

## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1 and 27

[WT Docket No. 00–230; FCC 03–113]

#### Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, we adopt final rules that remove unnecessary regulatory barriers to the development of more robust secondary markets in radio spectrum usage rights. First, we promote the wider use of spectrum leasing arrangements by facilitating the ability of licensees in our Wireless Radio Services that hold “exclusive” authority to 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, for any period of time within the term of the license. Second, we adopt streamlined approval procedures for license assignments and transfers of control in these Wireless Radio Services.

**DATES:** Effective January 26, 2004, except for §§ 1.913(a), 1.913(a)(3), 1.2002(d), 1.2003, 1.9003, 1.9020(e), 1.9030(e), and 1.9035(e), which contain information collection requirements that are not effective until approved by the Office of Management and Budget (OMB), and 1.948(j), which is effective on April 5, 2004. The agency will publish a document in the **Federal Register** announcing the effective date of the rules that require information collection.

**FOR FURTHER INFORMATION CONTACT:** Paul Murray, Wireless Telecommunications Bureau, at (202) 418–7240, or via the Internet at [Paul.Murray@fcc.gov](mailto:Paul.Murray@fcc.gov); for additional information concerning the information collections contained in this document, contact Judith B. Herman at (202) 418–0214, or via the Internet at [Judith.B-Herman@fcc.gov](mailto:Judith.B-Herman@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission’s Report and Order portion (*Report and Order*) of the Commission’s Report and Order and Further Notice of Proposed Rulemaking, FCC 03–113, in WT Docket No. 00–230, adopted on May 15, 2003, and released on October 6, 2003. Contemporaneous with this document, the Commission issues a Further Notice of Proposed Rulemaking (published elsewhere in this publication). The full text of this document is available for inspection

and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC’s copy contractor, Qualex International, 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: <http://www.fcc.gov>. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at [Brian.Millin@fcc.gov](mailto:Brian.Millin@fcc.gov).

#### Paperwork Reduction Act

This R&O contains a new information collection as described in Section D of the Final Regulatory Flexibility Analysis in Appendix C infra. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection(s) contained in this R&O as required by the Paperwork Reduction Act of 1995, Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new information collection(s) contained in this proceeding. Public and agency comments are due January 26, 2004. Comments should address: (a) Whether the new or modified 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 the respondents, including the use of automated collection techniques or other forms of information technology.

**OMB Control Number:** 3060–xxxx.

**Title:** Promoting Efficient Use of Spectrum through Elimination of Barriers to the Development of Secondary Markets.

**Form No.:** FCC Form 603.

**Type of Review:** New collection.

**Respondents:** Business or other for-profit.

**Number of Respondents/Annually:** 71,262.

**Estimated Time per Response:** 9 hrs.

**Total Annual Burden:** 641,311 hrs.

**Total Annual Costs:** \$117,088,018.33

**Needs and Uses:** The required notifications and applications will provide the Commission with useful information about spectrum usage and helps to ensure that licensees and

lessees are complying with Commission interference and non-interference related policies and rules. Similar information and verification requirements have been used in the past for licensees operating under authorizations, and such requirements will serve to minimize interference, verify that lessees are legally and technically qualified to hold licenses, and ensure compliance with Commission rules.

#### Synopsis of the Report and Order

##### I. Introduction

###### A. Wireless Radio Services

1. In the *Report and Order*, we take several actions to remove unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights in the Wireless Radio Services. Specifically, we take several 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 interpretation of the *de facto* control standard relating to section 310(d) of the Communications Act, 47 U.S.C. 310(d), in the context of spectrum leasing, replacing the standard that has been in place since 1963 under the *Intermountain Microwave* decision, 12 FCC 2d 559 (1963), with a refined standard that better accords with our contemporary market-oriented spectrum policies, fast-changing consumer demands, and technological advances. 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 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.

2. We implement two different options for spectrum leasing. One option enables licensees and “spectrum lessees” to enter into leasing arrangements, without the need for Commission approval, so long as the licensee retains *de jure* control of the license and *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.

3. In addition, 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.

#### B. Satellite Services

4. 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.

## II. Background

5. In November 2000, the Commission concurrently adopted the *Policy Statement* and the *Notice of Proposed Rulemaking (NPRM)*, 65 FR 81475 (December 26, 2000), in this proceeding regarding secondary markets in spectrum usage rights. The *Policy Statement* enunciated general goals and principles for the further development of those secondary markets, while the *NPRM* proposed concrete steps the Commission might take to implement such policies with respect to Wireless Radio Services and Satellite Services. Thirty-seven parties commented on the proposals set forth in the *NPRM*, and twenty-one filed reply comments.

6. In 2002, the Commission's staff-level Spectrum Policy Task Force undertook a comprehensive review of spectrum policy. In examining 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. 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.

## III. Report and Order

### A. Spectrum Leasing Arrangements in Wireless Radio Services

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

7. In this *Report and Order*, we find 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*, we grant those licensees holding exclusive use licenses in the Wireless Radio Services identified in this *Report and Order* 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 herein. We also 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.

8. We establish a revised *de facto* transfer of control standard 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 and 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* control of the license and *de facto* control of the leased spectrum (under the updated *de facto* control standard that replaces the *Intermountain Microwave* standard 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. 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 second 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 this "*de facto* transfer" leasing, spectrum lessees will be held directly and primarily responsible for compliance with applicable policies and rules.

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

9. We 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. 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.

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

10. We 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 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.

11. 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. 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. 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.

12. 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 is overly circumscribed and restrictive.

13. 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. 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.

#### b. Indicia of *De Facto* Control for Spectrum Leasing Arrangements

14. 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.

15. For all Wireless Radio Services affected in this proceeding, we establish the following two factors 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. First, 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. Second, 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.

16. *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 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. 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 CFR 1.1307, those that require international coordination, those that affect radio frequency quiet zones described in 47 CFR 1.924, or those that require notification to the Federal Aviation Administration under 47 CFR 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 CFR 1.1307(b) and related rules). 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.

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

18. 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, 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. In addition, the licensee is responsible for making all required filings (e.g., applications, notifications, and correspondence) 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.

19. We will not 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. In these circumstances, the licensee should not have any responsibility for the lessee's compliance or interactions with the Commission.

20. *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 set out in this *Report and Order*. We note, however, that to the extent that parties' 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.

#### c. Consistency of the New *De Facto* Control Standard for Spectrum Leasing With Section 310(d) Requirements

21. 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."

22. 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 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 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.

23. 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" such license or rights.

24. 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. Today's wireless communications environment, however, 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.

25. 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. The necessary degree of control that the licensee exercises with regard to the third party's spectrum use 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.

26. We have structured the new *de facto* control standard to include a set of core responsibilities (described above) 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). These responsibilities are defined by their statutory or regulatory relevance. A licensee exercising these defined 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.

### 3. Wireless Radio Services Eligible for Spectrum Leasing

27. 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. 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 CFR 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). 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.

28. 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, and (2) 218–219 MHz Service, one of the part 95 services. 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. We permit spectrum leasing activities for all covered licensees, whether their authorized use is limited to private or non-commercial operation, or not. 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. Finally, in services where we have adopted licensing with a geographic service area overlay protecting incumbent Wireless Radio Service licensees, the remaining incumbents will also be permitted to engage in leasing. (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.)

29. 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. We also exclude the Multi-channel 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. Finally, 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. In the *Further Notice*, we consider whether to permit spectrum leasing in a number of these services.

30. In our view, leasing on shared frequencies presents implementation concerns, 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.

### 4. Specific Policies and Procedures Applicable to Spectrum Leasing Arrangements

#### a. "Spectrum Manager" Leasing—Spectrum Leasing Arrangements That Do Not Involve a Transfer of *De Facto* Control Under Section 310(d)

31. Under 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) Respective Rights and Responsibilities of Licensees and Spectrum Lessees

32. *Licensees' rights and responsibilities.* Under spectrum

manager leasing arrangements, 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 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. Failure to do so would subject a licensee to possible enforcement action as a substantive rule violation.

33. 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. 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. We will not, however, hold licensees responsible for their lessees' compliance with Commission rules and policies that are not directly related to the use of the leased spectrum.

34. Because leasing pursuant to this option requires that spectrum lessees meet certain eligibility requirements, 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 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.

35. *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. 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. We will hold the spectrum lessee directly accountable for these certifications.

36. 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. 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, 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, they may also be subject to appropriate enforcement actions.

37. We also 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.

38. *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. 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.

39. *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.

#### (ii) Application of Particular Service Rules and Policies

40. *Interference-related service rules.* 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.

41. *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. 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. 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. 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.

42. 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. 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.

43. *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. 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. 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.

44. *Designated entity/entrepreneur policies and rules.* Under this leasing option, we determine that designated entity and entrepreneur 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 and/or transfer restrictions so long as the lease does not result in the lessee becoming a "controlling interest" or affiliate 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 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 or changes the rules regarding the five-year transfer restriction for C and F block licenses won in closed bidding. 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. 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, 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.

45. *Construction/performance requirements.* 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." 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.

46. *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. Accordingly, we will apply the Commission's general competition policies to spectrum manager leasing arrangements.

47. Specifically, the cellular cross-interest rule and associated policies will be applied to spectrum leasing arrangements involving cellular authorizations in Rural Service Areas (RSAs). Thus, a cellular licensee in an RSA (or any entity with an attributable interest in such a licensee) 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. For leases meeting these tests, the cellular spectrum is attributable to the spectrum lessee.

48. 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 marketplace competition in the Commercial Mobile Radio Services (CMRS) in transactions involving either the licensee or the spectrum lessee. As we indicated when we eliminated the CMRS spectrum cap, the Commission now evaluates the competitive effects of CMRS spectrum aggregation on a case-by-case basis. In those circumstances where information on potential competitive harm comes to our attention or where serious allegations of 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.



49. 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, in which 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 (which includes cellular, broadband PCS, and SMR spectrum regulated as CMRS) must disclose to the Commission whether they hold direct or indirect interests (of 10 percent or more) 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. 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 of our rules. In particular, a lessee must disclose whether it has a 10 percent direct or indirect interest in an entity, as defined in § 1.2112 of subpart Q of our rules. 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.

50. *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. 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 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.

51. *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), Equal Employment Opportunity (EEO), Telecommunications Relay Service (TRS), North American Numbering Plan (NANP), universal service funds, and regulatory fee payment obligations—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 or telecommunications carriers 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.

52. 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. Thus, a spectrum lessee who provides facilities-based service does not 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.

#### (iii) Notification

53. 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 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.

54. *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: (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. This notification will contain information similar to that submitted currently on our Form 603. 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. 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 operation. In all other respects, the rules generally applicable to spectrum manager leasing



arrangements, as enunciated above, apply to these shorter-term arrangements.

55. *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)

56. We also 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

57. This leasing option enables licensees and spectrum lessees to enter into the kind of long-term spectrum leasing arrangements endorsed by many of the commenters. Under this 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. 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).

(a) Respective Rights and Responsibilities of Licensees and Spectrum Lessees

58. *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). We thus relieve licensees of primary and direct responsibility for ensuring that their lessees’ operations comply with Commission policies and rules.

59. 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.

60. *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. Lessees will assume responsibility for interacting with the Commission regarding the leased spectrum, and making all related filings.

61. If there is a question about interference or other technical performance issue, 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. To the extent 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.

62. *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. 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. 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.

63. *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.

(b) Application of Particular Service Rules and Policies

64. *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.

65. *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 applicable to licensees under their license authorization. These include general eligibility restrictions placed on the licensees under their authorizations, such as foreign ownership limitations. 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.

66. *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.

67. *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, subject to any applicable transfer restrictions and/or any applicable unjust enrichment payment obligations. 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. 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. Small business bidding credit unjust enrichment payments will be required and calculated as they would if the license were being assigned or transferred. 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 or unjust enrichment obligations. 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.

68. *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 identical to the approach taken with respect to the spectrum manager leasing option. 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.

69. *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. Attribution of spectrum will necessarily depend upon the actual circumstances of a given lease.

70. *Regulatory classification.* As with spectrum manager leasing arrangements, 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.

71. *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 “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. 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.

#### (c) Streamlined Approval Procedures

72. 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.

73. *Specific approval procedures.* Parties entering into long-term *de facto* transfer leasing arrangements will be required to file an application with the Commission that includes information similar to that submitted currently using Form 603 for transfers and assignments. These spectrum leasing applications will be placed promptly on public notice once the application is sufficiently complete. Petitions to deny filed in accordance with section 309(d) 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. 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.

74. 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. 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.

75. *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.

76. 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. Through the process of approving the application, 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 Interdepartment Radio Advisory Committee (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. 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.

77. *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. 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.

#### (ii) Temporary, Short-Term *De Facto* Transfer Spectrum Leasing Arrangements

78. We 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.

79. 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, short-term *de facto* transfer leasing arrangements, for a period of up to 360 days, if they meet the specified conditions discussed below. 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 we accordingly will not require that short-term spectrum lessees meet all of the regulatory requirements that are applicable to the licensee.

80. We believe 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." 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.

81. 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).

82. 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.

83. We also 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*.

(a) Respective Rights and Responsibilities of Licensees and Spectrum Lessees

84. *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. 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.

85. *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. 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.

86. *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 applications under our long-term spectrum leasing procedures, and obtain Commission consent pursuant to those procedures. 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) 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.

87. 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.

88. *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.

89. *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.

#### (b) Application of Particular Service Rules and Policies

90. 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.

91. *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.

92. *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.

93. *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 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.

94. *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. 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. 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 build out their systems and provide spectrum-based services. For instance, 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.

95. *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. 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.

96. *Policies relating to competition.* We will not extend the Commission's policies concerning competition 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 consolidation of control over spectrum that could have the type of unacceptable anticompetitive effects that are contrary to the public interest.

97. *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.

98. *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.

#### (c) STA Approval Procedures

99. Parties seeking to implement short-term *de facto* transfer leases pursuant to the policies and procedures set forth above will submit their request 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, 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.

#### 5. Other Miscellaneous Matters Concerning Spectrum Leasing

100. *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. 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.

101. *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.

102. *Assignment of leases.* 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* 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.

103. *Transfer of control of spectrum lessees.* 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.

104. *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. Similarly, a license may automatically cancel if the licensee fails to comply with certain defined requirements, 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.

105. *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"). To this end, we 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.

106. *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; and, 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.

#### 6. Collection of Information on Spectrum Leasing

107. 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.

108. 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. Spectrum brokers with specific expertise on the properties of different spectrum bands could match parties interested in acquiring spectrum usage rights with existing licensees. 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. 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.

109. 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.

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

110. 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. 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*.

111. *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. Applications will be placed promptly on public notice once sufficiently complete. Petitions to deny filed in accordance with section 309(d) 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. 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.

112. 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 require further examination can be

gathered. If off-lined 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.

113. *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. We determine that the streamlining procedures we are adopting meet the statutory test for forbearance.

114. 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. 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 comments. 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.

#### *C. Secondary Markets in Satellite Services*

115. 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. Based on the record before us, we decide not to make changes to our Satellite Services in this *Report and Order*. Several of the

requests and recommendations made by commenting parties 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. Furthermore, New Skies raised this issue in response to the rulemaking specifically focused upon streamlining of the Commission's part 25 rules concerning earth station licensing (*Part 25 Earth Station Streamlining NPRM*) 66 FR 1283, (January 8, 2001). We defer to that proceeding because that 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. 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*.

116. The request by SIA to eliminate the need for prior Commission approval of *pro forma* transfers of control or assignments 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. 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.

117. 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. 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.

#### IV. Procedural Matters

##### A. Final Regulatory Flexibility Act Analysis Regarding the Report and Order

118. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), see 5 U.S.C. 603, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM*. The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

##### 1. Need for, and Objectives of, the Report and Order

119. 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.

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

120. 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. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO), for example, stated that the Commission would serve the public interest by granting small carriers additional flexibility needed to serve their communities and reducing administrative burdens on those small carriers that may wish to pursue innovative arrangements for spectrum

access with other license holders. In a similar vein, the Rural Telecommunications Group (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.

121. 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. The Commission requested comment on whether and how the "designated entity," entrepreneur, 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. 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.

122. 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. Leap Wireless International, Inc. (Leap Wireless), a designated entity, argued that the Commission should retain and apply its designated entity restrictions to all forms of spectrum leasing. Leap Wireless further contended that permitting designated entities to lease spectrum usage rights to entities that are not similarly qualified would allow manipulation and evasion of the Commission's designated entity policies and rules.

123. In contrast, a number of commenters argued that designated entity licensees should be free to enter into lease agreements with non-designated entities. Alaska Native Wireless, L.L.C. (Alaska Native Wireless), Cook Inlet Region, Inc. (Cook Inlet), TeleCorp PCS, Inc. (TeleCorp), and Winstar Communications, Inc. (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. Alaska Native Wireless, Cingular Wireless LLC (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. 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. Nextel Communications, Inc. (Nextel), AT&T Wireless Services, Inc. (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.

124. 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. 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. 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. The National Telephone Cooperative Association (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. Blooston, Mordkofsky, Dickens, Duffy, and Predergast (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.

125. 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. 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. 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. With respect to short-term leases,

however, Cook Inlet argued that a licensee should not have to make an unjust enrichment payment.

126. 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 include 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.

### 3. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

127. 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. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. 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).

128. 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 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.

129. *Cellular Licensees*. The SBA has developed a small business size standard for small businesses in the category "Cellular and Other Wireless Telecommunications." Under that SBA category, a business is small if it has 1,500 or fewer employees. 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. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

130. *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. 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. 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.

131. *220 MHz Radio Service—Phase II Licensees*. The Phase II 220 MHz service is subject to spectrum auctions. In an order relating to this service, 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. 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. 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. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. 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. 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. 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.

132. *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. 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. 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. 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. The SBA has approved these small size standards. 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. 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. 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.

133. *Upper 700 MHz Band Licenses.* The Commission released an order authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

134. *Paging.* In a recent order relating to paging, we adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. 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. The SBA has approved this definition. 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. Fifty-seven companies claiming small business status won 440 licenses. 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. 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. 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 Report*, 608 private and common carriers reported that they were engaged in the provision of either paging or "other mobile" services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

135. *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. 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. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. 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. On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

136. *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. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in an order relating to narrowband PCS. 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. 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. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

137. *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. 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. The SBA has approved these small business size standards for the 900 MHz Service. 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. 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.

138. 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.

139. 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.

140. *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. 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 PLMR 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.

141. The Commission's 1994 Annual Report on PLMRs 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.

142. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. 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 1,500 persons. 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.

143. *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. The SBA has approved these definitions. 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.

144. *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. "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. The SBA has approved these definitions. 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.

145. *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. 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. These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA. 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.

146. *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). 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. In an order relating to the 218–219 MHz Service, 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. 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. The SBA has approved of these definitions. 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.

147. *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. 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. These definitions have been approved by the SBA. 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.

148. *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. 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.

149. *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. 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.

150. *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. 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.

151. *Multiple Address Systems.* MAS entities, in general, fall into two categories: (1) Those using MAS spectrum for profit-based uses, and (2) those using MAS 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. "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. The SBA has approved of these definitions. 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. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

152. 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. 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.

153. *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. We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent 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.

154. *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. "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. The SBA has approved these definitions. The Commission will not know how many licensees will be small or very small businesses until the auction, if required, is held.

#### 4. Description of Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

155. 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.

156. 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.

157. 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.

158. 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 § 1.65 of the Commission's rules, 47 CFR 1.65. 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.

159. 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.

160. 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.

#### 5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

161. 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.

162. 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. 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 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.

163. 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. 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, 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.

164. *Applicability of spectrum leasing rules to many, but not all, Wireless Radio Services.* The *Report and Order* extends flexible spectrum leasing opportunities to a wide array of our Wireless Radio Services. 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.

165. *General applicability of license service rules and policies to spectrum lessees.* 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 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.

166. *Licensee reliance on spectrum lessee activities to meet construction or performance obligations.* 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.

167. *Applicability of designated entity eligibility and unjust enrichment policies.* 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. 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.

168. 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* 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.

169. 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. 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." 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.

170. *Spectrum manager subleasing.* 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.

171. *Spectrum manager leasing arrangements—notification to the Commission.* 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 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 policies.

172. *De facto transfer leasing arrangements—streamlined approval procedures.* 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.

173. 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.

174. *De facto transfer subleasing.* 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.

175. *Short-term de facto transfer leasing arrangements.* 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.

176. *Streamlined processing for transfer of control and license assignment applications.* 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 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.

#### 6. Report to Congress

177. 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. 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. In addition, the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will 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.

#### V. Ordering Clauses

178. Pursuant to the authority of 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, this *Report and Order* and the policies set forth therein are adopted and parts 1 and 27 of the Commission's rules, 47 CFR parts 1 and 27, are amended to establish policies and procedures to facilitate spectrum leasing arrangements and to streamline approval procedures for license assignments and transfers of control under the policies enunciated in the *Report and Order*. The rules will become effective January 26, 2004, except for §§ 1.913(a), 1.913(a)(3), 1.2002(d), 1.2003, 1.9003, 1.9020(e), 1.9030(e), and 1.9035(e), which contain information collection requirements that are not effective until approved by the Office of Management and Budget (OMB), and 1.948(j), which will become effective on April 5, 2004. The agency will publish a document in the **Federal Register** announcing the effective date of the rules that require information collection.

179. 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*.

180. 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, to the Chief Counsel for Advocacy of the Small Business Administration.

## List of Subjects

### 47 CFR Part 1

Administrative practice and procedure, Communications common carriers, Radio, Reporting and recordkeeping requirements, Telecommunications.

### 47 CFR Part 27

Communications common carriers, Radio.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

## Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR 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 heading, paragraph (a) introductory text and paragraphs (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 subpart X of this part) shall use the following forms and associated schedules for all applications and notifications:

\* \* \* \* \*

(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 subpart X 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).

\* \* \* \* \*

(b) \* \* \*

(1) Attachments to applications and notifications should be uploaded along with the electronically filed applications and notifications whenever possible. The files, other than the ASCII table of contents, should be in Adobe Acrobat Portable Document Format (PDF) whenever possible.

(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 paragraph (j) to read as follows:

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

\* \* \* \* \*

(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:

- (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 (B/ILT) channels in which the licensees hold exclusive use rights (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 CFR 90.187(b)(2)(v));

(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 subpart G 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).

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

(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 subpart G of this part).

(iv) Grant of consent to an application will be reflected in a public notice (*see* § 1.933(a)) 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 by adding paragraph (d) to read as follows:

**§ 1.2002 Applicants required to submit information.**

\* \* \* \* \*

(d) The provisions of paragraphs (a) and (b) of this section are applicable to spectrum lessees (*see* § 1.9003 of subpart X 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 the introductory text and the entry for “FCC 603” 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 603 Wireless Telecommunications Bureau Application for Assignment of Authorization and Transfer of Control; Notification or Application for Spectrum Leasing Arrangement;

\* \* \* \* \*

■ 6. Amend § 1.8002 by removing “and” in paragraph (a)(4), by removing the period at the end of paragraph (a)(5) and adding “; and” in its place, and by adding paragraph (a)(6) to read as follows:

**§ 1.8002 Obtaining an FRN.**

(a) \* \* \*

(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**

Sec.

1.9001 Purpose and scope.

1.9003 Definitions.

1.9005 Included services.

**General Policies and Procedures**

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

1.9020 Spectrum manager leasing arrangements.

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

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

1.9040 Contractual requirements applicable to spectrum leasing arrangements.

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

1.9050 Who may sign spectrum leasing notifications and applications.

1.9055 Assignment of file numbers to spectrum leasing notifications and applications.

1.9060 Amendments, waivers, and dismissals affecting spectrum leasing notifications and applications.

**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 subpart F 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 CFR 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 section 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.

(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 subpart I 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 subpart F 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 subpart I 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).

(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 sections 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 subpart P 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 subpart Q of this part and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 of subpart Q 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 subpart Q of this part) or affiliate (*see* § 1.2110(c)(5) of subpart Q 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 § 1.2110 of subpart Q 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 subpart G 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 subpart G 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 subpart F of this part may file the notification either electronically or manually. Except as provided in paragraph (e)(1)(ii) of this section, 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 subpart F 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 (g)(2) or (g)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the 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 subpart F 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 subpart F 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 (j)(2) of this section.

(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 subpart F 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 subpart F 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 (b)(2) of this section, 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 section 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 subpart A 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 sections 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 subpart P 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 subpart Q of this part and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (see § 1.2111 of subpart Q 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 subpart Q 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 § 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 subpart Q 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 subpart Q 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 subpart Q 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 subpart Q 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 subpart G 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 subpart G 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 subpart F 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 subpart G 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 subpart F of this part).

(ii) Petitions to deny filed in accordance with section 309(d) of the Communications Act must comply with the provisions of § 1.939 of subpart F 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 subpart G of this part).

(iv) Grant of consent to the application will be reflected in a Public Notice (see § 1.933(a)(2) of subpart F 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 subpart F 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 (f)(2) or (f)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the application. 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). Where there is pending before the Commission at the date of termination of the spectrum leasing arrangement a proper and timely application seeking to extend the arrangement, the parties may continue to operate under the original spectrum leasing arrangement without further action by the Commission until such time as the Commission shall make a final determination with respect to the application.

(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 subpart F of this part. The Commission will place information concerning the 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 subpart F of this part. The Commission will place information concerning the 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 (i)(2) of this section.

(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 subpart F 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 subpart F 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).

(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).

(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)), 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 subpart Q 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 subpart F 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 section 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 subpart G 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).

(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 (g)(2) or (g)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the 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* § 1.9035(e)), 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 paragraphs (h)(2) and (h)(3) of this section.

(2) If a licensee that holds a license that continues to be subject to transfer restrictions and/or requirements relating to unjust enrichment pursuant to the Commission's small business and/or entrepreneur provisions (*see* § 1.2110 of subpart Q 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 subpart Q 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* § 1.9030).

(i) *Assignment of spectrum leasing arrangement.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(g)) 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)) 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)) 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)) 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 subpart F 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:

(1) 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;

(2) 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;

(3) The spectrum leasing arrangement is not an assignment, sale, or transfer of the license itself;

(4) 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;

(5) 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 subpart Q of this part and related service-specific rules) and spectrum lessees must contain the following additional provisions:

(1) 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 § 1.9045; and

(2) 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 subpart Q 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 of subpart Q of this part 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. section 1001), and by appropriate administrative sanctions, including revocation of license pursuant to section 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 handwritten 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 subpart F 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 and 1.929 of subpart F 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 subpart F 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 subpart F of this part).

**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 § 27.4 by removing the definition of *Band Manager*.

■ 10. Amend § 27.10 by revising the undesignated introductory paragraph to read as follows:

**§ 27.10 Regulatory status.**

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.

\* \* \* \* \*

■ 11. Revise § 27.12 to read as follows:

**§ 27.12 Eligibility.**

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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