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

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

**REPORT AND ORDER
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

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

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I. INTRODUCTION

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

2. By this Report and Order, we take action to remove unnecessary regulatory barriers to the development of secondary markets in spectrum usage rights. The policies, rules, and procedures we adopt herein take important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. These flexible policies continue our evolution toward greater reliance on the marketplace to expand the scope of available wireless services and devices, leading to more efficient and dynamic use of the important spectrum resource to the ultimate benefit of consumers throughout the country. Facilitating the development of these secondary markets enhances and complements several of the Commission’s major policy initiatives and public interest objectives, including our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services by designated entities,⁴ and enable development of additional and innovative services in rural areas.

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

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

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

⁴ “Designated entities” include small businesses, rural telephone companies, and businesses owned by members of minority groups and/or women. Through the years, the Commission has implemented policies to help ensure that these entities are given the opportunity to provide spectrum-based services, consistent with Sections 309(j)(3) and (4) of the Communications Act. See generally 47 U.S.C. §§ 309(j)(3), (4); 47 C.F.R. § 1.2110; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348 (1994).

3. Specifically, we take several important steps to facilitate and streamline the ability of spectrum users to gain access to licensed spectrum by entering into spectrum leasing arrangements that are suited to the parties' respective needs. As a threshold matter, we revise the Commission's *de facto* control standard for interpreting Section 310(d) requirements in the context of spectrum leasing, replacing the outdated *Intermountain Microwave* standard⁵ that has been in place since 1963 with a refined standard that better accords with our contemporary market-oriented spectrum policies, fast-changing consumer demands, and technological advances.⁶ Commenters in this proceeding were unanimous in recommending that we adopt the Commission's tentative conclusion to replace this standard. The *Intermountain Microwave* standard, which focuses its *de facto* control analysis on whether licensees exercise close working control over all of the facilities using licensed spectrum, is not required by the Communications Act. Moreover, this standard impedes innovative and efficient leasing arrangements with third-party spectrum users that do not require Commission approval under the statute. The updated standard we adopt today for leasing refines the *de facto* control analysis, consistent with statutory requirements, by focusing instead on whether licensees continue to exercise effective working control over any spectrum they lease to others.

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

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

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

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

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

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

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

II. EXECUTIVE SUMMARY

A. Report and Order

8. In this Report and Order, we take several steps to facilitate the ability of most Wireless Radio Services licensees that hold "exclusive use" licenses⁸ to lease spectrum usage rights to third parties seeking access to spectrum.

9. *General overview of spectrum leasing policies.* We make clear that, subject to the conditions set forth in this Report and Order, licensees in the Wireless Radio Services covered herein may lease some or all of their spectrum usage rights to third parties, for any amount of spectrum and in any geographic area encompassed by the license, and for any period of time within the term of the license.⁹ In granting spectrum lessees and licensees the greatest amount of flexibility within the bounds of current law, we first replace the existing standard for assessing *de facto* control with an updated standard for spectrum leasing that better accommodates recent evolutionary developments in the Commission's spectrum policies, technological advances, and marketplace trends, consistent with statutory requirements. We then provide parties to spectrum lease transactions two different approaches based on the scope of the rights and responsibilities to be assumed by the lessee when leasing spectrum. Under the first leasing option – "spectrum manager" leasing – we enable parties to enter into spectrum leasing arrangements without the need to obtain prior Commission approval so long as the licensee retains both *de jure* control¹⁰ of the license and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard for leasing. Under the second option – "*de facto* transfer" leasing – we provide parties additional flexibility in structuring spectrum leasing arrangements by permitting them, pursuant to a streamlined approval process, to enter into leasing arrangements whereby licensees retain *de jure*

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

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

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

control of their licenses while *de facto* control over the use of the leased spectrum, and associated rights and responsibilities, are transferred for a defined period to spectrum lessees.

10. *The updated de facto control standard for spectrum leasing.* In order to facilitate spectrum leasing arrangements for which we find no public policy reason to require prior Commission approval, we replace our prior standard for interpreting *de facto* control under Section 310(d), as set forth in the 1963 *Intermountain Microwave* decision, with an updated standard that has been refined to reflect more recent evolutionary developments in the Commission's spectrum policies, technological advances, and marketplace trends.¹¹ This new standard is generally based on our "band manager" model that the Commission first employed in 2000 in the 700 MHz Guard Band¹² and recently extended (in a modified form) to the 1390-1392 MHz, 1670-1675 MHz, and 2385-2390 MHz bands and the paired 1392-1395 and 1432-1435 MHz bands.¹³ The *Intermountain Microwave* standard imposes significant constraints on the development of efficient spectrum use through secondary markets because it is essentially a "facilities-based" standard that requires licensees to exercise close working control over many different aspects associated with the operation of all of the station facilities using the licensed spectrum. This standard has become increasingly out of step with the flexible, market-based spectrum policies that Congress and the Commission have developed in recent years, and it imposes unnecessary barriers to efficient and effective access to spectrum resources.

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

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

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

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

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

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

The requirements of the “spectrum manager” leasing option include –

- The licensee must retain both *de jure* control of the license and *de facto* control of the leased spectrum. As noted above, exercising *de facto* control requires the licensee to maintain an active, ongoing oversight role to ensure that the spectrum lessee complies with the Communications Act and all applicable Commission policies and rules. The licensee must also engage in all interactions (including filings) with the Commission that are directly related to the use or uses of the spectrum, whether by the licensee or the lessee. (The licensee may employ agents in helping to carry out these responsibilities, but remains fully responsible for their performance.) The licensee will be held directly and primarily responsible for both maintaining its eligibility as a licensee and ensuring that each of its spectrum lessees complies with the relevant provisions of the Act and all applicable Commission policies and rules.
- The technical and interference-related services rules applicable to the particular spectrum-based service or frequency band(s) will also apply to the spectrum lessee as if it were a licensee in the service or band(s). In addition, as a general policy matter, the eligibility and qualification rules and the use restrictions applicable to the licensee in a particular service will be applied to spectrum lessees. For example, to address any potential national security, law enforcement, foreign policy, or trade policy concerns, we will require spectrum lessees to certify to foreign ownership criteria analogous to those applicable to Commission licensees. Further, leases associated with “designated entity”¹⁵ and “entrepreneur”¹⁶ licenses will be subject to applicable attribution and affiliation rules as well as our leasing rules, with the attribution and affiliation rules controlling in the event of conflict.
- In enforcing the Act and its policies and rules, the Commission will look primarily to the licensee to exercise its licensee responsibilities and ensure lessee compliance with the particular technical and service rules applicable to the particular spectrum-based service or frequency band(s). To the extent that a licensee fails to ensure such compliance, it potentially will be subject to enforcement action, such as admonishments, monetary forfeitures, and/or license revocation, as appropriate. Although spectrum lessee accountability is generally secondary under this option, the Commission will also hold spectrum lessees independently accountable for complying with the Act and the Commission’s policies and rules, potentially subjecting them to enforcement action, such as admonishments, monetary forfeitures, and other administrative sanctions. However, to the extent a lessee provides a communications service over the leased spectrum, the regulatory treatment of the lessee’s provision of such service will depend on the nature of the service, and the licensee would not necessarily be responsible for the lessee’s compliance with the

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

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

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

- The licensee will be required to provide notification and other relevant information and certification to the Commission with regard to each spectrum lease into which it has entered. Such notice must be provided within 14 days of the entering into the lease, and at least 21 days in advance of operation of facilities by the lessee. (For leases of up to one year, the licensee must provide notice at least 10 days in advance of operation.) In particular, licensees must submit information on the spectrum lessee, the specific spectrum leased (amount, frequency, geographic area of operation), and term of the lease. In addition, the lessee will be required to indicate whether it holds interests in other spectrum (through licenses or leases) in the geographic areas covered by the lease. The submission will be placed on an informational public notice on a weekly basis and publicly available in our Universal Licensing System (ULS) database.
- Although prior Commission approval is not required under this leasing option, the Commission retains the right to investigate and obtain additional information regarding particular leasing arrangements, post-notification, and to terminate such arrangements to the extent it determines that an arrangement raises significant public interest concerns (e.g., an arrangement constitutes an unauthorized transfer of *de facto* control under the new leasing standard or raises foreign ownership or competition concerns) or violates any notification certifications.

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

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

- The spectrum lessee, rather than the licensee, exercises *de facto* control of the leased spectrum. In addition to accepting the rights conveyed from the licensee pursuant to the terms of the lease, the lessee must exercise all associated responsibilities inherent in such control. The licensee retains *de jure*, or legal, control of the leased spectrum and may impose other terms and conditions on the lessee, as agreed to by the parties. The lessee assumes general responsibility for interacting with the Commission with respect to the leased spectrum (including making associated filings). The spectrum lessee will be held directly and primarily responsible for ensuring that it complies with the Communications Act and all applicable Commission policies and rules.
- All of the particular service rules and policies applicable to the licensee under its license authorization – both interference and non-interference related – will apply to the lessee. Accordingly, the eligibility rules (e.g., foreign ownership restrictions, designated entity/entrepreneur requirements), qualification rules, and use restrictions applicable to licensees will apply to lessees under this option.

- In enforcing the Act and its policies and rules, the Commission will look primarily to the spectrum lessee for compliance. The lessee will be subject to enforcement action, including admonishments, monetary forfeitures, and/or lease revocation, as appropriate. Although the licensee will retain some residual responsibility for ensuring compliance, this will generally be limited to instances in which it has knowledge or should have knowledge about a lessee's ongoing failure to comply, or instances that otherwise constitute a violation of the terms and conditions of the lease agreement. The Commission will not be involved in any disputes between licensees and their lessees to the extent that such disputes are not directly related to compliance with the Communications Act and applicable Commission policies and rules. We would expect that any violations of the terms and conditions of the lease agreement that are also directly related to compliance with the Act or rules would be handled in the first instance by the licensee as a private contractual enforcement matter and that the Commission would independently determine if additional regulatory enforcement steps would be warranted.
- A lease application must be filed with the Commission and prior Commission approval is required. If substantially complete, the application will be placed promptly on public notice. Petitions to deny filed in accordance with Section 309(d) of the Communications Act will be due within 14 days. Within 21 days of the public notice, the Wireless Telecommunications Bureau will either affirmatively consent to the transfer or "offline" the application to the extent that public interest concerns are raised (e.g., the lessee's qualifications, competition concerns) that require further examination.

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

- As under the long-term leasing arrangements described above, the spectrum lessee exercises *de facto* control of the leased spectrum, and must exercise all associated responsibilities inherent in such control. The spectrum lessee will be held directly and primarily responsible for compliance with the Communications Act and all applicable Commission policies and rules.
- Due to the short-term nature of these leasing arrangements, we provide some additional flexibility with regard to the particular service rules and policies applicable to the spectrum lessee. While the interference-related rules will apply to the lessee, we will not require that certain service rules applicable to the licensee – including certain use restrictions, designated entity and entrepreneur policies, and policies related to spectrum aggregation – be applied to short-term lessees.
- Short-term leasing arrangements that meet the specified conditions will be approved within 10 days pursuant to our special temporary authority (STA) procedures.

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

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

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

B. Further Notice of Proposed Rulemaking

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

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

- What additional steps the Commission should take to encourage the development of mechanisms for providing necessary spectrum information to licensees with underutilized spectrum and those in need of access to spectrum; what type of information interested parties may need; the potential for “market-maker” intermediaries to develop; and, the nature of the Commission’s role in regulating such intermediaries or otherwise facilitating access to spectrum information.
- What secondary market mechanisms are necessary to facilitate access to spectrum by new technologies; whether there will be need for a clearinghouse mechanism to provide real-time spectrum information for “opportunistic” devices; and, what the Commission’s role should be in the establishment or regulation of such a clearinghouse.

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

- Forbearing from requiring prior Commission approval for certain categories of spectrum leases that involve a transfer of *de facto* control to the lessee.
- Possibly forbearing from requiring prior Commission approval of certain categories of transfers of control and assignments of licenses that do not raise public interest issues requiring Commission analysis.

- Extending spectrum leasing policies and procedures to services not within the scope of the Report and Order, including public safety services, and other wireless services with shared or exclusive use licenses.
- Implementing the new *de facto* control standard established by the Report and Order for spectrum leasing in the context of other regulatory policies and procedures that require a determination of *de facto* control.
- Assessing the impact of secondary market policies on the Commission's designated entity rules.

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

III. BACKGROUND

A. Policy Statement and NPRM on Secondary Markets

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

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

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

¹⁸ *Policy Statement* at ¶ 1.

¹⁹ *Id.* at ¶ 11.

²⁰ *Id.* at ¶ 15.

²¹ *Id.* at ¶¶ 28-29.

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

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

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

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

²² *Id.* at ¶¶ 1, 16, 20, 24, 26, 27, 32, 34. See also Principles for Reallocation of Spectrum to Encourage the Development of Telecommunications Technologies for the New Millennium, *Policy Statement*, 14 FCC Rcd 19868, 19872 ¶ 13 (1999) (*Policy Statement on Principles for Spectrum Allocation*) (discussion of ways to expand secondary markets for spectrum).

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

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

²⁵ See generally *id.* at ¶¶ 18-34.

²⁶ See *id.* at ¶¶ 70-80.

²⁷ See *id.* at ¶¶ 81-82.

²⁸ See *id.* at ¶¶ 66-68.

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

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

B. Spectrum Policy Task Force Report

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

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

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

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

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

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

³⁵ See generally *37 Concerned Economists Comments*.

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

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

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

³⁹ *Id.* at 1.

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

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

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

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

⁴⁰ *Id.* at 12-13.

⁴¹ *Id.* at 13-14.

⁴² *Id.* at 14-15.

⁴³ *Id.* at 3-4.

⁴⁴ *Id.* at 4, 16-23.

⁴⁵ *Id.* at 5, 35-45.

⁴⁶ *See generally id.* at 55-60.

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

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

IV. REPORT AND ORDER

A. Spectrum Leasing Arrangements in Wireless Radio Services

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

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

⁴⁷ See generally *id.* at 55-58.

⁴⁸ *Id.* at 55-56.

⁴⁹ See generally *id.* at 56-57.

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

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

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

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

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

a. Background

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

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

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

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

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

⁵⁶ *Id.* at ¶ 62.

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

⁵⁸ *NPRM* at ¶ 23.

⁵⁹ See generally *id.* at ¶¶ 18-21.

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

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

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

⁶¹ See generally *id.* at ¶¶ 27-34.

⁶² See generally *id.* at ¶¶ 70-82.

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

⁶⁴ *Id.* at ¶ 29.

⁶⁵ *Id.* at ¶ 25.

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

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

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

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

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

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

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

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

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

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

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

⁷⁴ See, e.g., RTG Comments at 31-32.

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

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

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

b. Discussion

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

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

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

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

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

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

⁸¹ *NPRM* at ¶¶ 20-21, 25.

⁸² See Section IV.A.3, *infra*.

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

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

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

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

⁸⁴ We discuss this “spectrum manager” leasing option in detail in Section IV.A.5.a, *infra*.

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

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

⁸⁷ *NPRM* at ¶ 8.

⁸⁸ *See id.* at ¶ 8.

⁸⁹ *See id.* at ¶¶ 18-20.

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

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

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

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

⁹² We also note that we continue to make strides to free up additional licensed spectrum resources and to provide greater flexibility to unlicensed devices to facilitate spectrum-based broadband access. See, e.g., *In the Matter of Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, Notice of Proposed Rulemaking*, 17 FCC Rcd 24135 (2002); *In the Matter of Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band, Notice of Inquiry*, 17 FCC Rcd 25632 (2002); *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003); *Revision of Parts 2 and 15 of the Commission's Rules to Permit Unlicensed National Information Infrastructure (U-NII) devices in the 5 GHz band, Notice of Proposed Rulemaking*, 18 FCC Rcd 11581 (2003).

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

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

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

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

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

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

a. Background

46. As noted above, in its effort to eliminate Commission policies that unnecessarily impede the development of secondary markets in spectrum usage rights, the Commission tentatively concluded to replace its historic interpretation of the Section 310(d)⁹⁸ requirements set forth in the 1963 *Intermountain Microwave* decision⁹⁹ with an updated, more flexible *de facto* control standard that would be applied to

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

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

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

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

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

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

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

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

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

¹⁰² See *NPRM* at ¶¶ 78-80.

¹⁰³ *Id.* at ¶ 79.

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

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

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

¹⁰⁷ *Id.* at ¶ 43.

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

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

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

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

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

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

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

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

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

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

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

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

b. Discussion

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

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

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

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

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

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

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

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

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

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

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

54. Fundamental changes in the Commission's spectrum policies and the licensing models in the Wireless Radio Services, including those responsive to amendments to the Communications Act, have led us to reevaluate the continued appropriateness of the *Intermountain Microwave* standard¹²³ for evaluating whether a licensee retains *de facto* control of its license in the context of spectrum leasing. As discussed in the *NPRM*, even as the Commission has continued to apply the *Intermountain Microwave* test since the original 1963 decision, through the years it has recognized the need to evaluate the continued viability of that test in light of changing circumstances and current realities.¹²⁴ We have broad authority to interpret the requirements of the Communications Act,¹²⁵ and have significant discretion to revise existing policies, including the *Intermountain Microwave de facto* control interpretation, upon providing a reasoned basis for the policy revision.¹²⁶ We now determine that, in the context of spectrum leasing, retaining the *Intermountain Microwave* standard for evaluating *de facto* control issues under Section 310(d) no longer serves the public interest. Specifically, we determine that with regard to spectrum leasing, a new *de facto* control standard – one that continues to require that licensees exercise sufficient working control over the use of their leased spectrum so as to be consistent with the requirements of Section 310(d), but also allows additional flexibility to licensees to enter into certain types of leasing arrangements without the need for prior Commission approval – should replace the standard set forth in *Intermountain Microwave* and its progeny.

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

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

¹²² See Section V.D, *infra*.

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

¹²⁴ *NPRM* at ¶¶ 75-76.

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

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

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

56. During the last several years – in response to changes in the Communications Act and as part of the Commission's ongoing efforts to facilitate market-oriented spectrum licensing and allocation as well as deregulatory, pro-competitive policies – the Commission has made significant advances in improving its spectrum policies relating to Wireless Radio Services to serve the public interest. Congressional revisions to the Communications Act in the last two decades have provided significant new directives to the Commission that encourage and enhance its ability to fashion more flexible spectrum policies. For instance, in 1983, Congress added Section 7(a), establishing that the policy of the United States is “to encourage the provision of new technologies and services to the public.”¹²⁸ In 1993, Congress amended Title III of the 1934 Act to authorize the Commission to assign licenses through competitive bidding procedures, and directed that the Commission in designing those procedures implement policies that promote the efficient and intensive use of spectrum, opportunities for new entrants to provide spectrum-based services, and investment in and rapid deployment of new technologies and services.¹²⁹ The 1993 amendments to the Act also required that more spectrum be transferred from federal government use to commercial use,¹³⁰ and gave to the Commission the authority to forbear from enforcing certain statutory provisions and rules applicable to telecommunications services that no longer serve the public interest.¹³¹ In the Telecommunications Act of 1996, Congress made sweeping changes to the Communications Act of 1934 – primarily in connection with wireline telecommunications services, but with significant effects on certain spectrum-based services as well¹³² – in order to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”¹³³ Finally, in the Balanced Budget Act of 1997, Congress expanded the Commission's auction authority, provided for the transfer of additional spectrum from federal

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

¹²⁸ *See* 47 U.S.C. § 157(a).

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

¹³⁰ *See* 47 U.S.C. § 923.

¹³¹ *See* 47 U.S.C. § 159.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹³⁹ See *id.* at 5313-5314 ¶¶ 29-31.

¹⁴⁰ See *Policy Statement* at ¶¶ 1-2.

¹⁴¹ See *id.* at ¶¶ 9-10, 12.

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

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

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

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

63. Accordingly, we adopt a more refined interpretation of the Section 310(d) *de facto* control standard in the context of spectrum leasing and today's increasingly flexible regulatory policies. This revised standard will permit licensees and spectrum users to enter into certain types of leasing arrangements, without them being deemed transfers of *de facto* control that would require prior Commission approval, so long as the licensee maintains effective working control of the leased spectrum and has the ongoing responsibility for ensuring compliance with applicable Commission policies and rules during the term of the lease. This modification of the *de facto* control standard – which focuses on ensuring the licensee's control of the proper use of its leased spectrum (i.e., compliance with the policies and rules applicable to the service) instead of the licensee's own control of each of the facilities using the spectrum – is an important step in updating our policies affecting spectrum leasing to support our current spectrum use objectives¹⁴⁸ as well as the other statutory changes discussed above.

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

¹⁴⁵ *NPRM* at ¶ 71.

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

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

¹⁴⁸ See generally *Policy Statement*.

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

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

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

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

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

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

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

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

67. Other key elements of the licensee's continuing control are that it must be able to inspect the lessee's operations and that it must retain the right to terminate the lease in the event the spectrum lessee fails to comply with the terms of the lease and/or the Commission's requirements. If the licensee or the Commission determines that there is any violation of the Commission's rules or that the lessee's system is causing harmful interference, the licensee must immediately take steps to remedy the violation, resolve the interference, suspend or terminate the operation of the system, or take other measures to prevent further harmful interference until the situation can be remedied. If the lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the

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

¹⁵² See Section IV.A.5.a, *infra*.

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

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

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

68. *Licensee responsibility for interactions with the Commission, including all filings, required under the license authorization and applicable service rules directly related to the leased spectrum.* Pursuant to the second factor above, the licensee is required to engage in all of the licensee interactions with the Commission that are required under the applicable service rules and policies and are directly related to the use of the spectrum. As a preliminary matter, the licensee must file the necessary notification with the Commission, including information establishing the spectrum lessee's eligibility to lease the spectrum pursuant to the rules applicable to this type of leasing arrangement.¹⁵⁵ In addition, the licensee is responsible for making all required filings (e.g., applications, notifications, and correspondence¹⁵⁶) associated with the license authorization that are directly affected by the lessee's use of the licensed spectrum. Licensees may use agents (such as counsel and engineering consultants) to complete these electronic filings, just as they do now under current policies.¹⁵⁷

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

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

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

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

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

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

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

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

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

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

73. Section 310(d)’s purpose generally is to ensure that a licensee that the Commission has already passed upon as qualified in a particular service¹⁶² 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

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

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

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

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

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

74. While the refined *de facto* control standard adopted above departs from the specific factors set forth in *Intermountain Microwave*, the two approaches share a fundamental interpretation of statutory requirements under Section 310(d). Under both approaches, a licensee's continued control over the licensed use of spectrum lies at the heart of what it means to retain the license and the rights thereunder. Where the two standards differ is in the significance attached to certain non-licensed activities that relate to the license, and in the degree of control that a licensee must retain over its license and specific license rights to avoid a determination that it has "transferred, assigned, or disposed of in any manner"¹⁶³ such license or rights. In reassessing the significance of these non-licensed activities and the degree of control that a licensee must exercise over its license and derivative spectrum usage rights, we are fulfilling our obligation to ensure that the manner in which we apply Section 310(d) to spectrum leasing, along with related policies regarding *de facto* control, continue to reflect our best understanding of the statute's requirements. After reviewing the dramatic changes in the Wireless Radio Services – both the evolution of the licensing policies discussed above¹⁶⁴ and the associated development of the industry's use of these services – we have concluded that the continued application of the *Intermountain Microwave* standard to spectrum leasing is neither required by Section 310(d) nor serves the public interest.

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

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

¹⁶³ 47 U.S.C. § 310(d).

¹⁶⁴ See Section IV.A.2.b(i), above.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Wireless Radio Services Eligible for Spectrum Leasing

a. Background

82. The Commission tentatively concluded in the *NPRM* that it would like to facilitate the wider use of spectrum leasing among most Wireless Radio Services¹⁷² in which licensees hold exclusive rights to use the licensed spectrum.¹⁷³ Generally excluded from the proposal were the Guard Band Manager Service (Part 27, Subpart G), Experimental Radio, Auxiliary, Special Broadcast, and Other Program Distributional Services (Part 74), Public Safety Radio Services (Part 90), Maritime Services (Part 80), Aviation Services (Part 87), Personal Radio Services (Part 95), and the Amateur Radio Service (Part 97).¹⁷⁴ The Commission also excluded from its leasing proposal those services in which spectrum is “shared,” but it sought comment on whether leasing in such services should be permitted.¹⁷⁵

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

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

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

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

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

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

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

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

b. Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁸⁹ Accordingly, the following Wireless Radio Services are excluded from the leasing policies set forth in this Report and Order: the Guard Band Manager Service (Part 27, Subpart G); Experimental Radio, Auxiliary, Special Broadcast, and Other Program Distributional Services (Part 74); Maritime Services other than VHF Public Coast Stations regulated under Subpart J (Part 80); Aviation Services (Part 87); Public Safety Radio Services (Part 90); the Location and Monitoring Service with regard to licenses for non-multilateration LMS systems (Part 90); Personal Radio Services other than the 218-219 MHz Service (Part 95); and the Amateur Radio Service (Part 97). In addition, at this time we continue to exclude the ITFS and the Multipoint Distribution Service (MDS)/Multichannel Multipoint Distribution Service (MMDS), Parts 74 and 21 services, noting that a recent proceeding has been initiated that raises leasing issues, among others, with respect to those particular services. See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz (continued....)

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

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

a. Background

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

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

¹⁹⁰ *See* Section V.C, *infra*.

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

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

¹⁹³ At the time the *NPRM* was adopted, the CMRS “spectrum cap” aggregation limits were still in place. In November 2001, the Commission repealed the spectrum cap, effective January 1, 2003. *See* 2000 Biennial Regulatory Review – Spectrum Aggregation Limits for Commercial Mobile Radio Services, *Report and Order*, 16 FCC Rcd 22668 (2001) (*2000 Biennial Review Order on CMRS Aggregation Limits*). In that order, the Commission noted that it would continue to have an obligation to guard against potential anticompetitive effects that might result from entities aggregating control over spectrum. *See generally id.* at 22681-22693 ¶¶ 30-46, 22695-22696 ¶¶ 54-55, 22699-22700 ¶¶ 62-65.

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

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

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

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

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

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

¹⁹⁵ *Id.* at ¶¶ 50-51.

¹⁹⁶ *See id.* at ¶¶ 42-43.

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

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

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

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

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

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

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

service rules and policies generally should not be applied to a lessee.²⁰⁴ With regard to the application of specific service rules to spectrum lessees, commenters supported allowing licensees to rely on their lessees' activities for meeting applicable construction/performance requirements²⁰⁵ and permitting lessees to choose their regulatory status (to the extent licensees could),²⁰⁶ but they were split regarding how designated entity policies²⁰⁷ or then-applicable aggregation limits should apply to lessees.²⁰⁸ On other specific rules, parties offered few comments.²⁰⁹ Several parties recommended that the Commission postpone deciding whether to apply some or all service rules to spectrum lessees until after it issued an initial report and order establishing a general framework for spectrum leasing; they asserted that this would enable the Commission to engage in a more thorough analysis and review of the complexities potentially raised.²¹⁰

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

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

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

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

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

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

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

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

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

b. Discussion

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

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

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

²¹² See *NPRM* at ¶ 35.

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

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

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

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

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

5. Specific Policies and Procedures Applicable to Spectrum Leasing Arrangements

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

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

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

(i) Background

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

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

²¹⁷ See *NPRM* at ¶¶ 27-32.

²¹⁸ *Id.* at ¶¶ 29, 31-32.

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

²²⁰ *NPRM* at ¶ 33.

²²¹ See generally *id.* at ¶¶ 29-32.

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

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

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

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

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

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

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

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

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

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

(ii) Discussion

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

100. *Licensees' rights and responsibilities.* Under this type of leasing arrangement, we grant licensees the right to lease any or all of their spectrum usage rights to spectrum lessees, and to do so without the need for Commission approval, so long as licensees retain *de jure* control of the license²³⁰ and act as spectrum managers with regard to the leased spectrum by continuing to exercise *de facto* control over that spectrum, pursuant to the standard enunciated above. The Commission will hold licensees directly and primarily responsible for ensuring their lessees' compliance with the Act and applicable Commission policies and rules. Failure of a licensee to meet the criteria of the revised *de facto* control standard would constitute an unauthorized transfer of control under Section 310(d). The licensee must also file a notification with the Commission that it has entered into a spectrum leasing arrangement, as discussed more fully in Section IV.A.5.a(ii)(c), below. Failure to do so would subject a licensee to possible enforcement action as a substantive rule violation.

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

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

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

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

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

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

²³¹ 47 U.S.C. §§ 503(b), 312.

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

enforcement action. In addition, licensees retain responsibility for maintaining compliance with applicable eligibility and ownership requirements imposed on them pursuant to the license authorization. Spectrum leasing cannot be used by licensees and lessees as a means of thwarting or abusing the basic qualifications and eligibility policies applicable to licensees.

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

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

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

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

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

²³⁴ *NPRM* at ¶¶ 31-32.

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

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

²³⁷ See 47 U.S.C. § 503(b)(2)(B).

107. *Renewal.* A licensee and spectrum lessee that have entered into a spectrum leasing arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement during the term of the renewed license authorization. The licensee must notify the Commission of such an extension of the spectrum leasing arrangement on the same application it submits for license renewal.

(b) Application of particular service rules and policies

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

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

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

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

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

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

111. We will also require, as a general policy matter, that spectrum lessees satisfy the qualification requirements, including character qualifications, applicable to the licensee under the license authorization. Thus, for instance, the lessee must not be a person subject to the denial of Federal benefits under the Anti-Drug Abuse Act of 1988.²⁴¹ Similarly, the lessee must certify whether it is a person who has been convicted of a felony, had a license revoked for any reason (e.g., misrepresentation or lack of candor), had any application for initial, modification, or renewal of a station authorization, license, or construction permit denied by the Commission, or has been convicted of unlawful monopolization.²⁴²

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

113. *Designated entity/entrepreneur policies and rules.* Under this leasing option, we determine that designated entity²⁴⁶ and entrepreneur²⁴⁷ 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 rules²⁴⁸ and/or transfer restrictions²⁴⁹ so long as the lease

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

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

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

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

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

²⁴⁶ See note 15, *supra*.

²⁴⁷ See note 16, *supra*.

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

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