolution process to resolve any disputes between the incumbent Federal entity and the wireless telecommunications carriers who are winners of an FCC competitive bidding (auction) process, or "licensee."

It is difficult to determine the number of small entities that would be impacted by these proposed regulations. Census data for 2007 shows that there were 1,383 wireless telecommunications carriers that operated in that year and that most of those firms would be considered small entities (fewer than 1,500 employees). Thus, a number of small entities may take part in an auction. It is, however, difficult to determine the number of entities that will be successful at an FCC auction that will occur at an undetermined date in the future. There is no way to predict the potential bidders at this time. In fact, entities that are not in existence at this time may participate once the FCC schedules an auction. The regulations proposed by NTIA in this rule would impact only those entities that are successful at an FCC auction. More importantly, the FCC will issue rules regarding the operation of these auctions and could more accurately address the impact that auction rules would have on small entities. The regulations proposed here, on the other hand, only provide guidance regarding the operation of a Technical Panel and a dispute resolution board composed of Federal employees. Even if NTIA could determine the number of small entities that would participate in an FCC auction, these proposed rules would not impose significant costs on those entities.

To the extent that small entities are impacted at all by this proposed rule, it is unlikely

that they would suffer any economic harm. To the contrary, these proposed regulations would benefit any entity, large or small. For example, these proposed regulations provide a dispute resolution process which is designed to resolve issues very quickly (30 days) so that licensee's can have timely access to the spectrum. By gaining timely access to spectrum, licensees have certainty with respect to business plans and the deployment of new services.

Paperwork Reduction Act

The Paperwork Reduction Act (PRA) does not apply to these proposed regulations because NTIA is not seeking information from 10 or more members of the Public (44 U.S.C. 3502(3)), and because administrative proceeding such as the Technical Panel and the Dispute Resolution Board are exempt from the PRA, 44 U.S.C. 3518(c)(1).

Congressional Review Act

This rule has not been determined to be major under the Congressional Review Act, 5 U.S.C. 801 *et seq.*

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provision of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the Unfunded Mandates Reform Act of 1995.

National Environmental Policy Act

Because NTIA has determined that this rule does not constitute a major Federal action significantly affecting the quality of the human environment and in accordance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*), an Environmental Impact Statement is not required.

Government Paperwork Elimination Act

NTIA is committed to compliance with the Government Paperwork Elimination Act, which requires Government agencies to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Lists of Subjects in 47 CFR Part 301

Administrative practice and procedure, Communications Common Carriers, Communications equipment, Defense communications, Government employees, Satellites, Radio, Telecommunications.

Dated: __ July 10, 2012 _____.

Lawrence E. Strickling,

Assistant Secretary for Communications and Information Administration.

For the reasons set forth in the preamble, NTIA proposes to amend 47 CFR chapter III by adding part 301 to read as follows:

**PART 301---RELOCATION OF AND SPECTRUM SHARING BY FEDERAL
GOVERNMENT STATIONS**

Subpart A – General Information

Sec.

301.1 Purpose.

301.10 Cross-Reference.

301.20 Definitions.

Subpart B – Technical Panel

301.100 Membership.

301.110 Organization and Operations.

301.120 Reports on Agency Transition Plans.

301.130 Technical Assistance to Dispute Resolution Panels.

Subpart C – Dispute Resolution Boards

301.200 Requests to Resolve Disputes.

301.210 Establishment and Operation of Dispute Resolution Board.

301.220 Dispute Resolution.

301.230 Appeals.

Authority: National Telecommunications and Information Administration Organization Act, 47 U.S.C. 901 *et seq.*, as amended by the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, Title VI, Subtitle G, 126 Stat. 245 (February 22, 2012) (47 U.S.C. 923(g)-(i) and 928).

Subpart A – General Information

§ 301.1 Purpose.

Sections 113(g)-(i) and 118 of the National Telecommunications and Information Administration Organization Act (hereinafter “NTIA Organization Act”), as amended (47 U.S.C. 923(g)-(i) and 928), govern the procedures and requirements related to the relocation of and sharing by eligible Federal radio stations in certain spectrum bands reallocated from Federal to non-Federal use or to

shared use. Pursuant to these statutory provisions, Federal entities authorized to use eligible frequencies are entitled to payment from the Spectrum Relocation Fund for their documented relocation or sharing costs incurred as a result of planning for an auction of such frequencies or the reallocation of such frequencies from Federal use to exclusive non-Federal use or to shared use. The purpose of this part is to implement the particular provisions that mandate the adoption of such regulations, after public notice and comment, and that primarily affect non-Federal spectrum users, including the regulations herein governing Technical Panels and Dispute Resolution Boards.

§ 301.10 Cross reference.

The Manual of Regulations and Procedures for Federal Radio Frequency Management (hereinafter referred to as the “NTIA Manual”) issued by the Assistant Secretary of Commerce for Communications and Information, is incorporated by reference in § 300.1 of this chapter and available online at <http://www.ntia.doc.gov/osmhome/redbook/redbook.html>. Annex O of the NTIA Manual, as revised, contains information, policies and procedures applicable to Federal agencies that implement the statutory provisions referenced in § 301.1 of this subpart with regard to such agencies that operate authorized U.S. Government stations in eligible frequencies and that incur relocation costs or sharing costs because of planning for an auction or the reallocation of such frequencies from Federal use to exclusive non-Federal use or to shared use. The NTIA Manual applies only to Federal agencies and does not impact the rights or obligations of the public. Accordingly, this cross reference is for information purposes only.

§ 301.20 Definitions.

Assistant Secretary means the Assistant Secretary of Commerce for Communications and Information.

Auction means the competitive bidding process through which licenses are assigned by the Commission under section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)).

Commission means the Federal Communications Commission.

Dispute Resolution Board means any board established pursuant to section 113(i) of the NTIA Organization Act (47 U.S.C. 923(i)) and subpart C of this part.

Eligible Federal entity means any Federal entity that:

(1) Operates a U.S. Government station authorized to use a band of eligible frequencies; and

(2) That incurs relocation costs or sharing costs because of planning for an auction of spectrum frequencies or the reallocation of spectrum frequencies from Federal use to exclusive non-Federal use or to shared use.

Eligible frequencies means any band of frequencies reallocated from Federal use to non-Federal use or to shared use after January 1, 2003, that is assigned by auction.

Federal entity means any department, agency, or other instrumentality of the U.S. Government that utilizes a Government station assignment obtained under section 305 of the 1934 Act (47 U.S.C. 305).

Non-Federal user means a Commission licensee authorized to use eligible frequencies or a winning bidder in a Commission auction for eligible frequencies that has fulfilled the Commission's requirements for filing a long-form license application and remitting its final bid payment.

NTIA means the National Telecommunications and Information Administration.

NTIA Manual: The Manual of Regulations and Procedures for Federal Radio Frequency Management issued by the Assistant Secretary of Commerce for Communications and Information and incorporated by reference in § 300.1 of this chapter (47 CFR 300.1).

OMB means the Office of Management and Budget.

Technical Panel means the panel established by section 113(h)(3)(A) of the NTIA Organization Act (47 U.S.C. 923(h)(3)(A)) and governed by subpart B of this part.

Transition Plan means the plan submitted by a Federal entity pursuant to subsection 113(h)(1) of the NTIA Organization Act (47 U.S.C. 923(h)(1)).

Subpart B – Technical Panel

§ 301.100 Membership.

(a) Technical Panel Membership. The Technical Panel established by section 113(h)(3)(A) of the NTIA Organization Act (47 U.S.C. 923(h)(3)(A)) shall be composed of three (3) members, to be appointed as follows:

- (1) One member to be appointed by the Director of OMB;
- (2) One member to be appointed by the Assistant Secretary; and
- (3) One member to be appointed by the Chairman of the Commission.

(b) Qualifications. (1) Each member of the Technical Panel shall be a radio engineer or a technical expert.

(2) The Assistant Secretary, in consultation with OMB and the Chairman of the Commission, may impose additional qualifications for one or more members of the Technical Panel as are necessary pursuant to section 113(g)(6) of the NTIA Organization Act (47 U.S.C. 923(g)(6)), including, but not limited to, the following:

(i) The member must have appropriate and current security clearance to enable access to any classified or sensitive information that may be associated with or relevant to agency Transition Plans; and

(ii) The member must be a Federal employee as defined in 5 U.S.C. 2105(a).

(c) Term. The term of a member of the Technical Panel shall be eighteen (18) months, and no individual may serve more than one (1) consecutive term.

(d) Vacancies. (1) Any member of the Technical Panel appointed to fill a vacancy occurring before the expiration of the term for which the member's predecessor was appointed shall be appointed only for the remainder of that term.

(2) A member of the Technical Panel may serve after the expiration of that member's term until a successor has taken office.

(3) A vacancy shall be filled in the manner in which the original appointment was made pursuant to paragraph (a) of this section.

(e) Compensation. (1) No member of the Technical Panel shall receive compensation for service on the Technical Panel.

(2) If any member of the Technical Panel is an employee of the agency of the official that appointed such member to the Technical Panel pursuant to paragraph (a) of this section, compensation in the member's capacity as a Federal employee shall not be considered compensation under paragraph (e)(1) of this section.

§ 301.110 Organization and operations.

(a) Chair. (1) The member of the Technical Panel appointed by the Assistant Secretary pursuant to § 301.100(a) of this subpart shall be the Chair of the Technical Panel.

(2) The Chair of the Technical Panel may designate a Vice-Chair who may act as Chair in the absence of the Chair.

(b) Procedures of and actions by the Technical Panel. (1) The Technical Panel may meet either in person or by some mutually agreeable electronic means to take action on the reports required by § 301.120 of this subpart or in providing technical assistance to a Dispute Resolution Board pursuant to § 301.130 of this subpart.

(2) Meetings of the Technical Panel may be convened as necessary for the efficient and timely dispatch of business by either NTIA or the Chair of the Technical Panel to consider reports and any action thereon and to provide technical assistance to a Dispute Resolution Board pursuant to § 301.130 of this subpart.

(3) The Technical Panel shall endeavour to reach its decisions unanimously. Absent unanimous consent of all three members of the Technical Panel, a concurring vote of a majority of the total panel membership constitutes an action of the Technical Panel.

(4) A majority of the Technical Panel members constitutes a quorum for any purpose.

(5) The Chair of the Technical Panel, in consultation with the other members, may adopt additional policies and procedures to facilitate the efficient and timely dispatch of panel business.

(6) The Technical Panel may consult Federal entity subject matter experts regarding

mission risks while assessing the reasonableness of costs and timelines in the Federal entity's Transition Plans.

(c) Administrative support. The NTIA shall provide the Technical Panel with the administrative support services necessary to carry out its duties under this part.

§ 301.120 Reports on agency transition plans.

(a) Deadline for initial report. Not later than thirty (30) days after the receipt of a Federal entity's Transition Plan submitted in accordance with applicable procedures set forth in Annex O of the NTIA Manual, the Technical Panel shall submit to the NTIA and to such Federal entity the Technical Panel's report on the sufficiency of the Transition Plan.

(b) Scope and content of initial report. The Technical Panel's report shall include:

(1) A finding as to whether the Federal entity's Transition Plan includes the information required by the applicable provisions set forth in Annex O of the NTIA Manual;

(2) An assessment of the reasonableness of the proposed timelines contained in the Federal entity's Transition Plan;

(3) An assessment of the reasonableness of the estimated relocation or sharing costs itemized in the Federal entity's Transition Plan, including the costs identified by such plan for any proposed expansion of the capabilities of the Federal entity's system; and

(4) A conclusion, based on the finding and assessments pursuant to paragraphs (b)(1) through (3) of this section, as to the sufficiency of the Transition Plan.

(c) Insufficient Transition Plan. In the event the Technical Panel's initial report concludes that

the Federal entity's Transition Plan is insufficient pursuant to subsection (b), the report shall also include a description of the specific information or modifications that are necessary for the Federal entity to include in a revised Transition Plan.

(d) Revised plan. If the Technical Panel finds the plan insufficient, the applying Federal entity has up to 90 days to submit to the Technical Panel a revised plan

(e) Reports on revised agency Transition Plans. (1) Deadline for Supplemental Report. Not later than thirty (30) days after the receipt of a Federal entity's revised Transition Plan submitted after an initial or revised plan was found by the Technical Panel to be insufficient pursuant to paragraph (c) of this section, the Technical Panel shall submit to the NTIA and to such Federal entity the Panel's supplemental report on the sufficiency of the revised Transition Plan.

(2) Scope and content of supplemental report. The Technical Panel's supplemental report on the revised Transition Plan shall include:

(i) A finding as to whether the Federal entity's revised Transition Plan includes the necessary information or modifications identified in the Technical Panel's initial report pursuant to paragraph (b)(1) of this section;

(ii) A reassessment, if required, of the reasonableness of the proposed timelines contained in the Federal entity's revised Transition Plan;

(iii) A reassessment, if required, of the reasonableness of the estimated relocation or sharing costs itemized in the Federal entity's revised Transition Plan; and

(iv) A conclusion, based on the finding and reassessments pursuant to paragraphs (e)(2)(i) through (iii) of this section, as to the sufficiency of the revised Transition Plan.

§ 301.130 Technical assistance to Dispute Resolution Panels.

Upon request of a Dispute Resolution Board convened pursuant to subpart C of this part, the Technical Panel shall provide the board with such technical assistance as requested.

Subpart C – Dispute Resolution Boards.

§ 301.200 Requests to resolve disputes.

(a) Non-Federal user requests. (1) In general. A eligible non-Federal user may submit a written request to the NTIA in accordance with this subsection to establish a Dispute Resolution Board to resolve an actual, unresolved dispute that has arisen between the non-Federal user and one or more Federal entities regarding the execution, timing, or cost of the Transition Plan (or Plans) submitted by the Federal entity (or entities) pursuant to section 113(h)(1) of the NTIA Organization Act, as amended (47 U.S.C. 923(h)(1)).

(2) Negotiation, mediation and arbitration. Disputes arising out of the execution, timing, or cost of the Transition Plan (or Plans) submitted by the Federal entity (or entities) must be raised, in the first instance, with the officers or employees of the Federal entities identified in the Transition Plans as being responsible for the relocation or sharing efforts of the entities and who are authorized to meet and negotiate with non-Federal users regarding the transition. To the extent that such disputes cannot be resolved by the parties on an informal basis or through good faith negotiation, they are strongly encouraged to use expedited alternative dispute resolution procedures, such as arbitration or mediation, before submitting a written request in accordance with this subsection to establish a board.

(3) Eligibility to request the establishment of a board. To submit a request to establish

a board, a non-Federal user, as such term is defined in § 301.20 of this part, must be a winning bidder at an FCC auction for the eligible frequencies and the dispute must pertain to the execution, timing, or cost of the Transition Plan (or Plans) associated with the license (or licenses) subject to the winning bid (or bids).

(4) Contents of request. In order to be considered by a board under this subpart, a request must include:

(i) Specific allegations of fact sufficient to support the relief or action requested. Such allegations of fact, except for those of which official notice may be taken by the board, shall be supported by affidavits of a person or persons having personal knowledge thereof;

(ii) A summary of the parties' prior efforts and attempts to resolve the dispute pursuant to paragraph (a)(2) of this section and a description of the reasons, factors and other conditions that led to the inability of such efforts and attempts to resolve the dispute;

(iii) A detailed description of each of the claims upon which a resolution is sought by and available to the non-Federal user;

(iv) A detailed description of the requested action, remedy or relief sought;

(v) The requestor's contact information and a certificate of service showing to whom and when an identical copy of the request was provided to the Federal entity;
and

(vi) A meeting proposal setting forth the proposed date, time and place (including suggested alternatives) for a meeting with the Federal entity and the board, the date for which shall be no later than fifteen (15) days from the date the request is

received by NTIA.

(vii) A self-certification that the Federal entity is a winning bidder in an FCC auction pertaining to the incumbent Federal entity's radio-frequency spectrum.

(5) Federal entity response. A Federal entity has the right to submit a response to the board prior to the date of the scheduled meeting. If so directed by the Chair of the board, the Federal entity shall submit a written response to the non-Federal user's request.

(b) Federal entity requests. (1) In general. An eligible Federal entity may submit a written request in accordance with this subsection and Annex O of the NTIA manual to establish a Dispute Resolution Board to resolve an actual dispute that has arisen between the Federal entity and a non-Federal user regarding the execution, timing, or cost of the Transition Plan submitted by the Federal entity pursuant to section 113(h)(1) of the NTIA Organization Act, as amended (47 U.S.C. 923(h)(1)).

(2) Eligibility to request the establishment of a board. To submit a request to establish a board, a Federal entity, as such term is defined in § 301.20 of this part, must have submitted a Transition Plan pursuant to section 113(h)(1) of the NTIA Organization Act (47 U.S.C. 923(h)(1)) and the dispute must pertain to the execution, timing, or cost of such plan in connection with the non-Federal user's license (or licenses) to use the eligible frequencies.

(3) Contents of request. In order to be considered by a board under this subpart, a request must include:

(i) Specific allegations of fact sufficient to support the relief or action requested. Such allegations of fact, except for those for which official notice may be taken by the board, shall be supported by affidavits of a person or persons having

personal knowledge thereof;

(ii) A summary of the parties' prior efforts and attempts to resolve the dispute;

(iii) A detailed description of each of the claims upon which a resolution is sought by and available to the Federal entity;

(iv) A detailed description of the requested action, remedy or relief to be granted by the board;

(v) The requestor's contact information and a certificate of service showing to whom and when an identical copy of the request was provided to the non-Federal user; and

(vi) A meeting proposal setting forth the proposed date, time and place (including suggested alternatives) for a meeting with the non-Federal user and the board, the date for which shall be no later than fifteen (15) days from the date the request is received by NTIA.

(4) Non-Federal user response. A non-Federal user has the right to submit a response to the board prior to the date of the scheduled meeting. If so directed by the Chair of the board, the non-Federal user shall submit a written response to the Federal entity's request.

§ 301.210 Establishment and operation of a Dispute Resolution Board.

(a) In general. If the NTIA receives a written request under § 301.200, it shall establish a Dispute Resolution Board in accordance with this section.

(b) Board membership. A board established under this section shall be composed of three (3) members, to be appointed as follows:

- (1) A representative of OMB, to be appointed by the Director of OMB;
- (2) A representative of the NTIA, to be appointed by the Assistant Secretary; and
- (3) A representative of the Commission, to be appointed by the Chairman of the

Commission.

(c) Qualifications. The Assistant Secretary, in consultation with the Director of OMB and the Chairman of the Commission, may impose qualifications for one or more members of a board established under this section as are necessary pursuant to section 113(g)(6) of the NTIA Organization Act (47 U.S.C. 923(g)(6)), including, but not limited to, the following:

(1) The member has an appropriate and current security clearance to enable access to any classified or sensitive information that may be associated with or relevant to the Transition Plan subject to dispute;

(2) The member must be an employee of the appointing agency;

(3) The member must be from a predetermined slate of not less than three (3) qualified candidates from NTIA, OMB and the Commission and able to serve on a board immediately upon the notification of the establishment of a board under this section until it rules on the dispute that it was established to resolve; and

(4) The member may not simultaneously be a member of the Technical Panel governed by subpart B of this part or a former member of the Technical Panel that reviewed the Transition Plan subject to dispute.

(d) Chair. (1) The representative of OMB shall be the Chair of any board established under paragraph (a) of this section.

(2) The Chair may designate a Vice-Chair who may act as Chair in the absence of the Chair.

(e) Term. The term of a member of a board shall be until such board is terminated pursuant to paragraph (j) of this section or until a successor or replacement member is appointed under paragraph (b) of this section.

(f) Vacancies. Any vacancy on a board shall be filled in the manner in which the original appointment was made under paragraph (b) of this section.

(g) Compensation. (1) No member of a board shall receive any compensation for service on such board.

(2) Compensation in the member's capacity as an employee of the agency of the official that appointed such member to a board pursuant to paragraph (b) of this section shall not be considered compensation under paragraph (f)(1) of this section.

(h) Procedures of and actions by a board. (1) Except with respect to meetings with the parties pursuant to § 301.220(a), a board shall meet at the call of the Chair either in person or by some mutually agreeable electronic means to deliberate or rule on the dispute that it was established to resolve under paragraph (a) of this section or to receive technical assistance from the Technical Panel pursuant to § 301.130 of this part.

(2) A board shall endeavour to rule on the dispute that it was established to resolve under paragraph (a) of this section unanimously. Absent unanimous consent of all three members of a board, a concurring vote of a majority of the total board membership constitutes an action of such board.

(3) A majority of board members constitutes a quorum for any purpose.

(4) The Chair of a board, in consultation with the other members, may adopt additional policies and procedures to facilitate the efficient and timely resolution of the dispute that it was established to resolve under paragraph (a) of this section.

(i) Administrative support. The NTIA shall provide any board established pursuant to paragraph (a) of this section with the administrative support services necessary to carry out its duties under this subpart.

(j) Termination of a board. (1) A board established pursuant to paragraph (a) of this section shall terminate after it rules on the dispute that it was established to resolve and the time for appeal of its decision under section 113(i)(7) of the NTIA Organization Act has expired, unless such an appeal has been taken.

(2) If such an appeal has been taken, the board shall continue to exist until the appeal process has been exhausted and the board has completed any action required by a court hearing the appeal.

§ 301.220 Dispute resolution.

(a) Meeting with parties. In consideration of the proposal set forth in a request pursuant to either § 301.200(a)(4)(vi) or (b)(3)(vi) of or at another mutually convenient date, time and place (including via teleconference or other electronics means), the Chair of the board established under this subpart shall call a meeting of the board to be held simultaneously with representatives of the parties to the dispute to discuss the dispute.

(b) Additional written submissions. The parties to the dispute shall provide the board with any additional written materials and documents as it may request.

(c) Assistance from Technical Panel. A board established under this Subpart may request technical assistance, as necessary, from the Technical Panel governed by subpart B of this part.

(d) Deadline for decision. The board shall rule on the dispute not later than thirty (30) days from the date the request was received by the NTIA, unless the parties and the board all agree in

writing, and subject to the approval of the Assistant Secretary, to extend this period for a specified number of days.

(e) Board decision. The decision of a board established under this subpart shall be:

(1) In writing;

(2) Limited to matters regarding the reasonableness of the execution, timing, or cost of the Transition Plan submitted by the Federal entity;

(3) Based only on the record before it, including the request, meeting(s) with the parties all at the same time, any additional written submissions requested by the board and served on the other party, input from the Technical Panel, or other matters and material for which it may take official notice;

(4) In the form of a recommendation to NTIA, OMB, the Commission and the parties;

and

(5) Non-binding on the parties.

[FR Doc. 2012-17112 Filed 07/16/2012 at 8:45 am; Publication Date: 07/17/2012]