

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

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

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

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

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

⁴¹³ *NPRM* at ¶ 100.

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

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

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

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

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

a. Background

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

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

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

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

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

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

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

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

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

⁴²⁰ *Id.* at 19-21.

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

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

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

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

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

b. Discussion

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

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

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

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

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

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

⁴²⁷ *Spectrum Policy Task Force Report* at 57.

⁴²⁸ *Id.* at 57-58.

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

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

1. Background

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

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

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

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

⁴²⁹ *Id.* at 35, 57.

⁴³⁰ *NPRM* at ¶ 20.

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

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

2. Discussion

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

[T]he Commission shall forbear from applying any regulation or any provision of the Communications Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets if the Commission determines that – (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.⁴³³

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

243. In determining whether forbearance from the prior approval processes is consistent with the public interest, the Commission must consider whether forbearance will promote competitive market conditions, including whether it will enhance competition among telecommunications service providers.⁴³⁵ If the Commission determines that forbearance will promote competition among providers of telecommunications services, that determination may be the basis for finding that forbearance is in the public interest (one of the three prongs of the test).⁴³⁶

a. Forbearance with respect to certain spectrum leasing arrangements

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

⁴³³ 47 U.S.C. § 160(a).

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

⁴³⁵ 47 U.S.C. § 160(b).

⁴³⁶ *Id.*

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

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

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

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

247. *The lessee must satisfy applicable eligibility and use restrictions associated with the leased spectrum.* For a leasing agreement to be eligible for processing pursuant to this forbearance proposal, the lessee would be required to meet any applicable eligibility limitations and comply with any use restrictions associated with the spectrum it plans to lease. A lessee would also have to meet our basic qualification requirements for holding an authorization. Thus, for example, a lessee would be required to have the requisite character qualifications and to be able to certify its compliance under the Anti-Drug Abuse Act of 1988.⁴³⁹ Would certifications by the licensee and/or lessee in the notification that we propose below⁴⁴⁰ assure that these conditions are being satisfied?

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

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

⁴³⁸ See Section IV.A.5.b(i)(b).

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

⁴⁴⁰ See Section V.B.2.a(ii), *infra*.

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

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

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

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

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

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

⁴⁴² See 47 U.S.C. § 310(a).

⁴⁴³ See 47 U.S.C. §§ 310(b)(1)-(3).

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

253. Third, we propose that, as a condition of eligibility for forbearance, the lessee must not have more than 25 percent indirect foreign ownership,⁴⁴⁵ or must have previously obtained a declaratory ruling from the Commission in advance of entering into the subject lease that its lease of the spectrum at issue is consistent with the Commission's foreign ownership policies.⁴⁴⁶ Under Section 310(b)(4), "[n]o broadcast or common carrier or aeronautical en route or aeronautical fixed radio station shall be granted to or held by ... any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign country, if the Commission finds that the public interest will be served by the refusal or revocation of such license."⁴⁴⁷ We have traditionally conducted our public interest analysis of indirect foreign ownership in excess of 25 percent in the context of specific applications (whether for a new authorization or in connection with a transfer of control or license assignment) involving an entity with such ownership or in response to a request for declaratory ruling.⁴⁴⁸ Moreover, under the *Foreign Participation Order*, we treat different classes of foreign ownership differently, depending upon whether the applicant is from a WTO-member nation or a non-WTO-member nation.⁴⁴⁹ Under the current standard, an applicant that demonstrates more than 25 percent indirect foreign ownership attributable to entities from WTO member nations is entitled to a presumption that no competitive concerns are raised by the proposed investment, subject to Commission consideration of any relevant factors and evidence that might tend to rebut the presumption.⁴⁵⁰ In contrast, an applicant that demonstrates more than 25 percent indirect foreign

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

⁴⁴⁵ See 47 U.S.C. § 310(b)(4).

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

⁴⁴⁷ 47 U.S.C. § 310(b)(4).

⁴⁴⁸ See, e.g., Lockheed Martin Global Telecommunications, Comsat Corporation, and Comsat General Corporation, Applications for Assignment of Section 214 Authorizations, Private Land Mobile Radio Licenses, Experimental Licenses, and Earth Station Licenses and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act, *Order and Authorization*, 16 FCC Rcd 22897 (2001), *Erratum*, 17 FCC Rcd 2147 (2002), recon. denied, 17 FCC Rcd 14030 (2002); Space Station System Licensee, Inc. (Assignor) and Iridium Constellation LLC (Assignee), *Memorandum Opinion, Order and Authorization*, 17 FCC Rcd 2271 (IB 2002); Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as Amended, *Declaratory Ruling and Order*, 11 FCC Rcd 1850, 1857 ¶47 (1995).

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

⁴⁵⁰ See, e.g., General Electric Capital Corporation and SES Global, S.A., *Order and Authorization*, 16 FCC Rcd 17575, 17579 ¶ 30 (IB & WTB 2001); see also *Foreign Participation Order*, 12 FCC Rcd at 23913-23915 ¶¶ 50-53, 23940 ¶¶ 111-112. We do not presume, however, that indirect foreign investment from WTO-member nations poses no national security, law enforcement, foreign policy, or trade concerns, and accord deference to the expertise of Executive Branch agencies in identifying and interpreting these issues of concern in the context of particular applications and petitions for declaratory ruling under Section 310(b)(4). See *id.*, 12 FCC Rcd at 23919-23920 ¶¶ 63-64.

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

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

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

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

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

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

⁴⁵² 47 U.S.C. § 310(b)(4).

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) Notification

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

⁴⁵⁷ See 47 C.F.R. § 1.948(c)(1); Federal Communications Bar Association’s Petition for Forbearance from Section 3109d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, *Memorandum Opinion and Order*, 13 FCC Rcd 6293, 6312 ¶ 36 (1998) (*Pro Forma Forbearance Order*). Like the *pro forma* assignment and transfer of control situations, we propose that the notification be made electronically to the extent electronic filing is required for the (continued....)

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

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

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

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

(iii) Compliance with the forbearance standard

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

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

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

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

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

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

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

271. First, we believe that for spectrum leases meeting the elements above, 30 days public notice and individualized prior Commission review and approval appear to be unnecessary to ensure that the charges, practices, classifications, and services of licensees and lessees are just and reasonable and not unjustly or unreasonably discriminatory. We seek above to define benchmarks that would limit the scope of spectrum leases that could be put into place under the proposed forbearance process, and we believe that the permissible spectrum leases would be less likely to implicate concerns about the charges, practices, classifications, and services of the parties to the spectrum lease. In addition, at present, applications proposing a transfer of control or assignment of license do not generally contain information on the charges, practices, classifications, or services of the parties involved, and we have declined to use such applications as a context for regulating such issues.⁴⁶² Retaining a 30-day public notice period and individualized prior review of the applications – where we do not address these matters in any event in the context of such applications – thus is not necessary to ensure that licensees' and lessees' charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory. Moreover, we have other existing tools at our disposal, including enforcement actions, to ensure that charges, practices, classifications, and regulations are just and reasonable and not unjustly or unreasonably discriminatory.

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

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

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

⁴⁶² See Craig O. McCaw, *Memorandum Opinion and Order*, 9 FCC Rcd 5836, 5880-5881 ¶ 76 (1994), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), *recon. in part*, 10 FCC Rcd 11786 (1995).

⁴⁶³ See generally *Policy Statement*.

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

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

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

276. As a practical matter, many licenses that are beyond the scope of Section 10 are not subject to the statutory requirement of 30 days public notice prior to Commission approval, which applies only to common carrier and broadcast licenses. Nonetheless, Section 310(d) requires prior Commission review and approval of all transaction applications involving non-common carrier and non-broadcast licenses (as well as applications involving common carrier and broadcast licenses). While the review period may be shortened because the 30-day public notice period is not required as part of that process, the requirement of prior Commission approval can still cause delays and costs for parties seeking to enter into such transactions, many of which raise no significant public interest issues.

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

c. Forbearance with respect to certain transfers and assignments

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

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

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

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

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

279. Specifically, we seek comment on whether transfers of control and assignment of licenses⁴⁶⁷ meeting certain conditions or benchmarks could be eligible for a forbearance-based notification-only consent process. Could we determine that prior review of such transactions is not necessary to fulfill our public interest duties and goals? Clearly, any transfer and assignment arrangements found to be eligible for forbearance-based regulatory processing must be subject to appropriate conditions to ensure that crucial Commission policies are not thwarted by means of secondary market arrangements. Would allowing these categories of transactions to proceed with a minimum of regulatory cost and delay facilitate the movement of spectrum in the secondary market to its highest valued use, improve efficient use of spectrum, increase opportunities for access to spectrum where needed, and benefit wireless consumers by enhancing the services made available to them?

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

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

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

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

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

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

283. If we were to pursue forbearance for transfer and assignment applications, should we employ the same notification requirements as proposed for spectrum leases in a forbearance regime in Section V.B.2.a(ii) above? Does this provide sufficient notice to interested parties, in light of the differences between spectrum leases and transfers of *de jure* and *de facto* control? Could this process be revised in any way to achieve a better balance among the competing public policy objectives implicated by any such plan for forbearance for transfers and assignments?

284. We request commenters to address whether the forbearance conditions noted above would satisfy the Section 10 requirements for extending forbearance to some applications involving transfers of control and/or license assignments. Can parties provide any further explanation why forbearance from the 30-day public notice period and individualized prior Commission review and approval supports a finding that the Section 10 test has been met? To the extent parties suggest alternative or additional conditions and benchmarks to be used to define transfers of control and assignment of licenses that might be processed on a forbearance basis, we request that they address in detail the Section 10 implications of their proposals.

285. In assessing whether forbearance from prior public notice and individualized Commission review meet the Section 10 test, we request commenters to consider the provisions of Section 310(d), in particular the requirement that no transfer of control or assignment of license may take place unless the Commission finds that “the public interest, convenience, and necessity will be served thereby.”⁴⁶⁸ As stated above, the statutory transfer of control obligations help to ensure that a licensee, initially found qualified to hold a Commission authorization, does not in turn replace itself with an unqualified entity or somehow use the transfer/assignment process to shirk its obligations to the Commission. We wish to ensure that any forbearance policies adopted in the context of transfer and assignment applications will not undercut our ability to carry out this obligation.

286. We acknowledge that in seeking comment on extending forbearance policies to some transfer and assignment applications, we are striving to balance competing goals. As noted above, we anticipate that more successful functioning of secondary markets – both spectrum leases and outright transfers and assignments – will benefit consumers by increasing the range of wireless services available to them and driving spectrum to its highest valued use. But our public interest considerations are not limited solely to an assessment of competitive issues. We must also look to the Commission’s other statutory objectives in weighing whether forbearance from traditional application processing for transfer

⁴⁶⁸ 47 U.S.C. § 310(d).

and assignment application in total furthers the public interest and whether it can be authorized in accordance with the provisions of Section 10. We specifically request comment from interested parties regarding all the factors that should be taken into account in making our public interest calculus in this situation.

287. Finally, to the extent that we pursue forbearance from traditional regulatory processing for substantial transfer and assignment applications in the Wireless Radio Services encompassed within the Report and Order or in any additional services based on this Further Notice, relief from prior public notice and Commission approval requirements would be available only for telecommunications services and telecommunications carriers. In a manner parallel to adopting forbearance-based notification processing for spectrum leases, we recognize the need to provide consistent treatment to similar types of wireless service licenses. In addition, in the case of transfers and assignments, there is a real likelihood in today's environment that a licensee would have licenses that would be eligible for forbearance and some that would not. We seek comment on how to ensure that we can expeditiously process a proposed transfer of control or assignment of license that involves both categories of licenses. Are there alternative ways we can streamline processing of transfer and assignment applications involving non-telecommunications services and non-telecommunications carriers?⁴⁶⁹

C. Extending the Policies Adopted in the Report and Order to Additional Spectrum-Based Services

1. Background

288. In the Report and Order, we extend our new leasing policies to most Wireless Radio Services in which licensees hold exclusive rights to use the licensed spectrum.⁴⁷⁰ However, the *NPRM* did not propose to extend leasing to certain other Wireless Radio Services, including Public Safety Radio Services (Part 90), Guard Band Manager Service (Part 27, Subpart G), Maritime Services (Part 80), Aviation Services (Part 87), Personal Radio Services (Part 95) (other than the 218-219 MHz Service), Amateur Radio Service (Part 97), and Experimental Radio, Auxiliary, Special Broadcast, and other Program Distributional Services (Part 74), as well as shared frequencies licensed under our Wireless Radio Service rules. Although the Commission also asked about promoting spectrum leasing in the satellite services, all other spectrum-based services outside of Wireless Radio Services were excluded.

2. Discussion

289. We wish to consider extending our leasing policies, as adopted in the Report and Order and as they may be modified based on this Further Notice, to additional spectrum-based services. In light of our conclusions about the public interest benefits of spectrum leasing in the services for which we have adopted spectrum leasing policies, we consider in this Further Notice whether we should extend the policies adopted in the Report and Order to some of the radio services that we have excluded to date.

290. *Public safety services.* Our Public Safety Radio Pool is regulated pursuant to Part 90 of our rules.⁴⁷¹ State and local jurisdictions rely upon our Public Safety Radio Pool to carry out their public safety obligations. The pool encompasses the licensing of the radio communications of state and local

⁴⁶⁹ We note that we seek comment only with respect to services covered by the Report and Order and services that might be added pursuant to Section V.C, *infra*.

⁴⁷⁰ See Section IV.A.3.b, *supra*.

⁴⁷¹ 47 C.F.R. Part 90.

governmental entities and certain other categories of activities.⁴⁷² Communications transmitted over these facilities may include communications among members of a firefighting team, directions to an ambulance crew, and coordination among different police and fire agencies responding to a regional crisis. In many instances, such public safety communications are highly time-critical, but episodic in nature.⁴⁷³

291. We seek comment here on whether to permit licensees in the Public Safety Radio Pool to lease access rights to their licensed spectrum.⁴⁷⁴ Initially, we note that any such leasing would be a voluntary transaction by a public safety licensee, and not the use of this spectrum by third parties without consent by that licensee. We also recognize that public safety licensees require near-instant access to their full spectrum capacity, when demand surges due to emergencies.⁴⁷⁵ Using traditional technology, the only way to guarantee such access has been full-time dedicated spectrum.⁴⁷⁶ New technologies, however, may allow both ultra-reliable near-instant access by public safety licensees and use by other licensees at times of low public safety demand.⁴⁷⁷ We note that the Spectrum Policy Task Force recommended that the Commission consider permitting public safety licensees to lease their spectrum usage rights under conditions in which they could immediately reclaim and use their spectrum in such emergencies.⁴⁷⁸ Some have proposed to allow public safety licensees to lease their spectrum to others on an interruptible basis, whereby third parties could lease under the condition that they would immediately cease using the spectrum if the public safety licensees exercised their right to preempt such leased use.⁴⁷⁹ Under these circumstances, the public safety entity would lose no access to use of its spectrum, which it nevertheless could also make available at certain times to third parties. We intend to begin a proceeding

⁴⁷² See 47 C.F.R. § 90.15 (medical services, rescue organizations, veterinarians, persons with disabilities, disaster relief organizations, school buses, beach patrols, establishments in isolated places, communications standby facilities, and emergency repair of public communications facilities).

⁴⁷³ See *Spectrum Policy Task Force Report* at 43.

⁴⁷⁴ Any action we take in this proceeding will necessarily be coordinated with the action we take in the pending proceeding evaluating possible relocation of 800 MHz public safety, private, and commercial licensees. See *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels, Notice of Proposed Rule Making*, 17 FCC Rcd 4873 (2002), *Erratum*, 17 FCC Rcd 7169 (2002).

⁴⁷⁵ See *Spectrum Policy Task Force Report* 43; Bykowsky, Mark M. and Marcus, Michael J., "Facilitating Spectrum Management Reform via Callable/Interruptible Spectrum," 2002 Telecommunications Policy Research Conference (September 2002) at 15, available at <http://intel.si.umich.edu/tprc/papers/2002/147/SpectrumMgmtReform.pdf> (*Bykowsky/Marcus Report*); FCC Cognitive Radio Workshop, "Cognitive Radio Technologies in the Public Safety & Governmental Arenas," Presentation by Michael Marcus, Sc. D., Office of Engineering and Technology, Federal Communications Commission, at 2, 12 (May 19, 2003) (*Marcus Cognitive Radio Workshop Presentation*).

⁴⁷⁶ See *Spectrum Policy Task Force Report* at 43; *Marcus Cognitive Radio Workshop Presentation* at 10.

⁴⁷⁷ See *Spectrum Policy Task Force Report* at 43; *Bykowsky/Marcus Report* at 17-18; *Marcus Cognitive Radio Workshop Presentation* at 10, 12-14.

⁴⁷⁸ See *Spectrum Policy Task Force Report* at 43. Preliminary comment received in response to the *Spectrum Policy Task Force Report* included both support for permitting secondary market leasing in public safety bands through interruptible spectrum mechanisms, as well as the expression of reservations. See, e.g., Comments of the Chemical and Biological Arms Control Institute, ET Docket No. 02-135, at 5 (filed Jan. 27, 2003) (supportive of concept); Comments of APCO, ET Docket No. 02-135, at 3-4 (filed Jan. 27, 2003); Comments of Public Safety Wireless Network, ET Docket No. 02-135, at 5-6 (filed Jan. 27, 2003) (expressing reservations).

⁴⁷⁹ See generally *Bykowsky/Marcus Report*.

later this year on cognitive radio technologies, including those that would enable interruptible spectrum leasing. That proceeding will consider the state of technology as well as changes to the Commission's technical rules, policies, procedures, or practices that could facilitate the economic development of such technologies.⁴⁸⁰

292. In light of this, we request that commenters evaluate whether we should permit public safety licensees to lease their spectrum to third parties. Generally, we ask whether leasing in this spectrum will further the public interest, for instance, by resulting in more efficient use of the public safety spectrum, by providing another avenue for multiple public safety entities to use the same spectrum, and/or of providing financial resources to public safety licensees.⁴⁸¹ Should we permit public safety licensees to lease to entities that are not eligible to obtain a public safety authorization, which would provide for a larger number of possible arrangements? If we permit leasing of public safety radio pool spectrum, should it be subject to any special rules in light of the importance of ensuring adequate access to spectrum for public safety purposes? Parties supporting leasing in the public safety frequencies should identify any elements of such arrangements that the Commission should consider in adopting policies.

293. We also seek comment on the significance, if any, of the 1997 Balanced Budget Act for spectrum leasing of 700 MHz public safety spectrum. In that Act, Congress directed the Commission to reallocate 24 MHz of the spectrum recovered from TV channels 60-69 for public safety services,⁴⁸² and the Commission did so shortly thereafter.⁴⁸³ Congress specifically defined the "public safety services" that are intended to benefit from this spectrum allocation. Section 337(f) of the Communications Act defines the term "public safety services" as services:

- (A) the sole or principal purpose of which is to protect the safety of life, health, or property;
- (B) that are provided –
 - (i) by State or local government entities; or
 - (ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
- (C) that are not made commercially available to the public by the provider.⁴⁸⁴

294. We seek comment on whether this allocation of spectrum under Section 337(a)(1) affects the ability of licensees in the Public Safety 700 MHz band to lease this spectrum for use that does not meet the definition of public safety services. We also seek comment on the significance for spectrum

⁴⁸⁰ See The Office of Engineering and Technology Hosting Workshop on Cognitive Radio Technologies, ET Docket No. 03-108, *Public Notice* (May 16, 2003).

⁴⁸¹ We do not propose to define the ways in which public safety licensees could use spectrum leasing receipts but would expect in many cases that a portion of the funds would be used to upgrade the licensee's public safety communications equipment.

⁴⁸² See 47 U.S.C. § 337(a)(1).

⁴⁸³ Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Notice of Proposed Rulemaking*, 12 FCC Rcd 14141 (1997); *Reallocation Report and Order*, 12 FCC Rcd 22953 (1998).

⁴⁸⁴ 47 U.S.C. § 337(f)(1).

leasing, if any, of the statutory provision that permits nongovernmental organizations to be authorized as licensees of this spectrum by the relevant governmental entities.⁴⁸⁵

295. We also note that certain portions of the 700 MHz public safety spectrum are subject to special licensing regimes under our rules. For instance, 2.4 MHz of the Public Safety 700 MHz band is licensed to each state as a geographic area "State License."⁴⁸⁶ The Commission adopted the State License structure after concluding that it would allow, but not require, each state to plan and develop shared, wide-area systems under a substantially streamlined licensing process.⁴⁸⁷ In this regard, the Commission revised the rules to allow state licensees to authorize appropriate public safety agencies, including federal entities, within a state and its political subdivisions to use the spectrum pursuant to the state licensee's authorization.⁴⁸⁸ We seek comment on the significance, if any, of this regime to our consideration of whether to permit licensees to lease this spectrum.

296. Similarly, we point out that a total of 12.5 MHz of the Public Safety 700 MHz band (the "General Use" channels),⁴⁸⁹ as well as 6 MHz of public safety spectrum at 821-824/866-869 MHz,⁴⁹⁰ is administered by regional or state-level planning committees. We seek comment on whether and/or how leasing would work for spectrum governed by these planning committees and processes.

297. Section 337(c) of the Communications Act⁴⁹¹ provides that the Commission must waive any rules (other than its regulations regarding harmful interference) necessary to authorize entities providing public safety services to operate on unassigned non-public safety spectrum, if the Commission makes five specific findings. First, the applicant must demonstrate that no other spectrum allocated for

⁴⁸⁵ Because we recently adopted the same eligibility framework for the 50 MHz of spectrum at 4940-4990 MHz that is designated in support of public safety (the 4.9 GHz band), we pose the same questions relative to that band. See *The 4.9 GHz Band Transferred from Federal Government Use, Memorandum Opinion and Order and Third Report and Order*, 18 FCC Rcd 9152, 9158-9163 ¶¶ 16-25 (2003).

⁴⁸⁶ See 47 C.F.R. § 90.529 (State License). See also 47 C.F.R. § 90.20(d)(6) (designating certain Public Safety Pool frequencies in the 2-10 MHz range only for assignment to the central governments of the 50 individual states, the District of Columbia, and other districts and territories, and only for disaster communications purposes).

⁴⁸⁷ See *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communications Requirements Through the Year 2010, Third Memorandum Opinion and Order and Third Report and Order*, 15 FCC Rcd 19844, 19869 ¶ 57 (2000) (*700 MHz Third Report and Order*). The Commission noted that shared, wide-area systems, i.e., large trunked systems, can provide service to many governmental entities in a given geographical area, which provides greater spectrum efficiency than systems incorporating many smaller non-trunked systems or systems trunked on fewer channels. *Id.* at n.181, citing Final Report of the Public Safety Wireless Advisory Committee to the FCC, Sept. 11, 1996, at 317-318.

⁴⁸⁸ See 47 C.F.R. § 90.179(g); *700 MHz Third Report and Order*, 15 FCC Rcd at 19872 ¶ 65.

⁴⁸⁹ See, e.g., 47 C.F.R. § 90.531(b) (designating certain narrowband and wideband channels in the Public Safety 700 MHz band for assignment to public safety eligibles "subject to Commission-approved regional planning committee regional plans"). See also 47 C.F.R. § 90.531(b)(3) (designating certain low power channels in the Public Safety 700 MHz band for assignment by regional planning). See generally 47 C.F.R. § 90.527 (regional plan requirements).

⁴⁹⁰ See 47 C.F.R. §§ 90.16 (Public Safety National Plan), 90.617(a) (the assignment of certain public safety channels "will be done in accordance with the policies defined in the Report and Order of GEN Docket No. 87-112"). See also 47 C.F.R. § 90.20(d)(2) (certain Public Safety Pool frequencies in the 2 MHz band are available for assignment only in accordance with a geographic assignment plan).

⁴⁹¹ 47 U.S.C. § 337(c).

public safety use is immediately available. Second, the public safety entity must demonstrate that its use of the requested spectrum will not cause harmful interference to other spectrum users entitled to protection. Third, it must show that public safety use of the frequencies is consistent with other public safety spectrum allocations in the geographic area in question. Fourth, the applicant must show that the unassigned frequencies were allocated for their present use not less than two years prior to the grant of the application at issue. Finally, the applicant must demonstrate that grant of the application is consistent with the public interest. Waivers granted under Section 337(c) thus are intended to meet a public safety entity's immediate need for spectrum. Can we extend the spectrum leasing policies adopted in the Report and Order to licenses granted under Section 337(c)? Are there special considerations we should take into account in making this determination? Are there any additional limits that should be imposed on public safety licensees granted licenses under this section in entering into spectrum leasing arrangements?

298. Finally, some public safety spectrum is specifically designated for "interoperability,"⁴⁹² "mutual aid,"⁴⁹³ or similar activities.⁴⁹⁴ Given the importance of this spectrum in the event of significant disaster or other activity requiring communication and coordination, are there any unique factors we should take into account in considering whether, and if so how, to permit licensees to voluntarily lease this spectrum?

299. *Various Private Wireless and Personal Radio Services.* The Private Wireless Services include spectrum licensed under Parts 80 (Maritime Services),⁴⁹⁵ 87 (Aviation Services), and 97 (Amateur Radio Service).⁴⁹⁶ The Personal Radio Services include spectrum licensed under Part 95 of our rules. We use a variety of methods to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. In assessing whether our spectrum leasing policies should be extended to any of these services, the nature of the authorization granted to users of the covered spectrum must be taken into account.

300. Some services encompassed within Parts 80, 87, and 95 are licensed by rule.⁴⁹⁷ The rules governing these services indicate who may operate in the particular services and constitute the authorization to operate; no individual licenses are issued by the Commission. Specifically, users of the Wireless Medical Telemetry Service, Medical Implant Communications Service, Family Radio Service, Radio Control Radio Service, Citizens Band Service, Low Power Radio Service, and Multi-Use Radio Service do not receive an individualized license to cover operation. Given this licensing approach, we query whether it makes sense to extend our spectrum leasing policies to any services where licenses are

⁴⁹² The Commission's rules define "interoperability" as "[a]n essential communication link within public safety and public service wireless communications systems which permits units from two or more different entities to interact with one another and to exchange information according to a prescribed method in order to achieve predictable results." See 47 C.F.R. § 90.7.

⁴⁹³ See, e.g., 47 C.F.R. § 90.617(a)(1) (designating channels for "mutual aid").

⁴⁹⁴ See, e.g., 47 C.F.R. §§ 90.20(d)(15), (16), (19), (41), (80), (82), 90.20(g).

⁴⁹⁵ VHF Public Coast Stations, regulated under Subpart J of Part 80, are included in those services covered by the policies adopted in the Report and Order. High seas stations and automated maritime telecommunications system stations, on the other hand, were not included in the *NPRM*, but we now seek comment on whether to include these services in the policies adopted in the Report and Order.

⁴⁹⁶ In addition to these rule parts, Private Wireless Services are also licensed under Parts 90 and 101; exclusive use licenses authorized under these rule parts may be the subject of spectrum leases in accordance with the provisions of the Report and Order.

⁴⁹⁷ See 47 C.F.R. Parts 80, 87, 95.

issued by rule. We request any parties addressing this issue to discuss the legal and practical ramifications of their position, as well as whether spectrum leasing in such services would further the public interest.

301. In other private and personal wireless services, users have access to spectrum because they have passed a testing requirement.⁴⁹⁸ Upon successful completion of the required testing, users have the privilege of using the spectrum pursuant to an operator license.⁴⁹⁹ Moreover, these operators generally are not entitled to exclusive access to spectrum but instead must share access to the spectrum with all operators who have successfully completed the exam requirements.

302. Indeed, in some cases, the operations in these services are not governed by the issuance of a Commission license.⁵⁰⁰ We also note that in many of these services, stations do not have a fixed transmitting location.⁵⁰¹ We point out that, for many of the services authorized and regulated under these parts, a user does not have authority to transfer or assign an authorization or license. Finally, spectrum throughout these rule parts is subject to shared, not exclusive, use.⁵⁰²

303. These factors potentially present significantly different issues in considering whether spectrum leasing is meaningful and/or beneficial in these services than does spectrum leasing of exclusively licensed spectrum. For instance, if a licensee has no ability to transfer or assign a license, should that individual or entity have the ability to engage in spectrum leasing under the policies adopted in this rulemaking?⁵⁰³ Accordingly, we seek comment on the special considerations potentially applicable to the implementation of spectrum leasing to any of these services. We invite comments on the propriety of expanding the scope of our leasing policies to reach such services. Would such leasing promote more efficient spectrum use? Is spectrum leasing even a reasonable concept for some of these services? Would it further the public interest? Conversely, could it undermine the purposes of these services?

304. In addition, the Report and Order facilitates spectrum leasing by licensees on Industrial/Business Radio frequencies with exclusive authorizations, but requires that they lease only to entities that are also eligible for Industrial/Business Radio licensees.⁵⁰⁴ Should we revise our policies to permit leasing on these frequencies to commercial providers of wireless services? We seek comment on the significance, if any, to our determination on this issue of the Commission's decision in 2000 to permit such licensees to convert to commercial operation or to assign a private license to a commercial licensee in certain defined circumstances.⁵⁰⁵

⁴⁹⁸ See 47 C.F.R. Part 97.

⁴⁹⁹ See, e.g., 47 C.F.R. § 97.501.

⁵⁰⁰ See, e.g., 47 C.F.R. §§ 80.13(c), 87.18(b), 95.191(a), 95.204, 95.404.

⁵⁰¹ See, e.g., 47 C.F.R. §§ 95.23, 95.25, 95.192, 95.205, 95.405, 97.301.

⁵⁰² See, e.g., 47 C.F.R. §§ 95.7, 95.191(b), 95.207(b), 95.407, 97.101(b). We note that, with the exception of the amateur service, our rules establish individual channels in these services. These channels and all amateur service spectrum, however, are shared by users authorized to use that service.

⁵⁰³ See also paragraph 305, *infra*.

⁵⁰⁴ See Sections IV.A.5.a(ii)(b), IV.A.5.b(ii)(b), *supra*.

⁵⁰⁵ See Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22709, *Erratum*, 16 FCC Rcd 6803 (2000).

305. *Wireless services on shared frequencies.* In the Report and Order, we declined to allow leasing on shared frequencies, since parties can readily obtain their own authorizations on shared frequencies⁵⁰⁶ and they are not foreclosed from applying for an authorization by the existence of another licensee in the same geographic area. In light of our proposals in this Further Notice to expand spectrum leasing and to take other steps to promote secondary markets, we wish to give further consideration to the possible value and implementation of spectrum leasing pursuant to authorizations involving shared frequencies. It might be possible, for example, for a group of licensees operating on the same frequency on a shared basis to cooperate in leasing spectrum to another entity. We recognize that leasing on shared frequencies may raise different implementation issues than leasing pursuant to an authorization involving the exclusive use of a block of frequencies in a particular geographic area. We welcome comments on the feasibility and possible public interest benefits of leasing involving shared frequencies. To the extent commenters take a position on this issue, we request that they address any implementation issues or other considerations that might be unique to this type of leasing. We also ask commenters whether permitting leasing on such spectrum would defeat the purpose of having shared spectrum available to a number of potential users as licensees or would in fact promote achievement of such goals.

306. *Non-multilateration LMS.* Non-multilateration LMS systems, regulated under Part 90, transmit data to and from objects passing through particular locations (e.g., automated tolls, monitoring of railway cars), and are licensed on a site-by-site basis, except that municipalities or other governmental operations may file for a non-multilateration license covering an Economic Area.⁵⁰⁷ Should the Commission extend its spectrum leasing rules to non-multilateration LMS? Given the nature of the operations and in light of the shared spectrum usage in this service, would spectrum leasing potentially be of benefit in this service?

307. *Instructional Television Fixed Service and Multipoint Distribution Service.* These services currently are regulated under Parts 74 and 21, respectively.⁵⁰⁸ Our rules currently allow ITFS licensees to lease their excess channel capacity to others.⁵⁰⁹ Specifically, an ITFS licensee may lease up to 95 percent of its channel capacity for non-educational programming,⁵¹⁰ consistent with policies unique to this leasing environment. We recently instituted a comprehensive review of the service rules relating to MDS and ITFS.⁵¹¹ Among other issues, we sought comment on whether there are any circumstances under which we should restrict or require leasing in order to ensure that access to spectrum is not unduly limited.⁵¹²

308. In this proceeding, we query whether we should extend the policies developed in this docket to leasing involving ITFS and MDS licensees, which have developed with their own approach to excess capacity leasing. Should we offer leasing based on the models used in this docket as an alternative

⁵⁰⁶ See Section IV.A.3.b, *supra*.

⁵⁰⁷ 47 C.F.R. § 90.353(i).

⁵⁰⁸ See In the Matter of Amendment of Parts 1, 21, 73, 74, and 101 of the Commission's Rules To Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 MHz and 2500-2690 MHz Bands, *Notice of Proposed Rule Making and Memorandum Opinion and Order*, 18 FCC Rcd 6722 (2003) (*MDS/ITFS NPRM*), *recon. in part*, *Order*, FCC 03-169 (rel. July 10, 2003). The NPRM proposes to consolidate the Commission's ITFS and MDS rules into Parts 1 and 101.

⁵⁰⁹ See generally 47 C.F.R. § 74.931.

⁵¹⁰ See *MDS/ITFS NPRM*, 18 FCC Rcd at 6766-6768 ¶ 109.

⁵¹¹ See generally *id.*

⁵¹² *Id.* at 6771 ¶ 117.

format to the licensees in this service as well? Should the leasing policies adopted in this rulemaking replace the leasing standards that have been developed on a case-by-case basis for ITFS and MDS? How does action in this proceeding fit with the issues being considered in the open rulemaking proposing to evaluate the licensing structure for ITFS and MDS? We note that the record compiled in this proceeding on this issue may be taken into account in WT Docket No. 03-66 as we overhaul the rules and policies generally applicable to ITFS and MDS.

309. *Cable Television Relay Service.* This category includes cable television relay service under Part 78. Although we explicitly excluded this service from consideration in the *NPRM*, we now request comment from interested parties as to whether we should permit spectrum leasing in this service. Parties addressing this issue should discuss any special considerations that should affect our decision whether to permit licensees voluntarily to lease this spectrum.

310. *Multichannel Video Distribution and Data Service.* Multichannel Video Distribution and Data Service (MVDDS) is regulated pursuant to Subpart P of Part 101.⁵¹³ MVDDS licensees “must use spectrum in the 12.2-12.7 GHz band for any digital fixed non-broadcast service (broadcast services are intended for reception of the general public and not on a subscribership basis) including one-way direct-to-home/office wireless service.”⁵¹⁴ This service was established subsequent to the Commission’s adoption of the *NPRM* in this proceeding.⁵¹⁵ Although the Commission established multiple geographic service areas, the rules specifically provide that each geographic area license will be auctioned to one licensee.⁵¹⁶ We request interested parties to address whether the Commission’s decision to authorize only one licensee per service area in this band should affect our determination whether to permit licensees voluntarily to lease this spectrum. What would be the benefits and/or harms of extending our spectrum leasing policies to this service?

311. *700 MHz Guard Band Managers.* As noted above, the Part 27 Guard Band Manager Service is not included within the scope of action take in the Report and Order.⁵¹⁷ Should we take any action to revise the rules that govern the activities of 700 MHz guard band managers? Should such band managers be given the same opportunities as other licensees to engage in a greater range of spectrum leasing activities? Do the considerations related to interference and other operational factors affect the determination we might make with respect to leasing in the 700 MHz guard band manager frequencies?

312. *Satellite services.* Although we decided in the Report and Order to make no changes in the spectrum leasing policies applicable to our satellite services at this time,⁵¹⁸ we remain receptive to proposals for extending the policies we have developed in this proceeding to satellite services or considering alternative lease arrangements. Accordingly, we request parties to address whether we

⁵¹³ See 47 C.F.R. Part 101, Subpart P.

⁵¹⁴ 47 C.F.R. § 101.1407.

⁵¹⁵ In the Matter of Parts 2 and 25 of the Commission Rules To Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9614 (2002) (*MVDDS Second Report and Order*).

⁵¹⁶ See 47 C.F.R. §§ 101.1401, 101.1405. See also *MVDDS Second Report and Order*, 17 FCC Rcd at 134-135 (one licensee with 500 MHz of spectrum in each license area will mitigate potential interference to other users in band).

⁵¹⁷ See Section IV.A.3.b, *supra*.

⁵¹⁸ See Section IV.C.2, *supra*.

should take any further action in this proceeding to make spectrum leasing as defined in this proceeding available to satellite services as well in order to promote more efficient use of spectrum.

313. *Forbearance.* As we have noted, the forbearance provisions of Section 10 apply only to telecommunication services and telecommunications carriers.⁵¹⁹ Some of the licenses listed above involve spectrum operations that do not fall within the definition of telecommunications services. Do we have any other basis under the Act pursuant to which we could adopt any of the policies set forth in the Report and Order or proposed in this Further Notice?

314. *Extending streamlined processing of transfer and assignment applications to additional services.* The Report and Order applies streamlined processing rules to transfer and assignment applications involving authorizations in the services for which we adopt spectrum leasing policies. Should we expand the scope of authorizations to which this streamlined processing applies? Can we encompass non-telecommunications services and non-telecommunications carriers within this streamlined process? Does it make sense to extend streamlined application processing to transfer and assignment applications involving other services? We request commenters to document the benefits and/or harms (depending upon the position they take) associated with expanding the availability of streamlined processing of transfer and assignment applications to additional services.⁵²⁰

D. Application of the New *De Facto* Control Standard for Spectrum Leasing to Other Issues and Types of Arrangements

1. Background

315. As noted in the Report and Order, we are at present limiting application of our newly adopted *de facto* control standard to the leasing context.⁵²¹ Thus, the facilities-based *Intermountain Microwave* standard for evaluating *de facto* control continues to be the prevailing standard in other regulatory contexts that call for assessment of the exercise of *de facto* control over an applicant or licensee, such as in the case of designated entity and entrepreneur eligibility and management agreements.⁵²²

2. Discussion

316. We now examine whether we should apply our new *de facto* control standard to regulatory contexts other than leasing. We seek comment on whether our conclusion that the *Intermountain Microwave* standard no longer serves the public interest in the leasing context is also relevant to our application of the standard in other contexts. Alternatively, we seek comment on whether there are policy reasons to continue using a facilities-based approach to *de facto* control analysis in other regulatory contexts. Are there contexts in which evaluating licensee control of facilities continues to be important to

⁵¹⁹ See Section V.B.2.a(iii), *supra*.

⁵²⁰ We note that we seek comment only with respect to services covered by the Report and Order and services that might be added pursuant to this Section V.C.

⁵²¹ See Section IV.A.2.b, *supra*.

⁵²² As set out in the Report and Order, the *Intermountain Microwave* standard focuses on six factors – whether the licensee: (1) has unfettered use of all station facilities and equipment; (2) controls daily operations; (3) determines and carries out the policy decisions (including preparation and filing of applications with the Commission); (4) is in charge of employment, supervision, and dismissal of personnel operating the facilities; (5) is in charge of the payment of financial obligations, including expenses arising out of operations; and (6) receives the monies and profits from the operation of the facilities. See *Intermountain Microwave*, 12 FCC 2d at 559-60.

regulatory objectives that are distinguishable from our objectives in the leasing context? If we elect to continue using a facilities-based approach in some contexts but not others, how do we reconcile the existence of divergent *de facto* control standards under Section 310(d) and other provisions of the Act?

317. *Designated entity and entrepreneur eligibility.* At present, our rules for determining affiliation under our designated entity and entrepreneur policies largely incorporate the *Intermountain Microwave* test. We request commenters to address whether the new standard for assessing *de facto* control adopted in the Report and Order should also be employed for assessing affiliation and eligibility for designated entity and entrepreneur status. Specifically, does Section 309(j) implicate different concerns from Section 309(d)? Do the statutory objectives of Section 309(j) require more of a focus on actual facilities control by the beneficiary of our designated entity/entrepreneur policies, or is it sufficient that such an entity can obtain an authorization in an auction and then lease the spectrum pursuant to the Commission authorization without constructing and operating its own facilities? The underlying goals of Section 309(j) necessarily will affect whether we conclude that the new *de facto* control standard is suitable in this context. Would the new *de facto* control standard ensure that the intended beneficiaries of Section 309(j) in fact receive those benefits and that the designated entity/entrepreneur rules (to the extent they are retained) can not be unfairly manipulated?

318. *Management agreements.* The Commission has long permitted the use of management agreements and other agency arrangements by its licensees as a means to manage their authorized services and facilities.⁵²³ The issue of whether a licensee has retained *de facto* control vis-à-vis a manager in turn has long been premised on the *Intermountain Microwave* decision and our related *Motorola* decision.⁵²⁴ This assessment of management agreements is inherently a case-by-case determination as well as strongly tied to the control of facilities and operations implemented pursuant to a Commission authorization. Should we adopt the new *de facto* control standard for management agreements as well? Is there anything in the new standard that would forbid elements of management agreements previously entered into in reliance on the *Intermountain Microwave* and *Motorola* standards? Could extending a revised *de facto* control standard to management agreements allow parties to enter into a purported management agreement – which would not be subject to the notification and other obligations applicable to spectrum leasing – when in fact the arrangement should be considered under spectrum leasing policies? Would this allow parties to undercut our efforts to obtain adequate information for enforcement purposes as well as facilitating the efficient functioning of secondary markets?

319. Finally, are there any other contexts in which we currently use the *Intermountain Microwave* standard but should now consider adoption of our new *de facto* control standard? We request commenters identifying any such situations to discuss the appropriateness of the new standard in terms of overall policy objectives as well as practical deployment considerations.

E. Effect of Secondary Markets on Designated Entity/Entrepreneur Policies

1. Background

320. The Commission's designated entity and entrepreneur policies⁵²⁵ were adopted to further statutory requirements and to promote participation in the provision of spectrum-based services by certain

⁵²³ See, e.g., Implementation of Sections 3(n) and 332 of the Communications Act – Regulatory Treatment of Mobile Services, *Fourth Report and Order*, 9 FCC Rcd 7123, 7127 ¶ 20 (1994).

⁵²⁴ See *Intermountain Microwave*, 12 FCC 2d 559; *Motorola*.

⁵²⁵ Section 309(j)(3) of the Communications Act directs the Commission to disseminate licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by women and members of minority groups (collectively, “designated entities”). 47 U.S.C. § 309(j)(3). The (continued....)

designated entities. These policies were created in 1994 as one component of the Commission's implementation of the competitive bidding policies and procedures mandated by Sections 309(j)(3) and 309(j)(4) of the Act.⁵²⁶ Historically, the Commission's designated entity policies have sought to ensure that small businesses were given the opportunity to participate in the provision of spectrum-based services.⁵²⁷

321. The Commission currently applies a control test to ensure that its designated entity and entrepreneur policies serve the programs' intended beneficiaries. Section 1.2110(c)(2) sets forth the controlling interest standard and is generally used for determining which entities are eligible for small business or entrepreneur status.⁵²⁸ Under the controlling interest standard, which in large part codifies the factors of the *Intermountain Microwave* standard, the Commission attributes to the applicant the gross revenues of the applicant, its controlling interests, the applicant's affiliates, and the affiliates of the applicant's controlling interests in assessing whether the applicant is eligible for the Commission's small business provisions.⁵²⁹ The premise of this rule is that all parties that control an applicant or have the power to control an applicant, and such parties' affiliates, will have their gross revenues counted and attributed to the applicant in determining the applicant's eligibility for small business status or for any other size-based status using a gross revenue threshold.⁵³⁰

Commission's designated entity policies currently make bidding credits available to small businesses. In the past, the Commission also provided for an installment payment program for small businesses and entrepreneurs, which allowed winning bidders to pay for their licenses over a ten-year period. Although many licensees continue to participate in this installment payment program, the Commission has since suspended the use of such payments for current auction participants. Additionally, in broadband PCS, the Commission created a framework that reserves certain portions of the C and F block broadband PCS spectrum as "set-aside" licenses for "entrepreneurs," in which eligibility is restricted to entities below a specified financial threshold. Specifically, the Commission requires that, in order to be eligible to acquire a "set-aside" license under its "entrepreneur" policies, an applicant, including attributable investors and affiliates, must have had gross revenues of less than \$125 million in each of the last two years and must have less than \$500 million in total assets. 47 C.F.R. § 24.709.

⁵²⁶ See 47 U.S.C. §§ 309(j)(3), (4); see also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349-2350 ¶¶ 1-7 (1994) (*Competitive Bidding Second R&O*). Passed as part of the Omnibus Budget Reconciliation Act of 1993, Section 309(j) gave the Commission express authority to employ competitive bidding procedures when choosing among mutually exclusive initial licenses available to the public. See generally 47 U.S.C. § 309(j).

⁵²⁷ See generally *Competitive Bidding Second R&O*, 9 FCC Rcd at 2388-2400 ¶¶ 227-297; Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Memorandum Opinion and Order*, 9 FCC Rcd 7245, 7256 ¶ 64 (1994) (*Competitive Bidding Second MO&O*); Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Fifth Report and Order*, 9 FCC Rcd 5532, 5571 ¶ 93 (1994) (*Competitive Bidding Fifth R&O*); *Competitive Bidding Fifth MO&O*, 10 FCC Rcd 403, 404 ¶ 2 (1994).

⁵²⁸ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15323-27 ¶¶ 58-67; see 47 C.F.R. §§ 1.2110(b), (c). Previously, the attribution rules were adopted on a service-by-service basis. The controlling interest standard "together with the application of our affiliation rules, will effectively prevent larger firms from illegitimately seeking status as small businesses." *Id.*

⁵²⁹ *Id.* at 15323-24 ¶ 59; 47 C.F.R. § 1.2110(b).

⁵³⁰ *Part 1 Fifth Report and Order*, 15 FCC Rcd at 15324 ¶ 60. For an applicant (or licensee) seeking to establish broadband PCS entrepreneur eligibility, the total assets, as well as the gross revenues, of all parties that control the applicant or have the power to control the applicant, and such parties' affiliates, are counted and attributed to the applicant. See *id.*, 15 FCC Rcd at 15326-27 ¶ 67; 47 C.F.R. § 24.709(a)(1).

322. From the outset, the Commission has also been determined to ensure, pursuant to Section 309(j)(4)(E), that the designated entity and entrepreneur policies would not be abused.⁵³¹ As the Commission has explained, these policies are designed, among other reasons, to “deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our preferences to obtain a license at a lower cost than they otherwise would have to pay and later sell it at the market price.”⁵³² The Commission has also indicated that the unjust enrichment rules were designed to recapture for the government a portion of the value of the bidding credit or other special provision if a designated entity prematurely transfers its licenses to an ineligible entity.⁵³³ The Commission’s unjust enrichment provisions have been codified in section 1.2111 of the Commission’s rules.⁵³⁴

2. Discussion

323. We inquire whether we should alter the policies adopted in the Report and Order for designated entity leasing under the *de facto* transfer leasing option or under the proposals contained in this Further Notice. Should we permit a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same small business designated entity status as that of the licensee? What would be the public interest benefits of revising the policies and rules in this manner? Would such a revision be consistent with our unjust enrichment policies and rules? What alternative approaches might the Commission take were it to decide to provide additional flexibility to designated entity licensees? How would we best design policies so as to ensure compliance with our statutory obligations to prevent unjust enrichment?

VI. CONCLUSION

324. In the Report and Order, we have taken significant steps to facilitate the deployment of spectrum leasing in accordance with marketplace demands yet consistent with our statutory obligations. The actions we take here should further the objectives set forth in the *Policy Statement* and the *NPRM*. In the Further Notice of Proposed Rulemaking, we continue to explore additional steps that could further enhance secondary markets and increase the efficient use of spectrum and the availability to the public of innovative wireless services.

⁵³¹ See also 47 U.S.C. § 309(j)(3)(C) (directing the Commission to make the “avoidance of unjust enrichment” one of the objectives when designing systems of competitive bidding).

⁵³² *Competitive Bidding Second R&O*, 9 FCC Rcd at 2394 ¶ 258. That order also stated that, with regard to entrepreneur set-aside licenses, “[i]t would be inconsistent and unjust with the will of Congress for such preferred licensees to obtain a license with the government’s help, transfer that license after a short period of time to an entity that was not entitled to special treatment at the auction, and appropriate for themselves the difference between the full market price of the license and the discounted price which they paid the government for that license”). *Id.* at 2394 ¶ 260.

⁵³³ *Competitive Bidding Second MO&O*, 9 FCC Rcd at 7265 ¶ 121. See also *Competitive Bidding Fifth R&O*, 9 FCC Rcd at 5591 ¶ 134 (discussing the Commission’s adoption of strict repayment requirements to recapture any unjust enrichment from designated entity licensees that transfer control of their licenses to entities that would not qualify for the same level of benefits).

⁵³⁴ 47 C.F.R. § 1.2111.

VII. PROCEDURAL MATTERS

A. Comment Filing Procedures

325. *Comments and reply comments.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules,⁵³⁵ interested parties may file comments in response to the Further Notice of Proposed Rulemaking in **WT Docket No. 00-230** on or before December 5, 2003, and reply comments on or before January 5, 2004.

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

327. *How to file comments.* Comments may be filed either by filing electronically, such as by using the Commission's Electronic Comment Filing System (ECFS), or by filing paper copies.⁵³⁶

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

329. Parties who choose to file by paper may submit such filings by hand or messenger delivery, by U.S. Postal Service mail (First Class, Priority, or Express Mail), or by commercial overnight courier. Parties must file an original and four copies of each filing in **WT Docket No. 00-230**. Parties that want each Commissioner to receive a personal copy of their comments must file an original plus nine copies. If paper filings are hand-delivered or messenger-delivered for the Commission's Secretary, they must be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002-4913. To receive an official "Office of the Secretary" date stamp, documents must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission. (The filing hours at this facility are 8:00 a.m. to 7:00 p.m.) If paper filings are submitted by mail through the U.S. Postal Service (First Class mail, Priority Mail, and Express Mail), they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 445 12th Street, S.W., Washington D.C. 20554. If paper filings are submitted by commercial overnight courier (*i.e.*, by overnight delivery other than through the U.S. Postal Service), such as by Federal Express or United Parcel Service, they must be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. (The filing hours at this facility are 8:00 am to 5:30 pm.)⁵³⁷

⁵³⁵ 47 C.F.R. §§ 1.415, 1.419.

⁵³⁶ Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121(1998).

⁵³⁷ See "FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence," *Public Notice*, DA 01-2919 (rel. Dec. 14, 2001); "Reminder[:] Filing Locations for Paper Documents and Instructions for Mailing Electronic Media," *Public Notice*, DA 03-2730 (rel. Aug. 22, 2003).