

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

b. Private Commons

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

92. The private commons option provides a cooperative mechanism for licensees (or lessees) to make licensed spectrum available to users employing these advanced technologies in a manner similar to that by which unlicensed users gain access to spectrum to suit their particular needs, and to do so without the necessity of entering into individual spectrum leasing arrangements under our existing rules. In the 2.4 GHz and 5 GHz bands, for instance, users gain access and use of the spectrum with specified types of low-power communications devices provided they comply with technical requirements established by the Commission and set forth in our Part 15 rules.²⁴² In these bands, users then can create their own networks – such as those that are *ad hoc* or “mesh” in nature²⁴³ – using equipment that complies with Commission-established requirements. The private commons option provides a potentially complementary access model,²⁴⁴ in which licensees (or spectrum lessees) would determine to make

²⁴¹ *Id.*

²⁴² See 47 C.F.R. § 15.249.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. License Assignments and Transfers of Control

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

a. Background

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

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

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

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

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

²⁶⁰ *Id.* at ¶¶ 240, 278-287.

b. Discussion

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

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

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

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

²⁶⁴ See *id*.

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

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

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

103. As with the policies we adopt regarding *de facto* transfer leases, we make this additional streamlining of our approval processes available only to those license assignments and transfers of control that would not raise the kinds of potential public interest concerns that would necessitate public notice or individualized review prior to granting.²⁶⁸ Thus, to the extent a particular application falls within those categories of assignments or transfers of control that potentially raise public interest concerns regarding eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition (as discussed above²⁶⁹), or seeks waiver of or a declaratory ruling pertaining to Commission rules, we will, consistent with current requirements, continue to place the application on public notice (if it involves a common carrier license²⁷⁰) and subject the application to more individualized prior review before acting on it. For applications that do not raise such potential public interest concerns, prior public notice and additional individualized review is not necessary. Such applications now are routinely approved, and we find that the resources and delay associated with such prior notice and review requirements are not merited when balanced against our goal of promoting more fluid secondary markets in spectrum rights. In addition, we keep in place procedures that will ensure that the Commission fulfills its obligation to ensure that the public interest is served by approval of the application. The approval of such applications will be announced by public notice, and interested parties, the Bureau, and the Commission will have sufficient time during the reconsideration period to review these transactions, as necessary, to ensure that parties have complied with Commission policies. In addition, if compliance issues arise after the reconsideration period, the Commission retains authority to take other action as necessary. We also note that parties are accountable for any certifications they make in their applications. If the Commission determines, following approval of an application under these procedures, that any such certification, by either the licensee, assignee, or

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

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

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

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

transferee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate action.²⁷¹

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

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

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

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

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

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

²⁷⁴ *Further Notice* at ¶ 271.

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

notice, enabling members of the public and other interested parties to raise any concerns regarding the protection of consumers in petitions for reconsideration.

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

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

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

a. Background

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

b. Discussion

110. We will apply the streamlined processing procedures adopted in the *Report and Order* for license assignment and transfer of control applications, as modified by this order for qualifying applications, to all license assignment and transfer of control applications involving Wireless Radio Services authorizations regulated by the Bureau.²⁷⁸ Thus, under the policies we are adopting herein,

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

²⁷⁷ *Further Notice* at ¶ 314.

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

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

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

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

1. Background

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

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

²⁸⁰ *Further Notice* at ¶ 224.

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

²⁸² *Further Notice* at ¶¶ 225-226.

²⁸³ *Id.* at ¶ 227.

²⁸⁴ *Id.* at ¶ 228.

2. Discussion

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

114. With regard to the question of whether the Commission itself should provide additional information services to promote the development of secondary markets, we continue to believe that the private sector is better suited both to determine what types of information parties might demand, and to develop and maintain information on the licensed spectrum that might be available for use by third parties.²⁸⁵ Our decision is consistent with most of the comments we received on this question.²⁸⁶ Accordingly, while we will continue to collect and make available to the public the basic details related to spectrum licensees and lessees as provided in the *Report and Order*, we will not gather or provide additional information at this time.²⁸⁷

115. We believe that this approach to collecting information and facilitating exchanges is most consistent with the Commission's general approach of relying on market processes where possible to provide needed goods and services, while supplying necessary information, oversight, or other critical inputs in those cases where government can do this most efficiently. As noted above, the Commission plays a key role in providing reliable information about the identity of licensees and the spectrum they hold.²⁸⁸ Determining how best to analyze and organize this information in a manner that meets the varying needs of licensees and potential spectrum lessees is a separate undertaking that, we believe, can be achieved more efficiently and effectively by independent market-makers and exchanges competing with each other to provide the kinds of value-added information services that different parties in the

²⁸⁵ *Id.* at ¶ 226.

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

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

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

market may demand. For this reason, we take no action to establish the Commission as either a market-maker or exchange, nor do we take action to favor any particular type of private exchange mechanism.²⁸⁹

Similarly, we decline at this time to establish requirements for market-makers or other parties that may emerge to facilitate transactions. We will, however, continue to monitor the development of information services and market mechanisms in the private sector, and are prepared to revisit this issue at a later time if circumstances warrant.

V. ORDER ON RECONSIDERATION

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

117. Blooston Rural Carriers, Cingular Wireless, and NTCA each sought clarification of the licensee's responsibility for ensuring that spectrum lessees comply with Commission policies and rules,²⁹² while Verizon Wireless sought clarification of the licensee's ability to terminate a spectrum lease for non-compliance by the lessee.²⁹³ Cingular Wireless and Verizon Wireless requested additional procedural protections for licensees and spectrum lessees in the event the Commission sought to terminate a spectrum lease,²⁹⁴ while Blooston Rural Carriers, Cingular Wireless, and NTCA sought additional procedural protections for spectrum lessees if the license was terminated, either as a result of the licensee's bankruptcy or for some other unanticipated reason.²⁹⁵ Blooston Rural Carriers also sought clarification of Commission policies regarding the licensee's responsibility for meeting application

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

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

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

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

²⁹³ Verizon Petition at 1-3.

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

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

construction requirements when entering into spectrum leasing arrangements.²⁹⁶ And, Cingular Wireless requested clarification with respect to the licensee's responsibility for the cost-sharing obligations associated with relocation of incumbent microwave licensees in broadband PCS spectrum.²⁹⁷ We address these issues and petitions below.

118. Issues raised by two of the petitioners overlap with matters that we already have addressed in the Second Report and Order, above. First Avenue Networks recommended that we eliminate the requirement that parties file spectrum manager leases days in advance of being permitted to commence operations under the lease,²⁹⁸ an issue we addressed in Section IV.A.1.d, above.²⁹⁹ Cingular Wireless sought clarification of the Commission's policies regarding spectrum leasing by designated entities and entrepreneurs,³⁰⁰ which we have addressed in Section IV.A.4.b, above.³⁰¹ Because we have already considered and addressed the substance of these petitions, we will not discuss them further in this section.

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

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

a. Spectrum manager leasing arrangements

119. Background. In the *Report and Order*, we provided that licensees in spectrum manager leasing arrangements will be held directly accountable for lessee violations.³⁰² In addition, we stated that if the licensee or the Commission determines that there is any violation of the Commission's rules or that the lessee's system is causing harmful interference, the licensee must immediately take steps to remedy the violation, resolve the interference, suspend or terminate the operation of the system, or take other measures to prevent further harmful interference until the situation can be remedied.³⁰³ Finally, if the spectrum lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Bureau or Commission, we provided

²⁹⁶ Blooston Rural Carriers Petition at 7-9.

²⁹⁷ Cingular Wireless Petition at 9-10.

²⁹⁸ First Avenue Networks Petition at 1-4.

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

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

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

³⁰² *Report and Order* at ¶ 67.

³⁰³ *Id*.

that the licensee “must use all legal means necessary to enforce the order,” as codified in section 1.9010(b)(1)(iii).³⁰⁴

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

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

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

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

³⁰⁵ Cingular Wireless Petition at 6.

³⁰⁶ Blooston Rural Carriers Petition at 9-11.

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

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

necessary legal rights, and the responsibility for taking legal action when necessary, to enforce their lessees' compliance with Commission policies and rules.

b. *De facto* transfer leasing arrangements

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

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

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

126. In the *Report and Order*, we significantly limited licensee responsibilities in *de facto* transfer leasing arrangements by relieving licensees of primary and direct responsibility for ensuring that their lessees' operations comply with Commission policies and rules. Instead, as we made clear in the *Report and Order*, spectrum lessees are primarily and directly responsible for ensuring such compliance,

³⁰⁹ *Id.* at ¶¶ 135-136.

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

³¹¹ Cingular Wireless Petition at 7-8.

³¹² Blooston Rural Carriers Petition at 3-4.

³¹³ NTCA Petition at 2-3.

and we will first approach the lessee when we have questions about interference or other technical performance issues to demand that it bring its operations into compliance. We also have the direct authority to pursue remedies against lessees under Section 503(b) of the Act.³¹⁴ Thus, although licensees are generally relieved of responsibility for their lessees' actions, they are not relieved of all responsibility no matter the circumstance. Given that licensees under this type of leasing arrangement continue to hold *de jure* control of the leased spectrum, as well as non-delegable duties regarding their license, we find that holding them potentially accountable, in certain limited circumstances, is commensurate with their ongoing responsibilities, as licensees, to the Commission.

127. As we have indicated, such potential residual accountability is quite circumscribed, and would only attach to ongoing violations or other egregious behavior by the spectrum lessees about which the licensee had knowledge or should have knowledge.³¹⁵ For instance, our rules require that any agreement between a licensee and spectrum lessee must contain provisions that the spectrum lessee comply at all times with applicable Commission rules.³¹⁶ Accordingly, to the extent that a licensee is found complicit with ongoing violations by the spectrum lessee about which the licensee is aware and does nothing to ensure compliance, we believe it is appropriate to hold that licensee accountable. While we would expect that instances in which licensees that have entered into *de facto* transfer leases may be held accountable for ongoing or egregious acts of their lessees will be quite rare indeed, we cannot relieve these licensees altogether, in all cases no matter how egregious, for responsibility for any act of their spectrum lessees. Finally, although we decline to adopt petitioners' proposals for codifying dispositive rules as to what would or would not constitute such ongoing violations or other egregious acts of a spectrum lessee for which a licensee would be held accountable, we do believe that the kinds of factors proposed by them could be relevant to our case-by-case review of whether a particular licensee had in fact appropriately exercised its residual, non-delegable duties with regard to such actions by its spectrum lessee.

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

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

129. In its petition, Verizon Wireless asserted that the wording of section 1.9040(a)(i) is overly broad, and would discourage potential spectrum lessees from entering into spectrum leases. Specifically, Verizon Wireless contended that the provision, as worded, could be read to allow the licensee to

³¹⁴ *Report and Order* at ¶¶ 137-138.

³¹⁵ *See id.* at ¶ 136.

³¹⁶ *See* 47 C.F.R. § 1.9040(a)(i).

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

³¹⁸ 47 C.F.R. § 1.9040(a)(i).

terminate a lease for the lessee's failure to comply with *any* of the Commission's rules or any other applicable law. Such a broad interpretation, it contended, could enable a licensee to claim the absolute right to terminate a spectrum lease even in the event of the most minor infraction, regardless of any agreement otherwise reached between the leasing parties. Verizon Wireless argued that a licensee might use this provision as pretext for terminating a lease when economic circumstances might make it no longer in the licensee's interest to honor the leasing arrangement. Accordingly, Verizon Wireless requested that we clarify that our rules do not create an absolute right to terminate a lease for any violation whatsoever regardless of the contractual terms of the spectrum lease.³¹⁹

130. Discussion. In establishing policies that promote use of spectrum leasing arrangements, we have been careful to distinguish between the rights of licensees and spectrum lessees. Licensees, who always retain *de jure* control of the license and retain certain core obligations that cannot be delegated to spectrum lessees, always retain greater rights and authority over the license and leased spectrum than spectrum lessees. Consistent with these policies, we require that licensees retain broad authority and, as provided in section 1.9040(a)(i), that they may terminate a spectrum lease if the spectrum lessee violates Commission rules. We did not intend, however, to provide licensees with completely arbitrary authority to terminate a spectrum lease for any violation whatsoever, regardless of the contractual agreement between the parties. Such a broad reading of section 1.9040(a)(i) could have a chilling effect on parties' incentives to enter into a spectrum lease. Accordingly, we grant Verizon Wireless's petition in part by clarifying our intent with regard to this provision.

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

³¹⁹ Verizon Wireless Petition at 1-3.

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

³²¹ See paras. 125-127, *supra*.

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

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

a. Spectrum manager leasing arrangements

132. **Background.** Under the spectrum leasing policies we adopted in the *Report and Order*, leasing parties must notify the Commission of their spectrum manager leasing arrangement at least 21 days before commencing operations (or, if a spectrum lease for a year or less, at least 10 days before commencing operations).³²² As we explained in the *Report and Order*, while Commission approval is not required for spectrum manager leases, we determined that the Commission retains the authority to investigate and terminate a spectrum manager leasing arrangement under certain circumstances.³²³ Specifically, the Commission can terminate any spectrum manager leasing arrangement to the extent it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control under our new standard or raises foreign ownership, competitive, or other public interest concerns.³²⁴

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

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

135. We affirm and further clarify our procedures for Commission examination, and possible termination, of spectrum manager leasing arrangements to the extent that these arrangements do not

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

³²³ *Report and Order* at ¶¶ 124-125.

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

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

³²⁶ Cingular Wireless Petition at 8-9.

qualify for immediate processing under the procedures discussed above in the Second Report and Order.³²⁷ As noted above, leasing parties that seek to enter into spectrum manager leases pursuant to the policies established in the *Report and Order* (i.e., those that do not qualify for immediate processing) must file their notifications at least 21 days before commencing operations (or, if a lease for a year or less, at least 10 days before commencing operations), thus giving the Commission the opportunity to review these arrangements prior to commencement of operations.³²⁸ Interested parties may then seek informal guidance or a formal determination from the Commission regarding the particular spectrum manager lease by means of a letter, a complaint, or a petition for reconsideration.³²⁹ To the extent the Bureau determines that the leasing arrangement may raise potential public interest concerns relating to eligibility, foreign ownership, designated entity or entrepreneur policies, or competition, and believes further investigation is necessary prior to commencement of operations under the spectrum manager lease, it will take whatever steps it deems appropriate to investigate or address those concerns, including notifying the licensee and possibly requiring that parties not commence operations under the lease until such concerns have been resolved.³³⁰ The Commission also retains the right to terminate any lease to the extent that it determines at any time, post-notification, that the arrangement constitutes an unauthorized transfer of control under the *de facto* control standard for spectrum leasing or otherwise is found to violate Commission policies regarding spectrum leasing.³³¹ In addition, if the Commission determines, post-notification, that any certification provided in the notification, by either the licensee or spectrum lessee, is not true, complete, correct, and made in good faith, the Commission will be vigilant in taking appropriate enforcement action, potentially including forfeitures or termination of the spectrum manager leasing arrangement.³³²

b. *De facto* transfer leasing arrangements

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

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

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

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

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

³³¹ See *Report and Order* at ¶ 125.

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

³³³ *Report and Order* at ¶¶ 137-138.

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

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

139. However, we do not agree with Verizon Wireless to the extent it requests that spectrum lessees in *de facto* transfer leases be accorded the same rights as licensees in cases where the Commission decides to terminate the lease. Termination of a spectrum lease is not the equivalent of a license revocation, and thus spectrum lessees are not subject to the same procedural protections afforded licensees under Sections 312 and 316. As noted above, those procedural protections only apply to revocations or modifications of licenses or construction permits. A termination of a spectrum lease, in which a spectrum lessee holds temporary and subsidiary rights to the leased spectrum, does not rise to the level of either a revocation of a license or construction permit. Thus, spectrum lessees that gain their limited and temporary rights to access to spectrum through a spectrum leasing arrangement with licensees are not entitled to the same procedural protections, vis-à-vis the Commission, as a licensee that is authorized by the Commission to hold their authorizations.

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

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

141. Three petitioners sought additional protections for spectrum lessees in the event that the license is cancelled or terminated, or if the licensee goes bankrupt. Specifically, Cingular Wireless requested clarification that, in the event of an unanticipated license termination, a valid spectrum lease does not terminate simply because the license is sold, unless the lease so provides.³³⁶ Blooston Rural Carriers, meanwhile, asserted that the Commission should provide more protection for lessees in the event of licensee bankruptcy or license termination. They believed that merely stating that the

³³⁴ Verizon Wireless Petition at 2-3.

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

³³⁶ Cingular Wireless Petition at 9.

Commission would provide a spectrum lessee a reasonable transition period is too vague and does not adequately protect the spectrum lessee's investments. Instead, Blooston Rural Carriers contended that, in event of bankruptcy, the Commission should either require the leased spectrum to be partitioned/disaggregated to the lessee, or require the new licensee to assume the lease on substantially the same terms as the original licensee.³³⁷ Finally, NTCA asserted that lack of certain protections for lessees is a disincentive to spectrum leasing, and that the Commission should provide that long-term *de facto* transfer lessees retain some rights if the licensee goes bankrupt; in particular, NTCA argued that the Commission should permit spectrum lessees to continue operations and take over as the primary licensee, or have time to gradually transition to other available spectrum.³³⁸ RTG, in reply to the latter two petitions, generally supported Blooston Rural Carriers' and NTCA's contentions.³³⁹

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

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

³³⁷ Blooston Rural Carriers Petition at 4-7.

³³⁸ NTCA Petition at 3-4.

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

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

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

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

protections by affording them the opportunity to obtain certain protections during a reasonable transition period in order to minimize disruption to business and other activities.³⁴³

C. Licensee Responsibility for Meeting Construction Obligations

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

145. In their petition, Blooston Rural Carriers argued that the Commission should be more flexible regarding construction requirements when a licensee's failure to meet those obligations is jeopardized by the spectrum lessee's breach of its lease agreement with the licensee. They contended that strict enforcement of the Commission's policy would discourage spectrum leasing, and proposed that licensees be given a reasonable extension of buildout deadlines if they can show that they entered into good faith, arms-length leases with spectrum lessees and reasonably depended on the lessees to meet the applicable buildout requirements.³⁴⁵ RTG supported this petition.³⁴⁶

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

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

147. Background. The *Report and Order* did not directly address which entity, licensee or spectrum lessee, would be deemed the "PCS entity" for purposes of certain relocation responsibilities applicable in the broadband PCS services. Under sections 24.239 through 24.253 of the Commission's rules, which govern the relocation of microwave incumbents from certain frequencies in the 1850-1990

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

³⁴⁴ *Id.* at ¶¶ 114-115, 146.

³⁴⁵ Blooston Rural Carriers Petition at 7-9.

³⁴⁶ RTG Reply to Petitions at 2.

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

MHz Broadband PCS band,³⁴⁸ any “PCS entity” that benefits from spectrum clearance performed either by other PCS entities or by microwave incumbents that voluntarily relocate must contribute to such relocation costs.³⁴⁹

148. In its petition, Cingular Wireless requested that we clarify whether, in the context of spectrum leasing and absent specific lease provisions to the contrary, the licensee or the spectrum lessee would be deemed a “PCS entity” under the microwave relocation rules.³⁵⁰ In reply, the Fixed Wireless Communications Coalition asserted that a licensee’s microwave relocation obligations cannot be delegated to spectrum lessees under either the spectrum manager or the *de facto* transfer option.³⁵¹ PCIA’s Microwave Cost Sharing Clearinghouse, which administers the cost sharing plan, contended that licensees should be responsible for all cost-sharing obligations triggered by spectrum lessees in spectrum manager leases,³⁵² while spectrum lessees in *de facto* transfer leases should assume the obligations and rights of the licensee under the cost sharing rules because they are akin to holders of partitioned or disaggregated spectrum.³⁵³

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

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

³⁴⁹ 47 C.F.R. § 24.239.

³⁵⁰ Cingular Wireless Petition at 9-10.

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

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

³⁵³ *Id.* at 1-2.

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

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

spectrum lessee trigger a reimbursement obligation. Finally, relocations performed by licensees and spectrum lessees do not trigger obligations between the parties under our rules, although leasing parties may account for this possibility by contract.

E. Miscellaneous Additional Clarifications and Revisions

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

151. *Term of a spectrum leasing arrangement.* Under the spectrum leasing policies established in the *Report and Order*, we permit spectrum lessees to lease spectrum usage rights for any period or time during the term of the license. We also stated that existing spectrum leasing arrangements could also be renewable provided that the licensee obtained renewal of the underlying license authorization.³⁵⁷ We limit the term of spectrum leases in such a manner because spectrum lessees cannot have any greater right to the use of licensed spectrum than the licensee. Accordingly, although spectrum leasing parties are free to extend an existing spectrum leasing arrangement beyond the term of the license authorization if the license is renewed, no spectrum manager lease notification or *de facto* transfer lease application can propose a lease term that extends beyond the term of the license authorization itself. We will clarify our rules to reflect this policy.

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

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

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

³⁵⁷ See *Report and Order* at ¶ 39.

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

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

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

³⁶¹ See, e.g., Viking Dispatch Services, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 18814, 18820 n.42 (1999) (*Viking*); Amendment of Section 90.631 of the Commission’s Rules and Regulations (continued....)

channels can be obtained are governed by the rules governing the channel in question.³⁶²

154. The spectrum leasing rules do not relax or otherwise modify the initial eligibility requirements for any Commission license. Indeed, we specifically stated in the *Report and Order* that the spectrum leasing policies could not be used as a tool for evading applicable requirements that remain in effect, and that we were not taking any action that could lead to the evisceration of rules and policies that have not been directly and specifically revised by us in this proceeding.³⁶³ That is, an entity that does not qualify under our existing loading rules for a particular authorization cannot use the prospect of spectrum leasing to other entities in order to establish its own eligibility for that license. Consequently, we hereby clarify that an applicant's required showing of loading under our rules must consist only of that entity's mobile units, consistent with the rules governing the channel in question, rather than mobile units that would be operated by spectrum lessees pursuant to the spectrum leasing rules. Counting spectrum lessees' mobile units toward the applicant's initial loading would in effect make the applicant eligible for something it could not otherwise obtain under the relevant service rules. Such a result would contravene our stated intent in the *Report and Order*.³⁶⁴

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

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

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

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Concerning Loading Requirements for 900 MHz Trunked SMR Stations, *Report and Order*, 7 FCC Rcd 4914, 4915 ¶ 11 (1992).

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

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

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

³⁶⁵ *See* 47 C.F.R. § 1.9003.

156. *Section 1.9045(b)*. We revise the language of section 1.9045(b) of our rules³⁶⁶ to read as follows:

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

This revision more clearly effectuates the intent of the applicable spectrum leasing policies regarding installment payment licensees, as set forth in the *Report and Order*, which require that each such licensee has executed Commission-approved financing documents that establish, in every spectrum leasing arrangement, that the licensee bears sole responsibility to repay the entire amount of its debt obligation(s) to the Commission, and that each such licensee and spectrum lessee entering into a spectrum leasing arrangement with such a licensee have included, as part of the lease agreement, all Commission-required provisions.³⁶⁷

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

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

VI. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

159. Background. In the Second Report and Order, above, we provide examples of the ways in which advanced technologies, such as opportunistic devices, may be utilized within the context of current spectrum leasing policies.³⁷¹ We observe that these do not comprise an exhaustive list of all permissible

³⁶⁶ See 47 C.F.R. § 1.9045(b).

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

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

³⁶⁹ See *Rural Report and Order*.

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

³⁷¹ See Section IV.B.2, *supra*.

ways in which these advanced technologies may be utilized, but instead help illustrate the relevant regulatory issues before the Commission.³⁷² We recognize that, due to the transaction costs associated with leasing or other market factors, licensees and other parties may wish to utilize other types of arrangements involving opportunistic use of licensed spectrum. To that end, we adopt a “private commons” option distinct from either spectrum leases or other existing arrangements. As discussed above, the private commons option may be particularly well-suited to meet the unique needs of market participants that incorporate “smart” or “opportunistic” use technologies within their bands.

160. Discussion. Because there may be many arrangements that would involve opportunistic use of spectrum and that would be consistent with Commission rules, we seek comment on additional ways in which licensees and spectrum lessees may enter into arrangements in which other users may employ advanced technologies to opportunistically use licensed spectrum. We wish to build on the examples listed in the Second Report and Order, above, to provide licensees, spectrum lessees, and other parties with greater certainty as to the types of opportunistic use arrangements that would be permitted.³⁷³ To that end, we encourage commenters to describe additional means to increase spectrum access, how they might fit within the framework of the Commission’s rules, or the extent to which we should consider revising our rules so as to accommodate these uses.

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

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

³⁷² See para. 89, *supra*.

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

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

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

164. We seek comment on the examples of private commons set forth in the Second Report and Order above,³⁷⁵ as well other types of private commons arrangements. We also stated in the Second Report and Order that the licensee or spectrum lessee establishing and managing a private commons must retain both *de facto* control of the use of the spectrum within the private commons and direct responsibility for the users' compliance with the Commission's rules.³⁷⁶ Are there any additional policies or requirements that are necessary to clarify the nature of this control or that could help ensure compliance? What is an efficient way to enforce users' compliance with the rules? For instance, would it be appropriate to require users to employ smart devices that include certain technologies (e.g., a microchip set) that would enable private commons managers to shut down any devices found to be causing harmful interference?

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

VII. CONCLUSION

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

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

³⁷⁶ See para. 94, *supra*.

³⁷⁷ See para. 97, *supra*.

VIII. PROCEDURAL MATTERS

A. Comment Filing Procedures

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

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

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

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

171. Parties who choose to file by paper may submit such filings by hand or messenger delivery, by U.S. Postal Service mail (First Class, Priority, or Express Mail), or by commercial overnight courier. Parties must file an original and four copies of each filing in **WT Docket No. 00-230**. Parties that want each Commissioner to receive a personal copy of their comments must file an original plus nine copies. If paper filings are hand-delivered or messenger-delivered for the Commission's Secretary, they must be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002-4913. To receive an official "Office of the Secretary" date stamp, documents must be addressed to Marlene H. Dortch, Secretary, Federal Communications Commission. (The filing hours at this facility are 8:00 a.m. to 7:00 p.m.) If paper filings are submitted by mail 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

³⁷⁸ 47 C.F.R. §§ 1.415, 1.419.

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

Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743. (The filing hours at this facility are 8:00 am to 5:30 pm.)³⁸⁰

172. Parties may also file with the Commission some form of electronic media submission (e.g., diskettes, CDs, tapes, etc.) as part of their filings. In order to avoid possible adverse effects on such media submissions (potentially caused by irradiation techniques used to ensure that mail is not contaminated), the Commission advises that they should not be sent through the U.S. Postal Service. Hand-delivered or messenger-delivered electronic media submissions should be delivered to the Commission's contractor, Natek, Inc., at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002-4913. Electronic media sent by commercial overnight courier should be sent to the Commission's Secretary, Marlene H. Dortch, Federal Communications Commission, Office of the Secretary, 9300 East Hampton Drive, Capitol Heights, MD 20743.³⁸¹

173. Regardless of whether parties choose to file electronically or by paper, they should also send one copy of any documents filed, either by paper or by e-mail, to each of the following: (1) Best Copy & Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, facsimile (202) 488-5563, or e-mail at fcc@bcpiweb.com; and (2) Paul Murray, Spectrum & Competition Policy Division, Wireless Telecommunications Bureau, 445 12th Street, S.W., Washington, D.C., 20554, or e-mail at Paul.Murray@fcc.gov.

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

B. *Ex Parte* Presentations

175. This is a permit-but-disclose rulemaking proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.³⁸² *Ex parte* presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, *ex parte* or otherwise, are generally prohibited. Persons making oral *ex parte* presentations are reminded that a memorandum summarizing a presentation must contain a summary of

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

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

³⁸² 47 C.F.R. § 1.1206.

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

C. Final Regulatory Flexibility Analysis

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

D. Paperwork Reduction Act of 1995 Analysis

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

³⁸³ 47 C.F.R. § 1.1206(b)(2).

³⁸⁴ See 5 U.S.C. § 604.

E. Initial Regulatory Flexibility Analysis

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

F. Contact Information

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

IX. ORDERING CLAUSES

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

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

³⁸⁵ *Id.*

³⁸⁶ *Id.* § 604(a).

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

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

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

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

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

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

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

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

FEDERAL COMMUNICATIONS COMMISSION


Marlene H. Dortch
Secretary

APPENDIX A – COMMENTING PARTIES

(WT Docket No. 00-230)

A. Comments

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

B. Reply Comments

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

C. Ex Parte Comments

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

APPENDIX B – PETITIONS FOR RECONSIDERATION**A. Petitions For Reconsideration**

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

B. Oppositions and Replies

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

APPENDIX C – FINAL RULES

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

PART 1 – PRACTICE AND PROCEDURE

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

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

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

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

(a) * * *

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

* * * * *

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

* * * * *

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

* * * * *

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

* * * * *

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

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

* * * * *

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

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

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

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

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

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

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

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

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