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

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

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: May 15, 2003 **Released:** October 6, 2003

Comment Date: December 5, 2003
Reply Comment Date: January 5, 2004

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

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I. INTRODUCTION

1. Facilitating the development of secondary markets in spectrum usage rights is of critical importance as the Commission moves forward in implementing spectrum policies that increase the public benefits from the use of radio spectrum. In 2000, in its *Policy Statement* and Notice of Proposed Rulemaking (*NPRM*), the Commission proposed a framework to facilitate the development of secondary markets in spectrum usage rights.[1] It enunciated several goals to guide its efforts to eliminate regulatory barriers that hindered access to spectrum and to promote more efficient use of spectrum. These included removing regulatory uncertainty and establishing clear policies and rules concerning "spectrum leasing" arrangements in our Wireless Radio Services.[2] More recently, the Commission has sought to place the development of its secondary market policies within the larger context of the Commission's overall spectrum policy. In 2002, the Spectrum Policy Task Force (Task Force) conducted the first-ever comprehensive and systematic review of spectrum policy at the Commission.[3] On November 15, 2002, the Task Force presented its findings and recommendations, including several regarding the Commission's regulatory framework for developing secondary markets consistent with an integrated, market-oriented approach as well as significant technological evolution.

2. By this Report and Order, we take action to remove unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights. The policies, rules, and procedures we adopt herein take 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 Service licensees. These flexible policies continue our evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country. Facilitating the development of these secondary markets enhances and complements several of the Commission's major policy initiatives and public interest objectives, including 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,[4] and enable development of additional and innovative services in rural areas.

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[1] *See generally* Principles for Promoting Efficient Use of Spectrum By Encouraging the Development of Secondary Markets, *Policy Statement*, 15 FCC Rcd 24178 (2000) (*Policy Statement*); Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, 15 FCC Rcd 24203 (2000) (*NPRM*). The *NPRM* elicited nearly 60 comments and reply comments. By "spectrum usage rights," we refer to the terms, conditions, and period of use conferred under a license. *See Policy Statement* at ¶ 22 (general discussion of spectrum usage rights).

[2] *See generally NPRM* at ¶¶ 13-65, 70-82; *Policy Statement* at ¶¶ 16, 20, 29, 33-34. In particular, the Commission proposed to remove regulatory uncertainty and clarify the respective responsibilities of licensees, spectrum lessees, and the Commission with regard to spectrum leasing arrangements, all in a manner consistent with our statutory mandates and public interest objectives. *See generally NPRM* at ¶¶ 3, 27-62, 70-82; *Policy Statement* at ¶¶ 1, 15, 24, 27.

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

[4] "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 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).

3. Specifically, we take several important steps to facilitate and streamline the ability of spectrum users to gain access to licensed spectrum by entering into spectrum leasing arrangements that are suited to the parties' respective needs. As a threshold matter, we revise the Commission's *de facto* control standard for interpreting Section 310(d) requirements in the context of spectrum leasing, replacing the outdated *Intermountain Microwave* standard[5] that has been in place since 1963 with a refined standard that better accords with our contemporary market-oriented spectrum policies, fast-changing consumer demands, and technological advances.[6] Commenters in this proceeding were unanimous in recommending that we adopt the Commission's tentative conclusion to replace this standard. The *Intermountain Microwave* standard, which focuses its *de facto* control analysis on whether licensees exercise close working control over all of the facilities using licensed spectrum, is not required by the Communications Act. Moreover, this standard impedes innovative and efficient leasing arrangements with third-party spectrum users that do not require Commission approval under the statute. The updated standard we adopt today for leasing refines the *de facto* control analysis, consistent with statutory requirements, by focusing instead on whether licensees continue to exercise effective working control over any spectrum they lease to others.

4. To provide the flexibility sought by commenters while continuing to fulfill our core public interest objectives, we implement two different options for spectrum leasing. One option enables licensees and "spectrum lessees"[7] to enter into leasing arrangements, without the need for Commission approval, so long as the licensee retains *de facto* control of the leased spectrum under the newly refined standard. The other option permits parties to enter into arrangements in which the licensee transfers *de facto* control to the lessee pursuant to streamlined approval procedures. These alternatives are designed to afford licensees and lessees significant flexibility to craft the type of leasing arrangement that best accords with their particular needs and the demands of the marketplace. At the same time, each option is structured to ensure that leasing occurs in a manner that is consistent with current statutory restrictions, as well as Commission policies relating to homeland security, competition, and other public interest concerns.

5. Consistent with our efforts to facilitate secondary markets in spectrum by providing for streamlined approval procedures for certain spectrum leasing arrangements that involve transfers of *de facto* control, we determine to implement similar streamlined Commission approval procedures for all license assignments (whether a full or partial assignment of the license) and transfers of control in the same Wireless Radio Services covered by our newly adopted spectrum leasing policies.

6. In addition to the significant steps that we take in this Report and Order, we also adopt a Further Notice of Proposed Rulemaking (Further Notice) that proposes several actions the Commission could take to further enhance spectrum access and efficient spectrum use on a wider scale. Building on the legal framework we establish today, we seek comment on how to encourage the development of information and clearinghouse mechanisms that will facilitate secondary market transactions between licensees and new users in need of access to spectrum. We also seek comment on further streamlining of application processing for leasing, transfers, and assignments, expanding leasing to additional services not covered by today's order, and modifying or eliminating other regulatory barriers impeding secondary market transactions.

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[5] *See Intermountain Microwave*, 12 FCC 2d 559, 560 (1963).

[6] The Commission is not revising or limiting the *Intermountain Microwave* standard in any other regulatory context at this time, but we inquire about its continued use in other areas in the Further Notice of Proposed Rulemaking.

[7] We use the term "spectrum lessees" generally to refer to those entities that lease spectrum usage rights licensed by the Commission to other entities.

7. The Commission's objectives in "managing" spectrum usage have significantly evolved in recent years in response to statutory, technological, and marketplace changes. We are increasingly seeking to ensure that spectrum is put to its highest valued use, which generally can be most efficiently determined by operation of market forces. In pursuit of that goal, the Commission has increasingly granted flexibility to its licensees to enable them to put spectrum to its highest and best uses, consistent with preventing unacceptable interference. Innovative technological changes and substantially increased demand have reinforced the need for the Commission to revisit its traditional approaches. It is in this vein that the Report and Order and the Further Notice posit an end goal of an overall spectrum policy under which licensees have much greater ability and incentive to make unused spectrum – whether by frequency bandwidth, geographic area, or time (or any combination thereof) – available to third parties. These parties may be current spectrum operators requiring additional spectrum to meet customer needs over either the short- or long-term, new entrants seeking to serve a limited area or narrowly targeted end-user market, small businesses trying to deliver services in rural communities, diverse entities unable or unwilling to participate in spectrum auctions or that otherwise do not have a license through which they can access spectrum to meet consumer needs, or innovative spectrum users seeking to provide services by means of opportunistic spectrum devices.

II. EXECUTIVE SUMMARY

A. Report and Order

8. In this Report and Order, we take several steps to facilitate the ability of most Wireless Radio Services licensees that hold "exclusive use" licenses[8] to lease spectrum usage rights to third parties seeking access to spectrum.

9. *General overview of spectrum leasing policies*. We make clear that, subject to the conditions set forth in this Report and Order, licensees in the Wireless Radio Services covered herein may lease some or all of their spectrum usage rights to third parties, for any amount of spectrum and in any geographic area encompassed by the license, and for any period of time within the term of the license.[9] In granting spectrum lessees and licensees the greatest amount of flexibility within the bounds of current law, we first replace the existing standard for assessing *de facto* control with an updated standard for spectrum leasing that better accommodates recent evolutionary developments in the Commission's spectrum policies, technological advances, and marketplace trends, consistent with statutory requirements. We then provide parties to spectrum lease transactions two different approaches based on the scope of the rights and responsibilities to be assumed by the lessee when leasing spectrum. Under the first leasing option – "spectrum manager" leasing – we enable parties to enter into spectrum leasing arrangements without the need to obtain prior Commission approval so long as the licensee retains both *de jure* control[10] of the license and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard for leasing. Under the second option – "*de facto* transfer" leasing – we provide parties additional flexibility in structuring spectrum leasing arrangements by permitting them, pursuant to a streamlined approval process, to enter into leasing arrangements whereby licensees retain *de jure*

[8] We adopt spectrum leasing policies for all the Wireless Radio Services that the Commission specifically proposed to affect in the *NPRM*. Section IV.A.3, *infra*, identifies each of the covered services for which leasing is permitted pursuant to this Report and Order.

[9] All covered licenses, whether their authorized operation is limited to private or non-commercial use, or not, will be permitted to engage in spectrum leasing under the terms set forth in this Report and Order.

[10] *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).

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 spectrum lessees.

10. *The updated de facto control standard for spectrum leasing.* In order to facilitate spectrum leasing arrangements for which we find no public policy reason to require prior Commission approval, we replace our prior standard for interpreting *de facto* control under Section 310(d), as set forth in the 1963 *Intermountain Microwave* decision, with an updated standard that has been refined to reflect more recent evolutionary developments in the Commission's spectrum policies, technological advances, and marketplace trends.[11] This new standard is generally based on our "band manager" model that the Commission first employed in 2000 in the 700 MHz Guard Band[12] and recently extended (in a modified form) to the 1390-1392 MHz, 1670-1675 MHz, and 2385-2390 MHz bands and the paired 1392-1395 and 1432-1435 MHz bands.[13] The *Intermountain Microwave* standard imposes significant constraints on the development of efficient spectrum use through secondary markets because it is essentially a "facilities-based" standard that requires licensees to exercise close working control over many different aspects associated with the operation of all of the station facilities using the licensed spectrum. This standard has become increasingly out of step with the flexible, market-based spectrum policies that Congress and the Commission have developed in recent years, and it imposes unnecessary barriers to efficient and effective access to spectrum resources.

11. The refined standard that we adopt provides additional flexibility to licensees and potential spectrum lessees in that it enables these parties to enter into leasing transactions that are not deemed transfers of *de facto* control under Section 310(d) so long as licensees continue to exercise effective working control over the use of the spectrum they lease. As set forth herein, licensees may lease spectrum usage rights to spectrum lessees, without the need for prior Commission approval, to the extent that the licensees (1) maintain an active, ongoing oversight role to ensure that the lessee complies with all applicable Commission policies and rules, (2) retain responsibility for all interactions with the Commission required under the license related to the use of the leased spectrum (including notification requirements), and (3) remain primarily and directly accountable to the Commission for any lessee violation of these policies and rules.

12. *"Spectrum manager" leasing.* Under the "spectrum manager" leasing option, licensees and spectrum lessees may enter into spectrum leasing arrangements – for any amount of spectrum, in any geographic area, and for any period of time within the scope and term of the license – without the need for prior Commission approval, provided that licensees retain *de facto* control, as newly defined, over the leased spectrum. Under this leasing option, the licensee acts as a "spectrum manager" with regard to the spectrum rights it chooses to lease.[14]

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[11] As discussed more fully below, we are only replacing the *Intermountain Microwave* standard in the context of spectrum leasing. *See* Section IV.A.2.b, *infra*.

[12] *See* Part 27, Subpart G (Guard Band Managers); *see generally* Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000) (*Guard Band Manager Order*).

[13] *See* Amendments to Parts 1, 2, 27 and 90 of the Commission's Rules to License Services in the 216-222 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, *Report and Order*, 17 FCC Rcd 9980 (2002) (*27 MHz Report and Order*), *Erratum*, 17 FCC Rcd 17365 (2002), *modified on other grounds*, *Memorandum Opinion and Order*, FCC 03-204 (rel. August 19, 2003).

[14] We use the term "spectrum manager" here to distinguish it from a pure "band manager" approach that was adopted in the Part 27 Guard Band Manager Services. We discuss this concept in further detail in Section IV.A.5.a, *infra*.

The requirements of the "spectrum manager" leasing option include –

- The licensee must retain both *de jure* control of the license and *de facto* control of the leased spectrum. As noted above, exercising *de facto* control requires the licensee to maintain an active, ongoing oversight role to ensure that the spectrum lessee complies with the Communications Act and all applicable Commission policies and rules. The licensee must also engage in all interactions (including filings) with the Commission that are directly related to the use or uses of the spectrum, whether by the licensee or the lessee. (The licensee may employ agents in helping to carry out these responsibilities, but remains fully responsible for their performance.) The licensee will be held directly and primarily responsible for both maintaining its eligibility as a licensee and ensuring that each of its spectrum lessees complies with the relevant provisions of the Act and all applicable Commission policies and rules.

- The technical and interference-related services rules applicable to the particular spectrum-based service or frequency band(s) will also apply to the spectrum lessee as if it were a licensee in the service or band(s). In addition, as a general policy matter, the eligibility and qualification rules and the use restrictions applicable to the licensee in a particular service will be applied to spectrum lessees. For example, to address any potential national security, law enforcement, foreign policy, or trade policy concerns, we will require spectrum lessees to certify to foreign ownership criteria analogous to those applicable to Commission licensees. Further, leases associated with "designated entity"[15] and "entrepreneur"[16] licenses will be subject to applicable attribution and affiliation rules as well as our leasing rules, with the attribution and affiliation rules controlling in the event of conflict.

- In enforcing the Act and its policies and rules, the Commission will look primarily to the licensee to exercise its licensee responsibilities and ensure lessee compliance with the particular technical and service rules applicable to the particular spectrum-based service or frequency band(s). To the extent that a licensee fails to ensure such compliance, it potentially will be subject to enforcement action, such as admonishments, monetary forfeitures, and/or license revocation, as appropriate. Although spectrum lessee accountability is generally secondary under this option, the Commission will also hold spectrum lessees independently accountable for complying with the Act and the Commission's policies and rules, potentially subjecting them to enforcement action, such as admonishments, monetary forfeitures, and other administrative sanctions. However, to the extent a lessee provides a communications service over the leased spectrum, the regulatory treatment of the lessee's provision of such service will depend on the nature of the service, and the licensee would not necessarily be responsible for the lessee's compliance with the

[15] Section 309(j)(3) of the Communications Act directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by women and members of minority groups (collectively, "designated entities"). 47 U.S.C. §309(j)(3). The Commission's current designated entity policies make bidding credits available for small businesses. *See* 47 C.F.R. § 1.2110.

[16] The Commission has reserved certain portions of the C and F block broadband PCS spectrum as "set-aside" licenses for "entrepreneurs" in which eligibility is restricted to those applicants that, together with their affiliates and persons or entities that hold attributable interests in the applicant and their affiliates, have had gross revenues of less than $125 million in each of the last two years and have total assets of less than $500 million. *See* 47 C.F.R. §§ 1.2110, 24.709(a).

regulatory responsibilities arising out of the provision of such services (*e.g.*, lessees providing common carriage will be primarily responsible for compliance with applicable Title II requirements).

- The licensee will be required to provide notification and other relevant information and certification to the Commission with regard to each spectrum lease into which it has entered. Such notice must be provided within 14 days of the entering into the lease, and at least 21 days in advance of operation of facilities by the lessee. (For leases of up to one year, the licensee must provide notice at least 10 days in advance of operation.) In particular, licensees must submit information on the spectrum lessee, the specific spectrum leased (amount, frequency, geographic area of operation), and term of the lease. In addition, the lessee will be required to indicate whether it holds interests in other spectrum (through licenses or leases) in the geographic areas covered by the lease. The submission will be placed on an informational public notice on a weekly basis and publicly available in our Universal Licensing System (ULS) database.

- Although prior Commission approval is not required under this leasing option, the Commission retains the right to investigate and obtain additional information regarding particular leasing arrangements, post-notification, and to terminate such arrangements to the extent it determines that an arrangement raises significant public interest concerns (*e.g.*, an arrangement constitutes an unauthorized transfer of *de facto* control under the new leasing standard or raises foreign ownership or competition concerns) or violates any notification certifications.

13. *"De facto transfer" leasing.* Under this option, licensees and spectrum lessees may enter into spectrum leasing arrangements – for any amount of spectrum, in any geographic area, and for any period of time within the scope and term of the license – in which *de facto* control of the leased spectrum is transferred to the spectrum lessee(s) for the duration of the lease pursuant to streamlined procedures. For ease of reference, this option is termed the "*de facto* transfer" leasing option. Policies and procedures under this option will differ somewhat depending on whether the parties enter into "long-term" arrangements (leases with individual or combined terms of longer than 360 days) or "short-term" arrangements (leases of 360 days or less).

The requirements of the "long-term" *de facto* transfer leasing option include –

- The spectrum lessee, rather than the licensee, exercises *de facto* control of the leased spectrum. In addition to accepting the rights conveyed from the licensee pursuant to the terms of the lease, the lessee must exercise all associated responsibilities inherent in such control. The licensee retains *de jure*, or legal, control of the leased spectrum and may impose other terms and conditions on the lessee, as agreed to by the parties. The lessee assumes general responsibility for interacting with the Commission with respect to the leased spectrum (including making associated filings). The spectrum lessee will be held directly and primarily responsible for ensuring that it complies with the Communications Act and all applicable Commission policies and rules.

- All of the particular service rules and policies applicable to the licensee under its license authorization – both interference and non-interference related – will apply to the lessee. Accordingly, the eligibility rules (*e.g.*, foreign ownership restrictions, designated entity/entrepreneur requirements), qualification rules, and use restrictions applicable to licensees will apply to lessees under this option.

- In enforcing the Act and its policies and rules, the Commission will look primarily to the spectrum lessee for compliance. The lessee will be subject to enforcement action, including admonishments, monetary forfeitures, and/or lease revocation, as appropriate. Although the licensee will retain some residual responsibility for ensuring compliance, this will generally be limited to instances in which it has knowledge or should have knowledge about a lessee's ongoing failure to comply, or instances that otherwise constitute a violation of the terms and conditions of the lease agreement. The Commission will not be involved in any disputes between licensees and their lessees to the extent that such disputes are not directly related to compliance with the Communications Act and applicable Commission policies and rules. We would expect that any violations of the terms and conditions of the lease agreement that are also directly related to compliance with the Act or rules would be handled in the first instance by the licensee as a private contractual enforcement matter and that the Commission would independently determine if additional regulatory enforcements steps would be warranted.

- A lease application must be filed with the Commission and prior Commission approval is required. If substantially complete, the application will be placed promptly on public notice. Petitions to deny filed in accordance with Section 309(d) of the Communications Act will be due within 14 days. Within 21 days of the public notice, the Wireless Telecommunications Bureau will either affirmatively consent to the transfer or "offline" the application to the extent that public interest concerns are raised (*e.g.*, the lessee's qualifications, competition concerns) that require further examination.

The requirements of the "short-term" *de facto* transfer leasing option include –

- As under the long-term leasing arrangements described above, the spectrum lessee exercises *de facto* control of the leased spectrum, and must exercise all associated responsibilities inherent in such control. The spectrum lessee will be held directly and primarily responsible for compliance with the Communications Act and all applicable Commission policies and rules.

- Due to the short-term nature of these leasing arrangements, we provide some additional flexibility with regard to the particular service rules and policies applicable to the spectrum lessee. While the interference-related rules will apply to the lessee, we will not require that certain service rules applicable to the licensee – including certain use restrictions, designated entity and entrepreneur policies, and policies related to spectrum aggregation – be applied to short-term lessees.

- Short-term leasing arrangements that meet the specified conditions will be approved within 10 days pursuant to our special temporary authority (STA) procedures.

14. *Collection of information on spectrum leasing.* By virtue of the notification and filing requirements that we establish for leasing in this Report and Order, the Commission will be collecting important information on lessees and data on leases in ULS that should prove useful to entities seeking information on leasing, as well as our own enforcement purposes. At this time, we decide not to establish any additional specialized database or spectrum registry associated with leasing. We conclude that development of expanded information resources, beyond those required for our licensing and enforcement processes, may be best suited to private sector entities. Such entities, as well as the general public, will have access to our current licensing and spectrum-related databases. In the Further Notice, we explore whether the Commission should take further action to promote information access that would in turn aid in enhancing the efficiency and effectiveness of a secondary market in spectrum usage rights and licenses.

15. *Streamlined approval of license assignments and transfers of control.* We also adopt streamlined approval procedures for full license assignments and transfers of control. These procedures are similar to those adopted for long-term *de facto* transfer leasing arrangements. Substantially complete applications will be placed promptly on public notice. Petitions to deny filed in accordance with Section 309(d) of the Communications Act and other comments will be due within 14 days. Within 21 days of the public notice, the Wireless Telecommunications Bureau will either affirmatively consent to the transfer or "offline" the application to the extent that public interest concerns are raised (*e.g.*, the lessee's qualifications, competition concerns) that require further examination.

16. *Satellite Services.* Based on the record before us, we decline to revise the rules governing fixed and mobile satellite services in this Report and Order. We find that the current market for transponder leasing and access to unused spectrum allocated to satellite services through Special Temporary Authority appears to be working well. In the Further Notice, however, we explore this issue further and seek comment on improving access to unused or underutilized satellite spectrum through secondary markets.

B. Further Notice of Proposed Rulemaking

17. In light of the goals adopted in the *Policy Statement*, the recommendations for policy reform made in the *Spectrum Policy Task Force Report*, and the actions taken in the Report and Order, the Further Notice undertakes an examination of critical issues affecting our long term vision for enhancing opportunities for spectrum access, efficiency, and innovation. The Further Notice also considers options for expanding upon the steps taken in the current Report and Order as well as proposals for lifting restrictions on the effective functioning of primary markets.

18. Specifically, the Further Notice seeks comment on issues fundamental to the development of advanced secondary markets in spectrum usage rights, including:

- What additional steps the Commission should take to encourage the development of mechanisms for providing necessary spectrum information to licensees with underutilized spectrum and those in need of access to spectrum; what type of information interested parties may need; the potential for "market-maker" intermediaries to develop; and, the nature of the Commission's role in regulating such intermediaries or otherwise facilitating access to spectrum information.

- What secondary market mechanisms are necessary to facilitate access to spectrum by new technologies; whether there will be need for a clearinghouse mechanism to provide real-time spectrum information for "opportunistic" devices; and, what the Commission's role should be in the establishment or regulation of such a clearinghouse.

19. The Further Notice also considers a number of other potential actions to supplement and expand the action taken in the Report and Order, including:

- Forbearing from requiring prior Commission approval for certain categories of spectrum leases that involve a transfer of *de facto* control to the lessee.

- Possibly forbearing from requiring prior Commission approval of certain categories of transfers of control and assignments of licenses that do not raise public interest issues requiring Commission analysis.

- Extending spectrum leasing policies and procedures to services not within the scope of the Report and Order, including public safety services, and other wireless services with shared or exclusive use licenses.

- Implementing the new *de facto* control standard established by the Report and Order for spectrum leasing in the context of other regulatory policies and procedures that require a determination of *de facto* control.

- Assessing the impact of secondary market policies on the Commission's designated entity rules.

20. These are critical issues as the Commission moves forward toward more market-oriented spectrum policies. We invite extensive participation by all interested parties in the Further Notice part of this proceeding, and we look forward to receiving detailed comments with innovative suggestions and careful statutory analysis, where required.

III. BACKGROUND

A. *Policy Statement* and *NPRM* on Secondary Markets

21. In November 2000, after a public forum on secondary markets in radio spectrum usage rights,[17] the Commission concurrently adopted the *Policy Statement* and the *NPRM*. The *Policy Statement* enunciated general goals and principles for the further development of secondary markets in spectrum usage rights, while the *NPRM* proposed concrete steps the Commission might take to implement that policy with respect to Wireless Radio Services and Satellite Services.

22. In the *Policy Statement*, the Commission declared that its general goal was "to significantly expand and enhance the existing secondary markets for spectrum usage rights to permit spectrum to flow more freely among users and uses in response to economic demand, to the extent consistent with our statutory mandates and public interest objectives."[18] Among other things, the Commission was concerned that existing licensees were not fully utilizing the entire spectrum assigned to them. As a result, a substantial amount of spectrum is unnecessarily lying fallow, especially in rural areas, while at the same time there is a substantial unmet demand for various applications existing in areas facing spectrum constraints.[19] It identified several possible reasons that existing licensees might be reluctant to lease unused portions of their assigned spectrum to third parties, for either short or long periods. These included: regulatory uncertainty as to whether such leasing arrangements might be prohibited by Section 310(d) of the Communications Act; the lack of established mechanisms to offer spectrum usage rights for limited periods of time; and, the administrative requirements and transaction costs associated with making spectrum available to others.[20] In particular, the Commission noted that current policies for interpreting *de facto* control under Section 310(d), as set forth in the *Intermountain Microwave* standard, posed significant impediments to parties seeking to enter into spectrum leasing arrangements, and queried whether a more flexible standard should be adopted to facilitate spectrum leasing.[21] In sum, the

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[17] *See* "FCC Announces Public Forum on Secondary Markets in Radio Spectrum," *Public Notice*, DA-00-862 (rel. Apr. 13, 2000). The public forum was held on May 31, 2000. *See* Secondary Markets Public Forum Transcript (May 31, 2000) (*Public Forum Transcript*).

[18] *Policy Statement* at ¶ 1.

[19] *Id.* at ¶ 11.

[20] *Id.* at ¶ 15.

[21] *Id.* at ¶¶ 28-29.

Commission sought to identify ways to encourage existing licensees to lease their unused spectrum usage rights to other users and to enable licensees more readily to transfer spectrum usage rights to different users and uses pursuant to streamlined processes, with a minimum of administrative review and delay, consistent with its overall statutory authority and responsibilities.[22]

23. In the *NPRM*, the Commission proposed to take several steps to remove unnecessary regulatory barriers and to clarify and revise Commission policies and rules to facilitate the ability of Wireless Radio Services licensees holding "exclusive use" rights to lease their spectrum usage rights to third parties.[23] As a general matter, the *NPRM* proposed to ensure that these licensees could enter into a wide variety of spectrum leasing arrangements with third parties, from short to long term, in small or large amounts, so as to make spectrum more easily available to additional spectrum users and for a range of uses, and to do so without the need to permanently transfer their licenses to those users.[24] It sought guidance on the types of leasing arrangements desired by interested parties, and on the respective responsibilities of licensee, spectrum lessee, and the Commission in the context of spectrum leasing.[25] Particular focus was placed on Section 310(d) requirements relating to transfers of *de facto* control, and whether the *Intermountain Microwave* standard for interpreting those requirements should be replaced. Noting that this standard impeded a variety of leasing arrangements that enabled additional users and more efficient use of spectrum, that the factors it set forth were not statutorily required, and that it was not sufficiently flexible in light of significant licensing and technological changes that had evolved in recent years, the Commission tentatively concluded to replace the *Intermountain Microwave* standard with a *de facto* control standard that permitted certain leasing arrangements to proceed without the need for prior Commission approval.[26] The Commission also requested comment on whether there were alternative approaches that would facilitate the kinds of leasing arrangements that parties sought, including those that might involve *de facto* transfers of control that could be approved pursuant to streamlined processes. Finally, the Commission sought comment on whether, with regard to spectrum leasing, it should forbear from various Section 310(d) requirements.[27]

24. In addition to proposing the wider use of spectrum leasing arrangements in Wireless Radio Services, the Commission sought comment in the *NPRM* on possible ways it might improve secondary markets for Satellite Services.[28]

25. Thirty-seven parties commented on the proposals set forth in the *NPRM*, and twenty-one filed reply comments.[29] Of these commenters, the vast majority addressed ways in which the Commission could promote secondary markets in spectrum usage rights in our Wireless Radio Services.

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[22] *Id.* at ¶¶ 1, 16, 20, 24, 26, 27, 32, 34. *See also* 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*) (discussion of ways to expand secondary markets for spectrum).

[23] *See generally NPRM* at ¶¶ 1, 13 & n. 19, 24-25 & n. 40.

[24] *See generally id.* at ¶¶ 8, 18-21.

[25] *See generally id.* at ¶¶ 18-34.

[26] *See id.* at ¶¶ 70-80.

[27] *See id.* at ¶¶ 81-82.

[28] *See id.* at ¶¶ 66-68.

[29] Appendix A includes a list of parties filing comments and reply comments, as well as the short citation to such filings used in this Report and Order.

These parties included commercial carriers (including national carriers and rural carriers)[30] and related associations,[31] private carriers (including utility companies) and related associations,[32] equipment providers,[33] organizations representing small business concerns,[34] economists,[35] and entities interested in brokering the trading of spectrum usage rights.[36] The Commission also received a few comments that pertained to improving secondary markets in the Satellite Services.[37]

B. *Spectrum Policy Task Force Report*

26. In 2002, the Commission's staff-level Spectrum Policy Task Force undertook a comprehensive review of spectrum policy at the Commission.[38] In beginning the reexamination of 90 years of spectrum policy, the Task Force sought to assist the Commission in developing policies that are more responsive to the consumer-driven evolution of new wireless technologies, devices, and services.[39] Significant for this proceeding, the findings and recommendations submitted to the Commission in November 2002 in the *Spectrum Policy Task Force Report* addressed many issues relevant to the promotion of secondary markets in spectrum usage rights.

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[30] *See generally* Alaska Native Wireless Comments; AT&T Wireless Comments and Reply Comments; Blooston Rural Carriers Comments and Reply Comments; Cingular Wireless Comments and Reply Comments; Cook Inlet Comments; Leap Wireless Reply Comments; Long Lines Comments; Maritel Comments; Nextel Comments and Reply Comments; Pacific Wireless Comments; Securicor Comments; Sprint Comments; TeleCorp Reply Comments; Teligent Comments and Reply Comments; Verizon Wireless Comments; Winstar Comments and Reply Comments.

[31] *See generally* AMTA Comments; CTIA Comments; NTCA Comments; OPASTCO Comments; RTG Comments and Reply Comments; Rural Cellular Association Comments.

[32] *See generally* Cinergy Comments; Entergy Comments; ITA Reply Comments; Kansas City Power Comments; LMCC Comments; Charles Meehan Comments; MRFAC Reply Comments.

[33] *See generally* Direct Wireless Comments; HYPRES Comments; PowerLoom Reply Comments; Shared Spectrum Comments; SDR Forum Comments and Reply Comments; UTStarcom Comments and Reply Comments.

[34] *See generally* U.S. Small Business Administration Comments.

[35] *See generally* 37 Concerned Economists Comments.

[36] *See generally* Dynegy Reply Comments; El Paso Global Comments and Reply Comments; Enron Comments and Reply Comments; Macquarie Bank Reply Comments.

[37] *See generally* New Skies Reply Comments; HBO Comments; PanAmSat and GE Americom Reply Comments; SIA Comments and Reply Comments; Teledesic Comments.

[38] *See generally Spectrum Policy Task Force Report.* The Spectrum Policy Task Force was created in the spring of 2002 to assist the Commission in identifying and evaluating changes in spectrum policy that would increase the public benefits derived from the use of radio spectrum. The Task Force considered over 200 written comments from numerous types of entities, including manufacturers, wireless internet service providers, both licensed and unlicensed wireless spectrum operators, satellite operators, broadcast operators, and consumer groups. It also received several informal and formal comments from representatives of the licensed and unlicensed wireless industry, the satellite industry, the broadcast industry, the safety community, the government, and consumer groups, as well as economists, engineers, academics, consultants, telecommunications services brokers, and journalists. *Id.* at 2.

[39] *Id.* at 1.

27. The *Spectrum Policy Task Force Report* provides additional support for reform of our spectrum-related policies, including our policies with respect to secondary markets. It described the explosive demand for spectrum-based services and devices, noting that advances in technologies also have significantly increased the diversity of service offerings and contributed to increased consumer demand.[40] The Task Force reported on how technological advances were enabling changes in spectrum policy and offered many options and recommendations for dealing with current and future spectrum policy challenges. For instance, smart technologies, such as software-defined radios, may allow operators to take advantage of the time dimension of radio spectrum – that is, when particular frequencies are temporarily not being used – which is not taken into account by current Commission policies.[41]

28. Significantly, as in the *NPRM* and *Policy Statement*, the *Spectrum Policy Task Force Report* discussed the importance of policies to facilitate the ability of potential spectrum users to gain access to spectrum and pointed out that significant spectrum capacity remains untapped. Given that restrictions based on Commission policies have hindered licensees from making spectrum available to others, even in cases where a market existed to do so, the Task Force observed that granting licensees additional flexibility to make their licensed bands available to others would increase access to spectrum and minimize spectrum scarcity.[42] Accordingly, the Task Force recommended that the Commission take immediate steps to change its current spectrum policies, which reflect an environment composed of a limited number of types of operations, to reflect the increasingly dynamic and innovative nature of spectrum use. In particular, consistent with the thrust of the *Policy Statement* and *NPRM*, it recommended that the Commission strive, wherever possible, to eliminate regulatory barriers to increased spectrum access by potential users.[43]

29. *Key elements of a new spectrum policy.* The *Spectrum Policy Task Force Report* outlines a broad policy framework for moving forward, identifying several key elements to an improved spectrum policy. The key elements identified by the Task Force include: allowing maximum feasible flexibility of spectrum use by both licensed and unlicensed users; clearly and exhaustively defining spectrum users' rights and responsibilities; accounting for all potential dimensions of spectrum usage (frequency, power, space, and time); promoting efficient spectrum use; providing for continued technological advances; and, enabling efficient and reliable enforcement mechanisms to ensure regulatory compliance by all spectrum users.[44] The Task Force also recommended that the best way to implement policies that achieve these policy goals would be for the Commission to transition, to the greatest extent possible, from a "command-and-control" regulatory model to more flexible "exclusive use" and "commons" models.[45]

30. *Secondary markets and other approaches to expand access to spectrum.* The *Spectrum Policy Task Force Report* discussed in some detail a framework for developing the Commission's secondary market policies, possibly in conjunction with other policies that could expand users' access to spectrum.[46] Specifically, the Task Force observed that there are two alternative – and possibly complementary – approaches to facilitating access to spectrum. The first approach relies on secondary

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[40] *Id.* at 12-13.

[41] *Id.* at 13-14.

[42] *Id.* at 14-15.

[43] *Id.* at 3-4.

[44] *Id.* at 4, 16-23.

[45] *Id.* at 5, 35-45.

[46] *See generally id.* at 55-60.

market arrangements involving the leasing of spectrum usage rights, with "exclusive use" licensees holding the rights to determine which potential entrants could have access to the spectrum and under what conditions. The second approach allows open access to licensed spectrum for non-interfering devices through expanded use of government-defined "easements," which would draw largely on the "commons" model.[47]

31. In its recommendations to the Commission, the Task Force strongly endorsed implementing the proposed reforms that are the subject of the instant proceeding, namely giving Wireless Radio Services licensees greater flexibility to authorize others to use their licensed spectrum.[48] The Task Force further noted that recent developments in new technology, such as software-defined radio, frequency-agile radio, and spread spectrum, have heightened the importance of the access issue by making multiple dynamic and "opportunistic" uses of spectrum possible.[49] With regard to spectrum bands that have already been licensed, the Task Force recommended that the Commission look primarily to the use of secondary markets to facilitate licensees' ability to provide access to users, including users of "opportunistic" devices, through the leasing of spectrum.[50]

IV. REPORT AND ORDER

A. Spectrum Leasing Arrangements in Wireless Radio Services

32. In this Report and Order, we take important first steps in establishing policies and rules to enable better functioning secondary markets in our Wireless Radio Services by facilitating the ability of parties to enter into a wide variety of spectrum leasing arrangements that meet their business and spectrum needs, and, in turn, the needs of consumers.[51] These actions, drawn from the proposals set forth in the *NPRM* and the record before us, will serve the public interest for a number of reasons. Facilitating spectrum leasing arrangements permits many additional spectrum users to gain ready access to spectrum, and thus enables provision of new and diverse services and applications to help meet the ever-changing needs of the public. By clearly defining the respective rights and responsibilities of licensees and spectrum lessees, we are removing unnecessary regulatory barriers to spectrum leasing, alleviating spectrum constraints, and providing new opportunities to put underutilized or fallow spectrum to efficient use, consistent with statutory requirements.[52]

33. In the following sections, we first review the public interest benefits of broadly defined spectrum leasing activities that this Report and Order will facilitate. We then discuss our decision to replace the *Intermountain Microwave* standard for assessing *de facto* control under Section 310(d) with a new, more flexible standard in the context of spectrum leasing. Under this new control standard, licensees will be able to enter into spectrum leasing arrangements with third parties without the need for

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[47] *See generally id.* at 55-58.

[48] *Id.* at 55-56.

[49] *See generally id.* at 56-57.

[50] *Id.* at 56. The Task Force also recommended that the Commission might consider the limited use of easements at some time in the future.

[51] *See NPRM* at ¶¶ 24-25. The particular Wireless Radio Services affected by this Report and Order are discussed in Section IV.A.3, *infra*.

[52] *See generally NPRM* at ¶¶ 1-4, 11-14, 18-20 (articulating the Commission's particular goals relating to the instant proceeding); *see also Policy Statement* at ¶¶ 1-2 (articulating the Commission's general goals relating to secondary markets in spectrum usage rights).

Commission approval, so long as the licensees retain *de facto* control over the leased spectrum, pursuant to the new standard, and remain responsible for overseeing their lessees' compliance with Commission policies and rules. We next discuss an alternative model for spectrum leasing responsive to comments in this proceeding. Under this model, we also will allow spectrum leasing arrangements in which licensees transfer *de facto* control of spectrum to lessees for a defined term pursuant to streamlined approval procedures.

1. Facilitating the Use of Spectrum Leasing Will Further the Public Interest

a. Background

34. In the *NPRM*, the Commission proposed to revise and clarify Commission policies and rules to facilitate the ability of Wireless Radio Services licensees holding "exclusive use" rights to lease their spectrum usage rights to third parties.[53] The Commission proposed to permit these licensees to enter into a wide variety of long- or short-term spectrum leasing arrangements with third parties.[54] As proposed in the *NPRM*, these arrangements potentially could involve the leasing of a licensee's spectrum usage rights for any period of time during the term of the license, in any geographic or service area, and in any quantity of spectrum.[55] The Commission also proposed that spectrum leasing arrangements be renewable to the extent that the licensee obtained a renewal of its authorization.[56] It also inquired about the possible role of "band manager" licensing as a vehicle for facilitating the leasing of spectrum.[57] Finally, the Commission requested comment on whether the concept of spectrum leasing set forth in the *NPRM* was appropriately defined, or whether it should be defined differently, more narrowly, or more broadly.[58]

35. The Commission endeavored in the *NPRM* to develop and propose spectrum leasing policies that afforded licensees and spectrum lessees sufficient flexibility to enter into leasing arrangements that would meet their respective business needs and enable more efficient use of underutilized spectrum.[59] At the same time, it sought to ensure that the public interest would be served and the Commission would maintain its fundamental responsibilities for spectrum policy and for compliance with its rules and policies.[60] In pursuing these goals, the Commission proposed to establish a framework regarding the

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[53] *See generally NPRM* at ¶¶ 13-14 & n. 19, 24-25 & n. 40. As stated in the *NPRM*, the general goal of this proceeding is "to clarify Commission policies and rules, and revise them where necessary, to establish that wireless licensees have the flexibility to lease all or portions of their assigned spectrum in a manner, and to the extent, that it is consistent with the public interest and the requirements of the Communications Act." *Id.* at ¶ 14.

[54] *See generally id.* at ¶¶ 14, 18-23.

[55] *See generally id.* at ¶¶ 14, 20-21, 23, 25.

[56] *Id.* at ¶ 62.

[57] *See generally id.* at ¶ 22; *see also id*. at ¶ 17. At the time the *NPRM* was adopted in 2000, the Commission had adopted a "band manager" licensing approach in only one service, the 700 MHz Guard Band Manager Service. *See* Part 27, Subpart G (Guard Band Managers); *see generally* Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *Second Report and Order*, 15 FCC Rcd 5299 (2000) (*Guard Band Manager Order*). In 2002, the Commission adopted another variant of band manager licensing for the paired 1392-1395 and 1432-1435 MHz bands, and the unpaired 1390-1392 MHz, 1670-1675 MHz, and 2385-2390 MHz bands. *See 27 MHz Report and Order*, 17 FCC Rcd 9980.

[58] *NPRM* at ¶ 23.

[59] *See generally id.* at ¶¶ 18-21.

[60] *See generally id.* at ¶¶ 14, 23, 27-34.

respective responsibilities of licensee, spectrum lessee, and itself in the context of spectrum leasing.[61] Under the specific approach advanced in the *NPRM*, the Commission tentatively concluded to revise, based on its legal authority, its interpretation of what constitutes *de facto* control under Section 310(d) of the Act, as set forth in the 1963 *Intermountain Microwave* decision and its progeny. In place of that standard, the Commission proposed a more flexible standard that would permit spectrum leasing to proceed without prior Commission approval so long as the licensee continued to exercise *de facto* control over the leased spectrum.[62] In particular, the Commission proposed to hold licensees "directly responsible" for their spectrum lessees' non-compliance with the Act or Commission rules, and to take any action against licensees provided in our rules, including license revocation, for violations by spectrum lessees.[63] As an alternative to the general approach advanced in the *NPRM*, the Commission sought comment on whether it should permit leasing arrangements in which the lessee, instead of the licensee, would be held directly responsible for compliance with Commission policies and rules.[64] In addition, the Commission proposed to consider allowing subleasing, and sought comment on how subleasing could be implemented and whether it raised distinct issues.[65]

36. All parties commenting on Wireless Radio Services favored the Commission's goal of finding ways to promote the use of spectrum leasing arrangements, and agreed that the public interest would be served by Commission efforts to remove unnecessary regulatory barriers so as to facilitate leasing arrangements.[66] Commenters discussed the manifold benefits that would result from more flexible leasing policies. These included: promoting more efficient use of spectrum;[67] enhancing competition among new and incumbent service providers;[68] facilitating the ability of new and more diverse providers to serve the needs of their customers;[69] enabling small businesses to gain access to spectrum;[70] enhancing

[61] *See generally id.* at ¶¶ 27-34.

[62] *See generally id.* at ¶¶ 70-82.

[63] *See generally id.* at ¶¶ 27-34 (general framework concerning the licensee's responsibility for lessee's compliance).

[64] *Id.* at ¶ 29.

[65] *Id.* at ¶ 25.

[66] *See, e.g.*, AMTA Comments; AT&T Wireless Comments; Blooston Rural Carriers Comments; Cingular Comments; CTIA Comments; Long Lines Comments; Nextel Comments; NTCA Comments; Pacific Wireless Comments; Rural Cellular Association Comments; RTG comments; Securicor Comments; Sprint Comments; Teligent Comments; Verizon Wireless Comments; Macquarie Bank Reply Comments.

[67] *See, e.g.*, AMTA Comments at 2 (flexibility afforded by spectrum leasing could encourage efficiency by providing licensees with means to divest spectrum that may be more efficiently and profitably used by another entity or, conversely, to acquire additional increments of spectrum that their technology and customers may require); AT&T Wireless Comments at 1 (Commission's proposal to facilitate spectrum leasing is important step towards alleviating lack of available spectrum; promoting efficient use of spectrum would improve providers' ability to meet needs of their customers); Cingular Wireless Comments at 2 (spectrum leasing proposal would help ensure the highest and best use of spectrum); CTIA Comments at 1 (spectrum leasing proposal would foster competition and maximize efficient use of spectrum); El Paso Global Comments at 4 (allowing licensees and lessees maximum flexibility in entering into leasing arrangements would facilitate the development of a secondary market in spectrum, leading to the more efficient use of spectrum); LMCC Comments at 3 (promoting spectrum leasing and enhanced licensee flexibility would foster the more efficient use of spectrum).

[68] *See, e.g.*, CTIA Comments at 1 (spectrum leasing proposal would foster competition); Nextel Comments at 1, 5-9 (same).

[69] *See, e.g.*, AT&T Wireless Comments at 1 (Commission's proposal to facilitate spectrum leasing is important step towards alleviating lack of available spectrum; promoting efficient use of spectrum would improve (continued….)

the ability of designated entities to access additional capital;[71] and, increasing service offerings to rural customers by enabling rural telephone companies and others access to underutilized spectrum.[72]

37. Commenters also generally agreed with the Commission's proposal to provide maximum flexibility to licensees to lease some or all of their spectrum usage rights for periods of up to the term of the license,[73] and to allow these leasing arrangements to be renewed upon renewal of the license.[74] No commenters recommended that the Commission restrict spectrum leasing only to excess capacity arrangements. A number of parties commented directly on band manager licensing, contending that the Commission could draw certain lessons from this licensing model; they generally, however, opposed creating a new "class" of band manager licensee for the services affected by this proceeding or otherwise adopting certain requirements the Commission had adopted in the Guard Band Manager licensing rules.[75] While the bulk of the comments addressed issues pertaining to long-term spectrum leasing arrangements, a number of parties, including those interested in brokering spectrum usage rights, also contemplated the need for short-term leasing arrangements.[76]

providers' ability to meet needs of their customers); Kansas City Power Comments at 3-4 (increased flexibility in FCC rules would lead to increased use of underutilized spectrum, thus contributing to the overall availability of spectrum and creating opportunities to expand existing operations and develop new services); RTG Comments at 2 (spectrum leasing would allow companies not holding licenses to offer a panoply of wireless services).

[70] *See, e.g.*, AT&T Wireless Comments at 1 (Commission's proposal to facilitate spectrum leasing is important step towards alleviating lack of available spectrum); U.S. Small Business Administration Comments at 1 (a thriving secondary market may provide opportunity for small businesses and help reduce fallow spectrum).

[71] *See, e.g.*, Alaska Native Wireless Comments at 4-11; Cook Inlet Comments at 7-9.

[72] *See, e.g.*, Blooston Rural Carriers Comments at 2-3 (relaxation of policies and rules that stand in way of innovative spectrum use arrangements would help eliminate unnecessary inhibitions on secondary markets and create incentives for larger carriers to lease to rural telephone cooperatives, thereby helping to spur rapid deployment of services to all areas of the country); NTCA Comments at 1-4; RTG Comments at 2 (spectrum leasing would significantly increase the use of already-assigned spectrum bands and allow companies not holding licenses to offer a panoply of wireless services in unserved and underserved areas).

[73] *See, e.g.*, Alaska Native Wireless Comments at 8; AMTA Comments at 2-3; AT&T Wireless Comments at 1-4; Blooston Rural Carriers Comments at 3-5; Cingular Wireless Comments at 3-4; Cook Inlet Comments at 8; CTIA Comments at 10-11; Nextel Comments at 7; Securicor Comments at 7-8; RTG Comments at v, 27-28; Rural Cellular Association Comments at 5; Teligent Comments at 2-3; 37 Concerned Economists Comments at 2-4.

[74] *See, e.g.*, RTG Comments at 31-32.

[75] As noted above, at the time that the *NPRM* was issued, the only extant "band manager" licensing scheme was found in the 700 MHz Guard Band Manager rules, set forth in Part 27, Subpart G of our rules. Most of these commenting parties opposed creating a "new class" of "band manager" licensee directly modeled on that authorized in the Guard Band Manager licensing scheme, and certain policies and restrictions the Commission has adopted for that particular licensing scheme, for the services included in the *NPRM*. *See, e.g.*, AMTA Comments at 3; AT&T Wireless Comments at 11; Pacific Wireless Comments at 3; RTG Comments at 14; Teligent Reply Comments at 6-7; *but see* ITA Reply Comments at 4-6 (supporting band manager licensing framework, requiring the licensee to lease all of its spectrum to third parties).

[76] *See, e.g.*, AT&T Wireless Comments at 7; Cingular Wireless Comments at 4; Cook Inlet Comments at 10; El Paso Global Comments at 4; Macquarie Bank Reply Comments at 6; Pacific Wireless Comments at 4; RTG Comments at 27-28; Teligent Comments at 2; Vanu Comments at 6-7; Winstar Comments at 3, 14-15.

38. In addition, all commenters embraced the Commission's tentative determination to replace the *Intermountain Microwave de facto* control standard applicable to the Wireless Radio Services with a new standard more conducive to spectrum leasing.[77] Several commenters also endorsed the specific approach advanced in the *NPRM*.[78] Many other commenters, however, endorsed a significantly different approach to leasing, one that would allow licensees and lessees considerably more flexibility with regard to the allocation of the respective responsibilities of licensee and spectrum lessee. In particular, these commenters generally endorsed policies under which spectrum lessees could act more independently of, and without active supervision or oversight by, licensees, with spectrum lessees assuming direct and primary responsibility for compliance with Commission policies and rules.[79] Only a few comments specifically addressed whether or how subleasing should be implemented.[80]

b. Discussion

39. We find in this Report and Order that revising and clarifying our policies and rules to promote the use of a wide array of spectrum leasing arrangements will serve the public interest. Consistent with the goals articulated in the *NPRM*,[81] we will grant those Wireless Radio Services identified in the *NPRM*[82] the right to lease any or all of their spectrum usage rights (*i.e.*, in any amount of spectrum, in any geographic area covered by the license, and for any period of time during the term of the license) to third-party spectrum lessees pursuant to the policies and procedures enunciated below. We also will permit these leasing arrangements to be renewable, contingent on renewal of the underlying license authorization, and will allow certain types of subleasing provided that specified conditions are met. We find that providing the widest array of interested parties, including designated entities and others that face regulatory and market barriers in accessing spectrum resources, increased opportunities to enter into a variety of spectrum leasing arrangements with these Wireless Radio Services licensees will significantly advance our goal of promoting facilities-based competition in broadband and other communications services as well as our objective to ensure more efficient, intensive, and innovative uses of spectrum.[83]

40. In this Report and Order, we establish a revised transfer of *de facto* control test for leasing in the Wireless Radio Services in order to better accommodate the various components of the public interest that are relevant to these services. As described herein in detail, the nature of the markets – along with the needs of the businesses and consumers within those markets – have changed dramatically, resulting in an increase in the demand for spectrum, the need for more ready access to it, and a greater emphasis on

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[77] *See, e.g.*, AMTA Comments at 4; Cook Inlet Comments at 12-13; CTIA Comments at 11-13; El Paso Global Comments at 11; Nextel Comments at 3-4; Pacific Wireless Comments at 6; Teligent Comments at 5-6; Winstar Comments at 9.

[78] We discuss these comments more fully in Section IV.A.5.a(i), *infra.*

[79] We discuss these comments more fully in Section IV.A.5.b(i), *infra*.

[80] *See* Cingular Wireless Comments at 7 n.12 (subleasing should be prohibited absent express consent of the licensee); El Paso Global Comments at 4 (subleasing should be freely permitted); Vanu Comments at 7-8 (to the extent the Commission adopted a "safe harbor" for spectrum leasing arrangements, it should not extend the safe harbor to subleasing arrangements).

[81] *NPRM* at ¶¶ 20-21, 25.

[82] *See* Section IV.A.3, *infra*.

[83] We note that providing these exclusive use licensees with additional flexibility regarding the use of their licensed spectrum is consistent with the recommendations made by the Commission's Spectrum Policy Task Force. *See Spectrum Policy Task Force Report* at 35-41.

efficient and flexible use of spectrum. In the context of leasing, the facilities-based *Intermountain Microwave* standard for assessing transfers of *de facto* control does not adequately accommodate these changes, and to this extent it is outdated and is no longer consistent with the public interest. Moreover, using that particular standard is not essential under Section 310(d) for ensuring the integrity of other public interest goals, such as interference protection, national security, or competition. In contrast, the new spectrum-based test that we are adopting increases licensee flexibility, facilitates more efficient use of the spectrum, and will result in a more market-driven system that should better meet the needs of the public, all without compromising the other core public interest goals of the services.

41. In order to offer licensees and spectrum lessees significant flexibility with regard to the kinds of leasing arrangements they may enter into, we provide two options for spectrum leasing. The first option is consistent with the general approach proposed in the *NPRM.* Under this leasing option, licensees must retain *de jure* and *de facto* control of the leased spectrum (under the updated *de facto* control standard that replaces *Intermountain Microwave* in the context of leasing). The licensee acts, in effect, as a "spectrum manager" with regard to leased spectrum, and remains directly and primarily responsible for ensuring that each of its lessees complies with all applicable Commission policies and rules.[84] We also provide for a second leasing option in response to many commenters' interest in leasing policies that would permit a different, more flexible type of arrangement than proposed in the *NPRM*. Under this alternative leasing option, licensees are permitted to transfer *de facto* control of the leased spectrum, and associated responsibilities, to spectrum lessees for the term of the lease. In "*de facto* transfer" leasing, spectrum lessees will be held directly and primarily responsible for compliance with applicable policies and rules.[85]

42. As explained in the *NPRM* and the *Policy Statement*, we find that better functioning secondary markets will enable existing providers and new facilities-based entrants to gain more ready access to some or all of the spectrum they need to provide wireless services to the public.[86] As noted in the *NPRM*, the Commission has increasingly relied on flexible, market-oriented spectrum management policies as a means to help alleviate imbalances between supply and demand for spectrum.[87] Spectrum leasing provides an essential additional mechanism by which market forces can be brought to bear to address parties' needs to obtain access to spectrum. By facilitating spectrum leasing, we advance the development of numerous secondary market arrangements in which parties can use spectrum without the necessity of acquiring a license.[88] If licensees are able to enter into a wide range of leasing arrangements with third parties with a minimum of transaction costs – anything from a small amount of spectrum in a small area for a short period, to a large amount, over a large area, for up to the term of the license – licensees and spectrum lessees will be better able to design arrangements that meet their respective business plans and thereby enable them to bring additional wireless services to the public. As a general matter, the greater the flexibility permitted by our policies and rules, the more likely it is that parties will be able to enter into mutually desirable arrangements that are based on market demands. Wider use of spectrum leasing will, in turn, help achieve fuller utilization of the spectrum resource by making more spectrum available for the purposes for which it is needed, including new broadband services.[89]

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[84] We discuss this "spectrum manager" leasing option in detail in Section IV.A.5.a, *infra*.

[85] We discuss this "*de facto* transfer" leasing option in detail in Section IV.A.5.b, *infra*.

[86] *NPRM* at ¶ 11; *see generally Policy Statement.* We also note that the Task Force reached similar conclusions. *See Spectrum Policy Task Force Report* at 55-59.

[87] *NPRM* at ¶ 8.

[88] *See id.* at ¶ 8.

[89] *See id.* at ¶¶ 18-20.

43. We also determine that facilitating the development of secondary markets in spectrum usage rights enhances and complements several of the Commission's major policy initiatives: encouraging the availability of broadband services for all Americans; promoting increased, facilities-based competition; ensuring the provision of spectrum-based services by small businesses; and, enabling development of additional and innovative services in rural areas.

44. Robust secondary markets constitute a significant component of our broadband policies designed to bring advanced telecommunications services to all Americans.[90] Broadband service providers are increasingly turning to terrestrial wireless platforms to meet growing consumer demands for these services.[91] Facilitating the ability of such providers to gain ready access to licensed but unused or underutilized spectrum will provide an important, efficient, and more timely means of delivering these services.[92] Improved secondary markets also will serve our goal of enhancing competition among facilities-based providers.[93] By adopting the leasing policies and procedures herein, we remove unnecessary regulatory constraints, lower transaction costs, and reduce spectrum acquisition costs, so as to enable more parties to enter into voluntary leasing arrangements, thus enabling more facilities-based competition by new providers. These policies provide potential lessees a ready means of obtaining access to that spectrum (in amount, location, and duration) best suited for their business needs. They also remove regulatory uncertainty that may have prevented licensees from allowing a third party to gain access to fallow or underutilized spectrum,[94] even at an acceptable negotiated price, because the licensees either did not want to abandon their future rights to the spectrum (through permanent transfer or assignment, or through partitioning or disaggregation) or risk losing their licenses as unauthorized transfers of *de facto* control under Section 310(d).[95] Thus, these policies should facilitate the ability of

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[90] *See, e.g.*, Inquiry Concerning the Development of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Third Report*, 17 FCC Rcd 2844, 2847-2850 ¶ 7, 2905 ¶ 161 (2002) (*Broadband Third Report and Order*) (discussing a variety of Commission efforts to encourage the deployment of advanced telecommunications capabilities pursuant to Section 706 of the Telecommunications Act of 1996, including the goal of facilitating the growth of secondary markets in wireless spectrum).

[91] *See generally* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Service, *Seventh Report*, 17 FCC Rcd 12985, 13038-13063 (2002).

[92] We also note that we continue to make strides to free up additional licensed spectrum resources and to provide greater flexibility to unlicensed devices to facilitate spectrum-based broadband access. *See, e.g.*, In the Matter of Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Notice of Proposed Rulemaking*, 17 FCC Rcd 24135 (2002); In the Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, *Notice of Inquiry*, 17 FCC Rcd 25632 (2002); In the Matter of 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, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003); Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) devices in the 5 GHz band, *Notice of Proposed Rulemaking*, 18 FCC Rcd 11581 (2003).

[93] *See, e.g., Policy Statement* at ¶ 17 (noting importance of increasing facilities-based providers); *Broadband Third Report and Order*, 17 FCC Rcd at 2847 ¶ 6, 2897 ¶ 133 (same).

[94] We note that significant amounts of spectrum remain underutilized or lie fallow. *See Policy Statement* at ¶ 11; *Spectrum Policy Task Force Report* at 10-11 (discussing "white spaces" of spectrum not in use for significant periods of time).

[95] *See, e.g.*, Cingular Comments at 11 (noting that parties were reluctant to lease spectrum for fear that it might constitute an unauthorized transfer of control); RTG Comments at 21 (same); U.S. Small Business Administration Comments at 2, 4 (same); *see also Policy Statement* at ¶¶ 27-28 (discussing licensees' concerns (continued….)

licensees and potential spectrum lessees to negotiate voluntary, market-driven leasing arrangements that enable other providers or new entrants to provide facilities-based services to the public or other end-users.

45. Furthermore, the secondary markets policies we adopt will help achieve another of our goals, namely ensuring that many small businesses have significant new opportunities to provide spectrum-based services. As lessees, these entities should benefit from lower transaction and spectrum acquisition costs since they would not need to acquire a license authorization (through auction or transfer and assignment) and would only need access to the amount of spectrum specifically suited to meet their business needs. Thus, our spectrum leasing policies also help us to achieve many of the goals set forth in our designated entity policies,[96] and enable designated entities (including small businesses, rural telephone companies, and businesses owned by minority groups and women) to access additional capital through leasing arrangements that can be used to build out their networks. Finally, as discussed by commenters, a substantial amount of spectrum is underutilized in rural areas, and could be put to use through leasing arrangements. Facilitating the ability of rural telephone companies and other entities to gain access to spectrum usage rights so that they can provide new and advanced services to rural consumers should help our efforts to promote the further development and delivery of spectrum-based services to rural communities.[97]

2. Revising the Section 310(d) *De Facto* Control Standard for Spectrum Leasing

a. Background

46. As noted above, in its effort to eliminate Commission policies that unnecessarily impede the development of secondary markets in spectrum usage rights, the Commission tentatively concluded to replace its historic interpretation of the Section 310(d)[98] requirements set forth in the 1963 *Intermountain Microwave* decision[99] with an updated, more flexible *de facto* control standard that would be applied to

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that leasing might constitute an unauthorized transfer of *de facto* control under the existing *Intermountain Microwave de facto* control standard).

[96] These policies also seek to ensure that designated entities have the opportunity to provide spectrum-based services. *See generally* 47 U.S.C. §§ 309(j)(3), (4). We discuss our designated entity policies and how they apply in the context of spectrum leasing in Sections IV.A.5.a(ii)(b), IV.A.5.b(i)(b)(ii), IV.A.5.b(ii)(b)(ii), *infra*.

[97] *See, e.g.*, Blooston Rural Carriers Comments at 2-3; NTCA Comments at 1-4; RTG Comments at 2. *See also Policy Statement* at ¶ 11; Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies to Provide Spectrum-Based Services, *Notice of Inquiry*, 17 FCC Rcd 25554, 22555-22562 ¶¶ 2-14 (2002); *Spectrum Policy Task Force Report* at 58-60 (discussing ways of promoting the development of services in rural communities, including facilitating the ability of licensees to lease spectrum to entities that could build the networks and provide the service).

[98] Section 310(d) of the Act states, in pertinent part: "No … station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such … license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d).

[99] *Intermountain Microwave*, 12 FCC 2d 559 (1963). As noted in the *NPRM*, the *Intermountain Microwave* standard (and its progeny) is applied to a number of our Wireless Radio Services included within the spectrum leasing proposal. *NPRM* at ¶ 72; *see also* In the Matter of Marc Sobel, Applicant for Certain Part 90 Authorizations in the Los Angeles Area, *Decision*, 17 FCC Rcd 1872 (2002) (applying the *Intermountain Microwave* standard), *recon. denied*, 17 FCC Rcd 8562 (2002). As also noted in the *NPRM*, a related standard, set forth in the *Motorola* decision, pertains to our private radio services. *See NPRM* at ¶ 72; Applications of Motorola, Inc. for 800 MHz Specialized Mobile Radio Trunked Systems, File Nos. 507505 *et al.*, *Order* (issued July 30, 1985) (Private Radio Bureau) (*Motorola*).

spectrum leasing.[100] It proposed this new Section 310(d) *de facto* control standard to permit parties to enter into flexible spectrum leasing arrangements, without the need for prior Commission approval,[101] so long as licensees continued to exercise sufficient actual control (as updated herein) over the leased spectrum as well as retained ultimate and direct responsibility for spectrum lessees' compliance with the Act and Commission policies and rules.[102] Specifically, the Commission proposed that a licensee entering into a leasing arrangement must, under the new standard: "(1) retain full responsibility for compliance with the Act and our rules with regard to any use of licensed spectrum by any lessee or sublessee; (2) certify that each spectrum lessee (or sublessee) meets all applicable eligibility requirements and complies with all applicable technical and service rules; (3) retain full authority to take all actions necessary in the event of noncompliance, including the right to suspend or terminate the lessee's operations if such operations do not comply with the Act or Commission rules."[103] Comment was requested on this overall approach and on the proposed new standard.[104]

47. At the same time, the Commission stated that it was not proposing to revise or limit the *Intermountain Microwave* standard in any other regulatory context, including determinations of "control" applicable for purposes of establishing designated entity status under the competitive bidding rules.[105] In this context, the Commission requested comment on whether and how the designated entity and entrepreneur policies and rules, including those relating to unjust enrichment, should be implemented with respect to spectrum leasing arrangements between designated entity licensees and third parties that do not qualify for the same status.[106] The Commission noted that, while interested in promoting leasing, it also sought to ensure that its approach would not invite circumvention of the underlying purposes of these designated entity-related policies and rules.[107]

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[100] *See generally NPRM* at ¶¶ 73-76, 78-80. The Commission tentatively concluded that many spectrum leasing arrangements of the nature proposed in the *NPRM* would likely constitute a transfer of *de facto* control under the *Intermountain Microwave* standard. *Id.* at ¶¶ 72-76. The Commission was mindful that the statutory requirements of Section 310(d) impose some limitations on the types of arrangements that licensees could enter into with third parties without Commission approval. *See NPRM* at ¶¶ 13-14, 70. *See also Policy Statement* at ¶¶ 1, 24, 27 (noting that statutory obligations must be addressed as the Commission proceeds to promote secondary markets in spectrum usage rights).

[101] As noted in the *NPRM*, the Commission has consistently interpreted Section 310(d) as requiring prior Commission approval when licensees transfer either *de jure* or *de facto* control of their licenses to third parties. *NPRM* at ¶ 70; *see, e.g., Lorain Journal Co. v. FCC*, 351 F.2d 824, 828-29 (D.C. Cir. 1965) (affirming Commission precedent that "control" under Section 310(d) refers to both *de jure* and *de facto* control), *cert. den.*, 383 U.S. 967 (1966); *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 48 (D.C. Cir. 1994).

[102] *See NPRM* at ¶¶ 78-80.

[103] *Id.* at ¶ 79.

[104] The Commission recognized, however, that even under a revised standard, certain types of spectrum leasing arrangements might constitute a transfer of *de facto* control under Section 310(d). *See id.* at ¶¶ 78-81.

[105] *Id.* at ¶ 77, citing Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Memorandum Opinion and Order*, 10 FCC Rcd 403 (1994) (*Competitive Bidding Fifth MO&O*) and Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, *Order on Reconsideration of the Third Report and Order, Fifth Report, and Fourth Notice of Proposed Rulemaking*, 15 FCC Rcd 15293 (2000) (*Part 1 Fifth Report and Order*).

[106] *NPRM* at ¶¶ 44-45, 47-48, 52-55, 77.

[107] *Id.* at ¶ 43.

48. As previously noted, all parties commenting on *Intermountain Microwave* urged the Commission to replace that *de facto* control standard with one that would allow parties to enter into spectrum leasing arrangements that would not constitute transfers of *de facto* control requiring Commission approval.[108] While many commenters contended that spectrum leasing would not involve transfers of *de facto* control under Section 310(d),[109] others indicated that leasing arrangements might well involve transfers of control of licensees' spectrum usage rights to lessees requiring some form of FCC consent.[110] Finally, a number of commenters also stated that the Commission should consider forbearance from Section 310(d) requirements with regard to spectrum leasing arrangements.[111]

49. Several parties supported the general approach advanced in the *NPRM* of devising a new *de facto* control standard that would hold licensees ultimately responsible for their lessees' compliance with Commission rules with respect to the leased spectrum.[112] While many commenters also stated that the Commission could design a new standard that allowed leasing to proceed without the need for its approval,[113] some expressed concern that the standard proposed in the *NPRM* might not be consistent with Section 310(d).[114] A number of commenters objected to the proposal insofar as it required licensees to certify to their lessees' compliance with the Act and Commission rules or engage in some form of supervision or oversight of their lessees' activities.[115] To the extent, however, the Commission

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[108] *See, e.g.*, AMTA Comments at 4; Cook Inlet Comments at 12-13; CTIA Comments at 11-13; El Paso Global Comments at 11; Nextel Comments at 3-4; Pacific Wireless Comments at 6; Teligent Comments at 5-6; Winstar Comments at 9.

[109] *See, e.g.*, AT&T Wireless Comments at 12-14 (spectrum leasing would not constitute a transfer of *de facto* control); Nextel Comments at 10 (same); RTG Comments at 24 (same); Verizon Wireless Comments at 5-9 (same); Pacific Wireless Comments at 6.

[110] *See, e.g.,* Cingular Wireless Comments at 10-13 (forbearance may be necessary to create regulatory certainty that spectrum leasing, absent Commission approval, would not violate Section 310(d)); Leap Wireless Reply Comments at 4 (spectrum leasing probably would constitute a transfer of *de facto* control); Vanu Comments at 8-9 (flexible spectrum leasing arrangements may require FCC approval under Section 310(d)).

[111] *See, e.g.*, AT&T Wireless Reply Comments at 8; Cingular Wireless Comments at 10-13 (forbearance may be necessary to create regulatory certainty that spectrum leasing, absent Commission approval, would not violate Section 310(d)); CTIA Comments at 16; El Paso Global Comments at 12; Enron Reply Comments at 4 & n. 7; RTG Comments at 24; Winstar Comments at 11-12.

[112] *See, e.g.*, AMTA Comments at 3-4; AT&T Wireless Comments at 10; Nextel Comments at 12; Pacific Wireless Comments at 3.

[113] *See, e.g.*, AT&T Wireless Comments at 13; LMCC Comments at 3; Pacific Wireless Comments at 6-7; Sprint Comments at 2.

[114] *See, e.g.,* Cingular Wireless Comments at 10-13 (proposed standard might not be consistent with Section 310(d) requirements relating to *de facto* control); Cingular Wireless Reply Comments at 8 (proposed test deals more with ultimate legal control than *de facto* control); Leap Wireless Reply Comments at 4. Other commenters recognized that spectrum lessees could gain *de facto* control of the license through leasing arrangements. They contended that, in the leasing context, any activities short of transferring *de jure* control or ownership to the lessees should not require Commission approval under Section 310(d). *See, e.g.*, CTIA Comments at 15 (Commission should only be concerned about actual ownership of the license); Winstar Reply Comments, Attachment at 1 (proposing to define "secondary arrangements" in the Commission's rules such that licensees would be "found to have maintained control of their licenses as required by Section 310(d) if they retain *de jure* control (*i.e.*, legal ownership) of their licenses").

[115] *See, e.g.*, AT&T Wireless Comments at 13 (objecting to proposed requirement that licensees certify to lessees' compliance or otherwise be required to directly supervise or verify their lessees compliance); Blooston Rural Carriers Comments at 6-7 (objecting to any due diligence requirement); Cook Inlet Comments at 5-7 (same); (continued….)

determined that some form of licensee oversight was required in order that there be no transfer of *de facto* control under Section 310(d), a number of commenting parties requested that the Commission provide additional specificity regarding the nature of those oversight obligations.[116] Finally, several commenters suggested that the Commission, in designing its new *de facto* control standard, find guidance in the approach it took in the Guard Band Manager licensing scheme.[117]

50. There was no consensus regarding comments specifically directed to designated entity and entrepreneur policies and rules. Some commenters contended that allowing designated entities to lease spectrum usage rights to entities that are not similarly qualified would create an end-run around these policies and rules.[118] Others, however, argued that the designated entity eligibility rules and related unjust enrichment rules should not be applied to designated entity licensees that choose to lease to entities that would not be qualified for the same designated entity status.[119] For the most part, these latter commenters contended that, since spectrum leasing should not be deemed a transfer of *de facto* control under Section 310(d), leasing would not trigger application of designated entity and entrepreneur licensee policies and rules. They also argued that designated entity licensees should have the same opportunities to lease spectrum to third parties as licensees that do not qualify as designated entities.[120]

b. Discussion

51. We determine in this Report and Order that the time has come to replace the *Intermountain Microwave* standard with a new, more flexible *de facto* control standard for spectrum leasing that better balances the statutory requirements of Section 310(d) with more recent statutory and policy changes affecting Wireless Radio Services. As we discuss more fully below, the *Intermountain Microwave* "facilities-based" control standard is outdated in that it unnecessarily impedes the Commission's efforts to develop flexible and efficient leasing arrangements that permit third-party access to unused or underutilized spectrum usage rights (for either short or long term). We therefore adopt a new set of criteria for determining *de facto* control based on the licensee exercising effective working control over the use of any spectrum it leases, as opposed to direct control of the facilities themselves. In addition, these criteria require the licensee to retain full responsibility for compliance with applicable interference and non-interference related service rules by the lessee, and to be primarily responsible to the Commission for all spectrum-related transactions and filings.

52. We conclude that this new standard for determining *de facto* control is consistent with the statutory requirements of Section 310(d) because it ensures that the licensee retains full control over the

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Pacific Wireless Comments at 5 (same); Rural Cellular Association Comments at 6 (objecting to defining licensees' responsibility in such a manner that they would be required to monitor their lessees' compliance); Securicor Comments at 10-11, 15-16 (same; licensees should be able to rely on their lessees' certifications); Teligent Comments at 6-8 (although licensees are ultimately responsible, they should be able to reasonably rely on their lessees' certifications of compliance).

[116] *See, e.g.*, Cingular Wireless Comments at 3-6; RTG Comments at 10-20.

[117] *See, e.g.*, AMTA Comments at 3-4; ITA Reply Comments at 3-6; LMCC Comments at 7; Nextel Comments at 12; Pacific Wireless Comments at 3; Verizon Wireless Comments at 2-3.

[118] *See, e.g.*, Leap Wireless Reply Comments at 1-7; RTG Comments at 27; RTG Reply Comments at 17-19.

[119] *See, e.g.*, Alaska Native Wireless Comments at 9-13; AT&T Wireless Comments at 8-9; Blooston Rural Carriers at 5-6; Cingular Wireless Comments at 8; Cook Inlet Comments at 7-9; NTCA Comments at 6-8; U.S. Small Business Administration Comments at 1-4.

[120] *See, e.g.*, Alaska Native Wireless Comments at 9-13; Cook Inlet Comments at 7-9.

core spectrum management responsibilities that we require under Title III of the Act. Where the licensee retains such control over spectrum use, we also conclude that Section 310(d) does not require us to consider the lessee's control of facilities as a determinative factor in our evaluation of *de facto* control. Moreover, to the extent that the lessee's control of facilities under this model may raise policy issues within the Commission's regulatory purview, the leasing rules and notification procedures discussed below that we adopt in this Report and Order provide the means to address them.

53. We emphasize that at this time we are replacing the *Intermountain Microwave* standard for assessing *de facto* control only in the context of spectrum leasing.[121] In the Further Notice, we ask specifically about whether we should replace the *Intermountain Microwave* standard with a new *de facto* control standard, or some other substitute, in other regulatory contexts where it is employed.[122]

(i) Rationale for revising the Section 310(d) *de facto* control standard for spectrum leasing

54. Fundamental changes in the Commission's spectrum policies and the licensing models in the Wireless Radio Services, including those responsive to amendments to the Communications Act, have led us to reevaluate the continued appropriateness of the *Intermountain Microwave* standard[123] for evaluating whether a licensee retains *de facto* control of its license in the context of spectrum leasing. As discussed in the *NPRM*, even as the Commission has continued to apply the *Intermountain Microwave* test since the original 1963 decision, through the years it has recognized the need to evaluate the continued viability of that test in light of changing circumstances and current realities.[124] We have broad authority to interpret the requirements of the Communications Act,[125] and have significant discretion to revise existing policies, including the *Intermountain Microwave de facto* control interpretation, upon providing a reasoned basis for the policy revision.[126] We now determine that, in the context of spectrum leasing, retaining the *Intermountain Microwave* standard for evaluating *de facto* control issues under Section 310(d) no longer serves the public interest. Specifically, we determine that with regard to spectrum leasing, a new *de facto* control standard – one that continues to require that licensees exercise sufficient working control over the use of their leased spectrum so as to be consistent with the requirements of Section 310(d), but also allows additional flexibility to licensees to enter into certain types of leasing arrangements without the need for prior Commission approval – should replace the standard set forth in *Intermountain Microwave* and its progeny.

55. In establishing the new standard, we first observe that the methodology for determining when *de facto* transfers of control occur will vary depending on a variety of factors, including the types of

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[121] This is consistent with the proposal set forth in the *NPRM*. *See NPRM* at ¶ 77. Specifically, we are not at this time modifying the *de facto* control, ownership attribution, affiliation, or similar standards that are applied in special circumstances to determine eligibility or ownership and control of a licensee or applicant. *See id.*

[122] *See* Section V.D, *infra*.

[123] In referencing the *Intermountain Microwave* standard, we also include the similar *Motorola* standard.

[124] *NPRM* at ¶¶ 75-76.

[125] *Id.* at ¶ 71. Congress left the task of defining "control" to the Commission, and we are not bound by any exact formula in our determination of whether control under Section 310(d) has been transferred. *Id.*

[126] *See, e.g.*, *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994); *Federal National Association for Better Broadcasting v. FCC*, 849 F.2d 665, 669 (D.C. Cir. 1988); *Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986).

services at issue, the public interest requirements that are relevant to those services, and the type of control that is most relevant to such services.[127] At a minimum, the *de facto* transfer of control test for a particular class of services must focus on the type of control that would be necessary in order to ensure that the licensee satisfies the public interest requirements that the Commission has identified as critical to the provision of such services. Thus, as a general matter, revision of the test may be warranted as the public's interests and needs change and the nature of a service evolves. In particular, continuing to focus on one type of control (*e.g.*, control over facilities) may no longer constitute the best way to further the complex and sometimes competing public interest goals of today. This is the conclusion we have reached with respect to many of our Wireless Radio Services.

56. During the last several years – in response to changes in the Communications Act and as part of the Commission's ongoing efforts to facilitate market-oriented spectrum licensing and allocation as well as deregulatory, pro-competitive policies – the Commission has made significant advances in improving its spectrum policies relating to Wireless Radio Services to serve the public interest. Congressional revisions to the Communications Act in the last two decades have provided significant new directives to the Commission that encourage and enhance its ability to fashion more flexible spectrum policies. For instance, in 1983, Congress added Section 7(a), establishing that the policy of the United States is "to encourage the provision of new technologies and services to the public."[128] In 1993, Congress amended Title III of the 1934 Act to authorize the Commission to assign licenses through competitive bidding procedures, and directed that the Commission in designing those procedures implement policies that promote the efficient and intensive use of spectrum, opportunities for new entrants to provide spectrum-based services, and investment in and rapid deployment of new technologies and services.[129] The 1993 amendments to the Act also required that more spectrum be transferred from federal government use to commercial use,[130] and gave to the Commission the authority to forbear from enforcing certain statutory provisions and rules applicable to telecommunications services that no longer serve the public interest.[131] In the Telecommunications Act of 1996, Congress made sweeping changes to the Communications Act of 1934 – primarily in connection with wireline telecommunications services, but with significant effects on certain spectrum-based services as well[132] – in order to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[133] Finally, in the Balanced Budget Act of 1997, Congress expanded the Commission's auction authority, provided for the transfer of additional spectrum from federal

[127] For example, a practice in the broadcast services that places ultimate programming decisions in the hands of a non-licensee will raise significant transfer of control issues, while in the Wireless Radio Services, programming practices have not been particularly relevant to the Commission's transfer of control determinations. *See, e.g., Cablecom-General*, 87 FCC 2d 784, 788-91 (1981) (discussing different public interest concerns regarding Section 310(d) analysis as between broadcast licensees and common carrier licensees).

[128] *See* 47 U.S.C. § 157(a).

[129] *See* 47 U.S.C. §§ 309(j)(3), (4).

[130] *See* 47 U.S.C. § 923.

[131] *See* 47 U.S.C. § 159.

[132] For example, Congress eliminated the cap on license terms for non-broadcast spectrum licenses in Section 307(c) of the 1934 Act. 47 U.S.C. § 307(c).

[133] *See* Preamble to the Telecommunications Act of 1996.

government use, and granted the Commission explicit authority to allocate electromagnetic spectrum so as to promote the most efficient use of the spectrum.[134]

57. For its part, the Commission has promoted innovative policies and licensing models that seek to increase communications capacity and efficiency of spectrum use, and make spectrum available to new uses and users. Of particular importance for this proceeding is the Commission's embrace of policies that provide exclusive use licensees in the Wireless Radio Services with increased flexibility to make use of their licensed spectrum in ways that respond quickly and effectively to evolving needs (*e.g.*, consumer demands), technologies (*e.g.*, access-enhancing or efficiency-improving innovations), and market developments.[135] Typified by the Part 24 rules for broadband Personal Communications Services, the Part 27 rules for Wireless Communications Services, and the Part 101 rules for the 39 GHz Service, these licensing models have provided licensees increasing flexibility with regard to the applicable technical and service rules. In adopting these more flexible rules, the Commission has determined that it is in the public interest to afford Wireless Radio Services licensees significant flexibility in the design of their systems to respond readily to consumer demand for their services, thus allowing the marketplace to dictate the best uses of the licensed spectrum.[136]

58. Another noteworthy step in providing new kinds of flexibility to licensees was the Commission's introduction of the band manager licensing concept. In this context, the Commission expressly authorized licensees to be in the business of leasing their licensed spectrum to third-party users.[137] First implemented in 2000 in the 700 MHz Guard Band, the band manager licensing scheme was devised to enable spectrum users to gain access to spectrum and to build and operate their systems without the requirement that they hold individual license authorizations.[138] The Commission emphasized that band manager spectrum leasing served several public interest goals, including: providing licensees with incentives to maximize the efficient use of spectrum; enabling spectrum users to gain access to the amount of spectrum (in terms of quantity, length of time, and geographic area) that is best suited to their business needs; enabling more market-based determinations about how best and most efficiently to use

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[134] *See* 47 U.S.C. § 925 nt (Section 3002 of the Balanced Budget Act of 1997).

[135] *See generally NPRM* at ¶¶ 93-94 (discussing the Commission's adoption of flexible use policies). We note that, as a general matter, the Spectrum Policy Task Force also has emphasized the benefits of the adoption of these flexible use policies. *See generally Spectrum Policy Task Force Report* at 3, 5, 15-19, 21, 35-39. We also note, of course, that the Commission's flexible use policies are by no means limited to Wireless Radio Services.

[136] *See, e.g.*, Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Report and Order and Second Notice of Proposed Rulemaking*, 12 FCC Rcd 18600, 18633-34 (1997) ("It is in the public interest to afford licensees flexibility in the design of their systems to respond readily to consumer demand for their services, thus allowing the marketplace to dictate the best uses of the band.").

[137] Through the years, the Commission has authorized various types of "excess capacity" leasing, such as that between Instructional Television Fixed Service (ITFS) and MMDS licensees and that involving FM subcarrier leasing. *See generally* 47 C.F.R. § 74.931(c), (d), and (f) (ITFS leasing); 47 C.F.R. §§ 73.293, 73.295 (FM subcarrier leasing); *see also* Amendment of Part 101 of the Commission's Rules to Streamline Processing of Microwave Applications in the Wireless Telecommunications Services, *Report and Order*, 17 FCC Rcd 15040 (2002) (permitting private operational fixed microwave services licensees to lease reserve capacity to common carriers); 47 C.F.R. § 101.603(b)(1); *NPRM* at ¶ 16. It also permits third parties to gain access to spectrum by entering into local management agreements with broadcast licensees, provided the licensees retain *de facto* control of the licenses. *See, e.g.*, Application of WGPR Inc. and CBS, Inc. For Assignment of License of WGPR-TV, *Memorandum Opinion and Order*, 10 FCC Rcd 8140 (1995). *See also Guard Band Manager Order*, 15 FCC Rcd at 5320 ¶¶ 43-44 (discussing different types of leasing and sharing arrangements authorized by the Commission).

[138] *See Guard Band Manager Order*, 15 FCC Rcd at 5312 ¶ 27, 5314-5315 ¶ 33.

the limited spectrum resource; and, promoting the rapid development and deployment of new technologies, products, and services.[139]

59. Our efforts to help promote more robust and effective secondary markets in spectrum usage rights are central to achieving additional improvement in these spectrum management policies. As underscored in the *Policy Statement*, the Commission's secondary markets initiative seeks to significantly expand and enhance the existing secondary markets for spectrum usage rights to permit such rights to flow more freely among users and uses in response to economic demand, consistent with our statutory requirements. These more flexible secondary markets would make unused and underutilized spectrum held by existing licensees more readily accessible and available to other users and uses, and help to promote the development of new, spectrum efficient technologies.[140] The Commission noted also that an active secondary market – including the ability to lease spectrum usage rights to third parties (without the need to permanently transfer those rights to third parties) – would facilitate fuller utilization of spectrum by allowing more effective use of spectrum assigned to existing licensees, would increase the amount of spectrum available to prospective users, uses, and technologies, and would better ensure more effective and efficient use of the spectrum so as to maximize opportunities for new technologies, services, and users.[141]

60. By its very nature, the *Intermountain Microwave* standard imposes significant constraints on the development of these secondary markets because it restricts the ability of licensees to make spectrum available for a defined period to third-party users that would prefer to construct and use their own facilities instead of being forced to rely on the licensees' facilities and technology.[142] The *Intermountain Microwave* standard is a "facilities-based" standard that focuses on whether the licensee exercises close working control over many different aspects of the operation of the station facilities using the licensed spectrum. Specifically, applying a six factor test, the Commission examines whether the licensee: (1) has unfettered use of all station facilities and equipment; (2) controls daily operations; (3) determines and carries out the policy decisions (including preparation and filing of applications with the Commission); (4) is in charge of employment, supervision and dismissal of personnel operating the facilities; (5) is in charge of the payment of financial obligations, including expenses arising out of operations; and (6) receives the monies and profits from the operation of the facilities.[143] In sum, the *Intermountain Microwave* standard interprets Section 310(d) *de facto* control as requiring that licensees themselves exercise close working control of both the actual facilities/equipment operating the radio frequency (RF) energy and the policy decisions (*e.g.,* business decisions) regarding use of the spectrum.

61. The *Intermountain Microwave* standard for *de facto* control, and the particular factors specified therein, are not required by Section 310(d). In particular, the Act does not require a facilities-based *de facto* control standard whereby licensees are the only entities that can control the use of each facility and associated policies without Commission approval, and we conclude that such an interpretation

[139] *See id.* at 5313-5314 ¶¶ 29-31.

[140] *See Policy Statement* at ¶¶ 1-2.

[141] *See id.* at ¶¶ 9-10, 12.

[142] *See NPRM* at ¶¶ 73, 76; *Policy Statement* at ¶ 28.

[143] *See Intermountain Microwave*, 12 FCC 2d at 559-60. The Commission currently relies on the interpretation set forth in *Intermountain Microwave* when determining whether there has been a transfer of *de facto* control under Section 310(d). *See, e.g.*, In the Matter of Marc Sobel, Applicant for Certain Part 90 Authorizations in the Los Angeles Area, *Decision*, 17 FCC Rcd 1872, *recon. denied*, 17 FCC Rcd 8562 (2002).

is overly circumscribed and restrictive.[144] As discussed in the *NPRM*, the Commission is not bound by any exact formula for determining whether *de facto* control has been transferred, and control determinations must necessarily turn on the particular context involved.[145] Indeed, the Commission concerns itself with different issues relating to licensee control of its licensed spectrum depending on the particular service involved (*e.g.*, broadcast vs. Wireless Radio Service), and has broad discretion to formulate distinct policies based on practical differences, including differing public interest objectives, among the services.[146]

62. Based on our assessment of the record, we conclude that the *Intermountain Microwave* standard is increasingly out of step with the flexible spectrum use policies we are adopting in the Wireless Radio Services and that we consider essential to furthering our obligations to promote the public interest in today's environment.[147] *Intermountain Microwave* was decided at a time when it was difficult to imagine a distinction between the business and infrastructure, on the one hand, and the actual use of the spectrum license, on the other. We also note that the standard was designed in a regulatory environment that significantly predates the flexible use licensing models (including large geographic area licenses) and technological advances (*e.g.*, software-defined radios) that are making spectrum use increasingly divisible, fungible, and capable of being accessed in various dimensions (geography, bandwidth, and time) by different users on different systems. Its consequent focus on licensee control of facilities is no longer suited to the sea change in the regulatory and technological environment affecting most of our exclusive use Wireless Radio Services. Given these dramatic changes and our goals regarding spectrum access, we do not believe it makes sense to continue to require that a licensee have immediate direct control over every facility that operates using its licensed spectrum and nearly every aspect of the business plan, financing, and operations in connection with the use of the spectrum. Continued reliance on the *Intermountain Microwave* standard, particularly given that it is not required by statute, would unnecessarily impede our efforts to promote more ready access to spectrum with minimal transaction costs and to ensure that spectrum is put to its most highly valued use.

63. Accordingly, we adopt a more refined interpretation of the Section 310(d) *de facto* control standard in the context of spectrum leasing and today's increasingly flexible regulatory policies. This revised standard will permit licensees and spectrum users to enter into certain types of leasing arrangements, without them being deemed transfers of *de facto* control that would require prior Commission approval, so long as the licensee maintains effective working control of the leased spectrum and has the ongoing responsibility for ensuring compliance with applicable Commission policies and rules during the term of the lease. This modification of the *de facto* control standard – which focuses on ensuring the licensee's control of the proper use of its leased spectrum (*i.e.*, compliance with the policies and rules applicable to the service) instead of the licensee's own control of each of the facilities using the spectrum – is an important step in updating our policies affecting spectrum leasing to support our current spectrum use objectives[148] as well as the other statutory changes discussed above.

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[144] We discuss our legal analysis regarding *de facto* control under Section 310(d) in Section IV.A.2, *infra.*

[145] *NPRM* at ¶ 71.

[146] *See id.* at ¶ 72; *cf. Cablecom-General*, 87 FCC 2d 784, 788-91 (1981) (discussing different public interest concerns regarding Section 310(d) analysis as between broadcast licensees and common carrier licensees).

[147] *See also Policy Statement* at ¶¶ 28-29 (discussing the unnecessary constraints that the *Intermountain Microwave* standard has placed on leasing arrangements, and noting the Commission's ongoing efforts to find ways to enable third parties to gain access to spectrum).

[148] *See generally Policy Statement*.

(ii) Indicia of *de facto* control for spectrum leasing arrangements

64. In the context of spectrum leasing, we no longer interpret *de facto* control under Section 310(d) as requiring that the Wireless Radio Services licensees affected by this proceeding exercise close working control over, determine the services on, and set the policies affecting the station(s) operating with the spectrum licensed to them under their authorizations. Instead, when leasing spectrum, these licensees must act as spectrum managers to ensure that the spectrum lessees comply with applicable policies and rules. Our revision of the Section 310(d) *de facto* control standard for spectrum leasing draws significant guidance from the band manager licensing model.[149] When establishing the new band manager service, the Commission chose not to apply the "facilities-based" licensee approach of *Intermountain Microwave* when evaluating *de facto* control issues with respect to spectrum leasing.[150] Instead, it authorized licensees to lease spectrum to third parties for use on their own facilities, and determined that so long as the licensees carried out their specified responsibilities as band managers, the spectrum leasing would not be deemed a transfer of *de facto* control requiring Commission approval. The Commission determined that licensees, by exercising these responsibilities, would be able to ensure that the spectrum users' activities with regard to the leased spectrum complied with the applicable interference and other services rules permitted under the license authorization, consistent with the Commission's public interest objectives attached to that licensing scheme.

65. For all Wireless Radio Services affected in this proceeding, we establish the following standard for interpreting whether a licensee retains *de facto* control for purposes of Section 310(d) when it acts as a spectrum manager when leasing spectrum to a spectrum lessee:

(1) The licensee remains responsible for ensuring the lessee's compliance with the Communications Act and all applicable policies and rules directly related to the use of the spectrum. This responsibility includes maintaining reasonable operational oversight over the leased spectrum so as to ensure that the spectrum lessee complies with all applicable technical and service rules, including safety guidelines relating to radiofrequency radiation. In addition, the licensee must retain responsibility for meeting all applicable frequency coordination obligations and resolving interference-related matters, and must retain the right to inspect the lessee's operations and to terminate the lease to ensure compliance.

(2) The licensee is responsible for all interactions with the Commission, including notification about the spectrum leasing arrangement and all Commission filings required under the license authorization and applicable service rules that are directly related to the use of the leased spectrum.

[149] When band manager licensing was established in the 700 MHz Guard Band, the Commission determined that band managers constituted a "new class" of licensee that was engaged solely in the business of leasing spectrum to third parties. *Guard Band Manager Order*, 15 FCC Rcd at 5312 ¶ 27. In this proceeding, we use the concept of a "spectrum manager" to apply to licensees affected in this proceeding and to distinguish these licensees from the class of licensees designated as "band manager" licensees. Pursuant to this Report and Order, licensees may continue to act as traditional facilities-based licensees exclusively, or they may choose to lease some or all of their spectrum to third parties by acting as spectrum managers of the spectrum that they lease.

[150] *See id.*, 15 FCC Rcd at 5319-5323 ¶¶ 42-50. The *Guard Band Manager Order* applicable to the 700 MHz band makes no mention of *Intermountain Microwave*, and does not conduct a *de facto* control analysis that focuses on whether the licensee controls the station facilities or policies associated with them. *See id.*

In determining whether a licensee exercises *de facto* control of the spectrum it leases, we will apply a case-by-case analysis based on the totality of the circumstances, as we do under other *de facto* control tests employed by the Commission.[151] We discuss below the key criteria that will provide the framework for such analysis.

66. *Licensee responsibility for lessee compliance with Commission policies and rules.* Under the first factor, the licensee remains fully responsible for ensuring that its lessee's operations are in compliance with the Communications Act and all applicable policies and rules directly related to the use of the spectrum. This retention of legal and actual control of the spectrum therefore requires the licensee to take steps through contractual provisions and actual oversight and enforcement of such provisions to ensure that the spectrum lessee operates in conformance with applicable technical and use rules governing the license authorization. In addition, this means that a licensee must maintain a reasonable degree of actual working knowledge about the lessee's activities and facilities that affect its ongoing compliance with the Commission's policies and rules. While discussed in greater detail below,[152] these responsibilities include: coordinating operations and modifications of the lessee's system to ensure compliance with Commission rules regarding non-interference with co-channel and adjacent channel licensees (and any authorized spectrum user); making all determinations as to whether an application is required for any individual lessee stations (*e.g.*, those that require frequency coordination, submission of an Environmental Assessment under 47 C.F.R. § 1.1307, those that require international coordination, those that affect radio frequency quiet zones described in 47 C.F.R. § 1.924, or those that require notification to the Federal Aviation Administration under 47 C.F.R. Part 17); and, ensuring that the lessee complies with the Commission's safety guidelines relating to human exposure to radiofrequency (RF) radiation (*e.g.*, 47 C.F.R. § 1.1307(b) and related rules).[153] Furthermore, the licensee is responsible for resolving all interference-related matters, including conflicts between its lessee and any other lessee or licensee (or authorized spectrum user). We will permit a licensee to use agents (*e.g.*, counsel, engineering consultants) when carrying out these responsibilities, so long as the licensee continues to exercise effective control over its agents' actions as necessary.[154]

67. Other key elements of the licensee's continuing control are that it must be able to inspect the lessee's operations and that it must retain the right to terminate the lease in the event the spectrum lessee fails to comply with the terms of the lease and/or the Commission's requirements. 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. If the lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the

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[151] *See, e.g.*, *WRBR*, 13 FCC Rcd 10662, 10677 ¶ 50 (1998) (broadcast case); Application of Volunteers in Technical Assistance, 11 FCC Rcd 1358, 1365-66 ¶ 22 (Chief, Int'l Bur. 1995) (satellite case); *Intermountain Microwave*, 12 FCC 2d at 560 (wireless radio case). As the Commission has long recognized, there is no exact formula for determining *de facto* control, and questions of control will necessarily turn on the specific circumstances of the particular arrangement. *See, e.g.*, *La Star Cellular Telephone Company*, 9 FCC Rcd 7108, 7109 ¶ 13 (1994) (wireless radio case); *Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 822 ¶ 7 (1975) (broadcast case).

[152] *See* Section IV.A.5.a, *infra.*

[153] 47 C.F.R. §§ 1.1307(b). *See also* 47 C.F.R. §§ 1.1310, 2.1093 (exposure limits generally applicable to all facilities, operations, and transmitters regulated by the Commission).

[154] We note that this is consistent with current policies regarding a licensee's use of its own agents to carry out certain licensee responsibilities. As we discuss below, the licensee responsibilities outlined under this new *de facto* control standard cannot be delegated to spectrum lessees or their agents. *See* Section IV.A.2.b(iii), *infra.*

licensee or by order of the Commission, the licensee must use all legal means necessary to enforce the order.

68. *Licensee responsibility for interactions with the Commission, including all filings, required under the license authorization and applicable service rules directly related to the leased spectrum.* Pursuant to the second factor above, the licensee is required to engage in all of the licensee interactions with the Commission that are required under the applicable service rules and policies and are directly related to the use of the spectrum. As a preliminary matter, the licensee must file the necessary notification with the Commission, including information establishing the spectrum lessee's eligibility to lease the spectrum pursuant to the rules applicable to this type of leasing arrangement.[155] In addition, the licensee is responsible for making all required filings (*e.g.*, applications, notifications, and correspondence[156]) associated with the license authorization that are directly affected by the lessee's use of the licensed spectrum. Licensees may use agents (such as counsel and engineering consultants) to complete these electronic filings, just as they do now under current policies.[157]

69. We will not, however, hold the licensee responsible for the lessee's compliance with Commission rules and policies (and associated interactions with the Commission) that are not directly related to the use of the leased spectrum. To the extent a spectrum lessee provides a communications service over the leased spectrum, it may become subject to certain rules and regulatory treatment based on its provision of such service. For instance, lessees that operate as common carriers would have certain rights and obligations under Title II of the Act based on their regulatory status as service providers. Lessees acting as telecommunications carriers may also have certain funding obligations (*e.g.*, universal service fund). Lessees may also provide other types of services (*e.g.*, non-common carrier services, information services, etc.) that subject them to other provisions of the Act and specified regulatory treatment independent of their status as spectrum lessees. Clearly, in these circumstances, the licensee should not have any responsibility for the lessee's compliance or interactions with the Commission.

70. *Reliance on contractual provisions.* The obligations imposed on the licensee and lessee in the context of our revised *de facto* control standard may be reinforced by the terms of the contract between the parties. Thus, one would expect the spectrum leasing agreement to identify the right of the spectrum lessee to use certain frequencies within the licensee's service area. The agreement may well detail the operating parameters of the lessee's system (*e.g.*, power, maximum antenna heights, frequencies of operation, base station location(s), area(s) of operation, and other parameters) as appropriate, depending upon the service involved and the nature of the lease. The spectrum lessee would agree to operate its system in compliance with all technical specifications for the system consistent with Commission rules. In sum, we will allow parties to determine precise terms and provisions of their contract, consistent with, and except as otherwise reflected in, the mandates, requirements, and other obligations we set out in this Report and Order.[158] We note, however, that to the extent that parties'

[155] We discuss below the eligibility rules applicable to the spectrum manager leasing option, as well as the details on how a spectrum lessee's eligibility is established pursuant to this notification. *See* Sections IV.A.5.a(ii)(b) and IV.A.5.a(ii)(c), *infra.*

[156] *See, e.g.*, 47 C.F.R. Part 1, Subpart F.

[157] Nothing in our policies would prevent a lessee from serving as an agent for a licensee with respect to such ministerial actions, so long as the lessee is in fact acting as the licensee's agent. The licensee would remain responsible for the substance and form of the filings, which would require, at a minimum, the licensee to review and approve of them before they are filed. The signature requirements of section 1.917, 47 C.F.R. § 1.917, remain in effect.

[158] For example, we will require all lease agreements to contain certain types of provisions designed to preserve the fundamental regulatory *status quo* in the event of a licensee's or spectrum lessee's bankruptcy. *See* paragraphs 188-89, *infra.*

leasing arrangements entered into pursuant to this revised *de facto* control standard do not in fact embody the principles set forth above, the Commission may determine that the lease constitutes an unauthorized transfer of control and pursue appropriate enforcement action.

(iii) Consistency of the new *de facto* control standard for spectrum leasing with Section 310(d) requirements

71. As we continue to refine our regulatory policies for exclusive use Wireless Radio Service licenses – to respond to statutory changes, technological advances, and evolving public interest objectives (as discussed above) – we also must ensure that the rights and responsibilities for which we hold licensees accountable remain consistent with statutory requirements. In particular, where we determine that providing licensees the option of leasing portions of licensed spectrum to third parties would serve the public interest, we must ensure that the Commission's interpretation of what constitutes *de facto* control continues to comply with the requirements of Section 310(d). We now determine that our new *de facto* control standard enunciated for spectrum leasing arrangements is consistent with the Section 310(d) requirements.

72. We have broad authority to interpret the requirements of the Communications Act,[159] and we have significant discretion to revise existing policies, such as the interpretation of Section 310(d) *de facto* control requirements, upon providing a reasoned basis for the policy revision consistent with the statute.[160] Neither the specific language of Section 310(d) nor the general statutory framework of the Communications Act requires that the Commission apply a facilities-based *de facto* control analysis when interpreting Section 310(d) requirements. Rather, the specific factors employed in that type of analysis were derived from the Commission's determination, at that time, that there were a particular set of powers and responsibilities that the licensee should not relinquish in holding a license in order that the Commission conclude that the licensee had not "transferred, assigned or disposed of in any manner" a "construction permit or station license, or any rights thereunder."[161]

73. Section 310(d)'s purpose generally is to ensure that a licensee that the Commission has already passed upon as qualified in a particular service[162] retains both *de jure* and *de facto* control over the licensed spectrum pursuant to the Act and applicable policies and rules, remains directly accountable to the Commission for ensuring that the licensed spectrum is used in compliance with applicable policies and rules, and prevents ultimate control of the license from being delegated to a non-licensee without Commission approval. We conclude that providing licensees with the flexibility to lease certain of their spectrum usage rights to third parties, without the need for Commission approval, is consistent with the

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[159] *See NPRM* at ¶ 71; paragraph 61, *supra*. Congress left the task of defining "control" to the Commission, and we are not bound by any exact formula in our determination of whether control under Section 310(d) has been transferred. *See NPRM* at ¶ 71; paragraph 61, *supra.*

[160] *See, e.g.*, *Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994); *Federal National Association for Better Broadcasting v. FCC*, 849 F.2d 665, 669 (D.C. Cir. 1988); *Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986).

[161] 47 U.S.C. 310(d). As explained more fully below, many of these powers and responsibilities were neither license rights nor obligations required by the specific terms of the license. Rather, they concern specific aspects related to the use of the licensed spectrum. The Commission has presumed that the exercise of these specifically identified powers and responsibilities would implicate Section 310(d). In the following paragraphs, we discuss why we no longer subscribe to this presumption in the context of spectrum leasing.

[162] This earlier determination concerning the licensee's qualifications would have been made pursuant to Sections 308(b) and 309(a) of the Act. *See* 47 U.S.C. §§ 308(b), 309(a).

Section 310(d) requirements so long as the licensee exercises both *de jure* control and *de facto* control, as we have refined that latter standard in the spectrum leasing context.

74. While the refined *de facto* control standard adopted above departs from the specific factors set forth in *Intermountain Microwave*, the two approaches share a fundamental interpretation of statutory requirements under Section 310(d). Under both approaches, a licensee's continued control over the licensed use of spectrum lies at the heart of what it means to retain the license and the rights thereunder. Where the two standards differ is in the significance attached to certain non-licensed activities that relate to the license, and in the degree of control that a licensee must retain over its license and specific license rights to avoid a determination that it has "transferred, assigned, or disposed of in any manner"[163] such license or rights. In reassessing the significance of these non-licensed activities and the degree of control that a licensee must exercise over its license and derivative spectrum usage rights, we are fulfilling our obligation to ensure that the manner in which we apply Section 310(d) to spectrum leasing, along with related policies regarding *de facto* control, continue to reflect our best understanding of the statute's requirements. After reviewing the dramatic changes in the Wireless Radio Services – both the evolution of the licensing policies discussed above[164] and the associated development of the industry's use of these services – we have concluded that the continued application of the *Intermountain Microwave* standard to spectrum leasing is neither required by Section 310(d) nor serves the public interest.

75. Under the *Intermountain Microwave* analysis set forth in the Commission's 1963 decision, various specified activities, rights, roles, and obligations not covered by the license itself – such as the financing of station operations, the employment of station personnel, and the receipt of profits from station operations – bear on the question of whether a licensee has, in some manner, disposed of its license or any rights thereunder. The financing of station operations or the receipt of station profits, for example, were deemed to implicate Section 310(d) not because the licensee had disposed of a right under the license to finance the station facilities or to receive profits (which are not, after all, rights under the license), but instead because the Commission had decided at the time of that decision that when a non-licensee assumes this type of role, the licensee may have partially or indirectly relinquished (*i.e.*, "transferred, assigned, or disposed of in any manner") its licensed right to use the spectrum. As we have discussed above, however, today's wireless communications environment has dramatically changed from 1963, and we can no longer generally assume that the licensee must perform non-licensed activities identified by *Intermountain Microwave* – either individually or together – in order to conclude that the licensee has retained its license and all rights thereunder.

76. Thus, in applying the new standard for determining whether a spectrum lease evidences an unauthorized Section 310(d) transaction, we will not consider in the same way the specific elements derived from *Intermountain Microwave*.[165] For example, while control over and direction of station

[163] 47 U.S.C. § 310(d).

[164] *See* Section IV.A.2.b(i), above.

[165] We note, however, that even though matters not directly covered by a license, such as the financing of station facilities, will no longer be a determinative factor in our Section 310(d) analysis of leasing arrangements, this does not mean that such matters have no regulatory or statutory significance in other respects. Thus, we have the general authority – which we intend to exercise in the appropriate cases – to address public interest issues (*e.g.*, foreign ownership or competitive concerns) that may arise from the control and operation of facilities by a spectrum lessee. As discussed below, we will require each licensee and spectrum lessee that enters into a leasing arrangement that does not transfer *de facto* control of the leased spectrum to provide us with detailed information regarding the arrangement prior to the lessee's commencement of operations, and we will have the authority to investigate, and if necessary, terminate a lease that raises concerns sufficient to justify such action. In addition to the operational oversight and continued control over the lessee's spectrum use that we require the licensee to retain under the new *de facto* control test, we find that these safeguards are sufficient to meet our overall statutory obligations.

personnel or receipt of station profits are no longer specific factors in evaluating a spectrum lease under this new standard (as they would be in applying the *Intermountain Microwave* test), the licensee's active, ongoing oversight of the lessee's use of facilities to ensure compliance with license requirements remains critical.

77. We have also reevaluated the line drawn under the *Intermountain Microwave* test for marking the degree of control that a licensee must maintain over licensed activities in order to avoid a Section 310(d) violation in the context of spectrum leasing. As an initial matter, we observe that even under *Intermountain Microwave*, a non-licensee's mere use of licensed spectrum does not necessarily imply that the licensee has transferred, assigned or disposed of the license or any license rights. The linchpin is control. If the licensee continues to hold a sufficient degree of control over the non-licensee's use, there has been no transfer, assignment, or disposition. A clear example of this proposition is the cell phone subscriber. In this case, the licensee has authorized the subscriber to use the spectrum on a daily basis, even though the cell phone user operates – off-premises and without the presence of any representative of the licensee – a transmitting/receiving device that sends and receives electromagnetic communications over the licensed spectrum. Because the licensee continues to exercise a sufficient degree of control over such use, the licensee need not obtain prior Commission consent before permitting the subscriber to exercise the licensee's spectrum usage right, and Section 310(d) is not implicated.

78. As this example illustrates, when a licensee provides third parties with permission to use its licensed spectrum, the licensee does not transfer, assign, or dispose of the license rights if the licensee retains sufficient control over the third party's spectrum use. Moreover, the necessary degree of control need not be complete; so long as the licensee retains the requisite degree of control over a license right, the licensee may permit a third party certain use of the licensed spectrum without disposing of that right, even if the third party uses the spectrum on a daily basis without direct supervision, and even if that licensee has given the third party certain enforceable rights to continue that use. A stricter construction of the Section 310(d) transfer requirements would yield irrational results, requiring, for example, Commission approval before a telecommunications provider could enter into a commonplace contract with a new subscriber.[166] Thus, the statutory issue is not whether a licensee can authorize a third party to exercise a right under the license without first obtaining Commission consent, but, rather, the degree of control a licensee must retain over the third party's use of that right in order not to implicate a transfer of *de facto* control under Section 310(d). As explained below, the degree of control required under our new approach with regard to spectrum manager leases falls within the acceptable range.

79. More specifically, we have structured the new *de facto* control standard to include a set of core responsibilities that a licensee must retain, and cannot delegate to a spectrum lessee, in order to maintain a level of control over a lessee's use of the spectrum sufficient to satisfy the underlying purposes of Section 310(d).[167] These responsibilities are defined by their statutory or regulatory relevance.[168] They

[166] While the Commission does not adjudicate contractual disputes between telecommunications providers and their subscribers, we recognize that a contract between the two will, under some circumstances, provide the subscriber with certain enforceable rights to continue using the spectrum.

[167] As we discuss in Section IV.A.5.b, *infra*, licensees may also enter into a different type of leasing arrangement in which they delegate core responsibilities to spectrum lessees. Such transactions, however, will constitute Section 310(d) transfers of *de facto* control under the updated standard we adopt in this Report and Order.

[168] Our new approach toward assessing spectrum leasing arrangements for compliance with Section 310(d) does not ignore the statutory or regulatory significance associated with the service and operational choices made by the licensee or lessee. Thus, the licensee cannot relinquish control over these choices in any manner that would prevent the licensee from ensuring the lessee's compliance with the statutory and regulatory requirements for use of the leased spectrum. For example, in permitting a lessee to choose a transmitter site, the licensee must retain sufficient control over the lessee's choice to ensure that any transmitter operating under the authority of the (continued….)

include the obligation to maintain reasonable operational oversight over the leased spectrum so as to ensure that the spectrum lessee complies with all applicable technical and service rules. Among other things, the licensee must retain responsibility for meeting all applicable frequency coordination obligations and resolving all interference-related and RF safety matters, as well as the responsibility and direct accountability for the lessee's compliance with Commission policies and rules. In exercising its ongoing control over the use of the leased spectrum, the licensee must also retain the right to inspect its lessee's operations, as well as the right to terminate the lease in the event that the lessee fails to comply with the lease terms or Commission requirements. In addition, licensees are responsible for all interactions with the Commission required under the license authorization and applicable service rules. This includes filing the necessary notification to the Commission, including information establishing the spectrum lessee's eligibility to lease the spectrum pursuant to the rules applicable to this type of leasing arrangement, and making all required filings associated with the lessee's use of the licensed spectrum. In sum, we determine that a licensee exercising these responsibilities with regard to the spectrum lessees and leased spectrum will effectively retain *de facto* control of the license under Section 310(d), consistent with the public interest.

80. While today's decision signals a formal shift from our *Intermountain Microwave* approach for the purposes of spectrum leasing, the new standard is a natural outgrowth of our evolving view of the meaning of control under Section 310(d). In fact, for some time now, we have treated certain uses of spectrum under various kinds of leasing arrangements as falling outside the bounds of Sections 310(d)'s prior approval requirements.[169] More recently, the Commission has found that "band manager" spectrum leasing permitted in the 700 MHz Guard Band, as well as the newly authorized services in the 1390-1392 MHz, 1670-1675 MHz, and 2385-2390 MHz bands and the paired 1392-1395 and 1432-1435 MHz bands, do not involve transfers of *de facto* control because band manager licensees effectively retain working control of the license when they lease spectrum to third-party users. The *de facto* control analysis applied in these band manager licensing schemes differs substantially from the facilities-based *Intermountain Microwave* standard.[170] Instead of exercising close control over facilities, the band manager licensee

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license complies with Commission and statutory requirements. Moreover, as noted below in Section IV.A.5(a)(ii)(c), the Commission retains the authority to address problems with a lease even when that lease is not considered to be a transaction requiring Commission approval under Section 310(d). For example, if a spectrum manager leasing arrangement that complies with our new *de* facto transfer policy nevertheless raises significant competitive concerns, the Commission may terminate the lease as a public interest matter, pursuant to statutorily-based competition policies. The termination, however, is not based on any unauthorized transfer of *de facto* control under Section 310(d), because the licensee has not, by permitting the lessee to use spectrum under the terms of the lease, abdicated its responsibilities or relinquished its control over the license or any license right.

[169] For example, we permit satellite transponder leasing, local marketing agreements (LMAs) that permit non-licensees to program broadcast stations, and ITFS channel leasing to MDS operators, because we do not regard the participating licensees as having relinquished their licenses or any rights thereunder to any sufficiently meaningful degree. *See Domestic Fixed-Satellite Transponder Sales*, 90 FCC 2d 1238, 1252 (1982), *aff'd sub nom. Wold Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984), *modified*, Martin Marietta Communications Systems, 60 RR 2d 799 (1986) (satellite transponder leasing); Amendment to the Commission's Regulations and Policies Covering Domestic Fixed Satellite and Separate International Satellite Systems, *Report and Order*, 11 FCC Rcd 2429 (1996) (same); Review of Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, *Report and Order*, 14 FCC Rcd 12559, 12591 ¶ 66 (1999) (LMAs); 47 C.F.R. §§ 74.931(c), (d), and (f) (ITFS channel leasing); Amendment of Parts 2, 21, 74, and 94 of the Commission's Rules and Regulations in regard to frequency allocation to the Instructional Television Fixed Service, the Multipoint Distribution Service, and the Private Operational Fixed Microwave Service, *Report and Order*, 94 FCC 2d 1203, 1250 ¶ 117 (1983) (same), *recon. denied*, 98 FCC 2d 129 (1984).

[170] *See Guard Band Manager Order*, 15 FCC Rcd at 5319-5323 ¶¶ 42-50. In authorizing band manager licensing in the remaining bands, the Commission relied on the *de facto* control analysis set forth in the *Guard Band Manager Order*. *See 27 MHz Report and Order*, 17 FCC Rcd at 9998 ¶¶ 38-39.

satisfies the statutory Section 310(d) requirement that it exercise *de facto* control of its license by virtue of its ongoing management of leased spectrum (including determining to whom it leases the spectrum, how much spectrum is leased, and for how long). In particular, the band manager licensee must exercise effective and non-delegable working control over the use of the leased spectrum to ensure that the users comply with the applicable service rules.[171] So long as the licensee satisfies and is accountable for exercising these responsibilities, consistent with the public interest objectives of this licensing model, there is no unauthorized transfer of control under Section 310(d).

81. Similarly, in this proceeding we find that a licensee's lease of spectrum in the Wireless Radio Services to third-party users will not constitute a transfer of *de facto* control of the license or any of the license rights, if the licensee exercises its responsibilities as a spectrum manager with regard to the leased spectrum. By requiring the licensee to exercise the specified responsibilities discussed above, including an ongoing oversight role, we ensure that licensees – the entities whose qualifications we have already reviewed in granting the licenses – retain a meaningful and sufficient degree of effective control over the leased spectrum and can therefore be deemed to have retained *de facto* control of their license with regard to that spectrum.

3. Wireless Radio Services Eligible for Spectrum Leasing

a. Background

82. The Commission tentatively concluded in the *NPRM* that it would like to facilitate the wider use of spectrum leasing among most Wireless Radio Services[172] in which licensees hold exclusive rights to use the licensed spectrum.[173] Generally excluded from the proposal were the Guard Band Manager Service (Part 27, Subpart G), Experimental Radio, Auxiliary, Special Broadcast, and Other Program Distributional Services (Part 74), Public Safety Radio Services (Part 90), Maritime Services (Part 80), Aviation Services (Part 87), Personal Radio Services (Part 95), and the Amateur Radio Service (Part 97).[174] The Commission also excluded from its leasing proposal those services in which spectrum is "shared," but it sought comment on whether leasing in such services should be permitted.[175]

83. Most commenters either directly supported or did not oppose the scope of services proposed in the *NPRM* for allowing wider use of spectrum leasing arrangements.[176] Several parties opposed extending the spectrum leasing proposal to include services in which spectrum was shared, as well as

[171] These responsibilities include: licensee retention of both the authority and the ongoing duty to take whatever actions are necessary to ensure third-party compliance with the Act and the policies and rules applicable to the band, including responsibility for meeting all frequency coordination obligations and resolving all interference-related matters; licensee responsibility and direct accountability for any interference or other misuse of the leased frequencies arising from their use by the non-licensed users; and, licensee responsibility for engaging in all interactions with the Commission, including making all filings required under the license authorization. *See Guard Band Manager Order*, 15 FCC Rcd at 5318 ¶ 40, 5321 ¶¶ 46-47.

[172] *See NPRM* at ¶¶ 13 & n.19 (discussing Wireless Radio Services affected by this proceeding), 24 & n.40 (same); *see also* § 1.907 (definition of "Wireless Radio Services").

[173] *NPRM* at ¶¶ 13 & n.19, 24 & n.40, 25.

[174] *Id.* at ¶¶ 13 n.19, 24 n.40, 69. *See generally* 47 C.F.R. Parts 74, 80, 87, 90, 95, and 97.

[175] *NPRM* at ¶¶ 63-65. Multiple licensees may be authorized to operate on shared frequencies subject to requirements designed to facilitate equitable use of the shared frequencies and to prevent interference.

[176] *See, e.g.*, LMCC Comments at 3-4; MRFAC Reply Comments at 2-3; Securicor Comments at 8-9.

public safety frequencies,[177] while two parties requested that those services be included within the proposal.[178] Others sought inclusion of Instructional Television Fixed Services (ITFS) or VHF Public Coast Stations in the proposal.[179] Although many of the commenters did not directly address which services should be included within the scope of our leasing rules, the comments mostly reflected a focus on services licensed on a geographic basis.[180]

b. Discussion

84. We will apply the spectrum leasing policies and procedures set forth in this Report and Order to all of the exclusive use licenses in the Wireless Radio Services that were included in the *NPRM* proposal.[181] In addition, we will extend these leasing policies to two additional sets of exclusive use licenses: (1) VHF Public Coast Station licenses, a subset of the Part 80 services,[182] and (2) 218-219 MHz

[177] *See* LMCC Comments at 3-4; MRFAC Reply Comments at 2-3; Securicor Comments at 8-9.

[178] *See* Nextel Comments at 7-9; Verizon Wireless Comments at 3.

[179] *See* RTG Comments at 34-35 (supporting inclusion of ITFS services, which are regulated under Part 74 of the Commission's rules); Maritel Comments at 1-4 (supporting inclusion of VHF Public Coast Services, which are regulated under Part 80, Subpart J of the Commission's rules).

[180] *See, e.g.*, Alaska Native Wireless Comments; AT&T Wireless Comments; Cook Inlet Comments.

[181] Thus, exclusive use licenses in the following services would be encompassed under the spectrum leasing procedures we adopt in this Report and Order: the Cellular Radiotelephone Service (Part 22); the Rural Radiotelephone Service (Part 22); the Offshore Radiotelephone Service (Part 22); the Air-Ground Radiotelephone Service (Part 22); the Paging and Radiotelephone Service (Part 22); the narrowband Personal Communications Services (Part 24); the broadband Personal Communications Service (Part 24); the Wireless Communications Service in the 698-746 MHz band (Part 27); the Wireless Communications Service in the 746-764 MHz and 776-794 MHz bands (Part 27); the Wireless Communications Service in the 2305-2320 MHz and 2345-2360 MHz bands (Part 27); the 220 MHz Service (excluding public safety licensees) (Part 90); the Specialized Mobile Radio (SMR) Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licensees in the General Category channels) (Part 90); the Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (Part 90); paging operations under Part 90; the Business and Industrial/Land Transportation (B/ILT) channels (Part 90) (which would include all B/ILT channels above 512 MHz and those in the 470-512 MHz band where a licensee has achieved exclusivity, but excluding B/ILT channels in the 470-512 MHz band where a licensee has not achieved exclusivity and those channels below 470 MHz, including those licensed pursuant to 47 C.F.R. § 90.187(b)(2)(v)); the Local Multipoint Distribution Service (Part 101); the 24 GHz Service (Part 101); the 39 GHz Band (Part 101); the Multiple Address Systems band (Part 101); the Private Operational Fixed Point-to-Point Microwave Service (Part 101); the Common Carrier Fixed Point-to-Point Microwave Service (Part 101); and, the Local Television Transmission Service (Part 101). *See generally* 47 C.F.R. Parts 22, 24, 27, 90, 95, and 101. New services in these parts also may be included within the spectrum leasing rules and policies adopted herein, subject to a separate determination to exclude a service in the proceeding establishing service rules. Nothing in this Report and Order is intended to supplant any existing rules or policies permitting shared operation of facilities, private carrier operation, or the sale of excess capacity on a licensee's system. *See, e.g.*, 47 C.F.R. §§ 90.179 (share use/private carrier operation of Part 90 facilities), 101.135 (shared use/private carrier operation in the Private Operational Fixed Point-to-Point Microwave Service), 101.603 (leasing of excess capacity in the Private Operational Fixed Point-to-Point Microwave Service).

[182] Unlike other Part 80 Maritime services, these VHF Public Coast Station licenses were awarded pursuant to auction and involve a geographic area, flexible, and exclusive use licensing scheme similar to that of many of the other services affected by this proceeding. *See* 47 C.F.R. Part 80, Subpart J (Public Coast Station licenses). Accordingly, we determine that they should receive similar treatment with regard to leasing.

Service, one of the Part 95 services.[183] Finally, we will apply these policies to the new Part 27 services in the paired 1392-1395 MHz and 1432-1435 MHz bands and the unpaired 1390-1392 MHz, 1670-1675 MHz, and 2385-2390 MHz bands, as set forth in the order establishing these services.[184] We permit spectrum leasing activities for all covered licensees, whether their authorized use is limited to private or non-commercial operation, or not.[185] For services where shared spectrum can become exclusive under a particular authorization as a result of surpassing loading levels as specified in the applicable rules, we will look at the specific authorization to determine whether it is exclusive on this basis such that the licensee could avail itself of our leasing procedures.[186] Finally, we wish to make clear that, in services where we have adopted licensing with a geographic service area overlay protecting incumbent Wireless Radio Service licensees,[187] the remaining incumbents will also be permitted to engage in leasing.[188] We see no basis for treating such incumbents and the geographic area overlay licensees differently for purposes of our leasing policies.

85. Except as noted above, we do not at this time extend our leasing policies to any of the other services that were specifically excluded from the proposal in the *NPRM*, including services involving shared frequencies.[189] In our view, leasing on shared frequencies presents implementation concerns,

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[183] The 218-219 MHz Service "is authorized for system licensees to provide communication service to subscribers in a specific service area." *See* 47 C.F.R. § 95.803. The licenses in this service are exclusive use authorizations, and permit the licensee to provide service on either a common carrier (or CMRS) or private basis. *See* 47 C.F.R. Part 95, Subpart F. As with VHF Public Coast Stations, licenses in this service are similar to exclusive licenses in other services to which we are applying our leasing rules. We thus find that the 218-219 MHz Service licenses should be treated similarly with respect to the spectrum leasing policies adopted in this Report and Order.

[184] *See 27 MHz Report and Order*, 17 FCC Rcd at 9998 ¶¶ 38-39. The rules we adopt in this Report and Order supplant the band manager provisions previously adopted for the paired 1392-1395 MHz and 1432-1435 MHz bands and in the unpaired 1390-1392 MHz, 1670-1675 MHz, and 2385-2390 MHz bands. *Id.* Consistent with that order, we are not including the 216-222 MHz, the 1427-1429.5 MHz, or the 1429.5-1432 MHz bands, which are to be used for telemetry purposes, in the spectrum leasing policies set forth in this Report and Order available to those licensees. That order did not permit those licensees to lease their spectrum. *See generally id.*

[185] As detailed below, however, a lessee would be subject to any use restrictions, such as private or non-commercial use, applicable to the licensee.

[186] For example, Business and Industrial/Land Transportation authorizations in 470-512 MHz can become exclusive if the licensee's operations attain specified loading levels; we thus would assess the permissibility of leasing on a license-by-license basis.

[187] In many cases, these incumbents were licensed on a site-specific basis.

[188] To the extent an incumbent licensee is not a Wireless Radio Service licensee, as in the instance of broadcast licensees in the 700 MHz bands, we are not at this time permitting it to lease spectrum pursuant to the policies and procedures adopted herein.

[189] Accordingly, the following Wireless Radio Services are excluded from the leasing policies set forth in this Report and Order: the Guard Band Manager Service (Part 27, Subpart G); Experimental Radio, Auxiliary, Special Broadcast, and Other Program Distributional Services (Part 74); Maritime Services other than VHF Public Coast Stations regulated under Subpart J (Part 80); Aviation Services (Part 87); Public Safety Radio Services (Part 90); the Location and Monitoring Service with regard to licenses for non-multilateration LMS systems (Part 90); Personal Radio Services other than the 218-219 MHz Service (Part 95); and the Amateur Radio Service (Part 97). In addition, at this time we continue to exclude the ITFS and the Multipoint Distribution Service (MDS)/Multichannel Multipoint Distribution Service (MMDS), Parts 74 and 21 services, noting that a recent proceeding has been initiated that raises leasing issues, among others, with respect to those particular services. *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 (continued….)

particularly when the shared (or non-exclusive) nature of licensing on such frequencies permits interested parties to seek their own authorizations to operate and where the loading levels may convert a license on a previously shared frequency to an exclusive license. We do, however, consider in the Further Notice whether to extend our leasing policies to these and other additional services.[190]

4. General Applicability of Service Rules and Policies to Spectrum Leasing Arrangements

a. Background

86. In seeking in the *NPRM* to develop a framework for spectrum leasing policies, the Commission sought general comment on whether the service rules and general policies that are applicable to each licensee under its license authorization should also be applied to the entities that lease and use the licensed spectrum. With regard to interference-related service rules, including rules on frequency coordination and technical matters, the Commission tentatively concluded to make them applicable to third-party lessees in the same manner in which they apply to licensees.[191] The Commission also sought comment on whether the service rules and policies not related to interference concerns – including general eligibility and use restrictions, construction/performance requirements, designated entity policies (*e.g.*, attribution, transfer restrictions, and unjust enrichment),[192] spectrum aggregation limits,[193] regulatory classification, and various statutory and other regulatory obligations (*e.g.*, Title II) – should be applied to spectrum lessees in the same manner in which they apply to licensees, or whether instead there might be situations in which the service rules should be revised to be more flexible with regard to spectrum lessees.[194] It reached the tentative conclusion to permit licensees to rely on the activities of their lessee(s)

Bands, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003). We also exclude the Multichannel Video Distribution and Data Service (MVDDS) because that service was not included within the scope of the *NPRM* and was established subsequently without any provisions regarding leasing. *See* 47 C.F.R. Part 101, Subpart P. Finally, consistent with the approach in the *NPRM* generally to exclude public safety licensees from the leasing proposals at this time, we also exclude public safety licensees regulated by Part 90, including all public safety licensees that have obtained their licenses pursuant to Section 337 authority. *See* 47 U.S.C. § 337. In the Further Notice, we consider whether to permit spectrum leasing in a number of these services. *See* discussion in Section V.C, *infra*.

[190] *See* Section V.C, *infra.*

[191] *See generally NPRM* at ¶¶ 36-40 (application of, and compliance with, interference-related rules). The term "interference-related" captures not only the specific technical and operational rules governing the use of radio frequency devices in the particular service, but also the multitude of service rules (*e.g.*, designation of control points, coordinating/detuning with affected AM arrays, etc.) imposed on a licensee to ensure that multiple uses/users of spectrum can exist with little or no interference and that interference issues can be readily resolved when necessary.

[192] *See* 47 C.F.R. §§ 1.2110, 1.2111, 24.839.

[193] At the time the *NPRM* was adopted, the CMRS "spectrum cap" aggregation limits were still in place. In November 2001, the Commission repealed the spectrum cap, effective January 1, 2003. *See* 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*). 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.* at 22681-22693 ¶¶ 30-46, 22695-22696 ¶¶ 54-55, 22699-22700 ¶¶ 62-65.

[194] *See generally NPRM* at ¶¶ 42-43 (general application of service rules not related to interference matters); ¶¶ 44-47 (application of general qualification and eligibility rules and use restrictions); ¶ 48 (application of attribution rules); ¶¶ 49-50 (application of aggregation limits); ¶¶ 50-51 (application of construction requirements); ¶¶ 52-55 (application of designated entity and entrepreneur policies, including unjust enrichment); (continued….)

to comply with any applicable construction buildout or substantial service requirements.[195] In considering how it would proceed with regard to other non-interference related service rules, the Commission stated that it wanted to ensure that any measures taken to promote spectrum leasing would not lead to circumvention of the underlying purposes of the particular service rules.[196]

87. In addition, the Commission sought comment in the *NPRM* on whether it should, as a general matter, make technical rules more flexible and harmonize service rules so as to make spectrum usage rights increasingly fungible across Wireless Radio Services.[197] It expressly noted, however, that it was only seeking comment on revisions that would be directly related to promoting secondary markets through spectrum leasing, and was not seeking to revise existing technical rules or other service rules that applied to particular services. It stated that any proposals regarding the general applicability of service rules should be addressed in other proceedings, such as in biennial review proceedings.[198]

88. Commenting parties generally agreed with the proposal to apply interference-related service rules, including technical rules, to spectrum lessees.[199] Several discussed the need for mechanisms to ensure that lessees comply with interference rules.[200] Others stated that, to the extent that any new uses are allowed in a band, the Commission should focus on ensuring that there is no harmful interference.[201]

89. In contrast, there was no consensus relating to the applicability of non-interference service rules and policies to spectrum lessees. As a general matter, some asserted that a lessee should not have any greater rights than the licensee,[202] or that not exempting lessees from these service rules and policies could enable entities to circumvent the Commission's rules and policies.[203] Others contended that these

¶¶ 56-59 (application of matters relating to various statutory and other regulatory issues, including Title II, as well as other requirements such as Communications Assistance for Law Enforcement Act (CALEA), E911, and universal service); ¶¶ 60-61 (application of rules relating to periodic filings and other interactions with the Commission).

[195] *Id.* at ¶¶ 50-51.

[196] *See id.* at ¶¶ 42-43.

[197] *See generally id.* at ¶¶ 9, 83-97. *See also Policy Statement* at ¶¶ 8-10 (discussing Commission's general trend toward developing more flexible technical rules and flexible use within an increasing number of particular service rules, all moving toward the goal of creating more fungible spectrum usage rights); *Policy Statement on Principles for Spectrum Reallocation*, 14 FCC Rcd at 19870-71 ¶ 9, 19877 ¶ 20 (same).

[198] *See NPRM* at ¶¶ 9, 83 & n.125, 89 & n.137.

[199] *See, e.g.*, CTIA Comments at 2, 17-19; Vanu Comments at 11; Winstar Comments at 13.

[200] *See, e.g.*, Entergy Comments at 4-5; Kansas City Power Comments at 5. These parties were concerned that the Commission establish a means for protecting existing spectrum-adjacent licensees (particularly in private services) from interference by lessees, who might commence and terminate service more frequently, and with less advance scrutiny, than is currently the practice.

[201] *See, e.g.*, Entergy Comments at 3-5; Kansas City Power Comments at 4-5.

[202] *See, e.g.*, CTIA Comments at 2-3; Teligent Comments at 8-9 (spectrum lessee should not obtain greater rights or be subject to less requirements than would otherwise apply to a license holder of the same spectrum).

[203] *See, e.g.*, Leap Wireless Reply Comments at 2, 5; Securicor Comments at 12.

service rules and policies generally should not be applied to a lessee.[204] With regard to the application of specific service rules to spectrum lessees, commenters supported allowing licensees to rely on their lessees' activities for meeting applicable construction/performance requirements[205] and permitting lessees to choose their regulatory status (to the extent licensees could),[206] but they were split regarding how designated entity policies[207] or then-applicable aggregation limits should apply to lessees.[208] On other specific rules, parties offered few comments.[209] Several parties recommended that the Commission postpone deciding whether to apply some or all service rules to spectrum lessees until after it issued an initial report and order establishing a general framework for spectrum leasing; they asserted that this would enable the Commission to engage in a more thorough analysis and review of the complexities potentially raised.[210]

90. Remarking upon a much broader point about the impact of service rules on the development of secondary markets, several commenters stated that the Commission's secondary markets initiative, including its goals of enhancing the efficient use of spectrum, would be significantly advanced if the Commission revised many of the service rules to promote maximum flexibility in the use of spectrum in licensed bands. Such revisions, they asserted, would greatly assist in making spectrum usage rights more fungible, and thus secondary markets in those rights more active.[211]

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[204] *See, e.g.*, AT&T Wireless Comments at 5; Cingular Wireless Comments at 8; Enron Comments at 15; Nextel Comments at 15; Pacific Wireless Comments at 3-5; Winstar Comments at 13.

[205] All of those commenting supported the proposal, including existing licensees, potential spectrum lessees, economists, and spectrum brokers. *See, e.g.*, Blooston Rural Carriers Comments at 9 (would create additional incentives for development of secondary markets); Cingular Wireless Comments at 4-5 (same); Cook Inlet Comments at 10 (same); RTG Comments at 28-29 (same); El Paso Global Comments at 10 (would better ensure spectrum usage efficiently and did not sit idle); 37 Concerned Economists Comments at 5-6 (same).

[206] *See, e.g.*, Cingular Wireless Comments at 7 (regulatory status of a lessee should be tied to the actual service it provides, rather than the status of the licensee); El Paso Global Comments at 11; Teligent Comments at 8-9.

[207] *Compare* Leap Wireless Reply Comments at 1-7 (leasing could create an end run around the Commission's designated entity rules); RTG Comments at 27 and Reply Comments at 17-19 (same); *with* Alaska Native Wireless Comments at 9-13 (designated entity restrictions and unjust enrichment should not apply to leasing arrangements); AT&T Wireless Comments at 8-9; Blooston Rural Carriers Comments at 5-6; Cingular Wireless Comments at 8; Cook Inlet Comments at 7-9; NTCA Comments at 6-8; U.S. Small Business Administration Comments at 1-4.

[208] As noted above, at the time the *NPRM* was issued, the CMRS spectrum cap was still in place. Accordingly, parties commented on whether leased spectrum should be attributed to the licensee, the spectrum lessee, or both. *See, e.g.*, Cook Inlet Comments at 10 (amount of leased spectrum should be attributed to both licensee and lessee); UTStarcom Reply Comments at 3-4 (same); AT&T Wireless Comments at 5-7 (leased spectrum should be attributed only to licensee); OPASTCO Comments at 3 (same); CTIA Comments at 6-8 (leased spectrum should be attributed only to lessee); Winstar Comments at 14-15 (same). Some stated that spectrum should not be attributed when parties enter into short-term leasing arrangements. *See, e.g.*, RTG Comments at 28; Winstar Comments at 14-15 (same).

[209] For instance, we received little comment on whether general eligibility rules or use restrictions should apply to lessees. *But see, e.g.,* Nextel Comments at 14-15; Pacific Wireless Comments at 5.

[210] *See, e.g.*, Long Lines Comments at 4-5; Sprint Comments at 4; Teligent Reply Comments at 9-10.

[211] *See* 37 Concerned Economists Comments at 5-6 (broadening the rights generally granted licensees in primary license rights would promote efficient transfer of spectrum in secondary markets by reducing uncertainty and increasing flexibility of use; Commission should eliminate all requirements not related to interference or (continued….)

b. Discussion

91. We determine that we will generally apply the applicable service rules and policies – both interference-related and others – to spectrum lessees in the same manner as they apply to licensees. As emphasized in the *NPRM*, we do not intend for the secondary markets initiative to be used as a means to undermine the service rules and general policies applicable to particular licenses. Thus, consistent with the comments and as proposed in the *NPRM*, interference-related service rules and RF safety rules applicable to licensees will be applicable to all spectrum lessees. At the heart of the Commission's concerns and obligations is the need to protect the public and spectrum users from harmful interference caused by authorized and unauthorized users.[212] We see no reason to apply, nor is there a record to support, a distinct set of interference rules for spectrum lessees.[213] Similarly, as a general matter, we will also apply the non-interference-related service rules and policies to spectrum lessees, although we do provide additional flexibility in certain specified circumstances. For short-term *de facto* transfer leases, in particular, several of these service rules will not apply to spectrum lessees. In Section IV.A.5 that follows, we discuss how the specific rules will be applied to spectrum lessees in different leasing contexts.[214]

92. Consistent with the approach proposed in the *NPRM*, we will not in this Report and Order revise service rules of general applicability. As the comments of a number of parties indicated, Commission adoption of more flexible use or technical rules for various Wireless Radio Services could well enhance the secondary market for spectrum usage rights.[215] We note that, under the regulatory framework we establish for spectrum leasing in this Report and Order, any changes that the Commission makes to provide for more flexibility in the service rules applicable to licensees automatically enhances the flexibility of those service rules for spectrum lessees as well, which in turn could facilitate the further development of secondary markets in those services.[216] In recognition of this, we explore in the Further

anticompetitive concerns). *See also* El Paso Global Comments at 9; Nextel Comments at 14-16; ITA Reply Comments at 6-7; SDR Forum Comments at 6; Shared Spectrum Company Comments at 2; Sprint Comments at 3; Vanu Comments at 2-3, 12.

[212] *See NPRM* at ¶ 35.

[213] However, to the extent that a licensee has sought or received a waiver or other relief from such rules, such waiver or relief would be available to lessees of the underlying licensed spectrum unless the conditions were specifically limited to the licensee's use of its own operations or facilities.

[214] *See* Sections IV.A.5.a (spectrum manager leasing), IV.A.5.b (long- and short-term *de facto* transfer leasing), *infra*.

[215] We also note that several economists commenting in this proceeding recommended that the Commission institute significant revisions to our Wireless Radio Service rules that would allow secondary markets to emerge. *See* 37 Concerned Economists Comments at 5. *See also* Sprint Comments at 3-4 (endorsing these economists' long-term view of the direction in which the Commission should proceed); Vanu Comments at 12-13 (Commission should remove outdated service rule restrictions applicable to licensees, which would expand the trading of spectrum usage rights between licensees and lessees). As noted in the *Policy Statement*, we recognize that restrictions on permissible services reduce the potential for secondary trading of spectrum usage rights. *Policy Statement* at ¶ 26. Finally, we note that the Spectrum Policy Task Force also made similar findings, and recommended that the Commission adopt policies that would allow maximum flexible use of spectrum. *See generally Spectrum Policy Task Force Report* at 16-21.

[216] *See Policy Statement* at ¶ 19 (a major focus of our secondary markets efforts will be to remove, relax, or modify our rules and procedures to eliminate unnecessary inhibitions on the operation of secondary market processes and to promote flexibility and fungibility in the use of spectrum). Again, we note that these conclusions were also reached by the Spectrum Policy Task Force. *See generally Spectrum Policy Task Force Report* at 16-21, 55-58.

Notice the possible elimination or modification of a number of policies that may limit a licensee's flexibility in using the spectrum for its own purposes or for leasing.

5. Specific Policies and Procedures Applicable to Spectrum Leasing Arrangements

93. This section addresses the specific policies and procedures that we will apply with regard to the different types of spectrum leasing arrangements that licensees and lessees may wish to enter. These policies and procedures will differ depending on whether the leasing arrangements involve a transfer of *de facto* control under Section 310(d) and the duration of the lease.

a. "Spectrum manager" leasing – Spectrum leasing arrangements that do not involve a transfer of *de facto* control under Section 310(d)

94. In this subsection, we discuss the specific policies and procedures that apply to leasing arrangements between licensees and spectrum lessees that do not constitute transfers of *de facto* control under the new control standard articulated above. Under this spectrum manager leasing, licensees are not required to obtain prior Commission approval for such leases, but must notify the Commission of the lease and provide certain certifications and information regarding the spectrum lessees and the lease terms.

(i) Background

95. Under the spectrum leasing proposal advanced in the *NPRM*, licensees were to exercise *de facto* control over leased spectrum and retain direct and ultimate responsibility for ensuring that their lessees complied with the Act and the Commission's applicable technical and service rules.[217] Specifically, the Commission proposed to hold licensees directly responsible for their spectrum lessees' non-compliance, and to take any action against licensees provided in our rules, including license revocation or other enforcement action, if the lessee were to operate outside the parameters of the licensee's authorization.[218] At the same time, the Commission tentatively concluded that it would also hold spectrum lessees independently responsible for adhering to the Act and rules, and that they could be sanctioned for non-compliance, including forfeitures under Section 503(b), subject to certain distinct procedural safeguards.[219] Finally, the Commission invited comment on additional ways in which it might seek to ensure that spectrum lessees act responsibly with respect to compliance with the Act and Commission policies and rules.[220] Chief among the Commission's concerns was that spectrum users, whether licensee or lessee, be accountable for complying with the Act and any applicable Commission policies and rules.[221]

96. Even though the spectrum leasing arrangements contemplated under this approach would not necessitate prior Commission approval, the Commission noted that it might nonetheless be important to have relevant information about spectrum lessees. Accordingly, it requested comment on whether it

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[217] *See NPRM* at ¶¶ 27-32.

[218] *Id.* at ¶¶ 29, 31-32.

[219] *Id.* at ¶¶ 31-32; 47 U.S.C. § 503(b)(5). The Commission sought comment on whether it should require that spectrum lessees acknowledge in their lease agreements that they must accept Commission oversight and enforcement. *NPRM* at ¶ 32.

[220] *NPRM* at ¶ 33.

[221] *See generally id.* at ¶¶ 29-32.

should adopt any notification procedures for parties entering into leasing arrangements, including reports or other filings by licensees or lessees.[222]

97. Several commenters endorsed the general approach advanced in the *NPRM* in which licensees would lease spectrum to lessees, under a revised *de facto* control standard, while remaining "ultimately responsible" for ensuring the lessees' compliance with Commission policies and rules.[223] Many others generally endorsed a leasing approach in which licensees would be held "ultimately responsible" for their lessees' compliance, but would be able to rely largely on their lessees' certifications of compliance in carrying out their responsibilities.[224]

98. As for the Commission's ability to exercise jurisdiction over spectrum lessees and enforce its policies and rules against lessees, commenting parties generally asserted that the Commission would have sufficient jurisdiction and enforcement powers over lessees to carry out the agency's spectrum management responsibilities with respect to leasing arrangements, and many cited specific statutory bases.[225] Some indicated that jurisdiction and enforcement would be ensured if there were specific provisions in the leasing contract,[226] while others indicated that some form of notification filed with the Commission to identify the spectrum lessee might be sufficient.[227]

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[222] *See generally id.* at ¶¶ 33, 59-61.

[223] *See, e.g.*, AMTA Comments at 4 (endorsing general concept of holding licensees "ultimately responsible," with little or no discussion of what the licensees' specific responsibilities would entail); Nextel Reply Comments at 10-11 (same); SDR Forum Comments at 4-5 (same).

[224] *See, e.g.*, AT&T Wireless Comments at 9-10, 13 (while "ultimately responsible," licensees should not be required to exercise due diligence or other verification to ensure their lessees' compliance, and should be able to rely on their lessees' certification of compliance); Cook Inlet Comments at 6 (while licensees should retain "ultimate responsibility" for compliance, they may be unwilling to lease spectrum if they risk losing the license based on the actions of their lessees); Pacific Wireless Comments at 3, 5-6 (while licensee should retain "ultimate responsibility," they should be able to rely on their lessees' certifications of compliance); Securicor Comments at 15-16 (while licensees should be held "ultimately responsible," the Commission should proceed directly against lessees for violations and the licensee should be able to rely on their lessees' certifications of compliance); Teligent Comments at 4-5, 7-8 (same). *Cf.* Blooston Rural Carriers Comments at 6-7 (although "ultimately responsible," licensees should only have "secondary liability" for their lessees' non-compliance; exposing large regional licensees to potential enforcement action, including possible license forfeiture, for violations by a lessee that they are not in a position to prevent would make such licensees reluctant to lease spectrum to rural carriers).

[225] *See, e.g.*, Cingular Wireless Comments at 6 (citing §§ 312, 401, and 503(b)(5) of the Act); Cook Inlet Comments at 4-6; CTIA Comments at 10-11 (citing § 152(a) of the Act); RTG Comments at 18-19 (citing §§ 152, 205, 307(e)(2), 411(a), 501, 502, and 503(b)(5) of the Act); Teligent Comments at 7-8; Winstar Comments at 8 (citing §§ 2 and 152 of Communications Act and Part 15 of the rules).

[226] *See, e.g.*, Teligent Comments at 5 (suggesting that a lessee's certification in a lease that it was submitting to FCC jurisdiction would be enough); Pacific Wireless Comments at 5-6. *Cf.* AT&T Wireless Comments at 10-11, 13 (licensees can enforce lessee compliance through contractual means; licensees should be able to rely on their lessees' certifications of compliance, and the Commission need not be notified about leasing).

[227] *See, e.g.*, Blooston Rural Carriers Reply Comments at 4 (Commission could require reasonable notification through ULS); Cingular Wireless Reply Comments at 5 & n.15; 6 (FCC should be notified about leasing); Cook Inlet Comments at 4-5, 7 (licensees and lessees should file leasing notification with FCC; lessees should certify directly to Commission their acceptance of FCC's enforcement authority); CTIA Comments at 15 (licensee should notify the Commission about leasing arrangements); Cinergy Comments at 4-5 (FCC must institute procedures for providing public notice of leased operations, and institute mechanisms for resolving interference disputes); Entergy Comments at 4-5 (same); Kansas City Power Comments at 5 (same); NTCA Comments at 5 (Commission could require notification, identifying spectrum lessees in FCC database so that the (continued….)

99. Finally, commenters differed on whether there should be a general requirement that licensees notify the Commission about spectrum leasing arrangements. While many opposed any notification requirement on the grounds that this type of leasing did not involve a transfer of *de facto* control,[228] others indicated that requiring a post-lease notification would be acceptable or appropriate.[229]

(ii) Discussion

(a) Respective rights and responsibilities of licensees and spectrum lessees

100. *Licensees' rights and responsibilities.* Under this type of leasing arrangement, we grant licensees the right to lease any or all of their spectrum usage rights to spectrum lessees, and to do so without the need for Commission approval, so long as licensees retain *de jure* control of the license[230] and act as spectrum managers with regard to the leased spectrum by continuing to exercise *de facto* control over that spectrum, pursuant to the standard enunciated above. The Commission will hold licensees directly and primarily responsible for ensuring their lessees' compliance with the Act and applicable Commission policies and rules. Failure of a licensee to meet the criteria of the revised *de facto* control standard would constitute an unauthorized transfer of control under Section 310(d). The licensee must also file a notification with the Commission that it has entered into a spectrum leasing arrangement, as discussed more fully in Section IV.A.5.a(ii)(c), below. Failure to do so would subject a licensee to possible enforcement action as a substantive rule violation.

101. Since the licensee retains *de facto* control of the leased spectrum and is held directly accountable for lessee compliance with applicable policies and rules concerning the leased spectrum under this particular type of leasing arrangement, the Commission will look first to the licensee to exercise its responsibilities and ensure compliance. Consistent with the proposal advanced in the *NPRM*, to the extent a licensee fails to ensure its lessee's compliance, the licensee will be subject to enforcement action, including admonishments, monetary forfeitures, and/or license revocation, as appropriate, pursuant to Sections 503(b) (forfeiture provisions) and 312 (license revocation provisions) of the Communications Act.[231] As discussed earlier, we will not hold licensees responsible for their lessees' compliance with Commission rules and policies that are not directly related to the use of the leased spectrum.

102. Because leasing pursuant to this option requires that spectrum lessees meet certain eligibility requirements,[232] we will require that licensees submit appropriate certifications by the lessee as part of the lease notification. We will permit licensees to reasonably rely on those certifications. To the extent, however, that a licensee has knowledge that a spectrum lessee does not satisfy these eligibility requirements, or reasonably should have such knowledge, then allowing such leasing to proceed would violate our spectrum manager leasing policies and we will subject that licensee to appropriate

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Commission should proceed directly against lessees for any violation); RTG Comments at 18-19 (Commission could require notification similar to that required for *pro forma* transfers of control); UTStarcom Comments at 3 (same); Winstar Comments at 8 (same).

[228] *See, e.g.*, AT&T Wireless Comments at 11; Pacific Wireless Comments at 7.

[229] *See, e.g.*, Blooston Rural Carriers Reply Comments at 4-5; Cingular Reply Comments at 2-3; Cook Inlet Comments at 4; CTIA Comments at 15; Entergy Comments at 4-5; RTG Comments at 24.

[230] As noted earlier, *de jure* control refers to legal control.

[231] 47 U.S.C. §§ 503(b), 312.

[232] *See* Section IV.A.5.a(ii)(b), *infra*.

enforcement action. In addition, licensees retain responsibility for maintaining compliance with applicable eligibility and ownership requirements imposed on them pursuant to the license authorization. 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.

103. *Spectrum lessees' rights and responsibilities*. The spectrum lessee must comply with Commission requirements associated with the license, and must maintain an ongoing relationship with the licensee from whom it leases spectrum. As a preliminary matter, the lessee must certify that it meets all applicable general eligibility requirements associated with the leased spectrum (with such certifications becoming part of the notification submitted by the licensee, as noted above). The lessee's eligibility certifications will be similar to the certifications currently submitted by applicants seeking a license authorization in the particular service.[233] We will hold the spectrum lessee directly accountable for these certifications.

104. Although we intend to enforce our operational rules and policies directly against the licensee in the first instance, as discussed above, we also determine to hold spectrum lessees independently accountable for complying with the Act and our policies and rules, as proposed in the *NPRM*.[234] The lessee also must accept Commission oversight and enforcement consistent with the license authorization. The lessee must cooperate fully with any investigation or inquiry conducted by either the Commission or the licensee, allow the Commission or the licensee to conduct on-site inspections of transmission facilities, and even suspend operations under certain conditions. Spectrum lessees who violate our rules or other federal laws potentially will be subjected to forfeitures under Section 503(b) of the Communications Act,[235] other administrative sanctions, and criminal prosecution. In addition, to the extent that lessees in their leasing activities qualify as common carriers under Section 332 of the Communications Act and Title II,[236] they may also be subject to appropriate enforcement actions.[237]

105. We will require both the licensee and spectrum lessee to retain a copy of the lease agreement and to make it available upon request by the Commission.

106. *Subleasing.* We will allow spectrum lessees to sublease their spectrum usage rights under certain conditions. Specifically, the licensee must agree to permit subleasing and must be in privity with the sublessee so that the licensee can act as spectrum manager by exercising *de facto* control over the subleased spectrum. Pursuant to the notification requirements for this type of leasing, the licensee also must notify the Commission about the sublease. Of course, licensees may seek to protect themselves from the risks associated with subleasing arrangements by including provisions in their leases that prohibit the spectrum lessee from entering into a sublease. We do not intend to dictate how parties conduct their businesses. Rather, by permitting subleasing, we seek to permit freely-negotiated business transactions, subject to continuing to ensure our ability to administer the spectrum leasing policies adopted in this Report and Order.

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[233] *See, e.g.*, FCC Form 603 (main form).

[234] *NPRM* at ¶¶ 31-32.

[235] 47 U.S.C. § 503(b)(5). To the extent that spectrum lessees do not hold licenses or other authorizations, they are entitled to certain procedural protections, including the requirement that they receive citations in the first instance regarding any alleged violations. *Id.*

[236] *See* 47 U.S.C. §§ 332(c)(1), 201 *et seq.*

[237] *See* 47 U.S.C. § 503(b)(2)(B).

107. *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing 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 during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal.

(b) Application of particular service rules and policies

108. *Interference-related service rules.* As noted above, the interference and RF safety rules applicable to the licensee as a condition of its license authorization will also apply to the spectrum lessee. Spectrum manager licensees will have direct responsibility and accountability for ensuring that their spectrum lessees comply with these rules, including responsibility for resolving all interference disputes and complying with safety guidelines relating to radiofrequency radiation.

109. *General eligibility policies and rules*. Under spectrum manager leasing, we will require that spectrum lessees satisfy the eligibility and qualification requirements that are applicable to licensees under their license authorization.

110. Specifically, as a policy matter we extend to spectrum lessees the eligibility requirements of Section 310 pertaining to foreign ownership, doing so in order to both protect the national security and promote the public interest benefits of foreign investment in U.S. telecommunications markets.[238] Accordingly, we will require that spectrum lessees meet applicable foreign ownership eligibility requirements by certifying that they meet Section 310(a) requirements and, to the extent that Section 310(b) applies (*e.g.*, to the extent they are common carriers), that they meet those requirements as well.[239] Thus, as part of the notification process for this type of leasing arrangement, each spectrum lessee must certify that it is not a foreign government or representative of a foreign government in the same manner as required of licensees pursuant to Section 310(a). In addition, if the spectrum lessee intends to provide a service to which Section 310(b) applies, it must certify that it is not an alien or representative of an alien, is not organized under the laws of a foreign government, does not have more than one-fifth direct alien ownership, or either does not have more than one-quarter indirect alien ownership or has obtained the necessary declaratory ruling approving its level of ownership above one-quarter indirect alien ownership.[240]

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[238] *See, e.g.*, Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, 23919-23921 ¶¶ 61-66, 23940-23942 ¶¶ 111-117 (1997) (*Foreign Participation Order*); *Order on Reconsideration*, 15 FCC Rcd 18158 (2000); In re Applications of Voicestream Wireless Corporation, Powertel, Inc. and Deutsche Telekom AG, *Memorandum Opinion and Order*, 16 FCC Rcd 9779, 9821-9823 ¶¶ 73-77 (2001).

[239] *See generally* 47 U.S.C. §§ 310(a), (b). By its terms, Section 310(b) applies to licensees offering common carrier, broadcast, aeronautical en route, or aeronautical fixed services. 47 U.S.C. § 310(b). As discussed above, licensees must submit, as part of the notification process, all necessary certifications by lessees that they meet the applicable eligibility requirements. These certifications will be similar to those found currently as part of Form 603.

[240] If a potential spectrum lessee has more than one-quarter indirect alien ownership and has not yet received a declaratory ruling establishing its eligibility regarding the lease of spectrum in the particular service at issue, consistent with the Commission's foreign ownership policies, then it may not enter into this type of leasing arrangement. Of course, once the lessee can certify that it has obtained the appropriate declaratory ruling, then it can establish that it meets the foreign ownership eligibility requirements for purposes of this type of leasing arrangement.

111. We will also require, as a general policy matter, that spectrum lessees satisfy the qualification requirements, including character qualifications, applicable to the licensee under the license authorization. Thus, for instance, the lessee must not be a person subject to the denial of Federal benefits under the Anti-Drug Abuse Act of 1988.[241] Similarly, the lessee must certify whether it is a person who has been convicted of a felony, had a license revoked for any reason (*e.g.*, misrepresentation or lack of candor), had any application for initial, modification, or renewal of a station authorization, license, or construction permit denied by the Commission, or has been convicted of unlawful monopolization.[242]

112. *Use restrictions.* With regard to use restrictions, where a license authorization in a particular service is flexible, and imposes few if any restrictions on the types of services that licensees may offer, spectrum lessees too will be permitted to offer any of these services regardless of the specific services being offered by the licensee.[243] However, to the extent the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, we also will restrict spectrum lessees in the same manner.[244] Thus, for example, to the extent that licensees in private services are restricted from deploying commercial services on their spectrum, we also restrict lessees from using the spectrum for commercial services.[245]

113. *Designated entity/entrepreneur policies and rules.* Under this leasing option, we determine that designated entity[246] and entrepreneur[247] licensees will be able to undertake spectrum leasing arrangements so long as doing so is consistent with our existing designated entity and entrepreneur policies and rules. A designated entity and/or entrepreneur licensee may lease to any spectrum lessee and avoid the application of our unjust enrichment rules[248] and/or transfer restrictions[249] so long as the lease

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[241] *See* 21 U.S.C. § 862; 47 C.F.R § 1.2001 *et seq.*

[242] *See, e.g.*, FCC Forms 601 and 603 (which include certifications regarding these character qualifications as part of the application process for becoming licensees).

[243] For instance, in the broadband PCS service, licensees are permitted to offer either mobile or fixed services. *See* 47 C.F.R. § 24.3.

[244] For example, in the LMS service, licensees are authorized to use their spectrum only for services related to location or monitoring functions. *See* 47 C.F.R. § 90.353(b). We note that even services that generally allow flexible use may have certain use restrictions. For instance, in the broadband PCS service, licensees are not authorized to use their spectrum for broadcast purposes. *See* 47 C.F.R. § 24.3.

[245] *See, e.g.*, 47 C.F.R. § 101.603; *see also* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22759-64 ¶¶ 108-19, *Erratum*, 16 FCC Rcd 6803 (2000); Implementation of Sections 309(j) and 337 of the Communications Act of 1934, as Amended, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, 22759-22764 ¶¶ 108-119 (2002) (restricting certain private licensees of 800 MHz Business and Industrial/Land Transportation channels from offering commercial services for a specified period of time), *Erratum*, 16 FCC Rcd 6803 (2000).

[246] *See* note 15, *supra*.

[247] *See* note 16, *supra*.

[248] *See* 47 C.F.R. §§ 1.2111, 24.714(c).

[249] *See, e.g.,* 47 C.F.R. § 24.839 (prohibiting with certain exceptions assignments or transfers of control of C or F block broadband PCS licenses won in closed bidding to non-entrepreneurs during the first five years of the license term).

does not result in the lessee becoming a "controlling interest"[250] or affiliate[251] that would cause the licensee to lose its designated entity or entrepreneur status. We will require each licensee notifying the Commission about a lease involving a license still subject to entrepreneur transfer restrictions or potentially subject to unjust enrichment obligations to certify that the lease does not affect the licensee's continuing eligibility to hold a license won in closed bidding[252] or to retain bidding credit or installment payment benefits. Accordingly, nothing we do herein alters a designated entity's or entrepreneur's obligation to comply with our attribution requirements[253] or changes the rules regarding the five-year transfer restriction for C and F block licenses won in closed bidding.[254] Where a designated entity or entrepreneur licensee that is participating in the Commission's installment payment program enters into a lease that preserves its eligibility, the licensee remains fully and solely responsible for the outstanding debt amount, as reflected in our rules and any applicable financing documents.[255] To the extent that there is any conflict between the revised *de facto* control standard for spectrum leasing arrangements, as set forth in this Report and Order, and the *de facto* control standard in our rules for designated entities and entrepreneurs,[256] we will apply the latter for determinations regarding whether the licensee has maintained the 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.

114. *Construction/performance requirements*. In accordance with the proposal set forth in the *NPRM* and the comments received in this proceeding, we will allow licensees to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization. This reliance will be permissible whether the licensee is required to construct and operate one or more specific facilities, cover a certain percentage of geographic area, reach a certain percentage of population, or provide "substantial service."

115. In addition, we determine that applicable performance or buildout requirements remain a condition of the license, and cannot be passed on to spectrum lessees even though the activities of the latter may be "counted" for purposes of measuring buildout. To the extent that a licensee seeks to rely on the activities of a spectrum lessee to meet the licensee's obligation, and for some reason the lessee fails to engage in those activities, the Commission will enforce the applicable performance or buildout requirements against the licensee, consistent with our existing rules. Similarly, to the extent there are rules relating to discontinuance of operation, the Commission will enforce these rules against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.[257]

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[250] *See* 47 C.F.R. § 1.2110(c)(2).

[251] *See* 47 C.F.R. § 1.2110(c)(5).

[252] *See* 47 C.F.R. § 24.709; *see also* 47 C.F.R. § 24.839(a)(6); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, *Sixth Report and Order and Order on Reconsideration*, 15 FCC Rcd 16266, 16289-16291 ¶¶ 48-51 (2000) (*C/F Block Sixth Report and Order*) (the terms upon which the transfer restriction may be lifted early).

[253] *See* 47 C.F.R. § 1.2110.

[254] *See* 47 C.F.R. § 24.839.

[255] *See* paragraphs 188-189, *infra* (discussing certain requirements relating to spectrum leasing arrangements entered into by licensees that are participating in the Commission's installment payment program).

[256] *See* 47 C.F.R. § 1.2110.

[257] Accordingly, whenever a licensee must file with the Commission submissions establishing that it has met the particular buildout or performance requirements that are conditions of the license authorization, the (continued….)

116. *Policies and rules relating to competition.* Assessment of potential competitive effects of transactions, whether they be transfers of control, license assignments, or spectrum leasing arrangements, remains an important element of our policies to promote facilities-based competition and guard against the harmful effects of anticompetitive conduct.[258] Accordingly, we will apply the Commission's general competition policies to spectrum manager leasing arrangements.

117. Specifically, the cellular cross-interest rule and associated policies will be applied to spectrum leasing arrangements involving cellular authorizations in Rural Service Areas (RSAs).[259] Thus, a cellular licensee in an RSA (or any entity with an attributable interest in such a licensee, as defined by section 22.942 of our rules[260]) would not be permitted to enter into a spectrum lease involving the other cellular spectrum block to the extent the spectrum lessee would have the authority to make decisions or otherwise engage in activities that determine or significantly influence the nature and types of services provided using the leased spectrum, the terms upon which those services are offered, or the prices charged.[261] For leases meeting these tests, the cellular spectrum is attributable to the spectrum lessee for purposes of applying section 22.942.

118. In addition, we retain the discretion to consider the use of leased spectrum by a lessee to provide facilities-based commercial mobile radio services as a relevant factor when assessing CMRS marketplace competition in transactions involving either the licensee or the spectrum lessee. As we indicated when we eliminated the CMRS spectrum cap, the Commission now evaluates competitive effects of CMRS spectrum aggregation on a case-by-case basis.[262] In those circumstances where information on potential competitive harm comes to our attention or where serious allegations of

licensee may, as part of its requisite showing, submit materials representing that the activities of its lessees are being relied upon to meet some or all of the performance or buildout conditions placed on the licensee. *See, e.g.*, 47 C.F.R. § 24.203 (construction requirements for broadband PCS).

[258] *See generally 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22681-22693 ¶¶ 30-46, 22695-22696 ¶¶ 54-55, 22699-22700 ¶¶ 62-65, 22708-22710 ¶¶ 88-92 (discussing the Commission's continuing obligation to guard against anticompetitive effects that might result from entities aggregating certain control over spectrum, as well as the Commission's retention of the cellular cross-interest rule in Rural Service Areas); *see also Policy Statement* at ¶ 24 (Commission should seek to ensure competition in services when implementing secondary market initiatives); In the Matter of Echostar Communications Corporation, *Hearing Designation Order*, 17 FCC Rcd 20559, 20598-20603 ¶¶ 88-96 (2002) (general discussion of Commission's long-standing policy of promoting competition in the delivery of spectrum-based communications, including both wireless radio services and satellite-based services, as well as application of competitive analysis to a proposed merger). We also note that several commenters indicated that spectrum leasing potentially raises anticompetitive concerns. *See, e.g.*, 37 Concerned Economists Comments at 5-6 (in promoting secondary markets in spectrum usage rights, the Commission should remain concerned about possible anticompetitive effects); Macquarie Bank Reply Comments at 12.

[259] *See* 47 C.F.R. § 22.942; *see also 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22708-22710 ¶¶ 88-92.

[260] *See* 47 C.F.R. § 22.942.

[261] *See id.*; *see also 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22708-22710 ¶¶ 88-92. We note that the Commission's retention of the cellular cross-interest rule currently is subject to petitions for reconsideration. *See* Cingular Wireless LLC Petition for Reconsideration, WT Docket No. 01-14 (filed Feb. 13, 2002); Dobson Communications Corporation, Western Wireless Corporation, and Rural Cellular Corporation Petition for Reconsideration, WT Docket No. 01-14 (filed Feb. 13, 2002).

[262] *See generally 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd at 22693-22700 ¶¶ 49-65.

substantial competitive harm are made, we must determine, based on a case-by-case review of all relevant factors, whether services provided over both leased and licensed spectrum in specific product and geographic markets should be taken into account. Thus, the presence of a spectrum lease or other arrangement between or among CMRS providers may be attributable.

119. Although we anticipate that most leasing arrangements will serve to enhance competition, including the entry of new facilities-based competitors, we must nonetheless ensure that leasing does not enable harmful anticompetitive conduct. Because spectrum manager leases require only notification to the Commission, it is important that parties to such leases provide certain basic information to the Commission and the marketplace regarding any potential impact of the lease on facilities-based competition. At the same time, it is important that any such disclosure requirements not be so burdensome that they would discourage parties from using the spectrum leasing model to negotiate spectrum access arrangements that pose no competitive threat. To balance these interests, we will require, as part of the spectrum manager lease notification process, that certain lessees provide necessary certifications relating to these policies. Specifically, if the lease involves spectrum in the cellular services in Rural Service Areas, spectrum lessees must certify that the leasing arrangements do not violate the cellular cross-interest rules. In addition, spectrum lessees leasing CMRS spectrum[263] must disclose to the Commission whether they hold direct or indirect interests (of 10 percent or more)[264] in any entity that already has access to 10 MHz or more of CMRS spectrum (through a license or lease) in the same geographic area. We will also require these leasing parties to indicate whether the lease arrangement reduces the number of CMRS competitors in the market. Such disclosure requirements will help to ensure market transparency, and will also help the Commission to distinguish those leases that may warrant further inquiry to assess whether there is a competitive impact from the likely vast majority of leases that will have no competitive impact and require no further inquiry.[265]

120. *Regulatory classification*. We determine that for those license authorizations under which licensees have the opportunity to choose whether to operate as and be regulated under a CMRS/common carrier or a PMRS/non-common carrier structure (or both), spectrum lessees will also be entitled, to the same extent, to select their own regulatory status.[266] In the case of a service in which the regulatory status of licensees is prescribed by rule, the lessee will be presumed to be bound by the status set forth in the rules and applied to the licensee. Under this type of spectrum leasing, to the extent that a spectrum lessee

[263] For these purposes, CMRS spectrum includes cellular, broadband PCS, and SMR spectrum regulated as CMRS.

[264] 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).

[265] In the Further Notice, we inquire whether we can adjust upon this specific disclosure requirement, consistent with meeting our public interest obligation to guard against anticompetitive behavior. *See* Section V.B.2.a(i), *infra*.

[266] For example, in PCS, licensees are presumed to be providing CMRS over licensed frequencies, but are entitled to make a showing that such presumption is incorrect and to receive designation as a PMRS operator. *See* 47 C.F.R. § 20.9(b)(1) (permitting PCS licensee operating on a commercial mobile radio service basis to operate portions of the licensed spectrum on a private mobile radio service basis). Similarly, the LMDS rules provide significant flexibility in allowing a licensee to use its spectrum for CMRS, PMRS, or both. *See* 47 C.F.R. § 101.1013.

seeks to operate under a different regulatory status than the licensee or the service, the lessee will be responsible for meeting the obligations relating to its choice.[267]

121. *Various other rules, including certain statutory obligations.* Under spectrum manager leasing, spectrum lessees will be subject to other statutory and related regulatory requirements – including Title II obligations or other requirements, such as those relating to the Communications Assistance for Law Enforcement Act (CALEA),[268] Equal Employment Opportunity (EEO),[269] Telecommunications Relay Service (TRS),[270] North American Numbering Plan (NANP),[271] universal service funds,[272] and regulatory fee payment obligations[273] – depending upon the nature of their operations on the leased spectrum and the terms of the applicable statutory and/or regulatory provisions. These regulatory requirements are generally applied to entities based on the type of service they provide without regard to their status as a licensee or a lessee. For instance, such provisions may apply to common carriers[274] or telecommunications carriers[275] as defined under the Communications Act. Thus, if a lessee is operating as a common carrier, it will be subject to Sections 201 and 202 of the Communications Act of 1934, as amended, and the related obligations attendant to being a provider of wireless services on a common carrier basis. The applicability of these types of provisions will be independent of an entity's status as licensee or spectrum lessee.

122. While the rules and statutory requirements cited above apply to lessees as well as licensees based on the provision of service, we note that our E911 requirements expressly apply only to "licensees" instead of particular services.[276] Thus, a spectrum lessee who provides facilities-based service does not

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[267] *See, e.g.*, 47 C.F.R. §§ 20.9(b)(1), 101.1013.

[268] *See generally* 47 U.S.C. §§ 229, 1001 *et seq.*; 47 C.F.R. Part 64, Subparts V and W.

[269] *See, e.g.*, 47 C.F.R. §§ 1.815, 22.321.

[270] *See generally* 47 U.S.C. § 225; 47 C.F.R. Part 64, Subpart F.

[271] *See generally* 47 U.S.C. § 251(e); 47 C.F.R. Part 52.

[272] *See generally* 47 U.S.C. § 254; 47 C.F.R. §§ 54.706, 54.709.

[273] *See generally* 47 U.S.C. § 159; 47 C.F.R. Part 1, Subpart G. We note that while Section 9 of the Communications Act, 47 U.S.C. § 159, which prescribes the Commission's authority and obligation to collect regulatory fees, does not use the term "licensee" or "carrier" or any similar nomenclature, our orders prescribing regulatory fee amounts have used the term "licensee" when identifying the CMRS and other entities liable for payment of such regulatory fees. *See, e.g.*, In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 6805 (2003). Under this regulatory option for spectrum leases, licensees will remain responsible for payment of the small fees paid in advance of their license term (*e.g.*, land mobile, rural radio). *See* 47 C.F.R. § 1.1152. We note that these "small fees" are generally assessed on a "per license" basis. Where regulatory fees are paid annually on a per-unit basis (*e.g.*, CMRS services), we will require that licensees and lessees separately pay fees for those units to which they provide service or for which they otherwise are responsible. For example, if a CMRS licensee has 10,000 units in operation and a lessee has 1,500 units in operation, they would each be required to pay the associated annual, per-unit charge.

[274] *See, e.g.*, 47 U.S.C. § 225(c) (provision of telecommunications relay services); 47 U.S.C. § 229 (Communications Assistance for Law Enforcement Act compliance).

[275] *See, e.g.*, 47 U.S.C. § 251 (interconnection, numbering, and related obligations); 47 U.S.C. § 254 (universal service obligations; also uses the reference "providers of telecommunications services"); 47 U.S.C. § 255 (access by persons with disabilities; uses the term "provider of telecommunications service"); 47 U.S.C. § 1002 (CALEA assistance capability requirements).

[276] *See, e.g.*, 47 C.F.R. § 20.18.

come within the literal scope of the E911 rule. Because we do not intend that spectrum leasing be used as a means of circumventing the underlying purposes of our service rule and policies, including our E911 rules, licensees retain their E911 obligations with respect to leased spectrum. Accordingly, to the extent that a spectrum manager leasing arrangement involves a lessee providing CMRS services, the licensee must continue to ensure that the E911 obligations are being met, whether by the licensee or its lessee.[277]

(c) Notification

123. For spectrum manager leasing, we will require that licensees provide notification to the Commission that they have entered into this type of spectrum leasing arrangement. This notification must be submitted in advance of operation, as discussed below, and failure to notify the Commission prior to operation would constitute a substantive rule violation subject to enforcement action. This notification, which is designed not to be onerous, provides us with useful information about spectrum usage and helps us to ensure that licensees and lessees are complying with our interference and non-interference related policies and rules.[278]

124. *Notification requirements.* Licensees must report these leases to the Commission within 14 days of execution, and at least 21 days in advance of operation. Licensees will be required to submit the following information on each spectrum lease to the Commission through ULS:[279] (1) necessary information on the identity of the spectrum lessee (including necessary contact information) and its eligibility to lease spectrum; (2) the specific spectrum leased (in terms of amount, frequency, and geographic area involved), including the call sign affected by the lease; (3) the term of the lease; and (4) other information required pursuant to the policies applicable to these leasing arrangements (*e.g.*, foreign ownership and other certifications), as discussed above.[280] This notification will contain information similar to that submitted currently on our Form 603.[281] Such submission will be placed on an informational public notice on a weekly basis, unless the license involved is not subject to prior public notice requirements.[282] We include an advance notification requirement so as to allow the Commission and the public some opportunity to review the leasing arrangement prior to operation. While we will not usually require the lease parties to file a copy of the lease agreement with the notification, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection upon request by the Commission or its representatives. For spectrum manager leasing arrangements of one year or less, licensees must provide notice at least ten days in advance of

[277] *See id.* We note that the Commission currently is inquiring whether the E911 rules, which are expressly applicable only to licensees, should also be applied to non-licensees such as resellers. *See* Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, *Further Notice of Proposed Rulemaking*, 17 FCC Rcd 25576, 25609-25611 ¶¶ 92-97 (2002) (*E911 Scope Proceeding*). We may ultimately decide at a later time to transfer the record developed on this issue to the *E911 Scope Proceeding*.

[278] *See Policy Statement* at ¶ 24 (while seeking to promote the ability of licensees to freely trade their spectrum usage rights in secondary markets, the Commission should also maintain sufficient administrative control and authority to safeguard the interests of the public).

[279] To the extent that a licensee seeking to file a spectrum manager leasing notification falls within the provisions of section 1.911(d) of our rules, 47 C.F.R. § 1.911(d), it may file the notification either electronically or manually. In addition, there will be no filing fee associated with the filing of spectrum manager leasing notifications.

[280] *See* Section IV.A.5.a(ii)(b), *supra*.

[281] This new information collection is subject to review and approval by the Office of Management and Budget.

[282] *See* 47 C.F.R. §§ 1.933(c), (d).

operation. In all other respects, the rules generally applicable to spectrum manager leasing arrangements, as enunciated above, apply to these shorter-term arrangements.

125. *Commission authority to investigate and terminate the lease.* The Commission retains the ability to investigate and terminate any spectrum 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. We will closely monitor leasing information and activity to ensure that licensees and lessees do not use this leasing option as a means of thwarting or abusing the Act or applicable Commission policies and rules (*e.g.*, the basic qualifications and rules applicable to licensees). Commission review of a spectrum lease implemented under this option might be initiated if information were to come to the attention of our staff – through the notification process or other sources (*e.g.*, news reports or press releases) – that suggested a potential problem with the lease under the applicable rules and policies. Alternatively, interested parties might 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. Such processes are no different from current practices before the Commission where an entity may provide information to the Commission staff and pose questions about the permissibility of, for example, the terms and practices of the parties under a management agreement or other business transaction. We believe that these processes will ensure that we are able to terminate a leasing arrangement under this option where warranted in fulfillment of our statutory and public interest obligations.

b. "*De facto* transfer" leasing – Spectrum leasing arrangements that involve transfers of *de facto* control under Section 310(d)

126. In this section, we provide licensees and spectrum lessees with an alternative model for spectrum leasing – one in which licensees can delegate *de facto* control of the leased spectrum and associated legal responsibilities to their spectrum lessees. Under this "*de facto* transfer" leasing, we include two general categories for this type of spectrum leasing: (1) "long-term" leasing arrangements (*i.e.*, leases with individual or combined terms of longer than 360 days); and (2) "short-term" leasing arrangements (leases of 360 days or less). Although these leasing arrangements involve transfers of *de facto* control under Section 310(d) that necessitate Commission approval, we adopt significantly streamlined procedures to minimize the regulatory burdens and transaction costs imposed on parties entering into these arrangements.

(i) Long-term *de facto* transfer spectrum leasing arrangements

(a) Background

127. As noted above, as an alternative to the approach advanced in the *NPRM*, the Commission inquired whether it should permit licensees and spectrum lessees to enter into arrangements in which the lessee, instead of the licensee, would be held directly responsible for compliance with Commission policies and rules.[283] The Commission recognized that, even under a revised standard, certain types of spectrum leasing arrangements might constitute a transfer of *de facto* control under Section 310(d).[284]

128. The Commission also sought comment on its role in ensuring enforcement of the Act and Commission policies and rules under any alternative vision of spectrum leasing.[285] In addition, it

[283] *NPRM* at ¶ 29.

[284] *See id.* at ¶¶ 78-81.

[285] *See id.* at ¶¶ 81-82.

requested comment on the notification and/or procedures it should adopt. It proposed to consider permitting licensees and lessees to enter into such arrangements pursuant to some form of authorization, such as a blanket determination, in which the Commission would approve arrangements that met certain conditions.[286] Finally, to the extent that commenters thought that leasing arrangements might constitute transfers of *de facto* control under Section 310(d), the Commission proposed considering whether forbearance would be an appropriate approach to take.[287]

129. As we discussed above, many commenters expressed significant concern that the leasing model set forth in the *NPRM* was not sufficiently flexible with regard to the nature of the respective responsibilities of licensees and spectrum lessees. Specifically, several of these commenters – licensees and potential spectrum lessees alike – indicated that licensees would not be interested in exercising extensive or direct oversight over their spectrum lessees' activities and they opposed requiring licensees to act with due diligence regarding their lessees' compliance with the applicable service rules.[288]

130. Many commenters were concerned that licensees would not lease spectrum if their lessees' non-compliance could threaten the licensees' ability to hold the license.[289] In addition, many contended that the Commission's proposal to hold licensees directly responsible for their lessees' compliance with Commission policies and rules could actually impede the development of secondary markets.[290]

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[286] *See id.* at ¶ 81.

[287] *See id.* at ¶ 82.

[288] *See, e.g.*, AT&T Wireless Comments at 10 (Commission should not require licensees to verify their lessees' compliance); Blooston Rural Carriers Comments at 6-7 (Commission should not impose onerous due diligence requirements on licensees so long as lessees have included an appropriate regulatory compliance certification as part of their lease agreement and lessees are aware of Commission's jurisdiction over its use of the spectrum); Cook Inlet Comments at 5-7 (it is unreasonable to require each licensee to act as a regulator to ensure not only current but continued compliance by its lessees with the Commission's rules; for small businesses, in particular, a due diligence obligation would be prohibitively expensive, and risk of potential fine or forfeiture so great that entrepreneur licensees would be discouraged from full participation in the secondary market if a licensee Pacific Wireless Comments at 5 (Commission should not require licensees to verify their lessees' compliance); Securicor Comments at 10-11; process would be difficult to enforce and may take time and resources away from normal Commission activities); Winstar Comments at 7 (holding licensees "ultimately responsible" for their lessees' actions would impose an obligation on licensees to engage in on-going due diligence activities to ensure that lessees are in compliance and would defeat goals of secondary markets proceeding).

[289] *See, e.g.*, CTIA Comments at 8-9 (if licensees must guarantee their lessees' compliance, licensees would be reluctant to lease spectrum at all); Cook Inlet Comments at 4-7 (imposing risk on licensee that it may lose its license because of lessee activities about which licensee has no knowledge will stall the development of secondary markets); El Paso Global Comments at 5-7 (it is unreasonable to penalize licensee for lessee's violation of which it has no prior knowledge and or reasonable opportunity to try to cure; such a strict liability standard would make costs of entering leasing relationships too high); RTG Comments at 13-16 (licensees should not be responsible for the bad acts of their lessees unless they participate in those acts or have actual knowledge of them; making licensees guarantors of their lessees' behavior would undermine licensees' willingness to lease their excess spectrum).

[290] *See, e.g.*, Blooston Rural Carriers at 6 (opposing requirement that licensee be held primarily liable for acts of its lessees; licensee should only be held "secondarily liable"); Cingular Wireless Reply Comments at 2-4 (licensees should only be held "secondarily" liable for their lessees' compliance, not primarily responsible; licensees would be unlikely to lease spectrum if they could not be insulated from direct responsibility for their lessees' non-compliance); CTIA Comments at 4, 8-11, 14-15 (objecting to proposed *de facto* control standard as too restrictive, failing to provide licensees with sufficient flexibility to structure marketable lease arrangements; Commission's approach in holding licensee responsible for their lessees' compliance, which could result in licensee forfeitures and even license revocation, is not feasible and would discourage parties from entering into (continued….)

131. The commenters also stated that spectrum lessees, the entities that would actually be using the spectrum, should be deemed primarily responsible since those entities, not licensees, would have the requisite knowledge about the operational use of the spectrum.[291] Consistent with this line of thinking, a number of these commenters contended that the Commission should proceed directly against spectrum lessees for any possible violations.[292] Several commenters advocating this approach to leasing indicated that it was essential that the Commission, in exercising its spectrum management functions, have the ability to take direct and swift action against spectrum lessees to enforce its interference or other service rules.[293]

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spectrum leases; the licensee should generally be able to rely on its lessees to comply, and the Commission should hold the lessees, as operators of the spectrum, responsible for immediate compliance); El Paso Global Comments at 5-7 (Commission would undermine operation of the market if it enforces its rules against licensees when, instead, the spectrum lessees, as users of the spectrum, are clearly in the best position to avoid violations); Enron Comments at 19-20 (in order to participate in a secondary market, both licensee and any transmitting users would require assurances from Commission that failure of the other to comply with FCC regulations will not threaten their continued use of the spectrum); NTCA Comments at 4-6 (license holders should not be held directly accountable for acts of lessees if Commission seriously seeks to develop active and robust secondary market; if FCC intends to only hold the license holder liable, large licensees will not lease their fallow spectrum to smaller entities); RTG Comments at 13-16 (Commission's "draconian approach" would "snuff out" incentives that licensees may have to lease unused spectrum; licensees simply cannot be held to account for acts of its lessees if Commission seeks to promote a vibrant secondary market); Winstar Comments at 3, 6-9, 11 (opposing *NPRM* proposal that would hold licensee's directly accountable for their lessees' compliance; Commission would diminish licensees' incentives to lease spectrum to third parties unless it determines to hold spectrum lessees directly responsible for compliance). *Cf.* UTStarcom Comments at 3 (licensees should be able to delegate compliance obligations to their spectrum lessees).

[291] *See, e.g.*, Blooston Rural Carriers Comments at 6-7 (Commission should clarify that licensee's liability for a spectrum user's regulatory compliance is only "secondary"; licensee should be protected from liability for lessees' violations if it includes certain express covenants in lease agreements); Cingular Wireless Reply Comments at 3-4 (Commission should hold spectrum lessees primarily responsible for compliance with FCC rules); CTIA Comments at 8-11 (Commission should make responsibility for compliance with its rules dependent on which entity is actually operating the transmission facilities on the spectrum); El Paso Global at 5-7 (as between the spectrum lessee, the actual user of spectrum rights, and non-using licensee, the lessee clearly is in best position to avoid violations of Commission rules); RTG Comments at 2-3, 13-16 (Commission should place primary responsibility for compliance with its rules and regulations not on the licensee, but on the spectrum lessee, the beneficiary and operator of the spectrum; proper apportioning of compliance responsibilities – with rights and obligations placed on actual spectrum user – creates proper incentive structure for licensees to lease spectrum usage rights to independent entities in secondary markets); Winstar Comments at 6 (Commission should hold long-term spectrum lessee that operates the radio equipment responsible for compliance). *Cf.* AT&T Wireless Comments at 13 (licensee should be able to rely on spectrum lessee's certification that it is complying with FCC rules); Pacific Wireless Comments at 3, 5-6 (same); Securicor Comments at 15-16 (same); Teligent Comments at 4-5, 7-8 (same). *But see* Cinergy Comments at 5 (stating that licensees and lessees should be "equally responsible" for compliance, with little discussion); Entergy Comments at 5 (same); Kansas City Power Comments at 5 (same).

[292] *See, e.g.*, Cingular Wireless Reply Comments at 2-3 (Commission should create a regulatory structure in which it can proceed directly against the spectrum lessee for compliance with the rules); Cook Inlet Comments at 5; CTIA Comments at 10-11, 14; RTG Comments at 18-20; Securicor Comments at 9-10; Teligent Comments at 7; UTStarcom Comments at 3; Winstar Comments at 7-8.

[293] *See, e.g.*, Cingular Wireless Reply Comments at 2-3, 5 & n.15, 6 (to eliminate any uncertainty about whether the FCC has requisite authority and ability to proceed directly against spectrum lessees, the Commission could require lessees to be identified in an FCC database); Cook Inlet Comments at 4-6 (if lessee obligations are only addressed in private contracts, Commission might not have necessary regulatory authority over the spectrum lessee to ensure compliance; by requiring spectrum lessee to file leasing notification, Commission can directly (continued….)

132. Several commenters indicated that, to the extent that spectrum leasing was deemed to involve a transfer of *de facto* control under Section 310(d), they would endorse Commission approval through some form of "blanket" approval, conditional licensing, or processing similar to *pro forma* transfer notifications.[294] Also, several concluded that forbearance would be a reasonable approach in the event the Commission determined that spectrum leasing would involve a transfer of control.[295]

(b) Discussion

133. We adopt a second option for spectrum leasing to enable licensees and spectrum lessees to enter into the kind of long-term spectrum leasing arrangements endorsed by many of the commenters. Under this leasing option, referred to as *de facto* transfer leasing, licensees will be permitted to transfer *de facto* control of the leased spectrum to lessees pursuant to streamlined approval procedures as long as the leasing arrangements meet certain conditions, enunciated below.[296] We define these long-term leases as lease arrangements involving transfer of *de facto* control to a spectrum lessee that do not qualify as temporary "short-term" leasing (*i.e.*, leasing of no more than 360 days duration), as discussed in Section IV.A.5.b(ii), below.

134. Comments in this proceeding clearly support the Commission's adoption of a framework for spectrum leasing in which primary and direct responsibility for compliance with the Act and our policies and rules is shifted from licensees to lessees and in which licensees would not be required to exercise ongoing oversight or supervision of their lessees' activities. Facilitating this type of leasing arrangement pursuant to streamlined processing provides licensees and spectrum lessees a sought-after option distinctly different from the first leasing model adopted above, and should further enhance the development of more robust secondary markets in spectrum usage rights.

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exercise its regulatory authority over lessee); CTIA Comments at 9-11 (FCC rules governing secondary markets must ensure that the entity actually operating the transmission equipment on the spectrum is subject to the Act and other applicable rules, or else spectrum leasing arrangements could introduce serious problems with enforcement in cases where serious violations occur; if the spectrum lessee is actually operating the spectrum, it is not practical, especially in cases of interference protection, to rely on contractual obligations between licensees and lessees to expeditiously deal with rule violations, and the FCC must be able to exercise direct authority over the lessee); Winstar Comments at 7-8 (in order to protect against radio interference, the Commission should have direct jurisdiction over spectrum lessees and the ability to hold them directly responsible for compliance; "the matter is too important to be left entirely to the vagaries of private contract provisions enforced by civil litigation"). *Cf.* Cinergy Comments at 4-5 (flexibility provided by spectrum leasing potentially could lead to decreased compliance as relationship of actual spectrum user to FCC becomes more attenuated; FCC should establish procedures to ensure that any interference disputes are subject to rapid and conclusive resolution); Kansas City Power Comments at 5 (same).

[294] *See, e.g.*, El Paso Global Comments at 12; Pacific Wireless Comments at 7; RTG Comments at 24; Vanu Comments at 8-9.

[295] *See, e.g.*, AT&T Wireless Reply Comments at 8; Cingular Wireless Comments at 10-13; CTIA Comments at 16; El Paso Global Comments at 12; Enron Reply Comments at 4 n.7; RTG Comments at 24; Winstar Comments at 11-12.

[296] In adopting policies and procedures for spectrum leasing arrangements that allow for transfers of *de facto* control to spectrum lessees, while the licensee retains *de jure* control of the license, we are expressly allowing a partial transfer of rights to lessees for the period of the lease. Under these leasing policies, at the end of the term of the lease, the spectrum is returned to the licensee, which thus regains full control of the authorized spectrum. To the extent that there is any apparent conflict with Commission policies concerning so-called reversionary interests, the new policies enunciated in this Report and Order establish that return of *de facto* control of leased spectrum, from the lessee back to the licensee at the end of the lease term, is permissible.

(i) Respective rights and responsibilities of licensees and spectrum lessees

135. *Licensees' rights and responsibilities.* Under this leasing option, licensees may lease any or all of their spectrum usage rights pursuant to spectrum lease arrangements in which they retain *de jure* control of their licenses but transfer *de facto* control of leased spectrum, and associated responsibilities, to spectrum lessees. Under these *de facto* transfer leases, licensees are not required to exercise the kind of operational oversight over the leased spectrum and the lessee that is prescribed for licensees with regard to spectrum manager leasing (which requires no Commission approval) discussed in Section IV.A.5.a, above. We thus relieve licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules.

136. While licensees are relieved of many responsibilities under this leasing option, they nonetheless retain some residual responsibilities regarding the leased spectrum. The lease does not involve a complete and permanent transfer of control, and the licensee retains *de jure* control of the license as well as some degree of actual control, such that it retains some responsibility to the Commission for operations on spectrum encompassed within its license. While we seek to carefully limit this licensee responsibility in order not to impede commercially viable leasing arrangements, licensees who are implementing these leases cannot relinquish all rights and responsibilities of the license authorization to their lessees. Moreover, we think it is appropriate to expect our licensees to exercise an appropriate degree of care when entering into *de facto* transfer leasing arrangements. For instance, if a licensee engages in a sham leasing arrangement with an affiliate in an effort to enable that affiliate to undertake activities that might otherwise put the license at risk if undertaken directly by the licensee, we would subject the licensee to appropriate enforcement action. We will also hold the licensee accountable for its own violations, including those related to its lease arrangement with the lessee. In addition, we find 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. An example of this type of situation might include the case where a licensee allows a lessee to continue to operate on the leased spectrum despite a Commission order that the lessee cease operations.

137. *Spectrum lessees' rights and responsibilities.* Under *de facto* transfer leasing, the primary responsibility for ensuring compliance with Commission policies and rules is transferred to spectrum lessees. We will hold lessees primarily and directly responsible for complying with the interference, technical, or other service rules (including eligibility requirements) applicable to the licensee pursuant to the Act, the Commission's rules, and the terms of the underlying authorization. We determine that, under the procedures we adopt herein, spectrum lessees will be granted an instrument of authorization that brings them within the scope of our direct forfeiture procedures under Section 503(b) of the Act.[297] Lessees will assume responsibility for interacting with the Commission regarding the leased spectrum, and making all related filings.[298]

138. If there is a question about interference or other technical performance issues, the Commission's Enforcement Bureau will first approach the authorized spectrum lessee, and the lessee will be expected to bring its operations into compliance with the Commission's requirements.[299] To the extent

[297] *See* 47 U.S.C. § 503(b). Accordingly, the citation provision in Section 503(b)(5) of the Act would not apply. *See* 47 U.S.C. § 503(b)(5).

[298] Such filings will be subject to the applicable application fees under 47 C.F.R. § 1.1102 to the same extent as if a licensee were making the same filing.

[299] If and when necessary, the Commission will also approach the licensee to assist in resolving such issues.

that spectrum lessees violate the Communications Act, Commission rules, a Commission order, or a term or condition of an authorization, they will be subject to monetary forfeitures pursuant to Section 503(b)(1) in the same manner as any other person holding an authorization.[300]

139. *Subleasing.* We conclude that permitting subleasing for long-term *de facto* transfer leases will afford parties additional flexibility in their business arrangements. We thus will permit spectrum lessees under long-term leasing arrangements to sublease spectrum, provided certain conditions are met. Specifically, parties entering into a sublease will be required to comply with the Commission's rules for obtaining approval for leasing arrangements and will be governed by those same policies.[301] As with spectrum manager leasing arrangements, licensees may seek to protect themselves from the risks associated with subleasing arrangements by including provisions in their leases that prohibit the spectrum lessee from entering into a sublease.

140. Where a sublease has been approved by the Commission, the sublessee will become the party primarily responsible for compliance with Commission rules and policies, although the lessee and licensee will continue to have some responsibility to the Commission for their actions as well as those of the sublessee. In addition, when the parties to a sublease file their application with the Commission, they must include written consent from the licensee to the proposed sublease. This will ensure that the licensee is aware of the sublease and the role of the new sublessee in operating on frequencies covered by the licensee's license.

141. *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing 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 during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal. 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 extension of the spectrum leasing arrangement.

(ii) Application of particular service rules and policies

142. *Interference-related service rules.* As with all other forms of spectrum leasing discussed in this Report and Order, spectrum lessees must comply with all of the interference rules applicable to licensees under the license authorization. Under this type of leasing arrangement, however, as distinct from spectrum manager leasing above, spectrum lessees are primarily responsible for complying with these rules, including responsibility for resolving all interference disputes and complying with safety guidelines relating to radiofrequency radiation.

143. *Eligibility policies and rules*. Spectrum lessees under this *de facto* transfer leasing option must meet the same eligibility and qualification restrictions (including character qualifications) that are

[300] These long-term *de facto* transfer spectrum lessees, as holders of a form of "authorization" under our approach, will be subject to other types of enforcement action including, but not limited to, admonishments, notices of violations (NOVs), cease and desist orders, and revocation. *See, e.g.*, 47 C.F.R. § 1.89. Such spectrum lessees will also be required to respond to any letters of inquiry issued by the Commission, and failure to respond may subject a lessee to possible enforcement action. Interested parties will be able to file a formal or informal complaint against spectrum lessees that are common carriers, as specified in our rules. *See* 47 U.S.C. § 208; 47 C.F.R. §§ 1.711-1.736.

[301] As a result, the discussion of the spectrum lessee's rights and responsibilities in this Section addressing long-term leases involving a transfer of *de facto* control, as well as the discussion of the applicability of particular policies and rules, also applies generally to sublessees.

applicable to licensees under their license authorization. These include general eligibility restrictions placed on the licensees under their authorizations, such as foreign ownership limitations.[302] As with spectrum manager leasing, they also include qualification restrictions. The lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988, and must certify whether it is a person who has been convicted of a felony, had a license revoked for any reason (*e.g.*, misrepresentation or lack of candor), or been convicted of unlawful monopolization.[303]

144. *Use restrictions.* Spectrum lessees entering into *de facto* transfer leasing arrangements must comply with the use restrictions that the Commission has imposed with respect to particular services and authorizations, as with spectrum manager leasing discussed above.[304]

145. *Designated entity/entrepreneur policies and rules.* Under this *de facto* transfer leasing option, designated entity and entrepreneur licensees may enter into leasing arrangements with any entity under the streamlined processing procedures described below,[305] subject to any applicable transfer restrictions[306] and/or any applicable unjust enrichment payment obligations.[307] For example, under this option, a licensee holding a C or F block broadband PCS license won in closed bidding may, during the first five years of the license's initial term, enter into a spectrum leasing arrangement with a non-eligible entity only if the licensee's five-year construction requirement has already been met.[308] A licensee paying for a license under the Commission's installment payment program may enter into a long-term leasing arrangement for that license without triggering unjust enrichment obligations, provided that the lessee would qualify for installment payments under terms as favorable as the licensee's. However, nothing in a spectrum leasing agreement can modify the licensee's sole responsibility for its debt obligation to the government, pursuant to the Commission's rules and any applicable notes and security agreements. A licensee using installment payment financing that seeks to enter into a spectrum leasing arrangement with a lessee that would not qualify for an installment loan under terms as favorable as the licensee's must make full payment of the remaining unpaid principal and must pay any interest accrued through the effective date of the lease.[309] Small business bidding credit unjust enrichment payments will be required

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[302] *See* 47 U.S.C. §§ 310(a), (b).

[303] *See* Section IV.A.5.a(ii)(b), *supra.*

[304] *See id.*

[305] As discussed below, under the streamlined approval procedures for long-term *de facto* leases, the Wireless Telecommunications Bureau may "offline" a lease application should the Bureau encounter an issue, such as an entrepreneur or designated entity eligibility issue, that cannot be resolved within the abbreviated time frame for streamlined processing. *See* Section IV.A.5.b(iii), *infra*.

[306] *See*, *e.g.*, 47 C.F.R. § 24.839 (prohibiting with certain exceptions assignments or transfers of control of C or F block broadband PCS licenses won in closed bidding to non-entrepreneurs during the first five years of the license term). *See also C/F Block Sixth Report and Order*, 15 FCC Rcd at 16289-91 ¶¶ 48-52 (permitting assignments or transfers of control to non-entrepreneurs during the first five years of the license terms of C or F block broadband PCS licenses won in closed bidding provided that the licensee has met its five-year construction requirement).

[307] *See* 47 C.F.R. §§ 1.2111, 24.714(c).

[308] *See C/F Block Sixth Report and Order*, 15 FCC Rcd at 16289-91 ¶¶ 48-52; 47 C.F.R. §§ 24.203, 24.839(a)(6).

[309] *See* 47 C.F.R. § 1.2111(c). This requirement applies regardless of whether the licensee is leasing all or a portion of its bandwidth and/or license area.

and calculated as they would if the license were being assigned or transferred.[310] Accordingly, we will require each licensee applying to the Commission to enter into a long-term *de facto* transfer leasing arrangement to certify whether or not the license is subject to entrepreneur transfer restrictions[311] or unjust enrichment obligations.[312] In addition, we will require each licensee applying to the Commission to enter into a long-term *de facto* transfer leasing arrangement involving a license still subject to the installment payment program, and its proposed lessee, to execute the Commission-approved financing documentation in accordance with the requirements discussed *infra* at paragraphs 188 and 189.

146. *Construction/performance requirements*. We will allow licensees using this leasing option to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements that are conditions of the license authorization. Our policies here are consistent with the general proposal advanced in the *NPRM* and are identical to the approach taken with respect to the spectrum manager leasing option.[313] Because we determine that applicable performance or buildout requirements remain a condition of the license, and cannot be passed on to spectrum lessees even though the activities of the latter may be "counted" for purposes of measuring buildout, the Commission is not imposing any buildout obligations on the spectrum lessee.

147. *Policies and rules relating to competition*. As with spectrum manager leasing, the Commission's policies relating to cellular cross-interest restrictions and promoting facilities-based competition and guarding against the harmful effects of anticompetitive conduct will be applied to long-term *de facto* transfer spectrum leasing arrangements, and we will require that spectrum lessees submit the same certifications relating to competition matters.[314] Attribution of spectrum will necessarily depend upon the actual circumstances of a given lease.

148. *Regulatory classification*. As with spectrum manager leasing arrangements discussed earlier,[315] a spectrum lessee under long-term *de facto* transfer leasing will be entitled to select its own regulatory status, either as a CMRS/common carrier or PMRS/non-common carrier (or both), to the same extent as the licensee would be able to do under the applicable service rules. Under this leasing option, spectrum lessees are the entities responsible for meeting the necessary filing and notification obligations.

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[310] The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the spectrum lease application under the same rules that apply in the transfer and assignment context. *See* 47 C.F.R. §§ 1.2111, 24.714(c). If the lease covers only part of the license area and/or part of the bandwidth encompassed within the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated. *See* 47 C.F.R. §§ 1.2111(e), 24.714(c). We note that a licensee will receive no reduction in its unjust enrichment payment obligation for a lease that ends prior to the end of the fifth year of the license term. We note further that nothing in the rules we adopt herein is intended to eliminate the existing exemption from small business bidding credit unjust enrichment obligations for licenses won in Auctions No. 5 or No. 10. *See C/F Block Sixth Report and Order*, 15 FCC Rcd at 16290-91 ¶ 51.

[311] *See* 47 C.F.R. § 24.709; *see also* 47 C.F.R. § 26.839(a)(6); *C/F Block Sixth Report and Order,* 15 FCC Rcd 16266, 16289-16291 ¶¶ 48-51 (discussing the terms on which the transfer restriction may be lifted early).

[312] *See* 47 C.F.R. §§ 1.2111, 24.714(c). The Commission will not consider requests for reductions in unjust enrichment payment obligations to correspond with terms in leasing arrangements.

[313] *See* Section IV.A.5.a, *supra.*

[314] *See* Section IV.A.5.a(ii)(b), *supra.*

[315] *See id.*

149. *Various other rules, including statutory obligations*. Under this type of leasing, we will subject spectrum lessees to various other statutory and related regulatory requirements – including Title II obligations or other requirements, such as those relating to the Communications Assistance for Law Enforcement Act (CALEA), Equal Employment Opportunity (EEO), Telecommunications Relay Service (TRS), North American Numbering Plan (NANP), universal service funds, and regulatory fee payment obligations[316] – in the same manner as if they were licensees with regard to the leased spectrum. We do so because spectrum lessees gain *de facto* control of the leased spectrum (including associated rights and responsibilities) as well as a form of authorization under this leasing option. Similarly, we will require that long-term *de facto* transfer spectrum lessees that lease spectrum from licensees subject to E911 obligations meet those same obligations.[317] To the extent a licensee or lessee has any uncertainty regarding the applicability of particular statutory or regulatory provisions, it can seek guidance from the Commission.

(iii) Streamlined approval procedures

150. We adopt a set of streamlined procedures to facilitate parties' ability to enter into these long-term *de facto* transfer spectrum leasing arrangements. By adopting these streamlined procedures, we reduce transaction costs, uncertainty, and delay to facilitate spectrum leasing, consistent with our goals in this proceeding, while at the same time ensuring that the Commission fulfills its statutory responsibilities.

151. *Specific approval procedures.* Parties entering into long-term *de facto* transfer leasing arrangements will be required to file an application with the Commission (through ULS)[318] that includes information similar to that submitted currently using Form 603 for transfers and assignments.[319] These spectrum leasing applications will be placed promptly on public notice once the application is sufficiently

[316] As discussed above, while Section 9 of the Communications Act of 1934, as amended, 47 U.S.C. § 159, which prescribes the Commission's authority and obligation to collect regulatory fees, does not use the term "licensee" or "carrier" or any similar nomenclature, our orders prescribing regulatory fee amounts have used the term "licensee" when identifying the CMRS and other entities liable for payment of such regulatory fees. *See, e.g.*, In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, 18 FCC Rcd 6085 (2003). As with spectrum manager leasing arrangements, licensees leasing spectrum under this leasing option will remain responsible for payment of the small fees paid in advance of their license term (*e.g.*, land mobile, rural radio). *See* 47 C.F.R. § 1.1152. These "small fees" are generally assessed on a "per license" basis. Where regulatory fees are paid annually on a per-unit basis (*e.g.*, CMRS services), we will require that licensees and lessees separately pay fees for those units under their respective control. For example, if a CMRS licensee has 10,000 units in operation and a lessee has 1,500 units in operation, they would each be required to pay the associated annual, per-unit charge.

[317] We will not permit long-term *de facto* transfer leasing to undermine the public safety objectives of the Commission's E911 rules. We note that the Commission has entered into E911 consent decrees with several licensees to ensure that E911 obligations are met. Accordingly, approval of leasing arrangements involving these licensees will be contingent upon the Commission's assessment that such E911 obligations, including those addressed in consent decrees, will not be undermined.

[318] To the extent that a licensee seeking to file a *de facto* transfer leasing application falls within the provisions of section 1.911(d) of our rules, 47 C.F.R. § 1.911(d), it may file the application either electronically or manually. In addition, applicants filing a *de facto* transfer spectrum leasing application will be required to pay a filing fee consistent with a transfer of control application as required by 47 C.F.R. § 1.1102 applicable to the particular service involved. Licensees exempt from application filing fees pursuant to 47 C.F.R. § 1.1114 will not be required to pay a fee in connection with a *de facto* transfer leasing application.

[319] The new information collection requires approval by the Office of Management and Budget.

complete.[320] Petitions to deny filed in accordance with Section 309(d)[321] will be due within 14 days of the initial public notice date. The Wireless Telecommunications Bureau (Bureau) will either affirmatively consent to, deny, or "offline" the application no later than 21 days following the initial public notice listing the spectrum lease application.[322] Under this streamlined process, where there are no issues requiring further review and if no petition to deny, opposition, or other comments concerning the lease application are filed, the consent will be reflected in the first public notice issued after the grant. If, on the other hand, any opposition is submitted, the Bureau will address the arguments raised in an order.[323]

152. If the Bureau determines, based upon its own review or in light of filings by interested parties, that there are issues that cannot be resolved within the abbreviated time frame, it will notify the applicants and remove the application from streamlined processing.[324] For instance, the Bureau could offline an application to the extent it might raise competition concerns or foreign ownership issues that require further examination. If an application is removed from streamlined processing, the Bureau will issue a public notice so indicating. Within 90 days 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. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application. In addition, interested parties may seek reversal of a grant by filing a petition for reconsideration or an application for review.

153. *Spectrum leasing applications.* We are streamlining the submission form to minimize the burden on lease applicants while ensuring that we receive the information we need to complete our review of the proposed arrangement and to enforce our interference and other requirements as applicable to the lessee and the licensee. The application must include information about the licensee and the call sign affected by the lease, the identity of the spectrum lessee, the term of the lease, the particular spectrum leased, the geographic area encompassed within the lease, and sufficient information to demonstrate that the lease agreement meets the conditions imposed by the rules we adopt in this Report and Order. While we will not routinely require the lease applicants to submit a copy of the lease agreement with the application, parties must maintain copies of the lease as well as any authorization issued by the Commission, and make them available for inspection by the Commission or its representatives.

154. Following approval of a lease application, the spectrum lessee will be directly and primarily responsible for compliance with Commission rules and policies in the geographic areas and on the frequencies covered by the lease.[325] Through the process of approving the application, the spectrum

[320] The Wireless Telecommunications Bureau currently expects to list leasing applications on weekly public notices. Applications involving licenses not subject to prior public notice requirements will not be placed on such public notices. *See* 47 C.F.R. §§ 1.933(c), (d).

[321] *See* 47 U.S.C. §§ 309(b)-(d). Thus, some *de facto* transfer leasing applications will not be subject to petitions to deny.

[322] The filing of a petition to deny will not automatically lead to offlining the application from streamlined processing, although we will need to address the issues raised in any petition to deny.

[323] *See* 47 U.S.C. § 309(d)(2).

[324] To the extent the application fails to include information required by the Bureau to determine that the proposed lease meets our standards, the parties may be requested to provide additional information. This may necessitate removal of the application from streamlined processing to allow for submission and review of such data.

[325] We note, of course, that until such a lease is approved pursuant to these procedures, the licensee remains fully responsible for exercising *de facto* control and for any violations of Commission policies and rules by any third party leasing the spectrum.

lessee will be granted an authorization and will be placed on a par with the licensee in terms of the Commission's ability to take enforcement action pursuant to the Act. The Commission will be able to initiate an enforcement action against parties found to be in violation of Commission rules, including any misrepresentations about the lease, and actual behavior subsequent to the Commission's consent. The spectrum lessee also will become responsible for making any applicable filings, including applications and notifications, submission of any materials required to support a required Environmental Assessment, any reports required by our rules and applicable to the lessee, information necessary to facilitate international or IRAC coordination, or any other submissions applicable to the lessee's operations. In addition, spectrum lessees will be obligated to maintain accurate information on file pursuant to section 1.65 of our rules.[326] To facilitate our recordkeeping as well as access to information necessary to undertake any necessary enforcement inquiries or actions, we will make clear in ULS the relationship among each licensee, its lessees, and their sublessees in order to reflect the associations with the licensee's underlying call sign.

155. *Forbearance from Section 309(b) requirements relating to 30-day notice and comment for common carrier licenses.* Section 309(b) of the Act requires that, if a transfer or assignment of common carrier licenses involves a "substantial change in ownership or control," a 30-day public notice and comment period must be provided.[327] To the extent necessary to permit us to approve spectrum applications involving common carrier or CMRS licenses in less than 30 days pursuant to the procedures discussed above, we forbear from the Section 309(b) 30-day public notice requirement.

156. Under Section 10 of the Act, the Commission may forbear from applying any regulation or provision of the Act to a 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.[328] 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.[329] 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.[330]

157. We conclude, pursuant to the first prong of the test for establishing forbearance, that a 30-day notice and comment period for spectrum leases is not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory. We note that information relevant to these particular determinations are not included in the applications, and that in any event a full 30-day public notice period for spectrum leasing applications

[326] 47 C.F.R. § 1.65.

[327] *See* 47 U.S.C. § 309(c)(2)(B). The 30-day public notice and comment requirement set forth in Section 309(b) does not apply to Private Mobile Radio Service (PMRS) licenses. Accordingly, no forbearance from this requirement is necessary with regard to the many PMRS licenses that also are affected by the leasing procedures adopted in this Report and Order.

[328] 47 U.S.C. § 160(a).

[329] 47 U.S.C. § 160(b).

[330] *Id.*

is not necessary to achieve these objectives. Indeed, since we expect that leasing will promote competition (including facilities-based competition), increase or improve wireless services offered to the public, and otherwise benefit the public interest, we believe that facilitating spectrum leasing in fact will reinforce achievement of these objectives.

158. Similarly, in analyzing the second prong of the Section 10 forbearance standard with respect to the streamlined spectrum leasing procedures, we conclude that requiring a 30-day notice and comment period is not necessary for the protection of consumers. Using these procedures, the Commission will review all applications for spectrum leases and, as noted above, interested parties will continue to have the opportunity to file comments. In the event a particular application raises issues that might have an adverse effect on consumers, the Commission retains the authority, as discussed above, to remove that application from streamlined processing for further review. Forbearance from a 30-day public notice period will not deprive consumers of protection because our procedures allow adequate time for initial Commission review as well as an opportunity for subsequent review if necessary. We also note that the procedures we adopt will make it easier, with less cost and delay, for additional entities to gain access to spectrum so that it may be put to use for the ultimate benefit of consumers.

159. Finally, applying the third prong of the Section 10 forbearance standard, we determine that forbearance from the 30-day comment period required by Section 309(b) is consistent with the public interest. Forbearance will promote competition by allowing parties to lease spectrum without undue regulatory delay. We believe that a 21-day review period will provide adequate time to determine whether a particular application has the potential to harm the public interest. During the 21-day period, we will review all spectrum lease applications and evaluate the public interest implications of the proposed transaction. The efficiency gained by our expedited review process and streamlined procedures will increase carriers' ability to compete in the wireless marketplace, with benefits for consumers, in furtherance of our statutory goals. Such efficiency will promote competitive market conditions, thus enhancing competition among telecommunications service providers.

(ii) Temporary, short-term *de facto* transfer spectrum leasing arrangements

160. We also adopt a separate set of policies and procedures to facilitate the leasing of spectrum usage rights involving a transfer of *de facto* control to meet temporary, short-term needs for spectrum. Because these short-term leasing arrangements are by definition only temporary and raise different and fewer concerns from those associated with long-term leasing arrangements discussed above, we adopt even more expedited approval procedures and permit more flexible leasing policies.

(a) Background

161. As noted above, the Commission sought comment in the *NPRM* on both long-term and short-term spectrum leasing arrangements. The Commission recognized that a potential spectrum user, with a particularized business need, might require access to spectrum usage rights for only a short period of time.[331] The Commission specifically inquired whether there might be good reasons to distinguish between short- and long-term leasing arrangements, and whether some of the service rules applicable to licensees in certain services, such as aggregation limits or unjust enrichment, might not be appropriate for arrangements that were only of very limited duration.[332] At the same time, the Commission expressed

[331] *NPRM* at ¶ 19. *See also Policy Statement* at ¶¶ 12-13; *Public Forum Transcript* at 18.

[332] *NPRM* at ¶¶ 43, 49, 54.

concern that such leasing not be used in a manner that would undermine existing policies and rules requiring that licensees meet applicable construction or substantial service obligations.[333]

162. Although several parties commented briefly on short-term leasing, only a few specifically addressed whether the Commission should distinguish between short-term and long-term leasing arrangements, and if so, how.[334] In particular, a few commenters proposed that the Commission not apply certain service rules to lessees if the lease was for a short period of time.[335] Some commenters requested that the Commission distinguish between short-term and long-term leases for purposes of applying the CMRS spectrum cap, contending that lessees in short-term leases should not be attributed with the leased spectrum.[336] One commenter stated that designated entity licensees entering into short-term leasing arrangements with entities not eligible for the same level of bidding credits should not be required to pay unjust enrichment.[337] Another commenter suggested that the Commission establish a special safe harbor for short-term leasing because such transactions could not withstand high transaction costs or delays, and should not require prior Commission approval. It stated that short-term leasing would allow providers access to spectrum to meet demand during short periods of time in limited areas, such as major conventions or sporting events, without having to acquire extensive spectrum usage rights that would lie idle at other times.[338] A few commenters addressed where to draw the line between long- and short-term leasing, one suggesting that a 60-day lease would constitute a short-term lease, while another proposed that the Commission define "short-term" as a lease of less than three years, and another suggested one year.[339] Finally, one commenter stated that licensees entering into short-term leasing arrangements should not be able to rely on their lessees' activities to meet any applicable buildout requirements.[340]

(b) Discussion

163. We find that the public interest would be served by facilitating short-term *de facto* transfer leasing arrangements that meet entities' temporary needs for access to spectrum. There are legitimate specific needs that can most easily and efficiently be addressed through these kinds of short-term leasing arrangements, and we conclude that the public interest would be served by providing special procedures tailored to enable parties to enter into such arrangements, with minimal costs and delay, that can meet their temporary needs for access to spectrum. Accordingly, with regard to all of the wireless services affected by this Report and Order, we will approve, pursuant to our authority to grant special temporary authority (STA) under Section 309(f) of the Communications Act,[341] short-term *de facto* transfer leasing

[333] *Id.* at ¶ 50.

[334] *See, e.g.*, AT&T Wireless Comments at 7; Cingular Wireless Comments at 4; Cook Inlet Comments at 10; El Paso Global Comments at 4; Macquarie Bank Reply Comments at 6; Pacific Wireless Comments at 4; RTG Comments at 27-28; Teligent Comments at 2; Vanu Comments at 6-7; Winstar Comments at 3, 14-15.

[335] *See, e.g.*, Cook Inlet at 10; RTG Comments at 28 (contending that lessees under short-term leases would not effectively have gained the operational rights and benefits of control of the spectrum usage rights).

[336] *See, e.g.*, CTIA Comments at 8 n.19; RTG Comments at 28; Winstar Comments at 14-15.

[337] *See* Cook Inlet Comments at 12.

[338] *See* Vanu Comments at 6-7.

[339] *See* Cook Inlet Comments at 12 n.19 (suggesting one year); CTIA Comments at 8 n.19 (suggesting 60 days as an example); RTG Comments at 27 (proposing three years).

[340] *See* Cook Inlet Comments at 10.

[341] 47 U.S.C. § 309(f). *See also* 47 C.F.R. § 1.931(a)(2)(iv).

arrangements, for a period of up to 360 days, if they meet the specified conditions discussed below.[342] We believe that in order to permit meaningful, timely short-term arrangements, we must ensure that our processes do not unduly delay the efforts of a licensee and lessee to implement this type of agreed-to business arrangement. Also, by virtue of the temporary nature of these leases, we determine that additional flexibility with respect to certain of the service rules is appropriate, and that we accordingly will not require that short-term spectrum lessees meet all of the regulatory requirements that are applicable to the licensee, as discussed below.

164. We believe that potential spectrum users' needs for near-term, temporary access to spectrum usage rights can best be achieved under our statutory STA authority. Section 309(f) empowers the Commission to grant STA applications if it finds that "there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest."[343] Under this authority, the Commission may grant such applications for a period of up to 180 days and may renew the STA for as much as an additional 180 days per renewal.[344] Because of special considerations related to the temporary nature of such leases, and the specific need to minimize costs, uncertainty, and delay when addressing parties' short-term needs for access to spectrum that would benefit the public, we determine that short-term leasing arrangements that meet specific conditions generally warrant grant of an STA. Our findings in this Report and Order support the determination that the temporary operations associated with a short-term lease are in the public interest. Moreover, timely initiation of operations under such a short-term arrangement often is necessary to permit the spectrum lessee to meet service needs. Parties to a short-term lease may rely on the findings contained in this Report and Order, but must still include an individualized statement of why the proposed arrangement meets the public interest requirements of Section 309(f). Consistent with our statutory authority concerning temporary authorizations, we define a short-term lease as a lease agreement with a term of no more than 360 days. To fall within this definition, the lease may have an initial term of up to 180 days, which may be renewed for as much as an additional 180 days. Thus, a short-term lease potentially could have an initial term of 180 days or less, and be renewable one or more times up to a maximum of 360 days.[345]

165. As discussed below, we adopt safeguards to ensure that these special policies and procedures are provided only for temporary arrangements appropriate for the STA process we adopt here. We will not permit parties to convert these temporary arrangements into longer term leases in a manner that would evade the policies we have adopted for long-term arrangements involving a transfer of *de facto* control discussed earlier in this Report and Order.

[342] We note that licensees and lessees may enter into short-term leasing arrangements under spectrum manager leasing arrangements as well, so long as the licensee complies with the policies and procedures applicable to that type of leasing arrangement, as discussed in Section IV.A.5.a, above.

[343] 47 U.S.C. § 309(f).

[344] *Id.*

[345] A short-term lease may not exceed 360 days, or the remainder of the licensee's license term, whichever is shorter.

(i) Respective rights and responsibilities of licensees and spectrum lessees

166. *Licensees' and spectrum lessees' rights and responsibilities*. Under these short-term *de facto* transfer leasing arrangements, we will hold the spectrum lessee primarily accountable for compliance with the Commission's rules and policies (which generally will be operational, technical, and interference-based), to the extent they are applicable to the lessee's use of the leased spectrum. The licensee will generally not be directly liable for the acts of its lessee, but will be accountable for its own willful or repeated violations, including those related to its lease arrangement with the lessee. Similarly, both licensees and short-term spectrum lessees will be subject to our jurisdiction and to possible enforcement action for violation of any technical or other rules that are applicable to the license, to the same extent and in the same manner as any other licensee.[346] In addition, we will specifically and individually condition grant of these short-term spectrum leasing applications on the requirement that the spectrum lessee must temporarily suspend, terminate, or modify its operations without a hearing if the Commission or its staff issues an order determining that the lessee is or may be in violation of the Act, a rule, or other term or condition of the authorization.

167. *Enforcement of restrictions on short-term leasing*. As discussed above, the special policies and procedures that we adopt here are intended to be used only for short-term leasing arrangements. Accordingly, we will carefully review filings made by parties, and require appropriate certifications, to ensure that such leasing arrangements do not exceed 360 days. We also note that should we find evidence on our own investigation or have evidence brought to our attention that the parties to a leasing arrangements are attempting to use the short-term leasing procedures for a lease that in fact will exceed 360 days (or the parties reasonably expect the lease to run for longer than 360 days), we will take all appropriate enforcement action against the licensee and lessee, including possible forfeitures, revocation of authority to operate pursuant to the lease, and/or revocation of the underlying license.[347] Among other things, we will guard against the attempted use of affiliates to evade the short-term lease time limit as well as arrangements that seek to undercut fundamental Commission policies in the guise of being a short-term lease.

168. *Extension of leasing beyond 360 days.* We recognize that there may be circumstances in which parties enter into a short-term *de facto* transfer leasing arrangement expecting that the spectrum lessee's needs would not extend beyond 360 days and, at some later time, determine that they would like to maintain the spectrum lease beyond the short-term period. If so, then the parties must submit (in sufficient time prior to the expiration of the STA) the appropriate application under our long-term spectrum leasing procedures, and obtain Commission consent pursuant to those procedures, as described in Section IV.A.5.b(i)(b)(iii) above. With specific regard to designated entity licensees that seek to continue leasing to their spectrum lessees (or to their affiliates or controlling interests, as determined under our "controlling interest" standard[348]) beyond 360 days, we will permit them to convert their arrangements to a long-term lease to the extent that they comply with our long-term leasing procedures and that they pay any unjust enrichment that would have been owed had the parties filed a long-term spectrum leasing application in the first instance.[349]

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[346] Because consent to an STA constitutes the granting of an authorization, short-term *de facto* transfer leases will be subject to our direct forfeiture authority under Section 503(b).

[347] For example, a licensee would not be permitted to use the short-term procedures for a series of leases to affiliated companies in which the leases had a combined term of more than 360 days.

[348] *See generally* 47 C.F.R. § 1.2110(b)(2).

[349] *See generally* Section IV.A.5.b(i)(b), *supra*.

169. We will not permit parties to effectively convert a short-term lease into a longer term arrangement and, by so doing, undermine or evade the applicable policies and procedures that we have adopted for long-term spectrum leasing arrangements. Accordingly, we will monitor the parties' use of these short-term leasing arrangements to ensure that they are not entering into a series of short-term leasing arrangements or otherwise leasing pursuant to these special policies and procedures as a means to evade policies and procedures (*e.g.*, designated entity and/or entrepreneur rules or use restrictions) applicable to longer *de facto* control leasing arrangements. We also will deny any application to extend a short-term lease into something longer in those situations in which the parties would not have been able, in the first instance, to use the long-term leasing option because of the transfer, use or other restrictions applicable to the particular service.

170. *Subleasing*. In light of the fact that this type of leasing arrangement is designed to be short-term and to meet immediate needs of individual spectrum lessees, we will not permit subleasing under these short-term leasing policies.

171. *Renewal*. So long as the short-term leasing arrangement does not extend beyond a total of 360 days, a licensee and spectrum lessee that have entered into a spectrum leasing 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 during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal. 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 extension of the spectrum leasing arrangement.

(ii) Application of particular service rules and policies

172. We will require that many, but not all, of the service rules applicable to the licensee also apply to spectrum lessees in the context of short-term *de facto* transfer leasing. In particular, we will require that short-term spectrum lessees comply with all of the technical, operational, and interference-related requirements placed on licensees (just as those requirements apply to long-term lessees under the policies adopted herein). However, in order to encourage the use of short-term leasing to meet temporary needs for access to spectrum, we will provide additional flexibility to spectrum lessees by not requiring them to comply with certain of the other service rules applicable to licensees in many services,[350] as discussed below.

173. *Interference-related service rules.* Requiring that short-term spectrum lessees meet the same technical, operational, and interference-related requirements imposed on the licensee will ensure that the activities of a short-term spectrum lessee do not cause interference to other operators.

174. *Eligibility policies and rules.* We will also require, under these policies, that short-term lessees satisfy all statutorily-based eligibility requirements, such as the restrictions on foreign ownership set forth in Section 310 as well as the restrictions associated with the Anti-Drug Abuse Act of 1988. We note that this is consistent with our STA policies and rules.

175. *Use restrictions.* While use restrictions generally will be applied to lessees, we will permit some additional flexibility under short-term *de facto* transfer leasing with regard to one particular set of use restrictions. Specifically, we will permit licensees with service authorizations that restrict use of

[350] We note that the Commission historically has permitted entities to gain temporary access to spectrum through the STA process and to use that spectrum in a manner not specifically authorized under the particular service. *See generally* 47 C.F.R. § 1.931(b)(1).

spectrum to non-commercial uses to enter into short-term leasing arrangements, under these STA procedures, that allow the lessee to use the spectrum commercially. Given that these leases are by definition designed to meet only temporary spectrum needs, and can in no event be extended beyond 360 days under the safeguards we are adopting, we do not believe that permitting this more flexible use by spectrum lessees will undermine the policies underlying the use restrictions of these services.

176. *Designated entity policies and rules.* Similarly, we will provide additional flexibility for short-term *de facto* transfer leases with regard to our designated entity and entrepreneur policies. Specifically, we will not subject licensees entering into short-term leases to designated entity unjust enrichment provisions or entrepreneur transfer restrictions that would be applicable if a designated entity or entrepreneur licensee were to enter into a long-term lease arrangement or transfer or assign its license.[351] Thus, for example, a designated entity may lease spectrum on a short-term basis to a non-designated entity without triggering an unjust enrichment payment. In addition, entrepreneur licensees will not be restricted from entering into short-term leases with non-eligible entities.[352] We find that allowing this degree of flexibility in short-term leasing arrangements serves the public interest by making additional spectrum available for short-term use, and that because of the short-term nature of the leases involved and because of the safeguards we adopt, this approach will not undermine basic policies underlying our designated entity or entrepreneur rules by which licensees buildout their systems and provide spectrum-based services.[353] For instance, as discussed below, we do not permit designated entity and/or entrepreneur licensees to rely on short-term leasing arrangements to meet their buildout obligations. And, as discussed previously, we impose safeguards and restrictions to ensure that licensees and short-term spectrum lessees cannot convert these short-term arrangements into longer term arrangements that circumvent the designated entity or entrepreneur policies applicable to long-term leasing arrangements.

177. *Construction/performance requirements.* Unlike the policies applicable to long-term *de facto* transfer leasing arrangements described above, licensees will not be permitted to rely on the activities of their short-term spectrum lessees when seeking to establish that they have met any applicable construction requirements. As discussed above, these short-term leasing arrangements are expressly designed to be temporary in nature, and therefore cannot be counted to establish that the licensee is meeting the purposes and policies underlying our buildout rules, including the goal of ensuring establishment of service in rural areas.

178. *Policies relating to competition.* We will not extend the Commission's policies concerning competition, discussed earlier,[354] to short-term *de facto* transfer leasing arrangements. Because these short-term leasing arrangements are by definition only temporary, and cannot be extended beyond 360 days (unless the arrangement would qualify under the long-term spectrum leasing policies and procedures discussed above), we conclude that these spectrum leasing arrangements do not raise concerns about the

[351] As is the case in long-term leasing, nothing in a short-term spectrum leasing arrangement can modify the licensee's sole responsibility for its debt obligation to the government to the extent that a licensee participates in the Commission's installment payment program. *See* paragraphs 188-189, *infra*.

[352] As we discuss below, however, entrepreneur licensees (as well as other licensees) will not be able to rely on short-term leasing arrangements to meet any construction requirements. Thus, entrepreneurs will not be able to use short-term leasing as a means to evade any transfer restrictions placed on their licenses.

[353] *See generally* 47 U.S.C. §§ 309(j)(3), (j)(4).

[354] *See* Sections IV.A.5.a(ii)(b), IV.A.5.b(i)(b)(ii), *supra*.

consolidation of control over spectrum that could have the type of unacceptable anticompetitive effects that are contrary to the public interest.[355]

179. *Regulatory classification*. As with both spectrum manager leasing arrangements and long-term *de facto* transfer leasing, a short-term lessee will be entitled to select its own regulatory status, either as a CMRS/common carrier or PMRS/non-common carrier (or both), to the same extent as the licensee would be able to do under the applicable service rules. Under this leasing option, spectrum lessees are the entities responsible for meeting the necessary filing and notification obligations.

180. *Various other rules, including statutory obligations*. As with long-term *de facto* transfer leasing, we will subject short-term spectrum lessees to various other statutory and related regulatory requirements – including Title II obligations or other requirements, such as those relating to CALEA, EEO, TRS, NANP, universal service funds, and regulatory fee payment obligations – in the same manner as if they were licensees with regard to the leased spectrum. To the extent a licensee or lessee has any uncertainty regarding the applicability of particular statutory or regulatory provisions, it can seek guidance from the Commission. However, given the short-term nature of these leasing arrangements, we will not require lessees to comply with E911 requirements to the extent the requirements are placed on licensees.

(iii) STA approval procedures

181. Parties seeking to implement short-term *de facto* transfer leases pursuant to the policies and procedures set forth above will submit their request through ULS[356] containing information similar to that currently provided under Form 603, along with the required showing that the request meets the Section 309(f) standards. The spectrum lessee must certify that it meets the specified conditions so as to qualify for these short-term leasing procedures. The Bureau will then review the application, which will not be placed on public notice,[357] in an expedited fashion, acting on the STA request within ten days if the leasing arrangement meets the specified conditions. The STA, which can be for any term of up to 180 days, will become effective on the date of grant. In the event the parties seek to renew the lease for any period of time, up to another 180 days, they must submit another filing, subject to the same procedures. In no event may the cumulative STA period extend beyond a total of 360 days.[358]

6. Other Miscellaneous Matters Concerning Spectrum Leasing

a. Background

182. Several remaining issues may arise in the context of the spectrum leasing arrangements discussed in this Report and Order. These include issues relating to the extension of spectrum leasing

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[355] *See generally 2000 Biennial Review Order on CMRS Spectrum Aggregation*, 16 FCC Rcd 22668.

[356] To the extent that a licensee seeking to file a *de facto* transfer leasing application falls within the provisions of section 1.911(d) of our rules, 47 C.F.R. § 1.911(d), it may file the application either electronically or manually. In addition, applicants filing a *de facto* transfer spectrum leasing application will be required to pay a filing fee consistent with a transfer of control application as required by 47 C.F.R. § 1.1102 applicable to the particular service involved. Licensees exempt from application filing fees pursuant to 47 C.F.R. § 1.1114 will not be required to pay a fee in connection with a *de facto* transfer leasing application.

[357] This is consistent with our processing of most requests for STA.

[358] The parties to a short-term lease will be required to maintain a copy of the lease agreement in their records and to make it available to the Commission upon request. Similarly, the lessee must keep a copy of the STA grant in its records, to be provided to Commission personnel when requested.

arrangements for longer duration, expiration or termination of spectrum leases, assignment of spectrum leases, transfers of control involving spectrum lessees, and revocation of a license or of a spectrum lessee's operating authority.

b. Discussion

183. *Expiration or termination of spectrum leases*. For all spectrum leases facilitated under the policies enunciated in this Report and Order, the lease notification (in the case of spectrum manager leasing arrangements) or lease application (in the case of *de facto* transfer leasing arrangements) must set forth the planned termination date for the lease. For spectrum manager leasing arrangements subject only to a notification requirement, no further filing is required at termination unless the lease is terminated by the licensee or by the parties' mutual agreement in advance of the original termination date. In either event, the licensee would be required to file a notification within ten (10) days of the early termination date. For *de facto* transfer leases subject to the streamlined processing rules, our consent to the leasing arrangement proposed in an application will include consent to return the leased spectrum to the licensee at the end of the lease term.[359] This consent will also encompass return of the spectrum to the licensee prior to the lease termination date upon notification (on the applicable form) by the licensee of its unilateral termination of the lease. A similar notification will be required if the parties jointly seek to terminate the lease at an earlier date.[360]

184. *Extension of spectrum leasing arrangements.* Spectrum leasing arrangements entered into under the policies set forth in this Report and Order may be extended beyond the initial term set forth in the lease notification or application. For spectrum manager leasing arrangements, the licensee must notify the Commission of the extension of the arrangement within 14 days of execution of the extension and at least 21 days in advance of operating under the extended term. For long-term *de facto* transfer leasing arrangements, the licensee and spectrum lessee must notify the Commission at least 21 days in advance of operating under the extended term. Finally, for short-term *de facto* transfer leasing arrangements, the parties may extend the short-term arrangement, so long as it would not result in an arrangement exceeding 360 days, by notifying the Commission of the extension at least 10 days in advance of operating under the extended term.[361]

185. *Assignment of leases.* We recognize that circumstances may arise whereby a spectrum lessee may seek to assign the spectrum lease to another entity. With regard to spectrum manager leasing arrangements, we will permit a spectrum lessee to assign a lease to another entity provided that the licensee has agreed to such an assignment, files a notification with us, and is in privity with the lease assignee so that the licensee can act as spectrum manager by exercising *de facto* control over the subleased spectrum. With regard to *de facto* transfer leases, a spectrum lessee may file an application with us, assuming that the proposed arrangement meets the test for streamlined processing, for approval to assign the leasing authorization (or a subset thereof) to a third entity. For this type of leasing, we also require privity between the licensee and the lease assignee. In addition, should there be a *pro forma*

[359] As discussed earlier, to the extent that there is any apparent conflict with extant Commission policies concerning so-called reversionary interests with regard to the Wireless Radio Services affected by this proceeding, the new policies enunciated in this Report and Order establish that reversion of *de facto* control of leased spectrum, from the spectrum lessee back to the licensee at the end of the lease term, is permissible.

[360] We note that the Commission does not intend to become involved in private contractual disputes between the parties, consistent with our usual practice.

[361] As discussed in Section IV.A.5.b(ii), *supra*, a licensee and spectrum lessee also may, provided that the requisite conditions are met, convert a short-term *de facto* transfer leasing arrangement into a long-term *de facto* transfer leasing arrangement.

assignment of the lease, the parties involved in the *pro forma* transaction will be required to file a notification regarding the action subject to the same rules and procedures regarding *pro forma* transactions undertaken by licensees.[362]

186. *Transfer of control of spectrum lessees.* Similarly, we believe that we need to provide for the possibility that transfers of control of spectrum lessees will occur. In the case of spectrum manager leasing, we will require the licensee to notify the Commission, prior to consummation of a substantial transfer of control, pursuant to the same notification procedures required for spectrum manager leasing arrangements. Similarly, for leases involving a transfer of *de facto* control, because our consent to a lease application involves an assessment of the qualifications of the lessee, we will require that a lessee contemplating a transfer of substantive control obtain prior Commission consent, using the same procedures we have outlined above for *de facto* transfer leasing. Finally, should there be a *pro forma* transfer of control of the lessee, the parties involved in the *pro forma* transaction will be required to file a notification subject to the same rules and procedures regarding *pro forma* transactions undertaken by licensees.[363]

187. *Revocation or automatic cancellation of a license or of a spectrum lessee's operating authority.* For all spectrum leases discussed in this Report and Order, in the event we revoke an authorization held by a licensee that has entered into a lease arrangement, such revocation will require the lessee to terminate its operations since the spectrum lessee gains its access to the licensed spectrum through the licensee's authorization.[364] Similarly, a license may automatically cancel if the licensee fails to comply with certain defined requirements,[365] and the lessee similarly would be required to terminate its operations. In addition, we note that the lessee will have no greater right to obtain a comparable license than any other interested parties. If the Commission revokes the authority of a spectrum lessee to operate, that action by itself does not affect the status of the licensee before the Commission.

188. *Conditions regarding spectrum leasing arrangements entered into by licensees in the installment payment program*. We recognize that licensees currently participating in the Commission's installment payment program may seek to take advantage of the kinds of flexible spectrum leasing arrangements that we are facilitating by our action today. In permitting such licensees to enter into spectrum manager and *de facto* transfer leasing arrangements, we will require appropriate, commercially reasonable safeguards to ensure that they continue to meet their existing obligations to the Commission to pay license installment payment obligations. Accordingly, as a condition of participation in the new spectrum leasing opportunities set out in this Report and Order, licensees in the installment payment program, as well as their spectrum lessees (and any sublessees), will be required to take such actions and enter into such agreements that the Commission, in its discretion, determines are warranted to protect the integrity of the licensees' payment obligations for the licenses and the Commission's priority lien and security interest in the licenses and related proceeds (collectively "security interest").[366] To this end, we

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[362] *See* 47 C.F.R. § 1.948(c)(1).

[363] *See id*.

[364] In the event we require service termination by a lessee, we will take into account the public interest in affording a reasonable transition period to users of the service in order to minimize disruption to business and other activities.

[365] For example, if a licensee that is participating in the installment payment program fails to make timely payment, its license will automatically cancel. *See* 47 C.F.R. § 1.2110(g)(4)(iii). Failure to meet construction or coverage requirements also leads to automatic license termination. *See* 47 C.F.R. § 1.946(c).

[366] These requirements will apply to both spectrum manager and *de facto* transfer leasing arrangements, so long as the underlying license is subject to installment payments.

delegate to the Wireless Telecommunications Bureau and the Office of Managing Director (Bureau/OMD) the authority to make these determinations and implement the appropriate safeguards, consistent with the following guidelines:

- For a licensee participating in the Commission's installment payment program entering into a spectrum leasing arrangement, any new or existing documentation evidencing the Commission's security interest (hereinafter "financing documents") should include express reference to spectrum leasing arrangements involving spectrum lessees, as provided for in this Report and Order. This documentation should, at the least, make it clear that the Commission's security interest covers the licensee's rights in the lease payments.

- Any spectrum lease agreement that provides for a lease of spectrum that is licensed under the installment payment program should contain provisions providing that: (a) any lease is subject to the execution of Commission-approved financing documents and the certification of such execution; (b) any lease can only be with lessees that are qualified to enter into such arrangements under the Commission's rules and regulations; (c) the lessee is required to comply with the Commission's rules and regulations and other applicable law, at all times, and give the licensee or the Commission the right to revoke, cancel, or terminate the lease for failure to comply; (d) the lessee may not hold itself out to the public as the holder of the license and the lessee will not have the right to nor under any circumstances undertake to hold itself out as a licensee by virtue of such lease; (e) the license remains subject to the Commission's security interest, and the lease is not an assignment, sale, or transfer of the license itself; and (f) the licensee will not consent to any assignment in whole or part of such a lease, regardless of whether or not the lessee is the subject of reorganization and/or liquidation proceedings in bankruptcy, a receivership, or otherwise, unless such action is in compliance with the Commission's rules and regulations. The Bureau/OMD should ensure that the appropriate financing documentation reflects the licensee's obligation to include the foregoing provisions in its spectrum leases.

- In addition to the foregoing, the Bureau/OMD may require the lessee or any sublessee to execute, as a condition of leasing, appropriate documentation that, *inter alia*, acknowledges (1) the Commission's status as a secured party, and (2) the Commission's right to execute and file documentation that it deems necessary to protect its license-based security interests (*e.g.*, financing and continuation statements) without the lessee's (or sublessee's) approval.

- Finally, with respect to licenses that are still subject to the installment payment program, no licensee or potential lessee may file a spectrum leasing notification or application (or otherwise participate in the leasing contemplated in this Report and Order) without first executing the Commission-approved financing documentation and so certifying, as described above.

189. *Bankruptcy or receivership*. Finally, we note the possibility that either a licensee or spectrum lessee may enter into bankruptcy or receivership during the term of a spectrum leasing arrangement. In such event, the measures described in the preceding paragraph will help ensure that the public's interest in recouping the full amount of a licensee's debt obligations to the Commission is not unduly compromised. In addition, we believe that in all cases (regardless of whether a debt is owed or not) the public interest is best served if a licensee's or lessee's regulatory obligations and responsibilities are clearly preserved during bankruptcy or receivership. Accordingly, we will require all leases – both

spectrum manager and *de facto* transfer spectrum leasing arrangements – to contain the following basic provisions:

- The spectrum lessee must comply with the Commission's rules and regulations and other applicable law at all times, and if the lessee fails to so comply, the lease may be revoked, cancelled, or terminated by either the licensee or the Commission.
- If the license is revoked, cancelled, terminated, or otherwise ceases to be in effect, the lessee has no continuing authority to use the leased spectrum, unless otherwise authorized by the Commission.
- The lease is not an assignment, sale, or transfer of the license itself.
- The lease shall not be assigned to any entity that is not eligible or qualified to enter into a spectrum leasing arrangement under the Commission's rules and regulations.
- The licensee will not consent to any assignment of the lease except to the extent such assignment complies with the Commission's rules and regulations.

7. Collection of Information on Spectrum Leasing

a. Background

190. In the *NPRM*, the Commission sought general comment on whether the Commission should have a role in collecting and disseminating information regarding spectrum leasing and actual usage.[367] The Commission tentatively concluded that the private sector would be better suited to identifying the types of information most appropriate for encouraging the growth of secondary markets as well as collecting such information.[368]

191. Some commenters requested that the Commission gather additional information to facilitate the development of secondary markets, and suggested the possibility of a national database or spectrum registry.[369] One commenter, for example, argued that a consolidated government database would be essential to reducing transaction costs in secondary markets and to enabling efficient spectrum use,[370] while another thought that maintaining an accurate database of spectrum rights would encourage greater confidence among participants in secondary trading, and would be essential to enabling spot markets to function.[371] One commenter specifically recommended that the Commission create an administrative mechanism that would track actual spectrum usage.[372] Other commenters, however, opposed any attempt

[367] *See NPRM* at ¶¶ 98-100.

[368] *See id.* at ¶ 100. We note also that the Commission concluded in the *Policy Statement* that spectrum leasing would provide significant economic incentives to encourage the development of mechanisms to gather and disseminate the relevant information. *See Policy Statement* at ¶ 39.

[369] *See, e.g.*, Cook Inlet Comments at 7; Kansas City Power Comments at 5; RTG Comments at 9; Shared Spectrum Company Comments at 3-5.

[370] *See* Shared Spectrum Company Comments at 3-5.

[371] *See* Macquarie Bank Reply Comments at 20.

[372] *See* RTG Reply Comments at 16 (contending that such a mechanism would allow the public to determine what entity is operating on a given frequency in a certain geographic area and provide contact information about the spectrum user).

by the Commission to maintain a database on leased spectrum or otherwise gather information on spectrum that is being leased, contending that this would be unreasonably burdensome on licensees and lessees or that private sector entities would be better suited to gathering information most useful to the development of secondary markets.[373]

b. Discussion

192. As a result of the policies and procedures we are adopting for spectrum leasing arrangements in this Report and Order, including the notification procedures for spectrum manager leasing and streamlined application procedures for *de facto* transfer leasing, the Commission will be making a significant amount of information available in ULS with regard to spectrum leasing. We anticipate that this information, combined with the information the Commission gathers in connection with its licensing process (*e.g.*, transfers of control, assignments of licenses), will be helpful to entities seeking to gain access to spectrum usage rights through leasing. At this time, we will not impose any additional information filing requirements with regard to spectrum leasing.

193. As noted in the *Policy Statement*, we generally believe that if the market is dependent upon this information to flourish, economic incentives will encourage private sector entities to undertake the task.[374] Spectrum brokers with specific expertise on the properties of different spectrum bands could match parties interested in acquiring spectrum usage rights with existing licensees.[375] Thus, we support the establishment of private spectrum exchanges and spectrum brokers, as well as the development of services that list spectrum resources that licensees are offering for sale or lease.[376] Also, we note that determining whether the Commission should collect any additional data to facilitate leasing raises several concerns that must be considered. For instance, such information may involve data (*e.g.*, areas of available spectrum) that could disclose a company's business plans or sensitive information to its competitors. Also, collection of this information would impose costs on the Commission as well as licensees. Before imposing any additional information collection role for the Commission, we would want to establish that such a role would bring important benefits that would not otherwise be adequately addressed.

194. Even though we take no action at this time, we will further explore this issue in the Further Notice because we believe that access to information is a necessary ingredient in promoting secondary markets, particularly for potential participants who may command fewer resources.[377]

B. Streamlined Approval Processes for License Assignments and Transfers of Control

1. Background

195. In seeking ways to facilitate the development of efficient secondary markets in spectrum usage rights, the Commission in the *Policy Statement* expounded upon the need to develop not only

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[373] *See, e.g.*, El Paso Global Comments at 13 (agreeing with the Commission's conclusion that private sector entities would be better suited to the task of gathering information);Teligent Reply Comments at 11(arguing that maintenance of such a database would be unnecessary, and would discourage spectrum leasing by placing a burdensome requirement on both licensees and spectrum lessees).

[374] *See Policy Statement* at ¶ 39.

[375] *See id.*

[376] *See id.*

[377] *See* Section V.A.1, *infra.*

efficient and streamlined spectrum leasing policies but also policies that would streamline license assignments and transfers of control.[378] In particular, it noted that adopting more streamlined license assignment and transfer of control procedures would, as with spectrum leasing, encourage licensees to be more spectrum efficient, promote spectrum fungibility, minimize administrative delays, reduce transaction costs, and otherwise generally facilitate the movement of spectrum toward new, higher valued uses. [379]

2. Discussion

196. We extend the same type of streamlined approval procedures applicable to long-term *de facto* transfer leasing, as adopted above, to our approval procedures for license assignments and transfers of control in those services affected by our spectrum leasing policies.[380] Many of the public interest objectives and policy goals underlying our approach to long-term *de facto* transfer leasing apply with equal force to these transactions, and we will thereby achieve parity of treatment between these secondary market transactions by taking this action now in this Report and Order.

197. *Specific approval procedures.* The streamlined procedures that we adopt for processing license transfer or assignment applications will be implemented using Form 603, as revised to enable quicker processing.[381] Applications will be placed promptly on public notice once sufficiently complete.[382] Petitions to deny filed in accordance with Section 309(d)[383] will be due within 14 days of the initial public notice date. No later than 21 days following the initial public notice listing the transfer or assignment application, the Bureau will either affirmatively consent to, deny, or offline the application.[384] As with long-term *de facto* transfer leasing applications, where there are no issues requiring further review and if no petition to deny, opposition, or other comments concerning the lease application are filed, the consent will be reflected in the first public notice issued after the grant. If, on the other hand, any opposition is submitted, the Bureau will address the arguments raised in an order.[385]

198. If the Bureau determines, based upon its own review or in light of filings by interested parties, that there are issues that cannot be resolved within the abbreviated time frame, it will notify the applicants and remove the application from streamlined processing so that additional information that

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[378] *See generally Policy Statement.*

[379] *See id.* at ¶¶ 1, 9, 12, 18-20, 32, 34; *see also Policy Statement on Principles for Spectrum Allocation*, 14 FCC Rcd at 19872 ¶ 13. 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.

[380] We discuss the specific services eligible for spectrum leasing and this streamlined processing for license assignments or transfer of control in Section IV.A.3, *supra.*

[381] The new information collection requires approval by the Office of Management and Budget.

[382] Applications involving licenses not subject to prior public notice requirements will not be placed on such public notices. *See* 47 C.F.R. §§ 1.933(c), (d).

[383] *See* 47 U.S.C. §§ 309(b)-(d).

[384] The filing of a petition to deny will not automatically lead to offlining the application from streamlined processing, although we will need to address the issues raised in any petition to deny.

[385] *See* 47 U.S.C. § 309(d)(2).

require further examination can be gathered.[386] If offlined from streamlined processing, the Bureau will issue a public notice so indicating. Within 90 days 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. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application. In addition, interested parties may seek reversal of a grant by filing a petition for reconsideration or an application for review.

199. *Forbearance from Section 309(b) requirements relating to 30-day notice and comment for common carrier licenses.* To the extent that the license transfers and assignments involve common carrier or CMRS licenses, our streamlining of the approval procedures to enable consent to an application within 21 days of issuance of the public notice require that we forbear from the Section 309(b) 30-day public notice and comment requirement.[387] We determine that the streamlining procedures we are adopting meets the statutory test for forbearance.

200. As discussed above,[388] the Commission may, pursuant to Section 10 of the Act, forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, so long as 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.[389]

201. Examining the first prong of the test for establishing forbearance, we find that a 30-day notice and comment period for license assignments and transfers of control is not necessary to ensure that a carrier's charges, practices, classifications, and services are just and reasonable, and not unjustly or unreasonably discriminatory. As noted above with regard to long-term *de facto* transfer leasing, information relevant to these particular determinations are not included in the applications, and a full 30-day public notice period is not necessary to achieve these objectives. In addition, since we expect that streamlining license assignments and transfers of control will promote more fluid markets in spectrum usage rights, enable providers to gain quicker control of the spectrum they need to increase or improve wireless services offered to the public, and otherwise benefit the public interest, we believe that facilitating quicker processing of these applications in fact will reinforce achievement of these objectives.

202. Similarly, with regard to the second prong of the Section 10 forbearance standard, we conclude that requiring a 30-day notice and comment period is not necessary for the protection of consumers. Using these procedures, the Commission will review all applications for transfers or assignments and, as noted above, interested parties will continue to have the opportunity to file

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[386] To the extent the application fails to include information required by the Bureau to determine that the proposed lease meets our standards, the parties may be requested to provide additional information. This may necessitate removal of the application from streamlined processing to allow for submission and review of such data.

[387] *See* 47 U.S.C. § 309(c)(2)(B). The 30-day public notice and comment requirement set forth in Section 309(b) does not apply to Private Mobile Radio Service (PMRS) licenses. Accordingly, no forbearance from this requirement is necessary with regard to the many PMRS licenses that also are affected by the leasing procedures adopted in this Report and Order.

[388] *See* Section IV.A.5.b(i)(b)(iii), *supra.*

[389] 47 U.S.C. § 160(a).

comments. In the event a particular application raises issues that might have an adverse effect on consumers, the Commission retains the authority, as discussed above, to remove that application from streamlined processing for further review. Accordingly, forbearance from a 30-day public notice period will not deprive consumers of protection because our 21-day notice procedures allow adequate time for initial Commission review as well as an opportunity for subsequent review if necessary. We also note that the procedures we adopt will make it easier, with less cost and delay, for additional entities to gain access to spectrum so that it may be put to use for the ultimate benefit of consumers.

203. Finally, applying the third prong of the Section 10 forbearance standard, we determine that forbearance from the 30-day comment period required by Section 309(b) is consistent with the public interest. Forbearance will promote competition by allowing parties to transfer or assign spectrum authorizations without undue regulatory delay. As with spectrum leasing arrangements, we believe that a 21-day review period for license transfer or assignment applications will provide adequate time to determine whether a particular application has the potential to harm the public interest. During the 21-day period, we will review the application and evaluate the public interest implications of the proposed transaction. The efficiency gained by our expedited review process and streamlined procedures will increase carriers' ability to compete in the wireless marketplace, with benefits for consumers, in furtherance of our statutory goals. Such efficiency will promote competitive market conditions, thus enhancing competition among telecommunications service providers.

C. Secondary Markets in Satellite Services

1. Background

204. In the *NPRM*, the Commission requested comment on whether it should make various changes to its policies and rules in order to bolster secondary markets.[390] Specifically, it asked whether any changes were needed in the Commission's transponder lease or sales policy and whether any changes might make it easier to develop a market in the use of transponders or the leasing of rights to use satellite spectrum or improve the use of that satellite spectrum. It also inquired whether any changes in our earth station rules might help foster a more efficient secondary market. Finally, it asked whether the Commission should entertain requests to waive technical and service rules.[391] We received comments from four parties requesting different types of changes in our policies and rules.

205. New Skies requested that the Commission adopt limits for the downlink power from C-band satellites, which would also permit a gradual increase in allowed power. It also requested elimination of the requirement to license receive-only dishes of sufficient size to qualify for routine licensing, even when they are communicating with non-U.S. licensed satellites included on the Permitted Space Station List. New Skies further requested that only routinely licensed earth stations be allowed to communicate with space stations on the Permitted Space Station List without further authorization.[392]

206. SIA proposed that the Commission eliminate the need for prior Commission approval of *pro forma* transfers of control or assignments, as well as the requirement that a receive-only earth station operating with a non-U.S. licensed satellite on the Permitted Space Station List obtain a separate license to operate the station. SIA also opposed certain proposals regarding sharing between earth station operators and certain terrestrial users. In addition, SIA contended that there was no need for the

[390] *See generally NPRM* at ¶¶ 66-68.

[391] *Id.* at ¶ 68.

[392] New Skies Comments at 3-8.

Commission to have a greater role in collecting and disseminating information on licensed satellite spectrum.[393]

207. HBO contended that the Commission should more frequently entertain requests to waive technical and service rules. HBO also requested that the Commission clarify that satellite service operators should not be held responsible for the content of the material transmitted, arguing that such operators are not common carriers and do not have any control of the content of transmissions carried on their satellites.[394]

208. Finally, Teledesic recommended that satellite operators have the flexibility to subdivide and apportion the spectrum and lease their rights to various third-party users, as long as that does not interfere with a service's primary allocation. It also requested that the Commission relax its satellite anti-trafficking rules, which it argued hindered satellite companies from obtaining financing by selling equity in the company because the licensee had to prove that it was not "intending to profit" from the sale of its license. Further, Teledesic proposed that the Commission allow the leasing of dormant satellite spectrum, such as through short-term leases during the construction phase.[395] PanAmSat and GE American opposed Teledesic's proposal to allow short-term leasing of unoccupied satellite spectrum, stating that the means already exist, through the STA process, for operators to use spectrum on an interim basis.[396]

2. Discussion

209. Based on the record before us and the specific nature of the revisions that commenting parties proposed, we decide not to make changes to our Satellite Services in this Report and Order.[397] Several of these requests and recommendations raise issues that go beyond the focus of this proceeding and thus are more appropriately addressed in separate proceedings or are already being considered in other proceedings. Specifically, with respect to New Skies' request regarding revising downlink power limits from C-band satellites, New Skies raised this issue in response to Telesat's request to place ANIK F1 on the Permitted List, and the International Bureau found that there was no risk of harmful interference raised by the proposed satellite operations at issue.[398] Furthermore, New Skies raised this issue in response to the *Part 25 Earth Station Streamlining NPRM*.[399] We defer to that proceeding because that

[393] SIA Comments at 5-9; SIA Reply Comments at 2-4.

[394] HBO Comments at 1-2, 9. HBO further explained that, because satellite operators are concerned about the possibility of prosecution by federal or state authorities for violation of obscenity or indecency laws, those operators retain the right to suspend or terminate customer service if there is a threat of prosecution under federal or state laws. *Id.* at 2.

[395] Teledesic Comments at 5-9.

[396] PanAmSat and GE Americom Reply Comments at 1-2.

[397] We note that the spectrum leasing policies for the Wireless Radio Services adopted in this Report and Order are not intended to alter existing industry practices, approved by the Commission, regarding transponder leasing arrangements or to suggest that such leases would be subject to the procedures we adopt regarding Wireless Radio Services.

[398] Telesat Canada, Petition for Declaratory Ruling For Inclusion of ANIK F1 on the Permitted Space Station List, *Order*, 15 FCC Rcd 24828, 24834 ¶ 15 (Sat. and Rad. Div., Int'l Bur., 2000) (*First ANIK F1 Permitted List Order*); Telesat Canada, Petition for Declaratory Ruling For Inclusion of ANIK F1 on the Permitted Space Station List, *Order*, 16 FCC Rcd 16365, 16370 ¶ 11 (Int'l. Bur. 2001) (*Second ANIK F1 Permitted List Order*).

[399] *See* 2000 Biennial Regulatory Review – Streamlining and Other Revisions of Part 25 of the Commission's Rules Governing the Licensing of, and Spectrum Usage by, Satellite Network Earth Stations and (continued….)

record on this issue is better developed. New Skies' comments on the Permitted Space Station List are also beyond the scope of this proceeding. In any case, the International Bureau has previously explained that only routinely licensed earth stations are allowed to communicate with space stations on the Permitted Space Station List without further authorization.[400] Finally, the Commission is considering proposals to eliminate the routine licensing requirements for certain receive-only dishes in the *Part 25 Earth Station Streamlining NPRM*.

210. The request by SIA concerning *pro forma* transfers is more appropriately considered in other future proceedings that may review our overall satellite licensing procedures. Similarly, we deny HBO's recommendation that the Commission clarify liability for control of program content because that request is beyond the scope of this proceeding. In response to Teledesic's proposal to relax satellite anti-trafficking rules, we note that we recently eliminated those rules.[401] Finally, we determine that the rest of Teledesic's proposals, including its suggestions concerning allowing short-term satellite spectrum leases, raise issues that are inter-related with our due diligence or buildout rules and our ability to prevent potential interference among satellites and between satellites and terrestrial wireless licensees. As such, we conclude that they too are more appropriately considered in the context of specific rulemakings on those subjects.

211. In addition, we are not persuaded by HBO's suggestion that changes are necessary in our policies regarding requests for waivers of technical and service rules. We note that parties are free to petition the Commission at any time to waive any of its rules.[402]

212. Finally, we agree with SIA that, based on the record before us, there has been no demonstrable need for the Commission to have a greater role in collecting and disseminating information on licensed satellite spectrum. Accordingly, we will not take on such role at this time.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

213. The Report and Order we adopt today represents an important first step in the effort to remove unnecessary regulatory constraints and better promote efficient use of available spectrum. In particular, the Report and Order policies set forth the legal basis for moving forward toward a more fluid marketplace in spectrum, balancing both the desire for more flexibility and the statutory constraints and responsibilities governing our actions. These steps are necessary underpinnings to taking further steps to build the spectrum environment we envision as a long-term objective.

214. Despite this progress in removing regulations that unnecessarily inhibit market transactions, we recognize that the steps taken in the Report and Order are limited in scope, addressing only the legal framework for certain types of leasing transactions involving exclusive use wireless licenses. In order to facilitate secondary markets and improve opportunities for more users to gain access to spectrum, we believe we must provide a greater range of incumbent licensees with the requisite regulatory framework as well as the practical capability and economic incentive to permit access to unused spectrum encompassed within their authorizations. Thus, additional actions by the Commission are needed to

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Space Stations, *Notice of Proposed Rulemaking*, 15 FCC Rcd 25128 (2000) (*Part 25 Earth Station Streamlining NPRM*).

[400] *Second ANIK F1 Permitted List Order*, 16 FCC Rcd at 16368 ¶ 7.

[401] *See* Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 10760, 10839-10846 ¶¶ 209-225 (2003), *Erratum*, DA 03-2087 (rel. June 26, 2003), *Second Erratum*, DA 03-2861 (rel. Sept. 10, 2003).

[402] *See* 47 C.F.R. § 1.3.

further promote more flexible and, ultimately, more efficient use of the spectrum, with significant public interest benefits.

215. As the *Spectrum Policy Task Force Report* noted, the overarching goal of spectrum policy is to maximize the public benefits that are derived from spectrum-based services and devices.[403] In accordance with our statutory obligations, the Commission has balanced multiple competing objectives in the award of initial, mutually exclusive spectrum licenses through competitive bidding, including:

- the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

- promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

- recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource; and

- efficient and intensive use of the electromagnetic spectrum.[404]

The Commission has long recognized its critical role in ensuring that consumers have access to the broadest array of telecommunications services. One of the Commission's primary objectives is to promote opportunities for a wide variety of entities to participate in providing spectrum-based services. We seek to ensure that all qualified entities, including those who have innovative ideas for spectrum usage, can gain access to the spectrum necessary to effectuate their plans. How the Commission approaches opportunities to promote flexibility and increase access to spectrum therefore will play a critical role in determining whether, and to what extent, the public benefits from spectrum are maximized.

216. In many instances to date, for reasons based on economics, regulatory policy, or technology, licensees have been reluctant to permit access to their licensed spectrum, even if they currently foresee no use for it (whether by frequency or by geographic area). Yet access to this spectrum is becoming increasingly critical to ensure that the public can obtain the widest variety of innovative wireless services possible. As a consequence, there is a very real need for efficient secondary markets in which licensees have incentives to make available their unused spectrum and potential users have their needs met.[405]

217. To further this objective, we seek comment on various potential measures, beyond the steps initiated in the Report and Order, to promote the use of secondary markets to allow increased access to spectrum. We anticipate that, as technology continues to advance, the opportunities for flexible use will expand, transaction costs will decline, and the ability of spectrum licensees and potential new users to

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[403] *Spectrum Policy Task Force Report* at 12.

[404] 47 U.S.C. §§ 309(j)(3)(A)-(D).

[405] *See generally Policy Statement* at ¶¶ 11-12.

trade in secondary markets will expand. We seek comment on this view, and on what role the Commission should play in facilitating these trends.

218. First, we request comment on how to encourage the development of mechanisms for providing necessary spectrum information to licensees with underutilized spectrum and those in need of access to spectrum. In order to facilitate the availability of spectrum in the secondary market and promote the efficient use of available spectrum, both incumbent licensees and potential users must have access to information about the spectrum that is available and the demand that exists for it. As detailed in the Report and Order, the Commission will play a role in providing some of this information through its licensing database. The data we collect as part of our licensing authority may not, however, be sufficient for interested parties to determine in all cases what spectrum in fact is being used and what spectrum might be available for other users. In order to facilitate marketplace transactions, there may also be a need for "market-maker" intermediaries to gather more detailed information regarding available spectrum and to bring potential holders and users of spectrum together. We seek comment on the type of information that interested parties may need, the potential for "market-maker" intermediaries to develop, and the nature of the Commission's role in regulating such intermediaries or otherwise facilitating access to spectrum information.

219. Second, we seek comment on what secondary market mechanisms are necessary to facilitate access to spectrum by new technologies.[406] As noted in the *Spectrum Policy Task Force Report*, these technologies have significant potential to make "opportunistic" use of licensed but unused spectrum for very short time intervals without causing interference to licensed spectrum users.[407] As a result, we believe there will be a demand for secondary market arrangements that reflect these technological capabilities. Although we cannot be certain precisely what form these arrangements will take, we anticipate that to accommodate use of spectrum by opportunistic devices in small time increments, there may be a need for a sophisticated clearinghouse mechanism to provide highly granular real-time spectrum information. We seek comment on whether such a clearinghouse is likely to evolve as a function of the marketplace, whether clearinghouse entities should be authorized by the Commission, or whether the Commission itself should act in a clearinghouse role. Under all of these alternatives, we also seek comment on what policies the Commission should set to ensure that any clearinghouse information exchange process is fair, transparent, and effective.

220. Third, we seek comment on whether to expand the scope of the measures taken in the Report and Order to allow more flexible regulatory treatment of secondary market transactions. Building on the legal framework we establish today, we believe there are opportunities for us to exercise our statutory forbearance authority with respect to requirements for Commission approval for certain categories of leases discussed in this order. We also seek comment on applying our leasing policies to additional spectrum-based services not covered by the Report and Order and on applying the new *de facto* control standard we have developed for leasing to non-leasing contexts.

[406] At the same time, our efforts to promote secondary market mechanisms do not preclude us from exploring unlicensed operations as a means of facilitating access to spectrum by new technologies. *See, e.g.,* In the Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, *Notice of Inquiry*, 17 FCC Rcd 25632 (2002).

[407] *See also Spectrum Policy Task Force Report* at 20-21.

A. Achieving a More Efficient Spectrum Marketplace

1. The Commission's Role in Providing Secondary Market Information and Facilitating Exchanges

a. Background

221. In the *Policy Statement*, we observed that the market for spectrum, unlike the market for most other goods and services, lacks an efficient means for identifying buyers and sellers, comparing prices, and completing transactions.[408] We also noted that negotiation for spectrum transactions can be complicated by the Commission's technical and service rules, and that approval of transactions by the Commission can involve complex submissions in a time-consuming and expensive process for the parties involved.[409]

222. To improve efficiency in the market for spectrum usage rights, we proposed in the *Policy Statement* to pursue options that would accomplish three tasks. First, we would look to maintain an on-line listing of licenses by service, frequency, and service area. As we noted in the *Policy Statement*, this would be the simplest means for identifying spectrum to potential buyers and sellers, but it would not identify specific spectrum that licensees might be willing to assign or lease. Second, we would support the development of services that list spectrum resources that licensees are actively offering for sale or lease. The *Policy Statement* noted that these services could provide more useful information than a simple on-line listing. Third, we would support the establishment of private spectrum exchanges and brokers who would match parties interested in acquiring spectrum usage rights with suitable resources held by existing licensees. The *Policy Statement* noted that spectrum brokers could bring specific expertise to the unique properties of different spectrum bands so as to assist buyers in best meeting their needs.[410]

223. Our vision for the future spectrum marketplace presumes that access to adequate information is essential for ensuring that improved secondary markets achieve the highest benefit for spectrum users and consumers. Entities desiring to obtain access to spectrum must be able to identify the potential suppliers of that access, and we seek to ensure that the costs of obtaining such information and entering into transactions governing spectrum access are not driven by regulatory constraints. Both factors suggest that more than a mere compilation of information is needed to facilitate efficient spectrum access and usage, and to realize the public interest benefits that will follow from achievement of this goal.

b. Discussion

224. There are a variety of approaches the Commission could pursue to promote access to spectrum information needed in the secondary marketplace. The simplest of these approaches – maintaining an on-line database of licensees, lessees, and certain other types of users – is most readily facilitated by Commission action. Specifically, because the Commission is responsible for issuing spectrum licenses and enforcing its rules and policies, it necessarily must collect certain basic and pertinent information, such as the names of licensees and the geographic areas and frequency bands for which they hold their authorizations.

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[408] *Policy Statement* at ¶ 38.

[409] *Id.* at ¶ 39.

[410] *Id*.

225. In the Report and Order, we provide for the public availability of this type of information in the leasing context.[411] Based on the notifications and applications required to be filed by licensees and spectrum lessees, the ULS database will contain information on, *inter alia*, the identity of each licensee and spectrum lessee, licensee and lessee contact information, the spectrum and geographic area encompassed within the lease, and the term of the lease. We ask parties to comment on whether collection of this type of information by the Commission is sufficient to provide potential users of spectrum with adequate information about possible spectrum lease opportunities. Should we collect additional information from licensees, spectrum lessees, or any other authorized users about the nature of their operations (*e.g.*, more detail about the geographic area actually covered and the frequencies actually used)? Would the collection of more detailed operational information be burdensome for affected parties? Does the Commission receive information through any other data gathering requirements that might be useful for secondary market purposes? In addition, we ask parties about their experience in searching on ULS and how to ensure that it is a useful tool for researching secondary market opportunities.

226. We also seek comment on whether and to what extent the Commission should support or encourage the establishment of additional information services, such as listing offers to transfer, assign, or lease, establishing exchange mechanisms, or brokering exchanges.[412] As a general matter, 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."[413] We seek comment on the likelihood that private sector mechanisms will develop for the collection and dissemination of secondary market information. Would licensees and potential spectrum users be willing to provide information to private sector entities in addition to the information supplied to the Commission as part of the notification/application process? Would the Commission need to impose any limitations on the use of such information, whether by private sector information gatherers or by other parties that might be granted access to the information? Would private sector collection and dissemination of information have a meaningful effect in reducing transaction costs and bringing together possible parties to a spectrum lease?

227. We also request comment on the potential for independent third parties, *i.e.*, parties other than licensees and potential lessees, to emerge as "market-makers" that not only collect and disseminate information, but actually negotiate, broker, or otherwise facilitate spectrum leasing transactions.[414] We believe that as a result of the leasing mechanisms established by the Report and Order, market-makers could play a key role in bringing together incumbent licensees and other entities seeking access to spectrum. For example, they may take active steps to determine who has spectrum available where and to

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[411] *See generally* Sections IV.A.5.a(ii)(c), IV.A.5.b(i)(b)(iii), IV.A.5.b(ii)(b)(iii), IV.A.7, *supra*.

[412] In Australia and New Zealand, for example, government agencies maintain "registers" of radiocommunication licenses and frequencies. *See* www.aca.gov.au/pls/radcom/register_search.main_page; www.med.govt.nz/rrf/intro.html. The Australia Communications Authority provides its register as a searchable source of reference information on radiocommunications services. In New Zealand, the Registrar of Radio Frequencies is an independent statutory officer responsible for the maintenance of the Register of Radio Frequencies, which is intended to facilitate the operations of New Zealand's "Spectrum Licensing" regime, involving the creation of long-term and tradable spectrum property rights. In many respects, these systems appear similar to and share common elements with our ULS. We seek comment on whether and how "spectrum registers" such as those established in Australia and New Zealand or in any other country could help facilitate spectrum rights trading in the United States.

[413] *NPRM* at ¶ 100.

[414] We recognize that the term "market-maker" has a specific meaning to professionals in the financial community. As used here, we mean any party that facilitates exchanges of spectrum usage rights.

match that capacity with the demands of entities seeking access to spectrum to provide wireless services. It is also possible that market-makers or other innovators could develop "options" and other types of instruments – such as those seen in the financial markets – that would provide a vehicle for secondary market transactions. For example, a market-maker might arrange to have licensees write "put options" that would specify the terms and conditions under which these licensees would make their spectrum available. The market-maker could then write "call options" that would specify the terms and conditions under which users would be willing to pay for certain rights to that spectrum. We recognize that these voluntary transactions in spectrum would require tradeoffs in multiple dimensions – *e.g.,* time, space, geography, type of use, and technology – and that, in the absence of an effective facilitator, search costs would be high.

228. We ask interested parties to comment whether they think there is a useful role to be played by market-makers in facilitating secondary markets and increased access to unused spectrum. Are such facilitators necessary? If so, will they emerge naturally as rules allowing secondary market trading are established, or are there steps the Commission should take to promote them? If the Commission takes steps to promote market-makers, what steps should it take? Should it designate approved market-makers or let the marketplace determine the identity of such entities? Should the Commission impose any requirements on the organization and/or behavior of such entities? In general, we prefer to allow market-makers and other facilitators to handle these transactions with minimum Commission involvement, but we recognize that it may be necessary to set guidelines or rules to ensure a high level of transparency between the parties and to prevent self-dealing or discriminatory treatment. We seek comment on what steps the Commission should take to protect against these risks, and whether there are any potential problems we should be prepared to address.

229. Finally, if interested parties have any alternative proposals for facilitating operation of the marketplace in spectrum capability, we request that they outline and describe such alternatives. We certainly are receptive to exploring alternatives, and welcome the input of the types of parties that would be directly affected by the arrangements we are proposing today.

2. Developing Policies That Maximize Potential Public Benefits Enabled by Advanced Technologies, Including Opportunistic Devices

a. Background

230. Both the *Policy Statement* and the *Spectrum Policy Task Force Report* emphasize that emerging technologies are creating significant new opportunities for enabling more intensive and efficient use of spectrum.[415] In particular, these developments increasingly allow more users the technical ability to access unused spectrum in different bands for short periods of time, and to do so with more tolerance of interference than in the past.[416]

231. *Technological advances and their spectrum policy implications*. The Spectrum Policy Task Force noted that the increased use of digital technologies in general, and specific advances in software-defined radio, frequency-agile radio, and spread spectrum technologies, were creating new opportunities

[415] *See generally Policy Statement* at ¶¶ 6, 37; *Spectrum Policy Task Force Report* at 13-14, 55-58. *See also* The Office of Engineering and Technology Hosting Workshop on Cognitive Radio Technologies, ET Docket No. 03-108, *Public Notice* (May 16, 2003).

[416] *See Spectrum Policy Task Force Report* at 13-14; The Office of Engineering and Technology Hosting Workshop on Cognitive Radio Technologies, ET Docket No. 03-108, *Public Notice* (May 16, 2003).

for spectrum access and use.[417] Unlike traditional radios, the operating parameters of software-defined radios are determined more by the software than the hardware contained within these devices.[418] A software-defined radio can be programmed to transmit and receive different types of radio signals on varying frequencies. These and similar technological advances have been called "smart" or "opportunistic" technologies because, due to their operational flexibility, they can search the radio spectrum, sense the environment, and operate in spectrum not in use by others. Some technologies can operate in the so-called "white spaces," *i.e.*, geographic areas where spectrum is unused or frequencies that are not being used, and thus enable better and more intensive spectrum use of the radio spectrum.[419] In addition, the Task Force observed that even more sophisticated smart technologies are emerging that potentially allow operators to take advantage of the time dimension of radio spectrum.[420] Because such smart devices are agile and can change frequencies nearly instantaneously, they can operate for short periods of time in temporarily unused spectrum, making possible multiple dynamic and opportunistic uses of spectrum.[421]

232. *"Opportunistic" uses, access rights, and secondary markets.* Both the *Policy Statement* and the *Spectrum Policy Task Force Report* noted that these technological advances have important implications with respect to the nature of policies the Commission might adopt to facilitate access to spectrum, including access via secondary markets.[422] Both recommended that the Commission develop licensing and access models that take this new technological potential into account.[423] In particular, the *Spectrum Policy Task Force Report* highlighted the important link between opportunistic technologies and secondary markets. Noting that technological advances have increased the potential for any given spectrum to accommodate multiple non-interfering users, the Task Force recommended that the Commission look to the use of secondary markets to facilitate incumbent licensees' ability to provide access to users, including users of opportunistic devices, through the leasing of spectrum.[424] The Task Force concluded that, if licensees have well-defined and flexible spectrum usage rights, and if efficient secondary market mechanisms allow spectrum usage rights to be traded with low transaction costs, then licensees should have sufficient incentives to provide access via secondary markets. Our efforts here on licensing issues to pursue these *Spectrum Policy Task Force Report* recommendations complement the separate proceeding that we plan to initiate to consider potential changes to our technical rules, policies,

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[417] *See generally Spectrum Policy Task Force Report* at 13-15, 19-21, 56-57; The Office of Engineering and Technology Hosting Workshop on Cognitive Radio Technologies, ET Docket No. 03-108, *Public Notice* (May 16, 2003).

[418] *See, e.g.,* FCC Cognitive Radio Workshop, "SDR Technology Implementation for the Cognitive Radio," Presentation by Bruce Fette, Ph.D., Chief Scientist, General Dynamics Decision Systems, at 3 (May 19, 2003).

[419] *See Spectrum Policy Task Force Report* at 14.

[420] *Id.* at 19-21.

[421] *See generally* FCC Cognitive Radio Workshop (May 19, 2003).

[422] *See Policy Statement* at ¶ 37; *Spectrum Policy Task Force Report* at 13-15, 56-57.

[423] *See Policy Statement* at ¶ 37; *Spectrum Policy Task Force Report* at 14, 56. In the *Policy Statement*, for instance, the Commission observed that software-defined radios may offer significant potential for providing equipment solutions that would allow a service provider to promptly begin operations in a newly acquired band of frequencies or to operate economically on a term basis on leased spectrum. *Policy Statement* at ¶ 37.

[424] *Spectrum Policy Task Force Report* at 56, 58, 66.

procedures, and practices to facilitate the development of cognitive radio technologies, which enable opportunistic uses.[425]

b. Discussion

233. We seek comment here on additional steps that the Commission can take to implement spectrum licensing policies that eliminate unnecessary regulatory barriers and promote the potential public benefits made possible by this increasingly dynamic and innovative nature of spectrum use. We agree with the *Spectrum Policy Task Force Report* that these technological advances potentially provide several answers to current and future spectrum policy challenges. In particular, they make possible more intensive and efficient use of spectrum. They also allow operators to take advantage of the time dimension of the radio spectrum, which could enable additional access to spectrum for more users and services.

234. We also request comment on the recommendations made in the *Spectrum Policy Task Force Report* regarding Commission policies on access to spectrum as provided by opportunistic devices in currently licensed bands. In particular, we propose to move forward with the Task Force's general recommendation that, with regard to currently licensed bands, the Commission focus on advancing and improving a secondary markets approach to access to spectrum by opportunistic devices during the near term. Under this approach, the Commission initially would look to promote secondary markets through multiple steps, the first of which we are taking in the Report and Order.[426]

235. The *Spectrum Policy Task Force Report* noted that a secondary markets approach did not necessarily require that the prospective opportunistic user negotiate individually with each affected licensee.[427] It suggested that other mechanisms, such as band managers, frequency coordinators, and other intermediaries such as clearinghouses, could possibly manage the secondary uses on licensees' behalf.[428] We seek comment on the possible use of any or all of these mechanisms, and how any such tool should be structured by the Commission. Would any of these approaches be useful in facilitating access to spectrum under a secondary markets approach, particularly for innovators seeking to introduce new services or for individual users? Should the Commission remove any regulatory barriers or take other steps to facilitate the use of these alternative mechanisms?

236. Finally, we seek comment on whether the policies and procedures adopted in the Report and Order provide sufficient flexibility for dynamic leasing arrangements involving opportunistic uses of currently licensed spectrum bands. If not, we seek comment on additional steps the Commission should take consistent with our statutory authority. The Task Force noted the importance of a flexible and efficient regulatory regime that allows for the negotiation of the necessary access rights and keeps the transaction costs of negotiation low, and presented an "exclusive use" model of spectrum allocation as one in which licensees have exclusive and transferable rights to specified spectrum, as well as flexible

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[425] *See* The Office of Engineering and Technology Hosting Workshop on Cognitive Radio Technologies, ET Docket No. 03-108, *Public Notice* (May 16, 2003).

[426] In furtherance of recommendations contained in the *Spectrum Policy Task Force Report* at 54-55, 65, 67, we also are beginning to identify possible opportunities for expanded use of unlicensed devices in certain bands, such as the TV broadcast and 3650-3700 MHz bands where operation of unlicensed devices has been prohibited. Opportunistic devices may permit significant unlicensed operation in those bands without causing interference to authorized services. *See* In the Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, *Notice of Inquiry*, 17 FCC Rcd 25632 (2002).

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

[428] *Id.* at 57-58.

rights to use this spectrum subject only to technical constraints.[429] To facilitate secondary access by opportunistic devices, should the Commission more exhaustively define the nature of the rights embodied in "exclusive use" licenses in the Wireless Radio Services?

B. Forbearance From Individualized Prior Commission Approval for Certain Categories of Spectrum Leases and Transfers of Control/License Assignments

1. Background

237. The Report and Order takes significant steps to facilitate certain categories of spectrum leasing and to reduce the regulatory process requirements that can delay the timely implementation of business arrangements, increase transaction costs, and present potential regulatory uncertainty. Despite these advancements, however, we are concerned that even the streamlined regulatory process we have established for *de facto* transfer leasing may raise unnecessary hurdles for transactions that we could find, as a categorical determination, are consistent with the public interest.

238. Similarly, we have adopted policies in the Report and Order that should significantly streamline and facilitate the regulatory process applicable to transfers of control and license assignments in a significant number of our Wireless Radio Services. Nevertheless, we continue to consider additional actions we might take to minimize any unnecessary regulatory impediments to the effectuation of marketplace transactions while ensuring that we satisfy our statutory obligations relevant to license transfers of control and assignments.

239. The *NPRM* proposed a leasing paradigm in which licensees and third-party spectrum users could enter into spectrum leases without prior Commission approval if the arrangements met certain requirements.[430] As discussed in the Report and Order above, while there was some support for the paradigm proposed in the *NPRM*, a significant number of commenting parties endorsed spectrum leasing that did not require prior Commission approval but also involved a very different structure in the terms of the licensee-lessee relationship.[431] A handful of parties in this proceeding suggested that forbearance might be the appropriate approach to employ in granting greater flexibility to promote spectrum leasing and secondary markets generally, but then provided little substantive discussion about the nature of forbearance to be applied.[432] The record in response to the *NPRM* thus suggests the need to explore in greater detail how to grant increased flexibility to parties to design leasing arrangements that are responsive to their business needs and to implement them without facing unnecessary regulatory delays.

240. Similarly, we want to assess whether the public interest objectives and policy goals that underpin any revised approach to *de facto* transfer leasing that we may adopt are also applicable to some categories of outright license transfers and assignments. As part of this examination, we will assess whether, in light of all relevant statutory and public interest factors, we should strive to provide some parity in treatment between lease arrangements that involve a transfer of *de facto* control and full assignment of licenses and transfers of licensee control. This review thus must assess the possible applicability of forbearance or other streamlining steps to transaction applications.

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[429] *Id.* at 35, 57.

[430] *NPRM* at ¶ 20.

[431] *See generally* Sections IV.A.5.a(i), IV.A.5.b(i)(a), *supra*.

[432] *See, e.g.*, AT&T Wireless Reply Comments at 8: Cingular Wireless Comments at 10-13; CTIA Comments at 16; El Paso Global Comments at 12; Enron Reply Comments at 4 n.7; RTG Comments at 24; Winstar Comments at 11-12.

2. Discussion

241. *Forbearance standard.* As discussed in the Report and Order, Section 10 of the Communications Act authorizes the Commission to forbear from applying any provision of the Communications Act with respect to telecommunications carriers or telecommunications services (or a particular class thereof), provided a three-pronged test is satisfied. Section 10 states, in pertinent part:

> [T]he Commission shall forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets if the Commission determines that – (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.[433]

242. Thus, wireless radio service licensees that are telecommunications carriers, as defined by the Act, or otherwise provide commercial mobile radio services (CMRS) and common carrier-based services, fall within the scope of the Commission's statutory forbearance authority. The forbearance proposals we describe below with respect to spectrum leasing thus would be applicable only to entities and services meeting this test. Regulatory processing of leasing transactions involving spectrum and authorizations restricted to private use would not be encompassed within any forbearance-based structure we may adopt.[434]

243. In determining whether forbearance from the prior approval processes 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.[435] 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 (one of the three prongs of the test).[436]

a. Forbearance with respect to certain spectrum leasing arrangements

244. We seek comment on whether to forbear from individual prior review and approval by the Commission for certain categories of leasing arrangements involving a transfer of *de facto* control that

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[433] 47 U.S.C. § 160(a).

[434] For example, private microwave authorizations and private land mobile radio licenses could not be included within such streamlined processing in reliance on forbearance. In addition, we note that some services contemplate allowing licensees to provide telecommunications services or non-telecommunications services, or both. *See, e.g.*, 47 C.F.R. § 101.1013. We thus query whether, in such services, we would need to examine individual authorizations and related operations in order to assess whether any form of streamlined processing based on forbearance from statutory requirements would be permissible. In a service that encompasses both telecommunications services and non-telecommunications services, do we have any basis for treating all licenses identically, and extend forbearance-based processing to all if we should so choose?

[435] 47 U.S.C. § 160(b).

[436] *Id*.

would not raise any public interest concerns.[437] We propose particular benchmarks or elements for leasing transactions (related to the public interest concerns we generally consider in evaluating transactions involving a transfer of *de jure* and/or *de facto* control) that would, if satisfied, allow spectrum lease agreements to be handled under the forbearance model we propose in this Further Notice. We also seek comment on appropriate notification requirements for leases that would not be subject to individualized prior approval under this proposal.

245. While we believe forbearing from Commission approval for spectrum leases satisfying the benchmarks identified below will beneficially affect a significant number of arrangements – without undermining our public interest objectives – we recognize that our proposal has the potential to exclude certain leases from its reach. Within our statutory mandates, we necessarily are engaged in a weighing of sometimes competing objectives – on one side of the balance stands the objective of achieving the public interest benefits that come with increased reliance on the marketplace to drive spectrum to its most efficient use; on the other side stands the objectives of various other public interest obligations that are also statutorily based. We request parties to comment on whether any policy or legal barriers impede our ability to achieve the most effective balance of these competing objectives in pursuit of the public interest.

(i) Elements of leasing transactions that would not require prior Commission approval

246. We propose to forbear from the requirements of Sections 308, 309, and 310(d) of the Communications Act to the extent necessary to permit us to process notification filings regarding leases involving a transfer of *de facto* control that satisfy the conditions enunciated in this section without 30 days prior public notice and without prior Commission review and consent. Rather, as discussed below, the parties to the leasing arrangement would be required to file a notification with the Commission within 14 days of execution of the lease. Responsibility for compliance with Commission rules, resolving interference issues, and making Commission filings would shift to the lessee, in the same manner as described under the *de facto* transfer leasing model in the Report and Order above.[438]

247. *The lessee must satisfy applicable eligibility and use restrictions associated with the leased spectrum.* For a leasing agreement to be eligible for processing pursuant to this forbearance proposal, the lessee would be required to meet any applicable eligibility limitations and comply with any use restrictions associated with the spectrum it plans to lease. A lessee would also have to meet our basic qualification requirements for holding an authorization. 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.[439] Would certifications by the licensee and/or lessee in the notification that we propose below[440] assure that these conditions are being satisfied?

248. Many of our services are subject to few additional restrictions regarding eligibility or use, and thus this condition should not be, for the wireless services addressed in the Report and Order, a significant barrier to the implementation of leases in accordance with the forbearance procedures we propose in this Further Notice. At the same, however, we believe that this element is necessary in light of

[437] Spectrum manager leases that do not involve a transfer of control could continue to be implemented pursuant to the spectrum manager leasing model outlined in the Report and Order.

[438] *See* Section IV.A.5.b(i)(b).

[439] 21 U.S.C. § 862; 47 C.F.R. § 1.2001 *et seq.*

[440] *See* Section V.B.2.a(ii), *infra*.

the fact that we do have eligibility and/or use requirements adopted in furtherance of certain public interest objectives. For example, some of our services, such as PCS, include rules limiting eligibility to hold certain authorizations to entrepreneurs, as defined in our rules, or providing certain benefits (*i.e.*, bidding credits or installment payment plans) to the holders of such authorizations because of their designated entity or entrepreneur status.[441] While we seek to promote licensee flexibility and facilitate secondary markets where appropriate, we do not want the policies adopted in this proceeding to be used as a tool for evading applicable requirements that remain in effect. To do otherwise could lead to the evisceration of rules and policies that have not been directly and specifically revised by the Commission.

249. We seek comment on this proposed element. We note that inclusion of this element does not stand as an absolute bar to a lease contemplating spectrum usage that is inconsistent with applicable regulations but only serves to prevent such a lease proposal from being implemented without prior public notice or Commission review. We believe that, at present, such proposals should be subject to Commission review and evaluation before the lease is implemented. Is there any way to permit greater flexibility in lessee use of spectrum with forbearance-based notification without undermining other policies adopted by the Commission? Do retaining use and eligibility restrictions for lessees as a condition of permissible forbearance processing serve as a significant barrier to implementation of spectrum leases? We request parties opposing this element or suggesting an alternative approach to discuss how elimination or modification of this element could be accomplished while ensuring that spectrum leases that are subject to regulatory processing on a notification-only basis are not used by parties seeking to escape the application of other validly adopted Commission rules and policies.

250. While we propose to require a lessee to meet any eligibility limitations applicable to the licensee from which it is leasing spectrum, we request comment about how to apply this objective, if we adopt it, in the context of licensees that are designated entities and/or entrepreneurs. Should we require a lessee to be eligible for the same level of competitive bidding benefits, such as bidding credits, as the licensee from which it is leasing? Should we require only that the lessee be qualified to hold the license? If so, do we impose unjust enrichment obligations on a lessee that is qualified for a lesser level of competitive bidding benefits? How do we ensure that the Commission has an opportunity to calculate and collect any unjust enrichment payments?

251. *The lessee must comply with the foreign ownership provisions applicable to Commission licensees.* In order for parties to a lease to avail themselves of forbearance processing as discussed in this Further Notice, we first propose that, for a lease involving any radio authorization, the lessee not be a foreign government or the representative thereof.[442] This limitation is derived from Section 310(a), which is an absolute ban on foreign government holding of Commission radio authorizations. Because we are treating the lessee in a *de facto* transfer leasing situation as holding a Commission authorization, application of this restriction to lessees comports with our statutory obligations.

252. Second, for leases involving common carrier radio authorizations, we propose that the lessee must meet the requirements of Sections 310(b)(1)-(3), *i.e.*, it must not be an alien or a representative thereof, a corporation organized under the laws of any foreign government, or have more than 20 percent direct foreign ownership.[443] These mandates from Sections 310(b)(1)-(3) cannot be

[441] The holders of a number of authorizations in many of the services subject to competitive bidding have benefited from bidding credits and/or installment payment plans as a result of their eligibility. *See generally* 47 C.F.R. § 1.2110.

[442] *See* 47 U.S.C. § 310(a).

[443] *See* 47 U.S.C. §§ 310(b)(1)-(3).

waived in the case of a Commission licensee holding common carrier authorizations.[444] We believe that a party seeking to obtain *de facto* control under a leasing arrangement should also meet these requirements in order to be eligible for forbearance.

253. Third, we propose that, as a condition of eligibility for forbearance, the lessee must not have more than 25 percent indirect foreign ownership,[445] or must have previously obtained a declaratory ruling from the Commission in advance of entering into the subject lease that its lease of the spectrum at issue is consistent with the Commission's foreign ownership policies.[446] Under Section 310(b)(4), "[n]o broadcast or common carrier or aeronautical en route or aeronautical fixed radio station shall be granted to or held by … any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."[447] We have traditionally conducted our 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.[448] Moreover, under the *Foreign Participation Order*, we treat different classes of foreign ownership differently, depending upon whether the applicant is from a WTO-member nation or a non-WTO-member nation.[449] Under the current standard, an applicant that demonstrates more than 25 percent indirect foreign ownership attributable to entities from WTO member nations 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.[450] In contrast, an applicant that demonstrates more than 25 percent indirect foreign

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[444] Accordingly, licenses involving telecommunications services would be encompassed within this limitation. Sections 310(b)(1)-(3) also apply to broadcast, aeronautical en route, and aeronautical fixed station licenses. 47 U.S.C. §§ 310(b)(1)-(3).

[445] *See* 47 U.S.C. § 310(b)(4).

[446] *See, e.g., Foreign Participation Order,* 12 FCC Rcd at 23941 ¶ 114.

[447] 47 U.S.C. § 310(b)(4).

[448] *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); Space Station System Licensee, Inc. (Assignor) and Iridium Constellation LLC (Assignee), *Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271 (IB 2002); Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as Amended, *Declaratory Ruling and Order*, 11 FCC Rcd 1850, 1857 ¶47 (1995).

[449] *See Foreign Participation Order*, 12 FCC Rcd at 23902-23903 ¶¶ 26-27.

[450] *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 nations 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 id*., 12 FCC Rcd at 23919-23920 ¶¶ 63-64.

ownership attributable to entities from non-WTO member nations does not receive the favorable presumption and must meet the more demanding effective competitive opportunities test.[451]

254. Because we seek to avoid an application-specific review for leasing transactions processed under our forbearance approach, we propose that to be eligible for forbearance, the lessee must fall within the 25 percent statutory benchmark for indirect foreign ownership or obtain a declaratory ruling in advance. We believe that this condition will enable lease arrangements that involve indirect foreign ownership in excess of 25 percent to be implemented promptly without compromising our foreign ownership policies under Section 310(b)(4).[452]

255. We request parties to address the merits of applying the proposed foreign ownership conditions. Do the conditions ensure that we are meeting our obligations to enforce and apply Sections 310(a) and (b) in the context of spectrum leases that we allow to proceed without individualized prior Commission approval of a lease arrangement? What risk exists that parties could attempt to escape the applicability of the foreign ownership limitations by implementing a lease following only notification to the Commission? Conversely, is this element too strict in terms of applying our foreign ownership policies? Is there any way we can expand the scope of permissible indirect foreign ownership in lessees where we are not individually reviewing the application?

256. We note that, as part of our foreign ownership review process, we coordinate with Executive Branch agencies to ensure that the level and identity of the foreign ownership does not present any concerns with respect to national security, law enforcement, foreign policy, or trade policy.[453] We seek comment on whether our proposed foreign ownership conditions for forbearance raise any questions concerning enforcement of national security, law enforcement, foreign policy, or trade policy by Executive Branch agencies. Under the proposal set forth above, if a proposed lessee has no more than 25 percent indirect foreign ownership, and the parties otherwise meet the proposed conditions set out in this Further Notice, the parties could implement a *de facto* transfer spectrum lease without obtaining prior Commission approval. Do we need to adopt an alternative approach for indirect foreign ownership or other interests in lessees authorized to take advantage of our forbearance-based notification process proposed herein? What steps do we need to take to ensure that national security and other concerns addressed by Executive Branch agencies are satisfactorily handled? We note that no Executive Branch agencies provided comments for the record on this issue and particularly seek their input at this time.

257. *The spectrum lease arrangement must not raise any competitive concerns.* As discussed in the Report and Order, the Commission acknowledges the potential competitive effects that may be associated with a spectrum lease. We seek to clarify under what conditions leases would not pose any significant risk to our competition policies such that we would allow these transactions to proceed without individual Commission review and approval. We note that to the extent we can create more certainty for the parties involved in transactions, we are more likely to promote efficient secondary markets. We believe we can best promote certainty for parties negotiating spectrum lease agreements by establishing clearly defined rules and benchmarks for what will and will not be permitted, consistent with our competition policies and public interest requirements.

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[451] *See Foreign Participation Order*, 12 FCC Rcd at 23946 ¶ 131.

[452] 47 U.S.C. § 310(b)(4).

[453] *See Foreign Participation Order*, 12 FCC Rcd at 23919-23920 ¶¶ 63-64; *see also* note 450, *supra*.

258. The benchmarks under which we would allow spectrum leases to proceed without prior Commission approval must consider the competitive effects on both the input and output markets.[454] For the output market, we look at the effect on service providers. We propose that, in order to be eligible for forbearance processing under this proposal, a spectrum lease arrangement must not result in the loss of service in any geographic area by an independent, facilities-based CMRS provider involved in the transaction. We note that this requirement should impose no burden on spectrum licensees that provide service in a given market and that simply wish to lease unused portions of their spectrum. Nor should this requirement burden licensees that have not constructed and are therefore not providing service. The only effect of this condition should be on a licensee that is providing service and that, as a result of a contemplated lease, would cease to provide such service. We decline, at this time, to forbear from review of this latter class of leases. We request comment whether this is an appropriate safe harbor or whether some other benchmark would more effectively serve the public interest while ensuring that spectrum lease applications processed pursuant to forbearance-based procedures do not pose unacceptable threats to our competition policies. If we adopt this or another safe harbor, we request comment whether we should require the licensee, the lessee, or both to certify that the lease would not result in the loss of an existing, independent competitor in the geographic area encompassed within the lease.

259. For the input market, we consider the potential competitive effects by looking at the amount of spectrum held by the parties involved in the lease. For leases involving a transfer of *de facto* control, we propose to consider the lessee as having influence over the spectrum encompassed within the subject lease agreement. In the case of *de facto* transfer leasing, the lessee is gaining sufficient control of the spectrum to be able to affect competition in the geographic area encompassed by the lease. Although the Commission has eliminated the spectrum cap it applied to certain CMRS offerings and replaced it with a case-by-case examination of the competitive effects of a proposed transaction,[455] we believe that a defined, readily understood benchmark is necessary in this context.[456] Identifying a readily ascertainable safe harbor provides certainty to parties. We request commenters to provide us with recommendations for a safe harbor definition that satisfies these objectives, including a discussion of how the proposed safe harbor level will ensure that no significant competitive issues are posed by a particular lease transaction.

260. We note that our prior spectrum cap addressed only CMRS offerings, which are a subset of the wireless services to which we are proposing to extend the opportunity to implement spectrum leases without advance individualized review by the Commission. As a supplement to or replacement of a defined CMRS benchmark, we could specify that a lessee have an attributable interest in no more than a specified amount of common carrier wireless spectrum in the geographic market. We request commenters endorsing a limitation based on total common carrier wireless spectrum to discuss the appropriate level and the justification for their recommendation.

261. We request comment on these proposals for ensuring that spectrum leases for which we no longer require prior individualized review and approval do not raise competitive issues. With regard to

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[454] The input market looks at the spectrum and the number of licensees in an area, while the output market concerns itself with wireless service and the number of entities actually providing service. If concentration increases in the output market (*i.e.*, the number of service providers decreases) as a result of a transaction, there is a potential that higher prices may be charged to consumers. If concentration in the input market increases (*i.e.*, fewer licensees), then there is a potential that higher prices will be charged to the actual providers of service for use of the spectrum, also leading to higher prices to consumers.

[455] *See 2000 Biennial Review Order on CMRS Aggregation Limits*, 16 FCC Rcd 22668.

[456] By proposing to craft a defined benchmark for permitting spectrum leases to proceed on a notification basis pursuant to forbearance, we do not suggest that we are reversing our decision to eliminate the CMRS spectrum cap.

competitive issues, do we need to be concerned only about CMRS spectrum? Are there any individual services covered by our proposals in this Further Notice for which we need to be concerned about potential anticompetitive effects resulting from aggregation of spectrum? Are there other groups of services (similar to the services previously covered by the CMRS spectrum cap – PCS, cellular, and certain SMR spectrum) for which we should establish a total spectrum aggregation benchmark in order to prevent any adverse competitive effects stemming from spectrum leases implemented without prior Commission approval? How should we account for leases of private spectrum in this competitive benchmark setting? How should we determine what spectrum is attributable to a particular entity for competition analysis purposes? Should we consider a test based on "significant influence" over the spectrum?

262. When combined with our benchmark protecting competition in the output market, is a benchmark tied to a specified level of spectrum aggregation, whether for CMRS only, other sets of services, or common carrier wireless services generally, an appropriate means for enforcing our competition policies in the context of spectrum leases that may proceed without prior Commission review and approval? We seek to ensure that any benchmarks we define are not too restrictive and thus likely to impede marketplace arrangements that do not raise any competitive concerns. Conversely, we wish to avoid benchmark levels that present unacceptable levels of competitive risk. Is there a better way to define a competitive benchmark?

263. *Addressing any other public interest concerns associated with spectrum leases implemented pursuant to forbearance procedures*. Finally, we seek comment on whether spectrum leasing arrangements involving transfers of *de facto* control may raise any other public interest concerns that we need to address in defining those types of leases that could be implemented without individualized prior approval under an exercise of our forbearance authority. We request that commenters identifying any other relevant public interest considerations discuss whether those concerns can be addressed by some form of benchmark or safe harbor, and what that benchmark or safe harbor might be.

264. Are these proposed prerequisites to spectrum leasing sufficiently clear to permit licensees and lessees to readily comply with them and to provide the information required by a modified Form 603 that we would employ for purposes of notifying us of a spectrum lease? Are there any steps we can take to simplify any of these benchmarks and to facilitate licensee/lessee compliance therewith?

265. Under the proposed forbearance model, parties would be able to implement a lease after filing the required notification and without any prior Commission review necessarily having occurred. The Commission and members of the public would be allowed to review the notification and the Commission could request additional information from the parties if so warranted. As a result, could forbearance processing undercut our ability to enforce our policies? What actions can and should we take in response to a spectrum lease that is improperly implemented under our forbearance processing proposal?

(ii) Notification

266. As part of our forbearance proposal, we propose that the parties to a spectrum lease arrangement that qualifies for forbearance be required to file, within 14 days of executing the lease, a notification with the Commission similar to that filed by parties to a *pro forma* assignment or transfer of control,[457] including the date on which the parties expect to put the lease into effect. The notifications

[457] *See* 47 C.F.R. § 1.948(c)(1); Federal Communications Bar Association's Petition for Forbearance from Section 3109d) 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, 6312 ¶ 36 (1998) (*Pro Forma Forbearance Order*). Like the *pro forma* assignment and transfer of control situations, we propose that the notification be made electronically to the extent electronic filing is required for the (continued….)

would be placed on an informational public notice on a weekly basis, and would be "deemed approved" as of the date of the public notice. We seek comment on this proposal as well as any other proposal that commenters might suggest.[458]

267. Requiring these notifications will help us in enforcing our rules and policies by providing us with necessary information about the identity of and contact information for the entity actually authorized to operate on spectrum. This information may be critical in the event, for example, unacceptable interference is caused to other spectrum operators. In addition, we consider collection of this information in a publicly available database to be essential to facilitating the continued development of secondary markets and the efficient use of spectrum.

268. We note that by placing the notifications on public notice, we provide members of the public with the opportunity to scrutinize such filings, similar to our handling of notifications concerning *pro forma* transfers of control and assignment of licenses.[459] Any interested party would be entitled, consistent with our rules and policies concerning standing, to file a petition for reconsideration within 30 days of the date of that informational public notice.[460] Similarly, Commission staff would be able to reconsider the grant on its own motion within 30 days of the public notice date, and the Commission would be able to reconsider the grant on its own motion within 40 days of the public notice date.[461]

269. We note that we want to ensure that we have sufficient information about lease arrangements in order to effectuate our public interest responsibilities while minimizing the burden on the filing parties in terms of the information they must submit to the Commission. Accordingly, we request parties to discuss the types of information and level of detail that should be included in leasing notifications filed in accordance with this proposed procedure. How much detail should the parties provide regarding the ownership and affiliates of a lessee? What information should the parties provide about any spectrum overlaps created by a spectrum lease?

(iii) Compliance with the forbearance standard

270. As noted above, forbearance from prior approval for *de facto* transfer spectrum leases would be available only where telecommunications carriers and telecommunications services are involved

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service involved and contain information similar to that submitted on current Form 603 for transfers of control and assignment of licenses.

[458] One alternative to a forbearance-based notification process would be to place the *de facto* transfer spectrum leasing applications on public notice for less than 30 days as provided in the Report and Order, but forbear from addressing any petitions to deny in a written document prior to acting on the application. Alternatively, we could forbear from accepting petitions to deny. In that case, interested parties could seek reconsideration of a grant of a spectrum leasing application. We request any commenters addressing these alternatives to assess how such action would affect our ability to meet our multiple statutory objectives, whether either of these alternatives would meet the Section 10 forbearance standard, and whether adoption of any such alternative would provide any significant benefit over the policies adopted in the Report and Order for processing spectrum leasing applications.

[459] *See Pro Forma Forbearance Order*, 13 FCC Rcd at 6312 ¶ 36.

[460] *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(b); *Pro Forma Forbearance Order*, 13 FCC Rcd at 6312 ¶ 36.

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

in the transaction. We believe that, if we establish the benchmarks outlined above or something comparable, forbearing from the public notice and prior approval requirements would meet the test imposed by Section 10.

271. First, we believe that for spectrum leases meeting the elements above, 30 days public notice and individualized prior Commission review and approval appear to be unnecessary to ensure that the charges, practices, classifications, and services of licensees and lessees are just and reasonable and not unjustly or unreasonably discriminatory. We seek above to define benchmarks that would limit the scope of spectrum leases that could be put into place under the proposed forbearance process, and we believe that the permissible spectrum leases would be less likely to implicate concerns about the charges, practices, classifications, and services of the parties to the spectrum lease. In addition, at present, applications proposing a transfer of control or assignment of license 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 such issues.[462] Retaining a 30-day public notice period and individualized prior review of the applications – where we do not address these matters in any event in the context of such 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. Moreover, 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.

272. Second, for spectrum leases meeting the elements above, it appears that 30 days public notice and individualized prior Commission review and approval are not necessary to protect consumers. Indeed, because we have concluded that effectively functioning secondary markets will offer significant benefits to consumers,[463] this factor must be taken into account in assessing the protections afforded consumers under our forbearance proposal. We propose to adopt an explicit, readily understandable benchmark to ensure that the spectrum leases implemented pursuant to our proposed forbearance model do not raise competitive issues, which is a core aspect of protecting consumers in the wireless marketplace. In addition, because the notifications regarding such spectrum leases will be placed on public notice, members of the public and other interested parties will have an opportunity to raise any concerns regarding the protection of consumers in a petition for reconsideration.

273. Third, for spectrum leases meeting the elements above, we believe that forbearing from 30 days public notice and individualized prior Commission review and approval appears to further the public interest. As discussed above, we intend this process to enable parties to a spectrum lease to put their business plans into effect with reduced regulatory delay and transaction costs. These advantages appear likely to permit secondary markets to work more effectively, which should increase the efficient use of spectrum, improve access to spectrum by all interested parties, and increase the innovative and advanced wireless services available to consumers. At the same time, the limitations on the spectrum leases that could take advantage of this proposed process are designed to ensure that the public interest and our fulfillment of our statutory obligations are not in any way undermined.

274. We request commenters to address whether the conditions we have proposed above for permitting leases to proceed without prior public notice and Commission review and approval satisfy the Section 10 requirements to support adoption of forbearance. Specifically, have we accurately assessed satisfaction of the Section 10 requirements in this context? Can parties provide any further explanation

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[462] *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).

[463] *See generally Policy Statement*.

why forbearance from the 30-day public notice period and individualized prior Commission review and approval supports a finding that the Section 10 test has been met? Are there other factors that need to be assessed in making the Section 10 determination? To the extent parties suggest alternative or additional conditions and benchmarks to be used to define leasing arrangements that can be processed on a forbearance basis, we request that they address in detail the Section 10 implications of their proposals.

b. Eliminating prior Commission approval for spectrum leases involving non-telecommunications carriers and non-telecommunications services

275. As noted above, because our Section 10 forbearance authority applies only to providers of telecommunications services, we may forbear from applying Section 310(d) requirements only for leases involving telecommunications carriers and telecommunications services. Nevertheless, we wish to explore whether we can provide similar relief to parties whose lease transactions otherwise meet the conditions we have proposed above for forbearance processing but do not fall within the scope of Section 10. We believe such action is necessary and appropriate in order to place substantively similar wireless transactions involving different types of licenses on a comparable basis and to minimize unnecessary regulatory discrimination.

276. 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. Nonetheless, Section 310(d) requires prior Commission review and approval of all transaction applications involving non-common carrier and non-broadcast licenses (as well as applications involving common carrier and broadcast licenses). While the review period may be shortened because the 30-day public notice period is not required as part of that process, the requirement of prior Commission approval can still cause delays and costs for parties seeking to enter into such transactions, many of which raise no significant public interest issues.

277. We therefore seek comment on whether and how the Commission can structure its review to minimize possible delays in processing time for leases involving non-telecommunications carriers and non-telecommunications services.[464] Are there policy or legal barriers to designating additional categories of leases involving non-telecommunications carriers and non-telecommunications services that would not be subject to prior approval? Do we have authority to take action under other existing provisions of the Communications Act? Are there any other steps we can take in our processing of spectrum lease applications and/or notifications related to such facilities to help place these types of filings on comparable footing with spectrum leases involving only telecommunications services and telecommunications carriers?

c. Forbearance with respect to certain transfers and assignments

278. We seek to promote secondary markets generally, consistent with the principles enunciated in the *Policy Statement*[465] and the recommendations contained in the *Spectrum Policy Task Force Report*.[466] Secondary markets include not only spectrum leasing arrangements but also transfers of control of licensees and assignment of licenses. In order to not distort the marketplace in favor of spectrum leases and against transfers or assignments that might otherwise be pursued as a matter of sound business decision-making, we believe it is important to ensure that leases involving the temporary transfer

[464] We note that this proposal encompasses only services covered by the Report and Order and services that might be added pursuant to Section V.C, *infra*.

[465] *See* Section III.A, *supra*; *Policy Statement* at ¶¶ 12, 32.

[466] *See* Section III.B, *supra*; *Spectrum Policy Task Force Report* at 15-15, 57.

of *de facto* control and transfers and assignments involving the permanent transfer of *de facto* and *de jure* control are treated consistently to the extent feasible under our statutory obligations. We further believe that many of the same policy and public interest considerations that apply in the leasing context are equally applicable to transfers and assignments. Accordingly, we seek comment in this section on whether to use our forbearance authority to permit certain transfers of control and assignment of licenses to proceed without prior individualized Commission review and consent, based on benchmarks similar to those we propose to use in the leasing context. We ask parties to address whether the differences between a transfer of *de jure* and *de facto* control, on the one hand, and the transfer of *de facto* control alone pursuant to a lease agreement, on the other hand, warrant similar or distinct regulatory treatments. In addition to the fact that one type of transaction involves a transfer of *de jure* control, we note that such a transfer also is irrevocable. Under a lease, in contrast, the licensee retains an interest in the authorization and may revoke the lease under the terms agreed to by the parties or as prescribed by our rules and policies.

279. Specifically, we seek comment on whether transfers of control and assignment of licenses[467] meeting certain conditions or benchmarks could be eligible for a forbearance-based notification-only consent process. Could we determine that prior review of such transactions is not necessary to fulfill our public interest duties and goals? Clearly, any transfer and assignment arrangements found to be eligible for forbearance-based regulatory processing must be subject to appropriate conditions to ensure that crucial Commission policies are not thwarted by means of secondary market arrangements. Would allowing these categories of transactions to proceed with a minimum of regulatory cost and delay facilitate the movement of spectrum in the secondary market to its highest valued use, improve efficient use of spectrum, increase opportunities for access to spectrum where needed, and benefit wireless consumers by enhancing the services made available to them?

280. If we were to permit transfers of control and assignment of licenses to proceed on a notification-only basis, we request comment on transactions involving unjust enrichment payments and/or the assumption by a transferee or assignee of the licensee's installment payment plan terms. Under such a regulatory structure, should the presence of either one or both of these factors disqualify a transfer of control or assignment of license from processing under our forbearance procedures? Alternatively, would we be able to build a process for determining the amount of the applicable unjust enrichment payment as well as preparing and signing the documents necessary for a transferee or assignee to assume some portion or all of a licensee's installment payment obligations that ensures that these efforts do not unduly delay implementation of a lease agreement while affording the Commission sufficient time to act?

281. If we were to allow transfers of control and assignment of licenses to proceed without prior Commission approval, what safe harbors or conditions should we impose to ensure that our public interest objectives are not impeded by permitting such transactions to proceed without individualized Commission review? We could apply the same conditions and elements set forth above for spectrum lease arrangements, including:

- The transferee or assignee must satisfy applicable eligibility and use restrictions associated with the licensed spectrum.
- The transferee or assignee must comply with the foreign ownership requirements applicable to Commission licensees.
- The transfer or assignment must not raise any competitive concerns.

[467] This category would also include applications proposing to disaggregate spectrum and/or partition a geographic area, or a partial assignment.

- The transfer or assignment must not raise any other public interest concerns, to the extent we determine we need to adopt any other benchmarks or conditions.

282. We request commenters to assess the appropriateness of each of these conditions in applying forbearance from prior public notice and Commission consent to transfers of control and assignment of licenses. Further, the same questions raised regarding these conditions and benchmarks in the context of spectrum leasing eligible for forbearance processing are applicable in this context, and we request interested parties to address those matters here as well. In particular, would forbearance from prior Commission approval for transfers and assignments that meet these conditions facilitate our objectives for development of secondary markets? Would comparability of treatment between spectrum leases, on the one hand, and transfers of control and license assignments, on the other hand, help promote a marketplace that provides incentives to parties to employ the most appropriate arrangements and more effectively drive spectrum use to its highest valued use? In light of the fact that transfers and assignments involve transfer of *de jure* as well as *de facto* control, and on a permanent basis, should we impose any conditions on forbearance that would not apply in the leasing context?

283. If we were to pursue forbearance for transfer and assignment applications, should we employ the same notification requirements as proposed for spectrum leases in a forbearance regime in Section V.B.2.a(ii) above? Does this provide sufficient notice to interested parties, in light of the differences between spectrum leases and transfers of *de jure* and *de facto* control? Could this process be revised in any way to achieve a better balance among the competing public policy objectives implicated by any such plan for forbearance for transfers and assignments?

284. We request commenters to address whether the forbearance conditions noted above would satisfy the Section 10 requirements for extending forbearance to some applications involving transfers of control and/or license assignments. Can parties provide any further explanation why forbearance from the 30-day public notice period and individualized prior Commission review and approval supports a finding that the Section 10 test has been met? To the extent parties suggest alternative or additional conditions and benchmarks to be used to define transfers of control and assignment of licenses that might be processed on a forbearance basis, we request that they address in detail the Section 10 implications of their proposals.

285. In assessing whether forbearance from prior public notice and individualized Commission review meet the Section 10 test, we request commenters to consider the provisions of Section 310(d), in particular the requirement that no transfer of control or assignment of license may take place unless the Commission finds that "the public interest, convenience, and necessity will be served thereby."[468] As stated above, the statutory transfer of control obligations help to ensure that a licensee, initially found qualified to hold a Commission authorization, does not in turn replace itself with an unqualified entity or somehow use the transfer/assignment process to shirk its obligations to the Commission. We wish to ensure that any forbearance policies adopted in the context of transfer and assignment applications will not undercut our ability to carry out this obligation.

286. We acknowledge that in seeking comment on extending forbearance policies to some transfer and assignment applications, we are striving to balance competing goals. As noted above, we anticipate that more successful functioning of secondary markets – both spectrum leases and outright transfers and assignments – will benefit consumers by increasing the range of wireless services available to them and driving spectrum to its highest valued use. But our public interest considerations are not limited solely to an assessment of competitive issues. We must also look to the Commission's other statutory objectives in weighing whether forbearance from traditional application processing for transfer

[468] 47 U.S.C. § 310(d).

and assignment application in total furthers the public interest and whether it can be authorized in accordance with the provisions of Section 10. We specifically request comment from interested parties regarding all the factors that should be taken into account in making our public interest calculus in this situation.

287. Finally, to the extent that we pursue forbearance from traditional regulatory processing for substantial transfer and assignment applications in the Wireless Radio Services encompassed within the Report and Order or in any additional services based on this Further Notice, relief from prior public notice and Commission approval requirements would be available only for telecommunications services and telecommunications carriers. In a manner parallel to adopting forbearance-based notification processing for spectrum leases, we recognize the need to provide consistent treatment to similar types of wireless service licenses. In addition, in the case of transfers and assignments, there is a real likelihood in today's environment that a licensee would have licenses that would be eligible for forbearance and some that would not. We seek comment on how to ensure that we can expeditiously process a proposed transfer of control or assignment of license that involves both categories of licenses. Are there alternative ways we can streamline processing of transfer and assignment applications involving non-telecommunications services and non-telecommunications carriers?[469]

C. Extending the Policies Adopted in the Report and Order to Additional Spectrum-Based Services

1. Background

288. In the Report and Order, we extend our new leasing policies to most Wireless Radio Services in which licensees hold exclusive rights to use the licensed spectrum.[470] However, the *NPRM* did not propose to extend leasing to certain other Wireless Radio Services, including Public Safety Radio Services (Part 90), Guard Band Manager Service (Part 27, Subpart G), Maritime Services (Part 80), Aviation Services (Part 87), Personal Radio Services (Part 95) (other than the 218-219 MHz Service), Amateur Radio Service (Part 97), and Experimental Radio, Auxiliary, Special Broadcast, and other Program Distributional Services (Part 74), as well as shared frequencies licensed under our Wireless Radio Service rules. Although the Commission also asked about promoting spectrum leasing in the satellite services, all other spectrum-based services outside of Wireless Radio Services were excluded.

2. Discussion

289. We wish to consider extending our leasing policies, as adopted in the Report and Order and as they may be modified based on this Further Notice, to additional spectrum-based services. In light of our conclusions about the public interest benefits of spectrum leasing in the services for which we have adopted spectrum leasing policies, we consider in this Further Notice whether we should extend the policies adopted in the Report and Order to some of the radio services that we have excluded to date.

290. *Public safety services*. Our Public Safety Radio Pool is regulated pursuant to Part 90 of our rules.[471] State and local jurisdictions rely upon our Public Safety Radio Pool to carry out their public safety obligations. The pool encompasses the licensing of the radio communications of state and local

[469] We note that we seek comment only with respect to services covered by the Report and Order and services that might be added pursuant to Section V.C, *infra*.

[470] *See* Section IV.A.3.b, *supra*.

[471] 47 C.F.R. Part 90.

governmental entities and certain other categories of activities.[472] Communications transmitted over these facilities may include communications among members of a firefighting team, directions to an ambulance crew, and coordination among different police and fire agencies responding to a regional crisis. In many instances, such public safety communications are highly time-critical, but episodic in nature.[473]

291. We seek comment here on whether to permit licensees in the Public Safety Radio Pool to lease access rights to their licensed spectrum.[474] Initially, we note that any such leasing would be a voluntary transaction by a public safety licensee, and not the use of this spectrum by third parties without consent by that licensee. We also recognize that public safety licensees require near-instant access to their full spectrum capacity, when demand surges due to emergencies.[475] Using traditional technology, the only way to guarantee such access has been full-time dedicated spectrum.[476] New technologies, however, may allow both ultra-reliable near-instant access by public safety licensees and use by other licensees at times of low public safety demand.[477] We note that the Spectrum Policy Task Force recommended that the Commission consider permitting public safety licensees to lease their spectrum usage rights under conditions in which they could immediately reclaim and use their spectrum in such emergencies.[478] Some have proposed to allow public safety licensees to lease their spectrum to others on an interruptible basis, whereby third parties could lease under the condition that they would immediately cease using the spectrum if the public safety licensees exercised their right to preempt such leased use.[479] Under these circumstances, the public safety entity would lose no access to use of its spectrum, which it nevertheless could also make available at certain times to third parties. We intend to begin a proceeding

[472] See 47 C.F.R. § 90.15 (medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated places, communications standby facilities, and emergency repair of public communications facilities).

[473] *See Spectrum Policy Task Force Report* at 43.

[474] Any action we take in this proceeding will necessarily be coordinated with the action we take in the pending proceeding evaluating possible relocation of 800 MHz public safety, private, and commercial licensees. *See* Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, *Notice of Proposed Rule Making,* 17 FCC Rcd 4873 (2002), *Erratum*, 17 FCC Rcd 7169 (2002).

[475] *See Spectrum Policy Task Force Report* 43; Bykowsky, Mark M. and Marcus, Michael J., "Facilitating Spectrum Management Reform via Callable/Interruptible Spectrum," 2002 Telecommunications Policy Research Conference (September 2002) at 15, available at http://intel.si.umich.edu/tprc/papers/2002/147/SpectrumMgmtReform.pdf (*Bykowsky/Marcus Report)*; FCC Cognitive Radio Workshop, "Cognitive Radio Technologies in the Public Safety & Governmental Arenas," Presentation by Michael Marcus, Sc. D., Office of Engineering and Technology, Federal Communications Commission, at 2, 12 (May 19, 2003) (*Marcus Cognitive Radio Workshop Presentation*).

[476] *See Spectrum Policy Task Force Report* at 43; *Marcus Cognitive Radio Workshop Presentation* at 10.

[477] *See Spectrum Policy Task Force Report* at 43; *Bykowsky/Marcus Report* at 17-18; *Marcus Cognitive Radio Workshop Presentation* at 10, 12-14.

[478] *See Spectrum Policy Task Force Report* at 43. Preliminary comment received in response to the *Spectrum Policy Task Force Report* included both support for permitting secondary market leasing in public safety bands through interruptible spectrum mechanisms, as well as the expression of reservations. *See, e.g.,* Comments of the Chemical and Biological Arms Control Institute, ET Docket No. 02-135, at 5 (filed Jan. 27, 2003) (supportive of concept); Comments of APCO, ET Docket No. 02-135, at 3-4 (filed Jan. 27, 2003); Comments of Public Safety Wireless Network, ET Docket No. 02-135, at 5-6 (filed Jan. 27, 2003) (expressing reservations).

[479] *See generally Bykowsky/Marcus Report.*

later this year on cognitive radio technologies, including those that would enable interruptible spectrum leasing. That proceeding will consider the state of technology as well as changes to the Commission's technical rules, policies, procedures, or practices that could facilitate the economic development of such technologies.[480]

292. In light of this, we request that commenters evaluate whether we should permit public safety licensees to lease their spectrum to third parties. Generally, we ask whether leasing in this spectrum will further the public interest, for instance, by resulting in more efficient use of the public safety spectrum, by providing another avenue for multiple public safety entities to use the same spectrum, and/or of providing financial resources to public safety licensees.[481] Should we permit public safety licensees to lease to entities that are not eligible to obtain a public safety authorization, which would provide for a larger number of possible arrangements? If we permit leasing of public safety radio pool spectrum, should it be subject to any special rules in light of the importance of ensuring adequate access to spectrum for public safety purposes? Parties supporting leasing in the public safety frequencies should identify any elements of such arrangements that the Commission should consider in adopting policies.

293. We also seek comment on the significance, if any, of the 1997 Balanced Budget Act for spectrum leasing of 700 MHz public safety spectrum. In that Act, Congress directed the Commission to reallocate 24 MHz of the spectrum recovered from TV channels 60-69 for public safety services,[482] and the Commission did so shortly thereafter.[483] Congress specifically defined the "public safety services" that are intended to benefit from this spectrum allocation. Section 337(f) of the Communications Act defines the term "public safety services" as services:

> (A) the sole or principal 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 governmental entity whose primary mission is the provision of such services; and
>
> (C) that are not made commercially available to the public by the provider.[484]

294. We seek comment on whether this allocation of spectrum under Section 337(a)(1) affects the ability of licensees in the Public Safety 700 MHz band to lease this spectrum for use that does not meet the definition of public safety services. We also seek comment on the significance for spectrum

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[480] *See* The Office of Engineering and Technology Hosting Workshop on Cognitive Radio Technologies, ET Docket No. 03-108, *Public Notice* (May 16, 2003).

[481] We do not propose to define the ways in which public safety licensees could use spectrum leasing receipts but would expect in many cases that a portion of the funds would be used to upgrade the licensee's public safety communications equipment.

[482] *See* 47 U.S.C. § 337(a)(1).

[483] Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Notice of Proposed Rulemaking*, 12 FCC Rcd 14141 (1997); *Reallocation Report and Order*, 12 FCC Rcd 22953 (1998).

[484] 47 U.S.C. § 337(f)(1).

leasing, if any, of the statutory provision that permits nongovernmental organizations to be authorized as licensees of this spectrum by the relevant governmental entities.[485]

295. We also note that certain portions of the 700 MHz public safety spectrum are subject to special licensing regimes under our rules. For instance, 2.4 MHz of the Public Safety 700 MHz band is licensed to each state as a geographic area "State License."[486] The Commission adopted the State License structure after concluding that it would allow, but not require, each state to plan and develop shared, wide-area systems under a substantially streamlined licensing process.[487] In this regard, the Commission revised the rules to allow state licensees to authorize appropriate public safety agencies, including federal entities, within a state and its political subdivisions to use the spectrum pursuant to the state licensee's authorization.[488] We seek comment on the significance, if any, of this regime to our consideration of whether to permit licensees to lease this spectrum.

296. Similarly, we point out that a total of 12.5 MHz of the Public Safety 700 MHz band (the "General Use" channels),[489] as well as 6 MHz of public safety spectrum at 821-824/866-869 MHz,[490] is administered by regional or state-level planning committees. We seek comment on whether and/or how leasing would work for spectrum governed by these planning committees and processes.

297. Section 337(c) of the Communications Act[491] provides that the Commission must waive any rules (other than its regulations regarding harmful interference) necessary to authorize entities providing public safety services to operate on unassigned non-public safety spectrum, if the Commission makes five specific findings. First, the applicant must demonstrate that no other spectrum allocated for

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[485] Because we recently adopted the same eligibility framework for the 50 MHz of spectrum at 4940-4990 MHz that is designated in support of public safety (the 4.9 GHz band), we pose the same questions relative to that band. *See* The 4.9 GHz Band Transferred from Federal Government Use, *Memorandum Opinion and Order and Third Report and Order*, 18 FCC Rcd 9152, 9158-9163 ¶¶ 16-25 (2003).

[486] *See* 47 C.F.R. § 90.529 (State License). *See also* 47 C.F.R. § 90.20(d)(6) (designating certain Public Safety Pool frequencies in the 2-10 MHz range only for assignment to the central governments of the 50 individual states, the District of Columbia, and other districts and territories, and only for disaster communications purposes).

[487] *See* The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, *Third Memorandum Opinion and Order and Third Report and Order*, 15 FCC Rcd 19844, 19869 ¶ 57 (2000) (*700 MHz Third Report and Order*). The Commission noted that shared, wide-area systems, *i.e.*, large trunked systems, can provide service to many governmental entities in a given geographical area, which provides greater spectrum efficiency than systems incorporating many smaller non-trunked systems or systems trunked on fewer channels. *Id*. at n.181, citing Final Report of the Public Safety Wireless Advisory Committee to the FCC, Sept. 11, 1996, at 317-318.

[488] *See* 47 C.F.R. § 90.179(g); *700 MHz Third Report and Order*, 15 FCC Rcd at 19872 ¶ 65.

[489] *See, e.g.*, 47 C.F.R. § 90.531(b) (designating certain narrowband and wideband channels in the Public Safety 700 MHz band for assignment to public safety eligibles "subject to Commission-approved regional planning committee regional plans"). *See also* 47 C.F.R. § 90.531(b)(3) (designating certain low power channels in the Public Safety 700 MHz band for assignment by regional planning). *See generally* 47 C.F.R. § 90.527 (regional plan requirements).

[490] *See* 47 C.F.R. §§ 90.16 (Public Safety National Plan), 90.617(a) (the assignment of certain public safety channels "will be done in accordance with the policies defined in the Report and Order of GEN Docket No. 87-112"). *See also* 47 C.F.R. § 90.20(d)(2) (certain Public Safety Pool frequencies in the 2 MHz band are available for assignment only in accordance with a geographic assignment plan).

[491] 47 U.S.C. § 337(c).

public safety use is immediately available. Second, the public safety entity must demonstrate that its use of the requested spectrum will not cause harmful interference to other spectrum users entitled to protection. Third, it must show that public safety use of the frequencies is consistent with other public safety spectrum allocations in the geographic area in question. Fourth, the applicant must show that the unassigned frequencies were allocated for their present use not less than two years prior to the grant of the application at issue. Finally, the applicant must demonstrate that grant of the application is consistent with the public interest. Waivers granted under Section 337(c) thus are intended to meet a public safety entity's immediate need for spectrum. Can we extend the spectrum leasing policies adopted in the Report and Order to licenses granted under Section 337(c)? Are there special considerations we should take into account in making this determination? Are there any additional limits that should be imposed on public safety licensees granted licenses under this section in entering into spectrum leasing arrangements?

298. Finally, some public safety spectrum is specifically designated for "interoperability,"[492] "mutual aid,"[493] or similar activities.[494] Given the importance of this spectrum in the event of significant disaster or other activity requiring communication and coordination, are there any unique factors we should take into account in considering whether, and if so how, to permit licensees to voluntarily lease this spectrum?

299. *Various Private Wireless and Personal Radio Services*. The Private Wireless Services include spectrum licensed under Parts 80 (Maritime Services),[495] 87 (Aviation Services), and 97 (Amateur Radio Service).[496] The Personal Radio Services include spectrum licensed under Part 95 of our rules. We use a variety of methods to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. In assessing whether our spectrum leasing policies should be extended to any of these services, the nature of the authorization granted to users of the covered spectrum must be taken into account.

300. Some services encompassed within Parts 80, 87, and 95 are licensed by rule.[497] The rules governing these services indicate who may operate in the particular services and constitute the authorization to operate; no individual licenses are issued by the Commission. Specifically, users of the Wireless Medical Telemetry Service, Medical Implant Communications Service, Family Radio Service, Radio Control Radio Service, Citizens Band Service, Low Power Radio Service, and Multi-Use Radio Service do not receive an individualized license to cover operation. Given this licensing approach, we query whether it makes sense to extend our spectrum leasing policies to any services where licenses are

[492] The Commission's rules define "interoperability" as "[a]n essential communication link within public safety and public service wireless communications systems which permits units from two or more different entities to interact with one another and to exchange information according to a prescribed method in order to achieve predictable results." *See* 47 C.F.R. § 90.7.

[493] *See, e.g.*, 47 C.F.R. § 90.617(a)(1) (designating channels for "mutual aid").

[494] *See, e.g.*, 47 C.F.R. §§ 90.20(d)(15), (16), (19), (41), (80), (82), 90.20(g).

[495] VHF Public Coast Stations, regulated under Subpart J of Part 80, are included in those services covered by the policies adopted in the Report and Order. High seas stations and automated maritime telecommunications system stations, on the other hand, were not included in the *NPRM*, but we now seek comment on whether to include these services in the policies adopted in the Report and Order.

[496] In addition to these rule parts, Private Wireless Services are also licensed under Parts 90 and 101; exclusive use licenses authorized under these rule parts may be the subject of spectrum leases in accordance with the provisions of the Report and Order.

[497] *See* 47 C.F.R. Parts 80, 87, 95.

issued by rule. We request any parties addressing this issue to discuss the legal and practical ramifications of their position, as well as whether spectrum leasing in such services would further the public interest.

301. In other private and personal wireless services, users have access to spectrum because they have passed a testing requirement.[498] Upon successful completion of the required testing, users have the privilege of using the spectrum pursuant to an operator license.[499] Moreover, these operators generally are not entitled to exclusive access to spectrum but instead must share access to the spectrum with all operators who have successfully completed the exam requirements.

302. Indeed, in some cases, the operations in these services are not governed by the issuance of a Commission license.[500] We also note that in many of these services, stations do not have a fixed transmitting location.[501] We point out that, for many of the services authorized and regulated under these parts, a user does not have authority to transfer or assign an authorization or license. Finally, spectrum throughout these rule parts is subject to shared, not exclusive, use.[502]

303. These factors potentially present significantly different issues in considering whether spectrum leasing is meaningful and/or beneficial in these services than does spectrum leasing of exclusively licensed spectrum. For instance, if a licensee has no ability to transfer or assign a license, should that individual or entity have the ability to engage in spectrum leasing under the policies adopted in this rulemaking?[503] Accordingly, we seek comment on the special considerations potentially applicable to the implementation of spectrum leasing to any of these services. We invite comments on the propriety of expanding the scope of our leasing policies to reach such services. Would such leasing promote more efficient spectrum use? Is spectrum leasing even a reasonable concept for some of these services? Would it further the public interest? Conversely, could it undermine the purposes of these services?

304. In addition, the Report and Order facilitates spectrum leasing by licensees on Industrial/Business Radio frequencies with exclusive authorizations, but requires that they lease only to entities that are also eligible for Industrial/Business Radio licensees.[504] Should we revise our policies to permit leasing on these frequencies to commercial providers of wireless services? We seek comment on the significance, if any, to our determination on this issue of the Commission's decision in 2000 to permit such licensees to convert to commercial operation or to assign a private license to a commercial licensee in certain defined circumstances.[505]

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[498] *See* 47 C.F.R. Part 97.

[499] *See, e.g.*, 47 C.F.R. § 97.501.

[500] *See, e.g.,* 47 C.F.R. §§ 80.13(c), 87.18(b), 95.191(a), 95.204, 95.404.

[501] *See, e.g.*, 47 C.F.R. §§ 95.23, 95.25, 95.192, 95.205, 95.405, 97.301.

[502] *See, e.g.*, 47 C.F.R. §§ 95.7, 95.191(b), 95.207(b), 95.407, 97.101(b). We note that, with the exception of the amateur service, our rules establish individual channels in these services. These channels and all amateur service spectrum, however, are shared by users authorized to use that service.

[503] *See also* paragraph 305*, infra*.

[504] *See* Sections IV.A.5.a(ii)(b), IV.A.5.b(ii)(b), *supra*.

[505] *See* Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, *Erratum*, 16 FCC Rcd 6803 (2000).

305. *Wireless services on shared frequencies*. In the Report and Order, we declined to allow leasing on shared frequencies, since parties can readily obtain their own authorizations on shared frequencies[506] and they are not foreclosed from applying for an authorization by the existence of another licensee in the same geographic area. In light of our proposals in this Further Notice to expand spectrum leasing and to take other steps to promote secondary markets, we wish to give further consideration to the possible value and implementation of spectrum leasing pursuant to authorizations involving shared frequencies. It might be possible, for example, for a group of licensees operating on the same frequency on a shared basis to cooperate in leasing spectrum to another entity. We recognize that leasing on shared frequencies may raise different implementation issues than leasing pursuant to an authorization involving the exclusive use of a block of frequencies in a particular geographic area. We welcome comments on the feasibility and possible public interest benefits of leasing involving shared frequencies. To the extent commenters take a position on this issue, we request that they address any implementation issues or other considerations that might be unique to this type of leasing. We also ask commenters whether permitting leasing on such spectrum would defeat the purpose of having shared spectrum available to a number of potential users as licensees or would in fact promote achievement of such goals.

306. *Non-multilateration LMS*. Non-multilateration LMS systems, regulated under Part 90, transmit data to and from objects passing through particular locations (*e.g.*, automated tolls, monitoring of railway cars), and are licensed on a site-by-site basis, except that municipalities or other governmental operations may file for a non-multilateration license covering an Economic Area.[507] Should the Commission extend its spectrum leasing rules to non-multilateration LMS? Given the nature of the operations and in light of the shared spectrum usage in this service, would spectrum leasing potentially be of benefit in this service?

307. *Instructional Television Fixed Service and Multipoint Distribution Service*. These services currently are regulated under Parts 74 and 21, respectively.[508] Our rules currently allow ITFS licensees to lease their excess channel capacity to others.[509] Specifically, an ITFS licensee may lease up to 95 percent of its channel capacity for non-educational programming,[510] consistent with policies unique to this leasing environment. We recently instituted a comprehensive review of the service rules relating to MDS and ITFS.[511] Among other issues, we sought comment on whether there are any circumstances under which we should restrict or require leasing in order to ensure that access to spectrum is not unduly limited.[512]

308. In this proceeding, we query whether we should extend the policies developed in this docket to leasing involving ITFS and MDS licensees, which have developed with their own approach to excess capacity leasing. Should we offer leasing based on the models used in this docket as an alternative

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[506] *See* Section IV.A.3.b, *supra*.

[507] 47 C.F.R. § 90.353(i).

[508] *See* In the Matter of 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 MHz and 2500-2690 MHz Bands, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003) (*MDS/ITFS NPRM*), *recon. in part*, *Order*, FCC 03-169 (rel. July 10, 2003). The NPRM proposes to consolidate the Commission's ITFS and MDS rules into Parts 1 and 101.

[509] *See generally* 47 C.F.R. § 74.931.

[510] *See MDS/ITFS NPRM*, 18 FCC Rcd at 6766-6768 ¶ 109.

[511] *See generally id.*

[512] *Id*. at 6771 ¶ 117.

format to the licensees in this service as well? Should the leasing policies adopted in this rulemaking replace the leasing standards that have been developed on a case-by-case basis for ITFS and MDS? How does action in this proceeding fit with the issues being considered in the open rulemaking proposing to evaluate the licensing structure for ITFS and MDS? We note that the record compiled in this proceeding on this issue may be taken into account in WT Docket No. 03-66 as we overhaul the rules and policies generally applicable to ITFS and MDS.

309. *Cable Television Relay Service*. This category includes cable television relay service under Part 78. Although we explicitly excluded this service from consideration in the *NPRM*, we now request comment from interested parties as to whether we should permit spectrum leasing in this service. Parties addressing this issue should discuss any special considerations that should affect our decision whether to permit licensees voluntarily to lease this spectrum.

310. *Multichannel Video Distribution and Data Service*. Multichannel Video Distribution and Data Service (MVDDS) is regulated pursuant to Subpart P of Part 101.[513] MVDDS licensees "must use spectrum in the 12.2-12.7 GHz band for any digital fixed non-broadcast service (broadcast services are intended for reception of the general public and not on a subscribership basis) including one-way direct-to-home/office wireless service."[514] This service was established subsequent to the Commission's adoption of the *NPRM* in this proceeding.[515] Although the Commission established multiple geographic service areas, the rules specifically provide that each geographic area license will be auctioned to one licensee.[516] We request interested parties to address whether the Commission's decision to authorize only one licensee per service area in this band should affect our determination whether to permit licensees voluntarily to lease this spectrum. What would be the benefits and/or harms of extending our spectrum leasing policies to this service?

311. *700 MHz Guard Band Managers*. As noted above, the Part 27 Guard Band Manager Service is not included within the scope of action take in the Report and Order.[517] Should we take any action to revise the rules that govern the activities of 700 MHz guard band managers? Should such band managers be given the same opportunities as other licensees to engage in a greater range of spectrum leasing activities? Do the considerations related to interference and other operational factors affect the determination we might make with respect to leasing in the 700 MHz guard band manager frequencies?

312. *Satellite services*. Although we decided in the Report and Order to make no changes in the spectrum leasing policies applicable to our satellite services at this time,[518] we remain receptive to proposals for extending the policies we have developed in this proceeding to satellite services or considering alternative lease arrangements. Accordingly, we request parties to address whether we

[513] *See* 47 C.F.R. Part 101, Subpart P.

[514] 47 C.F.R. § 101.1407.

[515] In the Matter of Parts 2 and 25 of the Commission Rules To Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614 (2002) (*MVDDS Second Report and Order*).

[516] *See* 47 C.F.R. §§ 101.1401, 101.1405. *See also MVDDS Second Report and Order*, 17 FCC Rcd at 134-135 (one licensee with 500 MHz of spectrum in each license area will mitigate potential interference to other users in band).

[517] *See* Section IV.A.3.b, *supra*.

[518] *See* Section IV.C.2, *supra*.

should take any further action in this proceeding to make spectrum leasing as defined in this proceeding available to satellite services as well in order to promote more efficient use of spectrum.

313. *Forbearance*. As we have noted, the forbearance provisions of Section 10 apply only to telecommunication services and telecommunications carriers.[519] Some of the licenses listed above involve spectrum operations that do not fall within the definition of telecommunications services. Do we have any other basis under the Act pursuant to which we could adopt any of the policies set forth in the Report and Order or proposed in this Further Notice?

314. *Extending streamlined processing of transfer and assignment applications to additional services*. The Report and Order applies streamlined processing rules to transfer and assignment applications involving authorizations in the services for which we adopt spectrum leasing policies. Should we expand the scope of authorizations to which this streamlined processing applies? Can we encompass non-telecommunications services and non-telecommunications carriers within this streamlined process? Does it make sense to extend streamlined application processing to transfer and assignment applications involving other services? We request commenters to document the benefits and/or harms (depending upon the position they take) associated with expanding the availability of streamlined processing of transfer and assignment applications to additional services.[520]

D. Application of the New *De Facto* Control Standard for Spectrum Leasing to Other Issues and Types of Arrangements

1. Background

315. As noted in the Report and Order, we are at present limiting application of our newly adopted *de facto* control standard to the leasing context.[521] Thus, the facilities-based *Intermountain Microwave* standard for evaluating *de facto* control continues to be the prevailing standard in other regulatory contexts that call for assessment of the exercise of *de facto* control over an applicant or licensee, such as in the case of designated entity and entrepreneur eligibility and management agreements.[522]

2. Discussion

316. We now examine whether we should apply our new *de facto* control standard to regulatory contexts other than leasing. We seek comment on whether our conclusion that the *Intermountain Microwave* standard no longer serves the public interest in the leasing context is also relevant to our application of the standard in other contexts. Alternatively, we seek comment on whether there are policy reasons to continue using a facilities-based approach to *de facto* control analysis in other regulatory contexts. Are there contexts in which evaluating licensee control of facilities continues to be important to

[519] *See* Section V.B.2.a(iii), *supra*.

[520] We note that we seek comment only with respect to services covered by the Report and Order and services that might be added pursuant to this Section V.C.

[521] *See* Section IV.A.2.b, *supra*.

[522] As set out in the Report and Order, the *Intermountain Microwave* standard focuses on six factors – whether the licensee: (1) has unfettered use of all station facilities and equipment; (2) controls daily operations; (3) determines and carries out the policy decisions (including preparation and filing of applications with the Commission; (4) is in charge of employment, supervision, and dismissal of personnel operating the facilities; (5) is in charge of the payment of financial obligations, including expenses arising out of operations; and (6) receives the monies and profits from the operation of the facilities. *See Intermountain Microwave*, 12 FCC 2d at 559-60.

regulatory objectives that are distinguishable from our objectives in the leasing context? If we elect to continue using a facilities-based approach in some contexts but not others, how do we reconcile the existence of divergent *de facto* control standards under Section 310(d) and other provisions of the Act?

317. *Designated entity and entrepreneur eligibility*. At present, our rules for determining affiliation under our designated entity and entrepreneur policies largely incorporate the *Intermountain Microwave* test. We request commenters to address whether the new standard for assessing *de facto* control adopted in the Report and Order should also be employed for assessing affiliation and eligibility for designated entity and entrepreneur status. Specifically, does Section 309(j) implicate different concerns from Section 309(d)? Do the statutory objectives of Section 309(j) require more of a focus on actual facilities control by the beneficiary of our designated entity/entrepreneur policies, or is it sufficient that such an entity can obtain an authorization in an auction and then lease the spectrum pursuant to the Commission authorization without constructing and operating its own facilities? The underlying goals of Section 309(j) necessarily will affect whether we conclude that the new *de facto* control standard is suitable in this context. Would the new *de facto* control standard ensure that the intended beneficiaries of Section 309(j) in fact receive those benefits and that the designated entity/entrepreneur rules (to the extent they are retained) can not be unfairly manipulated?

318. *Management agreements*. The Commission has long permitted the use of management agreements and other agency arrangements by its licensees as a means to manage their authorized services and facilities.[523] The issue of whether a licensee has retained *de facto* control vis-à-vis a manager in turn has long been premised on the *Intermountain Microwave* decision and our related *Motorola* decision.[524] This assessment of management agreements is inherently a case-by-case determination as well as strongly tied to the control of facilities and operations implemented pursuant to a Commission authorization. Should we adopt the new *de facto* control standard for management agreements as well? Is there anything in the new standard that would forbid elements of management agreements previously entered into in reliance on the *Intermountain Microwave* and *Motorola* standards? Could extending a revised *de facto* control standard to management agreements allow parties to enter into a purported management agreement – which would not be subject to the notification and other obligations applicable to spectrum leasing – when in fact the arrangement should be considered under spectrum leasing policies? Would this allow parties to undercut our efforts to obtain adequate information for enforcement purposes as well as facilitating the efficient functioning of secondary markets?

319. Finally, are there any other contexts in which we currently use the *Intermountain Microwave* standard but should now consider adoption of our new *de facto* control standard? We request commenters identifying any such situations to discuss the appropriateness of the new standard in terms of overall policy objectives as well as practical deployment considerations.

E. Effect of Secondary Markets on Designated Entity/Entrepreneur Policies

1. Background

320. The Commission's designated entity and entrepreneur policies[525] were adopted to further statutory requirements and to promote participation in the provision of spectrum-based services by certain

[523] *See, e.g.,* Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, *Fourth Report and Order*, 9 FCC Rcd 7123, 7127 ¶ 20 (1994).

[524] *See Intermountain Microwave*, 12 FCC 2d 559; *Motorola*.

[525] Section 309(j)(3) of the Communications Act directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by women and members of minority groups (collectively, "designated entities"). 47 U.S.C. § 309(j)(3). The (continued….)

designated entities. These policies were created in 1994 as one component of the Commission's implementation of the competitive bidding policies and procedures mandated by Sections 309(j)(3) and 309(j)(4) of the Act.[526] Historically, the Commission's designated entity policies have sought to ensure that small businesses were given the opportunity to participate in the provision of spectrum-based services.[527]

321. The Commission currently applies a control test to ensure that its designated entity and entrepreneur policies serve the programs' intended beneficiaries. Section 1.2110(c)(2) sets forth the controlling interest standard and is generally used for determining which entities are eligible for small business or entrepreneur status.[528] Under the controlling interest standard, which in large part codifies the factors of the *Intermountain Microwave* standard, the Commission attributes to the applicant the gross revenues of the applicant, its controlling interests, the applicant's affiliates, and the affiliates of the applicant's controlling interests in assessing whether the applicant is eligible for the Commission's small business provisions.[529] The premise of this rule is that all parties that control an applicant or have the power to control an applicant, and such parties' affiliates, will have their gross revenues counted and attributed to the applicant in determining the applicant's eligibility for small business status or for any other size-based status using a gross revenue threshold.[530]

Commission's designated entity policies currently make bidding credits available to small businesses. In the past, the Commission also provided for an installment payment program for small businesses and entrepreneurs, which allowed winning bidders to pay for their licenses over a ten-year period. Although many licensees continue to participate in this installment payment program, the Commission has since suspended the use of such payments for current auction participants. Additionally, in broadband PCS, the Commission created a framework that reserves certain portions of the C and F block broadband PCS spectrum as "set-aside" licenses for "entrepreneurs," in which eligibility is restricted to entities below a specified financial threshold. Specifically, the Commission requires that, in order to be eligible to acquire a "set-aside" license under its "entrepreneur" policies, an applicant, including attributable investors and affiliates, must have had gross revenues of less than $125 million in each of the last two years and must have less than $500 million in total assets. 47 C.F.R. § 24.709.

[526] *See* 47 U.S.C. §§ 309(j)(3), (4); *see also* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349-2350 ¶¶ 1-7 (1994) (*Competitive Bidding Second R&O*). Passed as part of the Omnibus Budget Reconciliation Act of 1993, Section 309(j) gave the Commission express authority to employ competitive bidding procedures when choosing among mutually exclusive initial licenses available to the public. *See generally* 47 U.S.C. § 309(j).

[527] *See generally Competitive Bidding Second R&O*, 9 FCC Rcd at 2388-2400 ¶¶ 227-297); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7256 ¶ 64 (1994) (*Competitive Bidding Second MO&O*); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5571 ¶ 93 (1994) (*Competitive Bidding Fifth R&O*); *Competitive Bidding Fifth MO&O*, 10 FCC Rcd 403, 404 ¶ 2 (1994).

[528] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323-27 ¶¶ 58-67; *see* 47 C.F.R. §§ 1.2110(b), (c). Previously, the attribution rules were adopted on a service-by-service basis. The controlling interest standard "together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses." *Id*.

[529] *Id*. at 15323-24 ¶ 59; 47 C.F.R. § 1.2110(b).

[530] *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 60. For an applicant (or licensee) seeking to establish broadband PCS entrepreneur eligibility, the total assets, as well as the gross revenues, of all parties that control the applicant or have the power to control the applicant, and such parties' affiliates, are counted and attributed to the applicant. *See id*., 15 FCC Rcd at 15326-27 ¶ 67; 47 C.F.R. § 24.709(a)(1).

322. From the outset, the Commission has also been determined to ensure, pursuant to Section 309(j)(4)(E), that the designated entity and entrepreneur policies would not be abused.[531] As the Commission has explained, these policies are designed, among other reasons, to "deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our preferences to obtain a license at a lower cost than they otherwise would have to pay and later sell it at the market price."[532] The Commission has also indicated that the unjust enrichment rules were designed to recapture for the government a portion of the value of the bidding credit or other special provision if a designated entity prematurely transfers its licenses to an ineligible entity.[533] The Commission's unjust enrichment provisions have been codified in section 1.2111 of the Commission's rules.[534]

2. Discussion

323. We inquire whether we should alter the policies adopted in the Report and Order for designated entity leasing under the *de facto* transfer leasing option or under the proposals contained in this Further Notice. Should we permit 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 small business designated entity status as that of the licensee? What would be the public interest benefits of revising the policies and rules in this manner? Would such a revision be consistent with our unjust enrichment policies and rules? What alternative approaches might the Commission take were it to decide to provide additional flexibility to designated entity licensees? How would we best design policies so as to ensure compliance with our statutory obligations to prevent unjust enrichment?

VI. CONCLUSION

324. In the Report and Order, we have taken significant steps to facilitate the deployment of spectrum leasing in accordance with marketplace demands yet consistent with our statutory obligations. The actions we take here should further the objectives set forth in the *Policy Statement* and the *NPRM*. In the 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.

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[531] *See also* 47 U.S.C. § 309(j)(3)(C) (directing the Commission to make the "avoidance of unjust enrichment" one of the objectives when designing systems of competitive bidding).

[532] *Competitive Bidding Second R&O*, 9 FCC Rcd at 2394 ¶ 258. That order also stated that, with regard to entrepreneur set-aside licenses, "[i]t would be inconsistent and unjust with the will of Congress for such preferred licensees to obtain a license with the government's help, transfer that license after a short period of time to an entity that was not entitled to special treatment at the auction, and appropriate for themselves the difference between the full market price of the license and the discounted price which they paid the government for that license"). *Id.* at 2394 ¶ 260.

[533] *Competitive Bidding Second MO&O*, 9 FCC Rcd at 7265 ¶ 121. *See also Competitive Bidding Fifth R&O*, 9 FCC Rcd at 5591 ¶ 134 (discussing the Commission's adoption of strict repayment requirements to recapture any unjust enrichment from designated entity licensees that transfer control of their licenses to entities that would not qualify for the same level of benefits).

[534] 47 C.F.R. § 1.2111.

VII. PROCEDURAL MATTERS

A. Comment Filing Procedures

325. *Comments and reply comments*. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,[535] interested parties may file comments in response to the Further Notice of Proposed Rulemaking in **WT Docket No. 00-230** on or before December 5, 2003, and reply comments on or before January 5, 2004.

326. *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 Further Notice.

327. *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.[536]

328. 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.

329. 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.)[537]

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[535] 47 C.F.R. §§ 1.415, 1.419.

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

[537] *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).

330. 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.[538]

331. 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) Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, facsimile (202) 863-2898, or e-mail at qualexint@aol.com; and (2) Paul Murray, Commercial Wireless Division, Wireless Telecommunications Bureau, 445 12th Street, S.W., Washington, D.C., 20554, or e-mail at Paul.Murray@fcc.gov.

332. *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 Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail at qualexint@aol.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

333. 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.[539] *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.[540] 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) Qualex International, Portals II, 445 12th

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

[539] 47 C.F.R. § 1.1206.

[540] 47 C.F.R. § 1.1206(b)(2).

Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com; and (2) Paul Murray, Commercial Wireless Division, Wireless Telecommunications Bureau, Federal Communications Commission, Washington, D.C., 20554, Paul.Murray@fcc.gov.

C. Final Regulatory Flexibility Analysis

334. Pursuant to the Regulatory Flexibility Act,[541] the Final Regulatory Flexibility Analysis (FRFA) for the Report and Order is set forth in Appendix C. The Commission's Consumer Information Bureau, Reference Information Center, will send a copy of the Report and Order, including the Final Regulatory 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

335. The 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 Report and Order, 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 Report and Order 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

336. As required by the Regulatory Flexibility Act,[542] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible impact on small entities of the proposals in the Further Notice of Proposed Rulemaking. The IRFA is set forth in Appendix D. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the Further Notice, and they must 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 Further Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration, in accordance with the Regulatory Flexibility Act.[543]

F. Contact Information

337. 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 Chelsea Fallon, Wireless

[541] 5 U.S.C. § 603.

[542] *Id.*

[543] *Id.* § 603(a).

Telecommunications Bureau, at (202) 418-0654, TTY at (202) 418-7233, or e-mail at Chelsea.Fallon@fcc.gov.

VIII. ORDERING CLAUSES

338. 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, 161, 301, 303(r), 308, 309, 310, 332, and 503, IT IS ORDERED THAT this Report and Order and the policies set forth herein are ADOPTED and that Parts 1 and 27 of the Commission's rules, 47 C.F.R. Parts 1 and 27 are AMENDED as specified in Appendix B to establish policies and procedures to facilitate spectrum leasing arrangements under the policies enunciated in Section IV.A of the Report and Order, effective sixty days after publication in the Federal Register, and to streamline the processing of license assignment and transfer of control applications under the policies enunciated in Section IV.B of the Report and Order, effective April 5, 2004. The information collections contained in the rules applicable to spectrum leasing arrangements will become effective following OMB approval. The Commission will publish a document at a later date establishing the effective date of those rules.

339. 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 facilitating spectrum leasing as well as streamlining of application processing for license assignments and transfers of control, including, but not limited to, the development and implementation of the revised forms necessary to implement the policies adopted in this Report and Order and the rules set forth in Appendix B hereto.

340. 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 Further Notice of Proposed Rulemaking is hereby ADOPTED.

341. IT IS FURTHER ORDERED THAT the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of the Report and Order and the 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

Alaska Native Wireless, L.L.C. (Alaska Native Wireless)
American Mobile Telecommunications Association, Inc. (AMTA)
AT&T Wireless Services, Inc. (AT&T Wireless)
Blooston, Mordkofsky, Dickens, Duffy and Prendergast (Blooston Rural Carriers)
Cellular Telecommunications & Internet Association (CTIA)
Cinergy Corp. (Cinergy)
Cingular Wireless LLC (Cingular Wireless)
Cook Inlet Region, Inc. (Cook Inlet)
Direct Wireless Corporation (Direct Wireless)
El Paso Global Networks Company (El Paso Global)
Enron Corp (Enron)
Entergy Corporation (Entergy)
Home Box Office (HBO)
HYPRES, Inc. (HYPRES)
Kansas City Power & Light Company (Kansas City Power)
Land Mobile Communications Council (LMCC)
Long Lines, Ltd. (Long Lines)
Maritel, Inc. (Maritel)
National Telephone Cooperative Association (NTCA)
Nextel Communications, Inc. (Nextel)
Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)
Pacific Wireless Technologies, Inc. (Pacific Wireless)
Rural Cellular Association
Rural Telecommunications Group (RTG)
Satellite Industry Association (SIA)
Securicor Wireless Holdings, Inc. (Securicor)
Shared Spectrum Company (Shared Spectrum)
Software Defined Radio Forum (SDR Forum)
Sprint Corporation (Sprint)
Teledesic LLC (Teledesic)
Teligent, Inc. (Teligent)
U.S. Small Business Administration, Office of Advocacy (U.S. Small Business Administration)
UTStarcom, Inc. (UTStarcom)
Vanu, Inc. (Vanu)
Verizon Wireless
Winstar Communications, Inc. (Winstar)
37 Concerned Economists

B. Reply Comments

AT&T Wireless Services, Inc. (AT&T Wireless)
Blooston, Mordkofsky, Dickens, Duffy and Prendergast (Blooston Rural Carriers)
Cingular Wireless LLC (Cingular Wireless)
Dynegy Global Communications, Inc. (Dynegy)
El Paso Global Networks Company (El Paso Global)

Enron Corp (Enron)
Industrial Telecommunications Association, Inc. (ITA)
Leap Wireless International, Inc. (Leap Wireless)
Macquarie Bank Limited (Macquarie Bank)
MRFAC, Inc. (MRFAC)
New Skies Satellites N.V. (New Skies)
Nextel Communications, Inc. (Nextel)
PanAmSat Corporation and GE American Communications, Inc. (PanAmSat and GE Americom)
PowerLoom Corporation (PowerLoom)
Rural Telecommunications Group (RTG)
Satellite Industry Association (SIA)
Software Defined Radio Forum (SDR Forum)
TeleCorp PCS, Inc. (TeleCorp)
Teligent, Inc. (Teligent)
UTStarcom, Inc. (UTStarcom)
Winstar Communications, Inc. (Winstar)

APPENDIX B – 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 the section title and revising paragraphs (a), (a)(3), (b)(1) and (b)(2) to read as follows:

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

(a) *Application and notification forms.* Applicants, licensees, and spectrum lessees (*see* § 1.9003 of this part) shall use the following forms and associated schedules for all applications and notifications:

(1) * * *

* * * * *

(3) *FCC Form 603, Application for Assignment of Authorization or Transfer of Control; Notification or Application for Spectrum Leasing Arrangement.* 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. In addition, it is used by licensees and spectrum lessees (*see* § 1.9003 of this part) 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 subpart X of this part (*see* subpart X of this part).

(4) * * *

(b) * * *

(1) Attachments to applications and notifications should be uploaded along with the electronically filed applications and notifications whenever possible. The files * * * .

(2) Any associated documents submitted with an application or notification must be uploaded as attachments to the application or notification whenever possible. The attachment should be uploaded via ULS in Adobe Acrobat Portable Document Format (PDF) whenever possible.

* * * * *

3. Amend § 1.948 by adding new subsection (j) to read as follows:

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

(a) * * *

* * * * *

(j) *Streamlined processing for certain applications.* Applications for assignment of authorizations or transfer of control relating to the Wireless Radio Services identified in this subsection will be processed pursuant to streamlined approval procedures, as discussed herein.

(1) *Services eligible for streamlined processing*. Applications for assignment of authorizations or transfers of control relating to the following services are subject to the streamlined approval processes, as set forth in this subsection:

(i) the Paging and Radiotelephone Service (Part 22 of this chapter);

(ii) the Rural Radiotelephone Service (Part 22 of this chapter);

(iii) the Air-Ground Radiotelephone Service (Part 22 of this chapter);

(iv) the Cellular Radiotelephone Service (Part 22 of this chapter);

(v) the Offshore Radiotelephone Service (Part 22 of this chapter);

(vi) the narrowband Personal Communications Service (Part 24 of this chapter);

(vii) the broadband Personal Communications Service (Part 24 of this chapter);

(viii) the Wireless Communications Service in the 698-746 MHz band (Part 27 of this chapter);

(ix) the Wireless Communications Service in the 746-764 MHz and 776-794 MHz bands (Part 27 of this chapter);

(x) the Wireless Communications Service in the 1390-1392 MHz band (Part 27 of this chapter);

(xi) the Wireless Communications Service in the paired 1392-1395 MHz and 1432-1435 MHz bands (Part 27 of this chapter);

(xii) the Wireless Communications Service in the 1670-1675 MHz band (Part 27 of this chapter);

(xiii) the Wireless Communications Service in the 2305-2320 and 2345-2360 MHz bands (Part 27 of this chapter);

(xiv) the Wireless Communications Service in the 2385-2390 MHz band (Part 27 of this chapter);

(xv) the VHF Public Coast Station service (Part 80 of this chapter);

(xvi) the 220 MHz Service (excluding public safety licensees) (Part 90 of this chapter);

(xvii) the Specialized Mobile Radio Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licenses in the General Category channels) (Part 90 of this chapter);

(xviii) the Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (Part 90 of this chapter);

(xix) paging operations under Part 90 of this chapter;

(xx) the Business and Industrial/Land Transportation channels (Part 90 of this chapter);

(xxi) the 218-219 MHz band (Part 95 of this chapter);

(xxii) the Local Multipoint Distribution Service (Part 101 of this chapter);

(xxiii) the 24 GHz Band (Part 101 of this chapter);

(xxiv) the 39 GHz Band (Part 101 of this chapter);

(xxv) the Multiple Address Systems band (Part 101 of this chapter);

(xxvi) the Local Television Transmission Service (Part 101 of this chapter);

(xxvii) the Private-Operational Fixed Point-to-Point Microwave Service (Part 101 of this chapter); and,

(xxviii) the Common Carrier Fixed Point-to-Point Microwave Service (Part 101 of this chapter).

(2) *Streamlined approval procedures*. (i) Applications, if sufficiently complete and the required application fee has been paid (*see* § 1.1102 of this part), will be accepted for filing and 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) of this part.

(ii) Petitions to deny filed in accordance with § 309(d) of the Communications Act must comply with the provisions of § 1.939 of this part, 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.

(iii) 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 remove the application from streamlined processing for further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for 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 of this part).

(iv) Grant of consent to an application will be reflected in a Public Notice (*see* § 1.933(a) of this part) promptly issued after the grant.

(v) If the Bureau determines to remove an application from streamlined processing, it will issue a Public Notice indicating that the application has been removed from streamlined processing. Within 90 days of 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) 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).

* * * * *

4. Amend § 1.2002 to add a new subsection 1.2002(d) to read as follows:

§ 1.2002 Applicants required to submit information.

(a) * * *

* * * * *

(d) The provisions of paragraphs (a) and (b) of this section are applicable to spectrum lessees (*see* § 1.9003 of this part) engaged in spectrum manager leasing arrangements and *de facto* transfer leasing arrangements pursuant to the rules set forth in subpart X of this part.

* * * * *

5. Amend § 1.2003 by revising it to read as follows:

§ 1.2003 Applications affected.

The certification required by § 1.2002 must be filed with the following applications and any other requests for authorization filed with the Commission, as well as for spectrum leasing notifications and spectrum leasing applications (*see* subpart X of this part), regardless of whether a specific form exists.

FCC 301 * * *

* * * * *

FCC 603 Wireless Telecommunications Bureau Application for Assignment of Authorization and Transfer of Control; Notification or Application for Spectrum Leasing Arrangement;

FCC 605 * * *

* * * * *

6. Amend § 1.8002 by adding a new subsection 1.8002(a)(6) to read as follows:

§ 1.8002 Obtaining an FRN.

(a) * * *

(1) * * *

* * * * *

(6) Anyone entering into a spectrum leasing arrangement as a spectrum lessee (*see* subpart X of this part).

* * * * *

7. Add the following new subpart X to Part 1, to read as follows:

Subpart X – Spectrum Leasing

SCOPE AND AUTHORITY

§ 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. These spectrum leasing 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.

(b) Licensees holding exclusive use rights are permitted to engage in spectrum leasing whether their operations are characterized as commercial, common carrier, private, or non-common carrier.

§ 1.9003 Definitions.

De facto transfer leasing arrangement. A spectrum leasing arrangement in which a licensee retains *de jure* control of its license while transferring *de facto* control of the leased spectrum to a spectrum lessee, pursuant to the spectrum leasing rules set forth in this subpart.

FCC Form 603. FCC Form 603 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 § 1.911(d) of this part may file the notification 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 360 days.

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 360 days.

Spectrum leasing application. The application submitted to the Commission by a licensee and a spectrum lessee seeking approval of a *de facto* transfer leasing arrangement.

Spectrum leasing arrangement. An arrangement between a licensed entity and a third-party entity in which the licensee leases certain of its spectrum usage rights in the licensed spectrum to the third-party entity, the spectrum lessee, pursuant to the rules set forth in this subpart. The arrangement may involve the leasing of any amount of licensed spectrum, in any geographic area or site encompassed by the license, for any period of time during the term of the license authorization. Two different types of spectrum leasing arrangements, spectrum manager leasing arrangements and *de facto* transfer leasing arrangements, are permitted under this subpart.

Spectrum leasing notification. The required notification submitted by a licensee to the Commission regarding a spectrum manager leasing arrangement.

Spectrum lessee. A third-party entity that leases certain spectrum usage rights from a licensee pursuant to the spectrum leasing rules set forth in this subpart.

Spectrum manager leasing arrangement. A spectrum leasing arrangement in which a licensee retains both *de jure* control of its license and *de facto* control of the leased spectrum that it leases to a spectrum lessee, pursuant to the spectrum leasing rules set forth in this subpart.

§ 1.9005 Included services.

The spectrum leasing policies and rules of this subpart apply to the following services in the Wireless Radio Services in which commercial or private licensees hold exclusive use rights:

(a) the Paging and Radiotelephone Service (Part 22 of this chapter);

(b) the Rural Radiotelephone Service (Part 22 of this chapter);

(c) the Air-Ground Radiotelephone Service (Part 22 of this chapter);

(d) the Cellular Radiotelephone Service (Part 22 of this chapter);

(e) the Offshore Radiotelephone Service (Part 22 of this chapter);

(f) the narrowband Personal Communications Service (Part 24 of this chapter);

(g) the broadband Personal Communications Service (Part 24 of this chapter);

(h) the Wireless Communications Service in the 698-746 MHz band (Part 27 of this chapter);

(i) the Wireless Communications Service in the 746-764 MHz and 776-794 MHz bands (Part 27 of this chapter);

(j) the Wireless Communications Service in the 1390-1392 MHz band (Part 27 of this chapter);

(k) the Wireless Communications Service in the paired 1392-1395 MHz and 1432-1435 MHz bands (Part 27 of this chapter);

(l) the Wireless Communications Service in the 1670-1675 MHz band (Part 27 of this chapter);

(m) the Wireless Communications Service in the 2305-2320 and 2345-2360 MHz bands (Part 27 of this chapter);

(n) the Wireless Communications Service in the 2385-2390 MHz band (Part 27 of this chapter);

(o) the VHF Public Coast Station service (Part 80 of this chapter);

(p) the 220 MHz Service (excluding public safety licensees) (Part 90 of this chapter);

(q) the Specialized Mobile Radio Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licenses in the General Category channels) (Part 90 of this chapter);

(r) the Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (Part 90 of this chapter);

(s) paging operations under Part 90 of this chapter;

(t) the Business and Industrial/Land Transportation (B/ILT) channels (Part 90 of this chapter) (including all B/ILT channels above 512 MHz and those in the 470-512 MHz band where a licensee has achieved exclusivity, but excluding B/ILT channels in the 470-512 MHz band where a licensee has not

achieved exclusivity and those channels below 470 MHz, including those licensed pursuant to 47 C.F.R. § 90.187(b)(2)(v));

(u) the 218-219 MHz band (Part 95 of this chapter);

(v) the Local Multipoint Distribution Service (Part 101 of this chapter);

(w) the 24 GHz Band (Part 101 of this chapter);

(x) the 39 GHz Band (Part 101 of this chapter);

(y) the Multiple Address Systems band (Part 101 of this chapter);

(z) the Local Television Transmission Service (Part 101 of this chapter);

(aa) the Private-Operational Fixed Point-to-Point Microwave Service (Part 101 of this chapter); and,

(bb) the Common Carrier Fixed Point-to-Point Microwave Service (Part 101 of this chapter).

GENERAL POLICIES AND PROCEDURES

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

(a) Under the rules established for spectrum leasing arrangements in this subpart, the following standard is applied for purposes of determining whether a licensee retains *de facto* control under § 310(d) of the Communications Act with regard to spectrum that it leases to a spectrum lessee.

(b) A licensee will be deemed to have retained *de facto* control of leased spectrum if it enters into a spectrum leasing arrangement and acts as a spectrum manager with regard to portions of the licensed spectrum that it leases to a spectrum lessee, provided the licensee satisfies the following two conditions:

(1) *Licensee responsibility for lessee compliance with Commission policies and rules.* The licensee must remain fully responsible for ensuring the spectrum lessee's compliance with the Communications Act and all applicable policies and rules directly related to the use of the leased spectrum, as set forth below:

(i) Through contractual provisions and actual oversight and enforcement of such provisions, the licensee must act in a manner sufficient to ensure that the spectrum lessee operates in conformance with applicable technical and use rules governing the license authorization.

(ii) The licensee must maintain a reasonable degree of actual working knowledge about the spectrum lessee's activities and facilities that affect its ongoing compliance with the Commission's policies and rules. These responsibilities include: coordinating operations and modifications of the spectrum lessee's system to ensure compliance with Commission rules regarding non-interference with co-channel and adjacent channel licensees (and any authorized spectrum user); making all determinations as to whether an application is required for any individual spectrum lessee stations (*e.g.*, those that require frequency coordination, submission of an Environmental Assessment under § 1.1307 of this part, those that require international or Interdepartment Radio Advisory Committee (IRAC) coordination, those that affect radio frequency quiet zones described in § 1.924 of this part, or those that require notification to the Federal Aviation Administration under Part 17 of this chapter); and, ensuring that the spectrum lessee complies with the Commission's safety guidelines relating to human exposure to radiofrequency (RF) radiation (*e.g.*, § 1.1307(b) and related rules of this part). The licensee is responsible for resolving all

interference-related matters, including conflicts between its spectrum lessee and any other spectrum lessee or licensee (or authorized spectrum user). The licensee may use agents (*e.g.*, counsel, engineering consultants) when carrying out these responsibilities, so long as the licensee exercises effective control over its agents' actions.

(iii) The licensee must be able to inspect the spectrum lessee's operations and must retain the right to terminate the spectrum leasing arrangement in the event the spectrum lessee fails to comply with the terms of the arrangement and/or applicable Commission requirements. If the licensee or the Commission determines that there is any violation of the Commission's rules or that the spectrum 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. 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 legal means necessary to enforce compliance.

(2) *Licensee responsibility for interactions with the Commission, including all filings, required under the license authorization and applicable service rules directly related to the leased spectrum.* The licensee remains responsible for the following interactions with the Commission:

(i) The licensee must file the necessary notification with the Commission, as required under § 1.9020(d) of this subpart.

(ii) The licensee is responsible for making all required filings (*e.g.*, applications, notifications, correspondence) associated with the license authorization that are directly affected by the spectrum lessee's use of the licensed spectrum. The licensee may use agents (*e.g.*, counsel, engineering consultants) to complete these filings, so long as the licensee exercises effective control over its agents' actions and complies with any signature requirements for such filings.

§ 1.9020 Spectrum manager leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a spectrum manager leasing arrangement, without the need for prior Commission approval, provided that the licensee retains *de jure* control of the license and *de facto* control, as defined and explained in this subpart, of the leased spectrum. The licensee must notify the Commission of the spectrum leasing arrangement pursuant to the rules set forth in this section.

(b) *Rights and responsibilities of the licensee.* (1) The licensee is directly and primarily responsible for ensuring the spectrum lessee's compliance with the Communications Act and applicable Commission policies and rules.

(2) The licensee retains responsibility for maintaining its compliance with applicable eligibility and ownership requirements imposed on it pursuant to the license authorization.

(3) The licensee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(c) *Rights and responsibilities of the spectrum lessee.* (1) The spectrum lessee must comply with the Communications Act and with Commission requirements associated with the license.

(2) The spectrum lessee is responsible for establishing that it meets the eligibility and qualification requirements applicable to spectrum lessees under the rules set forth in this section.

(3) The spectrum lessee must comply with any obligations that apply directly to it as a result of its own status as a service provider (*e.g.*, Title II obligations if the spectrum lessee acts as a telecommunications carrier or acts as a common carrier).

(4) In addition to the licensee being directly accountable to the Commission for ensuring the spectrum lessee's compliance with the Commission's operational rules and policies (as discussed in this subpart), the spectrum lessee is independently accountable to the Commission for complying with the Communications Act and Commission policies and rules, including those that apply directly to the spectrum lessee as a result of its own status as a service provider.

(5) In leasing spectrum from a licensee, the spectrum lessee must accept Commission oversight and enforcement consistent with the license authorization. The spectrum lessee must cooperate fully with any investigation or inquiry conducted by either the Commission or the licensee, allow the Commission or the licensee to conduct on-site inspections of transmission facilities, and suspend operations at the direction of the Commission or the licensee and to the extent that such suspension would be consistent with the Commission's suspension policies.

(6) The spectrum lessee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(d) *Applicability of particular service rules and policies.* Under a spectrum manager leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization.

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (*see* §§ 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to the denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of this part).

(v) The licensee may reasonably rely on the spectrum lessee's certifications that it meets the requisite eligibility and qualification requirements contained in the notification required by this section.

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 of this part and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 of this part 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 so long as doing so does not result in the spectrum lessee becoming a "controlling interest" (*see* § 1.2110(c)(2) of this part) or affiliate (*see* § 1.2110(c)(5) of this part) of the licensee such that the licensee would lose its eligibility as a small business 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 section 1.2110 of this part, 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.

(5) *Construction/performance requirements.* Any performance or build-out requirement applicable under a license authorization (*e.g.*, a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable performance or build-out requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Cellular cross-interest rule.* The cellular cross-interest rule applies to spectrum manager leasing arrangements involving a cellular authorization in a Rural Service Area (RSA), and leased cellular spectrum is attributable to the spectrum lessee pursuant to § 22.942 of this chapter (*see* §§ 22.942, 22.909 of this chapter).

(7) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a Private Mobile Radio Service (PMRS), private, or non-commercial basis.

(8) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152 of this part). Where, however, regulatory fees are paid annually on a per-unit basis (such as for Commercial Mobile Radio Services (CMRS) pursuant to § 1.1152 of this part), the licensee and spectrum lessee are each required to pay fees for those units associated with its respective operations.

(9) *E911 requirements.* If E911 obligations apply to the licensee (*see* § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum.

(e) *Notification regarding the spectrum manager leasing arrangement.* A licensee that enters into a spectrum manager leasing arrangement must notify the Commission of that arrangement in advance of operation, as set forth herein.

(1) *Notification procedures.* (i) The licensee must submit the notification to the Commission by electronic filing, except that licensees falling within the provisions of § 1.911(d) of this part may file the notification either electronically or manually. Except as provided in paragraph (ii) herein, such notification must be submitted within 14 days of execution of the spectrum leasing arrangement and at least 21 days in advance of commencing operations.

(ii) For spectrum manager leasing arrangements of one year or less, the licensee must provide notification to the Commission within 14 days of execution of the spectrum leasing arrangement and at least ten (10) days in advance of operation. If the licensee and spectrum lessee 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.

(2) *Application fees.* There are no application fees required for the filing of a spectrum manager leasing notification.

(3) *Public notice of notifications.* Notifications under this subpart will be placed on an informational public notice on a weekly basis (*see* § 1.933(a) of this part).

(4) *Contents of notification.* The notification must contain all information requested on the applicable form, FCC Form 603, and any additional information and certifications required by the rules in this chapter and any rules pertaining to the specific service for which the notification is filed.

(5) *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.

(f) *Commission termination of a spectrum manager leasing arrangement*. The Commission retains the right to investigate and terminate any spectrum manager leasing arrangement if it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control of the leased spectrum, is otherwise in violation of the rules in this chapter, or raises foreign ownership, competitive, or other public interest concerns. Information concerning any such termination will be placed on public notice.

(g) *Expiration, extension, or termination of a spectrum leasing arrangement*. (1) Absent Commission termination or except as provided in paragraph (2) or (3) herein, 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 within 14 days of execution of the extension and at least 21 days in advance of operation under the extended term.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(h) *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 at least 21 days before the consummation of the assignment, pursuant to the notification procedures set forth in this section. In the case of a *pro forma* assignment, the licensee may file the notification regarding the action subject to the rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of

this part. The Commission will place information concerning a notification related to an assignment, whether substantial or *pro forma*, on public notice.

(i) *Transfer of control of a spectrum lessee.* The licensee must notify the Commission of any transfer of control of a spectrum lessee at least 21 days before the consummation of the transfer of control, pursuant to the notification procedures of this section. In the case of a *pro forma* transfer of control of the spectrum lessee, the licensee may file the notification regarding the action subject to the same rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of this part. The Commission will place information concerning a notification related to a transfer of control, whether substantial or *pro forma*, on public notice.

(j) *Revocation or automatic cancellation of a license or a spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have any authority to operate under the license, except as provided in paragraph (2) of this subsection.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931 of this part) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(k) *Subleasing*. A spectrum lessee may sublease the leased spectrum usage rights subject to the licensee's consent and the licensee's establishment of privity with the spectrum sublessee. The licensee must submit a notification regarding the spectrum subleasing arrangement in accordance with the notification procedures set forth in this section.

(l) *Renewal*. A licensee and spectrum lessee that have entered into a spectrum leasing 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 during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal (*see* § 1.949 of this part).

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

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a long-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A "long-term" *de facto* transfer leasing arrangement has an individual term, or series of combined terms, of more than 360 days.

(b) *Rights and responsibilities of the licensee.* (1) Except as provided in paragraph (2) herein, the licensee is relieved of primary and direct responsibility for ensuring that the spectrum lessee's operations comply with the Communications Act and Commission policies and rules.

(2) The licensee is responsible for its own violations, including those related to its spectrum leasing arrangement with the spectrum lessee, and for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge or should have knowledge.

(3) The licensee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(c) *Rights and responsibilities of the spectrum lessee.* (1) The spectrum lessee assumes primary responsibility for complying with the Communications Act and applicable Commission policies and rules.

(2) The spectrum lessee is granted an instrument of authorization pertaining to the *de facto* transfer leasing arrangement that brings it within the scope of the Commission's direct forfeiture provisions under § 503(b) of the Communications Act.

(3) The spectrum lessee is responsible for interacting with the Commission regarding the leased spectrum and for making all related filings (*e.g.*, all applications and notifications, submissions of any materials required to support a required Environmental Assessment, any reports required by Commission rules and applicable to the lessee, information necessary to facilitate international or Interdepartment Radio Advisory Committee (IRAC) coordination).

(4) The spectrum lessee is required to maintain accurate information on file pursuant to Commission rules (*see* § 1.65 of this part).

(5) The spectrum lessee must retain a copy of the spectrum leasing agreement and make it available upon request by the Commission.

(d) *Applicability of particular service rules and policies.* Under a long-term *de facto* transfer leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization.

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (*see* §§ 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of this part).

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* (i) A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 of this part and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 of this part and § 24.714 of this

chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a long-term *de facto* transfer leasing arrangement with any entity under the streamlined processing procedures described in this section, subject to any applicable unjust enrichment payment obligations and/or transfer restrictions (*see* § 1.2111 of this part and § 24.839 of this chapter).

(ii) A licensee holding a license won in closed bidding (*see* § 24.709 of this chapter) may, during the first five years of the license term, enter into a spectrum leasing arrangement with an entity not eligible to hold such a license pursuant to the requirements of section 24.709(a) of this chapter so long as it has met its five-year construction requirement (*see* §§ 24.203, 24.839(a)(6) of this chapter).

(iii) The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the application under the same rules that apply in the context of a license assignment or transfer of control (*see* § 1.2111 of this part and § 24.714 of this chapter). If the spectrum leasing arrangement involves only part of the license area and/or part of the bandwidth covered by the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated (*see* § 1.2111(e) of this part and § 24.714(c) of this chapter). A licensee will receive no reduction in its unjust enrichment payment obligation for a spectrum leasing arrangement that ends prior to the end of the fifth year of the license term.

(iv) A licensee that participates in the Commission's installment payment program (*see* § 1.2110(g) of this part) may enter into a long-term *de facto* transfer leasing arrangement without triggering unjust enrichment obligations provided that the lessee would qualify for as favorable a category of installment payments. A licensee using installment payment financing that seeks to lease to an entity not meeting the eligibility standards for as favorable a category of installment payments must make full payment of the remaining unpaid principal and any unpaid interest accrued through the effective date of the spectrum leasing arrangement (*see* § 1.2111(c) of this part). This requirement applies regardless of whether the licensee is leasing all or a portion of its bandwidth and/or license area.

(5) *Construction/performance requirements.* Any performance or build-out requirement applicable under a license authorization (*e.g.*, a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and the legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable build-out or performance requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Cellular cross-interest rule.* The cellular cross-interest rule applies to spectrum leasing arrangements involving a cellular authorization in a Rural Service Area (RSA), and leased cellular spectrum is attributable to the spectrum lessee pursuant to § 22.942 of this chapter (*see* §§ 22.942, 22.909 of this chapter).

(7) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis.

(8) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152 of this part). Where, however, regulatory fees are paid annually on a per-unit basis (such as for CMRS services pursuant to § 1.1152 of this part), the licensee and spectrum lessee each are required to pay fees for those units associated with its respective operations.

(9) *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 with the E911 obligations.

(e) *Spectrum leasing application.* Parties entering into a long-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 603, 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 § 1.911(d) of this part may file the notification either electronically or manually.

(1) *Application fees.* The spectrum leasing application will be treated as a transfer of control for purposes of determining the applicable application fees as set forth in § 1.1102 of this part.

(2) *Streamlined approval procedures.* (i) The spectrum leasing application will be placed on public notice once the application is sufficiently complete and accepted for filing (*see* § 1.933 of this part).

(ii) Petitions to deny filed in accordance with § 309(d) of the Communications Act must comply with the provisions of § 1.939 of this part 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.

(iii) 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 remove the application from streamlined processing for further review. For applications for which no prior public notice is required, the Bureau will affirmatively consent to the application, deny the application, or remove the application from streamlined processing for 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 of this part).

(iv) Grant of consent to the application will be reflected in a Public Notice (*see* §1.933(a)(2) of this part) promptly issued after the grant.

(v) If the Bureau determines to remove an application from streamlined processing, it will issue a Public Notice indicating that the application has been removed from streamlined processing. Within 90 days 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 an application is not deemed granted until the Bureau affirmatively acts upon the application.

(vii) 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).

(3) *Public notice of application.* Applications under this subpart will be placed on an informational public notice on a weekly basis (*see* § 1.933(a) of this part).

(4) *Contents of the application.* The application must contain all information requested on the applicable form, FCC Form 603, and any additional information and certifications required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed.

(5) *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.

(f) *Expiration, extension, or termination of spectrum leasing arrangement*. (1) Except as provided in paragraph (2) or (3) herein, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the application. The Commission's consent to the *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) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the application procedures set forth in § 1.9030(e) of this subpart. Where there is pending before the Commission at the date of termination of the spectrum leasing arrangement a proper and timely application seeking to extent 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.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(g) *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 of the spectrum lessee is approved by the Commission pursuant to the same application and approval procedures set forth in this section. In the case of a *pro forma* assignment, the parties involved in the *pro forma* transaction may file the notification regarding the action subject to the rules and procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of this part. The Commission will place information concerning the a notification relating to an assignment, whether substantial or *pro forma*, on public notice.

(h) *Transfer of control of spectrum lessee.* A spectrum lessee contemplating a 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 *pro forma* transfer of control of the spectrum lessee, the parties involved in the *pro forma* transaction may file the notification regarding the action subject to the rules and

procedures regarding *pro forma* transactions applicable to licensees set forth in § 1.948(c)(1) of this part. The Commission will place information concerning the a notification relating to a transfer of control, whether substantial or *pro forma*, on public notice.

(i) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have authority to operate under the license, except as provided in paragraph (2) of this subsection.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931 of this part) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(j) *Subleasing*. A spectrum lessee may sublease spectrum usage rights subject to the following conditions. Parties entering into a spectrum subleasing arrangement are required to comply with the Commission's rules for obtaining approval for spectrum leasing arrangements provided in this subpart and are governed by those same policies. The application filed by parties to a spectrum subleasing arrangement must include written consent from the licensee to the proposed arrangement. Once a spectrum subleasing arrangement has been approved by the Commission, the sublessee becomes the party primarily responsible for compliance with Commission rules and policies.

(k) *Renewal*. A licensee and spectrum lessee that have entered into a spectrum leasing 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 during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal (*see* § 1.949 of this part). 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 extension of the spectrum leasing arrangement.

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

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a short-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A "short-term" *de facto* transfer leasing arrangement has an individual or combined term of not longer than 360 days.

(b) *Rights and responsibilities of licensee.* The rights and responsibilities applicable to a licensee that enters into a short-term *de facto* transfer leasing arrangement are the same as those applicable to a licensee that enters into a long-term *de facto* transfer leasing arrangement, as set forth in § 1.9030(b) of this subpart.

(c) *Rights and responsibilities of spectrum lessee.* The rights and responsibilities applicable to a spectrum lessee that enters into a short-term *de facto* transfer leasing arrangement are the same as those

applicable to a spectrum lessee that enters into a long-term *de facto* transfer leasing arrangement, as set forth in § 1.9030(c) of this subpart.

(d) *Applicability of particular service rules and policies.* Under a short-term *de facto* leasing arrangement, the service rules and policies apply to the licensee and spectrum lessee in the same manner as under long-term *de facto* transfer leasing arrangements (*see* § 1.9030(d) of this subpart), except as provided herein:

(1) *Use restrictions and regulatory classification.* Use restrictions applicable to the licensee also apply to the spectrum lessee except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis, and except that a licensee with an authorization that restricts use of spectrum to non-commercial uses may enter into a short-term *de facto* transfer leasing arrangement that allows the spectrum lessee to use the spectrum commercially.

(2) *Designated entity/entrepreneur rules.* Unjust enrichment provisions (*see* § 1.2111 of this part) and transfer restrictions (*see* § 24.839 of this chapter) do not apply with regard to a short-term *de facto* transfer leasing arrangement.

(3) *Construction/performance requirements.* The licensee is not permitted to attribute to itself the activities of its spectrum lessee when seeking to establish that performance or build-out requirements applicable to the licensee have been met.

(4) *Cellular cross-interest rule and policies.* The cellular cross-interest rule and policies (*see* § 22.942 of this chapter) do not apply with regard to short-term *de facto* transfer leasing arrangements.

(5) *E911 requirements.* If E911 obligations apply to the licensee (*see* § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum. A spectrum lessee entering into a short-term *de facto* transfer leasing arrangement is not separately required to comply with any such obligations in relation to the leased spectrum.

(e) *Spectrum leasing application.* Parties entering into a short-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 603, 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 § 1.911 of this part may file the application either electronically or manually. Commission approval of such application is granted pursuant to special temporary authority (STA) policies (*see* § 309(f) of the Communications Act).

(1) *Application fees.* The spectrum leasing application will be treated as a transfer of control for purposes of determining the applicable application fees as set forth in § 1.1102 of this part.

(2) *Approval procedures.* (i) The spectrum leasing application must be filed at least ten (10) days prior to the date on which the spectrum lessee seeks to commence operation under the spectrum leasing arrangement. If the application meets the conditions specified in this section for a short-term *de facto* transfer leasing arrangement, it will be granted or denied within ten (10) days of receipt of the complete application.

(ii) The Commission may grant authority to permit operation under a short-term *de facto* transfer leasing arrangement for a maximum period of 180 days. The Commission may grant extension of the temporary authority as provided in § 1.9035(g)(2) of this section.

(iii) In no event may parties use the procedures for short-term *de facto* transfer leasing arrangements to enter into arrangements that would exceed 360 days.

(3) *Contents of the application.* (i) The application must contain all information requested on the applicable form, FCC Form 603, and any additional information and certifications required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed.

(ii) The application must contain a showing that grant of the temporary authority to permit implementation of the short-term *de facto* transfer leasing arrangement would further the public interest.

(4) *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 specified in the grant of temporary authority.

(f) *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 360 days, or that the parties reasonably expect to exceed 360 days.

(2) The licensee and spectrum lessee must submit, in sufficient time prior to the expiration of the short-term *de facto* transfer spectrum leasing arrangement, the appropriate application under the rules and procedures applicable to long-term *de facto* leasing arrangements, and obtain Commission consent pursuant to those procedures.

(g) *Expiration, extension, or termination of the spectrum leasing arrangement*. (1) Except as provided in paragraph (2) or (3) herein, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the grant of temporary authority. The Commission's grant of temporary authority pursuant to the *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* subsection 1.9035(e) of this section), a short-term *de facto* transfer leasing arrangement may be extended beyond the initial term set forth in the application, for one or more terms of up to 180 days each, provided that the initial term and extension(s) together would not result in a leasing arrangement that exceeds a total of 360 days.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(h) *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 360-day limit for short-term *de facto* transfer leasing arrangements, the parties may do so provided that they meet the conditions set forth in this subsection.

(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) of this part) beyond 360 days, 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.

(3) The licensee and spectrum lessee are not permitted to convert a short-term *de facto* transfer leasing arrangement into a long-term *de facto* transfer leasing arrangement if the parties would have been restricted, in the first instance, from entering into a long-term *de facto* transfer leasing arrangement because of a transfer, use, or other restriction applicable to the particular service (*see generally* § 1.9030 of this subpart).

(i) *Assignment of spectrum leasing arrangement.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(g) of this subpart) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(j) *Transfer of control of spectrum lessee.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(h) of this subpart) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(k) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(i) of this subpart) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(l) *Subleasing*. A spectrum lessee that has entered into a short-term *de facto* transfer leasing arrangement is not permitted to enter into a spectrum subleasing arrangement.

(m) *Renewal*. The rule applicable with regard to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(k) of this subpart) applies in the same manner to short-term *de facto* transfer leasing arrangements, except that the extension of the short-term *de facto* transfer leasing arrangement into the term of the renewed license authorization cannot enable the combined terms of the short-term *de facto* transfer leasing arrangements to exceed 360 days. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal (*see* § 1.949 of this part).

§ 1.9040 Contractual requirements applicable to spectrum leasing arrangements.

(a) Agreements between licensees and spectrum lessees concerning spectrum leasing arrangements entered into pursuant to the rules of this subpart must contain the following provisions:

(i) 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 the applicable requirements;

(ii) If the license is revoked, cancelled, terminated, or otherwise ceases to be in effect, the spectrum lessee has no continuing authority or right to use the leased spectrum unless otherwise authorized by the Commission;

(iii) The spectrum leasing arrangement is not an assignment, sale, or transfer of the license itself;

(iv) The spectrum leasing arrangement shall not be assigned to any entity that is ineligible or unqualified to enter into a spectrum leasing arrangement under the applicable rules as set forth in this subpart;

(v) The licensee shall not consent to an assignment of a spectrum leasing arrangement unless such assignment complies with applicable Commission rules and regulations.

(b) Agreements between licensees that hold licenses subject to the Commission's installment payment program (*see* § 1.2110 of this part and related service-specific rules) and spectrum lessees must contain the following additional provisions:

(i) The express acknowledgement that the license remains subject to the Commission's priority lien and security interest in the license and related proceeds, consistent with the provisions set forth in section 1.9045 of this subpart; and

(ii) The agreement that the spectrum lessee shall not hold itself out to the public as the holder of the license and shall not hold itself out as a licensee by virtue of its having entered into a spectrum leasing arrangement.

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

(a) If a licensee that holds a license subject to the Commission's installment payment program (*see* § 1.2110 of this part and related service-specific rules) enters into a spectrum leasing arrangement pursuant to the rules in this subpart, the licensee remains fully and solely responsible for the outstanding debt amount owed to the Commission. Nothing in a spectrum leasing arrangement, or arising from a spectrum lessee's bankruptcy or receivership, can modify the licensee's sole responsibility for its obligation to repay its entire debt obligation under the installment payment program pursuant to applicable Commission rules and regulations and the associated note(s) and security agreement(s).

(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 spectrum lessee may effectuate a spectrum leasing arrangement with respect to that license only insofar as Commission-required and approved note(s) and security agreement(s) have been executed that expressly establish, in the context of a spectrum leasing arrangement, the licensee's sole responsibility and obligation to repay the entire amount of its debt obligations to the Commission relating to the license.

§ 1.9050 Who may sign spectrum leasing notifications and applications.

Under the rules set forth in this subpart, certain notifications and applications to the Commission must be filed by licensees and spectrum lessees that enter into spectrum leasing arrangements. In addition, the rules require that certain notifications and applications be filed by the licensee and/or the spectrum lessee after they have entered into such arrangements. Whether the signature of the licensee, the spectrum lessee, or both, is required will depend on the particular notification or application involved, and whether the leasing arrangement concerns a spectrum manager leasing arrangement or a *de facto* transfer leasing arrangement.

(a) Except as provided in paragraph (b) of this section, the notifications, applications, amendments, and related statements of fact required by the Commission (including certifications) must be signed as follows (either electronically or manually, *see* paragraph (d) of this section): (1) By the licensee or spectrum lessee, if an individual; (2) by one of the partners if the licensee or lessee is a partnership; (3) by an officer, director, or duly authorized employee, if the licensee or lessee is a corporation; or (4) by a member who is an officer, if the licensee or lessee is an unincorporated association.

(b) Notifications, applications, amendments, and related statements of fact required by the Commission may be signed by the licensee or spectrum lessee's attorney in case of the licensee's or lessee's physical disability or absence from the United States. The attorney shall, when applicable, separately set forth the reason why the application is not signed by the licensee or lessee. In addition, if any matter is stated on the basis of the attorney's belief only (rather than knowledge), the attorney shall

separately set forth the reasons for believing that such statements are true. Only the original of notifications, applications, amendments, and related statements of fact need be signed.

(c) Notifications, applications, amendments, and related statements of fact need not be signed under oath. Willful false statements made therein, however, are punishable by fine and imprisonment (*see* 18 U.S.C. § 1001), and by appropriate administrative sanctions, including revocation of license pursuant to § 312(a)(1) of the Communications Act of 1934 or revocation of the spectrum leasing arrangement.

(d) "Signed," as used in this section, means, for manually filed notifications and applications only, an original hand-written signature or, for electronically filed notifications and applications only, an electronic signature. An electronic signature shall consist of the name of the licensee or spectrum lessee transmitted electronically via ULS and entered on the application as a signature.

§1.9055 Assignment of file numbers to spectrum leasing notifications and applications.

Spectrum leasing notifications or applications submitted pursuant to the rules of this subpart are assigned file numbers and service codes in order to facilitate processing in the manner in which applications in subpart F are assigned file numbers (*see* § 1.926 of this part).

§ 1.9060 Amendments, waivers, and dismissals affecting spectrum leasing notifications and applications.

(a) Notifications and applications regarding spectrum leasing arrangements may be amended in accordance with the policies, procedures, and standards applicable to applications as set forth in subpart F of this part (*see* §§ 1.927, 1.929 of this part).

(b) The Commission may waive specific requirements of the rules affecting spectrum leasing arrangements and the use of leased spectrum, on its own motion or upon request, in accordance with the policies, procedures, and standards set forth in subpart F of this part (*see* § 1.925 of this part).

(c) Notifications and pending applications regarding spectrum leasing arrangements may be dismissed in accordance with the policies, procedures, and standards applicable to applications as set forth in subpart F of this part (*see* § 1.935 of this part).

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PART 27 – MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

8. The authority citation for Part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

9. Amend Section 27.4 by deleting the paragraph including and defining "*Band Manager.*"

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10. Revise the first paragraph of section 27.10 by deleting the phrase including reference to "*Band Manager* licenses." This first paragraph should now read as follows:

Except with respect to *Guard Band Manager* licenses, which are subject to subpart G of this part, the following rules apply concerning the regulatory status in the frequency bands specified in § 27.5.

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11. Revise section 27.12 by deleting subsection (b) altogether and by removing the subsection reference "(a)" from the sole paragraph remaining under this section. This remaining paragraph in section 27.12 should read as follows:

Except as provided in § 27.604, any entity other than those precluded by section 310 of the Communications Act of 1934, as amended, 47 U.S.C. § 310, is eligible to hold a license under this part.

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APPENDIX C

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 *Notice of Proposed Rulemaking* (*NPRM*).[2] The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[3]

A. Need for, and Objectives of, the Report and Order

2. In the Report and Order, we adopt policies, rules, and procedures designed to facilitate the ability of many Wireless Radio Services licensees, including small businesses, to lease spectrum usage rights to third parties. Our action is intended to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communication services, including small businesses, to enter into spectrum leasing arrangements with many Wireless Radio Service licensees. We believe that our approach will enable the public to benefit from the provision of additional wireless services, with less regulatory process and less delay than under existing policies and rules governing the transfer and assignment of spectrum licenses. These flexible policies continue our evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to more efficient and dynamic use of spectrum. The result, we believe, will be to the ultimate benefit of consumers throughout the country. Facilitating development of these secondary markets enhances and complements several of the Commission's major policy initiatives and public interest objectives, including 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 by designated entities,[4] and enable development of additional and innovative services in rural areas.

3. To achieve these goals, we adopt separate sets of policies to facilitate two different categories of spectrum leases, based on the scope of the rights and responsibilities to be assumed by the lessee: spectrum manager leasing and *de facto* transfer leasing. These two categories are discussed below.

4. With respect to spectrum manager leasing arrangements, we permit licensees to enter into spectrum leases without having to obtain prior Commission approval, so long as the licensee retains both *de jure* control of the license and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard for leasing that we adopt in the Report and Order. The licensee must file a

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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] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Notice of Proposed Rulemaking*, 15 FCC Rcd 24203, 24241 (2000) (*NPRM*).

[3] *See* 5 U.S.C. § 604.

[4] "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 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).

notification with the Commission regarding a spectrum manager leasing arrangement within 14 days of entering into the arrangement and at least 21 days in advance of operation of facilities by the lessee.

5. Within the category of *de facto* transfer leasing, we specify different policies for long-term spectrum leasing arrangements (longer than 360 days) and short-term spectrum leasing arrangements (360 days or less). With respect to *de facto* transfer leasing arrangements longer than 360 days, we adopt measures to allow licensees and spectrum lessees substantial flexibility to enter into a variety of contractual arrangements that transfer *de facto* control over the use of the leased spectrum, as well as associated rights and responsibilities, to spectrum lessees for a defined period of time, subject to prior Commission consent pursuant to streamlined application procedures. Under these streamlined procedures, licensees and spectrum lessees must file applications with the Commission. These applications will be granted within 21 days from the date of the public notice that lists the application as accepted for filing, or will be offlined, *see* Report and Order, paras. 151-152, where additional time is necessary to evaluate the proposed leasing arrangement. We authorize short-term leasing arrangements of up to 360 days in length pursuant to special temporary authority (STA) procedures. Under the short-term leasing procedures, applicants will file an application for the necessary approval from the Commission. Within ten days of receipt of that application, the Commission will either grant or deny the special temporary authority to permit the lease arrangement to be implemented.

6. In addition to the spectrum leasing policies adopted in the Report and Order, we also adopt rules and policies to apply streamlined processing to transfer of control and license assignment applications in the Wireless Radio Services encompassed within the new spectrum leasing policies. Under this streamlined procedure, transfer of control and license assignment applications will be granted or offlined, *see* Report and Order, paras. 197-198, for additional review where additional time is necessary, within 21 days of being placed on public notice as accepted for filing.

7. Finally, in the context of spectrum leasing, we determine that the Commission at this time will only gather the information necessary for spectrum manager leasing notifications and *de facto* transfer leasing applications. This collected information is similar to the information the Commission collects in reviewing and acting on applications for consent to transfers of control and license assignment, and will provide a significant amount of data to parties seeking to gain access to spectrum usage rights through leasing. At this stage of the proceeding, we do not impose any additional information filing requirements for spectrum leasing or establish a spectrum registry. Rather, we further explore this issue in the Further Notice (including the respective roles of the Commission and the private sector in compiling such information as well as the potential costs for the parties to spectrum leasing arrangements and the Commission) because we believe that access to information is a necessary ingredient in promoting secondary markets.

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

8. Although no comments were submitted directly in response to the IRFA, many commenters noted that spectrum leasing could benefit small or rural carriers by enabling access to unused spectrum licensed to other entities, and could promote the deployment of wireless services to rural and underserved populations.[5] OPASTCO, for example, stated that the Commission would serve the public interest while furthering the RFA[6] and SBREFA[7] by granting small carriers additional flexibility needed to serve their

[5] *See, e.g.*, Blooston Rural Carriers Comments; NTCA Comments; OPASTCO Comments; RCA Comments; RTG Comments; Securicor Comments at 6; U.S. Small Business Administration Comments.

[6] Regulatory Flexibility Act, as amended, 5 U.S.C. §§ 601-612.

[7] Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

communities and reducing administrative burdens on those small carriers that may wish to pursue innovative arrangements for spectrum access with other license holders.[8] As described in Section E, *infra*, the Report and Order provides significant flexibility for licensees in many Wireless Radio Services and for potential spectrum lessees to enter into spectrum leasing arrangements meeting their business needs, consistent with applicable statutory requirements. Moreover, the Report and Order adopts rules and policies to simplify and streamline the necessary administrative steps.

9. In a similar vein, RTG noted that the leasing of spectrum usage rights would increase the use of assigned spectrum and would place spectrum into the hands of rural telephone companies and entrepreneurs who are willing to serve the less populated portions of license areas.[9] The Report and Order, as explained in Section E, *infra*, specifically seeks to facilitate more efficient spectrum use and would provide rural telephone companies and other innovators with access to spectrum to implement new wireless services and to help meet the wireless telecommunications needs in underserved areas (including rural areas).[10]

10. In addition to these general observations, the Commission in the *NPRM* had specifically requested comment on the extent to which the qualification and eligibility rules and policies that are generally applicable to each licensee in a particular service should be applied to third-party entities seeking to lease spectrum.[11] The Commission requested comment on whether and how the "designated entity,"[12] entrepreneur,[13] bidding credit, and unjust enrichment rules that apply to many services should be implemented with respect to spectrum leasing arrangements between designated entity licensees and third parties that do not qualify for the same status.[14] The Commission noted that, while interested in promoting spectrum leasing, it also sought to ensure that its approach would not invite circumvention of the underlying purposes of these designated entity-related policies and rules.[15]

11. In response to this request for comment, RTG agreed with the Commission that leasing should not be used as a means of circumventing eligibility or service rules.[16] Leap Wireless, a designated entity, argued that the Commission should retain and apply its designated entity restrictions to all forms of spectrum leasing.[17] Leap Wireless further contended that permitting designated entities to lease spectrum

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[8] *See* OPASTCO Comments at 2-4.

[9] *See* RTG Comments at 2.

[10] *See* Report and Order at ¶ 2.

[11] *See NPRM* at ¶¶ 44-45.

[12] "Designated entities" include small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women. *See* 47 C.F.R. § 1.2110.

[13] For broadband PCS licenses, the Commission created entrepreneur set-asides of spectrum available only to eligible entities. *See* 47 C.F.R. § 24.709.

[14] *NPRM* at ¶¶ 44-45, 47-48, 52-55, 77.

[15] *NPRM* at ¶ 43.

[16] *See* RTG Comments at 27; RTG Reply Comments at 17-19.

[17] *See* Leap Wireless Reply Comments at 1-7.

usage rights to entities that are not similarly qualified would allow manipulation and evasion of the Commission's designated entity policies and rules.[18]

12. In contrast, a number of commenters argued that designated entity licensees should be free to enter into lease agreements with non-designated entities.[19] Alaska Native Wireless, Cook Inlet, TeleCorp, and Winstar stated that designated entities, entrepreneurs, small businesses, and minorities should be permitted to lease their spectrum without restrictions on spectrum lessee eligibility under the designated entity rules.[20] Alaska Native Wireless, Cingular Wireless, and Cook Inlet argued that if the eligibility rules were applied to lessees, many small businesses and entrepreneurs would be unable to take advantage of the benefits of secondary markets.[21] These parties suggested that unrestricted leasing would give designated entity licensees a mechanism for raising capital to build out and operate their systems in unleased license areas.[22] Nextel, AT&T Wireless, and Cingular Wireless argued that the Commission should refrain from imposing an eligibility requirement that would limit the pool of potential lessees.[23]

13. With regard to the applicability of the Commission's unjust enrichment rules, a number of commenters argued that designated entities that lease spectrum to non-designated entities should not be required to make unjust enrichment payments to the Commission.[24] The U.S. Small Business Administration opposed applying unjust enrichment provisions to the leasing of spectrum by designated entities because it believes that leasing spectrum is fundamentally different from selling it.[25] Similarly, AT&T Wireless argued that small businesses that lease spectrum have not been "unjustly enriched" because they are not selling the asset that was discounted.[26] NTCA stated that requiring small businesses, such as rural telephone companies, to repay bidding credits would serve as a significant disincentive for carriers to be inventive about using spectrum.[27] Blooston Rural Carriers argued that allowing small businesses to retain the full value of their bidding credits when leasing their spectrum would promote greater opportunity for small businesses, because it would encourage these carriers to enter into a variety of business ventures.[28]

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[18] *See id*.

[19] *See, e.g.*, Alaska Native Wireless Comments at 9-13; AT&T Wireless Comments at 8-9; Blooston Rural Carriers Comments at 5-6; Cingular Wireless Comments at 8; Cook Inlet Comments at 7-9; NTCA Comments at 6-8; TeleCorp Reply Comments at 1-4; Winstar Comments at 13-14.

[20] *See* Alaska Native Wireless Comments at 9-13; Cook Inlet Comments at 9; TeleCorp Reply Comments at 3-4; Winstar Comments at 13-14.

[21] *See* Alaska Native Wireless Comments at 11; Cingular Wireless Comments at 8; Cook Inlet Comments at 7-9.

[22] *See* Alaska Native Wireless Comments at 11; Cingular Wireless Comments at 8; Cook Inlet Comments at 8.

[23] *See* AT&T Wireless Comments at 8; Cingular Wireless Comments at 8; Nextel Comments at 15; Nextel Reply Comments at 13.

[24] *See* AT&T Wireless Comments at 8-9; Blooston Rural Carriers Comments at 5-6; NTCA Comments at 6-8; U.S. Small Business Administration Comments at 1-4.

[25] *See* U.S. Small Business Administration Comments at 1-4.

[26] *See* AT&T Wireless Comments at 8-9.

[27] *See* NTCA Comments at 6-8.

[28] *See* Blooston Rural Carriers Comments at 5-6; Blooston Rural Carriers Reply Comments at 5.

14. In contrast, RTG stated that designated entities should have the right to lease their spectrum to any party that qualifies to use the spectrum, but then should be required to pay back any auction subsidies they received from the Commission.[29] RTG noted that unjust enrichment payments would not foreclose such spectrum leasing as the cost likely would be factored into the lease negotiations between designated entities and non-designated entities.[30] Cook Inlet also argued that a licensee who received the benefit of a bidding credit and who subsequently enters into a long-term lease should be required to pay back some or all of the bidding credit.[31] With respect to short-term leases, however, Cook Inlet argued that a licensee should not have to make an unjust enrichment payment.[32]

15. 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 and its goals to promote opportunities for designated entities (which includes a significant number of small businesses) would be better served by enforcing its designated entity and unjust enrichment policies in the context of spectrum leases involving *de facto* transfer leasing, as explained in Section E, *infra*.

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

16. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by proposed rules.[33] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[34] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[35] 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).[36]

17. 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 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 the Report and Order does not revise any rules involving the Satellite Services, we do not provide an assessment of satellite-related small businesses. When identifying small

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[29] *See* RTG Reply Comments at 18-19.

[30] *See id.* at 19.

[31] *See* Cook Inlet Comments at 11-12.

[32] *See id.* at 12.

[33] 5 U.S.C. § 604(a)(3).

[34] 5 U.S.C. § 601(6).

[35] 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."

[36] 15 U.S.C. § 632.

entities that could be affected by our new rules, we provide information describing auction 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.

18. **Cellular Licensees.** The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications."[37] Under that SBA category, a business is small if it has 1,500 or fewer employees.[38] 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.[39] Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

19. **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.[40] 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.[41] 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.

20. **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.[42] 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.[43] A "very small business" is defined as an entity that, together with

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[37] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517212.

[38] *Id*.

[39] 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).

[40] 13 C.F.R. § 121.201, NAICS code 517212.

[41] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form Organization)," Table 5, NAICS code 513322 (October 2000).

[42] 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).

[43] *Id.* at 11068 ¶ 291.

its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[44] The SBA has approved these small size standards.[45] Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998.[46] 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.[47] 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.[48] 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.[49]

21. **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.[50] 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.[51] 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.[52] 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.[53] The SBA has approved these small size standards.[54] 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

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[44] *Id.*

[45] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[46] *See generally* "220 MHz Service Auction Closes," *Public Notice*, 14 FCC Rcd 605 (WTB 1998).

[47] *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).

[48] *See* "Phase II 220 MHz Service Spectrum Auction Closes," *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

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

[50] *See* Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), *Report and Order*, 17 FCC Rcd 1022 (2002).

[51] *Id.* at 1087-88 ¶ 172.

[52] *Id.*

[53] *Id.* at 1088 ¶ 173.

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

licenses.[55] 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.[56] 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.[57]

22. **Upper 700 MHz Band Licenses.** The Commission released a *Report and Order* authorizing service in the upper 700 MHz band.[58] This auction, previously scheduled for January 13, 2003, has been postponed.[59]

23. **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.[60] 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.[61] The SBA has approved this definition.[62] 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.[63] Fifty-seven companies claiming small business status won 440 licenses.[64] 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.[65] 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.[66] Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000

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

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

[57] *Id*.

[58] 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).

[59] *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).

[60] 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).

[61] *Paging Second Report and Order*, 12 FCC Rcd at 2811 ¶ 179.

[62] *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.

[63] *See* "929 and 931 MHz Paging Auction Closes," *Public Notice*, 15 FCC Rcd 4858 (WTB 2000).

[64] *See id*.

[65] *See* "Lower and Upper Paging Band Auction Closes," *Public Notice*, 16 FCC Rcd 21821 (WTB 2002).

[66] *See* "Lower and Upper Paging Bands Auction Closes," *Public Notice*, 18 FCC Rcd 11154 (WTB 2003).

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.[67] Of these, we estimate that 589 are small, under the SBA-approved small business size standard.[68] We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

24. **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.[69] 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.[70] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[71] 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.[72] On March 23, 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.[73]

25. **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.[74] Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.[75] To ensure meaningful participation by small business entities in

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[67] *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).

[68] 13 C.F.R. § 121.201, NAICS code 517211.

[69] *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).

[70] *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.

[71] *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.

[72] FCC News, "Broadband PCS, D, E and F Block Auction Closes," No. 71744 (rel. January 14, 1997).

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

[74] 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).

[75] *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*.[76] 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.[77] 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.[78] The SBA has approved these small business size standards.[79] A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.[80] Three of these claimed status as a small or very small entity and won 311 licenses.

26. **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.[81] 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.[82] The SBA has approved these small business size standards for the 900 MHz Service.[83] 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.[84] 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.[85]

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).

[76] 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).

[77] *Id*.

[78] *Id*.

[79] *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.

[80] *See* "Narrowband PCS Auction Closes," *Public Notice*, 16 FCC Rcd 18663 (WTB 2001).

[81] 47 C.F.R. § 90.814(b)(1).

[82] *Id*.

[83] *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.

[84] *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).

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

27. 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.

28. 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.

29. **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.[86] 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.[87]

30. The Commission's 1994 Annual Report on PLMRs[88] indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

31. **Fixed Microwave Services.** Fixed microwave services include common carrier,[89] private-operational fixed,[90] and broadcast auxiliary radio services.[91] Currently, there are approximately 22,015

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[86] *See* 13 C.F.R. § 121.201, NAICS code 517212.

[87] *See generally* 13 C.F.R. § 121.201.

[88] Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at ¶ 116.

[89] 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

[90] 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.

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.[92] 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.

32. **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.[93] The SBA has approved these definitions.[94] 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.

33. **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.[95] "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.[96] The SBA has approved these definitions.[97] 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.

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[91] 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.

[92] 13 C.F.R. § 121.201, NAICS code 517212.

[93] 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).

[94] *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.

[95] *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).

[96] *Id*.

[97] *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.

34. **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.[98] 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.[99] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[100] 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.

35. **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).[101] 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.[102] 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.[103] 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 for the preceding three years.[104] The SBA has approved of these definitions.[105] 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

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[98] *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).

[99] *Id*.

[100] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[101] *See* "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

[102] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

[103] 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).

[104] *Id*.

[105] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

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.

36. **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.[106] 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.[107] These definitions have been approved by the SBA.[108] 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.

37. **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.[109] 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.

38. **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.[110] 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.

39. **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 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.[111] 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.

40. **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

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[106] 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.

[107] 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.

[108] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated February 22, 1999.

[109] 13 C.F.R. § 121.201, NAICS code 517212.

[110] *Id.*

[111] *Id*.

as an entity that has average gross revenues of less than $15 million in the three previous calendar years.[112] "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.[113] The SBA has approved of these definitions.[114] 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.[115] Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

41. 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.[116] 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.

42. **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 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.[117] We believe that there

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[112] *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 ¶ 123 (2000).

[113] *Id*.

[114] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

[115] *See* "Multiple Address Systems Spectrum Auction Closes," *Public Notice*, 16 FCC Rcd 21011 (2001).

[116] *See* 13 C.F.R. § 121.201, NAICS code 517212.

[117] *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 twelve 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 1,5000 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[118] 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.

43. **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.[119] "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.[120] The SBA has approved these definitions.[121] The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

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

44. The projected reporting, recordkeeping, and other compliance requirements resulting from this proceeding will apply to all entities in the same manner. We believe that equitably applying the same rules to all entities helps to promote fairness in the spectrum leasing process, and we do not believe that the costs and/or administrative burdens associated with the new rules will disproportionately affect small entities. Indeed, the rules adopted today should benefit small entities by giving them more information, more flexibility, and more options for acquiring valuable spectrum.

45. Parties seeking to implement spectrum leasing arrangements must file an electronic application on ULS, in accordance with the procedures discussed in the Report and Order. While we will not routinely require the lease applicants to file a copy of the lease agreement with the application, parties must maintain copies of the lease and the filed application, and must make them available for inspection by the Commission or its representatives.

46. For spectrum manager leasing arrangements, the licensee is responsible for filing a notification with the Commission regarding the nature of the arrangement. The licensee remains primarily responsible to the Commission for ensuring that the spectrum lessee operates consistent with the applicable interference-related and other service rules. (The lessee remains subject to all of the interference-related service rules and most of the non-interference-related rules, including the eligibility and qualification rules and use restrictions, applicable to the licensee.) The licensee also submits any filings to the Commission required in connection with the lessee's operations under the spectrum manager leasing arrangement. The Commission retains the authority, in appropriate situations, to proceed directly against a spectrum lessee in order to halt unacceptable interference.

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[118] 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.

[119] 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).

[120] *24 GHz Report and Order*, 15 FCC Rcd at 16967 ¶ 77; *see also* 47 C.F.R. § 101.538(a)(1).

[121] *See* Letter to Margaret Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Gary Jackson, Assistant Administrator, Small Business Administration, dated July 28, 2000.

47. Following Commission approval of *de facto* transfer leasing applications, spectrum lessees assume primary responsibility for compliance with Commission rules and policies in the geographic areas and on the frequencies covered by the lease. As under spectrum manager leasing arrangements, lessees are subject to all of the interference-related service rules and most of the non-interference-related rules, including the eligibility and qualification rules, though lessees in short-term leasing arrangements have additional flexibility with regard to certain use restrictions otherwise applicable to licensees in particular services. Lessees become responsible for making any applicable filings, including ULS applications and notifications, submission of any materials required to support a required Environmental Assessment, any reports required by our rules and applicable to the lessee, information necessary to facilitate international or IRAC coordination, or any other submissions that would be applicable to the lessee's operations if it instead were a full licensee. In addition, lessees are obligated to maintain accurate information on file pursuant to section 1.65 of our rules.[122] To facilitate our recordkeeping as well as access to information necessary to undertake any necessary enforcement inquiries or actions, we will assign a specific designator to the approved lease operations, which will reflect its association with the licensee's underlying call sign.

48. For both short-term and long-term *de facto* transfer leasing, the licensee retains certain residual responsibilities to the Commission for operations on spectrum encompassed within its license. We would subject the licensee to appropriate enforcement action if, for example, a licensee engaged in a sham leasing arrangement with an affiliate in an effort to enable that affiliate to undertake activities that might otherwise put the license at risk if undertaken directly by the licensee. We will also hold the licensee responsible for ongoing violations or other egregious behavior on the part of the spectrum lessee about which the licensee has knowledge.

49. Our adoption of streamlined processing for transfer of control and license assignment applications requires all entities to file an application with us in order to obtain Commission consent. This requirement currently applies to all entities, regardless of size, and will continue to do so. In connection with implementing this streamlined review process, the required application forms may be simplified or streamlined, thus reducing the burdens on small businesses and all other potential applicants, regardless of size.

E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

50. 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.[123]

51. Establishment of policies, rules, and streamlined procedures to facilitate the ability of parties to enter into a wide variety of flexible leasing arrangements involving our Wireless Radio Services. *See* Report and Order, para. 39. We do not anticipate any adverse impact on small entities as a result of taking steps to facilitate spectrum leasing in many of our Wireless Radio Services and reducing the regulatory burdens associated with entering into such arrangements. Indeed, facilitating spectrum leasing arrangements will permit spectrum lessees to obtain access to and use spectrum in a manner best

[122] 47 C.F.R. § 1.65. This section requires applicants to maintain the accuracy and completeness of information on file with the Commission.

[123] 5 U.S.C. §§ 603(c)(1)-(4).

suited to meeting the particular needs and business plans of both licensees and lessees. By affording existing licensees additional flexibility to enter into leasing arrangements with third parties that can put spectrum into use, we will help to alleviate spectrum constraints and provide new opportunities to put underutilized or fallow spectrum to efficient use. We believe that the rules and policies we adopt will benefit all parties, including small entities, that would like to lease their spectrum to others or obtain additional spectrum for their own use. Small entities, like all covered entities, will be governed by reduced filing requirements and reduced regulatory uncertainty.

52. Replacement of the *Intermountain Microwave* standard with a new *de facto* control standard for determining whether an unauthorized transfer of control has occurred in the context of spectrum leasing. *See* Report and Order, paras. 51-65. We anticipate no adverse impact on small entities as a result of adopting a new standard for assessing *de facto* control in the context of spectrum leasing. We believe that this revised *de facto* control standard achieves a better balance between the statutory requirements of Section 310(d) of the Communications Act of 1934, as amended,[124] and the realities of today's wireless marketplace and advancing technologies. By adopting this revised standard, we can permit licensees and spectrum lessees to enter into spectrum manager leasing arrangements without having to first obtain prior Commission approval. To the extent that the spectrum manager leasing arrangement can be tailored to meet the needs of a licensee and a spectrum lessee, this option will provide small entities as well as all other entities with an opportunity to enter into spectrum leasing arrangements for which only a notification to the Commission is required.

53. Applicability of spectrum leasing rules to many, but not all, Wireless Radio Services. *See* Report and Order, para. 85. The Report and Order extends flexible spectrum leasing opportunities to a wide array of our Wireless Radio Services. As indicated in Section A, *supra*, these new policies will benefit a number that entities that are licensees in these services as well as entities that might seek to lease spectrum from license holders, specifically including small entities. Because of the potential benefits for this wide-ranging group of entities, we have not designed particular benefits for small entities, which might provide this latter category with unwarranted competitive advantages. With regard to our decision to exclude certain Wireless Radio Services and certain categories of Wireless Radio Service licensees, including services involving operation on shared frequencies, from the scope of the new rules adopted in the Report and Order, we acknowledge that certain small (and large) entities that might benefit from entering into spectrum leasing agreements will not be allowed to take advantage of our new rules at this time. While we decide not to extend our spectrum leasing policies and rules to licensees in the excluded services in the Report and Order, we note that in the Further Notice, we consider whether to extend our leasing policies to these and other additional services. An alternative to this approach would have been to allow other or all wireless licensees to enter into spectrum leasing agreements at this time. Many of these services were excluded by the explicit provisions of the *NPRM* from consideration, and thus we have little record to support extending spectrum leasing rules to these services at this time. Rather, the Further Notice issued in conjunction with the Report and Order seeks additional comment on the appropriateness of extending the spectrum leasing rules adopted in the Report and Order to other categories of Wireless Radio Service licensees.

54. General applicability of license service rules and policies to spectrum lessees. *See* Report and Order, para. 91. The Report and Order determines that, as a general matter, the service rules and policies governing a licensee will also be applied to a spectrum lessee. We acknowledge that this approach may cause administrative compliance burdens and costs for small entities that choose to become spectrum lessees. These same costs and burdens, however, are imposed on all entities seeking to become spectrum lessees, just as all licensees wishing to enter into spectrum leasing arrangements must comply with the applicable requirements governing the form of arrangement. An alternative to the approach

[124] 47 U.S.C. § 310(d).

adopted in the Report and Order would be to hold only the licensee responsible for compliance with the Commission's rules and policies. This approach would affect the burdens and responsibilities applicable to licensees that choose to enter into spectrum leasing, many of whom may be small entities. We reject this approach because we believe that our decision here will help prevent the undermining of our service rules and policies unless and until we explicitly decide to change such rules and policies. In fact, small (and large) entities, as well as the public, will benefit from licensees and lessees adhering to, for example, our interference and RF radiation rules.

55. Licensee reliance on spectrum lessee activities to meet construction or performance obligations. *See* Report and Order, paras. 114-115, 147, 177. We decided in the Report and Order that licensees that engage in spectrum leasing arrangements remain responsible for complying with the construction or performance obligations associated with the license. The Report and Order determines that licensees that participate in spectrum manager leasing arrangements and long-term *de facto* transfer spectrum leasing arrangements can rely upon the activities of their spectrum lessees in satisfying their construction and/or performance obligations. We anticipate no adverse impact on small entities as a result of this decision, since our approach in fact offers additional flexibility for licensees and should encourage parties to enter into leasing agreements without added concern that the arrangement will impede licensee compliance with our construction and performance rules. The Report and Order also determined that licensees that participate in short-term *de facto* transfer spectrum leasing arrangements would not be able to rely upon the activities of the short-term lessee to satisfy the construction and/or performance obligations. Since short-term *de facto* transfer spectrum leasing arrangements are intended to be of limited duration, we believe that this step is necessary to ensure that licensees do not seek to evade enforcement of our construction and/or performance obligations. This action poses no greater burden on small entities but treats all licensees that seek to enter into spectrum leasing arrangements on a comparable basis.

56. Applicability of designated entity eligibility and unjust enrichment policies. *See* Report and Order, paras. 113, 145, 176. In the Report and Order, we continue to apply the existing designated entity and entrepreneur policies to both spectrum manager leasing arrangements and long-term *de facto* transfer leasing arrangements. Under the spectrum manager leasing policies, we allow designated entity and entrepreneur licensees to enter into leasing arrangements with spectrum lessees without triggering application of the Commission's unjust enrichment rules and/or transfer restrictions so long as the lease does not allow the lessee to become a "controlling interest" or "affiliate" of the licensee (as defined under existing Commission rules) such that the licensee would lose its designated entity or entrepreneur status. For long-term *de facto* transfer spectrum leasing, we allow licensees that have received designated entity benefits or hold a license as an entrepreneur to enter into long-term *de facto* transfer spectrum leasing arrangements with other entities, subject to provisions on transfer restrictions and unjust enrichment that apply to transfers or assignments of such licenses.[125] We decide, however, not to subject short-term *de facto* transfer spectrum leasing arrangements to the designated entity eligibility and unjust enrichment policies, in order to promote the availability of spectrum pursuant to spectrum leasing arrangements to meet short-term needs. We believe that providing this flexibility for leasing arrangements that are of short duration will not undermine enforcement of our general rules and policies. In each of these types of leasing arrangements, small entities will be affected by these policies, but will be treated comparably to larger entities that may be affected as licensees, spectrum lessees, or potential spectrum lessees.

57. Our decision in this area necessarily balances competing statutory obligations, competing public interest considerations, and the competing viewpoints expressed in comments filed with the Commission in this docket. We believe, however, that our decision about how to address these issues in the context of the three categories of spectrum leasing arrangements discussed in the Report and Order

[125] *See* 47 C.F.R. §§ 1.2111, 24.709.

strikes an appropriate balance of these many competing considerations that serves the public interest in facilitating secondary market transactions while also upholding the integrity of our rules promoting opportunities designated entities and entrepreneurs. The Commission already provides significant benefits to small businesses that have become licensees pursuant to our designated entity and entrepreneur policies. In the Report and Order, we allow these licensees to enter into spectrum manager and long-term *de facto* transfer leasing arrangements so long as doing so does not undermine those policies. As for short-term *de facto* transfer arrangements, we also do not apply these policies because we conclude that the opportunities for licensees and lessees to undermine our policies are slim in the context of arrangements of very limited duration, and because we seek to provide special flexibility in our rules when allowing parties to address short-term spectrum needs.

58. Accordingly, we decide that licensees that enter into spectrum manager and long-term *de facto* transfer leasing arrangements may confront limitations on their ability to enter into arrangements with interested parties to the extent that a particular license is still covered by any designated entity rules and policies restricting eligibility under the license. Under spectrum manager leasing arrangements, designated entity and entrepreneur licensees may enter into leasing arrangements insofar as such arrangements would not cause them to lose their designated entity or entrepreneur status under the Commission's applicable rules. For long-term *de facto* transfer arrangements, licensees must reimburse the government for unjust enrichment for leasing spectrum to a lessee in the same manner as it would have been required to pay had the licensee instead transferred it to that entity.[126] Further, in accordance with the Commission's rules and any applicable notes and security agreements, we will continue to hold a licensee participating in the Commission's installment payment program solely responsible for the debt obligation to the government. We believe that holding otherwise would allow entities to circumvent the rules concerning designated entities and would undermine the Commission's policies underlying those rules. The designated entity rules implement an explicit Congressional mandate to the Commission to allocate licenses so as to promote "economic opportunity and competition," and to "ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wider variety of applicants, including small businesses."[127] If we did not require designated entities to abide by any applicable designated entity eligibility and unjust enrichment rules and policies when leasing to non-designated entities, parties could easily undermine rules fulfilling our Congressional mandate to set aside spectrum for the sole use of designated entities.

59. Spectrum manager subleasing. *See* Report and Order, para. 106. We anticipate no adverse impact on small entities from our decision to allow spectrum manager lessees to sublease their spectrum usage rights under certain conditions. In fact, subleasing would likely benefit small (and large) entities by offering additional flexibility to obtain spectrum that fits an entity's particular business needs.

60. Spectrum manager leasing arrangements – notification to the Commission. *See* Report and Order, paras. 123-124. The Report and Order requires licensees that enter into a spectrum manager leasing arrangement to provide notification of the lease arrangement to the Commission. We anticipate no adverse economic impact on small entities as a result of requiring this notification filing. The required notification required is not onerous, and will provide the Commission, other spectrum licensees (including small entities), other spectrum lessees (including small entities), potential spectrum lessees (including small entities), and the public with essential information about spectrum usage. It will also help to ensure licensee and lessee compliance with our interference, service, and other rules and polices.

[126] *See* 47 C.F.R. §§ 1.2111(b)-(e) (unjust enrichment relating to set-asides, installment financing, bidding credits, and partitioning or disaggregation).

[127] 47 U.S.C. § 309(j)(3)(B).

61. *De facto* transfer leasing arrangements – streamlined approval procedures. *See* Report and Order, paras. 133, 150-154, 163-165. The Report and Order adopts a streamlined prior approval process for parties entering into *de facto* transfer leasing arrangements pursuant to streamlined approval procedures. These streamlined procedures, designed to facilitate spectrum leasing to the greatest extent possible and consistent with the public interest, apply equally to small and large entities, and amount to a reduction in applicable regulatory requirements. We anticipate no adverse impact on small entities as a result of this action. In fact, our adoption of this second spectrum leasing option and related streamlined processing requirements should further enhance the development of more robust secondary markets in spectrum usage rights resulting in increased benefits to small (and large) entities seeking greater flexibility and increased access to spectrum. We believe that small entities that might not be able to afford to acquire spectrum at auction will be able to reduce their spectrum acquisition costs and access a particular amount of spectrum that meets their individual business needs.

62. In addition, the information collected under this streamlined approach is similar to what is currently required under our transfer and assignment rules and should facilitate spectrum leasing by reducing transaction costs, uncertainty, and delay. While an alternative would be to require no approval, we believe that this would run counter to our statutory responsibilities under Section 310(d) of the Communications Act.[128]

63. *De facto* transfer subleasing. *See* Report and Order, paras. 139-140. We anticipate no adverse impact to small entities from our decision to allow *de facto* transfer lessees to sublease their spectrum usage rights under certain conditions. Consistent with our rationale concerning spectrum manager subleasing, we believe that subleasing under *de facto* transfer leasing arrangements would likely benefit small (and large) entities by offering additional flexibility to obtain spectrum that fits an entity's particular business needs.

64. Short-term *de facto* transfer leasing arrangements. *See* Report and Order, paras. 175-180. In the Report and Order, we extend many of the policies applicable to long-term *de facto* transfer leasing arrangements to short-term *de facto* transfer leasing arrangements, except that we ease certain restrictions on lessees that enter into short-term *de facto* transfer leasing arrangements. We anticipate no adverse impact on small entities from this action. Due to the fact that these short-term leases are intended to address temporary spectrum needs, we believe that it is appropriate to permit additional flexibility for such arrangements. Thus, for example, we will allow licensees with authorizations that limit use to non-commercial purposes to enter into lease agreements that allow the lessee to use the spectrum commercially. Similarly, we will not subject licensees entering into short-term leases to designated entity unjust enrichment provisions or to entrepreneur transfer restrictions that would be applicable if a designated entity or entrepreneur licensee were to enter into a long-term lease arrangement or transfer or assign its license. Our approach here should benefit small (and large) entities by facilitating the use of short-term leases that meet temporary spectrum needs while maintaining the integrity of other Commission policies.

65. Streamlined processing for transfer of control and license assignment applications. *See* Report and Order, paras. 196-198. In addition to establishing spectrum leasing policies, the Report and Order also extends the same type of streamlined approval procedures applicable to long-term *de facto* transfer leasing arrangements to our review and approval procedures for license assignments and transfers of control in those services affected by our spectrum leasing policies We anticipate no adverse impact on small entities as a result of this action. In fact, more timely processing of transfer of control and license assignment applications should benefit small (and large) entities in the same manner as contemplated by

[128] 47 U.S.C. § 310(d).

our streamlined approval procedures for long-term *de facto* transfer leasing, should promote the efficient operation in the marketplace of both small and large entities, and should benefit the public.

Report to Congress: The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.[129] In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.[130]

IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

[129] *See* 5 U.S.C. § 801(a)(1)(A).

[130] *See* 5 U.S.C. § 604(b).

APPENDIX D

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 Further Notice of Proposed Rulemaking (Further Notice). 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 325 of the item. The Commission will send a copy of the Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.[3]

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

2. While the changes we adopt today in the Report and Order are an important step towards facilitating leasing of spectrum usage rights and enhancing the functioning of the secondary spectrum marketplace generally, we believe that there are 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 Further Notice, we seek comment on: (1) how to encourage the development of information and clearinghouse mechanisms to facilitate secondary market transactions between licensees and new users in need of access to spectrum; (2) further streamlining of application processing for spectrum leasing, transfers of control, and license assignments; (3) expanding our spectrum leasing policies to additional services not encompassed within the Report and Order; (4) applying the new *de facto* control standard adopted for spectrum leasing to other issues and types of arrangements; and, (5) evaluating whether the spectrum leasing policies adopted in the Report and Order for designated entities should be altered in any respect. 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 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 Proposed Rules Will Apply

4. The RFA requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rulemaking proceedings, unless the Agency certifies that "the rule will not, if promulgated, have a significant impact on a substantial number of small entities."[4] The RFA generally defines the term

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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* 5 U.S.C. § 603(a).

[3] *See id*.

[4] 5 U.S.C. § 603(b)(3).

"small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[5] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[6] 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).[7] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[8] This IRFA describes and estimates the number of small entity licensees that may be affected if the proposals in this Further Notice are adopted.

5. This Further Notice could result in rule changes that, if adopted, would create new opportunities and obligations for Wireless Radio Services 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 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. Consequently, to assist the Commission in analyzing the total number of potentially affected small entities, we request commenters to estimate the number of small entities that may be affected by any rule changes resulting from this Further Notice.

Wireless Radio Services

6. Many of the potential rules on which comment is sought in this Further Notice, if adopted, would affect small entity licensees of the Wireless Radio Services identified below.

7. **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.

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[5] *Id*. at § 601(6).

[6] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, 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." 5 U.S.C. § 601(3).

[7] Small Business Act, 15 U.S.C. § 632 (1996).

[8] 5 U.S.C. § 601(4).

[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).

8. **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.

9. **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 claiming small business status won 158 licenses.[20] A third auction included four licenses: 2 BEA licenses

[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).

[20] *See* "Phase II 220 MHz Service Spectrum Auction Closes," *Public Notice*, 14 FCC Rcd 11218 (WTB 1999).

and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[21]

10. **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]

11. **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]

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[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*.

[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).

12. **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 standard.[40] We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

13. **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,

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[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).

[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).

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]

14. **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 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

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[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).

[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*.

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.

15. **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]

16. 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.

17. 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

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[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).

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.

18. **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]

19. The Commission's 1994 Annual Report on PLMRs[60] indicates that at the end of fiscal year 1994, there were 1,087,267 licensees operating 12,481,989 transmitters in the PLMR bands below 512 MHz. Because any entity engaged in a commercial activity is eligible to hold a PLMR license, the revised rules in this context could potentially impact every small business in the United States.

20. **Fixed Microwave Services.** Fixed microwave services include common carrier,[61] private-operational fixed,[62] and broadcast auxiliary radio services.[63] Currently, there are approximately 22,015 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

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[58] *See* 13 C.F.R. § 121.201, NAICS code 517212.

[59] *See generally* 13 C.F.R. § 121.201.

[60] Federal Communications Commission, 60th Annual Report, Fiscal Year 1994, at ¶ 116.

[61] 47 C.F.R. §§ 101 *et seq.* (formerly, part 21 of the Commission's Rules).

[62] 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.

[63] 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.

1,500 persons.[64] 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.[65] The SBA has approved these definitions.[66] 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.[67] "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.[68] The SBA has approved these definitions.[69] 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.[70] An additional classification for "very small

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[64] 13 C.F.R. § 121.201, NAICS code 517212.

[65] 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).

[66] *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.

[67] *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).

[68] *Id*.

[69] *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.

[70] *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 (continued….)

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.[71] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[72] 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).[73] 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.[74] 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.[75] 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 for the preceding three years.[76] The SBA has approved of these definitions.[77] 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.

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

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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).

[71] *Id*.

[72] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

[73] *See* "Interactive Video and Data Service (IVDS) Applications Accepted for Filing," *Public Notice*, 9 FCC Rcd 6227 (1994).

[74] Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fourth Report and Order*, 9 FCC Rcd 2330 (1994).

[75] 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).

[76] *Id*.

[77] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998.

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.[78] 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.[79] These definitions have been approved by the SBA.[80] 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.[81] 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.[82] 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 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.[83] 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.[84] "Very small business" is defined as an entity that, together with its affiliates, has

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[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 15182, 15192 ¶ 20 (1998); *see also* 47 C.F.R. § 90.1103.

[79] 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.

[80] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated February 22, 1999.

[81] 13 C.F.R. § 121.201, NAICS code 517212.

[82] *Id.*

[83] *Id*.

[84] *See* Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, 15 FCC Rcd 11956, 12008 ¶ 123 (2000).

average gross revenues of not more than $3 million for the preceding three calendar years.[85] The SBA has approved of these definitions.[86] 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.[87] 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.[88] 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 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.[89] We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[90] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500

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[85] *Id*.

[86] *See* Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated June 4, 1999.

[87] *See* "Multiple Address Systems Spectrum Auction Closes," *Public Notice*, 16 FCC Rcd 21011 (2001).

[88] *See* 13 C.F.R. § 121.201, NAICS code 517212.

[89] *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 1,5000 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[90] 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.

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.[91] "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.[92] The SBA has approved these definitions.[93] 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.[94] 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.[95] 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.[96] SBA approval of these definitions is not required.[97] An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, and closed on September 21, 2000.[98] 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.[99]

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[91] 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).

[92] *24 GHz Report and Order*, 15 FCC Rcd at 16967 ¶ 77; *see also* 47 C.F.R. § 101.538(a)(1).

[93] *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.

[94] *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).

[95] *Id.* at 5343 ¶ 108.

[96] *Id.*

[97] *Id*. at 5343 ¶ 108 n.246 (for the 746-764 MHz and 776-794 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).

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

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

34. **Multipoint Distribution Service, Multichannel Multipoint Distribution Service, and 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).[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 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 proposed in the Further Notice.

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[100] 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, *Report and Order*, 10 FCC Rcd 9589, 9593 ¶ 7 (1995) (*MDS Auction R&O)*.

[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.

[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*.

36. 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.[109] 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.

37. **Cable Television Relay Service.** This service includes transmitters generally used to relay cable programming within cable television system distribution systems. The SBA has defined a small business size standard for Cable and other Program Distribution, consisting of all such companies having annual receipts of no more than $12.5 million.[110] According to Census Bureau data for 1997, there were 1,311 firms in the industry category Cable and Other Program Distribution, total, that operated for the entire year.[111] Of this total, 1,180 firms had annual receipts of $10 million or less, and an additional 52 firms had receipts of $10 million or more but less than $25 million.[112] Thus, under this standard, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies proposed in the Further Notice.

38. **Cable System Operators (Rate Regulation Standard)**. The Commission has developed, with SBA approval, its own definition of a small cable system operator for purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[113] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable companies at the end of 1995.[114] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. The Commission's rules define a "small system," for purposes of rate regulation, as a cable system with 15,000 or fewer subscribers.[115] The Commission does not request nor does the Commission collect information concerning cable systems serving 15,000 or fewer subscribers, and thus is unable to estimate, at this time, the number of small cable systems nationwide.

39. **Cable System Operators (Telecom Act Standard)**. The Communications Act, as amended, also contains a size standard for a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate

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[109] 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.

[110] 13 C.F.R. § 121.201, NAICS code 517510.

[111] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 4 (issued October 2000).

[112] *Id.*

[113] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of $100 million or less. *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, *Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

[114] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[115] 47 C.F.R. § 76.901(c).

exceed $250,000,000."[116] The Commission has determined that there are 68,500,000 subscribers in the United States.[117] Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[118] Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450.[119] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

40. **Multichannel Video Distribution and Data Service.** MVDDS is a terrestrial fixed microwave service operating in the 12.2-12.7 GHz band. No auction has yet been held in this service, although an action has been scheduled for January 14, 2004.[120] Accordingly, there are no licensees in this service.

Private Wireless Radio Services

41. **Amateur Radio Service**. These licensees are believed to be individuals, and therefore are not small entities.

42. **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.[121] 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

[116] 47 U.S.C. § 623(m)(2).

[117] Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 17 FCC Rcd 1255 (2001) (*Eighth Annual Report*).

[118] 47 C.F.R. § 76.1403(b).

[119] Paul Kagan Associates, Inc., *Cable TV Investor*, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[120] "Auctions of Licenses in the Multichannel Video Distribution and Data Service Rescheduled for January 14, 2004," *Public Notice*, DA 03-2354 (August 28, 2003).

[121] 13 CFR § 121.201, NAICS code 517212 (2002).

dollars.[122] 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.

43. **Personal Radio Services.** Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[123] These services include Citizen Band Radio Service (CB), General Mobile Radio Service (GMRS), Radio Control Radio Service (R/C), Family Radio Service (FRS), Wireless Medical Telemetry Service (WMTS), Medical Implant Communications Service (MICS), Low Power Radio Service (LPRS), and Multi-Use Radio Service (MURS).[124] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being adopted. Since all such entities are wireless, we apply the definition of cellular and other wireless telecommunications, pursuant to which a small entity is defined as employing 1,500 or fewer persons.[125] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by the proposed rules.

44. Despite the paucity, or in some instances, total absence, of information about their status as licensees or regulatees or the number of operators in each such service, users of spectrum in these services are listed here as a matter of Commission discretion in order to fulfill the mandate imposed on the Commission by the Regulatory Flexibility Act to regulate small business entities with an understanding towards preventing the possible differential and adverse impact of the Commission's rules on smaller entities. Further, the listing of such entities, despite their indeterminate status, should provide them with fair and adequate notice of the possible impact of the proposals contained in the Further Notice.

45. **Public Safety Radio Services.** Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[126] There are

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[122] Amendment of the Commission's Rules Concerning Maritime Communications, *Third Report and Order and Memorandum Opinion and Order*, 13 FCC Rcd 19853 (1998).

[123] 47 C.F.R. Part 90.

[124] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by Subpart D, Subpart A, Subpart C, Subpart B, Subpart H, Subpart I, Subpart G, and Subpart J, respectively, of Part 95 of the Commission's rules. *See generally* 47 C.F.R. Part 95.

[125] 13 C.F.R. § 121.201, NAICS Code 517212.

[126] 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 (continued….)

a total of approximately 127,540 licensees in these services. Governmental entities[127] 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.[128]

Satellite-Related Services

46. **Fixed Satellite Transmit/Receive Earth Stations.** The most recent Commission data shows that there are approximately 3,149 earth station authorizations,[129] a portion of which are Fixed Satellite Transmit/Receive Earth Stations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of earth station licensees that are small business entities under SBA definitions.

47. **Fixed Satellite Small Transmit/Receive Earth Stations.** The most recent Commission data shows that there are approximately 3,149 earth station authorizations,[130] a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of fixed satellite small transmit/receive earth station licensees that are small business entities under SBA definitions.

48. **Fixed Satellite Very Small Aperture Terminal (VSAT) Systems (14 GHz)**. These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single "blanket" application may be filed for a specified number of small antennas and one or more hub stations. The most recent Commission data shows that there are 485 current VSAT System authorizations.[131] We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of VSAT system licensees are small business entities under SBA definitions.

49. **Mobile Satellite Earth Stations.** The most recent Commission data shows that there are 21 licensees.[132] We do not request nor collect annual revenue information from these licensees, and 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.

[127] 47 C.F.R. § 1.1162.

[128] 5 U.S.C. § 601(5).

[129] Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, FCC 03-184, Attachment A ¶ 29 (rel. July 25, 2003).

[130] *Id.* at ¶ 30.

[131] *Id*. at ¶ 31.

[132] *Id*. at ¶ 32.

unable to estimate the number of mobile satellite earth station licensees that are small business entities under SBA definitions.

50. **Radio Determination Satellite Earth Stations.** The most recent Commission data shows that there are four licensees.[133] We do not request nor collect annual revenue information, and are unable to estimate the number of radio determination satellite earth station licensees that are small business entities under SBA definitions.

51. **Space Stations (Geostationary).** The most recent Commission data shows that there currently are an estimated 75 U.S.-licensed Geostationary Space Station authorizations.[134] We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of geostationary space station licensees that are small business entities under SBA definitions.

52. **Space Stations (Non-Geostationary).** The most recent Commission data shows that there currently are seven Non-Geostationary Space Station licensees.[135] We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of non-geostationary space station licensees that are small business entities under SBA definitions.

53. **Direct Broadcast Satellites.** Because DBS provides subscription services, DBS falls within the SBA-recognized definition of "Cable and Other Program Distribution."[136] This definition provides that a small entity is one with $12.5 million or less in annual receipts.[137] Currently, there are three U.S.-licensed DBS licensees.[138] We do not request nor collect annual revenue information for DBS services, and are unable to determine the number of DBS operators that would constitute a small business entity under SBA definitions.

54. **Digital Audio Radio Services (DARS).** Commission records show that there are two Digital Audio Radio Services licensees.[139] We do not request nor collect annual revenue information from these licensees, and are unable to estimate the number of DARS licensees that are small business entities under SBA definitions.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

55. The policies and proposals in the Further Notice could apply to a significant number of Commission licensees and spectrum lessees in a range of wireless services. The Further Notice explores possible steps to allow certain spectrum leasing arrangements, and possibly license assignments and

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[133] *Id*. at ¶ 33.

[134] *Id*. at ¶ 34.

[135] *Id*. at ¶ 35.

[136] 13 CFR § 121.201, NAICS code 517510.

[137] *Id*.

[138] Assessment and Collection of Regulatory Fees for Fiscal Year 2003, *Report and Order*, FCC 03-184, Attachment A ¶ 36 (rel. July 25, 2003).

[139] *See* Nationwide Programmatic Agreement Regarding the Section 106 National Historic Preservation Act Review Process, 18 FCC Rcd 11664, 11712 (Appendix A) (2003).

transfers of control, to be implemented without prior individualized Commission approval, using forms similar to those used at present for obtaining prior Commission approval of these types of transactions. At most, the Further Notice proposals would shift the timing of filing of forms for certain of the transactions. In addition, the Further Notice inquires about extending to additional services the spectrum leasing procedures adopted in the Report and Order for spectrum manager leasing arrangements and *de facto* transfer leasing arrangements. Licensees otherwise would have to obtain prior Commission consent to transfers of control or license assignments on similar forms.

56. Consideration of extending the spectrum leasing policies adopted in the Report and Order to additional services specified in the Further Notice implicates potential reporting, recordkeeping and compliance requirements for licensees and spectrum lessees in these additional services, 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) licensee 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 lessees may retain or hire outside professionals (*e.g.*, legal and engineering staff) to draft lease agreements, 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.

57. The Further Notice also explores what steps the Commission should take, possibly including additional information submissions, to promote effective functioning of secondary markets in spectrum usage rights. The Further Notice does not, however, propose any specific reporting, recordkeeping or compliance requirements in this regard. We seek comment on what, if any, requirements we should impose if we adopt the proposals set forth in the Further Notice.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

58. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): "(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities."[140]

59. Regarding our inquiry about how to facilitate increased access to spectrum usage information, *see* Further Notice, paras. 224-227, we do not anticipate any adverse impact on small entities. In fact, small (and large) entities should benefit by obtaining access to information that would enable their acquisition of spectrum that suits particular business needs. In addition, we note that we are encouraging parties to comment on whether we should develop an on-line information database, require more detailed operational information from licensees/lessees, create additional information services, encourage private sector collection and distribution of information, or allow independent third parties to act as "market makers." Although certain information collection requirements might impact entities, including small entities, due to increased reporting requirements, the Further Notice and this IRFA

[140] 5 U.S.C. §§ 603(c)(1)-(c)(4).

provide interested parties with an opportunity to comment on the possible burdens associated with each of the possible steps.

60. We also seek comment as to whether there are any additional steps that could be taken to further an efficient secondary marketplace through technological advances, opportunistic spectrum users, or other mechanisms (*e.g.,* spectrum managers). *See* Further Notice, paras. 233-235. We do not anticipate that any rules we decide to adopt in this area would adversely impact small entities. We believe that small (and large) entities will benefit from removing any unnecessary regulatory barriers to efficient spectrum usage.

61. Regarding our proposal to forbear from individual prior review and approval by the Commission for certain categories of leasing arrangements involving a transfer of *de facto* control, *see* Further Notice, paras. 244-277, we do not anticipate any adverse impact on small entities. In this connection, while we believe that lessening regulatory requirements would facilitate leasing arrangements entered into by all entities, including both small and large entities, we are mindful that forbearance must also be in the public interest. Consequently, we seek comment on various aspects of this proposal and specifically request commenters, including small entities, to comment on the eligibility criteria for forbearance set forth in the Further Notice. We realize that although some of the specific criteria could impact small entities, overall small entities should benefit from a more streamlined approach. Moreover, these specific criteria affect all entities, whether large or small entities. For example, lessees will need to comply with our foreign ownership restrictions before forbearance would apply. This requirement would be equitably applied to all entities seeking to obtain spectrum through a spectrum leasing arrangement. Moreover, even where possible spectrum lessees may not take advantage of entering into spectrum leasing arrangements without individualized prior Commission approval, such entities (again, whether large or small entities) would be able to seek approval by means of our prior approval procedures for spectrum leasing arrangements.

62. Similarly, regarding our possible forbearance from individual prior review and approval by the Commission for transfer and assignment transactions, *see* Further Notice, paras. 278-287, it seems unlikely that small entities would suffer any adverse impact. Nonetheless, we seek comment on the various eligibility criteria that might be employed and, in particular, we encourage small entities to comment on the impact that our unjust enrichment and installment payment policies might have on this proposal.

63. Regarding the possibility extension of the spectrum leasing policies adopted in the Report and Order to a number of excluded wireless services, *see* Further Notice, paras. 289-314, we anticipate generally that there would be no adverse impact on small entities. Because there are substantial numbers of small entities in all the wireless services, small entities could be significantly affected by our extension of leasing policies to the wireless services excluded by the Report and Order. We believe, however, that these small entities would likely benefit from the increased flexibility that leasing arrangements will offer in meeting their particular spectrum needs.

64. Regarding the possibility of extending our decision to streamline the application processing for transfer and assignment applications to other wireless services, *see* Further Notice, para. 314, we anticipate no adverse impact to small entities. The information that would be collected under a more streamlined approach is similar to what is currently required under our transfer and assignment rules and should facilitate spectrum leasing by reducing transaction costs, uncertainty, and delay. While an

alternative would be to require no approval, we believe that this would run counter to our statutory responsibilities under Section 310(d) of the Communications Act.[141]

65. Regarding our analysis of the question of whether to apply our new *de facto* control standard to regulatory contexts other than leasing, *see* Further Notice, paras. 316-318, we cannot determine at this time what the impact on small entities might be. Should we move away from the facilities-based approach of our *Intermountain Microwave* standard, it may be presumed that small entities would have more flexibility to enter into certain types of management agreements. On the other hand, such an approach might not be warranted in connection with our designated entity and entrepreneur eligibility rules and policies. We thus encourage small entities to comment on the various issues raised in the Further Notice regarding an appropriate standard for defining *de facto* control.

66. Finally, regarding our inquiry into whether the restrictions adopted for designated entity leasing should be altered, *see* Further Notice, para. 323, we believe that small entities would likely benefit from the removal of certain restrictions. But as noted above, there is a balance of competing considerations taking place here. We hope that small entities in particular will comment on what approach best promotes an efficient secondary spectrum market, provides benefits to small entities, and considers our statutory and public interest obligations.

F. Federal Rules That May Duplicate, Overlap, or Conflict with the Proposed Rules

67. None.

68. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

[141] 47 U.S.C. § 310(d).

JOINT STATEMENT OF
CHAIRMAN MICHAEL K. POWELL and COMMISSIONER KEVIN J. MARTIN

Re: Promoting Efficient Use of the Spectrum Through Elimination of Barriers to the Development of Secondary Markets; Report and Order and Further Notice of Proposed Rulemaking; WT Docket No. 00-230

Today's action is one of the most important spectrum reform decisions by this Commission in the last decade. For years, the Commission has rhetorically praised the concept and possibilities created by secondary markets in spectrum. Today that rhetoric turns into reality. Our decision unlocks value trapped for too many years in a regulatory box. That box was most clearly epitomized by the anachronistic 40-year old *Intermountain Microwave* standard, which required Commission prior approval for a license transfer any time a licensee ceded any of a panoply of responsibilities associated with equipment, salaries, personnel and sundry other activities. We are pleased to announce the passing of *Intermountain*, as we explicitly abandon that standard for spectrum leases. Built on the 2000 *Spectrum Policy Statement* as refined and developed by this Commission, today we adopt a new standard more narrowly tailored to the statutory requirements and more suited to today's marketplace. Our decision signals a new day of increased spectrum access and improved services for consumers.

In this item, we adopt 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 providing a streamlined approval process for other leases. We also adopt a streamlined approval process for transfers and assignments of licenses. Together, the rules we adopt will 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 the balance of their spectrum to an entrepreneur. Similarly, the cost-benefit equation for spectrum sharing has been transformed. Where formerly the risk of interference imposed only costs, those costs must now be weighed against the value that may be negotiated in a lease or transfer. When cognitive radios and frequency-agile technologies are introduced to the mix, the opportunities multiply.

By increasing spectrum access, this item will advance a number of the Commission's key policy goals. Access to spectrum is critical to development of a wireless broadband platform. Moreover, ready access to spectrum promotes increased facilities-based competition among wireless service providers and between wireless providers and other platforms. And facilitating the ability to lease or transfer spectrum will expand spectrum access for innovators and entrepreneurs, increasing the number and variety of wireless applications available to consumers.

Additionally, this item offers the promise of greater wireless deployment in rural America. For example, a carrier with a nationwide license can, without significant 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. Spectrum leasing and transfers – along with partitioning and disaggregation – thus provides flexibility for the development of additional and innovative services in rural areas.

Whenever we change rules that have been in place for over forty years there will be trepidation about the outcome. We are indeed entering a new world of spectrum flexibility with a reduced role for government. That role, however, remains significant. Our order builds in some important safeguards to protect the public interest. Within such protections, we owe it to the public to modernize and streamline our rules. We should not be deterred from our obligation to continually seek better policies for the American people.

Our *Further Notice* seeks to develop a record on expanding to other services the sound policies set out in the Order and to further streamline our policy approach. We also seek comment on facilitating spectrum exchanges, maximizing the public benefits from new opportunistic devices, and extending the new de facto control standard. We look forward to developing a record on these issues – and continuing this important work.

SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets, Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 00-230

Effective FCC management of the spectrum resource is critical because it is a finite natural resource with immense potential value to the American people. As I have previously stated, the goal of the FCC should be to create regulatory policies that foster effective investment and stimulate the delivery of services to the American people. If private parties don't invest, any theoretical spectrum policy is meaningless because the Commission must rely on the private sector to make it all happen.

There are many pieces of the puzzle that must be in place for the Commission to have a market-driven spectrum policy that encourages investment. One of the most important pieces and one that I have consistently supported is the creation of secondary markets for spectrum. We must have an effective and legally defensible secondary market if the property-like rights driven license model for spectrum-based services is to succeed.

When licensing spectrum-based services, parties are provided with a grant to specific spectrum rights. At times, however, the licensee may not be able to utilize the entire grant. Our challenge has been to harness that untapped resource. As a result of today's decision, incumbents will be able to sell the additional rights, thus allowing to evolving to its higher-valued use.

I believe that adoption of today's Report and Order shepherds in a monumental shift in spectrum policy in the United States. This item recognizes the importance of creating a market-based approach to regulation by creating a secondary market for spectrum in the wireless radio services. In doing so, it substantially updates the FCC's standard for interpreting Section 310(d) of the Communications Act set forth in the 1963 *Intermountain Microwave*[1] decision for purposes of spectrum leasing. The Commission has broad authority to interpret the requirements of the Communications Act and has significant discretion to revise existing policies, doing so benefits the public interest and is consistent with our statutory authority.[2] The very changed nature of the wireless industry, coupled with the advances made in improving FCC spectrum policies and the need for more market-based forms of regulations, provide support for a change in the interpretation of Section 310(d) by the Commission. The new standard enables parties to enter into leasing transactions that are not deemed transfers of de facto control under Section 310(d) so long as the licensee continues to exercise effective working control over the spectrum while ensuring that the lessor and lessee comply with Commission requirements.

I have no doubt that our efforts today to create a secondary market for spectrum for wireless radio services will lead to increased efficiency in the use of the spectrum, and will result in greater consumer benefits, including the provision of new and innovative services to consumers. In addition, the Further NPRM we are adopting will provide the Commission with additional public input so that we can continue

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[1] *Intermountain Microwave*, 12 FCC 2d 559 (1963).

[2] *See, e.g., Telephone and Data Systems, Inc. v. FCC*, 19 F.3d 42, 49 (D.C. Cir. 1994); *Federal National Association for Better Broadcasting v. FCC*, 849 F.2d 665, 669 (D.C. Cir. 1988); *Telecommunications Research and Action Center v. FCC*, 800 F.2d 1181 (D.C. Cir. 1986).

to refine our secondary markets rules and policies. Over time, I am hopeful that the approach we are adopting today will serve as a model for other countries that are moving forward with creating increasingly vibrant and competitive regulatory environments for wireless services.

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

RE: *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets; Report and Order and Further Notice of Proposed Rulemaking (WT Docket No. 00-230).*

Developing a secondary market in spectrum holds great promise. It could lead to more efficient spectrum allocation, more intense use of rural spectrum that currently lies fallow, and, with new technologies like software designed radio, it could assist in bringing innovative spectrum uses to the public.

From a policy perspective, I could support many of the ideas in today's Order. I am encouraged that the Order concerns only a subset of our licensees. Generally we limit our actions to commercial telecommunications providers that paid for their spectrum licenses at auction. Allowing leasing by companies that have already compensated the public for the use of spectrum is both significantly different and far more defensible than allowing companies that were given their spectrum rights for free to lease it and reap windfall profits. Second, we would require all *de facto* leases to be reviewed by the Commission before being approved. Third, we would only allow spectrum-manager-type leasing where the lessor is held liable for the actions of the lessee. We make it clear that lessors are responsible if their lessees violate Commission rules. Because of these important protections, I could support many of the policy ideas contained in this Order.

But I keep running into the same problem and I cannot make it go away. I do not see how the law allows us to effectuate these policies. I must therefore respectfully dissent. Congress enacted Section 310(d) of the Communications Act and we must abide by it. That section makes it 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 today we 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 public interest finding. How can this be legal under Section 310(d)?

The majority believes that that when Congress said licensees can not transfer "any rights" under a license that they did somehow not mean this phrase to include the right to control all use of the spectrum on a day-to-day basis. This is not my reading of the statue. If "any rights" does not include the right to exclusive use of the spectrum on a day-to-day basis, what can it mean? The majority apparently believes that it means only those rights that are needed to "exercise effective working control" of the spectrum. But if this were true, why did Congress use such sweeping language? It could have limited Section 310(d) only to preclude transfers of a more limited set of powers. Instead it chose to include "any rights" under the license. The Order's interpretation conflicts with the plain language of the statute and effectively reads the "any rights thereunder" language completely out of the statute, preferring to treat the provision as if Congress had only limited transfers of "all rights" under a license.

The majority notes that taking the "any rights thereunder" language seriously would endanger previous Commission decisions allowing spectrum managers, ITFS leasing, and other types of leasing. If this is true, then given the plain language of the statute, we have even more incentive to look for Congressional clarification. Finally, the majority argues that a plain language reading of the statute proves too much, asserting that if the statute precludes leasing of complete day-to-day control of a license that it would also preclude a CMRS provider from allowing a customer to place a phone call over its

system. But this approach misses, I believe, an important distinction between these two extremes. A customer of a CMRS provider placing a call has no rights to control the spectrum when placing a call – the CMRS provider maintains all rights to the spectrum, including the right to monitor the call, to cut it off, or to assign it to one channel or another. Just as a restaurateur does not transfer any rights to control his restaurant to a patron who comes in for lunch, a CMRS provider does not transfer any rights to control its spectrum to a caller on its system. But if the restaurateur leases his building to another company, or if a licensee leases day-to-day control of his license to another company, a transfer of rights to control has occurred.

Because Section 310(d) does not allow transfers without FCC approval, I remain of the opinion that the Commission, if we wish to go down this road, will have to go the Congress and seek legislative changes before proceeding with the sweeping changes it would make today. Any other approach puts us in conflict with the law. Seeking legislative change can be frustrating and time consuming; I know that as well as anybody here. But the Commission simply cannot overstep its authority and exchange its policy preferences for those imposed by statute. Yet that is exactly what today's Order does.

Finally, I want to thank my colleagues for agreeing to eliminate several sections of the NPRM. I appreciate their willingness to accommodate Commissioner Adelstein's and my concerns. Beginning the process of allowing television and radio broadcasters to sell to non-broadcasters access to spectrum rights that Congress and the FCC gave them for free would have been a terrible mistake. It would have meant that broadcasters could sell control of part or all of their spectrum rights to others, potentially without Commission review. Broadcasters were given these spectrum rights for free because they are engaged in work that is critically important to our country – the provision of free over-the-air TV and radio. To allow them to sell these spectrum rights for other uses would have been deeply troubling. And by doing so we may have undermined the digital transition by giving broadcasters an incentive to hang on to control as much spectrum as they can for as long as they can with the hope of leasing it for profit.

Similarly, proposing to do away with traditional FCC review of transfers of control of all licenses, including broadcast licenses, would have been a mistake. It would have meant that the FCC would no longer need actually to conduct a review of mergers and acquisitions involving FCC licenses. It would merely require companies to file applications and then hold that transfers would be deemed granted unless the Commission acted within 21 days. So while we are considering eliminating our media consolidation rules on one hand, claiming that case-by-case review will pick up the slack, we would have been proposing to vastly cut back on even case-by-case review.

I also support the decision to eliminate a proposal to drop our policies designed to promote opportunities for small businesses to participate in spectrum-based services. We would have erred in abandoning the designated entity and entrepreneur policies without proposing replacing them with anything more than our general secondary markets policy. A hope that secondary markets will guarantee small and rural businesses access to spectrum is still untested. Congress has specifically instructed us to protect access by small and rural companies, and we must not take this instruction lightly.

I appreciate eliminating the section that would have proposed allowing licensees to mortgage their licenses as a way to raise money. After NextWave, we are right to be particularly cautious before allowing our licenses to become entangled in such arrangements. And given that the law instructs us that we many not grant licensees ownership rights in spectrum that is owned by the public, I believe we would have been on shaky ground.

Finally, as I understood it as late as this morning, the NPRM still proposes to apply our new and more liberal *de facto* transfer of control standard to questions of foreign ownership. This, too, troubles

me and could well set us on a collision course with the Section 310 mandate that the Commission review foreign ownership of U.S. licenses.

Thank you.

SEPARATE STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Market; WT Docket No. 00-230

Our approach to secondary markets requires an important balance. The Commission should encourage healthy and robust secondary markets. At the same time, we must ensure that license obligations continue to be satisfied and enforced. A regulatory framework for innovation should promote a secondary market that accommodates new technologies, but does not cause the Commission to lose or cede ultimate control over the spectrum.

I believe that today's Order accomplishes that delicate balance. By replacing the current facilities-based *Intermountain Microwave* standard with a new more flexible standard for determining *de facto* control, we take a significant step toward the creation of healthy and robust secondary markets, while also ensuring that license obligations required under our rules continue to be satisfied and enforced.

The development of secondary markets promises many benefits to the nation. A robust secondary market will increase access to spectrum, and will promote the development of new and innovative services for all Americans. I believe that it plays an important role in enabling the electromagnetic spectrum, a finite public resource, to be used more effectively and efficiently.

I am particularly hopeful that the development of secondary markets will increase access to spectrum in rural areas. I have heard time-and-time-again that the Commission's policies to improve access to spectrum have fallen short of our goal of providing service to rural and other underserved areas. Today, we remove significant regulatory obstacles and provide a framework for allowing licensees to lease more easily unused spectrum to entities that will use it. In doing so, we move closer to achieving our goal of ensuring that all areas of the nation receive the full benefits of advanced wireless services.

I also believe that increased access to spectrum can lead to increased opportunities for innovation in spectrum services and increased opportunities for new entrants who have developed the latest technologies.

When making decisions, such as those we do today, the Commission always must consider whether they are consistent with the applicable statute. We then must determine whether our decisions are in the public interest. This is an important two-pronged review. The analysis contained in the Order confirms that our actions are consistent with Section 310(d) of the Communications Act. And I believe that the public interest dictates that we utilize the available spectrum to the best of our ability.

However, in making this determination, we also must carefully balance the advantage of a higher valued use of the spectrum with the potential challenges we face when we allow licensees the freedom we grant them today. For the greater good, I choose to embrace the possibilities that our decision envisions and deal separately with the potential pitfalls. This is where our enforcement capacity becomes so very important.

While I am optimistic about our decision today, I must highlight my belief that the Commission's enforcement authority is critical to ensuring that this new regulatory environment is a success. We must make sure that not only the entities using spectrum are in compliance with our rules, but also that the Commission is capable and fully willing to enforce those rules. This enforcement authority, I believe, is particularly critical to instill confidence in the secondary markets. This is even more important when

spectrum will be leased frequently and will be used for a wide variety of purposes and by a wide variety of entities.

Finally, I do have concerns with our request for comment on allowing public safety licensees to potentially lease out their spectrum. I am unsure whether such flexibility would be in the public interest, but I believe that developing the record on this issue is appropriate to enable us to fully analyze the issues involved. I encourage all interested parties to fully comment on this portion of the Further Notice.

I have similar concerns about our request for comment on possible forbearance with respect to certain transfers and assignments. I am not convinced that there is such a problem with our current transfer and assignment rules and procedures that would warrant a determination to forbear from requiring prior approval for certain transfers and assignments. More importantly, I think such a proposal may raise statutory concerns, and I look forward to reviewing the record on all aspects of the issue.

I do, however, appreciate the cooperation of my colleagues in making other changes to the Further Notice that allow me to fully support the item before us.

I support the development of secondary markets, and I support this Order. I look forward to working on the issues raised in the Further Notice to ensure that we achieve successful secondary markets and the full utilization of the nation's radio spectrum consistent with a framework for innovation. I also will continue to be mindful of the Commission's important role in managing our nation's spectrum, and the important role enforcement will play in ensuring a vibrant and stable secondary market.