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

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230
	)	
	)	
	)	

SECOND REPORT AND ORDER, ORDER ON RECONSIDERATION, AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: July 8, 2004 **Released:** September 2, 2004

Comment Date: November 17, 2004
Reply Comment Date: December 17, 2004

By the Commission: Chairman Powell; Commissioners Abernathy and Martin issuing separate statements; Commissioner Adelstein approving in part, dissenting in part, and issuing a statement; Commissioner Copps dissenting and issuing a statement.

TABLE OF CONTENTS

I. INTRODUCTION

1. On May 15, 2003, we took significant first steps to facilitate the development of secondary markets in spectrum usage rights involving our Wireless Radio Services when we adopted our *Report and Order and Further Notice of Proposed Rulemaking* (*Report and Order* and *Further Notice*, respectively) in this proceeding.[1] In the *Report and Order*, we established policies and rules to enable spectrum users to gain access to licensed spectrum by entering into different types of spectrum leasing arrangements with licensees in most Wireless Radio Services.[2] In addition, we streamlined the Commission's approval procedures for license assignments and transfers of control in most Wireless Radio Services.[3] These steps advanced the general goal set forth in the Commission's *Secondary Markets Policy Statement*, namely that of significantly expanding and enhancing secondary markets to permit spectrum to flow more freely among users and uses in response to economic demand, to the extent consistent with our public interest objectives.[4] The policies we implemented also were consistent with several spectrum policy recommendations of the *Spectrum Policy Task Force Report*, including allowing more flexible use of

[1] *See generally* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (2003) (*Report and Order* and *Further Notice*, respectively), *Erratum*, 18 FCC Rcd 24817 (2003). By "spectrum usage rights," we refer to the terms, conditions, and period of use conferred under a license. *See Report and Order* at ¶ 1.

[2] *See generally id.* at ¶¶ 1-194.

[3] *See generally id.* at ¶¶ 195-203.

[4] *See generally* Principles for Promoting Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178 (2000) (*Secondary Markets Policy Statement*).

spectrum by licensees and other spectrum users, better defining licensees' and spectrum users' rights and responsibilities, enabling use of spectrum across various dimensions (frequency, space, and time), promoting the efficient use of spectrum, and providing for continued technological advances.[5] In the *Further Notice*, we proposed additional measures to facilitate the development of spectrum leasing, and sought particular comment on policies that could facilitate spectrum access for advanced technologies.[6]

2. Building upon the spectrum leasing framework we established in the *Report and Order*, we take several additional steps in this Second Report and Order to further reduce regulatory delay so that spectrum leasing parties in our Wireless Radio Services can implement certain classes of spectrum leasing arrangements in a more timely fashion, in accord with evolving marketplace demands and customer needs. As with the underlying *Report and Order*, these actions take us further down the path toward greater reliance on the marketplace, thus expanding the scope of available wireless services and devices and enabling more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country.[7] In addition, we implement policies enabling licensees and spectrum lessees to develop and manage "private commons" to provide more access to spectrum users and to take advantage of many of the advanced technologies that are being developed in the marketplace. Finally, we further streamline Commission approval procedures for certain classes of assignments and transfers of control in our Wireless Radio Services.

3. These additional steps to facilitate the development of secondary markets expand upon and complement several of the Commission's major policy initiatives and public interest objectives. These include our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services, and enable development of additional and innovative services in rural areas.

II. EXECUTIVE SUMMARY

4. In this Second Report and Order,[8] we adopt several of the proposals set forth in the *Further Notice*, along with additional policies, to further facilitate the development of secondary markets in spectrum usage rights. Specifically, we –

- Adopt immediate approval procedures for certain categories of *de facto* transfer spectrum leasing arrangements that do not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition;
- Further streamline our processing of short-term *de facto* transfer leases by replacing the Special Temporary Authority (STA) procedures with these new immediate approval procedures;

[5] *See generally* Spectrum Policy Task Force, ET Docket No. 02-135, *Report* (rel. Nov. 2002) (*Spectrum Policy Task Force Report*) at pp. 4, 16-23. This report is available at http://www.fcc.gov/sptf.

[6] *See generally Further Notice* at ¶¶ 213-323.

[7] *See generally Report and Order* at ¶¶ 2, 32-189.

[8] *See* Section IV, *infra.*

- Further streamline our processing of certain categories of spectrum manager leasing arrangements that do not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition (consistent with the new policies we adopt for certain categories of *de facto* transfer leasing arrangements);

- Extend our spectrum leasing policies to additional Wireless Radio Services, including Public Safety services (so long as public safety licensees lease spectrum to other public safety entities or entities providing communications in support of public safety operations), Automated Maritime Telecommunications Systems (AMTS) services, and Multichannel Video Distribution and Data Service (MVDDS);

- Clarify our spectrum leasing policies with regard to designated entity and entrepreneur licensees;

- Clarify existing policies with regard to the use of "smart" or "opportunistic" use technologies in the context of secondary markets, including clarification that dynamic spectrum leasing arrangements are permitted under the spectrum leasing policies;

- Establish a new type of secondary market arrangement that facilitates the development of "private commons" in licensed wireless radio spectrum;

- Adopt the same immediate approval procedures for certain categories of license assignments and transfers of control as adopted for *de facto* transfer spectrum leasing arrangements; and

- Extend our policies for streamlined processing of license assignments and transfers of control to all of the Wireless Radio Services regulated by the Wireless Telecommunications Bureau (Bureau).

5. In the Order on Reconsideration,[9] we address five petitions for reconsideration that we received with regard to the *Report and Order.* These petitions touched on a variety of issues, including the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules, protections for the licensee or spectrum lessee in the event a spectrum lessee or a license is terminated, and the respective responsibilities of licensees and spectrum lessees regarding particular service rules.

6. Finally, in the Second Further Notice of Proposed Rulemaking,[10] we seek comment on additional steps we could take to facilitate the development of secondary markets in spectrum usage rights. In particular, we request comment on policies that would further enhance the development of advanced technologies.

III. BACKGROUND

7. In the *Report and Order*, we took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications services to enter into spectrum leasing arrangements with Wireless Radio

[9] *See* Section V, *infra.*

[10] *See* Section VI, *infra.*

Service licensees. Specifically, we established two different spectrum leasing approaches based on the scope of the rights and responsibilities to be assumed by the spectrum lessee. Under the first leasing option – "spectrum manager" leasing – we enabled parties to enter into spectrum leasing arrangements without prior Commission approval so long as the licensee retains both *de jure* control[11] of the license and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard for leasing.[12] Under the second option – "*de facto* transfer" leasing – we permitted parties, pursuant to a streamlined approval process, to enter into leasing arrangements whereby the licensee retains *de jure* control of their licenses while *de facto* control over the use of the leased spectrum, and associated rights and responsibilities, are transferred for a defined period to the spectrum lessees. Parties may enter into either long-term or short-term *de facto* transfer leases, with some variation in the policies and procedures that apply to each type.[13] We also adopted streamlined Commission approval procedures for license assignments and transfers of control involving many of our Wireless Radio Services.[14]

8. In the *Further Notice*, we sought comment on various ways in which the Commission could further enhance opportunities for spectrum access, efficiency, and innovation by removing unnecessary regulatory barriers and implementing more market-oriented policies that would facilitate moving spectrum to its highest valued uses.[15] In particular, we sought comment on whether we could further streamline our processing of spectrum leasing arrangements and license assignments and transfers of control that did not raise a specified set of potential public interest concerns – relating to eligibility and use restrictions, foreign ownership, designated entity/entrepreneur issues, or competition – that would merit individualized Commission review.[16] We requested comment on whether our spectrum leasing policies should be extended to additional services,[17] and whether other actions should be taken to facilitate the development of secondary markets in spectrum usage rights.[18] Finally, we inquired as to what specific steps we could take, in the context of secondary markets, to maximize the potential public benefits enabled by advanced technologies, such as opportunistic devices.[19]

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[11] *De jure* control means legal control, or control as a matter of law. Typically, ownership of more than 50 percent of the voting stock of a corporate licensee evidences *de jure* control. *See generally* In re Application of Fox Television Stations, Inc., *Memorandum Opinion and Order*, 10 FCC Rcd 8452, 8513-14 ¶¶ 151-153 (1995).

[12] *See generally Report and Order* at ¶¶ 82-125, 182-189. As explained more fully in the *Report and Order*, we adopted a new, more flexible *de facto* control standard that applies to spectrum leasing arrangements. *See id.* at ¶¶ 51-70.

[13] *See generally id.* at ¶¶ 82-92, 126-189.

[14] *See generally id.* at ¶¶ 195-203.

[15] *See generally Further Notice* at ¶¶ 213-323.

[16] *See id.* at ¶¶ 237-287.

[17] *See id.* at ¶¶ 288-313.

[18] *See generally id.* at ¶¶ 221-229 (achieving a more efficient spectrum marketplace), 315-319 (applying the new *de facto* control standard for spectrum leasing to other types of arrangements), 320-323 (considering the effect of secondary markets policies on designated entity and entrepreneur policies).

[19] *See id.* at ¶¶ 230-236.

9. In response to the *Further Notice*, we received twenty-one (21) comments and ten (10) reply comments.[20] Five parties filed petitions for reconsideration of the *Report and Order*, and several parties filed oppositions or comments in response.[21]

IV. SECOND REPORT AND ORDER

A. Spectrum Leasing Arrangements

1. Additional Streamlining of Procedures for Certain Categories of Spectrum Leases

10. In the *Report and Order*, we took significant steps to develop spectrum leasing policies for many of our Wireless Radio Services and to streamline the regulatory processes applicable to parties that seek to enter into these types of arrangements. In the *Further Notice*, we proposed additional steps to further reduce unnecessary delay in the implementation of certain categories of spectrum leasing arrangements to the extent doing so would be consistent with meeting our statutory obligations that such transactions would be in the public interest.[22] In this Second Report and Order, we adopt several measures to remove unnecessary delay in the implementation of spectrum leasing arrangements, as explained herein.

a. Immediate approval of certain categories of *de facto* transfer leases that are subject to our forbearance authority

(i) Background

11. Under current spectrum leasing policies and procedures, licensees and spectrum lessees may enter into both long- and short-term *de facto* transfer leases pursuant to streamlined application and

[20] *See* AMTA Comments; APCO Comments; AT&T Wireless Comments and Reply Comments; BellSouth Comments; Boeing Reply Comments; Blooston Rural Carriers Comments; Cantor Fitzgerald Telecom Comments and Reply Comments; Cingular Wireless Comments; CTIA Comments; ITA Reply Comments; Mobex Comments; NAM/MRFAC Reply Comments; National ITFS Association Comments and Reply Comments; Nextel Communications Comments; Nextel Partners Reply Comments; PCIA Comments; Paging Systems Reply Comments; RTG Comments; Salmon PCS Comments; SBC Comments; Spectrum Market Comments; Sprint Comments; St. Clair County Reply Comments; T-Mobile Reply Comments; Verizon Wireless Comments; WCA Comments; WiNSeC Comments; Winstar Comments and Reply Comments. We also received *ex parte* comments from three parties. *See* Council Tree *Ex Parte* Comments; MDS America *Ex Parte* Comments; Salmon PCS *Ex Parte* Comments.

[21] *See* Blooston Rural Carriers Petition for Partial Reconsideration and/or Clarification; Cingular Wireless Petition for Reconsideration and Clarification; First Avenue Networks Petition for Reconsideration; NTCA Petition for Partial Reconsideration; Verizon Wireless Petition for Reconsideration and Clarification. In response, we received reply comments from Salmon PCS and RTG, an opposition was filed by the Fixed Wireless Communications Coalition, and an *ex parte* letter filed by PCIA's Microwave Cost Sharing Clearinghouse. *See generally* Salmon PCS Petition Reply Comments; RTG Petition Reply Comments (dated Feb. 13, 2004); Fixed Wireless Communications Coalition Opposition to Petition for Reconsideration; Letter to Katherine Harris, Deputy Chief, Mobility Division, from Eric W. DeSilva, Counsel to PCIA's Microwave Cost Sharing Clearinghouse (dated Mar. 25, 2004).

[22] *See generally Further Notice* at ¶¶ 237-240.

approval procedures.[23] Specifically, parties that seek to enter into long-term *de facto* transfer leasing arrangements submit their applications, which are then placed on public notice[24] and subject to further individualized Commission review prior to grant. The applications then are approved (or denied) by the Wireless Telecommunications Bureau (Bureau) within twenty-one (21) days unless they are removed from streamlined processing for further review based on potential public interest concerns identified by the Commission or in petitions to deny.[25] Parties that seek to enter into short-term *de facto* transfer leases do so pursuant to the same processes applicable to STAs. These applications, which are not placed on prior public notice, are acted upon by the Bureau within ten (10) days if specified conditions are met.[26] Consistent with our policies for other approvals, approval of both of these types of *de facto* transfer lease applications also is subject to the Commission's reconsideration procedures.[27]

12. In the *Further Notice*, we sought comment on whether we could minimize delay in the timely implementation of *de facto* transfer leases by eliminating unnecessary regulatory review for certain classes of spectrum leases. For *de facto* transfer leases subject to our forbearance authority under Section 10 of the Communications Act,[28] we proposed to forbear, to the extent necessary, from requiring prior public notice and individualized Commission review and approval for spectrum leasing arrangements that did not raise any of a specified set of potential public interest concerns.[29]

[23] *See generally Report and Order* at ¶¶ 150-154.

[24] The Wireless Telecommunications Bureau places these spectrum leasing applications on weekly public notices. We note that all *de facto* transfer spectrum leasing arrangements that fall within the scope of our forbearance authority – *i.e.*, those that involve licensees that are telecommunications carriers, as defined under the Act, or otherwise provide commercial radio services (CMRS) or common carrier-based services – generally are subject to the requirement, pursuant to Section 309(b), that the application be placed on public notice prior to grant. *See* 47 U.S.C. § 309(b). Those applications not statutorily subject to this requirement are placed on an "informational" public notice.

[25] As the Commission indicated in the *Report and Order*, these concerns might include foreign ownership or competition concerns, or other concerns requiring further review, such as those raised by petitions to deny (where such petitions are permitted under Section 309(d) of the Act). *See Report and Order* at ¶¶ 151-152; 47 U.S.C. §§ 309(b)-(d).

[26] *Report and Order* at ¶ 181.

[27] *See id.* at ¶ 152; *see generally* 47 C.F.R. § 1.101 *et seq.* (rules pertaining to petitions for reconsideration of actions taken on delegated authority).

[28] 47 U.S.C. § 160(a). As we noted in the *Further Notice*, our forbearance authority under Section 10 of the Communications Act applies to *de facto* transfer spectrum leases involving licensees that are telecommunications carriers, or that otherwise provide commercial mobile radio service and common carrier-based services. *See Further Notice* at ¶ 242.

[29] *See id.* at ¶¶ 244, 246-265, 268. In particular, we proposed to forbear from the requirements of Sections 308, 309, and 310(d) of the Communications Act to the extent necessary to permit the Commission to process notification filings regarding certain categories of *de facto* transfer leases without 30 days prior public notice and without prior Commission review and consent. *Id.* at ¶¶ 244, 246.

13. Specifically, we proposed that if the spectrum lessee satisfied certain eligibility requirements and applicable use restrictions,[30] and the spectrum lease did not raise specified potential public interest concerns relating to foreign ownership,[31] designated entity/entrepreneur,[32] or competition policies,[33] we would require only that the spectrum leasing parties notify the Commission of the spectrum leasing arrangement within 14 days of executing the lease.[34] Once the parties notified the Commission of a spectrum leasing arrangement that met these qualifications, we proposed that the lease would be deemed approved as of the time that the Bureau placed it on public notice.[35] Thereafter, our approval of the spectrum leasing arrangement would be subject to the Commission's reconsideration procedures. Any interested party would be entitled, consistent with our rules and policies concerning standing, to petition for reconsideration of our approval of the spectrum leasing arrangement within 30 days of the public notice date.[36] Similarly, the Bureau would be able to reconsider the grant on its own motion within 30 days of the public notice date, and the Commission could reconsider the grant on its own motion within 40 days of the public notice date.[37] We also inquired whether there were additional classes of leases that

[30] In the *Further Notice*, we proposed to forbear from requiring prior approval of *de facto* transfer spectrum leases provided, among other things, that the spectrum lessee certifies in the spectrum lease filing that it meets the basic qualification requirements for holding the license authorization associated with the lease, and that it would comply with all applicable use restrictions. *See id.* at ¶¶ 247-250. Thus, for example, a lessee would be required to have the requisite character qualifications and to be able to certify its compliance under the Anti-Drug Abuse Act of 1988. *See* 21 U.S.C. § 862; 47 C.F.R. § 1.2001 *et seq.*

[31] We proposed to forbear from requiring prior Commission review of *de facto* transfer spectrum leases so long as such leases would not, among other things, raise certain specified potential foreign ownership concerns. *See Further Notice* at ¶¶ 251-253.

[32] *See id.* at ¶¶ 266, 268. Noting that designated entity and entrepreneur licensees had received special benefits (*e.g.*, bidding credits, installment payment plans, or closed bidding licenses) from the Commission and that, as a result, would continue to remain subject to any applicable eligibility and use restrictions when leasing to spectrum lessees, we sought general comment on how our forbearance proposal would address spectrum leasing by designated entity and entrepreneur licensees. *See id.* at ¶¶ 266, 268.

[33] We sought comment in the *Further Notice* on possible benchmarks or safe harbors that would allow certain classes of *de facto* transfer leases that would not pose any significant risk to our competition policies to proceed without prior public notice and Commission review. *Id.* at ¶¶ 257-262. Specifically, we proposed to establish benchmarks that considered the competitive effects on both the input and output markets. *Id.* at ¶ 258 & n.454.

[34] *Id.* at ¶ 266. Under the proposal set forth in the *Further Notice*, both spectrum leasing parties would be involved in filing the application. *Id.* This is consistent with current requirements pertaining to *de facto* transfer spectrum leasing applications. *See Report and Order* at ¶ 151.

[35] *Further Notice* at ¶ 266.

[36] *Id.* at ¶ 268; *see* 47 U.S.C. § 405; 47 C.F.R. § 1.106(b).

[37] *Further Notice* at ¶ 268; *see* 47 C.F.R. §§ 1.108, 1.117. We also noted that, should information be brought to our attention at some later date suggesting that the parties to a spectrum lease implemented pursuant to this proposed forbearance option had not complied with the requirements and conditions we adopt for such action, the Commission could initiate a formal or informal investigation. *Further Notice* at ¶ 268 n.461; *see* 47 C.F.R. §§ 1.80, 1.89, 1.91, 1.92.

might raise other public interest concerns for which prior individualized Commission review and approval would continue to be appropriate.[38]

(ii) Discussion

14. Consistent with the broad support by commenters for the general forbearance proposal set forth in the *Further Notice*,[39] we adopt this proposal, with certain modifications, as discussed herein. Under the approach we adopt, spectrum leasing parties[40] that seek to enter into *de facto* transfer spectrum leases that qualify under this forbearance approach may file their spectrum lease application[41] with the Commission, which in turn will be immediately approved under the procedures set forth below.[42] Because we determine that *de facto* transfer leases meeting the specifications described below do not raise potential public interest concerns that would necessitate prior public notice or more individualized review, we believe that removing this unnecessary round of notice and regulatory review is appropriate, pursuant to our forbearance authority. This action serves the Commission's policy goals of facilitating secondary markets in spectrum usage rights by enabling parties to implement spectrum leasing arrangements without undue delay. At the same time, it continues to protect the public interest by subjecting these arrangements, following approval, to public notice and possible additional review under the Commission's reconsideration procedures should that be warranted.

(a) Elements of *de facto* transfer leasing transactions that would not require prior public notice and individualized Commission review

15. We will permit all *de facto* transfer spectrum leases that are subject to the Commission's forbearance authority and that do not potentially raise certain specified public interest concerns to proceed pursuant to the application and immediate grant procedures set forth in Section IV.A.1.a(ii)(b), below. As discussed in this section, if a particular *de facto* transfer leasing arrangement does not raise potential concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition, we conclude, under our forbearance authority, that we need no longer require prior public notice and individualized Commission review before the spectrum

[38] *Further Notice* at ¶¶ 263-265.

[39] All parties commenting on the forbearance proposal supported the Commission's general approach. *See, e.g.*, Blooston Rural Carriers Comments at 11-12; Cantor Fitzgerald Telecom Comments at 2; CTIA Comments at 2-4; Nextel Communications Comments at 6-9; Nextel Partners Reply Comments at 8; PCIA Comments at 5; RTG Comments at 2-5; SBC Comments at 7-10; Spectrum Market Comments at 4; T-Mobile Reply Comments at 6-8; WCA Comments at 11-15; Winstar Comments at 2. Some commenters recommended certain revisions to the particular elements proposed, as discussed more fully below.

[40] Spectrum leasing parties include licensees and spectrum lessees. The term "spectrum lessee," as used throughout this report, includes spectrum lessees and spectrum sublessees that have entered into spectrum subleasing arrangements as permitted under our spectrum leasing policies and rules.

[41] Because we determine to require that the *de facto* transfer spectrum leasing arrangements be approved, we use the term "application" instead of the term "notification" used in the *Further Notice.*

[42] As we explain more fully below, under the immediate approval process, spectrum leasing parties must submit qualifying applications and include the requisite filing fees. The Bureau will then process the application overnight and, provided that the payment of the requisite filing fees have been confirmed, indicate in our Universal Licensing System (ULS) that the application has been approved. *See* Section IV.A.1.a(ii)(b), *infra.*

lease may become effective.[43] Therefore, once parties file a spectrum leasing application consistent with these requirements, it will immediately be approved under the policies and rules we are adopting herein, and spectrum lessees may commence operations as provided under the terms of the lease.[44]

16. *Eligibility and use restrictions.* As proposed in the *Further Notice*, parties seeking to use the application/immediate approval procedures adopted under this forbearance approach for *de facto* transfer spectrum leases must comply, *inter alia*, with the applicable eligibility and use restrictions. Accordingly, we require that, in the spectrum leasing application submitted to the Commission, the spectrum lessee must certify that it meets the basic qualification requirements for holding the license authorization associated with the lease and that it will comply with all applicable use restrictions.[45]

17. As discussed in the *Further Notice*, we believe that spectrum lessee compliance with these requirements is necessary because, in many services, we continue to have eligibility and use restrictions that were adopted in furtherance of certain public interest objectives.[46] While we seek to promote licensee flexibility and facilitate secondary markets where appropriate, we do not intend for policies adopted in this proceeding to be used as a means for evading requirements that remain in effect for a given service.[47] Having spectrum lessees certify to the Commission that they will comply with applicable eligibility and use restrictions will ensure that spectrum leasing arrangements approved under the forbearance approach do not undermine these policies.

18. Consistent with the policies we adopted in the *Report and Order*, the applicable eligibility restrictions are the same for both long-term and short-term *de facto* transfer leases.[48] The applicable use restrictions may, however, differ depending on whether a long or short-term *de facto* transfer lease is involved.[49] As provided in the *Report and Order*, we permit some additional flexibility under short-term *de facto* transfer leasing with respect to one particular set of use restrictions; specifically, we permit

[43] If spectrum leasing parties do not qualify for this type of processing, they must proceed pursuant to the streamlined 21-day process set forth in the *Report and Order*. *See Report and Order* at ¶¶ 151-154.

[44] Thus, if the spectrum leasing parties indicate on the application that, under the terms of the lease, the spectrum lessee will commence the spectrum lease as of the date that the Commission approves the arrangement, then that will be the date on which the Commission's policies and rules regarding *de facto* transfer leases will be applied with regard to the leased spectrum. If, however, the spectrum leasing parties have indicated in the lease application that commencement is due to occur at some later date, then the date indicated will apply.

[45] We note that only a few commented on this proposal, with most providing general support for it. *See, e.g.*, Blooston Rural Carriers Comments at 12; RTG Comments at 2-3. Only one commenter opposed such restrictions. *See* AT&T Wireless Comments at 6.

[46] *Further Notice* at ¶ 248.

[47] *Id.*

[48] *See Report and Order* at ¶ 143 (eligibility requirements applicable to long-term *de facto* transfer leases), ¶ 174 (eligibility requirements applicable to short-term *de facto* transfer leases); 47 C.F.R. §§ 1.9030(d)(2), 1.9035(d)(1).

[49] *See Report and Order* at ¶ 144 (use restrictions applicable to long-term *de facto* transfer leases), ¶ 175 (use restrictions applicable to short-term *de facto* transfer leases); 47 C.F.R. §§ 1.9030(d)(3), 1.9035(d)(1).

licensees with service authorizations that restrict use of spectrum to non-commercial uses to enter into short-term *de facto* transfer leases to allow the spectrum lessee to use it commercially.[50]

19. *Foreign ownership.* As we generally proposed in the *Further Notice*, we determine that spectrum lessees seeking to enter into *de facto* transfer leases under this forbearance approach must be able to certify that they comply with specific requirements, described below, to ensure that the spectrum lease does not raise foreign ownership concerns under Section 310 of the Act that remain unaddressed prior to implementation of the lease. This approach will enable most *de facto* transfer leases to proceed immediately, while ensuring that the Commission and the Executive Branch have the opportunity to review any lease that may raise potential foreign ownership concerns prior to that spectrum lease going into effect.

20. Under the policy we are adopting, the spectrum lessee must certify that it is not a foreign government or representative thereof, consistent with the Section 310(a) requirements.[51] Second, if the spectrum lease involves a common carrier radio authorization, the spectrum lessee must certify that it is not an alien or representative thereof, a corporation organized under the laws of any foreign government, or have more than 20 percent direct foreign ownership, in accord with the requirements of Sections 310(b)(1)-(3).[52]

21. Finally, consistent with our policies under Section 310(b)(4),[53] as explained in the *Further Notice*,[54] the spectrum lessee must certify either (1) that it does not have more than 25 percent indirect

[50] *Report and Order* at ¶ 175; 47 C.F.R. § 1.9035(d)(1).

[51] 47 U.S.C. § 310(a).

[52] *Id.* § 310(b)(1)-(3).

[53] *Id.* § 310(b)(4).

[54] As noted in the *Further Notice*, we have traditionally conducted our Section 310(b)(4) public interest analysis of indirect foreign ownership in excess of 25 percent in the context of specific applications (whether for a new authorization or in connection with a transfer of control or license assignment) involving an entity with such ownership or in response to a request for declaratory ruling. *See, e.g.*, Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, *Order and Authorization*, 16 FCC Rcd 22897 (2001), *Erratum*, 17 FCC Rcd 2147 (2002), *recon. denied*, 17 FCC Rcd 14030 (2002). Moreover, under the *Foreign Participation Order*, we treat different classes of foreign ownership differently, depending upon whether the applicant is from a WTO-member country or a non-WTO-member country. *See Foreign Participation Order*, 12 FCC Rcd at 23902-23903 ¶¶ 26-27. Under the current standard, an applicant that demonstrates more than 25 percent indirect foreign ownership attributable to entities from WTO member countries is entitled to a presumption that no competitive concerns are raised by the proposed investment, subject to Commission consideration of any relevant factors and evidence that might tend to rebut the presumption. *See, e.g.,* General Electric Capital Corporation and SES Global, S.A., *Order and Authorization*, 16 FCC Rcd 17575, 17579 ¶ 30 (IB & WTB 2001); *see also Foreign Participation Order*, 12 FCC Rcd at 23913-23915 ¶¶ 50-53, 23940 ¶¶ 111-112. We do not presume, however, that indirect foreign investment from WTO-member countries poses no national security, law enforcement, foreign policy, or trade concerns, and accord deference to the expertise of Executive Branch agencies in identifying and interpreting these issues of concern in the context of particular applications and petitions for declaratory ruling under Section 310(b)(4). *See Foreign Participation Order*, 12 FCC Rcd at 23919-23920 ¶¶ 63-64. In contrast, an applicant that demonstrates more than (continued….)

foreign ownership or (2) that it has previously obtained a declaratory ruling from the Commission in advance of entering into the subject spectrum lease that establishes that the spectrum lease falls within the scope of that declaratory ruling (including the type of service and geographic coverage area) and that there has been no change in foreign ownership in the meantime. We emphasize that the spectrum lessee is primarily and directly responsible for ensuring that the scope of its prior declaratory ruling covers the proposed lease transaction. If it does not, the spectrum lessee must obtain a supplemental ruling that would apply to the particular transaction, and must do so *prior* to filing under the new immediate approval procedures. For example, a spectrum lessee may have previously received a ruling that approved its acquisition of a specific group of common carrier microwave licenses, or that approved its acquisition of a controlling interest in a carrier that holds a specific group of common carrier microwave licenses. Such a ruling would not cover a future spectrum lease of PCS spectrum. In such circumstances, in order for the spectrum lessee to be able to satisfy the certification requirement, it must first request and obtain from the Commission a supplemental ruling to cover the spectrum leasing arrangements involving PCS spectrum.

22. We recognize that this approach could require a spectrum lessee with indirect foreign ownership above 25 percent to file multiple Section 310(b)(4) requests in order to take advantage of the new immediate approval procedures for spectrum leases. The need to make multiple filings for Section 310(b)(4) approval could undercut many of the efficiencies provided by the new procedures. In order to minimize the need to request multiple Section 310(b)(4) rulings, we will entertain petitions for Section 310(b)(4) rulings that seek to cover future spectrum leasing arrangements involving spectrum for services and geographic coverage areas specified in the petitions. We also will entertain petitions that seek to cover such spectrum leases entered into by the petitioning carrier, as well as by wholly-owned subsidiaries of that carrier. However, in order to discourage the filing of speculative petitions, which would impose undue administrative burdens on Commission resources, we note that we will entertain petitions for such "blanket" rulings only in conjunction with a spectrum lease application that would be covered by the requested ruling. Consistent with our current practice, we will forward the petition for declaratory ruling to the appropriate Executive Branch agencies and process the application under our current streamlined procedures, assuming the application is otherwise eligible for such processing. We believe this approach eliminates unnecessary regulatory hurdles for carriers seeking maximum flexibility to expand the scope of their service offerings, while continuing to ensure that the Commission and the Executive Branch have a meaningful opportunity to review applications and petitions for potential harms to national security, law enforcement, public safety, security of critical infrastructure, foreign policy, and trade policy.[55]

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25 percent indirect foreign ownership attributable to entities from non-WTO member countries does not receive the favorable presumption and must meet the more demanding effective competitive opportunities test. *See id.* at 23946 ¶ 131.

[55] One commenter, T-Mobile, recommended that the Commission include in the forbearance approach those leases in which either (i) the proposed lessee has obtained a declaratory ruling for foreign ownership above 25 percent or (ii) the 100 percent direct or indirect parent of the lessee has obtained such a declaratory ruling. T-Mobile Comments at 2-4. T-Mobile made the same recommendation with respect to our forbearance proposal for applications to assign or transfer control of wireless licenses. *Id*. We find that the approach we adopt here strikes the optimum balance between the concerns raised by T-Mobile, reducing transaction costs, including unnecessary regulatory delay, and the concerns raised by the Executive Branch in numerous licensing proceedings before the Commission. *See, e.g.*, Applications of Vodafone AirTouch, plc., and Bell Atlantic Corporation, For Consent to Transfer of Control or Assignment of Licenses and Authorizations, *Memorandum Opinion and Order*, 15 FCC Rcd 16507 (WTB/IB 2000); Application of VoiceStream Wireless Corporation, Powertel, Inc., Transferors, and (continued….)

23. We note that because the same foreign ownership policies apply to both long-term and short-term *de facto* transfer leasing arrangements,[56] spectrum lessees under both of these types of *de facto* transfer lease applications will be required to make these certifications.

24. *Designated entity/entrepreneur eligibility.* Because designated entity and entrepreneur licensees have been conferred special benefits (*e.g.*, bidding credits, installment payment plans, or participation in closed bidding) by the Commission, and because these licensees may enter into long-term *de facto* transfer spectrum leasing arrangements only so long as such arrangements are consistent with our policies relating to applicable transfer restrictions and unjust enrichment payment obligations,[57] we believe it is both necessary and appropriate to retain the ability to review all long-term *de facto* transfer spectrum leasing arrangements involving designated entity or entrepreneur licensees to ensure compliance with applicable policies and rules, and thus such leasing arrangements cannot be processed under these procedures.[58] As we stated in the *Further Notice*, we do not intend for the forbearance approach to be used as a means to evade Commission rules,[59] and we believe this to be especially important where the rules have been implemented to fulfill our statutory obligations.[60] Given, however, that we have eliminated all of these restrictions with regard to short-term *de facto* transfer leases,[61] we determine that applications involving short-term *de facto* transfer leases do not raise any potential public interest concerns relating to our designated entity or entrepreneur policies that would preclude the spectrum leasing parties from proceeding under our forbearance approach.

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Deutsche Telekom AG, Transferee, *Memorandum Opinion and Order*, 16 FCC Rcd 9779 (2001); Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Assignor, and Telenor Satellite Mobile Services, Inc., and Telenor Satellite, Inc., Assignee, *Order and Authorization*, 16 FCC Rcd 22897 (2001); Space Station System Licensee, Inc. (Assignor) and Iridium Constellation LLC (Assignee) et al., *Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271 (IB 2002); Global Crossing, Ltd. (Debtor-in-Possession), Transferor, and GC Acquisition Limited, Transferee, *Order and Authorization*, 18 FCC Rcd 20301 (IB/WCB/WTB 2003) (*recon. pending*).

[56] *See Report and Order* at ¶¶ 110, 143; 47 C.F.R. §§ 1.9020(d)(2)(ii), 1.9030(d)(2)(ii).

[57] *See Report and Order* at ¶ 145; see also the discussion in Section IV.A.4, below.

[58] Our decision not to forbear with regard to this class of spectrum leases is consistent with the Commission's determination not to forbear from prior notice and individualized approval requirements with regard to *pro forma* transactions involving designated entity and entrepreneur licensees. *See* Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6307-6308 ¶¶ 25-26 (1998) (*Pro Forma Forbearance Order*).

[59] *Further Notice* at ¶ 248. While several commenters sought either modification or elimination of restrictions on spectrum leasing by designated entity and entrepreneur licensees, none recommended how the Commission should address eligibility-related restrictions in the context of the forbearance proposal in the event certain restrictions remained in place. *See* AT&T Wireless Comments at 6-9; Blooston Rural Carriers Comments at 3-5; Cingular Wireless Comments at 2-8; RTG Comments at 5-7. We discuss these comments more fully in Section IV.A.4, below, where we provide additional clarification on how the designated entity and entrepreneur policies will be applied in the context of spectrum leasing.

[60] *See generally Report and Order* at ¶¶ 237-238, 240, 245, 248, 251, 257, 263.

[61] *Id.* at ¶ 176; 47 C.F.R. § 1.9035(d)(2).

25. *Competition.* In light of the Commission's competition policies for Wireless Radio Services, we will permit spectrum leasing parties to proceed under our forbearance approach so long as the *de facto* transfer leasing arrangement does not raise potential competition concerns that merit prior public notice and Commission review before the application is approved. Consistent with our competition policies, however, we will exclude from this approach, at this time, all long-term *de facto* transfer leases involving spectrum that (1) is, or may reasonably be, used to provide interconnected mobile voice and/or data services and (2) creates a "geographic overlap" with other spectrum used to provide these services in which the spectrum lessee holds a direct or indirect interest (of 10 percent or more),[62] either as a licensee or as a spectrum lessee. Because the latter class of *de facto* transfer leases potentially raise competition concerns, they will continue to be subject to case-by-case review and approval under the policies we adopted in the *Report and Order*.[63]

26. As we noted in the *Report and Order*, assessment of potential competitive effects of spectrum leasing transactions remains an important element of our policies to promote facilities-based competition and guard against the harmful effects of anticompetitive conduct, and we thus apply the Commission's general competition policies to transactions involving long-term *de facto* transfer spectrum leases (as well as to spectrum manager leases).[64] The approach we adopt herein, pursuant to our forbearance authority, is designed to be consistent with our current competition policies with regard to Wireless Radio Services. In examining transactions for possible competitive harm, the Commission has primarily focused its efforts in recent years on services that could potentially affect the product market for mobile telephony, which includes interconnected mobile voice and/or data services.[65] Cellular, broadband Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services currently are used to provide CMRS services that potentially affect the mobile telephony market, and expressly are subject to the Commission's competition policies set forth in the *2000 Biennial Review Order on CMRS*

[62] For the purpose of implementing this requirement, we define these direct or indirect interests in the same manner as defined pursuant to existing rules for wireless licensees under Part 1. In particular, a lessee must disclose whether it has a 10 percent direct or indirect interest in an entity, as defined in Section 1.2112 of our rules. *See* 47 C.F.R. § 1.2112; *see also* 47 C.F.R. §§ 1.919 (ownership information relating to Wireless Radio Service licensees and applicants); 1.948 (ownership reporting requirements for transfers and assignments); *cf. Report and Order* at ¶¶ 119 (requiring spectrum lessees under spectrum manager leases to disclose, in the lease notification, whether they already hold direct or indirect interests, of 10 percent or more, in 10 MHz or more of certain CMRS spectrum in a particular geographic area, either as a licensee or spectrum lessee), 147 (requiring spectrum lessees under long-term *de facto* transfer leases to disclose, in the lease application, whether they already hold direct or indirect interests, of 10 percent or more, in 10 MHz or more of certain CMRS spectrum in a particular geographic area, either as a licensee or spectrum lessee).

[63] *See Report and Order* at ¶ 147 (citing ¶¶ 116-119 of the *Report and Order*). This is spectrum that the Commission has licensed with a mobile allocation and corresponding service rules; it is suitable for the provision of mobile telephony services on the basis of its physical properties, the state of equipment technology, and the relevant interference rights and obligations.

[64] *See Report and Order* at ¶¶ 116-119 (applying the Commission's competition policies to spectrum manager leases), 147 (applying the Commission's competition policies to long-term *de facto* transfer leases).

[65] *See, e.g.*, 2000 Biennial Regulatory Review – Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668 (2001) (*2000 Biennial Review Order on CMRS Aggregation Limits*).

Aggregation Limits.[66] In addition, spectrum in several other services may currently, or at some time in the future, be used to provide such CMRS services; these services include several services licensed under Part 27 of our rules[67] – including the Wireless Communications Service (WCS),[68] Broadband Radio Service,[69] Advanced Wireless Service (AWS),[70] the upper and lower 700 MHz bands,[71] and the 1390-1392 MHz, 1392-1395/1432-1435 MHz, and 2385-2390 MHz bands[72] – as well as narrowband PCS,[73] various paging

[66] *See generally id.* In that order, the Commission noted that it would continue to have an obligation to guard against potential anticompetitive effects that might result from entities aggregating control over spectrum. *See generally id.*, 16 FCC Rcd at 22681-22693 ¶¶ 30-46, 22695-22696 ¶¶ 54-55, 22699-22700 ¶¶ 62-65. We note, however, that the cellular cross-interest rules were eliminated in the *Rural Report and Order* adopted concurrently with this Second Report and Order. *See* Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services, WT Docket No. 02-381; 2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, WT Docket No. 01-14; Increasing Flexibility to Promote Access to and the Efficient and Intensive Use of Spectrum and the Widespread Deployment of Wireless Services, and to Facilitate Capital Formation, WT Docket No. 03-202, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-166 (rel. Aug. __, 2004) (*Rural Report and Order*). Accordingly, we will revise our spectrum leasing rules to reflect elimination of these rules in the context of spectrum leasing arrangements, as discussed below. *See* para. 157, *infra*.

[67] *See generally* 47 C.F.R. Part 27. Each of the Part 27 services listed here may provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation).

[68] *See generally* 47 C.F.R. Part 27 subpart E. The licensed spectrum in the WCS band includes the 2305-2320 MHz and 2345-2360 MHz bands, and may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation).

[69] 47 C.F.R. Part 27 subpart M. Pursuant to the Commission's competition policies, the Wireless Telecommunications Bureau and Media Bureau have recently examined transactions involving the assignment of MDS and ITFS licenses to determine whether potential competitive concerns were raised. *See* Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor in Possession) to Nextel Spectrum Acquisition Corp., *Memorandum Opinion and Order*, 19 FCC Rcd 6232, 6244 ¶ 29 (2004) (WTB and MB) (determining that the potential benefits of the transaction outweighed any potential competitive harm, and the that the transaction was in the public interest).

[70] *See generally* 47 C.F.R. Part 27 (including rules applicable to AWS). The licensed spectrum in these bands may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation). The Commission adopted the AWS service rules in 2003. *See* Service Rules for Advanced Wireless Services in the 1.7GHz and 21.GHz Bands, *Report and Order*, 18 FCC Rcd 25162 (2003). We note, too, that we determined to extend the spectrum leasing policies and rules adopted in the *Report and Order* to the AWS band. *See id.* at 25173-25174 ¶ 26. As part of this Second Report and Order and Order on Reconsideration, we will revise our Part 1 subpart X rules applicable to spectrum leasing arrangements to reflect that AWS is one of the included services.

[71] 47 C.F.R. Part 27 subparts F, H. The licensed spectrum in these bands may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.2, 2.106 (allocation in these services includes a mobile allocation).

[72] 47 C.F.R. Part 27 subparts I, J, K. These bands may be used to provide mobile telephony services. *See* 47 C.F.R. §§ 27.802, 27.902, 27.1002.

[73] 47 C.F.R. § Part 24 subpart D. Operators may provide mobile telephony services on spectrum in the narrowband PCS band. *See* 47 C.F.R. § 24.3.

services,[74] and mobile satellite service where the use of ancillary terrestrial components (ATC) is permissible.[75] Accordingly, under the policies we adopt herein, we find that long-term *de facto* transfer leasing transactions that involve a geographic overlap between or among any of these listed services, and are to be used to provide mobile telephony service, continue to merit public notice and case-by-case review by the Commission prior to approval.[76] Such transactions potentially raise public interest concerns relating to competition, and thus will not be subject to our forbearance approach at this time.

27. Thus, if the spectrum leasing transaction does not involve a geographic overlap with spectrum held by the spectrum lessee in any of the particular services listed, as described above, we will permit the leasing arrangement to proceed without prior public notice or case-by-case review. We note, however, that because of the emergence of new technologies and the convergence of different services (*e.g.*, wireline and wireless services),[77] our identification of those classes of spectrum leasing arrangements currently raising possible competitive concerns may not always capture that class of transactions that may raise competitive concerns in the future. For instance, new product markets may emerge through the bundling of different services, thus requiring us to determine whether such a new product market may raise competitive concerns. Alternatively, competition issues might arise if there was significant intermodal consolidation of services. Accordingly, as the Commission gains more experience with regard to these transactions and the kinds of competitive concerns that may arise, further refinements may be made to the forbearance approach we are adopting herein. In addition, to the extent that we determine that a spectrum leasing transaction raises an unanticipated potential competitive concern (*e.g.*, new and evolving product markets, intermodal consolidation), we reserve the right to reconsider the grant of a spectrum leasing transaction during our reconsideration process.

28. *Other public interest concerns.* Finally, we note that *de facto* transfer leasing arrangements that would require waiver of Commission policies or rules, or a declaratory ruling relating to them, may not use the streamlined processing we are adopting under this forbearance approach. Requests for a waiver or declaratory ruling implicates other potential public interest concerns associated with the license or spectrum leasing authorization, and would first need to be approved by the Commission. This policy will be applied with respect to both long- and short-term *de facto* transfer leasing arrangements.

(b) Application and immediate approval procedures

[74] These would involve certain frequencies in the Paging and Radio Telephone Service. *See* 47 C.F.R. §§ 20.561 (providing for one-way or two-way mobile operation on certain VHF and UHF channels); 22.651 (providing for trunked mobile operation on 470-512 MHz channels in New York-Northern New Jersey and Houston).

[75] 47 C.F.R. § 25.143(i)-(k).

[76] We have already determined that short-term *de facto* transfer spectrum leasing arrangements, which are by definition only temporary arrangements, do not raise potential competitive harm and thus are not subject to the Commission's competition policies. *See Report and Order* at ¶ 178.

[77] For instance, in the future we anticipate significant advances in voice over Internet Protocol (VoIP) and the provision of broadband services over power line systems. *See generally* In the Matter of IP-Enabled Services, *Notice of Proposed Rulemaking*, 19 FCC Rcd 4863 (2004); Carrier Current Systems, including Broadband over Power Line Systems, *Notice of Proposed Rulemaking*, 19 FCC Rcd 3335 (2004).

29. *Application/immediate approval procedures.* Consistent with the general proposal set forth in the *Further Notice*, we will no longer require prior public notice and individualized Commission review of *de facto* transfer leases that meet the requirements specified above. Under the policies and rules adopted herein, parties seeking to enter into such leasing arrangements will notify the Commission by filing *de facto* transfer lease applications, which in turn will be immediately approved under the procedures we are adopting herein. Specifically, if the spectrum leasing parties file their *de facto* transfer lease application in the Universal Licensing System (ULS), and the application establishes the requisite elements explained above and are otherwise complete and the payment of the requisite filing fees have been confirmed,[78] the Bureau will process the application and provide immediate approval through ULS processing. Approval will be reflected in ULS on the next business day after filing the application. Upon receiving approval, spectrum lessees will have the authority to commence operations under the terms of the spectrum lease.[79] The Bureau also will place the approved application on public notice.[80] We note that, in order to allow parties to enter into spectrum leasing arrangements more quickly, the immediate approval procedures that we are adopting vary slightly from what was proposed in the *Further Notice* in that approval occurs prior to the date that the application is placed on public notice.[81]

30. The changes adopted to facilitate even more efficient and timely processing of spectrum leasing transactions meeting the requirements set forth in this Second Report and Order necessitate changes to the ULS software and will required certain database updates. We accordingly direct the Bureau to undertake as soon as practicable the necessary programming changes to implement the provisions of this Second Report and Order and to modify as necessary any licensing databases. Once ULS is updated to permit the immediate approval process, we further direct the Bureau to release a public notice notifying the public that the new procedures are available.

31. *Post-approval reconsideration procedures.* We adopt the reconsideration procedures set forth in the *Further Notice*.[82] Accordingly, we will place the approved *de facto* transfer leases on a weekly informational public notice. Any interested party may file a petition for reconsideration within 30 days of the public notice date.[83] Similarly, the Bureau will be able to reconsider the grant on its own

[78] *See Report and Order* at nn. 318, 356 (noting that, as part of a complete application, spectrum leasing parties must submit the requisite filing fees).

[79] Thus, operations under a *de facto* transfer spectrum lease could commence immediately upon approval provided, of course, that the parties have established that time as the date that the spectrum lease commences.

[80] The Bureau will also send a letter to the spectrum leasing parties, by U.S. mail, indicating that the application was sufficiently complete and has been granted on the basis of, and in reliance on, the information and certifications supplied.

[81] In the *Further Notice*, we had proposed that the spectrum leasing filing would be "deemed approved" at the time it was placed on public notice. *Further Notice* at ¶ 266.

[82] *See id.* at ¶ 268.

[83] *See* 47 C.F.R. § 1.106(f). We note that the Commission employs similar reconsideration procedures for applications involving *pro forma* license assignments and transfers of control; as with the procedures adopted here, interested parties may file a petition for reconsideration within 30 days of the time the notice of the *pro forma* transaction is placed on public notice. *See Pro Forma Forbearance Order*, 13 FCC Rcd at 6312 ¶ 36.

motion within 30 days of the public notice date, and the Commission can reconsider the grant on its own motion within 40 days of the public notice date.[84]

32. These reconsideration procedures are consistent with our general reconsideration procedures for Bureau action taken on delegated authority, including action approving assignments and transfers of control under Sections 308, 309, and 310(d).[85] We believe that these reconsideration procedures provide a sufficient opportunity for review by interested parties, the Bureau, or the Commission of any *de facto* transfer lease that meets the conditions for approval without prior public notice or Commission review. To the extent that issues are raised on reconsideration regarding whether a particular spectrum lease complies with Commission policies and rules, the Bureau or Commission may deny the spectrum leasing application on reconsideration or take other necessary action, including requiring revisions to the leasing arrangement if appropriate.

33. *Other issues.* Parties will be held accountable for any certifications they make in the spectrum leasing applications that enable them to take advantage of the immediate approval procedures set forth herein. To the extent that the Commission determines, post-approval, that any certification provided on the application, by either the licensee or spectrum lessee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate enforcement action, potentially including forfeitures or termination of the spectrum leasing arrangement.[86] In addition, we note that the Commission reserves the right, post-approval, to correct administrative errors.[87]

(c) Compliance with forbearance requirements

34. As stated above, we determine that for all qualifying *de facto* transfer leases – *i.e.*, those subject to our Section 10 forbearance authority and satisfying the elements set forth in Section IV.A.1.a(ii), above – we will forbear from the applicable prior public notice requirements and individualized review requirements of Sections 308, 309, and 310(d) of the Communications Act,[88] to the extent necessary, so that these spectrum leases may be approved pursuant to the procedures set forth in Section IV.A.1.a(ii)(b), above. Our decision to forbear meets the requirements of Section 10 of the Act, which enables the Commission to forbear from applying any regulation or provision of the Act to a

[84] *See* 47 C.F.R. §§ 1.108, 1.113.

[85] *See generally* 47 C.F.R. §§ 1.101-1.120 (Part 1 rules relating to petitions for reconsideration and review of actions taken on delegated authority and by the Commission).

[86] We note that this is consistent with general Commission policies.

[87] *See, e.g., American Trucking Ass'n v. Frisco Transportation Co.*, 358 U.S. 133, 145-146 (1958) (acknowledging an agency's ability to correct administrative errors; the Court stated that "[t]o hold otherwise would be to say that once an error has been done the agency is powerless to take remedial steps"); *Chlorine Institute v. OSHA*, 613 F.2d 120, 123 (5th Cir.) *cert. den.*, 449 U.S. 826 (1980).

[88] Section 309(b) requires a 30-day notice and comment period for authorizations involving common carrier services, while Section 310(d) requires review and approval for transfers of *de facto* control relating to license authorizations. *See generally* 47 U.S.C. §§ 309(b), 310(d). We note that in the *Report and Order*, we have already exercised limited forbearance with regard to the 30-day notice and comment period for *de facto* transfer leases by reducing the comment period to 14 days. *Report and Order* at ¶ 151. We also reduced the review period to 21 days, unless the Commission determined to removed the application from this streamlined processing for additional review. *Report and Order* at ¶ 151.

telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if the following three-prong test is satisfied: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[89]

35. Examining the first prong of the forbearance test, we conclude that for *de facto* transfer spectrum leases meeting the elements set forth in Section IV.A.1.a(ii)(a), above, the prior public notice and individualized review requirements of Sections 309(b)[90] and 310(d) are not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory.[91] Indeed, even when parties file applications proposing a transfer of control or assignment of a license, such applications do not generally contain information on the charges, practices, classifications, or services of the parties involved, and we have declined to use such applications as a context for regulating these issues.[92] Because we do not address these issues in our review of these applications, retaining prior public notice and review requirements is not necessary to ensure that licensees' and lessees' charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory. In addition, the eligibility, foreign ownership, and competition benchmarks we establish limit the types of *de facto* transfer spectrum leases that qualify for forbearance to those that are unlikely to raise concerns about the charges, practices, classifications, and services of the parties to the spectrum lease. Moreover, as indicated in the *Further Notice*, we have other existing tools at our disposal, including enforcement actions, to ensure that charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory.[93]

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[89] 47 U.S.C. § 160(a). In determining whether forbearance is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including whether it will enhance competition among telecommunications service providers. *See* 47 U.S.C. § 160(b). If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for finding that forbearance is in the public interest. *See* 47 U.S.C. § 160(b).

[90] Long-term *de facto* transfer leases that are subject to our forbearance authority include leases involving common carrier services. Section 309(b) generally provides that applications involving transfers of substantial control are to be placed on public notice for at least 30 days in advance of being granted. *See* 47 U.S.C. § 309(b). Short-term *de facto* transfer leases are not, under existing policies, subject to this 30-day prior public notice requirement because the applications are processed under STA procedures set forth in Section 309(e); we note that, in this Second Report and Order, we replace the STA procedures used for short-term *de facto* transfer leases, as explained in Section IV.A.1.c, below.

[91] We have already determined, in the *Report and Order*, that a full 30-day public notice period is not required for any *de facto* transfer lease applications. *Report and Order* at ¶¶ 155-159 (reducing the public notice requirement to 21 days).

[92] *See* Craig O. McCaw, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5880-5881 ¶ 76 (1994), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), *recon. in part*, 10 FCC Rcd 11786 (1995).

[93] *See Further Notice* at ¶ 271.

36. Similarly, in analyzing the second prong of the Section 10 forbearance standard, we conclude that requiring prior notice and comment and Commission review of qualifying *de facto* transfer leases is not necessary for the protection of consumers. Indeed, we have determined that effectively functioning secondary markets will offer significant benefits to consumers,[94] and we regard consumers as fully protected by the limitations and safeguards placed on the forbearance process. Our screening criteria ensure that forbearance procedures will only apply to spectrum leases that do not raise potential competitive issues, which is a core aspect of protecting consumers in the wireless marketplace. In addition, spectrum leases approved under our forbearance authority will be placed on public notice, enabling members of the public and other interested parties to raise any concerns regarding the protection of consumers in petitions for reconsideration.

37. With respect to the third Section 10 criterion, we believe that forbearing from prior public notice and Commission review of qualifying *de facto* transfer spectrum leases will further the public interest. This process will enable parties entering into spectrum leasing arrangements that do not raise potential public interest concerns to put their business plans into effect with reduced regulatory delay and transaction costs. This will allow secondary markets to work more effectively, which in turn will increase the efficient use of spectrum, improve access to spectrum by all interested parties, promote competitive market conditions, and increase the innovative and advanced wireless services available to consumers. At the same time, the limitations on spectrum leases that qualify for forbearance are designed to ensure that the public interest and our fulfillment of our statutory obligations are not in any way undermined.

b. Immediate approval of certain categories of *de facto* transfer leases that are not subject to forbearance

(i) Background

38. As we noted in the *Further Notice*, Section 10 of the Act authorizes us to forbear from statutory and regulatory requirements only with respect to spectrum leases that involve telecommunications carriers and telecommunications services.[95] Even so, we stated our wish to provide similar streamlined processing for spectrum leases involving non-telecommunications carriers as we are providing for spectrum leasing transactions that fall within the scope of Section 10. Accordingly, we sought comment on whether and how the Commission could structure its review of spectrum leasing transactions involving non-telecommunications carriers or services in order to minimize possible delays in processing these transactions.[96]

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[94] *See Report and Order* at ¶¶ 32, 39-45; *see generally Secondary Markets Policy Statement*, 15 FCC Rcd 24178.

[95] *Further Notice* at ¶ 275.

[96] *Id.* at ¶¶ 275-277. We also noted that, as a practical matter, many licenses that are beyond the scope of Section 10 are not subject to the statutory requirement of 30 days public notice prior to Commission approval, which applies only to common carrier and broadcast licenses. *See* 47 U.S.C. § 309(b). Section 310(d) does, however, require prior Commission review and approval of all transaction applications involving non-common carrier and non-broadcast licenses (just as it does for applications involving common carrier and broadcast licenses that are subject to our forbearance authority). *Further Notice* at ¶ 276; *see generally* 47 U.S.C. §§ 308, 309, 310(d).

(ii) Discussion

39. We will permit *de facto* transfer leases involving non-telecommunications providers and carriers, and thus are not eligible for Section 10 forbearance, to proceed under the same application/immediate approval policies as adopted above for *de facto* transfer leases subject to forbearance so long as the leasing parties can establish that the arrangements meet the same kinds of criteria as required for telecommunications providers.[97] These procedures comply with the statutory requirements of Sections 308, 309, and 310(d). In addition, our decision accords with commenters' support of our goal to streamline *de facto* transfer lease transactions involving non-telecommunications carriers in a manner similar to that adopted under the forbearance approach.[98]

40. Under the policies we are adopting, so long as the parties establish in their *de facto* transfer lease application – by provision of sufficient information and related certifications – that the spectrum lessee complies with the applicable eligibility, use, and foreign ownership-related requirements, and does not seek a waiver or declaratory ruling,[99] the Commission will immediately approve the application as consistent with statutory requirements and the public interest. As with *de facto* transfer lease applications filed under our forbearance approach, we will announce the grant of these *de facto* transfer leases involving non-telecommunications services in a weekly informational public notice, subject to reconsideration within 30 days by interested parties or the Bureau, and within 40 days by the Commission on its own motion.[100]

41. Streamlined processing of qualifying spectrum leases involving non-telecommunications services serves the public interest and is necessary in order to place substantively similar wireless spectrum leasing transactions involving different types of licenses on a comparable basis and to minimize unnecessary regulatory discrimination. The policies and procedures we adopt are also consistent with the statutory requirements of Sections 308, 309, and 310(d). First, consistent with these provisions, we continue to require an application and approval process. In addition, in order to determine whether to approve these transactions, the Commission requires that each application establish a distinct set of facts and representations concerning the particular spectrum leasing transaction before it will be approved. Thus, before any particular spectrum lease application will be approved, the Commission will determine,

[97] *See* paras. 15-28, *supra.*

[98] All of the comments we received on this issue supported our efforts to streamline spectrum lease transactions involving non-telecommunications carriers in the manner similar to what we are adopting under the forbearance approach. *See, e.g.*, Blooston Rural Carriers Comments at 12-13 (providing general support for the Commission's goals); Nextel Communications Comments at 7-9; WCA Comments at 13-15. One commenter recommended that the Commission take an approach similar to that it has taken for Section 214 applications. *See* WCA Comments at 13-15.

[99] *See* paras. 15-28, *supra*. Because licenses in non-telecommunications services generally are not auctioned, and thus would not implicate our designated entity or entrepreneur policies, we need not be concerned about restrictions and potential public interest concerns associated with these policies regarding spectrum leasing by designated entity or entrepreneur licensees. *See* para. 24. Similarly, because spectrum leasing in non-telecommunications services would not involve the kind of CMRS spectrum implicated by our competition policies (see the discussion in paras. 25-26, above), we are not concerned about potential public interest concerns relating to competition that would necessitate prior review of these spectrum leases.

[100] *See* para. 31, *supra*; *see also* 47 C.F.R. §§ 1.101 *et seq.* (rules relating to petitions for reconsideration of actions taken on delegated authority).

based on the particulars of that application, that all of the criteria relevant to establishing that the public interest would be served by the granting of the application have been established, and the statutory requirements for case-by-case review and approval of the application will have been satisfied.

c. Applying the immediate approval procedures to short-term *de facto* transfer leases

(i) Background

42. Under procedures adopted in the *Report and Order*, short-term *de facto* transfer leasing arrangements are processed in the same manner as STAs authorized pursuant to Section 309(f) of the Communications Act.[101] Under these procedures, parties wishing to enter into short-term arrangements must establish through requisite certifications in their application that they qualify for these procedures and must also meet any additional requirements associated with our STA procedures. The Bureau then reviews the application and will act on the request within ten days if the specified conditions are met. A short-term lease can be for any term of up to 180 days; the parties may also renew the lease for any period of time up to another 180 days, but to do so they must submit another filing, subject to the same procedures.[102]

(ii) Discussion

43. We determine that short-term *de facto* transfer leasing arrangements should qualify for processing under the application/immediate grant procedures that we are adopting for qualifying long-term *de facto* transfer leases.[103] Accordingly, we determine to process these arrangements under the new procedures we are adopting, and we will no longer process them under the STA procedures.

44. Under the policies and rules adopted in the *Report and Order*, short-term *de facto* transfer leases do not raise potential public interest concerns relating to eligibility, use restrictions, or foreign ownership that would require either prior public notice or additional Commission review before being approved. In order to qualify to enter into short-term *de facto* transfer leases, spectrum lessees are already required, under existing policies, to meet the same eligibility and foreign ownership restrictions[104] that we have adopted above for determining whether a long-term *de facto* transfer lease qualifies for the application/immediate approval procedures. Short-term *de facto* transfer lease applicants must also certify that they would comply with certain applicable use restrictions.[105] In addition, we have determined that short-term *de facto* transfer leasing arrangements do not raise potential public interest concerns relating either to designated entity/entrepreneur or competition matters.[106] Accordingly, these issues do

[101] *Report and Order* at ¶¶ 163-164, 181.

[102] *Id.* at ¶ 181.

[103] *See generally* Section IV.A.1.a, *supra.*

[104] *Report and Order* at ¶ 174.

[105] We note that for short-term *de facto* transfer leasing arrangements, certain eligibility and use restrictions applicable to long-term *de facto* transfer leasing arrangements do not apply. *See Report and Order* at ¶ 175.

[106] *See id.* at ¶¶ 176 (the designated entity and entrepreneur policies are not applied with respect to short-term *de facto* transfer leases), 178 (competition policies are not applied with respect to short-term *de facto* transfer leases).

not prevent a short-term *de facto* transfer lease application from qualifying for the immediate approval procedures we are adopting herein.

45. Eliminating the requirement that short-term *de facto* transfer leases be processed under the procedures applicable to STAs enables us to remove unnecessary regulatory requirements and simplify the applicable rules. First, we will no longer require short-term lease applicants to include a public interest statement in accordance with the applicable rules derived from our STA procedures.[107] In addition, we will no longer require that the term of a short-term *de facto* transfer lease be limited to 180 days and renewable for up to a total of 360 days. Instead, for purposes of administrative efficiency and general clarity, we will simplify the application requirements to do away with multiple filings, and to permit parties to enter into a short-term *de facto* transfer lease for a term of up to one year (365 days) by submitting a single application.[108]

d. Immediate processing of certain categories of spectrum manager leases

(i) Background

46. The *Report and Order* provided that parties entering into spectrum manager leases are required to file the leasing notification with the Commission within 14 days of when they execute the lease and at least 21 days prior to commencing operations (10 days prior if the lease is for one year or less).[109] We stated that this advance notification was included so as to allow the Commission and the public some opportunity to review the leasing arrangement prior to it going into effect.[110]

(ii) Discussion

47. Upon further consideration, we have decided to revise our policies for spectrum manager lease notifications to be consistent with the policies for *de facto* transfer leases as described in Section IV.A.1.a, above. Accordingly, where parties seek to enter into spectrum manager leases that do not raise specified potential public interest concerns – *i.e.*, those relating to eligibility, use restrictions, foreign ownership, designated entity/entrepreneur, or competition – we will permit them to commence operations under those leasing arrangements once they have notified the Commission of the lease, have made the necessary certifications to qualify for immediate processing, and have determined, through ULS, that the notification has been successfully processed.[111] These immediate processing procedures for spectrum

[107] *See* 47 C.F.R. §§ 1.931(a)(1) (STA procedures for Wireless Telecommunications Services), 1.931(b)(3) (STA procedures for Private Wireless Services).

[108] These short-term *de facto* transfer leases may be renewed so long as the combined term of the application and any renewal(s) does not exceed one year. We note that the remainder of the policies applicable to short-term *de facto* transfer leases, as set forth in the *Report and Order*, will remain in place for the reasons established therein. *See generally Report and Order* at ¶¶ 166-180.

[109] *Id.* at ¶ 124; *see also* 47 C.F.R. § 1.9020(e).

[110] *Report and Order* at ¶ 124.

[111] The spectrum leasing parties will be able to determine whether the notification has been successfully processed, through ULS, in the same manner they would determine whether a *de facto* transfer lease application has been approved, as set forth in para. 29, *supra.* Specifically, if the parties file a spectrum manager lease notification in ULS that establishes, through the information provided and related certifications, that they qualify for this processing method, ULS will reflect, on the next business day, that the notification was sufficiently (continued….)

manager leases will ensure parity in the regulatory treatment of spectrum manager and long-term *de facto* transfer leasing arrangements, thus eliminating unnecessary delay for parties seeking to enter into similar categories of spectrum manager leases and minimizing the possibility that our regulatory policies would be a factor in potential leasing parties' decision-making. Our determination also grants, in part, one party's petition for reconsideration, in which it sought elimination of unnecessary delay between the time the licensee filed a spectrum manager lease notification and the time in which leasing parties could commence operation under the spectrum leasing arrangement.[112]

48. We adopt these similar policies for spectrum manager leases because the public interest concerns relating to these leases are either identical or similar to those associated with long-term *de facto* transfer leases. In particular, the policies relating to eligibility and use restrictions, foreign ownership, and competition apply with equal force, regardless of whether the spectrum lease is a spectrum manager lease or a long-term *de facto* transfer lease.[113] In addition, designated entity or entrepreneur licensees seeking to lease spectrum under spectrum manager leases are subject to certain restrictions associated with designated entity and entrepreneur policies, just as long-term *de facto* transfer leases are subject to certain restrictions.[114]

49. Accordingly, under the new policies we are adopting, if the spectrum manager lease satisfies the same qualifying elements as required for long-term *de facto* transfer leases as set forth in Section IV.A.1.a above[115] – and thus does not raise potential public interest concerns regarding eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition – we do not believe it necessary to review these notifications in advance of operations, and the leasing

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complete and accepted for this processing on the basis of, and in reliance on, the information and certifications supplied. The spectrum lease notification will then be placed on public notice.

[112] *See* First Avenue Networks Petition for Reconsideration at 1-4. First Avenue Networks asserted that it was capable of providing wireless broadband connections within three days of signing a lease and contended that the current rules unnecessarily delayed its prompt delivery of service to its customers. Accordingly, it recommended that we eliminate the requirement that the Commission be notified of spectrum manager leases days in advance of permitting parties to commence operations under the spectrum leasing arrangement. *See id.*

[113] *See Report and Order* at ¶¶ 109-11 (eligibility and foreign ownership requirements for spectrum manager leases), 112 (use restrictions for spectrum manager leases), 116-119 (competition policies relating to spectrum manager leases), 143 (eligibility and foreign ownership requirements for long-term *de facto* transfer leases), 144 (use restrictions for long-term *de facto* transfer leases), 147 (competition policies relating to long-term *de facto* transfer leases). We note that short-term *de facto* transfer leasing arrangements are not always subject to the same policies as spectrum manager leasing arrangements. With regard to these particular issues, short-term *de facto* leases are not subject to the same use restrictions or competition policies as spectrum manager leases. *Compare id.* at ¶¶ 112 (use restrictions applicable to spectrum manager leases) and 116-119 (competition policies applicable to spectrum manager leases) *with* ¶¶ 175 (exemption of short-term *de facto* transfer leases from certain use restrictions) and 178 (exemption of short-term *de facto* transfer leases from competition policies), respectively.

[114] *See id.* at ¶¶ 113 (spectrum manager leases), 145 (long-term *de facto* transfer leases). While these restrictions differ depending on whether a spectrum manager or long-term *de facto* transfer lease is involved, both types of spectrum leases trigger potential public interest considerations that warrant providing the Commission an opportunity to review the leases prior to commencement of operations.

[115] *See* Section IV.A.1.a, above.

parties are entitled to commence operations once they have received the requisite confirmation through ULS.[116] As with *de facto* transfer leases,[117] spectrum manager leases that proceed pursuant to these immediate processing procedures are subject to post-notification review. Under these procedures, any interested party may file a petition for reconsideration within 30 days of the date of the public notice listing the notification as accepted.[118] Similarly, the Bureau will have 30 days from the public notice date, and the Commission 40 days, to reconsider whether the spectrum manager lease is in the public interest.

50. Finally, we determine to eliminate the requirement that parties file their spectrum lease notifications within 14 days of execution of their contractual agreement. We conclude that this requirement is superfluous so long as parties file the lease notification within the time frame required by our spectrum manager lease policies, either under the newly streamlined procedures adopted in this order (for qualifying spectrum manager leases) or at least 21 days in advance of commencing operations (10 days in advance if the lease is no longer than a year). Eliminating this requirement is consistent with the policies we are adopting, above, for *de facto* transfer leases; parties filing those applications are not required to file their spectrum leases with the Commission within 14 days of execution.

2. Extending Spectrum Leasing Policies to Additional Spectrum-Based Services

a. Background

51. In the *Further Notice*, we sought comment on whether the spectrum leasing policies should be extended to a variety of services that had been excluded from the spectrum leasing policies adopted in the *Report and Order*. In particular, we requested comment on whether such policies should be extended to the following services: Public Safety Radio Services (Part 90); Instructional Television Fixed Services (ITFS) (Part 74) and Multipoint Distribution Service (MDS) (Part 21); various other private wireless and Personal Radio Services, including certain Maritime services (Part 80),[119] Aviation services (Part 87), Personal Radio services (Part 95),[120] and Amateur services (Part 97); various services/authorizations in which frequencies are "shared"; and, miscellaneous other services, including non-multilateration Location and Monitoring Service (LMS) (Part 90), Cable Television Relay Service (Part 78), Multichannel Video Distribution and Data Service (MVDDS) (Part 101), 700 MHz Guard Band (Part 27), and satellite services (Part 25).[121]

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[116] To the extent, however, that the spectrum manager leasing arrangements do not qualify for immediate processing because they potentially raise public interest concerns in any of these enunciated areas, then we believe it continues to be appropriate for the Commission and the public to have the opportunity to review the leases prior to parties commencing operations, consistent with the *Report and Order*. *See Report and Order* at ¶¶ 124-125. We also provide additional clarification regarding the Commission's opportunity to review these spectrum manager leases in the Order on Reconsideration, below. *See* Section V.B.1.a, *infra.*

[117] *See* paras. 30, 39, 43, *supra.*

[118] This is the date in which the Bureau announces acceptance of the spectrum manager lease notification.

[119] We note that licensees in the VHF Public Coast services, Part 80 subpart J, already may enter into spectrum leasing arrangements under the *Report and Order*. *Report and Order* at ¶ 84; 47 C.F.R. § 1.9005(o).

[120] We have already permitted licensees in the 218-219 MHz Service, Part 95 subpart F, to enter into spectrum leasing arrangements under the *Report and Order*. *Report and Order* at ¶ 84; 47 C.F.R. § 1.9005(u).

[121] *See generally Further Notice* at ¶¶ 288-314.

b. Discussion

52. We determine that we will extend the spectrum leasing policies to some additional Wireless Radio Services, as identified below, but will not extend these policies to other services at this time, as explained herein.

53. *Public Safety Services.* With regard to the Public Safety Services in Part 90, we will permit public safety licensees with exclusive use rights[122] to lease their spectrum usage rights to other public safety entities and entities providing communications in support of public safety operations.[123] We, however, decline at this time to permit public safety licensees to enter into spectrum leasing arrangements for commercial or other non-public safety operations.

54. We will permit public safety licensees in these services to enter into spectrum leasing arrangements with other public safety entities and entities that provide communications in support of public safety operations, consistent with the policies we adopted last year in the *4.9 GHz Report and Order*. In that order, we established new licensing and service rules for the 4940-4990 MHz band (4.9 GHz band) that were designed to increase the effectiveness of public safety communications, foster interoperability, and further ongoing and future homeland security initiatives within the 4.9 GHz band.[124] We believed that these objectives would be best accomplished by basing the eligibility criteria for being licensed in the 4.9 GHz band on the "public safety services" definition set forth in section 90.523 of our rules,[125] which the Commission adopted in 1998 to implement Section 337(f)(1) of the Communications Act.[126] Under this definition, "public safety services" are services:

> (A) the sole or principle purpose of which is to protect the safety of life, health, or property;
>
> (B) that are provided – (i) by State or local government entities; or (ii) by nongovernmental organizations that are authorized by a government entity whose primary mission is the provision of such services; and
>
> (C) that are not made commercially available to the public.[127]

[122] To the extent that licensees are sharing spectrum, they are not permitted to enter into spectrum leasing arrangements with other entities.

[123] In this section, we are only discussing public safety licensees authorized under Part 90 rules. *See* 47 C.F.R. Part 90 subpart B; § 90.311(a)(1)(i). We already permit Part 101 licensees (including public safety licensees) to lease spectrum under the rules adopted in the *Report and Order*. *See Report and Order* at ¶ 84 & n.181.

[124] *See* The 4.9 GHz Band Transferred from Federal Government Use, *Memorandum Opinion and Order*, 18 FCC Rcd 9152, 9158 ¶ 16 (2003) (*4.9 GHz Report and Order*).

[125] *Id.* at 9158-59 ¶ 16 (citing 47 C.F.R. § 90.523); *see also* 47 C.F.R. § 90.1203(a).

[126] 47 U.S.C. § 337(f)(1).

[127] 47 C.F.R. § 90.523.

Under this standard, nongovernmental organizations are eligible if they obtain written approval from a state or local government entity whose mission is the oversight or provision of public safety services.[128] Though we noted that utilities and pipelines were examples of potential licensees, we did not attempt to delineate every type of nongovernmental organization that would be eligible to be licensed in the 4.9 GHz band; rather, we determined that traditional public safety entities are better poised to be most knowledgeable about what other users and/or uses would be supportive of public safety operations.[129] We did, however, expressly require that use of the 4.9 GHz band by entities other than traditional public safety entities be in support of public safety, and prohibited communications with no nexus to the safety of life, health or property.[130]

55. For the same reasons that we decided to permit non-traditional public safety entities to be licensed in the 4.9 GHz band for use in support of public safety operations, we now conclude that it is appropriate to permit public safety licensees to lease spectrum for such use. In addition, we believe that our decision herein to permit spectrum leasing among public safety entities achieves an appropriate balance between commenters that supported extension of our spectrum leasing policies to these services and those that expressed concern about possible abuses.[131] Further, spectrum would not be used by commercial entities to the potential detriment of public safety operations. We believe that allowing public safety licensees to lease spectrum for use in support of public safety operations will help maximize the efficient use of spectrum among public safety entities by providing them incentives to lease any excess spectrum capacity, thus diminishing the likelihood that public safety entities will warehouse spectrum.[132]

56. Our decision at this time not to permit public safety licensees in our Public Safety Services to lease spectrum to entities other than public safety entities, or entities providing communications in support of public safety operations, is based on the record before us and reflects several concerns. Most commenters strongly objected to allowing public safety licensees to enter into spectrum leasing arrangements with commercial entities, contending that such leasing faced possible statutory barriers or could allow potential abuses without implementation of certain safeguards.[133] Two commenters also

[128] *4.9 GHz Report and Order*, 18 FCC Rcd at 9159 ¶ 17 (citing 47 C.F.R. § 90.523(a)).

[129] *Id.* at 9159-60 ¶¶ 17-19.

[130] *Id.* at 9162-63 ¶¶ 22-23.

[131] As noted above, two commenters supported providing public safety licensees additional flexibility to lease spectrum to other entities. *See* ITA Reply Comments at 9-10 (support for permitting public safety entities to lease spectrum to other entities eligible under private land mobile entities that are eligible under Part 90 services); St. Clair County Reply Comments at 2-3 (general support for permitting public safety entities to lease spectrum to commercial entities).

[132] Additionally, we note that applicable buildout requirements also act as constraints against spectrum warehousing. *See, e.g.*, 47 C.F.R. §§ 90.155(a), (b).

[133] *See* APCO Comments at 1-6; CTIA Comments at 4-5; SBC Comments at 13; Winstar Comments at 3; ITA Reply Comments at 9-10. For instance, one commenter representing public safety officials expressed "grave concerns" about potential harm that might result if public safety entities were to lease spectrum on a commercial basis. It pointed out possible significant statutory barriers to such leasing involving spectrum 700 MHz band on the grounds that Section 337 of the Act might effectively preclude making such spectrum commercially available. This commenter also was concerned that while most public safety entities would act responsibly when leasing spectrum, some agencies might by pressured by cash-strapped state and local governments to lease more and more (continued….)

proposed consideration of future technological developments and the possibility of requiring that any leased spectrum be subject to "interruptible use" capacities that would enable public safety licensees to immediately reclaim the use of any leased spectrum for public safety emergencies.[134] Since issuance of the *Further Notice* in this proceeding, we have released the *Cognitive Radio NPRM* seeking comment upon, among other things, technical issues relating to "smart" or cognitive radios that could enable implementation of "interruptible" spectrum leasing arrangements that could be used with regard to leasing of spectrum licensed to public safety entities.[135] As our next step in this area, we intend to consider the technical issues raised in that proceeding, which appear to be important groundwork in addressing broader public safety spectrum leasing.

57. *ITFS/MMDS services.* All of the comments received in this docket[136] were previously transferred to and considered in the *BRS/EBS Report and Order* in WT Docket No. 03-66, in which we comprehensively reviewed our policies and rules relating to the ITFS and MDS services.[137] In that order, we converted the MDS service into the Broadband Radio Service and the ITFS service into the Educational Radio Service,[138] and extended the secondary markets spectrum leasing policies to those services, but included certain modifications in order to maintain the educational purpose of ITFS.[139] We

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spectrum capacity, potentially to the detriment of public safety operational requirements, or they could be become "fronts" for commercial entities. *See* APCO Comments at 1-6. Another commenter opposed leasing by public safety entities on the grounds that they might warehouse spectrum. *See* CTIA Comments at 4-5. Two commenters supported providing public safety licensees greater flexibility to lease spectrum to others. *See* ITA Reply Comments at 9-10 (support for permitting public safety entities to lease spectrum to other entities eligible under private land mobile entities that are eligible under Part 90 services); St. Clair County Reply Comments at 2-3 (general support for permitting public safety entities to lease spectrum to commercial entities).

[134] One commenter recommended that any spectrum leasing of public safety channels should be subject to strict rules that ensure that the substantial majority of the public safety system is in fact used for public safety purposes, and that by public safety licensees can effectively reclaim the use of the spectrum, such as through newly developed cognitive radio capacity, when necessary. *See* APCO Comments at 1-6. Another commenter focused on possible future technological developments that would assist in developing appropriate leasing policies for public safety licensees, including "interruptible use" capacities that would enable public safety licensees to immediately reclaim the use of any leased spectrum for public safety emergencies. *See generally* WiNSec Comments.

[135] *See Cognitive Radio NPRM*, 18 FCC Rcd at 26878-26883 ¶¶ 51-67.

[136] We received comments from several parties on spectrum leasing involving the ITFS and MDS services. *See* BellSouth Comments at 6-10; National ITFS Association/Catholic Television Network Comments at 1-9 and Reply Comments at 1-3; SBC Comments at 12-13; Spectrum Market LLC Comments at 4-5; Sprint Comments at 4-6; WCA Comments at 1-8.

[137] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-145 (rel. July 29, 2004) (*BRS/EBS Report and Order*). As we noted in the *Further Notice*, there are unique policies associated with ITFS licensees' educational purposes, and the services have already developed their own approach to excess capacity leasing. *See Further Notice* at ¶¶ 307-08.

[138] *See generally BRS/EBS Report and Order.*

[139] *See id.* at ¶¶ 177-181.

also grandfathered pre-existing "excess capacity" leasing arrangements that were entered into under the previous ITFS-specific leasing rules.[140]

58. *Maritime services.* Consistent with the spectrum leasing policies adopted in the *Report and Order*, we will extend the spectrum leasing rules to Automated Maritime Telecommunications Systems (AMTS) services in Part 80. As discussed by commenters that supported this extension,[141] the AMTS service involves a geographic licensing approach similar to another Part 80 service, VHF Public Coast stations, which also involves exclusive use licenses and already is permitted to enter into spectrum leasing arrangements under the leasing policies pursuant to the *Report and Order*.[142]

59. We do not, however, extend our spectrum leasing policies to any of our high seas public coast stations.[143] No commenters supported extending our spectrum leasing policies to these services, and they differ significantly from that of VHF Public Coast and AMTS stations. These frequencies are allocated internationally by the International Telecommunication Union (ITU) to facilitate interoperable radio communications among vessels of all nations and stations on land worldwide.[144] Flexible use is not permitted; instead, the ITU Radio Regulations specify how each frequency may be used (*i.e.*, for radiotelephone, radiotelegraph, facsimile, narrow-band direct printing, or data transmission).[145] In addition, unlike VHF Public Coast and AMTS stations, high seas public coast stations are not permitted to serve units on land.[146] Finally, high seas stations are licensed only on a site-by-site basis. The Commission declined to adopt a geographic licensing approach for this spectrum because of special considerations relating to the extensive international coordination required, the need to conform to

[140] *See id.* at ¶ 181.

[141] We received comments from three parties that supported extending our spectrum leasing policies to the AMTS services. They asserted that to do so would be consistent with our earlier decision, in the *Report and Order*, to permit VHF Public Coast Station licensees to enter into spectrum leasing arrangements. *See* AMTA Comments at 3-4; Mobex Comments at 2-5; Paging Systems Reply Comments at 2-4.

[142] *Report and Order* at ¶ 84 & n.183. Also, we note that the Commission has previously stated that the licensing of incumbent site-based AMTS stations are akin to geographic licensing in many respects because the licensing of each system was tied to fixed geographic features (coastlines and waterways). *See* Regionet Wireless License, LLC, *Order*, 15 FCC Rcd 16119, 16122 ¶ 7 (2000).

[143] *See* 47 C.F.R. §§ 80.357(b), 80.361, 80.363(a)(2), 80.371(a)-(b).

[144] *See generally* Amendment of the Commission's Rules Concerning Maritime Communications, *Second Memorandum Opinion and Order and Fifth Report and Order*, 17 FCC Rcd 6685, 6687 ¶ 4 (2002) (*Public Coast Fifth Report and Order*). We note, too, that while VHF Public Coast and AMTS stations use frequencies in the very high frequency band, high seas public coast stations use much lower frequencies, which enables them to serve vessels hundreds or even thousands of miles from land. *See generally id.*

[145] *See Public Coast Fifth Report and Order*, 17 FCC Rcd at 6710 ¶ 56, 6716-17 ¶ 75.

[146] *See* Amendment of the Commission's Rules Concerning Maritime Communications, *Second Report and Order and Second Further Notice of Proposed Rule Making*, PR Docket No. 92-257, 12 FCC Rcd 16949, 17020 (1997); 47 C.F.R. § 80.123; *see also* Technology for Communications International, *Order*, 14 FCC Rcd 16173, 16176-77 ¶ 8 (WTB PSPWD 1999) (denying a request for a waiver to permit a high seas public coast station to serve units on land, and explaining that, because of the propagation characteristics of HF signals, interference to international communications is a possibility associated with service to units on land using HF frequencies not presented by VHF land mobile service).

changing international allocations and allotments, and the fact that some of the spectrum is shared with the Federal Government.[147]

60. *MVDDS services.* We will extend our spectrum leasing policies to the MVDDS services consistent with the comments we have received.[148] We conclude that licensees will have similar "exclusive use" rights as other licensees to whom these policies currently apply,[149] and that the benefits of spectrum leasing should be made available to licensees and potential spectrum lessees in these services. Consistent with the service rules for these services,[150] which permit partitioning along county lines and prohibit disaggregation under any license authorization, we will permit MVDDS licensees to lease different geographic portions (divided along county borders) to eligible spectrum lessees,[151] but will permit only one entity, either the licensee or spectrum lessee, to operate in a given geographic area.[152]

61. *Services/authorizations involving shared frequencies.* We will not extend spectrum leasing to shared services at this time. As we noted in the *Further Notice*, we had previously declined to allow leasing on shared frequencies because parties can readily obtain access to the spectrum by obtaining their own authorizations on shared frequencies and they are not foreclosed from applying for authorizations by the existence of another licensee in the same geographic area.[153] Although we sought comment on whether there might nonetheless be reasons to extend spectrum leasing to shared services, commenters opposed extension of the leasing rules to services/authorizations involving shared frequencies services.[154]

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[147] *Public Coast Fifth Report and Order*, 17 FCC Rcd at 6711-12 ¶ 59, 6713-14 ¶¶ 64-66.

[148] *See* MDS America *Ex Parte* Comments at 2-4.

[149] *See Report and Order* at ¶ 84.

[150] Consistent with our general spectrum leasing policies, any spectrum leasing arrangement involving these services must comply with the underlying service rules.

[151] *See* 47 C.F.R. § 101.1412 (MVDDS eligibility restrictions for cable operators).

[152] The MVDDS service rules permit licensees to partition along county borders but prohibit spectrum disaggregation. *See* 47 C.F.R. §§ 101.1405, 101.1415. *See also* Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd., to Provide a Fixed Service in the 12.2-12.7 GHz Band, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614, 9685-9687 ¶¶ 180-184 (2002). The Commission limited partitioning to county lines because three ubiquitous services would be sharing the spectrum, in addition to point-to-point facilities that required protection, *id.* at 9686 ¶ 181, and it declined to permit disaggregation because the complexity and problems associated with effectively engineering and solving the potential interference problems, including difficulty in determining which licensee is causing interference problem, warrant keeping the number of licensees responsible and the number of total transmitters low to comport with the Commission's goal of promoting shared use of the band and protecting Direct Broadcast Service (DBS) operations. *Id.* at 9687 ¶ 184.

[153] *See Further Notice* at ¶ 305.

[154] Two parties commented on extending spectrum leasing to services/authorizations involving shared frequencies. Both opposed spectrum leasing in these services. One contended that there was no need for spectrum leasing since entities seeking access to spectrum in these bands can always come to the Commission and (continued….)

62. *Various Part 90 services.* We determine not to revise current spectrum leasing policies with regard to Part 90 services.[155] In particular, we will not extend these policies to Private Land Mobile Radio (PLMR) stations below 470 MHz (including those with "FB8" status). These stations share spectrum below 470 MHz, and while there is some degree of "exclusivity" (because the stations are trunked and cannot share in the usual way), the operations nonetheless are still on shared spectrum often occupied by others. Accordingly, we determine that, consistent with our current policies regarding shared services/authorizations, these stations should not be included among those services to which the spectrum leasing policies apply. In addition, we do not extend our spectrum leasing policies to non-multilateration LMS services because licensing in these services is shared and non-exclusive. Entities seeking access to spectrum for these non-multilateration LMS uses can gain access to spectrum without the need to enter into spectrum leasing arrangements with licensees.

63. *Other services.* We decline, at this time, to extend the spectrum leasing policies to any additional services on which we had sought comment, including the 700 MHz Guard Band Service, Amateur Services, Personal Radio Services, Aviation Services, Cable Television Relay Services, and satellite services.[156]

64. We do not believe it appropriate to extend the spectrum leasing policies adopted in the *Report and Order* to the Guard Band Manager Service. This service already has its own distinct set of policies and rules regarding leasing arrangements, and no commenters proposed replacing those policies. Accordingly, we see no reason at this time to replace those policies at this time. Nor do we extend spectrum leasing policies to the Part 97 Amateur Radio Services. An individual Amateur Radio licensee gains access to particular bands of spectrum after obtaining an operator license by successfully completing the relevant exam requirements for those particular bands.[157] The amateur licensee must share access to the spectrum with all amateur operators who have also successfully passed examinations for the same privileges. Thus, an amateur licensee has no exclusive use rights with regard to the spectrum that it can lease to others. Moreover, a new Amateur Radio applicant is not precluded from applying for an authorization by the existence of another licensee in the same geographic area. We also do not extend our spectrum leasing policies to additional services among the Part 95 Personal Radio Services. Apart from

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for a nominal fee obtain licenses involving available spectrum. *See* ITA Reply Comments at 7-8. Another urged that spectrum leasing not be extended to shared spectrum until progress had been achieved with regard to pending proceedings concerning refarming of these bands; it also expressed concern about the potentially complex frequency coordination processes that would ensue. *See* NAM/MRFAC Reply Comments at 3-6.

[155] We received two comments pertaining to spectrum leasing in our Part 90 services. One commenter requested that the Private Land Mobile Radio (PLMR) stations below 470 MHz with "FB8 status" should be included among those services permitted to enter into spectrum leasing arrangements. It contended that this would be consistent with the inclusion, in the *Report and Order*, of the Part 90 services above 470 MHz. *See* ITA Reply Comments at 7-10. As noted by ITA, we included the Part 90 services about 470 MHz among the services permitted to lease spectrum under the policies adopted in the *Report and Order*. *Report and Order* at ¶ 84 n.181; 47 C.F.R. § 1.9005(t). In addition, it recommended that B/ILT licensees should be able to lease to public safety entities.[155] ITA Reply Comments at 9. The other commenter opposed any revisions that would allow Business and Industrial/Land Transportation (B/ILT) licensees to lease to commercial entities, expressing concern about potential harmful interference. *See* Boeing Reply Comments at 2-6.

[156] One commenter recommended extending our spectrum leasing policies to these services, but provided no rationale for so doing. *See* Winstar Comments at 2.

[157] *See* 47 C.F.R. §§ 97.501, 97.101(b); *see also Further Notice* at ¶ 301.

the 218-219 MHz service (to which spectrum leasing policies already apply[158]), the Personal Radio Services are either licensed by rule and/or operate on shared spectrum. For example, Citizens Band Radio operators are authorized by rule to operate without individual licenses on any of 40 channels nationwide (choosing one at a time).[159] Radio Control operators are authorized by rule to operate without individual licenses on any of the radio control channels nationwide.[160] A General Mobile Radio Service (GMRS) operator must obtain a license, but operates on twenty-three frequencies nationwide. Thus, whether licensed by rule and/or operating on shared spectrum, Part 95 licensees do not have exclusive spectrum rights to lease to others,[161] and entities seeking to gain access to such spectrum can readily do so without the need to enter into spectrum leasing arrangements with existing licensees.

65. Nor do we extend our spectrum leasing policies to our Part 87 Aviation Services. No commenter proposed that the spectrum leasing policies be applied to these services. In addition, most of the spectrum in these services is licensed on a shared basis, and thus is not assigned for the exclusive use of any particular licensee.[162] Finally, aviation safety concerns among the Aviation Services that do involve exclusive use rights – *i.e.*, aeronautical advisory stations (unicoms) at uncontrolled airports[163] and aeronautical enroute stations[164] – recommend against extending our spectrum leasing policies to these services. In particular, the Commission has determined that the licensees in these services should, for aviation safety purposes, be limited to one operator at any one location.[165] Accordingly, we will not permit licensees to lease spectrum usage rights to other entities.

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[158] We note that the *Report and Order* permitted spectrum leasing by one Personal Radio Service, the 218-219 MHz service, in which licensees have exclusive use of the licensed spectrum. *See Report and Order* at ¶ 84 & n.183.

[159] *See* 47 C.F.R. Part 95 subpart D.

[160] *See* 47 C.F.R. Part 95 subpart C.

[161] *See* 47 C.F.R. §95.7(a) (General Mobile Radio Service).

[162] 47 C.F.R. § 87.41(b). We note that automatic weather observation station, automatic surface observation station, and automatic terminal information station operate on a shared basis, not on an exclusive use basis. While only one automatic weather observation station, automatic surface observation station, or automatic terminal information station will be licensed at an airport, these stations do not operate on dedicated spectrum, but instead generally are assigned frequencies available for air traffic control operations. 47 C.F.R. §§ 87.527(c), 87.529.

[163] Unicom transmissions are limited to the necessities of safe and expeditious operation of aircraft. *See* 47 C.F.R. § 87.261(a). "Uncontrolled airports" are those that do not have a control tower, a control tower remote communications outlet, or an FAA flight service station that effectively controls traffic at that airport. 47 C.F.R. § 87.215(b); *see also* Review of Part 87 of the Commission's Rules Concerning the Aviation Radio Service, *Report and Order and Further Notice of Proposed Rule Making*, 18 FCC Rcd 21432, 21459-60 n.211 (2003) (*Part 87 Report and Order*).

[164] 47 C.F.R. § 87.213(b). Aeronautical enroute stations provide operational control communications to aircraft along domestic or international air routes. *See* 47 C.F.R. § 87.261(a). Operational control communications include the safe, efficient and economical operation of aircraft, such as fuel, weather, position reports, aircraft performance, and essential services and supplies. Public correspondence is prohibited. *Id.*

[165] At uncontrolled airports, unicoms (which are assigned only one frequency) are often the only available source of critical safety-related information regarding runway, wind, or weather conditions. *See* 47 (continued….)

66. Finally, we do not extend our spectrum leasing policies applicable to Wireless Radio Services to two services, the Cable Television Relay Service and satellite services, that are administered by bureaus outside of the Wireless Telecommunications Bureau. No commenters proposed extending the spectrum leasing policies to these two services, and the general policies applicable to these two services differ, in many respects, from those administered by the Wireless Bureau.[166] Accordingly, we will not extend our spectrum leasing policies to these two services at this time.

3. Spectrum Leasing Policies Applicable to Designated Entity/Entrepreneur Licensees

a. Background

67. In the *Report and Order*, we decided that designated entity and entrepreneur licensees would be permitted to enter into a spectrum manager lease with any qualified lessee, regardless of the lessee's designated entity or entrepreneur eligibility, and avoid the application of our unjust enrichment rules and transfer restrictions, so long as the lease did not result in the lessee's becoming a "controlling interest" or affiliate of the licensee that would cause the licensee to lose its designated entity or entrepreneur eligibility under section 1.2110 of our rules.[167] We further determined that, to the extent that any conflict arose between the revised *de facto* control standard for spectrum leasing arrangements as set forth in the *Report and Order* and the controlling interest standard in our rules for determining designated entity and entrepreneur eligibility, we would apply the latter in determining whether the licensee had maintained the

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C.F.R. § 87.217(a); *Part 87 Report and Order*, 18 FCC Rcd at 21460 ¶ 56. The Commission limits unicoms to one-per-uncontrolled-airport for safety reasons. *See* Amendment of Part 87 of the Rules to Provide a Summary Procedure for Processing Mutually Exclusive Applications in the Aviation Services, *Order*, 60 Rad. Reg. 2d 251, at ¶ 2 (1986). As for aeronautical enroute stations, large trunk air carriers use these stations to maintain reliable communications between each aircraft and the appropriate dispatch office, while small airlines and large commercial aircraft operators use them to maintain flight-following systems. *See generally Part 87 Report and Order*, 18 FCC Rcd at 21441 ¶ 17. The Commission recently reviewed its aeronautical enroute station licensing rules, and concluded that the public interest, including aviation safety, is best served by authorizing only one operator at a location. *See id.* at 21442-43 ¶¶ 22-23.

[166] We also note that there already exists a robust secondary market for parties seeking to gain access to spectrum in our satellite services. We adopted rules to encourage the development of a secondary market for certain satellite operators in the *First Space Station Reform Order*. *See* Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order*, 18 FCC Rcd 10760 (2003) (*First Space Station Reform Order*). In that order, we adopted a procedure applicable to non-geostationary orbit (NGSO) and geostationary orbit, mobile satellite service (GSO MSS) satellite system operators under which the Commission issues licenses by dividing the available spectrum equally among the qualified applicants in a processing round. *See id.* at 10776 ¶ 29. We also eliminated the anti-trafficking rule for satellite operators to enable NGSO and GSO MSS licensees to buy and sell spectrum to each other in a secondary market after licenses are issued. We noted that secondary markets can provide benefits to satellite users and consumers not only through the outright transfer of licenses, but also through partial redistribution or transfer of unused spectrum. By encouraging satellite licensees to sell unused spectrum to other parties willing to put the spectrum into use, we allow parties flexibility to transfer satellite bandwidth to more efficient uses in response to changing market conditions and consumer demands, and we allow marketplace forces to determine which companies succeed. *Id.* at 10842-43 ¶ 218 (citing *Secondary Markets Policy Statement*, 15 FCC Rcd at 24182 ¶ 11).

[167] *Report and Order* at ¶ 113; 47 C.F.R. § 1.9020(d)(4); *see id.* § 1.2110(b), (c). In this context, the term "entrepreneur" refers to an entity eligible to hold certain broadband personal communications services C and F block licenses won in closed bidding. *See id.* §§ 1.2110 and 24.709.

requisite degree of ownership and control to allow it to remain eligible for the licenses or for other benefits such as bidding credits and installment payments.[168] We also decided in the *Report and Order* that designated entity and entrepreneur licensees would be allowed to enter into long-term *de facto* transfer leasing arrangements subject to any existing transfer restrictions and unjust enrichment payment obligations.[169]

68. In the *Further Notice*, we inquired whether we should alter the *de facto* transfer leasing policies adopted in the *Report and Order* and allow a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same eligibility status as that of the licensee.[170] We sought comment on how, if such a policy change were made, we could ensure continued compliance with our statutory obligations to prevent unjust enrichment.[171] We also sought comment on whether to use the new *de facto* control standard, rather than the existing controlling interest standard (including the *Intermountain Microwave* criteria[172]), when evaluating affiliation and eligibility for designated entity and entrepreneur benefits.[173] We specifically asked whether this latter change would be consistent with the statutory objectives of Section 309(j).[174]

b. Discussion

69. *Affirmation of existing rules.* We affirm the rules we established in the *Report and Order* for spectrum leasing by designated entity and entrepreneur licensees, declining requests that we provide such licensees with the unfettered right to lease spectrum to any entity, without regard to our eligibility rules for designated entities and entrepreneurs. As we explain below, our decision means that we will continue to rely on our existing attribution rules, including our definitions of controlling interest and affiliation, for all determinations of designated entity and entrepreneur eligibility. However, in response to suggestions that we clarify these rules, we provide additional guidance regarding their application.

70. We decline to adopt the suggestion of some commenters (one of which is also a petitioner) that we allow designated entity and entrepreneur licensees to lease spectrum to any entity, without regard to how the spectrum lease might affect the licensee's designated entity or entrepreneur eligibility.[175] We

[168] *Report and Order* at ¶ 113; 47 C.F.R. § 1.9020(d)(4).

[169] *Report and Order* at ¶ 145.

[170] *Further Notice* at ¶ 323.

[171] *Id.*

[172] *See Intermountain Microwave*, 12 FCC 2d 559 (1963); *see also Report and Order* at ¶¶ 3, 10, 60; Matter of Amendment of Part 1 of the Commission's rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15324 ¶ 61 (2000) (*Part 1 Fifth Report and Order*).

[173] *Further Notice* at ¶ 317.

[174] *Id.*

[175] *See* AT&T Wireless Comments at 8-9; Cingular Wireless Comments at ii, 2-4, 6-8; Cingular Wireless Petition at 2-4; Salmon PCS Comments at 8-11; *see also* Blooston Comments at 2-5 (Commission should allow "small business licensees [to] lease their spectrum without jeopardizing eligibility status or entitlement to bidding credits if the spectrum user actually provides service to a rural area"); Council Tree *Ex Parte* Comments at 14-17 (continued….)

believe that adopting such a change to our rules would contravene the requirements and objectives of Section 309(j) of the Act.[176] Section 309(j) requires, among other things, that the Commission ensure that small businesses are given the opportunity to participate in the provision of spectrum-based services and that, to further this goal, it consider the use of bidding preferences.[177] These statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service.[178] In such a way, Congress sought to promote diversity among service providers, as well as the rapid deployment of new technologies for the benefit of, among others, rural customers.[179]

71. Section 309(j) also directs the Commission to prescribe anti-trafficking restrictions and payment schedules as necessary to prevent designated entity benefits from giving rise to unjust enrichment.[180] If we were to allow designated entities and entrepreneurs to enter into spectrum manager leasing arrangements without considering whether the spectrum lessee had acquired an attributable interest in the licensee, we would run the risk that designated entity and entrepreneur incentives would benefit, indirectly, entities that do not qualify for such incentives in the primary market. In other words, we would be paving the way for the very unjust enrichment Congress wanted us to prevent. While one commenter argues that "[t]here is no reason to believe that Congress intended to limit designated entities to only one form of participation in the spectrum market – construction and operation of a facilities-based network[,]"[181] the legislative history of Section 309(j) indicates otherwise. There, Congress explains that the reason for imposing anti-trafficking restrictions and unjust enrichment payment obligations on entities that receive small business benefits is to deter "participation in the licensing process by those who have no intention of offering service to the public."[182] While we believe that spectrum leasing by small businesses serves many policy goals, we cannot disregard Congress' stated intent that a licensee receiving designated entity or entrepreneur benefits be an entity that actually provides service under the license.

72. We also reject recommendations that we allow licensees to avoid unjust enrichment payment obligations and transfer restrictions in situations where the spectrum lessee will use the spectrum lease to

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(Commission should lift unjust enrichment repayment obligations and entrepreneur transfer restrictions, if not for all long-term *de facto* transfer leasing arrangements, then "for entities owned and controlled by Alaska Native Corporations or Indian tribes when rural area spectrum rights are involved"); Salmon PCS Petition Reply Comments at 9-14. In declining to adopt the suggestions proffered by these parties, we specifically are denying Cingular Wireless' petition for reconsideration on these issues.

[176] 47 U.S.C. § 309(j).

[177] *Id.* § 309(j)(4).

[178] *See* H.R. Rep. No. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993).).

[179] *See* 47 U.S.C. § 309(j)(3).

[180] *Id.* § 309(j)(4)(E); *see also id.* § 309(j)(3)(C).

[181] *See* AT&T Wireless Comments at 9.

[182] H.R. Rep. No. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993).).

serve rural areas.[183] Only one commenter attempts to explain why such a recommendation would not be contraindicated by concerns about unjust enrichment, claiming that the Commission's "statutory obligations of ensuring the participation of rural telephone companies in the provision of advanced telecommunications services and ensuring the rapid deployment of new technologies, products or services for the benefit of the public, including those residing in rural areas, outweigh any risk of unjust enrichment."[184] The premise of that claim – that the Commission is statutorily required to ensure both the rapid deployment of service to rural areas and the participation of rural telephone companies in the provision of advanced telecommunications services – is not supported by Section 309(j) of the Act and has been explicitly rejected by the U.S. Court of Appeals for the D.C. Circuit.[185] Rather, Section 309(j) requires that the Commission "seek to promote," as one of many, sometimes conflicting goals, the objective that service be developed and rapidly deployed to rural customers,[186] and requires further that the Commission ensure that rural telephone companies be given the "opportunity" to participate in the provision of spectrum-based services.[187]

73. To facilitate these ends within the context of competitive bidding, the Commission has provided small businesses with bidding credits and entrepreneurs with license set-asides, while specifically declining to establish an independent bidding credit for large telephone companies serving rural areas.[188] When initially considering whether to create a separate bidding credit for rural telephone companies, the Commission determined that telephone companies providing service in rural areas do not *per se* have the same difficulty accessing capital as other groups, such as small businesses.[189] In subsequent decisions considering this issue, the Commission has not changed its determination.[190] If we

[183] *See* Blooston Rural Carriers Comments at 3-5; Council Tree *Ex Parte* Comments at ii, 3, 14-17; RTG Comments at 5-7.

[184] *See* Blooston Rural Carriers Comments at 5.

[185] *Melcher v. FCC*, 134 F.3d 1143, 1154-55 (D.C. Cir. 1998).

[186] 47 U.S.C. § 309(j)(3)(A).

[187] *Id.* § 309(j)(4)(D).

[188] *See* Reallocation and Service rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022, 1090-91, n.505 and accompanying text (2002); *see also* Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9664-65 ¶ 176 (1995).

[189] *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403, 457-58 ¶ 100 (1994).

[190] *See, e.g.*, Amendment of the Commission's rules to Establish New Personal Communications Services, Narrowband PCS, GEN Docket No. 90-314, ET Docket No. 92-100, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PR docket No. 93-253, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476-77 ¶ 41 (2000); Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules to License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16968-69 ¶ 81; *see also Part 1 Fifth Report and Order*, 15 FCC Rcd at 15320-21 ¶ 52; Revision of Part 22 and Part 90 of the Commission's rules to Facilitate Future Development of Paging Systems, WT Docket No. 96-18, Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PR docket No. 93-253, (continued….)

provided small businesses and entrepreneurs with the unrestricted ability to enter into spectrum leasing arrangements with non-eligible entities planning to serve rural areas, without regard to our eligibility rules, we would, in effect, be allowing small business and entrepreneur incentives to benefit, indirectly, the very entities which we had expressly found no basis for assisting in that fashion in the primary market.[191] We, of course, remain committed to promoting access to competitive advanced telecommunications services in rural and underserved areas and note that we have adopted other methods of facilitating such access in our *Rural Report and Order*.[192]

74. For similar reasons, we also reject a suggestion that we lift unjust enrichment repayment obligations and entrepreneur transfer restrictions for licensees owned and controlled by Alaska Native Corporations and Indian tribes that lease rural area spectrum rights to non-eligible entities pursuant to long-term *de facto* transfer leasing arrangements.[193] Indian tribes and Alaska Regional or Village Corporations already enjoy enhanced access to designated entity and entrepreneur benefits through an exclusion from our affiliation rules available only to them.[194] Again, were we to permit such entities to enter into long-term *de facto* transfer leases without being subject to unjust enrichment obligations or entrepreneur transfer restrictions, we would effectively be allowing them to transfer these benefits to spectrum lessees that would not be able to qualify for the benefits in the primary market, and particularly not on such an enhanced basis. While we decline to adopt this specific recommendation, we note that we are considering various measures in our Tribal Lands proceeding to foster the extension of wireless telecommunications service to tribal lands.[195]

75. To summarize, in affirming our rules and in declining to adopt proposals to the contrary, we have determined that we will continue to rely on our existing attribution rules, including our definitions of controlling interest and affiliation, for all determinations of whether a licensee undertaking a lease has maintained its designated entity and/or entrepreneur eligibility. We, nonetheless, recognize that further guidance on the application of those rules in the context of leasing might be useful. Accordingly, we offer such guidance below.

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Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, 10091-92 ¶ 114 (1999).

[191] Our reasoning here applies equally to spectrum manager and long-term *de facto* transfer leasing arrangements.

[192] *See generally Rural Report and Order.* We further note that we recently facilitated licensing to rural telecommunications companies by modifying our controlling interest and attribution rules for rural telephone cooperatives. *See* Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Second Order on Reconsideration of the Third Report and Order and Order on Reconsideration of the Fifth Report and Order*, 18 FCC Rcd 10180, 10186-95 ¶¶ 10-20 (2003); 47 C.F.R. § 1.2110(b)(3)(iii).

[193] *See* Council Tree *Ex Parte* Comments at ii, 3, 14-17.

[194] *See* 47 C.F.R. § 1.2110(c)(5)(xi) ("*Exclusion from affiliation coverage.* For purposes of this section, Indian tribes or Alaska Regional or Village Corporations . . . or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entitles, and that otherwise complies with the requirements of this section. . . ."). Further, we offer a separate bidding credit to licensees that serve qualifying tribal lands. *Id.* § 1.2110(f)(3).

[195] *See* Extending Wireless Telecommunications Services to Tribal Lands, *Second Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 4775 (2003).

76. *Application of Existing Attribution Rules to Spectrum Manager Leasing Arrangements.* In response to requests from two commenters (one of which is also a petitioner),[196] we clarify here how our attribution rules, including the *Intermountain Microwave* criteria, are applied in determining whether spectrum manager leasing arrangements by designated entity and entrepreneur licensees satisfy our eligibility requirements. We note, as a preliminary matter, that we expect a licensee to conduct an analysis of possible control by, or affiliation with, the proposed spectrum lessee before entering into a spectrum manager leasing arrangement and before certifying that the spectrum lease does not affect the licensee's continued designated entity or entrepreneur eligibility.[197] That analysis should take into account the Commission's definitions of control and affiliation, which will help to determine, as they do in non-spectrum leasing contexts, whether the gross revenues (and, in the case of entrepreneurs, the total assets) of a spectrum lessee are to be attributed to a designated entity or entrepreneur licensee.[198] Such a determination will be made by evaluating the licensee's Commission-regulated business in the context of a spectrum lessee's involvement with the licensee. For example, a spectrum lessee would become an attributable interest holder in the licensee if the lessee were to become an officer or director of the licensee.[199] An attributable affiliation might also be created if a lease called for the licensee and spectrum lessee "to combine their efforts, property, money, skill and knowledge."[200] Similarly, a spectrum lease might create a contractual affiliation between licensee and spectrum lessee if the leasing arrangement represented a significant portion of the licensee's day-to-day business operations.[201] While one commenter suggests that a licensee can preserve its designated entity or entrepreneur eligibility simply by maintaining day-to-day control over a spectrum leasing business,[202] we believe that, in order to satisfy the requirements of Section 309(j) of the Act and avoid unjust enrichment obligations or transfer restrictions, the licensee cannot make spectrum leasing its primary business and must, as discussed above, continue to provide facilities-based network services under its licenses.

77. In examining whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee, the licensee should look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum

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[196] *See* Cingular Wireless Comments at 7-8; Cingular Wireless Petition at 3-4; Salmon PCS Comments at 4-5, 8.

[197] Each licensee notifying the Commission about a spectrum manager lease involving a license still subject to entrepreneur transfer restrictions or potentially subject to unjust enrichment obligations must certify that the lease does not affect the licensee's continuing eligibility to hold a license won in closed bidding or to retain bidding credit or installment payment benefits. *Report and Order* at ¶ 113; *see generally* 47 C.F.R. § 1.9020(e). The Commission retains the right to investigate the veracity of such certification, post-notification, and to terminate a spectrum manager leasing arrangement if it determines that the arrangement raises significant public interest concerns. *Report and Order* at ¶ 12; 47 C.F.R. § 1.9020(f).

[198] *See* 47 C.F.R § 1.2110(c)(2), (c)(5).

[199] *See id.* § 1.2110(c)(2)(ii)(F).

[200] *See id.* § 1.2110(c)(5)(x).

[201] *See id.* § 1.2110(c)(5)(ix).

[202] Salmon PCS Petition Reply Comments at 10-11; *see also* AT&T Wireless Comments at 9.

lease, and what relationship the two parties have with one another apart from the lease.[203] Referring to an example provided by one commenter,[204] we conclude that a spectrum manager lease between a designated entity or entrepreneur licensee and a non-designated entity/entrepreneur spectrum lessee with a prior business relationship where substantially all of the spectrum capacity of the licensee is to be leased would cause the spectrum lessee to become an attributable affiliate of the licensee. Such affiliation would render the licensee ineligible for designated entity or entrepreneur benefits and, therefore, would make such a spectrum lease impermissible.[205] On the other hand, a spectrum manager lease involving a small portion of the designated entity or entrepreneur licensee's spectrum capacity where no relationship existed between the licensee and spectrum lessee apart from the lease would likely be permissible. Situations falling somewhere between these two examples would have to be evaluated according to the individual circumstances involved.

78. While we direct licensees to continue to rely on our existing attribution rules to determine whether a proposed spectrum manager leasing arrangement would affect their continuing eligibility for designated entity or entrepreneur benefits, we recognize that certain of our affiliation criteria do not contemplate spectrum leasing and are therefore incompatible with spectrum manager leasing arrangements. For instance, under our attribution rules, affiliation generally arises where another entity shares office space, employees, or other facilities with a designated entity or entrepreneur licensee and, through these sharing arrangements, gains control or potential control of the licensee.[206] In addition, under *Intermountain Microwave*, one indication of affiliation is the use by another entity of the licensee's facilities and equipment.[207] However, because spectrum leasing arrangements, by their very nature, always involve the spectrum lessee's construction or use of facilities in the licensee's service area and/or operation of those facilities over the licensee's bandwidth, it would be unworkable to apply our facilities-related indicia of affiliation in the customary manner to spectrum leasing situations. We clarify, therefore, that a spectrum lessee's construction or use of facilities in the licensee's service area or over its bandwidth does not, by itself, transform the lessee into a controlling interest or affiliate of the licensee.[208] On the other hand, joint use of office space, employees, or equipment or other facilities by the licensee and the spectrum lessee might indicate affiliation and would require an analysis of whether the spectrum lessee would, through such use, acquire control or potential control of the licensee.

79. Likewise, we clarify that the existence of spectrum manager leasing arrangement does not, by itself, create an "identity of interest" between the licensee and lessee resulting in an attributable affiliation

[203] We remind licensees that a change in that relationship subsequent to filing the spectrum manager lease notification could also adversely affect their ongoing eligibility for entrepreneur or designated entity benefits.

[204] Salmon PCS Petition Reply Comments at 6-8.

[205] We note that even a spectrum manager lease between two designated entities or entrepreneurs might give rise to questions of eligibility, if affiliation between the licensee and spectrum lessee were the result.

[206] 47 C.F.R. § 1.2110(c)(5)(viii).

[207] *Intermountain Microwave*, 12 FCC 2d 559 (1963); *see Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 61 (incorporating the *Intermountain Microwave* principles of control into section 1.2110 of the Commission's rules).

[208] We clarify further that the licensee need not exert facilities-based control over the leased operations in order to maintain its designated entity or entrepreneur eligibility, except to the extent required by the *de facto* control standard for spectrum leasing arrangements. *See Report and Order* ¶ 65; 47 C.F.R. § 1.9010.

under section 1.2110(c)(5)(i)(D).[209] However, every designated entity or entrepreneur licensee should take care to examine, and we will continue to review, whether there is an identity of interest between the licensee and its spectrum lessee beyond the mere existence of the spectrum lease that confers attributable affiliation under our rules. For example, members of the same family or entities with common investments should be considered affiliates and treated, for purposes of attribution, as one person or entity.[210] Similarly, we clarify that a spectrum manager leasing arrangement does not, *per se*, constitute a management agreement or joint marketing arrangement resulting in the spectrum lessee's being considered a controlling interest of the licensee under sections 1.2110(c)(2)(ii)(H)-(I).[211] We, nonetheless, caution designated entities and entrepreneurs that specific provisions in spectrum manager leasing arrangements, or other agreements with their spectrum lessees, might constitute management agreements or joint marketing arrangements. As our rules state, "affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control or potential control, of the other concern."[212]

80. When entering into a spectrum manager leasing arrangement, the licensee must retain both *de jure* and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard. Consistent with this requirement, a designated entity or entrepreneur licensee cannot use this spectrum leasing vehicle to circumvent our attribution rules. The designated entity or entrepreneur must, if it wishes to undertake a spectrum manager lease, preserve its existing eligibility. As we have discussed, to do so, the designated entity or entrepreneur must evaluate and certify that nothing concerning its spectrum manager lease alters its ongoing eligibility for the benefits it has received. Leasing arrangements that would create a controlling interest or attributable affiliation that altered the designated entity or entrepreneur licensee's eligibility are prohibited. In lieu of using a spectrum manager leasing arrangement in such a situation, designated entities or entrepreneurs are free to undertake a *de facto* transfer lease, subject to the Commission's unjust enrichment requirements and any applicable transfer restrictions.[213] While an attributable interest analysis will not provide licensees with the complete certainty that two commenters desire (one of which is also a petitioner),[214] it is an analysis with which all designated entity and entrepreneur licensees should be familiar. Such an analysis is required whenever an auction applicant seeks designated entity or entrepreneur eligibility, or when a designated entity or entrepreneur licensee applies for license grant or to assign or transfer control of its authorization.

81. These clarifications should serve to allay the concern expressed by two commenters (one of which is also a petitioner) that our *Report and Order* might be interpreted as limiting designated entities and entrepreneurs to entering into spectrum manager leases only with other designated entities and entrepreneurs because we stated that "[u]nder spectrum manager leasing, we [would] require that

[209] *See* 47 C.F.R. § 1.2110(c)(5)(i)(D).

[210] *See id.* § 1.2110(c)(5)(iii).

[211] *Id.* § 1.2110(c)(2)(ii)(H)-(I).

[212] *Id.* § 1.2110(c)(5)(ix).

[213] *See Report and Order* at ¶ 145.

[214] *See* Cingular Wireless Comments at 13-14; Salmon PCS Comments at 4-5, 7-8; *see also* Cingular Wireless Petition at 2-3. To the extent the clarification we provide herein is not consistent with the clarification sought by Cingular Wireless in its petition for reconsideration, we deny that petition.

spectrum lessees satisfy the eligibility and qualification requirements that are applicable to licensees under their authorization."[215] While the language could conceivably refer to our eligibility requirements for designated entity and entrepreneur eligibility rather than to the general eligibility requirements in section 1.9020 of our rules, as one commenter acknowledges, "[i]t is clear from the context that the Commission was referring to these general eligibility requirements… ."[216] Nevertheless, to avoid any possibility of confusion, we will also amend the language of our rules to clarify that, subject to the other eligibility restrictions set forth in the *Report and Order* and in section 1.9020(d) of our rules, including those discussed above, a designated entity or entrepreneur licensee may enter into a spectrum manager leasing arrangement with any spectrum lessee, regardless of the lessee's eligibility for designated entity or entrepreneur benefits.[217]

82. *Application of Controlling Interest Standard to Designated Entity and Entrepreneur Eligibility Determinations*. Insofar as we have determined to continue to rely upon our existing attribution rules (including our definitions of controlling interest and affiliation) as well as existing Commission precedent for all determinations of designated entity and entrepreneur eligibility, we decline to follow recommendations that we should instead rely on the new *de facto* control standard adopted for leasing for our eligibility determinations.[218] While three parties opine that application of the controlling interest standard will significantly limit the flexibility of designated entities and entrepreneurs to enter into leasing agreements;[219] only one of these parties specifically responds to our question asking whether extending the *de facto* control standard for spectrum manager leases to all evaluations of affiliation and eligibility for designated entity and entrepreneur status would be consistent with the objectives of Section 309(j).[220] That party, as noted above, suggests that designated entities need not be limited to constructing and operating a facilities-based network in order to satisfy Congress' objective that they participate in the spectrum market.[221] We cannot accept that reading of Section 309(j). As we have earlier explained, Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license.[222]

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[215] *See* Cingular Wireless Comments at 4-5 (citing *Report and Order* ¶ 109); Cingular Wireless Petition at 4-6; Salmon PCS Petition Reply Comments at 8. The language of paragraph 109 of the *Report and Order* is reproduced with a few stylistic changes at section 1.9020(d)(2)(i). *See* 47 C.F.R. § 1.9020(d)(2)(i).

[216] Cingular Wireless Comments at 5; Cingular Wireless Petition at 4-5.

[217] *See* 47 C.F.R. § 1.9020(d)(4), as amended in Appendix C herein. Because the clarification we provide herein is partially consistent with the recommendation for clarification made by Cingular Wireless in its petition for reconsideration, we grant that petition in part on this issue.

[218] *See* AT&T Wireless Comments at 7-8; Cingular Wireless Comments at iii, 1, 12-14; Salmon PCS Comments at 8-11.

[219] *See* AT&T Wireless Comments at 8-9; Cingular Wireless Comments at 7-8; Salmon PCS Comments at ii, 4, 8, 10; Salmon PCS Petition Reply Comments at 9-11.

[220] *See* AT&T Wireless Comments at 9.

[221] *Id.*

[222] *See* H.R. Rep. No. 103-111, at 257-58 (1993) (Conference Agreement adopted House provisions, in relevant part, with amendments. H.R. Conf. Rep. No. 103-213, at 483 (1993).).

4. Application of the *De Facto* Control Standard for Spectrum Leasing with regard to Other Issues and Types of Arrangements

a. Background

83. In the *Report and Order*, we limited the application of the revised *de facto* control standard to the context of spectrum leasing arrangements,[223] while leaving in place the existing *de facto* control tests – including those based on *Intermountain Microwave* and other facilities-based analyses – for designated entity and entrepreneur eligibility issues, management agreements, and other similar types of agreements. We sought comment on whether and how the revised *de facto* control standard should be extended to apply in these and any other contexts. [224]

b. Discussion

84. Based on the record before us,[225] we decline in this proceeding to extend the revised *de facto* transfer standard applicable to spectrum leasing arrangements to other types of arrangements outside the context of spectrum leasing. Although commenters supported applying the revised standard more broadly, there are significant legal and practical difficulties that commenters have failed to address. It is not clear from the sparse record how such a change would affect existing rules and policies relating to management agreements or other spectrum transactions, or what benefits would be achieved, and we are concerned that revising our rules in these areas may cause a host of unintended consequences or ambiguities.

B. Policies to Facilitate Advanced Technologies

1. Background

85. In the *Further Notice*, we observed that the *Secondary Markets Policy Statement* and the *Spectrum Policy Task Force Report* emphasized the benefits of "smart" or "opportunistic" technologies, especially the potential for increased access to unused spectrum.[226] In addition, the *Spectrum Policy Task Force Report* and the Commission's recently issued *Cognitive Radio NPRM* on the use of advanced technologies describe how they may enable devices to search across many bands, sense the level of emissions, and then operate in spectrum that is either not in use by other parties or below a certain level of

[223] *Report and Order* at ¶¶ 51-53.

[224] *Further Notice* at ¶¶ 315-319.

[225] Three commenters recommended that the new standard be applied to management agreements, without explaining how such a revision would impact existing policies concerning management agreements or why such revisions would be appropriate. AT&T Wireless Comments at 7-8; Cingular Wireless Comments at 12-14; Nextel Partners Reply Comments at 9. One of these also suggested that the new standard be applied when determining whether the licensee or spectrum lessee had control over the leased spectrum for purposes of determining whether potential competitive concerns were raised with regard to the arrangement. AT&T Wireless Comments at 8. Another suggested that the new standard to be applied to "all spectrum transactions" without elaboration. Nextel Partners Reply Comments at 9.

[226] *Further Notice* at ¶¶ 230-231. *See also Secondary Markets Policy Statement* at ¶¶ 6, 37; *Spectrum Policy Task Force Report* at 13-14, 55-58.

emissions.[227] The *Further Notice* sought comment on the use of advanced technologies in licensed bands in the context of secondary markets and, in particular, requested comment on the *Spectrum Policy Task Force Report* recommendation that the Commission focus on advancing and improving access to spectrum by opportunistic devices through a secondary markets approach, at least in the near term.[228] The *Further Notice* also inquired as to whether the *Report and Order* provided sufficient flexibility for more "dynamic" leasing arrangements made possible by opportunistic devices.[229]

2. Discussion

86. Because we believe that smart or opportunistic technologies hold significant potential to promote access to and more efficient use of the spectrum, we clarify our existing spectrum leasing rules, and introduce an additional means, to help facilitate the development of arrangements involving the use of these new and evolving technologies in services for which spectrum leasing is permitted. Opportunistic use technologies facilitate many dynamic ways of sharing spectrum. For example, smart or cognitive radio devices can potentially sense and adapt to their spectrum environment, find and use spectrum in locations or during time intervals that will not cause interference to other users, and operate across multiple bands and using different protocols. Such devices may also have networking capability, either on a peer-to-peer (device-to-device) basis or by interacting with available wide-area or local-area networks.[230] The spectrum access capabilities of these technologies can be achieved by a variety of potential cooperative approaches, such as secondary markets arrangements, in which users of licensed spectrum arrange access with licensees under mutually agreeable terms.[231] With smart or cognitive radios, for example, it is possible to reconfigure the performance parameters of the individual devices to allow more opportunistic uses of the spectrum. As these capabilities become available on a broader basis, the Commission can facilitate these additional forms of spectrum access by ensuring that our licensing and technical rules do not inadvertently impose barriers to the deployment of such capabilities if and when licensees (or spectrum lessees) seek to take advantage of such capabilities. These cooperative uses of these capabilities would also complement other approaches to promoting spectrum access, *e.g.*, facilitating access for advanced technologies on an unlicensed basis. The approaches considered in this order are cooperative in nature – avoiding placing regulatory barriers on licensees (or spectrum lessees)

[227] *See Spectrum Policy Task Force Report* at 13-14, 27-30; *Cognitive Radio NPRM*, 18 FCC Rcd 26859.

[228] *Further Notice* at ¶¶ 233-236.

[229] *Id.* at ¶ 236. In the *Further Notice*, we used the term "smart" and "opportunistic" devices interchangeably. *Id.* at ¶ 231. The *Spectrum Policy Task Force Report* uses terms interchangeably as well. *Spectrum Policy Task Force Report* at 14. In the *Cognitive Radio NPRM*, we generally refer to these types of devices as cognitive radios. *See generally Cognitive Radio NPRM*, 18 FCC Rcd 26859.

[230] We discussed the potential technical capabilities of such cognitive radio in more detail in the *Cognitive Radio NPRM. See generally id.*, 18 FCC Rcd at 26866-26870 ¶¶ 20-32.

[231] While a secondary markets approach to promoting access to licensed spectrum is largely market-based and cooperative, other policy options to promoting such access are possible, including some that are not primarily based on cooperation among private actors and that may spring from Commission regulations. For example, in two proceedings currently before the Commission, we discuss a range of policy options, including cooperative approaches as well as the use of licensed spectrum without the licensee's consent. *See Cognitive Radio NPRM*, 18 FCC Rcd 26859; Establishment of an Interference Temperature Metric to Quantify and Manage Interference and to Expand Available Unlicensed Operation in Certain Fixed, Mobile and Satellite Frequency Bands, 18 FCC Rcd 25309 (2003).

that wish to provide for opportunistic uses of spectrum pursuant to the terms and conditions that they set – so long as they fall within the licensee's spectrum usage rights and are not inconsistent with applicable technical and other regulations imposed by the Commission to prevent harmful interference to other licensees.

87. Recognizing the variety of ways in which advanced technologies enhance opportunities for more parties to gain access to and share the use of the same spectrum, we seek to provide licensees and spectrum lessees the flexibility to enter into mutually beneficial access and use arrangements that take fuller advantage of what these new and innovative technologies may make possible. To that end, we clarify below some of the types of spectrum leasing and other arrangements that could allow for use of advanced technologies, including opportunistic devices. The value of this increased flexibility is reflected in the comments received on this issue. Commenters that addressed this issue maintained that licensees should be permitted to engage in dynamic spectrum leasing arrangements,[232] and generally should be free to weigh the potential benefits and costs of allowing access to licensed spectrum.[233] We also introduce an additional mechanism, which we call a "private commons," that will allow cooperative use arrangements not explicitly recognized within the Commission's policies or rules, and we seek comment in the Second Further Notice on how we can distinguish between these and other arrangements, such as spectrum leasing or end-user arrangements, to avoid unintended and unnecessary barriers to the deployment and use of advanced technologies.[234]

a. Facilitating advanced technologies within existing regulatory frameworks, including dynamic spectrum leasing arrangements

88. We clarify that our spectrum leasing policies and rules permit parties to enter into a variety of dynamic forms of spectrum leasing arrangements that take advantage of the capabilities associated with advanced technologies.[235] Such a clarification generally accords with comments we received. For example, one commenter specifically recommended that the Commission's secondary markets policies and rules be expanded to accommodate "dynamic" spectrum leasing arrangements, and other commenters also endorsed adoption of spectrum leasing policies in which licensees could take fuller advantage of technological advances, including opportunistic use devices, through secondary markets arrangements.[236]

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[232] Verizon Wireless Comments at 5.

[233] *See* Blooston Rural Carriers Comments at 10; Cingular Wireless Comments at 8-9; CTIA Comments at 5-6; Nextel Partners Reply Comments at 10; SBC Comments at 6-7; Sprint Comments at 3-4; T-Mobile Reply Comments at 5-6; Verizon Wireless Comments at 4-5; WCA Comments at 8-9. Many of these commenters also argued that opportunistic use should not occur in licensed bands without the consent of the licensee.

[234] We are separately considering in the Cognitive Radio proceeding issues involved in the authorization of cognitive radio equipment, whether used in conjunction with licensed access to spectrum or under Part 15. *See generally Cognitive Radio NPRM*, 18 FCC Rcd 26859.

[235] We also note that the Commission's existing rules allow providers of wireless network infrastructures, such as CMRS and other providers, to employ opportunistic devices and other advanced technologies so as to better serve existing subscribers or offer services to additional subscribers within a licensed band. Similarly, a licensee with a private network may employ opportunistic devices to enhance communications among users on its network. *See id.*, 18 FCC Rcd at 26863 ¶ 11.

[236] *See* Verizon Wireless Comments at 5. *See generally* Blooston Rural Carriers Comments at 10; Cingular Wireless Comments at 8-9; CTIA Comments at 5-6; Nextel Partners Reply Comments at 10; SBC (continued….)

Consistent with these views, we clarify that parties may enter into spectrum leasing arrangements in which licensees and spectrum lessees share use of the same spectrum, on a non-exclusive basis, during the term of the lease. For example, a licensee and spectrum lessee may enter into a spectrum manager or *de facto* transfer lease in which use of the same spectrum is shared with each other by employing opportunistic devices.[237] In another variation, a licensee could enter into a spectrum manager lease with one party that has access to the spectrum on a priority basis, while also leasing use of the same spectrum to another party on a lower-priority basis, with the requirement that the lower-priority spectrum lessee employ opportunistic technology to avoid interfering with the priority lessee. Of course, the licensee may not lease spectrum usage rights that exceed the rights it currently holds and, as these examples illustrate, the licensee may choose to lease a more restricted bundle of usage rights.

89. Significantly, these arrangements could facilitate opportunistic use by parties operating at the same power level and under similar technical parameters as the licensee, or they could promote such use at lower power levels. We also emphasize that neither scenario would affect unlicensed operations to the extent they are permitted in that particular licensed band pursuant to Commission rules under Part 15.[238] For example, as set forth in section 15.209 of the Commission's rules and augmented on a band-by-band basis, Part 15 users (*e.g.,* Ultra-Wide Band operators) can operate pursuant to applicable technical and operational rules whether or not opportunistic use or other advanced technologies are employed or authorized by the licensee.[239] We would also expect that new and innovative radiofrequency devices would be agile enough to function on an unlicensed basis or as part of licensed operations. Moreover, the examples discussed here do not provide an exhaustive list of all the possible arrangements that could involve the use of opportunistic devices and be consistent with secondary markets and service rules already in place. Accordingly, in the Second Further Notice, we seek comment on the types of additional commercial or sharing arrangements that would further exploit the benefits of new and innovative technological advances.

90. We recognize that, in some cases, under the current framework for spectrum manager and *de facto* transfer lease arrangements, these options may not be economically or technically feasible due to the transaction costs associated with coordinating many users in a single band, or many users employing advanced technologies to access multiple bands by frequency-hopping. Nonetheless, we do not believe that these should be insurmountable barriers and we concur with the *Spectrum Policy Task Force Report* that "a secondary markets approach by opportunistic devices does not necessarily require the prospective opportunistic user to negotiate individually with each affected licensee," and that band managers, clearinghouses, and other intermediaries could facilitate these transactions.[240] We also agree with the

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Comments at 6-7; Sprint Comments at 3-4; T-Mobile Reply Comments at 5-6; Verizon Wireless Comments at 4-5; WCA Comments at 8-9.

[237] An example of such an arrangement would be a cellular licensee that leases to a manufacturer of low-power opportunistic devices for use of the licensed spectrum on a non-interfering basis.

[238] Although several commenters contended that opportunistic use should not occur in licensed bands without the consent of the licensee, *see* note 233 *supra*, we note that the Commission will generally continue to consider the benefits of Part 15 access on a band-by-band basis.

[239] Under sections 15.205 and 15.209 of the Commission's rules, unlicensed devices are permitted to operate at very low power levels in all bands except certain specified restricted bands. 47 C.F.R. §§ 15.205, 15.209.

[240] *Spectrum Policy Task Force Report* at 57.

Spectrum Policy Task Force Report finding that a "secondary market approach has significant potential to foster opportunistic technologies, such as agile frequency-hopping radios, software-defined radios, and adaptive antennas, at reasonable transaction costs."[241] In short, while the existing spectrum leasing options may not meet all types of spectrum access needs, we have great confidence in the ability of market participants to find innovative means of enhancing spectrum access and lowering transaction costs, and we therefore expect the market for spectrum usage rights to become increasingly efficient. At the same time, licensees and spectrum lessees may wish to make spectrum available in ways not anticipated by the Commission's current rules, and such innovative efforts may be a driving force in promoting the development of advanced technologies and the efficient use of the spectrum. We therefore introduce a new concept under our current exclusive-use licensing models that may foster the experimentation and new uses of licensed spectrum without unnecessary regulatory intervention.

b. Private Commons

91. To facilitate the use of advanced technologies, and thus better promote access to and the efficient use of spectrum, we expand the spectrum licensing framework by identifying an additional option that may be utilized by current and future licensees and spectrum lessees. This concept, which we call a "private commons," will allow licensees and spectrum lessees to make spectrum available to individual users or groups of users that do not fit squarely within the current options for spectrum leasing or within the traditional end-user arrangements associated with the licensee's (or spectrum lessee's) subscriber-based services and network infrastructures. New technologies enable users, through use of advanced devices, to engage in a wide range of communications that do not require use of a licensee's (or lessee's) network infrastructure. To facilitate the use of these technologies, we adopt the private commons option, which will permit, and be restricted to, peer-to-peer communications between devices in a non-hierarchical network arrangement that does not utilize the network infrastructure of the licensee (or spectrum lessee).

92. The private commons option provides a cooperative mechanism for licensees (or lessees) to make licensed spectrum available to users employing these advanced technologies in a manner similar to that by which unlicensed users gain access to spectrum to suit their particular needs, and to do so without the necessity of entering into individual spectrum leasing arrangements under our existing rules. In the 2.4 GHz and 5 GHz bands, for instance, users gain access and use of the spectrum with specified types of low-power communications devices provided they comply with technical requirements established by the Commission and set forth in our Part 15 rules.[242] In these bands, users then can create their own networks – such as those that are *ad hoc* or "mesh" in nature[243] – using equipment that complies with Commission-established requirements. The private commons option provides a potentially complementary access model,[244] in which licensees (or spectrum lessees) would determine to make access available to a similar

[241] *Id.*

[242] *See* 47 C.F.R. § 15.249.

[243] *See generally Cognitive Radio NPRM*, 18 FCC Rcd at 26888-26889 ¶¶ 77-80.

[244] Consistent with our discussion of dynamic leasing arrangements, the general ability of a licensee to deploy a private commons model is not intended to, and does not, overturn rights under Part 15, as it exists or as amended, to operate in a band or limit the Commission's ability to implement new underlay approaches when considering particular bands. For instance, a licensee could not, as its own technical condition, restrict the emission limits of devices in a private commons to a level below the level authorized for that band under the (continued….)

class of users, and would do so under technical requirements for sharing use of the licensed band established and managed by the licensee (or lessee).[245] The nature of these types of users' access to spectrum under this private commons option thus differs qualitatively from the nature of access provided to spectrum lessees under the Commission's spectrum leasing policies and procedures. In the private commons, the licensee (or lessee) authorizes users of devices operating at particular technical parameters specified by the licensee (or lessee) to operate on the licensed frequencies, consistent with the applicable technical requirements and use restrictions under the license authorization, using peer-to-peer (device-to-device) technologies. In spectrum leasing arrangements, individually negotiated spectrum access rights are provided to entities that traditionally obtained licenses and that would then provide traditional network-based services to end-users.[246]

93. This approach is consistent with the kinds of additional flexibility many commenters sought. Several commenters supported providing licensees the option of allowing opportunistic use of the licensed spectrum through secondary market mechanisms, and asserted advantages to empowering licensees to establish the technical parameters and interference rules instead of government-established access rules.[247] Commenters also asserted that enabling licensees to determine the technical parameters of such use would minimize interference concerns relating to other users in the band,[248] and would have the necessary incentives to be innovative and efficient in enabling users to access the licensed spectrum through use of such devices.[249]

94. These private commons arrangements may take a variety of forms, but will share a number of defining characteristics, as described herein. The private commons option will allow for flexible uses of licensed spectrum rights in which the licensee or lessee does not necessarily offer services (in whole or part) over its own end-to-end physical network of base stations, mobile stations, and other elements. The licensee or spectrum lessee, as a manager of a private commons, will set terms and conditions for use in the private commons by users (consistent with the terms of the license and applicable service rules),[250] and retain both *de facto* control of the use of the spectrum within the private commons and direct

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Commission's Part 15 rules for unlicensed devices, such as UWB devices, and thereby eliminate the opportunity for such devices to use that spectrum.

[245] Such technical requirements, of course, would have to be consistent with all of the Commission's technical rules applicable to the service or band at issue for preventing interference to other licensees.

[246] We note that the private commons option is not designed to provide a potential means to evade Commission policies and rules applicable to spectrum leasing arrangements, as set forth in the *Report and Order*. *See* para. 90, *supra*.

[247] *See* Cingular Wireless Comments at 8-10; CTIA Comments at 5-6; SBC Comments at 6; Sprint Comments at 3 (supporting the provision of access to licensed spectrum by "opportunistic" third parties through secondary markets mechanisms); WCA Comments at 9. *See also* Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. Rev. 2007 (2003).

[248] *See* Nextel Partners Reply Comments at 10; Verizon Comments at 4.

[249] *See* Cingular Wireless Comments at iii; T-Mobile Reply Comments at 5.

[250] As with spectrum leases, the spectrum usage rights in a private commons cannot exceed the rights granted the licensee in the first instance.

responsibility for compliance with the Commission's rules.[251] And, while private commons arrangements will not be subject to the same notification requirements that are required by our spectrum leasing rules, licensees (or spectrum lessees) managing the commons will be required at this time to notify the Commission about any private commons they establish prior to users being permitted to operate within that private commons.

95. We anticipate at least two types of private commons that licensees (or spectrum lessees) could make available to individuals or groups of users. In the first example, a private commons could be created by a licensee (or spectrum lessee), which may or may not otherwise have a network infrastructure to provide services, by granting access for a fee (*e.g.*, on a transaction, usage, fixed, or other basis) to users who employ smart or opportunistic wireless devices that conform to the terms and conditions established by the licensee (or lessee), such as a requirement that devices operating in the licensed band use a particular technology, hardware, or software. The users' devices may be used to engage in peer-to-peer (device-to-device) communications, such as by becoming part of compatible *ad hoc* or "mesh" wireless networks.[252] Such users may need access to a particular licensed spectrum band in lieu of (or perhaps in addition to) gaining access to other bands that may be more heavily used or that do not allow for the quality of service necessary for a particular application. This type of private commons might be particularly valuable to users that find existing bands that provide for unlicensed operations to be crowded or otherwise less desirable.

96. Under a second potential type of private commons arrangement, the licensee (or spectrum lessee) would not charge an ongoing access fee or otherwise have any direct relationship with the users. For instance, manufacturers of smart or opportunistic devices, or the developers of software or hardware used within such devices, may wish, as licensees or spectrum lessees, to provide spectrum access to anyone who purchases their devices, or devices with their hardware or software. This type of arrangement might be particularly effective in promoting new technologies or new uses by providing an opportunity for equipment developers to capitalize on their investments and innovations without having to get a license directly from the Commission, but could arrange for users of the equipment to access the spectrum usage rights from an existing licensee. Because a licensee (or spectrum lessee) could offer to private commons users the interference protection rights of its license, this arrangement could provide some additional benefits as compared with possible lower-powered, unlicensed operation in the same or other bands.

97. We will require licensees and spectrum lessees that seek to allow spectrum access on a private commons basis to notify the Commission of the arrangement at this time. This notification will be similar to, but simpler than, the notification required for spectrum manager leases. It would provide certain information and certifications regarding the general terms and conditions for spectrum access to users in the private commons, including the term and coverage area of the arrangement, general

[251] Thus, as with a licensee under a spectrum manager leasing arrangement that retains *de facto* control (under the revised *de facto* control standard for spectrum leasing) and direct responsibility for its spectrum lessee's compliance, so too the licensee or spectrum lessee acting as the private commons manager must retain *de facto* control and direct responsibility for users of the private commons. And, as with spectrum leasing arrangements, the licensee or spectrum lessee retains the right to terminate the private commons arrangement.

[252] *See Cognitive Radio NPRM*, 18 FCC Rcd at 26888-26889 ¶¶ 77-80. These types of peer-to-peer communications made possible by advanced technologies, *see generally id.*, are thus distinct from the traditional, hierarchical end-to-end physical network infrastructures (*e.g.*, base stations, mobile stations, or related elements) operated by licensees and spectrum lessees.

information on the technical requirements and the equipment that the licensee or spectrum lessee has approved for operation in the private commons, as well as a description of the types of uses that are allowed. Consistent with our approach to Part 15 devices, we will not require the notification to include specific information about each individual user.[253] We examine this notification requirement, and the continued need for the notification, in the Second Further Notice, below. We also recognize the need to clearly identify the distinguishing elements of spectrum leases, managed private commons, and end-user arrangements, respectively, as means to create spectrum access. Accordingly, in the Second Further Notice, we seek comment on the specifications necessary to make such distinctions consistent with the Commission's regulatory and enforcement objectives, and we seek comment on other arrangements and regulatory changes that may facilitate spectrum access and that should be considered within a private commons framework.[254]

98. We believe that a private commons will provide an important complement to the spectrum leasing policies we have already adopted to facilitate spectrum access, as well as to unlicensed access to spectrum. We expect the combination of spectrum leasing arrangements, private commons, and the various ways in which licensees currently may utilize advanced technology will further enhance this move towards greater spectrum access, and we are optimistic about the potential benefits that are likely to emerge as licensees and other users find more ways to promote access to and the efficient use of spectrum. We note that the flexibility afforded by a private commons may help make possible a number of new means to apply advanced radio technologies, including such concepts as "policy radio," an emerging approach that would allow use that is even more dynamic than that described above.[255]

99. We also envision this approach as part of a balance between license-based access mechanisms, such as the spectrum leasing and private commons models that allow licensees and spectrum lessees to define access rights based on market forces, and unlicensed access mechanisms that allow free access by non-interfering devices pursuant to regulation. We recognize that there is an ongoing and important debate on spectrum policy, with some parties stressing the merits of unlicensed and shared

[253] As discussed herein, the kind of users and uses expected in a private commons are akin to those involved with unlicensed uses, and we do not require that the Commission be informed of the identity of each such device user even though such use occurs in licensed bands. *See generally* 47 C.F.R. Part 15 (permitting unlicensed users to operate in licensed bands). Also, because the licensee or spectrum lessee always retains *de facto* control over the use of the spectrum in the private commons, users share certain similarities with end-users about whom the Commission does not know the identity. Accordingly, the policies that led us to require that we be notified of the identity of spectrum lessees, such as potential foreign ownership or competition concerns, *see generally Report and Order* at ¶¶ 100-125, 133-159 (requiring that the Commission be informed of the identity of the spectrum lessee and determining, among other things, that spectrum leasing arrangements potentially raised foreign ownership and competition concerns), do not apply with regard to users in a private commons.

[254] We invite licensees or spectrum lessees uncertain as to whether the arrangements they contemplate constitutes a private commons to seek informal or formal guidance from the Commission during the pendancy of the Second Further Notice of Proposed Rulemaking.

[255] These include emerging cognitive radio technologies that allow multiple users to share use of the same spectrum through adaptive techniques that enable users to avoid conflicts in terms of time, frequency, code, and other signal characteristics, such as those being developed by the Defense Advanced Research Projects Agency (DARPA). DARPA's goals are to enable an increase by a factor of ten in usage of typical spectrum, and is aiming to develop technology that is applicable not only to the military, but also could be applied for civil use. *See generally* http://www.darpa.mil/ato/programs/XG/rfc_vision.pdf (discussion of DARPA's "neXt Generation" (XG) program).

uses, both within a free and open "spectrum commons" and in licensed bands under private control,[256] and other parties arguing for the merits of "exclusive" licensed use of spectrum.[257] We are not here taking sides in that debate. Rather, we expect that existing and new licensees and spectrum lessees in various services and spectrum bands will consider the market potential of a private commons and other arrangements and seek opportunities to lower transaction costs and provide multiple avenues of spectrum access and a range of devices to consumers, businesses and other entities. In addition, we anticipate that, as unlicensed use becomes more popular, users of unlicensed devices that operate under the Part 15 rules may have an incentive to seek access to a managed private commons in licensed bands that may be less susceptible to overcrowding and, because of the benefit of interference protection, may be a way to avoid the potential risks associated with the "tragedy of the commons."[258] Licensees and spectrum lessees in turn will have an incentive to provide private commons through a variety of means, with terms and conditions that are most valued by users. We expect these users will choose the most efficient means of spectrum access for their particular needs, considering the costs and benefits of all options, including private commons and unlicensed use.

C. License Assignments and Transfers of Control

1. Immediate Approval Procedures for Certain Categories of License Assignments and Transfers of Control

a. Background

100. In the *Report and Order*, we streamlined the regulatory process for transfers of control and license assignments in the same Wireless Radio Services covered by our new spectrum leasing policies. In the *Further Notice*, we proposed to take additional steps to remove unnecessary delay in processing certain categories of transfers of control and license assignments to the extent doing so would be consistent with our statutory obligation to determine whether such transactions would be in the public interest.[259] In particular, we inquired whether the policies that we adopted with regard to *de facto* transfer leasing under our forbearance authority should also be applied to license assignments and transfers of control.[260]

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[256] *See, e.g.,* Yochai Benkler,*Overcoming Agoraphobia; Building the Commons of the Digitally Networked Environment*, 11 Harv. J. L. & Tech. 287 (1998); Benkler, *Some Economics of Wireless Communications*, 16 Harv. J. L. & Tech. 25 (2002); Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World*, New York: Random House (2002); Lawrence Lessig, *Commons and Code*, 9 Fordham Intell. Prop. Media & Ent. L. J. 405 (1999); Kevin Werbach, *Supercommons: Towards a Unified Theory of Wireless Communications*, 82 Tex. L. Rev. 863 (2004).

[257] *See* Stuart Minor Benjamin, *Spectrum Abundance and the Choice Between Private and Public Control*, 78 N.Y.U. L. Rev. 2007 (2003); Thomas Hazlett, *The Wireless Craze, the Unlimited Bandwidth Myth, the Spectrum Auction Faux Pas, and the Punchline to Ronald Coase's 'Big Joke': An Essay on Airwave Allocation Policy*," 14 Harv. J. L. & Tech 335 (2001).

[258] *See* Garrett Hardin, *The Tragedy of the Commons*, Science 162: 1243-1248 (1968).

[259] *See generally Further Notice* at ¶¶ 237-240.

[260] *Id.* at ¶¶ 240, 278-287.

b. Discussion

101. We adopt immediate approval procedures for the same categories of license assignments and transfers of control involving Wireless Radio Services as are subject to our immediate approval procedures for *de facto* transfer spectrum leasing arrangements, as set forth in Sections IV.A.1.a and IV.A.1.b, above.[261] This decision comports with the comments we received.[262] Accordingly, we conclude that an application for assignment or transfer of control of Wireless Radio Service licenses qualifies for immediate approval if, consistent with our policies for *de facto* transfer leases, the application establishes, through required certifications, that the transaction does not raise any specified potential public interest concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition, or does not require a waiver or declaratory ruling.[263] In such cases, we will not require prior public notice or additional individualized Commission review before the transaction is approved.[264] In addition, the applications must not involve license authorizations that are subject to Commission review or investigation that potentially affects the status of the license authorization itself.[265] Finally, as with the approach we adopt with regard to *de facto* transfer leasing, our approval of the license assignment or transfer of control will be placed on public notice, subject to reconsideration by interested parties or the Bureau within 30 days, and by the Commission within 40 days.[266]

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[261] *See* Sections IV.A.1.a and IV.A.1.b, *supra.* We also note that, as with immediate processing of *de facto* transfer leases, changes must be made with regard to ULS in order to implement immediate processing of license assignments and transfers of control. *See* para. 30, *supra.* Thus, we direct the Bureau to undertake as soon as practicable the necessary programming changes to implement the provisions of this Second Report and Order and to modify as necessary any licensing databases. Once ULS is updated to permit the immediate approval process, we further direct the Bureau to release a public notice notifying the public that the new procedures are available. *See id.*

[262] All commenting parties supported applying the same forbearance approach adopted for *de facto* transfer leases to license assignments and transfers of control. *See, e.g.*, CTIA Comments at 3-4; SBC Comments at 7-10; T-Mobile Reply Comments at 6-8; WCA Comments at 11-15.

[263] That is, parties to a license assignment or transfer of control application would qualify for immediate approval processing only insofar as the they establish the same qualifications for the application as is required of the licensee and spectrum lessee in a *de facto* transfer lease application that would be subject to immediate approval. *See* Section IV.A.1.a(ii), *supra.*

[264] *See id.*

[265] If there is a pending question as to whether the license is subject to revocation, cancellation, or termination (*e.g.*, where the initial construction requirements for a site-based license may have not been met, as required under our rules (*e.g.*, sections 90.155, 90.631(e)), or where there has been a permanent discontinuation of services, in contravention of our rules (*e.g.*, sections 90.157, 90.631(f)), we determine that a license assignment or transfer of control cannot proceed under these procedures. *See, e.g.*, 47 C.F.R. §§ 90.155, 90.157, 90.631(e)-(f).

[266] *See* para. 31, *supra.* To the extent a license assignment or transfer of control involving a Wireless Radio Service does not qualify for this streamlined application/immediate grant processing, we will process the application pursuant to the procedures we adopted in the *Report and Order*. *See Report and Order* at ¶¶ 197-198. Once received, the applications will be placed on public notice (if required by the service involved). They will then be reviewed and approved by the Commission within twenty-one (21) days unless they are removed from this (continued….)

102. As we noted in the *Report and Order*, one of the goals in this proceeding is to streamline our policies relating to license assignments and transfers of control so as to minimize administrative delays, reduce transaction costs, encourage more efficient use of spectrum, promote spectrum fungibility, and otherwise facilitate the movement of spectrum toward new and higher valued uses.[267] The additional streamlining of our processing of these specified categories of license assignments and transfers of control helps us to achieve these goals while at the same time meeting our statutory obligations, under Sections 308, 309, and 310(d), to review license assignments and transfers of control to ensure that they are consistent with the public interest.

103. As with the policies we adopt regarding *de facto* transfer leases, we make this additional streamlining of our approval processes available only to those license assignments and transfers of control that would not raise the kinds of potential public interest concerns that would necessitate public notice or individualized review prior to granting.[268] Thus, to the extent a particular application falls within those categories of assignments or transfers of control that potentially raise public interest concerns regarding eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition (as discussed above[269]), or seeks waiver of or a declaratory ruling pertaining to Commission rules, we will, consistent with current requirements, continue to place the application on public notice (if it involves a common carrier license[270]) and subject the application to more individualized prior review before acting on it. For applications that do not raise such potential public interest concerns, prior public notice and additional individualized review is not necessary. Such applications now are routinely approved, and we find that the resources and delay associated with such prior notice and review requirements are not merited when balanced against our goal of promoting more fluid secondary markets in spectrum rights. In addition, we keep in place procedures that will ensure that the Commission fulfills its obligation to ensure that the public interest is served by approval of the application. The approval of such applications will be announced by public notice, and interested parties, the Bureau, and the Commission will have sufficient time during the reconsideration period to review these transactions, as necessary, to ensure that parties have complied with Commission policies. In addition, if compliance issues arise after the reconsideration period, the Commission retains authority to

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processing because of the need for further investigation or consideration, or if they are denied, for raising potential public interest concerns identified by the Commission or in petitions to deny. *Id.*

[267] *See Report and Order* at ¶ 195; *see also Secondary Markets Policy Statement*, 15 FCC Rcd 24178 ¶ 1, 24181 ¶ 9, 24182-24183 ¶ 12, 24185-24186 ¶¶ 18-20, 24191 ¶ 32, 24192 ¶ 34 (2000); Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 FCC Rcd 19868, 19872 ¶ 13 (1999) (*Policy Statement on Principles for Spectrum Allocation*). In addition, we note that the *Spectrum Policy Task Force* supported the need for the Commission to identify ways in which it can streamline its regulatory processes in order to facilitate a range of secondary market activities – spectrum leasing as well as other transactions, whether transfers of control of licensees or assignment of licenses, in whole or in part. *See Spectrum Policy Task Force Report* at 15, 57.

[268] We note that the procedures we are adopting in this Second Report and Order do not revise existing Commission policies pertaining to *pro forma* or involuntary transactions.

[269] *See* paras. 15-28, *supra* (identifying categories of transactions involving *de facto* transfer spectrum leasing arrangements that would not be subject to the forbearance approach outlined in this Second Report and Order).

[270] We note that the 30-day notice and comment period under Section 309(b) applies to common carrier licenses but not to Private Mobile Radio Services (PMRS) licenses. *See* 47 U.S.C. § 309(b)-(c).

take other action as necessary. We also note that parties are accountable for any certifications they make in their applications. If the Commission determines, following approval of an application under these procedures, that any such certification, by either the licensee, assignee, or transferee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate action.[271]

104. *License assignments and transfers of control subject to our forbearance authority.* Thus, for license assignment and transfer of control applications that fall within the scope of our forbearance authority and that meet the specified requirements (*i.e.*, do not raise any of the potential public interest concerns identified above) for immediate approval, we will forbear from prior public notice and additional individualized review requirements. We find that such forbearance satisfies each prong of the test under Section 10, and will serve the public interest.

105. Evaluating the first prong of the forbearance test, we conclude that the prior public notice and individualized Commission review requirements of Sections 309(b) and 310(d) are not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory.[272] As we noted earlier, it is already the case, under current rules, that when parties file applications proposing a transfer of control or assignment of a license, such applications do not generally contain information on the charges, practices, classifications, or services of the parties involved, and we have declined to use such applications as a context for regulating these issues.[273] Retaining prior public notice and review requirements for these applications thus is not necessary to ensure that licensees' and lessees' charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory. And, as indicated in the *Further Notice*, we have other existing tools at our disposal, including enforcement actions, to ensure that charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory.[274]

106. In examining the second prong of the Section 10 forbearance standard with respect to these applications, we conclude that requiring prior notice and comment and Commission review is not necessary for the protection of consumers. As discussed above, we have already determined that effectively functioning secondary markets will offer significant benefits to consumers,[275] and we believe consumers will be fully protected by the limitations and safeguards placed on the forbearance process. Also, given that protecting consumers in the wireless marketplace is a core aspect of our competition policies, we have limited this streamlined application and immediate approval process to license

[271] Earlier in this Second Report and Order we similarly discussed spectrum leasing parties' accountability for their certifications when seeking to avail themselves of immediate approval procedures for *de facto* transfer lease applications. *See* para. 33, above.

[272] We have already determined, in the *Report and Order*, that a full 30-day public notice period is not required for any *de facto* transfer lease applications. *Report and Order* at ¶¶ 155-159 (reducing the public notice requirement to 21 days).

[273] *See* Craig O. McCaw, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5880-5881 ¶ 76 (1994), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), *recon. in part*, 10 FCC Rcd 11786 (1995).

[274] *Further Notice* at ¶ 271.

[275] *See* para. 36, *supra*; *see also Report and Order* at ¶¶ 32, 39-45.

assignments and transfers of control that would not raise potential competitive issues. Consumers are further protected because applications approved under this forbearance authority will be placed on public notice, enabling members of the public and other interested parties to raise any concerns regarding the protection of consumers in petitions for reconsideration.

107. Finally, we conclude that forbearing from prior public notice and Commission review of qualifying license assignment and transfer of control applications will further the public interest. This streamlined processing will enable secondary markets to work more effectively, with reduced regulatory delay and transaction costs. This in turn will increase the efficient use of spectrum, improve access to spectrum by all interested parties, promote competitive market conditions, and increase the innovative and advanced wireless services available to consumers. At the same time, the limitations on the types of license assignments and transfer of control applications that qualify for forbearance are designed to ensure that the public interest and our fulfillment of our statutory obligations are not undermined.

108. *License assignments and transfers of control not subject to forbearance.* Similarly, we also determine that the streamlined approach we are adopting for qualifying license assignments and transfers of control involving services that are not subject to our forbearance authority is consistent with the statutory requirements of Sections 308, 309, and 310(d). Consistent with these provisions, we continue to require an application and approval process. In addition, in order to determine whether to approve these transactions, the Commission requires that each application establish a distinct set of facts and representations concerning the particular license assignment or transfer of control application before it can be approved. Thus, before any particular application will be approved under these immediate approval procedures, the Commission will have determined, based on the particulars of that application, that all of the criteria relevant to establishing that the public interest would be served by the granting of the application had been supplied, and the statutory requirements for case-by-case review and approval of the application will have been satisfied.

2. Extending the Streamlined Processing Policies Relating to License Assignments and Transfers of Control to Additional Wireless Radio Services

a. Background

109. In the *Report and Order*, we limited our streamlined processing policies relating to license assignments and transfers of control to include only those services to which our spectrum leasing policies applied.[276] In the *Further Notice*, we inquired whether we should expand these streamlined processing rules to include additional services.[277]

b. Discussion

110. We will apply the streamlined processing procedures adopted in the *Report and Order* for license assignment and transfer of control applications, as modified by this order for qualifying applications, to all license assignment and transfer of control applications involving Wireless Radio

[276] *Report and Order* at ¶ 196; *see also* 47 C.F.R. §§ 1.948(j), 1.9005.

[277] *Further Notice* at ¶ 314.

Services authorizations regulated by the Bureau.[278] Thus, under the policies we are adopting herein, license assignment and transfer of control applications that raise potential public interest concerns (*i.e.*, concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition) will be processed according to the 21-day processing procedures for license assignments and transfers of control set forth in the *Report and Order*, while those applications that qualify under the immediate approval procedures adopted in this order will be processed under the procedures adopted for license assignments and transfers of control set forth herein.[279]

111. We believe that there should be parity among these Wireless Radio Services when it comes to processing of license assignments and transfers of control. This will allow licensees and assignees/transferees in each service to benefit from streamlined processing that minimizes administrative delay, reduces transaction costs, and otherwise generally facilitates the movement of spectrum toward new, higher valued uses.

[278] Accordingly, all license assignment and transfer of control applications for Wireless Radio Services governed by section 1.948 and that must use FCC Form 603, with the exception of the Broadcast Auxiliary Service, are now subject to streamlined approval processing or immediate approval processing.

[279] *See* Section IV.C.1.b, *supra*. We note that many of these services, by virtue of the applicable rules, do not raise potential public interest concerns pertaining to designated entity/entrepreneur restrictions or competition.

D. The Commission's Role in Providing Secondary Markets Information and Facilitating Exchanges

1. Background

112. In the *Further Notice*, we sought comment on a variety of approaches the Commission could take to promote access to the information needed to make possible spectrum leases or exchanges of spectrum usage rights in the secondary market. The simplest option discussed was maintaining an on-line database of licensees, spectrum lessees, and other information.[280] We pointed out that, under the spectrum leasing procedures adopted in the *Report and Order*, the Commission will make publicly available information that is contained in the required notifications and applications filed by spectrum leasing parties, including the identity of spectrum lessees, contact information, the spectrum and geographic area encompassed within the lease, and the term of the spectrum lease.[281] We also sought comment on whether the Commission should collect additional information, support establishment of services such as listing offers to transfer, assign, or lease, or support the establishment of exchange mechanisms or brokering exchanges.[282] Finally, we invited comment on the potential for independent third parties to emerge as "market-makers" that negotiate, broker, or otherwise facilitate spectrum leasing transactions.[283] Specifically, we inquired whether the Commission should designate approved market-makers, whether requirements should be imposed relating to their operation, and whether it should attempt to facilitate the development of such market-makers.[284]

2. Discussion

113. We recognize that the Commission plays a critical role in the development of efficient secondary markets for spectrum usage rights. We believe that the spectrum leasing procedures established in the *Report and Order*, combined with the information made available through our ULS database, will help in the development of these secondary markets. At the same time, we recognize that it may be necessary to evaluate, and perhaps expand, the information made available by the Commission as secondary markets in spectrum usage rights develop.

114. With regard to the question of whether the Commission itself should provide additional information services to promote the development of secondary markets, we continue to believe that the private sector is better suited both to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties.[285] Our decision is consistent with most of the comments we received on this question.[286]

[280] *Further Notice* at ¶ 224.

[281] *Report and Order* at ¶¶ 124, 153; *Further Notice* at ¶ 224.

[282] *Further Notice* at ¶¶ 225-226.

[283] *Id.* at ¶ 227.

[284] *Id.* at ¶ 228.

[285] *Id.* at ¶ 226.

Accordingly, while we will continue to collect and make available to the public the basic details related to spectrum licensees and lessees as provided in the *Report and Order*, we will not gather or provide additional information at this time.[287]

115. We believe that this approach to collecting information and facilitating exchanges is most consistent with the Commission's general approach of relying on market processes where possible to provide needed goods and services, while supplying necessary information, oversight, or other critical inputs in those cases where government can do this most efficiently. As noted above, the Commission plays a key role in providing reliable information about the identity of licensees and the spectrum they hold.[288] Determining how best to analyze and organize this information in a manner that meets the varying needs of licensees and potential spectrum lessees is a separate undertaking that, we believe, can be achieved more efficiently and effectively by independent market-makers and exchanges competing with each other to provide the kinds of value-added information services that different parties in the market may demand. For this reason, we take no action to establish the Commission as either a market-maker or exchange, nor do we take action to favor any particular type of private exchange mechanism.[289] Similarly, we decline at this time to establish requirements for market-makers or other parties that may emerge to facilitate transactions. We will, however, continue to monitor the development of information services and market mechanisms in the private sector, and are prepared to revisit this issue at a later time if circumstances warrant.

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[286] Almost all commenting parties opposed requiring additional information-gathering by the Commission. *See* AT&T Wireless Comments at 2-4; Blooston Rural Carriers Comments at 9-10; Cingular Wireless Comments at 14-15; CTIA Comments at 6; Nextel Communications Comments at 3-6; Nextel Partners Reply Comments at 6-7; PCIA Comments at 4-5; SBC Comments at 2-4; Sprint Comments at 6-7; Verizon Wireless Comments at 2-3; WCA Comments at 10-11; T-Mobile Reply Comments at 6. They asserted that, in the event additional mechanisms are needed, private entities would provide them. Several commenters asserted that the Commission nonetheless had a key role to play in maintaining the quality of information in its ULS database. *See* Blooston Rural Carriers Comments at 8; Nextel Communications Comments at 3; Nextel Partners Reply Comments at 6; SBC Comments at 3-4; Verizon Wireless Comments at 2.

[287] *Report and Order* at ¶¶ 124, 153. As noted in the *Report and Order*, we require spectrum leasing parties to provide, among other things: information on the identity of the spectrum lessee; the specific spectrum being leased (in terms of amount, frequency, and geographic area involved), including the call sign affected by the lease; the term of the spectrum lease; and, certifications regarding the spectrum lessee's basic qualifications, eligibility, and other matters required under the applicable spectrum leasing policies. *Id*. at ¶¶ 124, 153.

[288] We note, too, that not only are our ULS database files available for review, but they can also be downloaded by the public and customized to address varying needs.

[289] There was little support for the Commission taking any additional action with regard to promoting the development of market-makers. Only one party recommended that the Commission designate an entity to perform market-making functions, such as verifying the financial viability of parties and providing guaranteed funds transfers. *See* Cantor Fitzgerald Telecom Comments at 3-4. In addition, one commenter recommended that the Commission take steps to "fertilize" the development of market-makers, suggesting that the Commission join with NTIA to host a "Spectrum Market Makers Conference" annually for the next three years. Winstar Comments at 2. No commenter recommended that the Commission assume the role of broker or market-maker.

V. ORDER ON RECONSIDERATION

116. Five parties – Blooston Rural Carriers, Cingular Wireless, First Avenue Networks, NTCA, and Verizon Wireless – filed petitions for reconsideration seeking clarification or revision of a number of different issues addressed in the *Report and Order*.[290] Four parties filed responses to these petitions.[291]

117. Blooston Rural Carriers, Cingular Wireless, and NTCA each sought clarification of the licensee's responsibility for ensuring that spectrum lessees comply with Commission policies and rules,[292] while Verizon Wireless sought clarification of the licensee's ability to terminate a spectrum lease for non-compliance by the lessee.[293] Cingular Wireless and Verizon Wireless requested additional procedural protections for licensees and spectrum lessees in the event the Commission sought to terminate a spectrum lease,[294] while Blooston Rural Carriers, Cingular Wireless, and NTCA sought additional procedural protections for spectrum lessees if the license was terminated, either as a result of the licensee's bankruptcy or for some other unanticipated reason.[295] Blooston Rural Carriers also sought clarification of Commission policies regarding the licensee's responsibility for meeting application construction requirements when entering into spectrum leasing arrangements.[296] And, Cingular Wireless requested clarification with respect to the licensee's responsibility for the cost-sharing obligations associated with relocation of incumbent microwave licensees in broadband PCS spectrum.[297] We address these issues and petitions below.

118. Issues raised by two of the petitioners overlap with matters that we already have addressed in the Second Report and Order, above. First Avenue Networks recommended that we eliminate the requirement that parties file spectrum manager leases days in advance of being permitted to commence operations under the lease,[298] an issue we addressed in Section IV.A.1.d, above.[299] Cingular Wireless

[290] *See* Blooston Rural Carriers Petition for Partial Reconsideration and/or Clarification; Cingular Wireless Petition for Reconsideration and Clarification; First Avenue Networks Petition for Reconsideration; NTCA Petition for Partial Reconsideration; Verizon Wireless Petition for Reconsideration and Clarification.

[291] We received reply comments from Salmon PCS and RTG, an opposition from the Fixed Wireless Communications Coalition, and an *ex parte* letter from PCIA's Microwave Cost Sharing Clearinghouse. *See* Salmon PCS Petition Reply Comments; RTG Petition Reply Comments (dated Feb. 13, 2004); Fixed Wireless Communications Coalition Opposition to Petition for Reconsideration; Letter to Katherine Harris, Deputy Chief, Mobility Division, from Eric W. DeSilva, Counsel to PCIA's Microwave Cost Sharing Clearinghouse (dated Mar. 25, 2004).

[292] Blooston Rural Carriers Petition at 2-4, 9-11; Cingular Wireless Petition at 6-8; NTCA Petition at 2-3.

[293] Verizon Petition at 1-3.

[294] Cingular Wireless Petition at 8-9 (seeking additional protections for licensees in the context of spectrum manager leases); Verizon Wireless Petition at 2-3 (seeking additional protections for spectrum lessees in the context of *de facto* transfer leases).

[295] Blooston Rural Carriers Petition at 4-7; Cingular Wireless Petition at 8-9; NTCA Petition at 3-4.

[296] Blooston Rural Carriers Petition at 7-9.

[297] Cingular Wireless Petition at 9-10.

[298] First Avenue Networks Petition at 1-4.

sought clarification of the Commission's policies regarding spectrum leasing by designated entities and entrepreneurs,[300] which we have addressed in Section IV.A.4.b, above.[301] Because we have already considered and addressed the substance of these petitions, we will not discuss them further in this section.

A. Licensee Responsibility To Ensure That Spectrum Lessees Comply With Commission Policies and Rules

1. The licensee's responsibility to ensure the spectrum lessee's compliance with Commission policies and rules

a. Spectrum manager leasing arrangements

119. Background. In the *Report and Order*, we provided that licensees in spectrum manager leasing arrangements will be held directly accountable for lessee violations.[302] In addition, we stated that if the licensee or the Commission determines that there is any violation of the Commission's rules or that the lessee's system is causing harmful interference, the licensee must immediately take steps to remedy the violation, resolve the interference, suspend or terminate the operation of the system, or take other measures to prevent further harmful interference until the situation can be remedied.[303] Finally, if the spectrum lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Bureau or Commission, we provided that the licensee "must use all legal means necessary to enforce the order," as codified in section 1.9010(b)(1)(iii).[304]

120. In its petition for reconsideration, Cingular Wireless contended that a spectrum manager licensee should not be held accountable for the spectrum lessee's violations of any rules if the licensee exercises some form of "due diligence."[305] In their petition, Blooston Rural Carriers asserted that requiring that a spectrum manager licensee use "all legal means necessary" to ensure that a spectrum lessee does not continue to violate rules imposes an ambiguous and potentially onerous requirement on the licensee even if the licensee takes reasonable steps to ensure compliance; they requested that we clarify the provision by including a "reasonableness" element in the requirement.[306]

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[299] *See* para. 47, *supra.* Given that we have revised our policies regarding spectrum manager leases so as to permit spectrum lessees in most Wireless Radio Services to commence operations under a lease as soon as the spectrum manager leasing notification is filed, we have granted First Avenue Network's Petition. *See id.*

[300] Cingular Wireless Petition at 1-6; *see also* Salmon PCS Petition Reply Comments at 5-14.

[301] *See* paras. 70-71 & n.175, 76-81 & nn.196, 214, 217, *supra.* Specifically, when we clarified the policies applicable to designated entity and entrepreneur licensees that seek to enter into spectrum leasing arrangements, we affirmed in part but otherwise denied Cingular Wireless's petition for reconsideration with regard to the revisions it sought concerning the policies we adopted in the *Report and Order. See id.*

[302] *Report and Order* at ¶ 67.

[303] *Id.*

[304] *Id.*; 47 C.F.R. § 1.9010(b)(1)(iii).

[305] Cingular Wireless Petition at 6.

[306] Blooston Rural Carriers Petition at 9-11.

121. Discussion. We affirm the *Report and Order* in holding that licensees in spectrum manager leasing arrangements are directly responsible and accountable for violations of Commission policies and rules by their spectrum lessees, and thus we deny Cingular Wireless's petition. In entering into spectrum manager leasing arrangements, licensees have chosen to retain *de facto* control of the leased spectrum, which includes ongoing oversight responsibilities as well as direct accountability for ensuring their lessees' compliance with the rules.[307] Spectrum lessees in this type of leasing arrangement are not held directly accountable, but instead are secondarily liable.[308] Accordingly, holding spectrum manager licensees directly accountable is the only means of ensuring that some entity is directly accountable for compliance with Commission rules pertaining to the use of the leased spectrum. We note, however, that while licensees, as a policy and legal matter, will be held accountable for their lessees' compliance, the Commission retains discretion, based on the facts and circumstances regarding the licensee's exercise of its oversight responsibilities, as to whether and how it may proceed against the licensee when a spectrum lessee violates Commission policies. Thus, we agree with Cingular Wireless that the extent of a licensee's due diligence should be considered in determining the appropriate course of action.

122. In addition, consistent with the concerns raised by Blooston Rural Carriers, we modify section 1.9010(b)(1)(iii) of the Commission's rules by adding a reasonableness element to the provision. As modified, the rule will now state that the spectrum manager licensee must "use all reasonable legal means necessary to enforce compliance." This clarification should ameliorate any concern that the licensee would have to exhaust all legal means, no matter how unreasonable, to ensure its lessees' compliance. Nevertheless, we emphasize that licensees that enter into spectrum manager leasing arrangements must maintain *de facto* control over the leased spectrum, which includes retention of the necessary legal rights, and the responsibility for taking legal action when necessary, to enforce their lessees' compliance with Commission policies and rules.

b. *De facto* transfer leasing arrangements

123. Background. In contrast to licensee responsibilities in spectrum manager leasing arrangements, we significantly limited licensee responsibilities in *de facto* transfer leasing arrangements by relieving licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules. We did, nonetheless, provide that licensees in *de facto* transfer leases retain "some residual responsibilities" regarding the leased spectrum. While noting that we were seeking to carefully limit licensee responsibilities so as not to impede commercially viable leasing arrangements, we also stated that it "may be appropriate to hold the licensee responsible in specific cases for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge or should have knowledge."[309]

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[307] We note, however, that there are some actions by spectrum lessees for which licensees are not directly or strictly accountable. They include certain certifications by spectrum lessees regarding eligibility matters for which the licensee is not directly accountable, as well as lessees' compliance with rules and policies not directly related to the use of the leased spectrum. *Report and Order* at ¶¶ 69, 101-104.

[308] Indeed, spectrum lessees under spectrum manager leases do not hold an authorization (in contrast to spectrum lessees under *de facto* transfer leases), and thus are not brought within the scope of the Commission's direct forfeiture procedures under Section 503(b) of the Act. *See id.* at ¶ 137 (discussing spectrum lessees' direct accountability, in *de facto* transfer leasing arrangements, for forfeitures under Section 503(b)).

[309] *Id.* at ¶¶ 135-136.

124. In its petition, Cingular Wireless objected to stating that the Commission "may" hold licensees potentially responsible for "ongoing violations" or "egregious behavior," subject to forfeitures or license cancellation, contending that this standard is "extremely vague" and provides licensees insufficient guidance.[310] Cingular Wireless sought either elimination of the licensee's residual responsibility with regard to *de facto* transfer leases or clarification of the standard to which the licensee would be held accountable.[311] Blooston Rural Carriers objected to holding the licensee accountable for what it "should have known," and requested that the Commission clarify that the licensee will have fully discharged its oversight responsibilities if it includes certain express covenants in a spectrum lease; under such a revised standard, if a licensee becomes aware of a violation, the licensee would then be accountable for enforcing the lease terms.[312] Finally, NTCA requested in its petition that the Commission not hold the licensee liable for its lessee's violations so long as the licensee abides by some basic guidelines; NTCA recommended that we establish a safe harbor for *de facto* transfer leasing with regard to a licensee's residual responsibilities, but did not elaborate on what that safe harbor would entail.[313]

125. Discussion. We affirm the *Report and Order* and deny the petitions for reconsideration on this issue. We believe that the language in the *Report and Order* achieves the right balance with regard to the accountability of licensees in *de facto* transfer leasing arrangements for the violations of Commission policies and rules by their spectrum lessees.

126. In the *Report and Order*, we significantly limited licensee responsibilities in *de facto* transfer leasing arrangements by relieving licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules. Instead, as we made clear in the *Report and Order*, spectrum lessees are primarily and directly responsible for ensuring such compliance, and we will first approach the lessee when we have questions about interference or other technical performance issues to demand that it bring its operations into compliance. We also have the direct authority to pursue remedies against lessees under Section 503(b) of the Act.[314] Thus, although licensees are generally relieved of responsibility for their lessees' actions, they are not relieved of all responsibility no matter the circumstance. Given that licensees under this type of leasing arrangement continue to hold *de jure* control of the leased spectrum, as well as non-delegable duties regarding their license, we find that holding them potentially accountable, in certain limited circumstances, is commensurate with their ongoing responsibilities, as licensees, to the Commission.

127. As we have indicated, such potential residual accountability is quite circumscribed, and would only attach to ongoing violations or other egregious behavior by the spectrum lessees about which the licensee had knowledge or should have knowledge.[315] For instance, our rules require that any

[310] Cingular Wireless asserted that such a standard would require the licensee to be in a position to supervise and control the spectrum lessee's day-to-day operations akin to a licensee's responsibilities when entering into a spectrum manager lease. Cingular Wireless Petition at 6-8.

[311] Cingular Wireless Petition at 7-8.

[312] Blooston Rural Carriers Petition at 3-4.

[313] NTCA Petition at 2-3.

[314] *Report and Order* at ¶¶ 137-138.

[315] *See id.* at ¶ 136.

agreement between a licensee and spectrum lessee must contain provisions that the spectrum lessee comply at all times with applicable Commission rules.[316] Accordingly, to the extent that a licensee is found complicit with ongoing violations by the spectrum lessee about which the licensee is aware and does nothing to ensure compliance, we believe it is appropriate to hold that licensee accountable. While we would expect that instances in which licensees that have entered into *de facto* transfer leases may be held accountable for ongoing or egregious acts of their lessees will be quite rare indeed, we cannot relieve these licensees altogether, in all cases no matter how egregious, for responsibility for any act of their spectrum lessees. Finally, although we decline to adopt petitioners' proposals for codifying dispositive rules as to what would or would not constitute such ongoing violations or other egregious acts of a spectrum lessee for which a licensee would be held accountable, we do believe that the kinds of factors proposed by them could be relevant to our case-by-case review of whether a particular licensee had in fact appropriately exercised its residual, non-delegable duties with regard to such actions by its spectrum lessee.

2. The licensee's responsibility to terminate a spectrum lease for violations by the spectrum lessee

128. Background. In the *Report and Order*, we required that the licensee always retain broad authority to terminate a lease if the spectrum lessee was violating Commission rules.[317] Section 1.9040(a)(i) codified this policy in part, stating: "The spectrum lessee must comply at all times with applicable rules set forth in this chapter and other applicable law, and the spectrum leasing arrangement may be revoked, cancelled, or terminated by the licensee or Commission if the spectrum lessee fails to comply with applicable requirements."[318]

129. In its petition, Verizon Wireless asserted that the wording of section 1.9040(a)(i) is overly broad, and would discourage potential spectrum lessees from entering into spectrum leases. Specifically, Verizon Wireless contended that the provision, as worded, could be read to allow the licensee to terminate a lease for the lessee's failure to comply with *any* of the Commission's rules or any other applicable law. Such a broad interpretation, it contended, could enable a licensee to claim the absolute right to terminate a spectrum lease even in the event of the most minor infraction, regardless of any agreement otherwise reached between the leasing parties. Verizon Wireless argued that a licensee might use this provision as pretext for terminating a lease when economic circumstances might make it no longer in the licensee's interest to honor the leasing arrangement. Accordingly, Verizon Wireless requested that we clarify that our rules do not create an absolute right to terminate a lease for any violation whatsoever regardless of the contractual terms of the spectrum lease.[319]

130. Discussion. In establishing policies that promote use of spectrum leasing arrangements, we have been careful to distinguish between the rights of licensees and spectrum lessees. Licenses, who always retain *de jure* control of the license and retain certain core obligations that cannot be delegated to spectrum lessees, always retain greater rights and authority over the license and leased spectrum than spectrum lessees. Consistent with these policies, we require that licensees retain broad authority and, as

[316] *See* 47 C.F.R. § 1.9040(a)(i).

[317] *See, e.g., Report and Order* at ¶¶ 67, 101, 136.

[318] 47 C.F.R. § 1.9040(a)(i).

[319] Verizon Wireless Petition at 1-3.

provided in section 1.9040(a)(i), that they may terminate a spectrum lease if the spectrum lessee violates Commission rules. We did not intend, however, to provide licensees with completely arbitrary authority to terminate a spectrum lease for any violation whatsoever, regardless of the contractual agreement between the parties. Such a broad reading of section 1.9040(a)(i) could have a chilling effect on parties' incentives to enter into a spectrum lease. Accordingly, we grant Verizon Wireless's petition in part by clarifying our intent with regard to this provision.

131. We expect that leasing parties will negotiate certain terms in their lease agreement that delineate the circumstances under which the licensee would have the right to terminate the spectrum lease. We will not dictate the specific terms of such a provision. We will, however, require that those terms be consistent with the respective rights of licensees and spectrum lessees as defined by our policies and rules on spectrum manager and *de facto* transfer leases, respectively. As a general matter, licensees entering into spectrum manager leases retain both *de jure* control of the license and *de facto* control of the leased spectrum, and are directly responsible to the Commission for ensuring their lessees' compliance with Commission policies and rules. Accordingly, such licensees' retention of the contractual right to terminate spectrum leases for their spectrum lessees' non-compliance must be commensurate with the licensees' retention of *de facto* control over the leased spectrum and their ongoing responsibilities to the Commission, as spectrum manager licensees, to ensure compliance.[320] As for *de facto* transfer leases, licensees retain *de jure* control of the license and have certain residual responsibilities for ensuring that spectrum lessees do not commit ongoing or other egregious violations, as discussed above.[321] In sum, these licensees' retention of the contractual right to terminate a spectrum lease for lessee non-compliance must be commensurate with the licensees' ongoing residual responsibilities. Thus, as long as the licensee retains sufficient ability to ensure its spectrum lessee's compliance with Commission policies and rules, and retains the authority to terminate a spectrum leasing arrangement commensurate with the licensee's responsibilities under our policies and rules (as discussed above), the spectrum leasing arrangement may contain specific provisions that offer the spectrum lessee certain protections against the licensee's otherwise arbitrary termination of the spectrum lease.

B. Protections for Licensees and Spectrum Lessees in the Event of Termination of the Spectrum Lease or the License

1. Procedural protections for licensees and spectrum lessees with regard to Commission termination of a spectrum leasing arrangement

a. Spectrum manager leasing arrangements

132. Background. Under the spectrum leasing policies we adopted in the *Report and Order*, leasing parties must notify the Commission of their spectrum manager leasing arrangement at least 21 days before commencing operations (or, if a spectrum lease for a year or less, at least 10 days before commencing operations).[322] As we explained in the *Report and Order*, while Commission approval is not

[320] For instance, to ensure that licensees retain *de facto* control, the spectrum lease might provide that the lease will be terminated if the spectrum lessees do not remedy any violations within a very short timeframe.

[321] *See* paras. 125-127, *supra.*

[322] *Report and Order* at ¶ 124. Following adoption of the Second Report and Order, above, leasing parties that submit a qualifying spectrum manager lease notification that raises no specified potential public interest concerns may commence operations immediately after that notification has been successfully processed. *See* Section IV.A.1.d, *supra.*

required for spectrum manager leases, we determined that the Commission retains the authority to investigate and terminate a spectrum manager leasing arrangement under certain circumstances.[323] Specifically, the Commission can terminate any spectrum manager leasing arrangement to the extent it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control under our new standard or raises foreign ownership, competitive, or other public interest concerns.[324]

133. Cingular Wireless petitioned the Commission to adopt a policy by which licensees would have the procedural protections, under Sections 312 and 316 of the Act,[325] including notice and opportunity to be heard, prior to the Commission deciding to terminate a spectrum manager lease.[326]

134. Discussion. We conclude that the procedural protections afforded licensees under Sections 312 and 316 do not apply to decisions by the Commission to terminate spectrum manager leasing arrangements. Sections 312 and 316 of the Act expressly apply only to revocation or modification of licenses or construction permits, and spectrum manager leases, which do not involve an authorization or permit under the Act, are neither. Accordingly, we deny Cingular Wireless's petition.

135. We affirm and further clarify our procedures for Commission examination, and possible termination, of spectrum manager leasing arrangements to the extent that these arrangements do not qualify for immediate processing under the procedures discussed above in the Second Report and Order.[327] As noted above, leasing parties that seek to enter into spectrum manager leases pursuant to the policies established in the *Report and Order* (*i.e.*, those that do not qualify for immediate processing) must file their notifications at least 21 days before commencing operations (or, if a lease for a year or less, at least 10 days before commencing operations), thus giving the Commission the opportunity to review these arrangements prior to commencement of operations.[328] Interested parties may then seek informal guidance or a formal determination from the Commission regarding the particular spectrum manager lease by means of a letter, a complaint, or a petition for reconsideration.[329] To the extent the Bureau determines

[323] *Report and Order* at ¶¶ 124-125.

[324] As noted in the *Report and Order*, Commission review of a spectrum manager lease might be initiated if information were to come to the attention of Bureau staff that suggested a potential problem with the lease under the applicable rules and policies. *Id.* at ¶ 125. We also stated that interested parties could seek informal guidance or a formal determination from the Commission regarding a particular lease arrangement by means of a letter to the Commission, a petition, or a complaint, doing so in the same manner that they raise questions about the permissibility of particular management agreements or other business transactions. *Id.* at ¶¶ 124-125.

[325] 47 U.S.C. §§ 312, 316. These provisions provide certain procedural protections in the event the Commission seeks to revoke or modify of licenses or construction permits. *See generally* 47 U.S.C. §§ 312, 316.

[326] Cingular Wireless Petition at 8-9.

[327] We have already explained the procedures we will follow if the spectrum manager leasing arrangement qualifies for the immediate processing procedures set forth in the Second Report and Order, and we will not reiterate those procedures here. *See* Section IV.A.1.d, *supra.*

[328] *See Report and Order* at ¶¶ 124-125.

[329] *See id.* at ¶ 124. Interested parties may file a petition for reconsideration under the same procedures that apply with regard to spectrum manager leases under the immediate processing procedures discussed in the Second Report and Order, above. *See* para. 49, *supra.*

that the leasing arrangement may raise potential public interest concerns relating to eligibility, foreign ownership, designated entity or entrepreneur policies, or competition, and believes further investigation is necessary prior to commencement of operations under the spectrum manager lease, it will take whatever steps it deems appropriate to investigate or address those concerns, including notifying the licensee and possibly requiring that parties not commence operations under the lease until such concerns have been resolved.[330] The Commission also retains the right to terminate any lease to the extent that it determines at any time, post-notification, that the arrangement constitutes an unauthorized transfer of control under the *de facto* control standard for spectrum leasing or otherwise is found to violate Commission policies regarding spectrum leasing.[331] In addition, if the Commission determines, post-notification, that any certification provided in the notification, by either the licensee or spectrum lessee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate enforcement action, potentially including forfeitures or termination of the spectrum manager leasing arrangement.[332]

b. *De facto* transfer leasing arrangements

136. Background. In the *Report and Order*, we provided that spectrum lessees entering into *de facto* transfer leases will be granted an instrument of authorization when the Commission approves of the leasing application, and that they will be held primarily and directly responsible for compliance with Commission policies and rules and will be subject to forfeiture proceedings under Section 503(b) of the Act.[333]

137. Verizon Wireless petitioned to request that the Commission clarify that the spectrum lessee will be subject to the same due process protections as licensees with regard to the notice, forfeiture, and other enforcement procedures currently applicable to licensees, including the Commission's decision to terminate the *de facto* transfer spectrum leasing authorization.[334]

138. Discussion. We agree with Verizon Wireless that because spectrum lessees in *de facto* transfer leasing arrangements receive an instrument of authorization, and are directly accountable to the Commission and subject to forfeiture proceedings under Section 503(b), they are entitled to the same procedural protections as licensees pertaining to the forfeiture proceedings. Accordingly, to the extent the Commission pursues forfeiture actions against a *de facto* transfer spectrum lessee for alleged violation of Commission policies or rules, the spectrum lessee is entitled to the procedural protections afforded other holders of authorizations under Section 503(b).

139. However, we do not agree with Verizon Wireless to the extent it requests that spectrum lessees in *de facto* transfer leases be accorded the same rights as licensees in cases where the Commission decides to terminate the lease. Termination of a spectrum lease is not the equivalent of a license

[330] For instance, if a licensee files a spectrum manager lease notification that potentially raises a competitive issue, or potentially could cause a designated entity licensee to lose its designated entity status under a particular spectrum manager lease, the Bureau may require submission of additional information from the parties prior to commencement of operations under the spectrum leasing arrangement.

[331] *See Report and Order* at ¶ 125.

[332] This is consistent with the policies applicable to *de facto* transfer leases. *See* paras. 33, 39, 43, *supra.*

[333] *Report and Order* at ¶¶ 137-138.

[334] Verizon Wireless Petition at 2-3.

revocation, and thus spectrum lessees are not subject to the same procedural protections afforded licensees under Sections 312 and 316. As noted above, those procedural protections only apply to revocations or modifications of licenses or construction permits. A termination of a spectrum lease, in which a spectrum lessee holds temporary and subsidiary rights to the leased spectrum, does not rise to the level of either a revocation of a license or construction permit. Thus, spectrum lessees that gain their limited and temporary rights to access to spectrum through a spectrum leasing arrangement with licensees are not entitled to the same procedural protections, vis-à-vis the Commission, as a licensee that is authorized by the Commission to hold their authorizations.

2. Protections for spectrum lessees in the event of license termination

140. Background. In the *Report and Order*, we stated that, in the event the licensee's authorization was revoked or cancelled, the spectrum lessee under either a spectrum manager or *de facto* transfer lease arrangement would have to terminate its operations. As we noted, termination was necessary because the spectrum lessee gains access to the licensed spectrum only through the licensee's authorization. We recognized that termination of the spectrum lease might require service termination by the lessee and, accordingly, we stated that the Commission would take into account the public interest in affording a reasonable transition period to users of the service in order to minimize disruption to consumers, ongoing businesses, and other activities. In addition, we determined that the spectrum lessee would have no greater right to obtain a comparable license than any other interested parties.[335]

141. Three petitioners sought additional protections for spectrum lessees in the event that the license is cancelled or terminated, or if the licensee goes bankrupt. Specifically, Cingular Wireless requested clarification that, in the event of an unanticipated license termination, a valid spectrum lease does not terminate simply because the license is sold, unless the lease so provides.[336] Blooston Rural Carriers, meanwhile, asserted that the Commission should provide more protection for lessees in the event of licensee bankruptcy or license termination. They believed that merely stating that the Commission would provide a spectrum lessee a reasonable transition period is too vague and does not adequately protect the spectrum lessee's investments. Instead, Blooston Rural Carriers contended that, in event of bankruptcy, the Commission should either require the leased spectrum to be partitioned/disaggregated to the lessee, or require the new licensee to assume the lease on substantially the same terms as the original licensee.[337] Finally, NTCA asserted that lack of certain protections for lessees is a disincentive to spectrum leasing, and that the Commission should provide that long-term *de facto* transfer lessees retain some rights if the licensee goes bankrupt; in particular, NTCA argued that the Commission should permit spectrum lessees to continue operations and take over as the primary licensee, or have time to gradually transition to other available spectrum.[338] RTG, in reply to the latter two petitions, generally supported Blooston Rural Carriers' and NTCA's contentions.[339]

[335] *Report and Order* at ¶ 187 & n.364.

[336] Cingular Wireless Petition at 9.

[337] Blooston Rural Carriers Petition at 4-7.

[338] NTCA Petition at 3-4.

[339] RTG Reply Comments to Blooston Rural Carriers's and NTCA's Petitions at 3.

142. Discussion. Because we conclude that the *Report and Order* achieves the right balance respecting the rights of spectrum lessees with regard to the license authorization itself, in the event of license cancellation, we deny these petitions. Axiomatic to spectrum leasing is that spectrum lessees do not hold the underlying license authorization and that they lease spectrum usage rights contingent on the licensee continuing to hold that authorization.[340] Since spectrum lessees do not hold the authorization, they do not, as spectrum lessees, have the same rights as licensees.[341] Similarly, because spectrum lessees do not hold the license authorization, and lease spectrum only contingent upon the licensee continuing to hold that authorization, the lessees' rights to the leased spectrum terminates in the event the license is cancelled and from that point forward they have no greater rights than any other entity to the license itself.[342]

143. While spectrum lessees are not granted special protections by the Commission with regard to the license itself, they are of course free to obtain certain appropriate contractual protections from licensees when they enter into spectrum leasing arrangements. For instance, to address the concerns that Cingular Wireless has raised, spectrum lessees could enter into agreements to protect their interests in the event the licensee sells the license. Similarly, the concerns raised in the petitions regarding the potential bankruptcy of the licensee could be addressed contractually by requiring the licensee to alert the spectrum lessee in the event the licensee begins to experience financial problems that may pose a risk of bankruptcy. Finally, as discussed above, if there is an unanticipated termination or cancellation of the license that requires service termination by the spectrum lessee, we provide spectrum lessees adequate protections by affording them the opportunity to obtain certain protections during a reasonable transition period in order to minimize disruption to business and other activities.[343]

C. Licensee Responsibility for Meeting Construction Obligations

144. Background. The spectrum leasing rules adopted in the *Report and Order* permit licensees to rely on the activities of their lessees, if they so choose, for purposes of complying with the buildout obligations that are conditions of the license authorization. In the event that the licensee chooses to rely on its lessee's activities, but the lessee fails to build out, the Commission will enforce the rules against the licensee consistent with existing rules.[344]

145. In their petition, Blooston Rural Carriers argued that the Commission should be more flexible regarding construction requirements when a licensee's failure to meet those obligations is jeopardized by the spectrum lessee's breach of its lease agreement with the licensee. They contended that strict enforcement of the Commission's policy would discourage spectrum leasing, and proposed that

[340] We point out that if spectrum lessees parties want greater rights than afforded under our spectrum leasing policies, they may explore acquiring the necessary spectrum as the licensees themselves.

[341] In this proceeding, we have sought to remove impediments to leasing and even facilitate spectrum leasing. We have not, however, sought to use regulatory policies to distort the marketplace in favor of spectrum leasing. Spectrum leasing and spectrum acquisitions are different types of arrangements, with different business and regulatory effects.

[342] Of course, nothing restricts the spectrum lessee from trying to obtain the new license under applicable Commission policies.

[343] *See Report and Order* at ¶ 187 n.364.

[344] *Id.* at ¶¶ 114-115, 146.

licensees be given a reasonable extension of buildout deadlines if they can show that they entered into good faith, arms-length leases with spectrum lessees and reasonably depended on the lessees to meet the applicable buildout requirements.[345] RTG supported this petition.[346]

146. Discussion. We reaffirm the *Report and Order* in holding that meeting the applicable buildout obligations remains a condition of the license authorization, such that a licensee is ultimately responsible for meeting those requirements regardless of whether it seeks to rely on spectrum lessees to meet some of those obligations. As a condition of the license authorization, the licensee must remain responsible to the Commission for meeting these licensee obligations, and cannot escape those obligations by delegating them to another entity that does not hold the license. We note that a licensee is free to negotiate a contractual provision in its leasing agreement with a spectrum lessee that could protect the licensee against the spectrum lessee's failure to meet such obligations.[347]

D. Responsibility for Compliance With Cost-Sharing Obligations for Relocation of Microwave Licensees in Broadband PCS

147. Background. The *Report and Order* did not directly address which entity, licensee or spectrum lessee, would be deemed the "PCS entity" for purposes of certain relocation responsibilities applicable in the broadband PCS services. Under sections 24.239 through 24.253 of the Commission's rules, which govern the relocation of microwave incumbents from certain frequencies in the 1850-1990 MHz Broadband PCS band,[348] any "PCS entity" that benefits from spectrum clearance performed either by other PCS entities or by microwave incumbents that voluntarily relocate must contribute to such relocation costs.[349]

148. In its petition, Cingular Wireless requested that we clarify whether, in the context of spectrum leasing and absent specific lease provisions to the contrary, the licensee or the spectrum lessee would be deemed a "PCS entity" under the microwave relocation rules.[350] In reply, the Fixed Wireless Communications Coalition asserted that a licensee's microwave relocation obligations cannot be delegated to spectrum lessees under either the spectrum manager or the *de facto* transfer option.[351] PCIA's Microwave Cost Sharing Clearinghouse, which administers the cost sharing plan, contended that licensees should be responsible for all cost-sharing obligations triggered by spectrum lessees in spectrum

[345] Blooston Rural Carriers Petition at 7-9.

[346] RTG Reply to Petitions at 2.

[347] In addition, we note that if the licensee anticipates that it may fail to meet its buildout obligations, it may request an extension of the deadline for meeting those obligations by seeking to show, under the specific factual showing required under our existing policies and rules relating to extension. *See, e.g.*, 47 C.F.R. § 1.946(e).

[348] *See* 47 C.F.R. §§ 24.239-24.253. *See also* Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825 (1996) (subsequent history omitted).

[349] 47 C.F.R. § 24.239.

[350] Cingular Wireless Petition at 9-10.

[351] Fixed Wireless Communications Coalition Opposition to Petition for Reconsideration at 2-5.

manager leases,[352] while spectrum lessees in *de facto* transfer leases should assume the obligations and rights of the licensee under the cost sharing rules because they are akin to holders of partitioned or disaggregated spectrum.[353]

149. Discussion. We clarify that broadband PCS licensees are the "PCS entities" responsible, under sections 24.239 through 24.253, for cost sharing obligations triggered by spectrum lessees under both spectrum manager and *de facto* transfer leases. Thus, we agree with the Fixed Wireless Communications Coalition that these responsibilities cannot be delegated to spectrum lessees, and disagree with the contention of PCIA's Microwave Cost Sharing Clearinghouse that spectrum lessees under *de facto* transfer leases are tantamount to partitionees or disaggregatees and therefore should be treated alike under the relocation rules. Spectrum lessees under *de facto* transfer leases, unlike partitionees and disaggregatees, are not licensees and, in particular, do not exercise *de jure* control over the leased spectrum. We find that it is reasonable to hold licensees responsible for the cost sharing obligations triggered by spectrum lessees of both spectrum manager and *de facto* transfer leases because licensees may attribute lessee buildout towards meeting their own buildout obligations.[354] It would be incongruous to allow licensees to benefit from the spectrum lessees' buildout while allowing them to avoid cost-sharing obligations triggered by such buildout. Under our clarification, any party that is owed reimbursement under the cost-sharing rules will have direct recourse to the licensee.[355] We recognize that a licensee may, by contract, account for a spectrum lessee's obligations to the licensee should the spectrum lessee trigger a reimbursement obligation. Finally, relocations performed by licensees and spectrum lessees do not trigger obligations between the parties under our rules, although leasing parties may account for this possibility by contract.

E. Miscellaneous Additional Clarifications and Revisions

150. Finally, on our own motion for reconsideration of the *Report and Order*, we determine that the following clarifications and revisions are appropriate.[356]

151. *Term of a spectrum leasing arrangement.* Under the spectrum leasing policies established in the *Report and Order*, we permit spectrum lessees to lease spectrum usage rights for any period or time during the term of the license. We also stated that existing spectrum leasing arrangements could also be renewable provided that the licensee obtained renewal of the underlying license authorization.[357] We

[352] Letter to Katherine Harris, Deputy Chief, Mobility Division, from Eric W. DeSilva, Counsel to PCIA's Microwave Cost Sharing Clearinghouse (dated Mar. 25, 2004).

[353] *Id.* at 1-2.

[354] *See Report and Order* at ¶¶ 114-115, 146.

[355] We note that if a spectrum lessee was solely responsible for reimbursement and the license was assigned or underwent a transfer of control in which the lease did not also convey, it could be difficult for an entity that is owed reimbursement to obtain satisfaction from the spectrum lessee.

[356] We also make corrections to typographical errors in the rules adopted in the *Report and Order*. Specifically, in § 1.9010(b)(i), we replace the reference to "§ 1.9020(d)" with the correct reference to § 1.9020(e)." In addition, we replace reference to "§ 1.911(d)" in our rules (which does not exist) with "§ 1.913(d)" when citing to the Commission's rules regarding manual filing. *See* 47 C.F.R. § 1.913(d).

[357] *See Report and Order* at ¶ 39.

limit the term of spectrum leases in such a manner because spectrum lessees cannot have any greater right to the use of licensed spectrum than the licensee. Accordingly, although spectrum leasing parties are free to extend an existing spectrum leasing arrangement beyond the term of the license authorization if the license is renewed, no spectrum manager lease notification or *de facto* transfer lease application can propose a lease term that extends beyond the term of the license authorization itself. We will clarify our rules to reflect this policy.

152. *Leasing of excess capacity by Part 101 licensees.* We note that, prior to adoption of policies and rules for spectrum leasing arrangements, as set forth in our Part 1 subpart X rules, licensees in Part 101 services have been permitted to lease excess capacity, as set forth in section 101.603(b) for private operational fixed services and section 101.701 for common carriers.[358] Nothing in our secondary markets rules established in the *Report and Order* supplants the excess capacity leasing rules for Part 101 services, and licensees may continue to lease excess capacity consistent with sections 101.603(b) and 101.701 of our rules.

153. *Loading requirements relating to certain services.* Another issue we wish to clarify regards channel loading requirements pertaining to applications for obtaining licenses in certain services, and how our spectrum leasing policies will be applied with respect to those applications. In some services, our rules require an applicant to demonstrate that it will "load" a channel with a certain number of mobile units in order to obtain exclusive use of that channel,[359] or require a licensee to load a channel to full capacity before it can request additional spectrum.[360] An applicant must demonstrate a genuine need for the number of mobile units for which it seeks authorization,[361] and the uses for which those channels can be obtained are governed by the rules governing the channel in question.[362]

154. The spectrum leasing rules do not relax or otherwise modify the initial eligibility requirements for any Commission license. Indeed, we specifically stated in the *Report and Order* that the spectrum leasing policies could not be used as a tool for evading applicable requirements that remain in effect, and that we were not taking any action that could lead to the evisceration of rules and policies that have not been directly and specifically revised by us in this proceeding.[363] That is, an entity that does not qualify under our existing loading rules for a particular authorization cannot use the prospect of spectrum leasing to other entities in order to establish its own eligibility for that license. Consequently, we hereby clarify that an applicant's required showing of loading under our rules must consist only of that entity's mobile units, consistent with the rules governing the channel in question, rather than mobile units that

[358] *See* 47 C.F.R. §§ 101.603(b), 101.701.

[359] *See*, *e.g.*, 47 C.F.R. §§ 90.313(c), 90.625(a), 90.633(b).

[360] *See*, *e.g.*, 47 C.F.R. §§ 80.511, 90.625(a), 90.627(b)(2), 90.631(c).

[361] *See*, *e.g.*, Viking Dispatch Services, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 18814, 18820 n.42 (1999) (*Viking*); Amendment of Section 90.631 of the Commission's Rules and Regulations Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, 7 FCC Rcd 4914, 4915 ¶ 11 (1992).

[362] *Viking*, 14 FCC Rcd at 18820 ¶ 10.

[363] *Report and Order* at ¶ 248; *see also id.* at ¶ 102 ("Spectrum leasing cannot be used by licensees and lessees as a means of thwarting or abusing the basic qualifications and eligibility policies applicable to licensees.").

would be operated by spectrum lessees pursuant to the spectrum leasing rules. Counting spectrum lessees' mobile units toward the applicant's initial loading would in effect make the applicant eligible for something it could not otherwise obtain under the relevant service rules. Such a result would contravene our stated intent in the *Report and Order*.[364]

155. *Definition of "spectrum lessee."* We revise the definition of "spectrum lessee," as set forth in the under section 1.9003 of our rules,[365] to state:

> *Spectrum lessee.* Any third-party entity that leases, pursuant to the spectrum leasing rules set forth in this subpart, certain spectrum usage rights held by a licensee. This term includes reference to third-party entities that lease spectrum usage rights as spectrum sublessees under spectrum subleasing arrangements.

Such a revision clarifies that spectrum lessees include spectrum lessees that lease spectrum usage rights under spectrum subleasing arrangements.

156. *Section 1.9045(b).* We revise the language of section 1.9045(b) of our rules[366] to read as follows:

> (b) If a licensee holds a license subject to the installment payment program rules (*see* § 1.2110 and related service-specific rules), the licensee and any spectrum lessee must execute the Commission-approved financing documents. No licensee or potential spectrum lessee may file a spectrum leasing notification or application without having first executed such Commission-approved financing documentation. In addition, they must certify in the spectrum leasing notification or application that they have both executed such documentation.

This revision more clearly effectuates the intent of the applicable spectrum leasing policies regarding installment payment licensees, as set forth in the *Report and Order*, which require that each such licensee has executed Commission-approved financing documents that establish, in every spectrum leasing arrangement, that the licensee bears sole responsibility to repay the entire amount of its debt obligation(s) to the Commission, and that each such licensee and spectrum lessee entering into a spectrum leasing

[364] *See also Report and Order* at ¶¶ 112 (use restrictions applicable to spectrum manager leases), 144 (use restrictions applicable to long-term *de facto* transfer leases); 47 C.F.R. §§ 1.9020(d)(3), 1.9030(d)(3); *see also id.* at ¶ 177 (stating that for purposes of establishing that performance or buildout obligations are met, licensees in short-term *de facto* transfer leases may not attribute to themselves the performance or buildout activities of spectrum lessees); 47 C.F.R. § 1.9035(d)(2) (same). We do note, however, that once licensees have met the requirements, consistent with the clarification provided herein, and have obtained the licenses, they will later be able to enter into spectrum leasing arrangements pursuant to the spectrum leasing policies for these services as established in the *Report and Order*. And, to the extent that previous Commission or Bureau decisions in *Viking* and *East River* would have prohibited the types of spectrum leasing arrangements permitted in the *Report and Order*, those decisions are modified. *See Viking*, 14 FCC Rcd 18814; East River Electric Power Cooperative, *Memorandum Opinion and Order*, 13 FCC Rcd 5871 (WTB) (1997) (*East River*).

[365] *See* 47 C.F.R. § 1.9003.

[366] *See* 47 C.F.R. § 1.9045(b).

arrangement with such a licensee have included, as part of the lease agreement, all Commission-required provisions.[367]

157. *Requirements relating to cellular cross-interests.* The *Report and Order* applied the existing policies relating to cellular cross-interests to spectrum leasing arrangements.[368] Because we have, in the *Rural Report and Order*[369] adopted concurrently with this Second Report and Order, eliminated the cellular cross-interest rule, we also will eliminate reference in our spectrum leasing rules to these policies and their applicability to such arrangements.

158. *Spectrum leasing forms.* In the rules adopted to implement the *Report and Order*, we required that spectrum leasing parties file spectrum manager lease notifications and *de facto* transfer lease applications using a modified Form 603,[370] a form previously used in the context of assignments of existing authorizations and transfers of control involving entities holding authorizations. In the interest of administrative efficiency, we now determine to create a separate filing form, FCC Form 608, that pertains specifically to spectrum leasing arrangements, and our rules will be revised to so reflect.

VI. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

159. Background. In the Second Report and Order, above, we provide examples of the ways in which advanced technologies, such as opportunistic devices, may be utilized within the context of current spectrum leasing policies.[371] We observe that these do not comprise an exhaustive list of all permissible ways in which these advanced technologies may be utilized, but instead help illustrate the relevant regulatory issues before the Commission.[372] We recognize that, due to the transaction costs associated with leasing or other market factors, licensees and other parties may wish to utilize other types of arrangements involving opportunistic use of licensed spectrum. To that end, we adopt a "private commons" option distinct from either spectrum leases or other existing arrangements. As discussed above, the private commons option may be particularly well-suited to meet the unique needs of market participants that incorporate "smart" or "opportunistic" use technologies within their bands.

160. Discussion. Because there may be many arrangements that would involve opportunistic use of spectrum and that would be consistent with Commission rules, we seek comment on additional ways in which licensees and spectrum lessees may enter into arrangements in which other users may employ advanced technologies to opportunistically use licensed spectrum. We wish to build on the examples listed in the Second Report and Order, above, to provide licensees, spectrum lessees, and other parties with greater certainty as to the types of opportunistic use arrangements that would be permitted.[373]

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[367] *See Report and Order* at ¶¶ 188-189.

[368] *See id.* at ¶¶ 117, 147; 47 C.F.R. §§ 1.9020(d)(6), 1.9030(d)(6).

[369] *See Rural Report and Order.*

[370] *See id.* at Appendix B (Final Rules) (discussing FCC Form 603 in newly adopted code provisions at 47 C.F.R. §§ 1.913(a)(3), 1.9003 (definition of "FCC Form 603"), 1.9020(e)(4), 1.9030(e), 1.9035(e)).

[371] *See* Section IV.B.2, *supra.*

[372] *See* para. 89, *supra.*

[373] *See generally* Section IV.B.2, *supra.*

To that end, we encourage commenters to describe additional means to increase spectrum access, how they might fit within the framework of the Commission's rules, or the extent to which we should consider revising our rules so as to accommodate these uses.

161. With regard to spectrum access through spectrum leasing arrangements, we seek comment on additional ways in which licensees and spectrum lessees may utilize advanced technologies, such as opportunistic devices, within the context of the Commission's spectrum leasing policies and rules. What types of uses have not been addressed by the Commission but nonetheless merit consideration due, for example, to an ability to enhance access? We encourage commenters to be specific as to the nature of the relationship between the licensees and spectrum lessee(s) in such arrangements, especially with regard to their responsibility for compliance with Commission rules.

162. With regard to spectrum access through private commons, we seek comment on the potential for this approach to improve access as well as the regulatory distinctions that are necessary to make this an effective regulatory model. Does the private commons established in the Second Report and Order sufficiently accommodate the wide variety of ways in which licensees (and spectrum lessees) and other users may wish to enter cooperative arrangements that employ "smart" or "opportunistic" devices? Should the private commons be modified or expanded so as to better accommodate the variety of arrangements that may be desired by the market? For example, should we adopt an approach to private commons that would allow intermediaries to facilitate transactions with users, design and set up communications networks for users or provide value-added services or applications?[374] Are there alternative regulatory constructs that might help promote such arrangements? If so, how should these arrangements be structured, both in terms of licensees' reporting requirements before the Commission and the nature of the licensee's relationship with opportunistic users?

163. In addition, we seek comment on the technical parameters necessary to distinguish private commons from spectrum leasing arrangements or other arrangements. For example, at what point is a licensee with no physical infrastructure to use the spectrum engaged in providing a private commons to users, as opposed to a spectrum leasing arrangement with spectrum lessees? To what extent should a licensee (or spectrum lessee) with a private commons be permitted to grant access to another spectrum licensee (or spectrum lessee)? Should a licensee with an existing physical network and subscribers (*e.g.*, a CMRS provider) be permitted to be a subscriber in another licensee's private commons? If so, what would distinguish such use from a spectrum leasing arrangement?

164. We seek comment on the examples of private commons set forth in the Second Report and Order above,[375] as well other types of private commons arrangements. We also stated in the Second Report and Order that the licensee or spectrum lessee establishing and managing a private commons must retain both *de facto* control of the use of the spectrum within the private commons and direct responsibility for the users' compliance with the Commission's rules.[376] Are there any additional policies or requirements that are necessary to clarify the nature of this control or that could help ensure

[374] This example is similar to a spectrum manager lease arrangement under our current secondary markets framework, but in this case, the communications equipment and devices that conform to the licensee's specifications (and the Commission's rules) would be owned and controlled by the users, not the licensee, lessee or the intermediary.

[375] *See generally* Section IV.B.2, *supra.*

[376] *See* para. 94, *supra.*

compliance? What is an efficient way to enforce users' compliance with the rules? For instance, would it be appropriate to require users to employ smart devices that include certain technologies (*e.g.*, a microchip set) that would enable private commons managers to shut down any devices found to be causing harmful interference?

165. Finally, we seek comment on the appropriate notification process for licensees or *de facto* transfer lessees that choose to offer a private commons. In the Second Report and Order above, we stated that a licensee or spectrum lessee managing the private commons must notify the Commission prior to permitting users to begin operating within the private commons.[377] We propose here to give the licensee or spectrum lessee the option of notifying the Commission directly or, in the alternative, providing a URL that posts the terms and conditions. In the event these terms and conditions change, the licensee would have to make this information available on its website or, if this is not possible, by providing this information directly to the Commission. Is this an efficient notification procedure, and are there alternative means by which the Commission could collect this information in a less burdensome manner?

VII. CONCLUSION

166. In the Second Report and Order, we take additional steps, consistent with the *Further Notice*, to facilitate the development of secondary markets in spectrum usage rights in our Wireless Radio Services, both in the context of spectrum leasing arrangements and license assignments and transfers of control. In addition, we address several petitions for reconsideration we received relating to the *Report and Order*. Finally, in the Second Further Notice of Proposed Rulemaking, we continue to explore additional steps that could further enhance secondary markets and increase the efficient use of spectrum and the availability to the public of innovative wireless services.

VIII. PROCEDURAL MATTERS

A. Comment Filing Procedures

167. *Comments and reply comments*. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[378] interested parties may file comments in response to the Second Further Notice of Proposed Rulemaking in **WT Docket No. 00-230** on or before November 17, 2004, and reply comments on or before December 17, 2004.

168. *Form of comments*. In order to facilitate staff review of the record in this proceeding, parties that submit comments or reply comments in this proceeding are requested to provide a table of contents with their comments. Such a table of contents should, where applicable, parallel the table of contents of the Second Further Notice of Proposed Rulemaking.

169. *How to file comments.* Comments may be filed either by filing electronically, such as by using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies.[379]

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[377] *See* para. 97, *supra.*

[378] 47 C.F.R. §§ 1.415, 1.419.

[379] Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

170. Parties are strongly urged file their comments using ECFS (given recent changes in the Commission's mail delivery system). Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Only one copy of an electronic submission must be filed. In completing the transmittal screen, the electronic filer should include its full name, Postal Service mailing address, and the applicable docket or rulemaking number, **WT Docket No. 00-230**. Parties also may submit comments electronically by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

171. Parties who choose to file by paper may submit such filings by hand or messenger delivery, by U.S. Postal Service mail (First Class, Priority, or Express Mail), or by commercial overnight courier. Parties must file an original and four copies of each filing in **WT Docket No. 00-230**. Parties that want each Commissioner to receive a personal copy of their comments must file an original plus nine copies. If paper filings are hand-delivered or messenger-delivered for the Commission's Secretary, they must be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002-4913. To receive an official "Office of the Secretary" date stamp, documents must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission. (The filing hours at this facility are 8:00 a.m. to 7:00 p.m.) If paper filings are submitted by mail though the U.S. Postal Service (First Class mail, Priority Mail, and Express Mail), they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 445 12th Street, S.W., Washington D.C. 20554. If paper filings are submitted by commercial overnight courier (*i.e.*, by overnight delivery other than through the U.S. Postal Service), such as by Federal Express or United Parcel Service, they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. (The filing hours at this facility are 8:00 am to 5:30 pm.)[380]

172. Parties may also file with the Commission some form of electronic media submission (*e.g.*, diskettes, CDs, tapes, etc.) as part of their filings. In order to avoid possible adverse affects on such media submissions (potentially caused by irradiation techniques used to ensure that mail is not contaminated), the Commission advises that they should not be sent through the U.S. Postal Service. Hand-delivered or messenger-delivered electronic media submissions should be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002-4913. Electronic media sent by commercial overnight courier should be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743.[381]

173. Regardless of whether parties choose to file electronically or by paper, they should also send one copy of any documents filed, either by paper or by e-mail, to each of the following: (1) Best Copy & Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554,

[380] *See* "FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence," *Public Notice*, DA 01-2919 (rel. Dec. 14, 2001); "Reminder[:] Filing Locations for Paper Documents and Instructions for Mailing Electronic Media," *Public Notice*, DA 03-2730 (rel. Aug. 22, 2003).

[381] *See* "Reminder[:] Filing Locations for Paper Documents and Instructions for Mailing Electronic Media," *Public Notice*, DA 03-2730 (rel. Aug. 22, 2003).

facsimile (202) 488-5563, or e-mail at fcc@bcpiweb.com; and (2) Paul Murray, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, 445 12th Street, S.W., Washington, D.C., 20554, or e-mail at Paul.Murray@fcc.gov.

174. *Availability of documents*. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554. These documents also will be available electronically at the Commission's Disabilities Issues Task Force web site, www.fcc.gov/dtf, and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Best Copy & Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (800) 378-3160, facsimile (202) 488-5563, or via e-mail at fcc@bcpiweb.com. This document is also available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, Brian.Millin@fcc.gov, or send an e-mail to access@fcc.gov.

B. *Ex Parte* Presentations

175. This is a permit-but-disclose rulemaking proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[382] *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[383] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules. Parties submitting written *ex parte* presentations or summaries of oral *ex parte* presentations are urged to use the ECFS in accordance with the Commission rules discussed above. Parties filing paper *ex parte* submissions must file an original and one copy of each submission with the Commission's Secretary, Marlene H. Dortch, at the appropriate address as shown above for filings sent by either U.S. mail, overnight delivery, or hand or messenger delivery. Parties must also serve the following with either one copy of each *ex parte* filing via e-mail or two paper copies: (1) Best Copy & Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (800) 378-3160, facsimile (202) 488-5563, or e-mail at fcc@bcpiweb.com; and (2) Paul Murray, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C., 20554, Paul.Murray@fcc.gov.

C. Final Regulatory Flexibility Analysis

176. Pursuant to the Regulatory Flexibility Act,[384] the Final Regulatory Flexibility Analysis (FRFA) for the Second Report and Order and the Order on Reconsideration is set forth in Appendix D. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the Second Report and Order and the Order on Reconsideration, including the Final Regulatory

[382] 47 C.F.R. § 1.1206.

[383] 47 C.F.R. § 1.1206(b)(2).

[384] *See* 5 U.S.C. § 604.

Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.

D. Paperwork Reduction Act of 1995 Analysis

177. The Second Report and Order contains either a new or modified information collection. As part of our continuing effort to reduce paperwork burdens, we invite the public and other government agencies to take this opportunity to comment on the information collection contained in this Second Report and Order and Order on Reconsideration, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due sixty dates from publication of a summary of the Second Report and Order and Order on Reconsideration in the Federal Register. Comments should address the following: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology. A copy of any comments on the information collections contained herein should be submitted to Judith B. Herman, Federal Communications Commission, 445 12th St., S.W., Room 1-C804, Washington, D.C. 20554, or via the Internet to Judith-B.Herman@fcc.gov, and to Edward C. Springer, OMB Desk Officer, 10236 New Executive Office Building, 724 17th St., N.W., Washington, D.C. 20503, or via the Internet to Edward.Springer@omb.eop.gov.

E. Initial Regulatory Flexibility Analysis

178. As required by the Regulatory Flexibility Act,[385] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals in the Second Further Notice of Proposed Rulemaking (Second Further Notice). The IRFA is set forth in Appendix E. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the Second Further Notice, and have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the Second Further Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.[386]

F. Contact Information

179. The Wireless Telecommunications Bureau contact for this proceeding is Paul Murray at (202) 418-0688, Paul.Murray@fcc.gov. Press inquires should be directed to Lauren Patrich, Wireless Telecommunications Bureau, at (202) 418-0654, TTY at (202) 418-7233, or e-mail at Lauren.Patrich@fcc.gov.

IX. ORDERING CLAUSES

180. Pursuant to Sections 1, 4(i), 8, 9, 10, 301, 303(r), 308, 309, 310, 332, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 158, 159, 160, 301, 303(r), 308, 309, 310, 332, and 503, IT IS ORDERED THAT this Second Report and Order and Order on Reconsideration and the policies set forth herein are ADOPTED, and that Parts 1, 24, and 90 of the Commission's rules, 47 C.F.R. Parts 1, 24, and 90, are AMENDED, as specified in Appendix C, to revise rules and procedures to further facilitate spectrum leasing arrangements under the policies enunciated in Sections IV.A and V of the Second Report and Order and Order on Reconsideration, to establish rules and procedures applicable to private commons arrangements under the policies enunciated in Section IV.B, and to further streamline the processing of license assignment and transfer of control applications under the policies enunciated in Section IV.C of the Second Report and Order, effective sixty days after publication in the Federal Register. The information collections contained in the rules set forth in Appendix C will become effective following OMB approval; the Commission will publish a document at a later date establishing the effective date of those rules. In addition, the immediate approval and processing procedures set forth in sections IV.A and IV.C of the Second Report and Order will become effective following Commission implementation of necessary software changes to the Commission's Universal Licensing System and any necessary database updates; the Wireless Telecommunications Bureau shall release a public notice advising the public once these procedures have been implemented and are available to the public.

181. IT IS FURTHER ORDERED THAT, pursuant to Section 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 5(c), the Wireless Telecommunications Bureau and the Office of the Managing Director ARE GRANTED DELEGATED AUTHORITY to implement the policies set forth in this Second Report and Order, including, but not limited to, the development and implementation of the

[385] *Id.*

[386] *Id.* § 604(a).

revised forms necessary to implement the policies adopted in this Second Report and Order and the rules set forth in Appendix C hereto.

182. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), and 303(r), Blooston Rural Carrier's Petition for Partial Reconsideration and/or Clarification is GRANTED IN PART and DENIED in all other respects.

183. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), and 303(r), Cingular Wireless' Petition for Reconsideration and Clarification is GRANTED IN PART and DENIED in all other respects.

184. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), and 303(r), First Avenue Network's Petition for Reconsideration is GRANTED IN PART and DENIED in all other respects.

185. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), and 303(r), NTCA's Petition for Partial Reconsideration is DENIED.

186. IT IS FURTHER ORDERED that, pursuant to Sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(b), 155(c)(1), and 303(r), Verizon Wireless's Petition for Reconsideration and Clarification is GRANTED IN PART and DENIED in all other respects.

187. IT IS FURTHER ORDERED THAT, pursuant to the authority contained in Sections 1, 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 303(r), the Second Further Notice of Proposed Rulemaking is hereby ADOPTED.

188. IT IS FURTHER ORDERED THAT the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the Second Report and Order, Order on Reconsideration, and the Second Further Notice of Proposed Rulemaking, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A – COMMENTING PARTIES

(WT Docket No. 00-230)

A. Comments

(1) American Mobile Telecommunications Association (AMTA)
(2) Association of Public Safety Communications Officials (APSCO)
(3) AT&T Wireless Services, Inc. (AT&T Wireless)
(4) BellSouth Corporation and BellSouth Wireless Cable, Inc. (BellSouth)
(5) Blooston Law Firm (Blooston Rural Carriers)
(6) Cantor Fitzgerald Telecom Services, LLC (Cantor Fitzgerald Telecom)
(7) Cellular Telecommunications and Internet Association (CTIA)
(8) Center for Wireless Network Security (WiNSeC)
(9) Cingular Wireless LLC (Cingular Wireless)
(10) Mobex Communications, Inc. (Mobex)
(11) National ITFS Association and Catholic Television Network (National ITFS Association)
(12) Nextel Communications, Inc. (Nextel Communications)
(13) PCIA (late filed)
(14) Rural Telecommunications Group (RTG)
(15) Salmon PCS, LLC (Salmon PCS)
(16) SBC Communications, Inc. (SBC)
(17) Spectrum Market, LLC (Spectrum Market)
(18) Sprint
(19) Verizon Wireless
(20) Winstar Communications, LLC (Winstar)
(21) Wireless Communications Association International, Inc. (WCA)

B. Reply Comments

(1) Blooston Rural Carriers
(2) Boeing Company (Boeing)
(3) Cantor Fitzgerald Telecom
(4) Industrial Telecommunications Association, Inc. (ITA)
(5) National Association of Manufacturers and MRFAC, Inc.
(6) National ITFS Association
(7) Nextel Partners, Inc. (Nextel Partners)
(8) Paging Systems, Inc. (Paging Systems)
(9) St. Clair County, Illinois (St. Clair)
(10) T-Mobile USA, Inc. (T-Mobile)
(11) Winstar

C. *Ex Parte* Comments

(1) Council Tree *Ex Parte* Comments
(2) MDS America *Ex Parte* Comments
(3) Salmon PCS *Ex Parte* letter (filed March 9, 2004)

APPENDIX B – PETITIONS FOR RECONSIDERATION

A. Petitions For Reconsideration

(1) Blooston Rural Carriers Petition for Partial Reconsideration and/or Clarification (Blooston Rural Carriers Petition)
(2) Cingular Wireless Petition for Reconsideration and Clarification (Cingular Wireless Petition)
(3) First Avenue Networks Petition for Reconsideration (First Avenue Networks Petition)
(4) National Telecommunications Cooperative Association Petition for Partial Reconsideration (NTCA Petition)
(5) Verizon Wireless Petition for Reconsideration and Clarification (Verizon Wireless Petition)

B. Oppositions and Replies

(1) Salmon PCS (Salmon PCS Petition Reply)
(2) RTG (RTG Petition Reply)
(3) Fixed Wireless Communications Coalition (Fixed Wireless Communications Coalition Opposition)
(4) Microwave Cost Sharing Clearinghouse *Ex Parte* letter (dated March 25, 2004)

APPENDIX C – FINAL RULES

For the reasons discussed above, the Federal Communications Commission amends title 47 of the Code of Federal Regulations, Parts 1 and 27, as follows:

PART 1 – PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. 151, 154(i), 154(j), 155, 225, 303(r), 309 and 325(e).

2. Amend § 1.913 by revising paragraph (a)(3), adding paragraph (a)(5), revising the first sentence of the introductory paragraph of (b), and revising the introductory sentence in paragraph (d)(1), to read as follows:

§ 1.913 Application and notification forms; electronic and manual filing.

(a) * * *

(3) *FCC Form 603, Application for Assignment of Authorization or Transfer of Control.* FCC Form 603 is used by applicants and licensees to apply for Commission consent to assignments of existing authorizations, to apply for Commission consent to transfer control of entities holding authorizations, to notify the Commission of the consummation of assignments or transfers, and to request extensions of time for consummation of assignments or transfers. It is also used for Commission consent to partial assignments of authorization, including partitioning and disaggregation.

* * * * *

(5) *FCC Form 608, Notification or Application for Spectrum Leasing Arrangement.* FCC Form 608 is used by licensees and spectrum lessees (*see* § 1.9003) to notify the Commission regarding spectrum manager leasing arrangements and to apply for Commission consent for *de facto* transfer leasing arrangements pursuant to the rules set forth in part 1, subpart X. It is also used to notify the Commission if a licensee or spectrum lessee establishes a private commons (*see* § 1.9080).

* * * * *

(b) *Electronic filing.* Except as specified in paragraph (d) of this section or elsewhere in this chapter, all applications and other filings using FCC Forms 601 through 608 or associated schedules must be filed electronically in accordance with the electronic filing instructions provided by ULS. * * *

* * * * *

(d) *Manual filing.* (1) ULS Forms 601, 603, 605, and 608 may be filed manually or electronically by applicants and licensees in the following services:

* * * * *

3. Amend § 1.948 by revising paragraph (j) to read as follows:

§ 1.948 Assignment of authorization or transfer of control, notification of consummation.

* * * * *

(j) *Processing of applications.* Applications for assignment of authorization or transfer of control relating to the Wireless Radio Services will be processed pursuant either to general approval procedures or the immediate approval procedures, as discussed herein.

(1) *General approval procedures*. Applications will be processed pursuant to the general approval procedures set forth in this paragraph unless they are submitted and qualify for the immediate approval procedures set forth in paragraph (j)(2) of this section.

(i) To be accepted for filing under these general approval procedures, the application must be sufficiently complete and contain all necessary information and certifications requested on the applicable form, FCC Form 603, including any information and certifications (including those of the proposed assignee or transferee relating to eligibility, basic qualifications, and foreign ownership) required by the rules of this chapter and any rules pertaining to the specific service for which the application is filed, and must include payment of the required application fee(s) (*see* § 1.1102).

(ii) Once accepted for filing, the application will be placed on public notice, except no prior public notice will be required for applications involving authorizations in the Private Wireless Services, as specified in § 1.933(d)(9).

(iii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iv) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or determine to subject the application to further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days following the date on which the application has been filed, if filed electronically, and any required application fee has been paid (*see* § 1.1102); if filed manually, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days after the necessary data in the manually filed application is entered into ULS.

(v) If the Bureau determines to subject the application to further review, it will issue a public notice so indicating. Within 90 days following the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) Grant of consent to the application will be reflected in a public notice (*see* § 1.933(a)) promptly issued after the grant.

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) *Immediate approval procedures.* Applications that meet the requirements of paragraph (j)(2)(i) of this section qualify for the immediate approval procedures set forth in this paragraph.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (j)(1) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if assigned or transferred, create a geographic overlap with spectrum in any licensed Wireless Radio Service (including the same service) in which the proposed assignee or transferee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the assignee or transferee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The assignment or transfer of control does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules, and there is no pending issue as to whether the license is subject to revocation, cancellation, or termination by the Commission.

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the assignment or transfer of control will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after the filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data in the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after the grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

4. Amend § 1.2003 by revising the paragraph entitled "FCC 603," and adding a paragraph entitled "FCC 608," to read as follows:

§ 1.2003 Applications affected.

* * * * *

FCC 603 Wireless Telecommunications Bureau Application for Assignment of Authorization and Transfer of Control;

* * * * *

FCC 608 Notification or Application for Spectrum Leasing Arrangement;

* * * * *

5. Amend § 1.9001(a) to read as follows:

§ 1.9001 Purpose and scope.

(a) The purpose of part 1, subpart X is to implement policies and rules pertaining to spectrum leasing arrangements between licensees in the services identified in this subpart and spectrum lessees. This subpart also implements policies for private commons arrangements. These policies and rules also implicate other Commission rule parts, including parts 1, 2, 20, 22, 24, 26, 27, 80, 90, 95, and 101 of title 47, chapter I of the Code of Federal Regulations.

* * * * *

6. Amend § 1.9003 by removing the definition of "FCC Form 603" and replacing it with the definition of "FCC Form 608," revising the definition of "Long-term de facto transfer leasing arrangement," adding the new definition "Private commons," and revising the definitions of "Short-term de facto transfer leasing arrangement" and "Spectrum lessee," to read as follows:

§ 1.9003 Definitions.

* * * * *

FCC Form 608. FCC Form 608 is the form to be used by licensees and spectrum lessees that enter into spectrum leasing arrangements pursuant to the rules set forth in this subpart. Parties are required to submit this form electronically when entering into spectrum leasing arrangements under this subpart, except that licensees falling within the provisions of § 1.913(d) of this part may file the form either electronically or manually.

Long-term de facto transfer leasing arrangement. A long-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual term, or series of combined terms, of more than one year.

Private commons. A "private commons" arrangement is an arrangement, distinct from a spectrum leasing arrangement but permitted in the same services for which spectrum leasing arrangements are allowed, in which a licensee or spectrum lessee makes certain spectrum usage rights under a particular license authorization available to a class of third-party users employing advanced communications technologies that involve peer-to-peer (device-to-device) communications and that do not involve use of the licensee's or spectrum lessee's end-to-end physical network infrastructure (*e.g.*, base stations, mobile stations, or other related elements).

Short-term de facto transfer leasing arrangement. A short-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual or combined term of not longer than one year.

* * * * *

Spectrum lessee. Any third-party entity that leases, pursuant to the spectrum leasing rules set forth in this subpart, certain spectrum usage rights held by a licensee. This term includes reference to third-party entities that lease spectrum usage rights as spectrum sublessees under spectrum subleasing arrangements.

* * * * *

7. Amend § 1.9005 as follows:

a. Redesignate paragraphs (r) through (dd) as paragraphs (u) through (gg), respectively;

b. Redesignate paragraph (q) as new paragraph (r);

c. Add new paragraphs (q), (s), and (t);

d. Revise newly designated paragraphs (ff) and (gg); and,

d. Add new paragraph (hh).

§ 1.9005 Included services.

* * * * *

(q) The Advanced Wireless Services (part 27 of this chapter);

* * * * *

(s) The Automated Maritime Telecommunications Systems service (Part 80 of this chapter);

(t) The Public Safety Radio Services (part 90 of this chapter);

* * * * *

(ff) The Private Operational Fixed Point-to-Point Microwave Service (part 101 of this chapter);

(gg) The Common Carrier Fixed Point-to-Point Microwave Service (part 101 of this chapter); and,

(hh) The Multipoint Video Distribution and Data Service (part 101 of this chapter).

* * * * *

8. Amend § 1.9010 by revising the last sentence of paragraph (b)(1)(iii), and by revising paragraph (b)(2)(i), to read as follows:

§ 1.9010 *De facto* control standard for spectrum leasing arrangements.

* * * * *

(b) * * *

(1) * * *

(iii) * * * If the spectrum lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Commission, the licensee must use all reasonable legal means necessary to enforce compliance.

(2) * * *

(i) The licensee must file the necessary notification with the Commission, as required under § 1.9020(e).

* * * * *

9. Amend § 1.9020 as follows:

a. Revise paragraph (a) by adding a new sentence at the end of the paragraph;

b. Revise paragraphs (d)(2)(i) and (d)(4);

c. Remove paragraph (d)(6), and redesignate paragraphs (d)(7) through (d)(9) as paragraphs (d)(6) through (d)(8), respectively;

d. Revise paragraph (e);

e. Redesignate paragraphs (f) through (l) as paragraphs (g) through (m), respectively;

f. Add new paragraph (f);

g. Revise newly designated paragraphs (h)(1), (h)(2), (i), and (j);

h. Revise the last sentence of newly designated paragraph (l); and,

i. Revise newly designated paragraph (m).

§ 1.9020 Spectrum manager leasing arrangements.

(a) * * * The term of a spectrum manager leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(d) * * *

(2) * * * (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization, with the following exceptions. A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Educational Broadband Service (*see* § 27.1201 of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee meets the other eligibility and qualification requirements applicable to Part 27 services (*see* § 27.12 of this chapter). A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Public Safety Radio Services (*see* part 90, subpart B and § 90.311(a)(1)(i) of this chapter) is not required to comply with the eligibility

requirements pertaining to such a licensee so long as the spectrum lessee is an entity providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

* * * * *

(4) *Designated entity/entrepreneur rules.* A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee, regardless of whether the spectrum lessee meets the Commission's designated entity eligibility requirements (*see* § 1.2110) or its entrepreneur eligibility requirements to hold certain C and F block licenses in the broadband personal communications services (*see* § 1.2110 and § 24.709 of this chapter), so long as the spectrum manager leasing arrangement does not result in the spectrum lessee's becoming a "controlling interest" or "affiliate" (*see* § 1.2110) of the licensee such that the licensee would lose its eligibility as a designated entity or entrepreneur. To the extent there is any conflict between the revised *de facto* control standard for spectrum leasing arrangements, as set forth in this subpart, and the definition of controlling interest (including its *de facto* control standard) set forth in § 1.2110, the latter definition governs for determining whether the licensee has maintained the requisite degree of ownership and control to allow it to remain eligible for the license or for other benefits such as bidding credits and installment payments.

* * * * *

(e) *Notifications regarding spectrum manager leasing arrangements.* A licensee that seeks to enter into a spectrum manager leasing arrangement must notify the Commission of the arrangement in advance of the spectrum lessee's commencement of operations. The spectrum manager lease notification will be processed pursuant either to the general notification procedures or the immediate processing procedures, as set forth herein. The licensee must submit the notification to the Commission by electronic filing using the Universal Licensing System (ULS) and FCC Form 608, except that a licensee falling within the provisions of § 1.913(d) may file the notification either electronically or manually.

(1) *General notification procedures.* Notifications of spectrum manager leasing arrangements will be processed pursuant the general notification procedures set forth in this paragraph unless they are submitted and qualify for the immediate processing procedures set forth in paragraph (e)(2) of this section.

(i) To be accepted under these general notification procedures, the notification must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those of the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules in this chapter and any rules pertaining to the specific service for which the notification is filed. No application fees are required for the filing of a spectrum manager leasing notification.

(ii) The licensee must submit such notification at least 21 days in advance of commencing operations unless the arrangement is for a term of one year or less, in which case the licensee must provide notification to the Commission at least ten (10) days in advance of operation. If the licensee and spectrum lessee thereafter seek to extend this leasing arrangement for an additional term beyond the initial term, the licensee must provide the Commission with notification of the new spectrum leasing arrangement at least 21 days in advance of operation under the extended term.

(iii) A notification filed pursuant to these general notification procedures will be placed on an informational public notice on a weekly basis (*see* § 1.933(a)) once accepted, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(2) *Immediate processing procedures.* Notifications that meet the requirements of paragraph (e)(2)(i) of this section qualify for the immediate processing procedures.

(i) To qualify for these immediate processing procedures, the notification must be sufficiently complete and contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership) required for notifications processed under the general notification procedures set forth in paragraph (e)(1)(i) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if the spectrum leasing arrangement were consummated, create a geographic overlap with spectrum in any licensed Wireless Service (including the same service) in which the proposed spectrum lessee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the spectrum lessee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The spectrum leasing arrangement does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules.

(ii) Provided that the notification establishes that the proposed spectrum manager leasing arrangement meets all of the requisite elements to qualify for these immediate processing procedures, ULS will reflect that the notification has been accepted. If a qualifying notification is filed electronically, the acceptance will be reflected in ULS on the next business day after filing of the notification; if filed manually, the acceptance will be reflected in ULS on the next business day after the necessary data from the manually filed notification is entered into ULS. Once the notification has been accepted, as reflected in ULS, the spectrum lessee may commence operations under the spectrum leasing arrangement, consistent with the term of the arrangement.

(iii) A notification filed pursuant to these immediate processing procedures will be placed on an informational public notice on a weekly basis (*see* § 1.933(a)) once accepted, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date of a spectrum manager leasing arrangement.* The spectrum manager leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, as of the beginning date of the term as specified in the spectrum leasing notification.

* * * * *

(h) *Expiration, extension, or termination of a spectrum leasing arrangement.* (1) Absent Commission termination or except as provided in paragraph (h)(2) or (h)(3) of this section, a spectrum

leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the spectrum leasing notification.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing notification provided that the licensee notifies the Commission of the extension in advance of operation under the extended term and does so pursuant to the general notification procedures or immediate processing procedures set forth in this section, whichever is applicable. If the general notification procedures are applicable, the licensee must notify the Commission at least 21 days in advance of operation under the extended term.

* * * * *

(i) *Assignment of a spectrum leasing arrangement.* The spectrum lessee may assign its spectrum leasing arrangement to another entity provided that the licensee has agreed to such an assignment, is in privity with the assignee, and notifies the Commission before the consummation of the assignment, pursuant to the applicable notification procedures set forth in this section. In the case of a non-substantial (*pro forma*) assignment that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the licensee must file notification of the assignment with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the assignment, whether substantial or *pro forma*, on public notice.

(j) *Transfer of control of a spectrum lessee.* The licensee must notify the Commission of any transfer of control of a spectrum lessee before the consummation of the transfer of control, pursuant to the applicable notification procedures of this section. In the case of a non-substantial (*pro forma*) transfer of control that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the licensee must file notification of the transfer of control with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the transfer of control, whether substantial or *pro forma*, on public notice.

* * * * *

(l) * * * The licensee must submit a notification regarding the spectrum subleasing arrangement in accordance with the applicable notification procedures set forth in this section.

(m) *Renewal*. Although the term of a spectrum manager leasing arrangement may not be longer than the term of a license authorization, a licensee and spectrum lessee that have entered into an arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, renew the spectrum leasing arrangement to extend into the term of the renewed license authorization. The Commission must be notified of the renewal of the spectrum leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the renewal of the license authorization and the extension of the spectrum leasing arrangement into the term of the renewed license authorization.

10. Revise § 1.9030 as follows:

a. In paragraph (a), revise the last sentence, and add a new sentence following that sentence;

b. Revise paragraph (d)(2)(i);

c. Remove paragraph (d)(6), and redesignate paragraphs (d)(7) through (d)(9) as paragraphs (d)(6) through (d)(8), respectively;

d. Revise newly designated paragraph (d)(8);

e. Revise paragraph (e);

f. Redesignate paragraphs (f) through (k) as paragraphs (g) through (l), respectively;

g. Add new paragraph (f); and,

h. Revise newly designated paragraphs (g)(1), (g)(2), (h), (i), and (l).

§ 1.9030 Long-term *de facto* transfer leasing arrangements.

(a) * * * A "long-term" *de facto* transfer leasing arrangement has an individual term, or series of combined terms, of more than one year. The term of a long-term *de facto* transfer leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(d) * * *

(2) * * * (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization. A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Educational Broadband Service (*see* § 27.1201 of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee meets the other eligibility and qualification requirements applicable to Part 27 services (*see* § 27.12 of this chapter). A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Public Safety Radio Services (*see* part 90, subpart B and § 90.311(a)(1)(i) of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee is an entity providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

* * * * *

(8) *E911 requirements.* To the extent the licensee is required to meet E911 obligations (*see* § 20.18 of this chapter), the spectrum lessee is required to meet those obligations with respect to the spectrum leased under the spectrum leasing arrangement insofar as the spectrum lessee's operations are encompassed within the E911 obligations.

(e) *Applications for long-term de facto transfer leasing arrangements.* Applications for long-term *de facto* transfer leasing arrangements will be processed either pursuant to the general approval procedures or the immediate approval procedures, as discussed herein. Spectrum leasing parties must submit the application by electronic filing using ULS and FCC Form 608, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.913(d) may file the application either electronically or manually.

(1) *General approval procedures*. Applications for long-term *de facto* transfer leasing arrangements will be processed pursuant to the general approval procedures set forth in this paragraph unless they are submitted and qualify for the immediate approval procedures set forth in paragraph (e)(2) of this section.

(i) To be accepted for filing under these general approval procedures, the application must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those of the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed. In addition, the spectrum leasing application must include payment of the required application fee(s); for purposes of determining the applicable application fee(s), the application will be treated as a transfer of control (*see* § 1.1102).

(ii) Once accepted for filing, the application will be placed on public notice, except no prior public notice will be required for applications involving authorizations in the Private Wireless Services, as specified in § 1.933(d)(9).

(iii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939, except that such petitions must be filed no later than 14 days following the date of the public notice listing the application as accepted for filing.

(iv) No later than 21 days following the date of the public notice listing an application as accepted for filing, the Wireless Telecommunications Bureau (Bureau) will affirmatively consent to the application, deny the application, or determine to subject to the application to further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or determine to subject the application to further review no later than 21 days following the date on which the application has been filed and any required application fee has been paid (*see* § 1.1102).

(v) If the Bureau determines to subject the application to further review, it will issue a public notice so indicating. Within 90 days following the date of that public notice, the Bureau will either take action upon the application or provide public notice that an additional 90-day period for review is needed.

(vi) Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) Grant of consent to the application will be reflected in a public notice (*see* § 1.933(a)) promptly issued after the grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) *Immediate approval procedures.* Applications that meet the requirements of paragraph (e)(1)(i) of this section qualify for the immediate approval procedures.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (e)(1)(i) of this

section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if the spectrum leasing arrangement were consummated, create a geographic overlap with spectrum in any licensed Wireless Service (including the same service) in which the proposed spectrum lessee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the spectrum lessee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The spectrum leasing arrangement does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules.

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the *de facto* transfer spectrum leasing arrangement will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data from the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application, as reflected in ULS.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date of a de facto transfer leasing arrangement.* If the Commission consents to the *de facto* transfer leasing arrangement, the *de facto* transfer leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(g) *Expiration, extension, or termination of spectrum leasing arrangement.* (1) Except as provided in paragraph (g)(2) or (g)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the application. * * *

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the applicable application procedures set forth in §1.9030(e). Where there is pending before the Commission at the date of termination of the spectrum leasing arrangement a proper and timely application seeking to extend the arrangement, the parties may continue to operate under the original spectrum leasing arrangement without further action by the Commission until such time as the Commission shall make a final determination with respect to the application.

* * * * *

(h) *Assignment of spectrum leasing arrangement.* The spectrum lessee may assign its lease to another entity provided that the licensee has agreed to such an assignment, there is privity between the licensee and the assignee, and the assignment is approved by the Commission pursuant to the same application and approval procedures set forth in this section. In the case of a non-substantial (*pro forma*) assignment that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the parties involved in the assignment must file notification of the assignment with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the assignment, whether substantial or *pro forma*, on public notice.

(i) *Transfer of control of a spectrum lessee.* A spectrum lessee seeking to transfer of control must obtain Commission consent using the same application and Commission consent procedures set forth in this section. In the case of a non-substantial (*pro forma*) transfer of control that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the parties involved in the transfer of control must file notification of the transfer of control with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the transfer of control, whether substantial or *pro forma*, on public notice.

* * * * *

(l) *Renewal*. Although the term of a long-term *de facto* transfer spectrum leasing arrangement may not be longer than the term of a license authorization, a licensee and spectrum lessee that have entered into an arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement into the term of the renewed license authorization. The Commission must be notified of the renewal of the spectrum leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the renewal of the license authorization and the extension of the spectrum leasing arrangement into the term of the renewed license authorization.

11. Amend § 1.9035 as follows:

a. In paragraph (a), revise the last sentence, and add a new sentence following that sentence;

b. Remove paragraph (d)(4) and redesignate paragraph (d)(5) as paragraph (d)(4);

c. Revise paragraph (e);

d. Redesignate paragraphs (f) through (m) as paragraphs (g) through (n), respectively;

e. Add new paragraph (f);

f. Revise newly designated paragraphs (g)(1), (h)(1), (h)(2), (i)(1), and (i)(2);

g. Revise newly designated paragraph (j) by replacing the phrase "§ 1.9030(g)" with the phrase "§ 1.9030(h)";

h. Revise newly designated paragraph (k) by replacing the phrase "§ 1.9030(h)" with the phrase "§ 1.9030(i)";

i. Revise newly designated paragraph (l) by replacing the phrase "§ 1.9030(i)" with the phrase "§ 1.9030(j)"; and,

j. Revise newly designated paragraph (n).

§ 1.9035 Short-term *de facto* transfer leasing arrangements.

(a) * * * A "short-term" *de facto* transfer leasing arrangement has an individual or combined term of not longer than one year. The term of a short-term *de facto* transfer leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(e) *Spectrum leasing application.* Short-term *de facto* transfer leasing arrangements will be processed pursuant to immediate approval procedures, as discussed herein. Parties entering into a short-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 608, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.913(d) may file the application either electronically or manually.

(1) To be accepted for filing under these immediate approval procedures, the application must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those relating to the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules of this chapter and any rules pertaining to the specific service for which the application is required. In addition, the application must include payment of the required application fee; for purposes of determining the applicable application fee, the application will be treated as a transfer of control (*see* § 1.1102). Finally, the spectrum leasing arrangement must not require a waiver of, or declaratory ruling, pertaining to any applicable Commission rules.

(2) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the short-term *de facto* transfer spectrum leasing arrangement will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data from the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application, as reflected in ULS.

(3) Grant of consent to the application under these procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date of spectrum leasing arrangement.* The spectrum leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(g) *Restrictions on the use of short-term de facto transfer leasing arrangements*. (1) The licensee and spectrum lessee are not permitted to use the special rules and expedited procedures applicable to

short-term *de facto* transfer leasing arrangements for arrangements that in fact will exceed one year, or that the parties reasonably expect to exceed one year.

* * * * *

(h) *Expiration, extension, or termination of the spectrum leasing arrangement*. (1) Except as provided in paragraph (h)(2) or (h)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the short-term *de facto* transfer leasing arrangement. The Commission's approval of the short-term *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) Upon proper application (*see* paragraph (e) of this section), a short-term *de facto* transfer leasing arrangement may be extended beyond the initial term set forth in the application provided that the initial term and extension(s) together would not result in a leasing arrangement that exceeds a total of one year.

* * * * *

(i) *Conversion of a short-term spectrum leasing arrangement into a long-term de facto transfer leasing arrangement.* (1) In the event the licensee and spectrum lessee involved in a short-term *de facto* transfer leasing arrangement seek to extend the spectrum leasing arrangement beyond the one-year limit for short-term *de facto* transfer leasing arrangements, the parties may do so provided that they meet the conditions set forth in paragraphs (i)(2) and (i)(3) of this section.

(2) If a licensee that holds a license that continues to be subject to transfer restrictions and/or requirements relating to unjust enrichment pursuant to the Commission's small business and/or entrepreneur provisions (*see* § 1.2110 of this part and § 24.709 of this chapter) seeks to extend a short-term *de facto* transfer leasing arrangement with its spectrum lessee (or related entities, as determined pursuant to § 1.2110(b)(2)) beyond one year, it may convert its arrangement into a long-term *de facto* transfer spectrum leasing arrangement provided that it complies with the procedures for entering into a long-term *de facto* transfer leasing arrangement and that it pays any unjust enrichment that would have been owed had the licensee filed a long-term *de facto* transfer spectrum leasing application at the time it applied for the initial short-term *de facto* transfer leasing arrangement.

* * * * *

(n) *Renewal.* The rule applicable with regard to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(l)) applies in the same manner to short-term *de facto* transfer leasing arrangements, except that the renewal of the short-term *de facto* transfer leasing arrangement to extend into the term of the renewed license authorization cannot enable the combined terms of the short-term *de facto* transfer leasing arrangements to exceed one year. The Commission must be notified of the renewal of the spectrum leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949).

* * * * *

12. Amend § 1.9045 by revising paragraph (b) to read as follows:

§ 1.9045 Requirements for spectrum leasing arrangements entered into by licensees participating in the installment payment program.

* * * * *

(b) If a licensee holds a license subject to the installment payment program rules (*see* § 1.2110 and related service-specific rules), the licensee and any spectrum lessee must execute the Commission-approved financing documents. No licensee or potential spectrum lessee may file a spectrum leasing notification or application without having first executed such Commission-approved financing documentation. In addition, they must certify in the spectrum leasing notification or application that they have both executed such documentation.

* * * * *

13. Add § 1.9048 to read as follows:

§ 1.9048 Special provisions relating to spectrum leasing arrangements involving licensees in the Public Safety Radio Services.

Licensees in the Public Safety Radio Services (*see* part 90, subpart B and § 90.311(a)(1)(i) of this chapter) may enter into spectrum leasing arrangements with other public safety entities eligible for such a license authorization as well as with entities providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

14. Add § 1.9080 to read as follows:

§ 1.9080 Private commons.

(a) *Overview.* A "private commons" arrangement is an arrangement, distinct from a spectrum leasing arrangement but permitted in the same services for which spectrum leasing arrangements are allowed, in which a licensee or spectrum lessee makes certain spectrum usage rights under a particular license authorization available to a class of third-party users employing advanced communications technologies that involve peer-to-peer (device-to-device) communications and that do not involve use of the licensee's or spectrum lessee's end-to-end physical network infrastructure (*e.g.*, base stations, mobile stations, or other related elements). In a private commons arrangement, the licensee or spectrum lessee authorizes users of certain communications devices employing particular technical parameters, as specified by the licensee or spectrum lessee, to operate under the license authorization. A private commons arrangement differs from a spectrum leasing arrangement in that, unlike spectrum leasing arrangements, a private commons arrangement does not involve individually negotiated spectrum access rights with entities that seek to provide network-based services to end-users. A private commons arrangement does not affect unlicensed operations in a particular licensed band to the extent that they are permitted pursuant to Part 15.

(b) *Licensee/spectrum lessee responsibilities.* As the manager of any private commons, the licensee or spectrum lessee:

(1) Establishes the technical and operating terms and conditions of use by users of the private

commons, including those relating to the types of communications devices that may be used within the private commons, consistent with the terms and conditions of the underlying license authorization;

(2) Retains *de facto* control of the use of spectrum by users within the private commons, including maintaining reasonable oversight over the users' use of the spectrum in the private commons so as to ensure that the use of the spectrum, and communications equipment employed, comply with all applicable technical and service rules (including requirements relating to radiofrequency radiation) and maintaining the ability to ensure such compliance; and,

(3) Retains direct responsibility for ensuring that the users of the private commons, and the equipment employed, comply with all applicable technical and service rules, including requirements relating to radiofrequency radiation and requirements relating to interference.

(c) *Notification requirements.* Prior to permitting users to commence operations within a private commons, the licensee or spectrum lessee must notify the Commission, using FCC Form 608, that it is establishing a private commons arrangement. This notification must include information that describes: the location(s) or coverage area(s) of the private commons under the license authorization; the term of the arrangement; the general terms and conditions for users that would be gaining spectrum access to the private commons; the technical requirements and equipment that the licensee or spectrum lessee has approved for use within the private commons; and, the types of communications uses that are to be allowed within the private commons.

PART 24 – PERSONAL COMMUNICATIONS SERVICES

15. The authority citation for Part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

16. Revise § 24.239 by adding the following sentence at the end of the paragraph, to read as follows:

§ 24.239 Cost-sharing requirements for broadband PCS.

* * * If a licensee in the Broadband PCS Service enters into a spectrum leasing arrangement (as set forth in part 1, subpart X of this chapter) and the spectrum lessee triggers a cost-sharing obligation, the licensee is the PCS entity responsible for satisfying the cost-sharing obligations under §§ 24.239 through 24.253 of this chapter.

PART 90 – PRIVATE LAND MOBILE RADIO SERVICES

17. The authority citation for Part 90 continues to read as follows:

Authority: 47 U.S.C. 154(i), 161, 303(g), 303(r), and 332(c)(7).

18. Amend § 90.20 by adding a new paragraph (h) to read as follows:

(h) *Spectrum leasing arrangements.* Notwithstanding any other provisions of this paragraph to the contrary, licensees in the Public Safety Radio Services (*see* part 90, subpart B of this chapter) may enter into spectrum leasing arrangements (*see* part 1, subpart X of this chapter) with entities providing communications in support of public safety operations.

APPENDIX D – FINAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Further Notice*.[2] The Commission sought written public comment on the proposals in the *Further Notice*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objectives of, the Second Report and Order and Order on Reconsideration

2. In the Second Report and Order[4] and the Order on Reconsideration,[5] we build on the framework established in the *Report and Order*, in which we adopted policies, rules, and procedures designed to facilitate the ability of many Wireless Radio Services licensees, including many small businesses, to lease spectrum usage rights and to transfer and assign licenses to third parties. In this Second Report and Order, we take additional steps to further reduce regulatory delay so that spectrum leasing parties in our Wireless Radio Services can implement certain classes of spectrum leasing arrangements and can transfer and assign licenses in a more timely fashion, in accordance with evolving marketplace demands and customer needs. In the Order on Reconsideration, we address a variety of issues addressed in the *Report and Order*, including the respective responsibilities of licensees and spectrum lessees regarding particular service rules.

3. As with the underlying *Report and Order*, these actions take us further down the path toward greater reliance on the marketplace, thus expanding the scope of available wireless services and devices and enabling more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country.[6] The steps taken in the Second Report and Order and in the Order on Reconsideration to facilitate the development of secondary markets in wireless spectrum expand upon and complement several of the Commission's major policy initiatives and public interest objectives. These include our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services by designated entities,[7] and enable development of additional and innovative services in rural areas.

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[1] *See* 5 U.S.C. §603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See generally* Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 20604 (Appendix D) (2003) (*Report and Order* and *Further Notice*, respectively), *Erratum*, 18 FCC Rcd 24817 (2003).

[3] *See* 5 U.S.C. § 604. We also note that this proceeding is deregulatory in nature, and that some of the issues discussed here could perhaps have been certified under 5 U.S.C. § 605.

[4] *See* Second Report and Order, Section IV, *supra*

[5] *See* Order on Reconsideration, Section V, *supra.*

[6] *See generally Report and Order* at ¶¶ 2, 32-189.

[7] "Designated entities" include small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women. Through the years, the Commission has implemented policies to help (continued….)

4. Second Report and Order. Consistent with the proposals set forth in the *Further Notice*, the Second Report and Order further streamlines our processing of certain classes of spectrum leasing transactions – both *de facto* transfer and spectrum manager leases – by adopting immediate processing procedures (*i.e.*, overnight processing through the Universal Licensing System (ULS)) for transactions that do not raise certain specified potential public interest concerns.[8] Thus, leasing parties submitting qualifying spectrum leasing transactions will be able to proceed immediately with implementation of their spectrum leases, instead of having to wait 21 days[9] (10 days if a short-term lease), as required under existing spectrum leasing rules for both *de facto* transfer and spectrum manager leases.[10]

5. With respect to both long-term and short-term *de facto* transfer leasing, we adopt immediate approval procedures for certain categories of *de facto* transfer leasing arrangements that do not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition.[11] For transactions that involve telecommunications carriers subject to the Commission's Section 10 forbearance authority, the Second Report and Order forbears from the 21-day prior public notice requirements (10 days for short-term *de facto* transfer spectrum leasing).[12] For transactions that do not involve telecommunications carriers (and thus are not subject to forbearance), we permit spectrum leases to proceed under the immediate approval procedures because their applications establishes all of the requisite elements necessary for determining that approval is consistent with the public interest.[13] The Second Report and Order also adopts similar immediate processing for qualifying spectrum manager lease notifications.[14] Post-approval reconsideration procedures (for *de facto* transfer leases) and post-notification reconsideration procedures (for spectrum manager leases) apply, providing interested parties an opportunity to seek reconsideration, and similarly providing the Wireless Telecommunications Bureau (Bureau) 30 days, and the Commission 40 days, to reconsider whether the spectrum leasing is in the public interest. The Bureau (or Commission) also retains the right to take appropriate action for any false certifications that leasing parties make in their application or notification.[15]

(Continued from previous page)
ensure that these entities are given the opportunity to provide spectrum-based services, consistent with Sections 309(j)(3) and (4) of the Communications Act. *See generally* 47 U.S.C. §§ 309(j)(3), (4); 47 C.F.R. § 1.2110; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 (1994).

[8] *See generally* Second Report and Order at paras. 10-50.

[9] The Commission reserves the right to take longer than 21 days if the spectrum leasing transaction raises potential public interest concerns requiring additional review.

[10] *See generally* Second Report and Order at paras. 10-50.

[11] *See id.* at paras. 15-45.

[12] *See id.* at paras. 15-37.

[13] *See id.* at paras. 39-41.

[14] *See id.* at paras. 47-50.

[15] *See id.* at paras. 31-32, 39, 43, 49.

6. The Second Report and Order affirms and further clarifies the policy set forth in the *Report and Order* that permits designated entity (DE) and entrepreneur licensees to enter into spectrum manager leases with any entity, but only provided that the lease does not cause the DE or entrepreneur licensee to lose its eligibility under the applicable Commission policies and rules.[16] DE and entrepreneur licensees must therefore undertake the same kind of determination required when evaluating eligibility for auctions or license transfers prior to certifying that their spectrum leasing arrangement is in compliance with our rules. Because spectrum leasing arrangements entered into by DE and entrepreneur licensees are not subject to the immediate processing procedures, the Commission will have the ability to review, on a case-by-case basis, any leasing certification that it believes gives rise to a question of the licensee's continued eligibility.

7. Also, the Second Report and Order extends spectrum leasing policies to three additional services. Specifically, it permits public safety licensees in the Part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. In addition, it extends the spectrum leasing policies to the Multichannel Video Distribution and Data Service (MVDDS) and Automated Maritime Communications Systems (AMTS) Services in which licensees hold exclusive use rights. It does not, however, extend the spectrum leasing policies to other wireless radio services that involve sharing of the authorizations or to services in which the spectrum leasing policies might undermine policies related to the underlying authorization.[17]

8. Furthermore, the Second Report and Order establishes the new regulatory concept of a "private commons" that would be available to individual users or groups of users that do not fit squarely within the current options for spectrum leasing or within traditional end-user models associated with subscriber-based services and network architectures. The private commons option is similar to "public" commons of the kind associated with the current uses and applications of unlicensed devices under Part 15 rules, except that it would involve licensed spectrum in which the licensee (or spectrum lessee) would not necessarily offer services over its own end-to-end physical network of base stations, mobile stations, and other elements; as manager of the commons, the licensee (or lessee) sets the terms and conditions for users, notifies the Commission about the private commons prior to users' operations, and retains direct responsibility for users' compliance with the rules.[18]

9. In addition, the Second Report and Order extends immediate approval procedures for certain classes of license assignments and transfers of control. The order adopts the same immediate approval procedures for license assignments and transfer of control transactions that would not raise specified public interest concerns (*i.e.*, those relating to eligibility and use, foreign ownership, designated entity, or competition), consistent with the policies adopted in the order for *de facto* transfer leases.[19] The Second Report and Order also extends the applicable streamlined approval procedures – either the immediate approval or 21-day streamlined approval (or longer if additional review is necessary) – to all wireless radio services regulated by the Bureau, regardless of whether spectrum leasing is permitted.[20]

[16] *See id.* at paras. 69-84.

[17] *See id.* at paras. 52-66.

[18] *See id.* at paras. 91-99.

[19] *See id.* at paras. 101-108.

[20] *See id.* at paras. 110-111.

10. Finally, in the Second Report and Order we conclude that the information already provided by spectrum leasing parties when they file applications or notifications relating to entering into spectrum leasing arrangements is sufficient for enabling secondary markets the development of efficient markets in spectrum usage rights. Accordingly, we determine that we will not, at this time, require the spectrum leasing parties to provide the Commission with any additional information than that already required under existing rules. We also decline, at this time, to take action to establish the Commission as either a market-maker or exchange.

11. Order on Reconsideration. In the Order on Reconsideration, we address five petitions for reconsideration that we received with regard to the *Report and Order*. These petitions touched on a variety of issues, including the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules, protections for the licensee or spectrum lessee in the event a spectrum lease or a license is terminated, and the respective responsibilities of licensees and spectrum lessees regarding particular service rules. In the Order on Reconsideration, we provide additional clarification to our spectrum leasing policies and rules.[21]

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

12. Second Report and Order. We received no comments in response to the previous IRFA. We note, however that several commenting parties that represent small entities or rural carriers expressed support for the Commission's efforts to provide additional streamlining of our processing of certain categories of spectrum leasing arrangements and license assignments and transfers of control.

13. For instance, the Rural Telecommunications Group (RTG) supported additional streamlining of Commission processing of certain classes of spectrum leasing arrangements and licensee transfer and assignments. It asserted that such a process would help stimulate secondary market transactions by substantially lowering the cost of such transactions and decreasing the time in which such transactions may be completed.[22] Similarly, Blooston Rural Carriers supported the Commission's general proposal, set forth in the *Further Notice*, to remove unnecessary regulatory barriers to the development of secondary markets,[23] and believed that the kinds of rules proposed, and ultimately adopted in the Second Report and Order, would further facilitate broader access to spectrum resources. In addition, Blooston Rural Carriers supported that Commission's decision to forbear from certain categories of spectrum leases and assignments, stating that such forbearance would beneficially affect a significant number of arrangements without undermining the Commission's public interest objectives.[24]

14. In addition to these general observations, we inquired in the *Further Notice* whether the Commission should alter the *de facto* transfer leasing policies adopted in the *Report and Order* and allow a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same eligibility status as that of the licensee.[25] In

[21] *See generally* Order on Reconsideration at paras. 116-157.

[22] See RTG Petition at 1-4.

[23] *See* Blooston Rural Carriers Petition at 10-11.

[24] *See id.* at 24-25.

[25] *Further Notice* at ¶ 323.

particular, the we sought comment on how, if such a policy change were made, the Commission could ensure continued compliance with our statutory obligations to prevent unjust enrichment.[26] We also sought comment on whether to use the new *de facto* control standard, rather than the existing controlling interest standard (including the *Intermountain Microwave* criteria[27]), when evaluating affiliation and eligibility for designated entity and entrepreneur benefits.[28] We specifically asked whether this latter change would be consistent with the statutory objectives of Section 309(j).[29]

15. Some commenters, including AT&T Wireless, Cingular Wireless (which also is a petitioner), Council Tree, and Salmon PCS, suggested that the Commission should permit designated entity and entrepreneur licensees to enter into spectrum leasing arrangements with any entity, regardless of how that arrangement might affect the licensee's designated entity or entrepreneur eligibility. One of these commenters, Council Tree, further suggested that the Commission should eliminate unjust enrichment obligations and entrepreneur transfer restrictions for licensees owned and controlled by Alaska Native Corporations and Indian tribes. These commenters argued generally that designated entity and entrepreneur licensees should benefit from the same flexibility with regard to entering into spectrum leasing arrangements as any other licensees.[30] In addition, while two commenters acknowledged the importance of ensuring the spectrum leasing by designated entity and entrepreneur licensees did not undermine the Commission's designated entity or entrepreneur policies, Blooston Rural Carriers and RTG recommended that if such licensees enter into spectrum leasing arrangements that serve rural areas, they should not be subject to any unjust enrichment obligations or transfer restrictions. They generally contended that such a result would be consistent with the purpose of those policies to promote services in rural communities.[31]

16. The Commission devoted significant consideration to the applicability of its designated entity qualification rules to potential spectrum lessees seeking access to spectrum licensed to designated entities, as well as the applicability of its unjust enrichment policies. Reaching a decision on these issues required a balancing of complex competing considerations. The Commission concluded, however, that its statutory obligations under Section 309(j) of the Communications Act[32] and its goals to promote opportunities for designated entities (which includes a significant number of small businesses) would be better served by affirming, but clarifying, its designated entity and unjust enrichment policies adopted in

[26] *Id.*

[27] *See Intermountain Microwave*, 12 FCC 2d 559 (1963); *see also Report and Order* at ¶¶ 3, 10, 60; Matter of Amendment of Part 1 of the Commission's rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and Fourth Further Notice of Proposed Rule Making*, 15 FCC Rcd 15293, 15324 ¶ 61 (2000) (*Part 1 Fifth Report and Order*).

[28] *Further Notice* at ¶ 317.

[29] *Id.*

[30] *See* AT&T Wireless Comments at 8-9; Cingular Wireless Comments at ii, 2-4, 6-8; Cingular Wireless Petition at 2-4; Council Tree *Ex Parte* Comments at 3, 14-17; Salmon PCS Comments at 8-11.

[31] *See* Blooston Rural Carriers Comments at 3-5; RTG Comments at 5-7.

[32] *See* 47 U.S.C. § 309(j).

the *Report and Order* in the context of spectrum leases involving both spectrum manager leasing arrangements and long-term *de facto* transfer leasing arrangements.[33]

17. Order on Reconsideration. Five parties petitioned the Commission seeking revision or clarification of the *Report and Order* on several particular issues pertaining to the spectrum leasing policies that were adopted. These included Cingular Wireless' and NTCA's petitions for clarification of the licensee's responsibility for ensuring that spectrum lessees comply with Commission policies and rules,[34] Verizon Wireless' petition for Cingular Wireless' and Verizon Wireless' petitions for clarification of the licensee's ability to terminate a spectrum lease for non-compliance by the lessee,[35] Blooston Rural Carriers' petition for clarification of Commission policies regarding the licensee's responsibility for meeting application construction requirements when entering into spectrum leasing arrangements,[36] and Cingular Wireless's petition for clarification with respect to the licensee's responsibility for the cost-sharing obligations associated with relocation of incumbent microwave licensees in broadband PCS spectrum.[37] Four parties, requested additional procedural protections for licensees and spectrum lessees. Specifically, Cingular Wireless and Verizon Wireless sought additional protections for licensees in the event the Commission sought to terminate a spectrum lease,[38] while Blooston Rural Carriers, Cingular Wireless, and NTCA requested additional procedural protections for spectrum lessees if the license was terminated, either as a result of the licensee's bankruptcy or for some other unanticipated reason.[39] In the Order on Reconsideration, the Commission generally affirmed, and further clarified, the spectrum leasing policies adopted in the *Report and Order* with regard to these issues.[40] None of these petitioners noted that revisions or clarifications should be made in order to better accommodate the needs of small businesses.

18. In addition, as noted above, Cingular Wireless petitioned the Commission, requesting that it permit designated entity and entrepreneur licensees to enter into spectrum leasing arrangements with any entity, regardless of how that arrangement might affect the licensee's designated entity or entrepreneur eligibility. Because this issue was addressed in the Second Report and Order, it will not be discussed again here.

[33] *See* Second Report and Order at paras. 67-82.

[34] Blooston Rural Carriers Petition at 2-4; 9-11; Cingular Wireless Petition at 6-8; NTCA Petition at 2-3.

[35] Verizon Petition at 1-3.

[36] Blooston Rural Carriers Petition at 7-9.

[37] Cingular Wireless Petition at 9-10.

[38] *Id.* at 8-9 (seeking additional protections for licensees in the context of spectrum manager leases); Verizon Wireless Petition at 2-3 (seeking additional protections for spectrum lessees in the context of *de facto* transfer leases).

[39] Blooston Rural Carriers Petition at 4-7; Cingular Wireless Petition at 8-9; NTCA Petition at 3-4.

[40] *See generally* Order on Reconsideration at paras. 69-82.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

19. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[41] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[42] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[43] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[44]

20. In the following paragraphs, we further describe and estimate the number of small entity licensees that may be affected by the rules we adopt in the Second Report and Order. Since this rulemaking proceeding applies to multiple services, we will analyze the number of small entities affected on a service-by-service basis. Because we have adopted streamlined processing procedures for all license assignment and transfer of control applications involving Wireless Radio Services authorizations regulated by the Bureau, we describe all of the services regulated by the Bureau.

21. As adopted, the Second Report and Order will further streamline the processing of certain spectrum leasing arrangements and license assignments and transfers of control, as well as create new opportunities and obligations for three additional Wireless Radio Services licensees to enter into spectrum leasing arrangements with third parties. When identifying small entities that could be affected by our new rules, we provide information describing auctions results, including the number of small entities that are winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated.[45]

22. **Cellular Licensees.** The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications."[46] Under that SBA

[41] 5 U.S.C. § 604(a)(3).

[42] 5 U.S.C. § 601(6).

[43] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[44] 15 U.S.C. § 632.

[45] Consequently, to assist the Commission in analyzing the total number of potentially affected small entities, we requested commenters to estimate the number of small entities that might have been affected by any rule changes resulting from the *Further Notice*.

[46] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

category, a business is small if it has 1,500 or fewer employees.[47] According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees.[48] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

23. **220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[49] According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees.[50] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

24. **220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[51] This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[52] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[53] The SBA has approved these small size standards.[54] Auctions of Phase II

[47] *Id*.

[48] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000).

[49] 13 C.F.R. § 121.201, NAICS code 517212.

[50] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000).

[51] 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 Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

[52] *Id.* at 11068 ¶ 291.

[53] *Id.*

[54] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

licenses commenced on September 15, 1998, and closed on October 22, 1998.[55] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[56] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[57] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[58]

25. **Lower 700 MHz Band Licenses.** We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[59] We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[60] A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[61] Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[62] The SBA has approved these small size standards.[63] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. [64] A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses.[65] Seventeen winning bidders claimed small or very

[55] *See generally* "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

[56] *See* "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made," *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

[57] *See* "Phase II 220 MHz Service Spectrum Auction Closes," *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

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

[59] *See* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

[60] *Id.* at 1087-88 ¶ 172.

[61] *Id.*

[62] *Id.* at 1088 ¶ 173.

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

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

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

small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[66]

26. **Upper 700 MHz Band Licenses.** The Commission released a *Report and Order*, authorizing service in the upper 700 MHz band.[67] This auction, previously scheduled for January 13, 2003, has been postponed.[68]

27. **Paging.** In the *Paging Second Report and Order*, we adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[69] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[70] The SBA has approved this definition.[71] An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[72] Fifty-seven companies claiming small business status won 440 licenses.[73] An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[74] 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[75] Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile"

[66] *Id*.

[67] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001).

[68] *See* "Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled," *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

[69] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812 ¶¶ 178-181 (*Paging Second Report and Order*); *see also* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088 ¶¶ 98-107 (1999).

[70] *Paging Second Report and Order*, 12 FCC Rcd at 2811 ¶ 179.

[71] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[72] *See* "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

[73] *See id*.

[74] *See* "Lower and Upper Paging Band Auction Closes," *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

[75] *See* "Lower and Upper Paging Bands Auction Closes," *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

services.[76] Of these, we estimate that 589 are small, under the SBA-approved small business size standard.[77] We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

28. **Broadband Personal Communications Service (PCS).** The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[78] For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[79] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[80] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[81] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[82]

29. **Narrowband PCS.** The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less.[83] Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.[84] To ensure meaningful participation by small business entities in

[76] *See Trends in Telephone Service,* Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers that are Small Businesses) (May 2002).

[77] 13 C.F.R. § 121.201, NAICS code 517211.

[78] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); *see also* 47 C.F.R. § 24.720(b).

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

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

[81] FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. January 14, 1997).

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

[83] Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 ¶ 46 (1994).

[84] *See* "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674," *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); "Announcing the High (continued….)

future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.[85] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[86] A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[87] The SBA has approved these small business size standards.[88] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.[89] Three of these claimed status as a small or very small entity and won 311 licenses.

30. **Specialized Mobile Radio (SMR)**. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[90] The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[91] The SBA has approved these small business size standards for the 900 MHz Service.[92] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[93] A

(Continued from previous page)
Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787," *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

[85] Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

[86] *Id*.

[87] *Id*.

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

[89] *See* "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

[90] 47 C.F.R. § 90.814(b)(1).

[91] *Id*.

[92] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

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

second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[94]

31. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

32. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

33. **Private Land Mobile Radio (PLMR).** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any such entity employing no more than 1,500 persons.[95] The commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[96]

34. **Fixed Microwave Services.** Fixed microwave services include common carrier,[97] private-operational fixed,[98] and broadcast auxiliary radio services.[99] Currently, there are approximately 22,015

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

[95] *See* 13 C.F.R. § 121.201, NAICS code 517212.

[96] *See generally* 13 C.F.R. § 121.201.

[97] 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

[98] Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See generally* 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed (continued….)

common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to "Cellular and Other Wireless Telecommunications" companies – that is, an entity with no more than 1,500 persons.[100] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

35. **Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[101] The SBA has approved these definitions.[102] The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

36. **39 GHz Service.** The Commission defines "small entity" for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[103] "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[104] The SBA has approved these

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to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[99] Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[100] 13 C.F.R. § 121.201, NAICS code 517212.

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

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

[103] *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, *Report and Order*, 12 FCC Rcd 18600 (1997).

[104] *Id*.

definitions.[105] The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

37. **Local Multipoint Distribution Service.** An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[106] An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[107] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[108] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

38. **218-219 MHz Service.** The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).[109] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[110] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[111] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million

[105] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002.

[106] *See* Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order*, *Order on Reconsideration, and Fifth Notice of Proposed Rule Making,* 12 FCC Rcd 12545, 12689-90 ¶ 348 (1997).

[107] *Id*.

[108] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[109] *See* "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

[110] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

[111] Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999).

for the preceding three years.[112] The SBA has approved of these definitions.[113] At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

39. **Location and Monitoring Service (LMS).** Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[114] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million.[115] These definitions have been approved by the SBA.[116] An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

40. **Rural Radiotelephone Service**. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.[117] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

41. **Air-Ground Radiotelephone Service.** We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.[118] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

42. **Offshore Radiotelephone Service.** This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states

[112] *Id*.

[113] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[114] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order*, 13 FCC Rcd 15182, 15192 ¶ 20 (1998); *see also* 47 C.F.R. § 90.1103

[115] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd at 15192 ¶ 20; *see also* 47 C.F.R. § 90.1103.

[116] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated February 22, 1999.

[117] 13 C.F.R. § 121.201, NAICS code 517212.

[118] *Id.*

bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.[119] The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

43. **Multiple Address Systems (MAS).** Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years.[120] "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years.[121] The SBA has approved of these definitions.[122] The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001.[123] Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

44. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the "Cellular and Other Wireless Telecommunications" definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons.[124] The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

45. **Incumbent 24 GHz Licensees**. The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to

[119] *Id*.

[120] *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 ¶ 123 (2000).

[121] *Id*.

[122] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

[123] *See* "Multiple Address Systems Spectrum Auction Closes," *Public Notice*, 16 FCC Rcd 21011 (2001).

[124] *See* 13 C.F.R. § 121.201, NAICS code 517212.

existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any entity employing no more than 1,500 persons.[125] We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[126] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

46. **Future 24 GHz Licensees**. With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[127] "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[128] The SBA has approved these definitions.[129] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

47. **700 MHz Guard Band Licenses.** In the *700 MHz Guard Band Order*, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[130] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[131] Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[132] SBA approval of these definitions is not

[125] *See id.* According to Census Bureau data for 1997, in this category, there were a total of 977 firms that operated for the entire year. U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000). Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. *Id*. The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[126] Teligent acquired the Digital Electronic Message Service (DEMS) licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[127] Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16967 ¶ 77 (2000) (*24 GHz Report and Order*); *see also* 47 C.F.R. § 101.538(a)(2).

[128] *24 GHz Report and Order*, 15 FCC Rcd at 16967 ¶ 77; *see also* 47 C.F.R. § 101.538(a)(1).

[129] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

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

[131] *Id*. at 5343 ¶ 108.

[132] *Id*.

requires.[133] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, can closed on September 21, 2000.[134] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[135]

48. **Broadband Radio Service (formerly Multipoint Distribution Service) and Educational Broadband Service (formerly Instructional Television Fixed Service)**. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[136] In its recently issued *BRS/EBS Report and Order* in WT Docket No. 03-66, the Commission comprehensively reviewed our policies and rules relating to the ITFS and MDS services, and replacing the Multipoint Distribution Service (MDS) with the Broadband Radio Service and Instructional Television Fixed Service (ITFS) with the Educational Broadband Service.[137] In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[138] The SBA has approved of this standard.[139] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[140] Of the

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

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

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

[136] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O)*.

[137] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-145 (rel. July 29, 2004) (*BRS/EBS Report and Order*). As we noted in the *Further Notice*, there are unique policies associated with ITFS licensees' educational purposes, and the services have already developed their own approach to excess capacity leasing. *See Further Notice* at ¶¶ 307-08.

[138] 47 C.F.R. § 21.961(b)(1).

[139] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of $40 million size standard for MDS auction).

[140] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See MDS Auction R&O*, 10 FCC Rcd at 9608 ¶ 34.

67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[141]

49. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[142] which includes all such companies generating $12.5 million or less in annual receipts.[143] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[144] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[145] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies in the Second Report and Order.

50. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities.[146] There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

51. **Multichannel Video Distribution and Data Service.** MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. Licenses in this service were auctioned in January 2004, with 10 winning bidders for 192 licenses. Eight of these 10 winning bidders claimed small businesses status for 144 of these licenses.[147]

52. **Aviation and Marine Services.** Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and

[141] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

[142] 13 C.F.R. § 121.201, NAICS code 517510.

[143] *Id.*

[144] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[145] *Id*.

[146] In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

[147] "Multichannel Video Distribution and Data Service Auction Closes," *Public Notice*, DA 04-215 (Feb. 2, 2004).

Other Telecommunications," which is 1,500 or fewer employees.[148] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[149] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

53. **Public Safety Radio Services.** Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[150] There are a total of approximately 127,540 licensees in these services. Governmental entities[151] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[152]

[148] 13 CFR § 121.201, NAICS code 517212 (2002).

[149] Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853 (1998).

[150] With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15-90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 C.F.R. §§ 90.15-90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33-90.55.

[151] 47 C.F.R. § 1.1162.

[152] 5 U.S.C. § 601(5).

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

54. The projected reporting, recordkeeping, and other compliance requirements resulting from the Second Report and Order and the Order on Reconsideration will apply to all entities in the same manner, consistent with the approach we adopted in the *Report and Order*.[153] We believe that applying the same rules equally to all entities helps to promote fairness in the spectrum leasing process, as well in the license assignment and transfer of control process, and we do not believe that the costs and/or administrative burdens associated with the rules, as revised for certain classes of spectrum leasing and license transfer and assignment transactions will disproportionately or unduly burden small entities. The revisions we adopt today should benefit small entities by giving them more information, more flexibility, and more options for gaining access to valuable wireless spectrum.

55. Immediate processing procedures for qualifying transactions. One of our goals is to further streamline Commission processing of certain spectrum leasing arrangements and of license assignment and transfer of control applications in order to minimize administrative delays, reduce transaction costs, encourage more efficient use of spectrum, and otherwise facilitate the movement of spectrum toward new and higher valued uses.[154] Additional streamlining, including adoption of immediate processing procedures for certain categories of these transactions that do not raise specified potential public interest concerns, helps us to achieve these goals while at the same time meeting our statutory obligations, under Sections 308, 309, and 310(d), to review license assignments and transfers of control to ensure that they are consistent with the public interest.[155]

56. Under the rules adopted in the Second Report and Order, parties seeking to benefit from the Commission's immediate processing procedures for spectrum leasing arrangements and for license transfers and assignments must submit filings with the Commission using our Universal Licensing System (ULS), just as such filings were required under the procedures adopted in the underlying *Report and Order*.[156] In order to qualify for such immediate processing under these new procedures, we require parties to make certain additional certifications.[157] Otherwise, the reporting requirements are not substantially different that those already required when parties seek to enter into spectrum leasing arrangements, as already established under the underlying *Report and Order*. If parties qualify, they benefit by having their arrangements processed immediately, and thus have less delay in gaining access to the spectrum by implementing the transactions.

57. Extending spectrum leasing policies to additional spectrum-based services. We extend the spectrum leasing policies to permit public safety licensees in the Part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. We also extend the spectrum leasing policies to two other services in which licensees hold exclusive use rights, the Multichannel Video Distribution and Data Services (MVDDS) and the

[153] *See generally Report and Order*, Appendix C (Final Regulatory Flexibility Analysis justifying adoption of the same filing requirements on all entities, regardless of size).

[154] *See* Second Report and Order at para. 10.

[155] *See* Second Report and Order at paras. 10-50.

[156] *See Report and Order* at paras. 123-125, 150-154, 181.

[157] *See* Second Report and Order at paras. 15-28, 39-41, 47-49.

Automated Maritime Communications Systems (AMTS) Services. The reporting requirements for these services is no different from the reporting requirements already required for all other services to which our spectrum leasing policies apply.

58. Adoption of the "private commons" option. In the Second Report and Order, we adopt the private commons option under which licensees and spectrum lessees may make licensed spectrum available to individuals or groups of users employing certain advanced wireless technologies in a manner similar to that by which unlicensed users gain access to spectrum, and to do so without the need for entering into individual spectrum leasing arrangements. While we do require that licensees or spectrum lessees that establish a private commons to notify the Commission, we do not require the same amount of information as required for spectrum leasing arrangements.

59. Immediate approval procedures for certain categories of license assignment and transfer of control applications. We adopt streamlined application processes for license assignments and transfers of control involving Wireless Radio similar to those we have adopted for *de facto* transfer spectrum leasing arrangements. As with *de facto* transfer leasing arrangements, in order to qualify for such immediate processing under these new procedures, we require parties to make certain additional certifications.[158] Otherwise, the reporting requirements are not substantially different that those already required when parties seek to enter into spectrum leasing arrangements.

60. Extending the streamlined processing policies relating to license assignments and transfers of control to additional wireless services. We also determine to apply the streamlined processing procedures adopted in the *Report and Order* for license assignments and transfer of control applications, as well as the immediate approval processing for qualifying transactions as adopted in this Second Report and Order, to all of the Wireless Radio Services authorizations regulated by the Bureau. Thus, while new services now may benefit from more streamlined processing of license transfer and assignment applications, the reporting requirements do not differ from those already required for licensees and assignees/transferees under the policies established in the *Report and Order.*

61. Order on Reconsideration. In the Order on Reconsideration, we generally affirm the spectrum leasing policies and rules established in the underlying *Report and Order*, and do not impose any additional reporting requirements on licensees and spectrum lessees.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

62. The RFA requires an agency to describe any significant alternatives that it considered in reaching its final decision, which may include the following four alternatives, (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[159]

[158] *See* Second Report and Order at paras. 101-103.

[159] 5 U.S.C. §§ 603(c)(1)-(4).

63. Immediate processing of certain categories *de facto* transfer leasing arrangements. *See* Second Report and Order, paras. 11-45. Consistent with the broad support by commenters, [160] we generally adopt the forbearance proposal set forth in the *Further Notice* with a few modifications. We do not anticipate any adverse impact on small entities as a result of our decision to adopt immediate processing of certain categories of spectrum leasing arrangements, both *de facto* transfer leases and spectrum manager leases.

64. In particular, we permit all *de facto* transfer leases involving telecommunications services that are subject to the Commission's forbearance authority to proceed pursuant to the application and immediate grant procedures set forth in the Second Report and Order. *See* Report and Order at paras. 11-36. In particular, we require that, in the spectrum leasing application submitted to the Commission, the spectrum lessee must make certain additional certifications (*e.g.*, those in which the spectrum leasing arrangement involves license authorizations that permit interconnected mobile voice and/ore data services) in order to qualify for immediate approval processing (in lieu of the general 21-day processing procedures under the rules adopted in the *Report and Order*).[161] Consistent with the general proposal set forth in the *Further Notice*, we will no longer require prior public notice and individualized Commission review of these leases that meet the requirements specified above. Specifically, if the spectrum leasing parties file their *de facto* transfer lease application in the Universal Licensing System (ULS), and the application established the requisite elements explained above, and are otherwise complete, the Bureau will process the application and provide immediate approval through ULS processing, reflected on the next business day after filing the application. We believe that forbearing from pubic notice and additional Commission review of the qualifying *de facto* transfer spectrum leasing arrangements that do not raise potential public interest concerns, is consistent with the public interest and will benefit all entities, including small entities, by allowing them gain immediate access to spectrum to implement their business plans with reduced regulatory delay and transaction costs.

65. We also permit *de facto* transfer leases that involve spectrum leasing arrangements not subject to forbearance to proceed under the same application/immediate approval policies as adopted above for *de facto* transfer leases subject to forbearance, so long as the leasing parties can establish that the arrangements are consistent with the public interest because they establish the same specified qualifications. *See* Report and Order at paras. 37-40. As above, permitting entities that seek to enter into these leasing arrangements that qualify for immediate approval serves to benefit all such entities, including small entities.

66. In addition, we revise our rules for processing short-term *de facto* transfer leases so that they may be approved pursuant to the immediate approval procedures. Because such short-term *de facto* transfer leasing arrangements, under the policies applicable to them, would qualify for immediate approval processing because they do not potential public interest concerns that merit prior public notice or additional review, we no longer will require such applications to be processed pursuant to our Special Temporary Authority (STA) 10-day review procedures. These immediate processing procedures benefit all entities entering into short-term *de facto* transfer leases, including small entities.

[160] All parties commenting on the forbearance proposal supported the Commission's general approach. *See, e.g.,* Blooston Rural Carriers Comments at 11-12; RTG Comments at 2-5; SBC Comments at 7-10; PCIA Comments at 5; Spectrum Market Comments at 4; Cantor Fitzgerald Comments at 2; CTIA Comments at 2-4.

[161] *See* Second Report and Order at paras. 15-28.

67. Immediate processing of certain categories of spectrum manager leasing arrangements. *See* Second Report and Order at paras. 46-50. We also revise our policies for spectrum manager lease notifications to be consistent with the policies for *de facto* transfer leases as described above. Accordingly, where parties seek to enter into spectrum manager leases that do not raise specified potential public interest concerns (*e.g.*, potential competition concerns), we will permit them to commence operations under those leasing arrangements once they have notified the Commission of the lease, and have made the necessary certifications to qualify for immediate processing. If the spectrum manager lease satisfies the qualifying elements, we do not believe it necessary to review these notifications in advance of operations. The immediate processing procedures adopted for these qualifying spectrum manager leases will benefit all entities that qualify, including small entities, and will facilitate more rapid and efficient use of wireless radio spectrum.

68. Extending spectrum leasing policies to additional spectrum-based services. *See* Second Report and Order at paras. 51-66. We extend the spectrum leasing policies to permit public safety licensees in the Part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. We also extend the spectrum leasing policies to two other services in which licensees hold exclusive use rights, the Multichannel Video Distribution and Data Services (MVDDS) and the Automated Maritime Communications Systems (AMTS) Services. For these public safety licensees, we facilitate more efficient and effective use of public safety communications, foster interoperability, and further our various homeland security initiatives. For MVDDS and AMTS, we permit the same benefits of spectrum leasing to be extended to these services as well. Extension of our spectrum leasing policies in these services will benefit all entities in these services, both small and large.

69. Clarification of the spectrum leasing policies applicable to designated entity and entrepreneur licensees. *See* Second Report and Order at paras. 67-82. We affirm and clarify the rules established in the *Report and Order* for spectrum leasing by designated entity and entrepreneur licensees. On so doing, we decline requests that we choose an alternative providing such licensees with the right to lease spectrum to any entity, without regard to our eligibility rules for designated entities and entrepreneurs. Although a few commenters suggest that we adopt the alternative policy, we believe that adopting such a change would contravene the requirements and objectives of Section 309(j) of the Act.[162] Under Section 309(j), Congress sought to promote diversity among service providers, as well as the rapid deployment of new technologies for the benefit of, among others, rural customers. If we allow designated entities and entrepreneurs to enter into spectrum manager leasing arrangements without considering whether the spectrum lessee acquires an interest in the licensee, we run the risk that entities that do not qualify for such incentives in the primary market will be unjustly enriched.

70. We also reject recommendations that we allow licensees to maintain their designated entity and/or entrepreneur eligibility without the imposition of unjust enrichment payment obligations and transfer restrictions in situations where the spectrum lessee will use the lease to serve rural areas.[163] The Commission is not required to ensure both the rapid deployment of service to telecommunications service to rural areas and the participation of rural telephone companies. Section 309(j) only requires that the Commission seek to promote the objective that service be developed and rapidly deployed to rural customers and only ensure that rural telephone companies are given the opportunity to participate. The

[162] 47 U.S.C. § 309 (j)(4).

[163] Blooston Rural Carriers Comments at 3-5.

Commission has provided small businesses with bidding credits and entrepreneurs with license set-asides in order for them to have the opportunity to participate in the provision of spectrum based services. The Commission has determined that telephone companies providing service in rural areas do not have per se the same difficulty accessing capital as other groups and allowing unrestricted ability to lease to non-eligible entities planning to serve rural areas would be allowing the larger entities to benefit indirectly from small businesses.

71. Clarification that "dynamic" spectrum leasing arrangements are permitted. *See* Second Report and Order at paras. 85-88. We clarify that our spectrum leasing policies and rules permit spectrum leasing parties to enter into a variety of dynamic forms of spectrum leasing arrangements that take advantage of the capabilities associated with advanced technologies. Thus, spectrum leasing parties may enter into spectrum leasing arrangements in which licensees and spectrum lessees share use of the same spectrum, on a non-exclusive basis, during the term of the spectrum lease. For example, a licensee and spectrum lessee may enter into a spectrum manager or *de facto* transfer lease in which use of the same spectrum is shared with each other by employing opportunistic devices. In another variation, a licensee could enter into a spectrum manager lease with one party that has access to the spectrum on a priority basis, while also leasing use of the same spectrum to another party on a lower-priority basis, with the requirement that the lower-priority spectrum lessee employ opportunistic technology to avoid interfering with the priority lessee. Both small and large entities will benefit from these dynamic leasing arrangements.

72. Adoption of the "private commons" option. *See* Second Report and Order at paras. 90-99. We adopt the private commons option in the Second Report and Order to facilitate the use of advanced technologies and thus better promote access to and the efficient use of spectrum. The private commons option will allow licensees or spectrum lessees to make spectrum available to individual users or groups of users that may not fit squarely within the current options for spectrum leasing or within the traditional models associated with subscriber-based services and network architectures. The private commons would be similar to "public" commons of the kind associated with the current uses and applications of unlicensed devices under Part 15 rules, except that is would involve licensed spectrum in which the licensee (or lessee) would not necessarily offer services over its own end-to-end physical network of base stations, mobile stations, and other elements. As manager of the commons, the licensee (or lessee) would set terms and conditions for users, retain direct responsibility for users' compliance with the rules, and notify the Commission about the private commons prior to users' operations. The private commons option will help small (and large) entities by allowing for more flexible uses of licensed spectrum to incorporate new means of implementing advanced technologies and provides an important complement to the spectrum leasing policies we have already adopted to facilitate spectrum access.

73. Immediate approval procedures for certain categories of license assignment and transfer of control applications. *See* Second Report and Order at paras. 98-104. We adopt streamlined application processes for license assignments and transfers of control involving Wireless Radio similar to those we have adopted for *de facto* transfer spectrum leasing arrangements. This policy will help all entities, including small entities, by reducing transaction costs, minimizing administrative delay, and encouraging more efficient use of spectrum.

74. Extending the streamlined processing policies relating to license assignments and transfers of control to additional wireless services. *See* Second Report and Order at paras. 109-110. We will apply the streamlined processing procedures adopted in the *Report and Order* for license assignments and transfer of control applications, as well as the immediate approval processing for qualifying transactions as adopted in this Second Report and Order, to all of the Wireless Radio Services authorizations regulated by the Bureau, This decision enables all license transfers and assignments involving these Wireless Radio

Services, not just those Wireless Radio Services for which spectrum leasing is permitted, to benefit from streamlined processing or immediate processing, whichever is applicable. This ensures that an addition set of Wireless Radio Services licensees, both small entities and large ones, may now take advantage of these procedures that minimize administrative delays and reduce transaction costs.

75. Clarification of spectrum leasing policies and rules in the Order on Reconsideration. *See* Order on Reconsideration at paras. 116-157. The Order on Reconsideration addresses petitions that seek clarification on a variety of issues, including: (1) the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules; (2) protections for the licensee or spectrum lessee in the event of a spectrum lease or a license is terminated; and (3) the respective responsibilities of licensees and spectrum lessees regarding particular service rules. As a general matter, the Order on Reconsideration affirms and further clarifies the policies adopted in the underlying *Report and Order*. We do not anticipate any adverse impact on small entities as a result of this action. Our approach here should benefit small entities by reducing regulatory uncertainty and further enhancing the development of a more robust secondary markets and access to spectrum.

Report to Congress: The Commission will send a copy of the Second Report and Order and the Order on Reconsideration, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[164] In addition, the Commission will send a copy of the Second Report and Order and the Order on Reconsideration, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Second Report and Order, Order on Reconsideration, and the FRFA (or summaries thereof) will also be published in the Federal Register.[165]

IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Report and Order and the Order on Reconsideration, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

164 *See* 5 U.S.C. § 801(a)(1)(A).

165 *See* 5 U.S.C. § 604(b).

APPENDIX E – INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Second Further Notice of Proposed Rulemaking (Second Further Notice).[2] Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Further Notice provided in paragraph 167 of the item. The Commission will send a copy of the Second Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[3] In addition, the Second Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.[4]

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

2. In the Second Report and Order, we adopt changes that further facilitate the leasing of spectrum usage rights and enhancing the functioning of the secondary spectrum marketplace generally. However, we believe that there may be additional measures that we might take to improve efficiency and promote access to a secondary spectrum market in order to ensure the greatest benefit to spectrum users and consumers. Thus, in the Second Further Notice, we seek comment on evaluating additional policies that could facilitate the development of advanced technologies through secondary market arrangements, such as spectrum leasing and private commons, and obtaining further clarification regarding the private commons options. We discuss the potential impact of these on small entities in the paragraphs that follow.

B. Legal Basis

3. The potential actions on which comment is sought in this Second Further Notice would be authorized under Sections 1, 4(i), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), and 303(r).

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

4. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.[5] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[6] In addition, the term "small business" has the same meaning as the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* Second Further Notice, Section VI, *supra.*

[3] *See* 5 U.S.C. § 603(a).

[4] *See id*.

[5] 5 U.S.C. § 604(a)(3).

[6] 5 U.S.C. § 601(6).

term "small business concern" under the Small Business Act.[7] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[8]

5. In the following paragraphs, we further describe and estimate the number of small entity licensees that may be affected by the rules we propose in the Second Further Notice. Since this rulemaking proceeding applies to multiple services, we will analyze the number of small entities affected on a service-by-service basis.

6. As adopted, the Second Report and Order will create new opportunities and obligations for Wireless Radio Service s licensees and other entities that may lease spectrum usage rights from these licensees. When identifying small entities that could be affected by our new rules, we provide information describing auctions results, including the number of small entities that aware winning bidders. We not, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated. Consequently, to assist the Commission in analyzing the total number of potentially affected small entities, we requested commenters to estimate the number of small entities that may be affected by any rule changes resulting from this Second Further Notice.

7. In the Second Further Notice, we seek comment on possible further refinements to our existing policies and rules for spectrum leasing arrangements and for private commons arrangements. If any revisions were adopted, such revisions potentially could affect small entity licensees holding licenses in the Wireless Radio Services identified below.

8. **Cellular Licensees.** The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications."[9] Under that SBA category, a business is small if it has 1,500 or fewer employees.[10] According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees.[11] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

[7] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[8] 15 U.S.C. § 632.

[9] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

[10] *Id*.

[11] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000).

9. **220 MHz Radio Service – Phase I Licensees.** The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to "Cellular and Other Wireless Telecommunications" companies. This category provides that a small business is a wireless company employing no more than 1,500 persons.[12] According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees.[13] If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

10. **220 MHz Radio Service – Phase II Licensees.** The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. In the *220 MHz Third Report and Order*, we adopted a small business size standard for defining "small" and "very small" businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[14] This small business standard indicates that a "small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[15] A "very small business" is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[16] The SBA has approved these small size standards.[17] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[18] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[19] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies

[12] 13 C.F.R. § 121.201, NAICS code 517212.

[13] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000).

[14] 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 Service, *Third Report and Order*, 12 FCC Rcd 10943, 11068-70 ¶¶ 291-295 (1997).

[15] *Id.* at 11068 ¶ 291.

[16] *Id.*

[17] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[18] *See generally* "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

[19] *See* "FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made," *Public Notice*, 14 FCC Rcd 1085 (WTB 1999).

claiming small business status won 158 licenses.[20] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[21]

11. **Lower 700 MHz Band Licenses.** We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[22] We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[23] A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[24] Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[25] The SBA has approved these small size standards.[26] An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses.[27] A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses.[28] Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[29]

[20] *See* "Phase II 220 MHz Service Spectrum Auction Closes," *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

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

[22] *See* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

[23] *Id.* at 1087-88 ¶ 172.

[24] *Id.*

[25] *Id.* at 1088 ¶ 173.

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

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

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

[29] *Id*.

12. **Upper 700 MHz Band Licenses.** The Commission released a *Report and Order*, authorizing service in the upper 700 MHz band.[30] This auction, previously scheduled for January 13, 2003, has been postponed.[31]

13. **Paging.** In the *Paging Second Report and Order*, we adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[32] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[33] The SBA has approved this definition.[34] An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold.[35] Fifty-seven companies claiming small business status won 440 licenses.[36] An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[37] 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[38] Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Trends in Telephone Service,* 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services.[39] Of these, we estimate that 589 are small, under the SBA-approved small business size

[30] Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Memorandum Opinion and Order*, 16 FCC Rcd 1239 (2001).

[31] *See* "Auction of Licenses for 747-762 and 777-792 MHz Bands (Auction No. 31) Is Rescheduled," *Public Notice*, 16 FCC Rcd 13079 (WTB 2003).

[32] Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Second Report and Order*, 12 FCC Rcd 2732, 2811-2812 ¶¶ 178-181 (*Paging Second Report and Order*); *see also* Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems, *Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 10030, 10085-10088 ¶¶ 98-107 (1999).

[33] *Paging Second Report and Order*, 12 FCC Rcd at 2811 ¶ 179.

[34] *See* Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

[35] *See* "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

[36] *See id*.

[37] *See* "Lower and Upper Paging Band Auction Closes," *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

[38] *See* "Lower and Upper Paging Bands Auction Closes," *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

[39] *See Trends in Telephone Service,* Industry Analysis Division, Wireline Competition Bureau, Table 5.3 (Number of Telecommunications Service Providers that are Small Businesses) (May 2002).

standard.[40] We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

14. **Broadband Personal Communications Service (PCS).** The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[41] For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[42] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[43] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.[44] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[45]

15. **Narrowband PCS.** The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less.[46] Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.[47] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband*

[40] 13 C.F.R. § 121.201, NAICS code 517211.

[41] *See* Amendment of Parts 20 and 24 of the Commission's Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, *Report and Order*, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); *see also* 47 C.F.R. § 24.720(b).

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

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

[44] FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. January 14, 1997).

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

[46] Implementation of Section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, *Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 10 FCC Rcd 175, 196 ¶ 46 (1994).

[47] *See* "Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674," *Public Notice*, PNWL 94-004 (rel. Aug. 2, 1994); "Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787," *Public Notice*, PNWL 94-27 (rel. Nov. 9, 1994).

PCS Second Report and Order.[48] A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[49] A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[50] The SBA has approved these small business size standards.[51] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.[52] Three of these claimed status as a small or very small entity and won 311 licenses.

16. **Specialized Mobile Radio (SMR)**. The Commission awards "small entity" bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years.[53] The Commission awards "very small entity" bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years.[54] The SBA has approved these small business size standards for the 900 MHz Service.[55] The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band.[56] A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[57]

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[48] Amendment of the Commission's Rules to Establish New Personal Communications Services, Narrowband PCS, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

[49] *Id*.

[50] *Id*.

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

[52] *See* "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

[53] 47 C.F.R. § 90.814(b)(1).

[54] *Id*.

[55] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999. We note that, although a request was also sent to the SBA requesting approval for the small business size standard for 800 MHz, approval is still pending.

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

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

17. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed "small business" status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business.

18. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

19. **Private Land Mobile Radio (PLMR).** PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any such entity employing no more than 1,500 persons.[58] The commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[59]

20. **Fixed Microwave Services.** Fixed microwave services include common carrier,[60] private-operational fixed,[61] and broadcast auxiliary radio services.[62] Currently, there are approximately 22,015

[58] *See* 13 C.F.R. § 121.201, NAICS code 517212.

[59] *See generally* 13 C.F.R. § 121.201.

[60] 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

[61] Persons eligible under parts 80 and 90 of the Commission's rules can use Private Operational-Fixed Microwave services. *See generally* 47 C.F.R. parts 80 and 90. Stations in this service are called operational-fixed to distinguish them from common carrier and public fixed stations. Only the licensee may use the operational-fixed station, and only for communications related to the licensee's commercial, industrial, or safety operations.

[62] Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's Rules. *See* 47 C.F.R. Part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, (continued….)

common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to "Cellular and Other Wireless Telecommunications" companies—that is, an entity with no more than 1,500 persons.[63] The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

21. **Wireless Communications Services.** This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[64] The SBA has approved these definitions.[65] The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670-1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

22. **39 GHz Service.** The Commission defines "small entity" for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[66] "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[67] The SBA has approved these

(Continued from previous page)
or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[63] 13 C.F.R. § 121.201, NAICS code 517212.

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

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

[66] *See* Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Band, *Report and Order*, 12 FCC Rcd 18600 (1997).

[67] *Id*.

definitions.[68] The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000. The 18 bidders who claimed small business status won 849 licenses.

23. **Local Multipoint Distribution Service.** An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[69] An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years.[70] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[71] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

24. **218-219 MHz Service.** The first auction of 218-219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs).[72] Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[73] In the *218-219 MHz Report and Order and Memorandum Opinion and Order*, we defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[74] A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million

[68] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Hector Barreto, Administrator, Small Business Administration, dated January 18, 2002.

[69] *See* Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, Reallocate the 29.5-30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *Second Report and Order*, *Order on Reconsideration, and Fifth Notice of Proposed Rule Making,* 12 FCC Rcd 12545, 12689-90 ¶ 348 (1997).

[70] *Id*.

[71] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[72] *See* "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

[73] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

[74] Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218-219 MHz Service, *Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 1497 (1999).

for the preceding three years.[75] The SBA has approved of these definitions.[76] At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218-219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this IRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

25. **Location and Monitoring Service (LMS)**: Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[77] A "very small business" is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million.[78] These definitions have been approved by the SBA.[79] An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

26. **Rural Radiotelephone Service**. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.[80] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

27. **Air-Ground Radiotelephone Service.** We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.[81] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

28. **Offshore Radiotelephone Service.** This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states

[75] *Id*.

[76] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[77] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems*, Second Report and Order*, 13 FCC Rcd 15182, 15192 ¶ 20 (1998); *see also* 47 C.F.R. § 90.1103

[78] Amendment of Part 90 of the Commission's Rules to Adopt Regulations for Automatic Vehicle Monitoring Systems, *Second Report and Order*, 13 FCC Rcd at 15192 ¶ 20; *see also* 47 C.F.R. § 90.1103.

[79] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated February 22, 1999.

[80] 13 C.F.R. § 121.201, NAICS code 517212.

[81] *Id.*

bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.*, an entity employing no more than 1,500 persons.[82] The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

29. **Multiple Address Systems (MAS).** Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines "small entity" for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years.[83] "Very small business" is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years.[84] The SBA has approved of these definitions.[85] The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001.[86] Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

30. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the "Cellular and Other Wireless Telecommunications" definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons.[87] The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

31. **Incumbent 24 GHz Licensees**. The rules that we adopt could affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to

[82] *Id*.

[83] *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 ¶ 123 (2000).

[84] *Id*.

[85] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

[86] *See* "Multiple Address Systems Spectrum Auction Closes," *Public Notice*, 16 FCC Rcd 21011 (2001).

[87] *See* 13 C.F.R. § 121.201, NAICS code 517212.

existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for "Cellular and Other Wireless Telecommunications." This definition provides that a small entity is any entity employing no more than 1,500 persons.[88] We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[89] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

32. **Future 24 GHz Licensees**. With respect to new applicants in the 24 GHz band, we have defined "small business" as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[90] "Very small business" in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[91] The SBA has approved these definitions.[92] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

33. **700 MHz Guard Band Licenses.** In the *700 MHz Guard Band Order*, we adopted size standards for "small businesses" and "very small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.[93] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[94] Additionally, a "very small business" is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[95] SBA approval of these definitions is not requires.[96] An

[88] *See id.* According to Census Bureau data for 1997, in this category, there were a total of 977 firms that operated for the entire year. U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513322 (October 2000). Of this total, 965 firms had employment of 999 or fewer employees, and an additional 12 firms had employment of 1,000 employees or more. *Id*. The census data do not provide a more precise estimate of the number of firms that have 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[89] Teligent acquired the Digital Electronic Message Service (DEMS) licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[90] Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz, *Report and Order*, 15 FCC Rcd 16934, 16967 ¶ 77 (2000) (*24 GHz Report and Order*); *see also* 47 C.F.R. § 101.538(a)(2).

[91] *24 GHz Report and Order*, 15 FCC Rcd at 16967 ¶ 77; *see also* 47 C.F.R. § 101.538(a)(1).

[92] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary M. Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

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

[94] *Id*. at 5343 ¶ 108.

[95] *Id*.

auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, can closed on September 21, 2000.[97] Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[98]

34. **Broadband Radio Service (formerly Multipoint Distribution Service) and Educational Broadband Service (formerly Instructional Television Fixed Service)**. Multichannel Multipoint Distribution Service (MMDS) systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS).[99] In its recently issued *BRS/EBS Report and Order* in WT Docket No. 03-66, the Commission comprehensively reviewed our policies and rules relating to the ITFS and MDS services, and replacing the Multipoint Distribution Service (MDS) with the Broadband Radio Service and Instructional Television Fixed Service (ITFS) with the Educational Broadband Service.[100] In connection with the 1996 MDS auction, the Commission defined "small business" as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years.[101] The SBA has approved of this standard.[102] The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs).[103] Of the

(Continued from previous page)

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

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

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

[99] Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding, MM Docket No. 94-131 and PP Docket No. 93-253, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O)*.

[100] *See* Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-145 (rel. July 29, 2004) (*BRS/EBS Report and Order*). As we noted in the *Further Notice*, there are unique policies associated with ITFS licensees' educational purposes, and the services have already developed their own approach to excess capacity leasing. *See Further Notice* at ¶¶ 307-08.

[101] 47 C.F.R. § 21.961(b)(1).

[102] *See* Letter to Margaret Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Bureau, from Gary Jackson, Assistant Administrator for Size Standards, Small Business Administration, dated March 20, 2003 (noting approval of $40 million size standard for MDS auction).

[103] Basic Trading Areas (BTAs) were designed by Rand McNally and are the geographic areas by which MDS was auctioned and authorized. *See MDS Auction R&O*, 10 FCC Rcd at 9608 ¶ 34.

67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.[104]

35. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution,[105] which includes all such companies generating $12.5 million or less in annual receipts.[106] According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year.[107] Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[108] Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies in the Second Further Notice.

36. **Multichannel Video Distribution and Data Service.** MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. Licenses in this service were auctioned in January 2004, with 10 winning bidders for 192 licenses. Eight of these 10 winning bidders claimed small businesses status for 144 of these licenses.[109]

37. **Aviation and Marine Services.** Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category "Cellular and Other Telecommunications," which is 1,500 or fewer employees.[110] Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875-157.4500 MHz (ship transmit) and 161.775-162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a "small" business as an entity that, together

[104] 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard for "other telecommunications" (annual receipts of $12.5 million or less). *See* 13 C.F.R. § 121.201, NAICS code 517910.

[105] 13 C.F.R. § 121.201, NAICS code 517510.

[106] *Id.*

[107] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[108] *Id*.

[109] "Multichannel Video Distribution and Data Service Auction Closes," *Public Notice*, DA 04-215 (Feb. 2, 2004).

[110] 13 CFR § 121.201, NAICS code 517212 (2002).

with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a "very small" business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars.[111] There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as "small" businesses under the above special small business size standards.

38. **Public Safety Radio Services.** Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[112] There are a total of approximately 127,540 licensees in these services. Governmental entities[113] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[114]

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

39. The policies and proposals set forth in the Second Report and Order impact a number of Commission licensees and spectrum lessees in various wireless services. The Second Further Notice explores ways in which licensees and spectrum lessees may enter into arrangements in which advanced technologies are opportunistically employed. The Second Further Notice and seeks to provide parties with greater certainty as to the types of opportunistic use arrangements that would be permitted while fitting into the framework of the Commission's current rules.

40. Our proposals in the Second Report and Order to implement certain advanced technologies necessarily implicates potential reporting, recordkeeping and compliance requirements for licensees and

[111] Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853 (1998).

[112] With the exception of the special emergency service, these services are governed by Subpart B of part 90 of the Commission's Rules, 47 C.F.R. §§ 90.15-90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service that is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed to highway maintenance service provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (EMRS) use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 C.F.R. §§ 90.15-90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 C.F.R. §§ 90.33-90.55.

[113] 47 C.F.R. § 1.1162.

[114] 5 U.S.C. § 601(5).

spectrum lessees, including: (1) retention of lease agreements; (2) reporting of spectrum leasing terms to the Commission; (3) licensee and lessee compliance with the Commission's technical and service rules; (4) licensee filings with the Commission on behalf of the lessee; (5) licensee verification of lessee compliance with Commission rules; (6) license supervision of a lessee's adherence to the Commission's rules and policies; and (7) the leasing of spectrum by entities designated as "small business" or "very small business" under the Commission's rules. Licensees and spectrum lessees may retain or hire outside professionals (e.g., legal and engineering staff) to draft lease arrangements, provide consulting services, maintain records and comply with applicable Commission rules. They also may employ existing or new employees to be responsible for reporting, recordkeeping, and other compliance requirements.

41. The Second Further Notice also explores what steps the Commission should take to further enhance secondary markets and increase the efficient use of spectrum and the availability to the public of innovative wireless services. The Second Further Notice does not propose any specific reporting, recordkeeping or compliance requirements in these matters. We are open to comment on what, if any, requirements we should impose if we adopt these proposals.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

42. The RFA requires and agency to describe any significant, specifically small business alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) and exemption from coverage of the rule, or any part thereof, for small entities."[115]

43. Regarding our inquiry on ways to facilitate further development of advanced technologies, *see* Second Further Notice, paras. 158-164, we do not anticipate any adverse impact on small entities. In fact, small (and large) entities should benefit from the reduction in transaction costs associated with leasing and the availability of other types of arrangements involving opportunistic use of licensed spectrum. We encourage comments on ways in which others may employ advanced technologies to opportunistically use licensed spectrum. Specifically, commenters should propose additional means to increase spectrum access and how that would fit into the rules and policies already established by the Commission. We do not believe that a revision of our rules would adversely impact small entities.

44. With regard to spectrum access through spectrum leasing arrangements, we seek comment on additional ways in which licensees and spectrum lessees may utilize advanced technologies, such as opportunistic devices, within the context of the Commission's spectrum leasing policies and rules. *See* Second Further Notice at para. 160. We do not anticipate that any rules we adopt in this area would adversely impact small entities. We believe that small and large entities will benefit from increased access to spectrum and the utilization of advanced technologies.

45. With regard to spectrum access through private commons, we seek comment on the potential for this approach to improve access as well as the regulatory distinctions that are necessary to make this an effective regulatory model. *See* Second Further Notice at para.161. We do not anticipate any adverse

[115] 5 U.S.C. §§ 603(c)(1)-(c)(4).

impact on small entities. We believe that both small and large entities that make use of "smart" or "opportunistic" technologies within their bands will benefit from the private commons option because this approach is designed to minimize some of the transaction costs associated with leasing or other market factors.

46. In addition, we seek comment on the technical parameters necessary to distinguish private commons from spectrum leasing arrangements or other arrangements. *See* Second Further Notice at para 162. We do not anticipate any adverse impact on small entities as a result of setting these parameters. We believe that setting these parameters will benefit both small and large entities by reducing regulatory uncertainty and encouraging spectrum use.

47. We also seek comment on the examples of private commons set forth in the Second Report and Order, as well as other types of private commons arrangements. *See* Second Further Notice at para. 163. As stated in the Second Report and Order, licensee or spectrum lessees establishing a private commons retains direct responsibility for compliance with the Commission's rules. We encourage comment on whether there are any additional policies or requirements that could help ensure compliance. We do not anticipate any adverse impact on small entities as a result of establishing further compliance guidelines. We believe that establishing further compliance guidelines all entities, including small entities, will benefit from the additional control over their spectrum.

48. Finally, we seek comment on the appropriate notification process for licensees or spectrum lessees that choose to offer a private commons. *See* Second Further Notice at para. 164. In the Second Report and Order we stated that a licensee or spectrum lessee managing the private commons must notify the Commission prior to permitting users to begin operating within the private commons. In the Second Further Notice, we propose to give the licensee or spectrum lessee the option of notifying the Commission directly or, in the alternative, providing a URL that posts the terms and conditions. We believe that this procedure will benefit all entities, including small entities, by taking an additional step toward increasing the efficient use of spectrum.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

49. None.

50. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Second Further Notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

SEPARATE STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking* (WT Docket No. 00-230)

Last May, the Commission took an ambitious and pro-competitive step by creating secondary markets, placing a greater emphasis on allowing parties to lease their spectrum rights to third parties better positioned to utilize the spectrum in the most efficient manner. Today's Order further enhances these secondary markets by removing unnecessary regulatory roadblocks.

By setting forth expedited approval procedures for leasing transactions that are in the public interest, consumers in rural areas and nationwide will receive the benefits of inexpensive wireless services more rapidly. In addition, by streamlining secondary market transactions we remove unnecessary regulatory barriers that may be hindering the development of currently under-utilized spectrum. Additionally, our new rules will allow potential entrants greater opportunities to obtain much needed spectrum and create an environment where they can tailor their services according to consumers' needs.

I fully support the changes adopted today because they will encourage dynamic spectrum leasing and further the Commission's goal of making available communications services to all Americans, in the most rapid and efficient manner.

SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Promoting Efficient Use of the Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, WT Docket No. 00-230

Last May, the Commission took an important and innovative step forward when we adopted basic rules to enable facilities-based providers of broadband and other communications services to lease wireless radio spectrum from licensees. Fostering such secondary markets for unused spectrum furthers our overall spectrum management responsibility by ensuring that spectrum is utilized efficiently. What's more, everyone benefits. Lessors are able to monetize unused portions of their spectrum grants. Lessees gain entry to previously unavailable markets. And, most importantly, consumers gain access to a greater range of wireless services – when and where they need them, including in rural areas.

With this Second Report and Order and Further Notice of Proposed Rulemaking, we mark our further progress in the development of flexible and fair secondary spectrum markets. An important part of today's order is to streamline our processing rules governing spectrum leases and other applications, and to provide increased clarity. Streamlining will enable greater speed-to-market for new technologies and services.

As I have stated before, an open, market-based regulatory approach is the best way to ensure the health of our industry and the robustness of its consumer offerings. Already, we have seen promising activity in the secondary markets for spectrum; in less than five months, at least 54 spectrum leasing applications have been filed. As the markets mature – and as we continue to maintain an open, market-based regulatory approach – I anticipate even greater reliance on our secondary-markets system. We will continue to examine ways to improve our rules governing secondary-spectrum markets through our second Further Notice of Proposed Rulemaking and I look forward to reviewing the record and taking additional steps to ensure the efficient use of the spectrum resource.

STATEMENT OF COMMISSIONER MICHAEL J. COPPS Dissenting

Re: Promoting Efficient Use of the Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, WT Docket No. 00-230

I continue to believe that a well-regulated secondary market in spectrum could lead to more efficient and intensive use of spectrum, and, with new technologies like software designed radio, could assist in bringing innovative spectrum uses to the public. Yet I run into the same problem here that I did last year with the earlier secondary markets item: while there may be policy justification for some of this, there is no legal justification. I believe approval of this item contravenes Section 310(d) of the Communications Act.

In Section 310(d), Congress makes clear that no "station license *or any rights thereunder* shall be transferred, assigned or disposed of in any manner . . . except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." But the Commission's ever-expanding secondary market's policies allow licensees to transfer a significant right – the right to control the spectrum on a day-to-day basis – without applying to the Commission and without the requirement of any Commission finding that such transfer serves the public interest.

My dissent to the original Secondary Markets Order includes my full legal argument on this point and I won't repeat it here. But because I believe that the Commission's overall scheme is disallowed by the Communications Act, I will dissent.

SEPARATE STATEMENT OF
COMMISSIONER KEVIN J. MARTIN

Re: Promoting Efficient Use of the Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, WT Docket No. 00-230

In May of last year, we took the first major steps to facilitate the development of secondary markets in spectrum. In that First Report and Order, we adopted a new regime for spectrum leases, allowing leases for which there is no change in *de facto* control to proceed without prior Commission approval and allowing other leases to use a streamlined approval process. We also adopted a streamlined approval process for transfers and assignments of licenses. Our goal was to legitimize fully market transactions in spectrum and to reduce associated transaction costs.

Today's item builds on that framework, further reducing transaction costs and regulatory delay. Among other things, we adopt even more streamlined approval procedures for spectrum leases, assignments, and transfers that do not raise public interest concerns. We also expand the reach of our rules to additional wireless radio services. I believe that these changes will encourage secondary markets to flourish.

Together, our secondary markets rules create new opportunities for licensees with under-utilized spectrum, to the benefit of consumers. A carrier with a business plan that calls for serving only the most densely populated portions of its service area now has every incentive to lease or transfer the balance of their spectrum to an entrepreneur. When cognitive radios and frequency-agile technologies are introduced to the mix, the opportunities multiply.

Additionally, our secondary markets rules offer the promise of greater wireless deployment in rural America. For example, a carrier with a nationwide license can, with reduced transaction costs, lease or sell spectrum to rural carriers to build networks in rural areas. Rural carriers thus have the potential to obtain spectrum and build networks suited to their particular geography, while at the same time enabling the national carrier to develop partners to fill out its footprint.

For all of these reasons, I am pleased to support this item.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART

Re: Promoting Efficient Use of the Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking*, WT Docket No. 00-230

Less than a year ago, the Commission adopted its First Report and Order establishing new policies and rules for secondary market spectrum leasing. In that Order, we achieved an important balance between a market that encourages and nurtures new technologies and spectrum use and one that does not diminish the Commission's ultimate control over the spectrum. Our decision today is an important follow-up to the steps we took last year and generally continues to maintain the balance that I believe is an essential element of good spectrum policy.

I support most of our Order because it acknowledges the importance of secondary markets and takes additional steps to further their development. The Order builds on our initial spectrum leasing framework for secondary markets emphasizing spectrum facilitation and innovation. It promotes our ultimate goal of a robust secondary market.

I strongly believe that secondary markets offer significant opportunities for effective and efficient spectrum use. Secondary markets hold a great deal of promise for the entire nation and particularly for rural areas. By removing burdensome regulatory obstacles, we get the spectrum into the hands of the people who are willing and ready to use it.

I also am pleased to see that the Commission has identified additional avenues for licensees and lessees to use the spectrum. Non-traditional approaches to spectrum facilitation, like the private commons, open the door to more users – which in turn leads to new services. As long as the Commission maintains the right balance, non-traditional approaches can potentially increase the development of secondary markets.

However, I am forced to dissent from a portion of this item because I fear the majority loses its balance in adopting so-called "immediate approval" procedures for certain license transfers and assignments. I am not convinced that there is such a problem with our streamlined transfer and assignment rules and procedures that would warrant a determination to forbear from requiring prior notification for certain transfers and assignments. Indeed, the current procedures with the 21-day waiting period have only been in place for six months. More importantly, though, I think our forbearance analysis falls short here. One of the Commission's bedrock obligations is spectrum management, and I am just not convinced that it is in the public interest for us to forbear from a prior review of all license assignments and transfer of control. The public interest prong of our forbearance analysis is a high bar, and I do not believe that we have developed anywhere near the record to meet it.

In the future, as we move forward to develop our policies for secondary markets we need to maintain the balance between Commission authority and market-based access opportunities. As long as the scales remain equal, I believe that secondary markets will only continue to thrive.