FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 24, and 90

[WT Docket No. 00–230; FCC 04–167]

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

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (''Commission'') adopts final rules that take additional steps to facilitate the development of more robust secondary markets in radio spectrum usage rights. In particular, the Commission builds upon the policies adopted in 2003 to facilitate the ability of licensees in our Wireless Radio Services that hold ''exclusive'' authority to lease some or all of their spectrum usage rights to third parties and to streamline approval procedures for license assignments and transfers of control in these Wireless Radio Services. First, the Commission adopts immediate processing procedures for certain classes of spectrum leasing arrangements and license transfers and assignments that do not raise potential public interest concerns. In addition, the Commission extends the spectrum leasing policies to additional services. The Commission also adopts a new regulatory concept, the ''private commons.'' Finally, the Commission addresses several petitions for reconsideration, and revises and further clarifies the Commission's spectrum leasing policies and rules.

DATES: Effective February 25, 2005, except for §§ 1.913(a)(5), 1.948(j)(2), 1.2003, 1.9003, 1.9020(e)(2), 1.9030(e)(2), 1.9035(e), and 1.9080, which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

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

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Second Report and Order and Order on Reconsideration portion (*Second Report and Order* and *Order on Reconsideration,* respectively) of the Commission's Second Report and Order, Order on Reconsideration, and Second Further Notice of Proposed Rulemaking, FCC 04–167, in WT Docket No. 00–230, adopted on July 8, 2004, and released on September 2, 2004. Contemporaneous with this document, the Commission issues a Second Proposed Rule of Proposed Rulemaking (*Second FNPRM*), published elsewhere in this publication. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, SW., Washington, DC 20554. The complete text may be purchased from the FCC's copy contractor, Best Copy & Printing, Inc., 445 12th Street, SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *http://www.fcc.gov*. Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365 or at *Brian.Millin@fcc.gov.*

Paperwork Reduction Act

This *Second Report and Order* contains two modified information collections, as described in the Final Regulatory Flexibility Analysis, which will become effective upon approval by the Office of Management and Budget (OMB). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public to comment on the information collection(s) contained in this *Second Report and Order* as required by the Paperwork Reduction Act of 1995, Public Law 104–13. These information collection(s) will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection(s) contained in this proceeding. Public and agency comments are due February 25, 2005. Comments should address: (a) Whether the new or modified collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

Synopsis of the Second Report and Order and Order on Reconsideration

I. Introduction

1. In the *Second Report and Order* and the *Order on Reconsideration*, we build on the framework established in the *Report and Order* portion of the Commission's *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 00–230 (*First Report and Order*), 68 FR 66252 (November 25, 2003), in which we adopted policies, rules, and procedures designed to facilitate the ability of many Wireless Radio Services licensees, including many small businesses, to lease spectrum usage rights and to transfer and assign licenses to third parties. In this *Second Report and Order*, we take additional steps to further reduce regulatory delay so that spectrum leasing parties in our Wireless Radio Services can implement certain classes of spectrum leasing arrangements and can transfer and assign licenses in a more timely fashion, in accordance with evolving marketplace demands and customer needs. In the Order on Reconsideration, we address a variety of issues addressed in the *First Report and Order*, including the respective responsibilities of licensees and spectrum lessees regarding particular service rules.

2. As with the underlying *First Report and Order*, these actions take us further down the path toward greater reliance on the marketplace, thus expanding the scope of available wireless services and devices and enabling more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country. The steps taken in the *Second Report and Order* and in the *Order on Reconsideration* to facilitate the development of secondary markets in wireless spectrum expand upon and complement several of the Commission's major policy initiatives and public interest objectives. These include our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services by designated entities, and enable development of additional and innovative services in rural areas.

II. Background

3. In the *First Report and Order*, we took important first steps to facilitate significantly broader access to valuable spectrum resources by enabling a wide array of facilities-based providers of broadband and other communications

services to enter into spectrum leasing arrangements with Wireless Radio Service licensees. Specifically, we established two different spectrum leasing approaches based on the scope of the rights and responsibilities to be assumed by the spectrum lessee. Under the first leasing option—''spectrum manager'' leasing—we enabled parties to enter into spectrum leasing arrangements without prior Commission approval so long as the licensee retains both *de jure* control of the license and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard for leasing. Under the second option—''*de facto* transfer'' leasing—we permitted parties, pursuant to a streamlined approval process, to enter into leasing arrangements whereby the licensee retains *de jure* control of their licenses while *de facto* control over the use of the leased spectrum, and associated rights and responsibilities, are transferred for a defined period to the spectrum lessees. Parties may enter into either long-term or short-term *de facto* transfer leases, with some variation in the policies and procedures that apply to each type. We also adopted streamlined Commission approval procedures for license assignments and transfers of control involving many of our Wireless Radio Services.

4. In the *Further Notice of Proposed Rulemaking* portion of the Commission's *Report and Order and Further Notice of Proposed Rulemaking* in WT Docket No. 00–230 (*FNPRM*), 68 FR 66232 (November 25, 2003), we sought comment on various ways in which the Commission could further enhance opportunities for spectrum access, efficiency, and innovation by removing unnecessary regulatory barriers and implementing more market-oriented policies that would facilitate moving spectrum to its highest valued uses. In particular, we sought comment on whether we could further streamline our processing of spectrum leasing arrangements and license assignments and transfers of control that did not raise a specified set of potential public interest concerns—relating to eligibility and use restrictions, foreign ownership, designated entity/entrepreneur issues, or competition—that would merit individualized Commission review. We requested comment on whether our spectrum leasing policies should be extended to additional services, and whether other actions should be taken to facilitate the development of secondary markets in spectrum usage rights. Finally, we inquired as to what specific steps we could take, in the context of secondary markets, to maximize the potential public benefits enabled by advanced technologies, such as opportunistic devices. In response to the *FNPRM*, we received twenty-one (21) comments and ten (10) reply comments. Five parties filed petitions for reconsideration of the *First Report and Order*, and several parties filed oppositions or comments in response.

III. Second Report and Order

A. Spectrum Leasing Arrangements

1. Additional Streamlining of Procedures for Certain Categories of Spectrum Leases

a. Immediate Approval of Certain Categories of *de facto* Transfer Leases That Are Subject to Our Forbearance Authority

5. Under current spectrum leasing policies and procedures, as adopted in the *First Report and Order*, licensees and spectrum lessees may enter into both long- and short-term *de facto* transfer leases pursuant to streamlined application and approval procedures. Specifically, parties that seek to enter into long-term *de facto* transfer leasing arrangements submit their applications, which are then placed on public notice and subject to further individualized Commission review prior to grant. The applications then are approved (or denied) by the Wireless Telecommunications Bureau (Bureau) within twenty-one (21) days unless they are removed from streamlined processing for further review based on potential public interest concerns identified by the Commission or in petitions to deny. Parties that seek to enter into short-term *de facto* transfer leases do so pursuant to the same processes applicable to Special Temporary Authority authorizations (STAs). These applications, which are not placed on prior public notice, are acted upon by the Bureau within ten (10) days if specified conditions are met. Consistent with our policies for other approvals, approval of both of these types of *de facto* transfer lease applications also is subject to the Commission's reconsideration procedures.

6. In the *FNPRM*, we sought comment on whether we could minimize delay in the timely implementation of *de facto* transfer leases by eliminating unnecessary regulatory review for certain classes of spectrum leases. For *de facto* transfer leases subject to our forbearance authority under Section 10 of the Communications Act, we proposed to forbear, to the extent necessary, from requiring prior public notice and individualized Commission review and approval for spectrum leasing arrangements that did not raise any of a specified set of potential public interest concerns.

7. Consistent with the broad support by commenters for the general forbearance proposal set forth in the *FNPRM*, we adopt this proposal, with certain modifications, as discussed herein. Under the approach we adopt, spectrum leasing parties that seek to enter into *de facto* transfer spectrum leases that qualify under this forbearance approach may file their spectrum lease application with the Commission, which in turn will be immediately approved under the procedures set forth below. Because we determine that *de facto* transfer leases meeting the specifications described below do not raise potential public interest concerns that would necessitate prior public notice or more individualized review, we believe that removing this unnecessary round of notice and regulatory review is appropriate, pursuant to our forbearance authority. Elements of *de facto* transfer leasing transactions that would not require prior public notice and individualized Commission review.

(i) Elements of *de facto* Transfer Leasing Transactions That Would Not Require Prior Public Notice and Individualized Commission Review

8. We will permit all *de facto* transfer spectrum leases that are subject to the Commission's forbearance authority and that do not potentially raise certain specified public interest concerns to proceed pursuant to the application and immediate grant procedures set forth herein. If a particular *de facto* transfer leasing arrangement does not raise potential concerns relating to eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition, we conclude, under our forbearance authority, that we need no longer require prior public notice and individualized Commission review before the spectrum lease may become effective. Therefore, once parties file a spectrum leasing application consistent with these requirements, it will immediately be approved under the policies and rules we are adopting herein, and spectrum lessees may commence operations as provided under the terms of the lease.

9. *Eligibility and use restrictions.* As proposed in the *FNPRM*, parties seeking to use the application/immediate approval procedures adopted under this forbearance approach for *de facto* transfer spectrum leases must comply, *inter alia*, with the applicable eligibility

and use restrictions. Accordingly, we require that, in the spectrum leasing application submitted to the Commission, the spectrum lessee must certify that it meets the basic qualification requirements for holding the license authorization associated with the lease and that it will comply with all applicable use restrictions. We believe that spectrum lessee compliance with these requirements is necessary because, in many services, we continue to have eligibility and use restrictions that were adopted in furtherance of certain public interest objectives. While we seek to promote licensee flexibility and facilitate secondary markets where appropriate, we do not intend for policies adopted in this proceeding to be used as a means for evading requirements that remain in effect for a given service. Having spectrum lessees certify to the Commission that they will comply with applicable eligibility and use restrictions will ensure that spectrum leasing arrangements approved under the forbearance approach do not undermine these policies.

10. Consistent with the policies we adopted in the *First Report and Order*, the applicable eligibility restrictions are the same for both long-term and short-term *de facto* transfer leases. The applicable use restrictions may, however, differ depending on whether a long or short-term *de facto* transfer lease is involved. As provided in the *First Report and Order*, we permit some additional flexibility under short-term *de facto* transfer leasing with respect to one particular set of use restrictions; specifically, we permit licensees with service authorizations that restrict use of spectrum to non-commercial uses to enter into short-term *de facto* transfer leases to allow the spectrum lessee to use it commercially.

11. *Foreign ownership.* As we generally proposed in the *FNPRM*, we determine that spectrum lessees seeking to enter into *de facto* transfer leases under this forbearance approach must be able to certify that they comply with specific requirements, described below, to ensure that the spectrum lease does not raise foreign ownership concerns under Section 310 of the Act that remain unaddressed prior to implementation of the lease. This approach will enable most *de facto* transfer leases to proceed immediately, while ensuring that the Commission and the Executive Branch have the opportunity to review any lease that may raise potential foreign ownership concerns prior to that spectrum lease going into effect.

12. Under the policy we are adopting, the spectrum lessee must certify that it is not a foreign government or representative thereof, consistent with the section 310(a) requirements. Second, if the spectrum lease involves a common carrier radio authorization, the spectrum lessee must certify that it is not an alien or representative thereof, a corporation organized under the laws of any foreign government, or have more than 20 percent direct foreign ownership, in accord with the requirements of sections 310(b)(1)–(3).

13. Finally, consistent with our policies under section 310(b)(4), as explained in the *FNPRM*, the spectrum lessee must certify either (1) that it does not have more than 25 percent indirect foreign ownership or (2) that it has previously obtained a declaratory ruling from the Commission in advance of entering into the subject spectrum lease that establishes that the spectrum lease falls within the scope of that declaratory ruling (including the type of service and geographic coverage area) and that there has been no change in foreign ownership in the meantime. We emphasize that the spectrum lessee is primarily and directly responsible for ensuring that the scope of its prior declaratory ruling covers the proposed lease transaction. If it does not, the spectrum lessee must obtain a supplemental ruling that would apply to the particular transaction, and must do so prior to filing under the new immediate approval procedures. For example, a spectrum lessee may have previously received a ruling that approved its acquisition of a specific group of common carrier microwave licenses, or that approved its acquisition of a controlling interest in a carrier that holds a specific group of common carrier microwave licenses. Such a ruling would not cover a future spectrum lease of PCS spectrum. In such circumstances, in order for the spectrum lessee to be able to satisfy the certification requirement, it must first request and obtain from the Commission a supplemental ruling to cover the spectrum leasing arrangements involving PCS spectrum.

14. We note that because the same foreign ownership policies apply to both long-term and short-term *de facto* transfer leasing arrangements, spectrum lessees under both of these types of *de facto* transfer lease applications will be required to make these certifications.

15. *Designated entity/entrepreneur eligibility.* Because designated entity and entrepreneur licensees have been conferred special benefits (*e.g.*, bidding credits, installment payment plans, or participation in closed bidding) by the Commission, and because these licensees may enter into long-term *de facto* transfer spectrum leasing arrangements only so long as such arrangements are consistent with our policies relating to applicable transfer restrictions and unjust enrichment payment obligations, we believe it is both necessary and appropriate to retain the ability to review all long-term *de facto* transfer spectrum leasing arrangements involving designated entity or entrepreneur licensees to ensure compliance with applicable policies and rules, and thus such leasing arrangements cannot be processed under these procedures. As we stated in the *FNPRM*, we do not intend for the forbearance approach to be used as a means to evade Commission rules, and we believe this to be especially important where the rules have been implemented to fulfill our statutory obligations. Given, however, that we have eliminated all of these restrictions with regard to short-term *de facto* transfer leases, we determine that applications involving short-term *de facto* transfer leases do not raise any potential public interest concerns relating to our designated entity or entrepreneur policies that would preclude the spectrum leasing parties from proceeding under our forbearance approach.

16. *Competition.* In light of the Commission's competition policies for Wireless Radio Services, we will permit spectrum leasing parties to proceed under our forbearance approach so long as the *de facto* transfer leasing arrangement does not raise potential competition concerns that merit prior public notice and Commission review before the application is approved. Consistent with our competition policies, however, we will exclude from this approach, at this time, all long-term *de facto* transfer leases involving spectrum that (1) is, or may reasonably be, used to provide interconnected mobile voice and/or data services and (2) creates a ''geographic overlap'' with other spectrum used to provide these services in which the spectrum lessee holds a direct or indirect interest (of 10 percent or more), either as a licensee or as a spectrum lessee. Because the latter class of *de facto* transfer leases potentially raise competition concerns, they will continue to be subject to case-by-case review and approval under the policies we adopted in the *First Report and Order.*

17. As we noted in the *First Report and Order*, assessment of potential competitive effects of spectrum leasing transactions remains an important element of our policies to promote

facilities-based competition and guard against the harmful effects of anticompetitive conduct, and we thus apply the Commission's general competition policies to transactions involving long-term *de facto* transfer spectrum leases (as well as to spectrum manager leases). The approach we adopt herein, pursuant to our forbearance authority, is designed to be consistent with our current competition policies with regard to Wireless Radio Services. In examining transactions for possible competitive harm, the Commission has primarily focused its efforts in recent years on services that could potentially affect the product market for mobile telephony, which includes interconnected mobile voice and/or data services. Cellular, broadband Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services currently are used to provide CMRS services that potentially affect the mobile telephony market, and expressly are subject to the Commission's competition policies. In addition, spectrum in several other services may currently, or at some time in the future, be used to provide such CMRS services; these services include several services licensed under part 27 of our rules—including the Wireless Communications Service (WCS), Broadband Radio Service, Advanced Wireless Service (AWS), the upper and lower 700 MHz bands, and the 1390–1392 MHz, 1392–1395/1432–1435 MHz, and 2385–2390 MHz bands—as well as narrowband PCS, various paging services, and mobile satellite service where the use of ancillary terrestrial components (ATC) is permissible. Accordingly, under the policies we adopt herein, we find that long-term *de facto* transfer leasing transactions that involve a geographic overlap between or among any of these listed services, and are to be used to provide mobile telephony service, continue to merit public notice and case-by-case review by the Commission prior to approval. Such transactions potentially raise public interest concerns relating to competition, and thus will not be subject to our forbearance approach at this time.

18. *Other public interest concerns.* Finally, we note that *de facto* transfer leasing arrangements that would require waiver of Commission policies or rules, or a declaratory ruling relating to them, may not use the streamlined processing we are adopting under this forbearance approach. Requests for a waiver or declaratory ruling implicates other potential public interest concerns associated with the license or spectrum leasing authorization, and would first need to be approved by the Commission. This policy will be applied with respect to both long- and short-term *de facto* transfer leasing arrangements.

(ii) Application and Immediate Approval Procedures

19. *Application/immediate approval procedures.* Consistent with the general proposal set forth in the *FNPRM*, we will no longer require prior public notice and individualized Commission review of *de facto* transfer leases that meet the requirements specified above. Under the policies and rules adopted herein, parties seeking to enter into such leasing arrangements will notify the Commission by filing *de facto* transfer lease applications, which in turn will be immediately approved under the procedures we are adopting herein. Specifically, if the spectrum leasing parties file their *de facto* transfer lease application in the Universal Licensing System (ULS), and the application establishes the requisite elements explained above and are otherwise complete and the payment of the requisite filing fees have been confirmed, the Bureau will process the application and provide immediate approval through ULS processing. Approval will be reflected in ULS on the next business day after filing the application. Upon receiving approval, spectrum lessees will have the authority to commence operations under the terms of the spectrum lease. The Bureau also will place the approved application on public notice.

20. *Post-approval reconsideration procedures.* We adopt the reconsideration procedures set forth in the *FNPRM*. Accordingly, we will place the approved *de facto* transfer leases on a weekly informational public notice. Any interested party may file a petition for reconsideration within 30 days of the public notice date. Similarly, the Bureau will be able to reconsider the grant on its own motion within 30 days of the public notice date, and the Commission can reconsider the grant on its own motion within 40 days of the public notice date.

21. *Other issues.* Parties will be held accountable for any certifications they make in the spectrum leasing applications that enable them to take advantage of the immediate approval procedures set forth herein. To the extent that the Commission determines, post-approval, that any certification provided on the application, 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 leasing arrangement.

(iii) Compliance With Forbearance Requirements

22. As stated above, we determine that for all qualifying *de facto* transfer leases—*i.e.*, those subject to our section 10 forbearance authority and satisfying the elements set forth above—we will forbear from the applicable prior public notice requirements and individualized review requirements of sections 308, 309, and 310(d) of the Communications Act, to the extent necessary, so that these spectrum leases may be approved pursuant to the procedures set forth above. Our decision to forbear meets the requirements of Section 10 of the Act, which enables the Commission to forbear from applying any regulation or provision of the Act to a telecommunications carrier or service, or class of telecommunications carriers or services, in any or some of its geographic markets, if the following three-prong test is satisfied: (1) Enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.

b. Immediate Approval of Certain Categories of *de facto* Transfer Leases That Are Not Subject to Forbearance

23. We will permit *de facto* transfer leases involving non-telecommunications providers and carriers, and thus are not eligible for section 10 forbearance, to proceed under the same application/immediate approval policies as adopted above for *de facto* transfer leases subject to forbearance so long as the leasing parties can establish that the arrangements meet the same kinds of criteria as required for telecommunications providers. These procedures comply with the statutory requirements of Sections 308, 309, and 310(d). In addition, our decision accords with commenters' support of our goal to streamline *de facto* transfer lease transactions involving non-telecommunications carriers in a manner similar to that adopted under the forbearance approach.

24. Under the policies we are adopting, so long as the parties establish in their *de facto* transfer lease application—by provision of sufficient information and related certifications—that the spectrum lessee complies with the applicable eligibility, use, and foreign ownership-related requirements, and does not seek a waiver or declaratory ruling, the Commission will immediately approve the application as consistent with statutory requirements and the public interest. As with *de facto* transfer lease applications filed under our forbearance approach, we will announce the grant of these *de facto* transfer leases involving non-telecommunications services in a weekly informational public notice, subject to reconsideration within 30 days by interested parties or the Bureau, and within 40 days by the Commission on its own motion.

25. Streamlined processing of qualifying spectrum leases involving non-telecommunications services serves the public interest and is necessary in order to place substantively similar wireless spectrum leasing transactions involving different types of licenses on a comparable basis and to minimize unnecessary regulatory discrimination. The policies and procedures we adopt are also consistent with the statutory requirements of sections 308, 309, and 310(d). First, 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 spectrum leasing transaction before it will be approved. Thus, before any particular spectrum lease application will be approved, the Commission will determine, 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 have been established, and the statutory requirements for case-by-case review and approval of the application will have been satisfied.

c. Applying the Immediate Approval Procedures to Short-Term *de facto* Transfer Leases

26. Under procedures adopted in the *First Report and Order,* short-term *de facto* transfer leasing arrangements are processed in the same manner as authorized pursuant to section 309(f) of the Communications Act. Under these procedures, parties wishing to enter into short-term arrangements must establish through requisite certifications in their application that they qualify for these procedures and must also meet any additional requirements associated with our STA procedures.

27. We determine that short-term *de facto* transfer leasing arrangements should qualify for processing under the application/immediate grant procedures that we are adopting for qualifying long-term *de facto* transfer leases. Accordingly, we determine to process these arrangements under the new procedures we are adopting, and we will no longer process them under the Special Temporary Authority (STA) procedures.

28. Under the policies and rules adopted in the *First Report and Order,* short-term *de facto* transfer leases do not raise potential public interest concerns relating to eligibility, use restrictions, or foreign ownership that would require either prior public notice or additional Commission review before being approved. In order to qualify to enter into short-term *de facto* transfer leases, spectrum lessees are already required, under existing policies, to meet the same eligibility and foreign ownership restrictions that we have adopted above for determining whether a long-term *de facto* transfer lease qualifies for the application/immediate approval procedures. Short-term *de facto* transfer lease applicants must also certify that they would comply with certain applicable use restrictions. In addition, we have determined that short-term *de facto* transfer leasing arrangements do not raise potential public interest concerns relating either to designated entity/entrepreneur or competition matters. Accordingly, these issues do not prevent a short-term *de facto* transfer lease application from qualifying for the immediate approval procedures we are adopting herein.

29. Eliminating the requirement that short-term *de facto* transfer leases be processed under the procedures applicable to STAs enables us to remove unnecessary regulatory requirements and simplify the applicable rules. First, we will no longer require short-term lease applicants to include a public interest statement in accordance with the applicable rules derived from our STA procedures. In addition, we will no longer require that the term of a short-term *de facto* transfer lease be limited to 180 days and renewable for up to a total of 360 days. Instead, for purposes of administrative efficiency and general clarity, we will simplify the application requirements to do away with multiple filings, and to permit parties to enter into a short-term *de facto* transfer lease for a term of up to one year (365 days) by submitting a single application.

d. Immediate Processing of Certain Categories of Spectrum Manager Leases

30. The *First Report and Order* provided that parties entering into spectrum manager leases are required to file the leasing notification with the Commission within 14 days of when they execute the lease and at least 21 days prior to commencing operations (10 days prior if the lease is for one year or less).

31. Upon further consideration, we have decided to revise our policies for spectrum manager lease notifications to be consistent with the policies for *de facto* transfer leases as described above. Accordingly, where parties seek to enter into spectrum manager leases that do not raise specified potential public interest concerns—*i.e.*, those relating to eligibility, use restrictions, foreign ownership, designated entity/entrepreneur, or competition—we will permit them to commence operations under those leasing arrangements once they have notified the Commission of the lease, have made the necessary certifications to qualify for immediate processing, and have determined, through ULS, that the notification has been successfully processed. These immediate processing procedures for spectrum manager leases will ensure parity in the regulatory treatment of spectrum manager and long-term *de facto* transfer leasing arrangements, thus eliminating unnecessary delay for parties seeking to enter into similar categories of spectrum manager leases and minimizing the possibility that our regulatory policies would be a factor in potential leasing parties' decision-making. Our determination also grants, in part, one party's petition for reconsideration, in which it sought elimination of unnecessary delay between the time the licensee filed a spectrum manager lease notification and the time in which leasing parties could commence operation under the spectrum leasing arrangement.

32. We adopt these similar policies for spectrum manager leases because the public interest concerns relating to these leases are either identical or similar to those associated with long-term *de facto* transfer leases. In particular, the policies relating to eligibility and use restrictions, foreign ownership, and competition apply with equal force, regardless of whether the spectrum lease is a spectrum manager lease or a long-term *de facto* transfer lease. In addition, designated entity or entrepreneur licensees seeking to lease spectrum under spectrum manager leases are subject to certain restrictions associated with designated entity and entrepreneur

policies, just as long-term *de facto* transfer leases are subject to certain restrictions.

33. Accordingly, under the new policies we are adopting, if the spectrum manager lease satisfies the same qualifying elements as required for long-term *de facto* transfer leases as set forth above—and thus does not raise potential public interest concerns regarding eligibility and use restrictions, foreign ownership restrictions, designated entity/entrepreneur restrictions, or competition—we do not believe it necessary to review these notifications in advance of operations, and the leasing parties are entitled to commence operations once they have received the requisite confirmation through ULS. As with *de facto* transfer leases, spectrum manager leases that proceed pursuant to these immediate processing procedures are subject to post-notification review. Under these procedures, any interested party may file a petition for reconsideration within 30 days of the date of the public notice listing the notification as accepted. Similarly, the Bureau will have 30 days from the public notice date, and the Commission 40 days, to reconsider whether the spectrum manager lease is in the public interest.

34. Finally, we determine to eliminate the requirement that parties file their spectrum lease notifications within 14 days of execution of their contractual agreement. We conclude that this requirement is superfluous so long as parties file the lease notification within the time frame required by our spectrum manager lease policies, either under the newly streamlined procedures adopted in this order (for qualifying spectrum manager leases) or at least 21 days in advance of commencing operations (10 days in advance if the lease is no longer than a year).

2. Extending Spectrum Leasing Policies to Additional Spectrum-Based Services

35. In the *FNPRM,* we sought comment on whether the spectrum leasing policies should be extended to a variety of services that had been excluded from the spectrum leasing policies adopted in the *First Report and Order.* We determine that we will extend the spectrum leasing policies to some additional Wireless Radio Services, as identified below, but will not extend these policies to other services at this time, as explained herein.

36. *Public Safety Services.* With regard to the Public Safety Services in part 90, we will permit public safety licensees with exclusive use rights to lease their spectrum usage rights to other public safety entities and entities providing communications in support of public safety operations. We, however, decline at this time to permit public safety licensees to enter into spectrum leasing arrangements for commercial or other non-public safety operations.

37. We will permit public safety licensees in these services to enter into spectrum leasing arrangements with other public safety entities and entities that provide communications in support of public safety operations, consistent with the policies we adopted last year in concerning the 4.9GHz band. We established new licensing and service rules for the 4940–4990 MHz band (4.9 GHz band) that were designed to increase the effectiveness of public safety communications, foster interoperability, and further ongoing and future homeland security initiatives within the 4.9 GHz band. We believed that these objectives would be best accomplished by basing the eligibility criteria for being licensed in the 4.9 GHz band on the ''public safety services'' definition set forth in section 90.523 of our rules, which the Commission adopted in 1998 to implement section 337(f)(1) of the Communications Act. Under this definition, ''public safety services'' are services: (A) The sole or principal purpose of which is to protect the safety of life, health, or property; (B) that are provided—(i) by State or local government entities; or (ii) by nongovernmental organizations that are authorized by a government entity whose primary mission is the provision of such services; and (C) that are not made commercially available to the public. For the same reasons that we decided to permit non-traditional public safety entities to be licensed in the 4.9 GHz band for use in support of public safety operations, we now conclude that it is appropriate to permit public safety licensees to lease spectrum for such use. In addition, we believe that our decision herein to permit spectrum leasing among public safety entities achieves an appropriate balance between commenters that supported extension of our spectrum leasing policies to these services and those that expressed concern about possible abuses. Further, spectrum would not be used by commercial entities to the potential detriment of public safety operations.

38. *ITFS/MMDS services.* All of the comments received in this docket were previously transferred to and considered in WT Docket No. 03–66, in which we comprehensively reviewed our policies and rules relating to the Instructional Television Fixed Services (ITFS) and Multipoint Distribution Service (MDS) services. In a recently issued order in that proceeding, we converted the MDS service into the Broadband Radio Service and the ITFS service into the Educational Radio Service, and extended the secondary markets spectrum leasing policies to those services, but included certain modifications in order to maintain the educational purpose of ITFS. We also grandfathered pre-existing ''excess capacity'' leasing arrangements that were entered into under the previous ITFS-specific leasing rules.

39. *Maritime services.* Consistent with the spectrum leasing policies adopted in the *First Report and Order,* we will extend the spectrum leasing rules to Automated Maritime Telecommunications Systems (AMTS) services in part 80. As discussed by commenters that supported this extension, the AMTS service involves a geographic licensing approach similar to another part 80 service, VHF Public Coast stations, which also involves exclusive use licenses and already is permitted to enter into spectrum leasing arrangements under the leasing policies pursuant to the *First Report and Order.* We do not, however, extend our spectrum leasing policies to any of our high seas public coast stations. No commenters supported extending our spectrum leasing policies to these services, and they differ significantly from that of VHF Public Coast and AMTS stations. These frequencies are allocated internationally by the International Telecommunication Union (ITU) to facilitate interoperable radio communications among vessels of all nations and stations on land worldwide. Flexible use is not permitted; instead, the ITU Radio Regulations specify how each frequency may be used (*i.e.*, for radiotelephone, radiotelegraph, facsimile, narrow-band direct printing, or data transmission). In addition, unlike VHF Public Coast and AMTS stations, high seas public coast stations are not permitted to serve units on land. Finally, high seas stations are licensed only on a site-by-site basis. The Commission declined to adopt a geographic licensing approach for this spectrum because of special considerations relating to the extensive international coordination required, the need to conform to changing international allocations and allotments, and the fact that some of the spectrum is shared with the Federal Government.

40. *MVDDS services.* We will extend our spectrum leasing policies to the Multichannel Video Distribution and Data Service (MVDDS) services consistent with the comments we have received. We conclude that licensees will have similar ''exclusive use'' rights

as other licensees to whom these policies currently apply, and that the benefits of spectrum leasing should be made available to licensees and potential spectrum lessees in these services. Consistent with the service rules for these services, which permit partitioning along county lines and prohibit disaggregation under any license authorization, we will permit MVDDS licensees to lease different geographic portions (divided along county borders) to eligible spectrum lessees, but will permit only one entity, either the licensee or spectrum lessee, to operate in a given geographic area.

41. *Services/authorizations involving shared frequencies.* We will not extend spectrum leasing to shared services at this time. As we noted in the *FNPRM,* we had previously declined to allow leasing on shared frequencies because parties can readily obtain access to the spectrum by obtaining their own authorizations on shared frequencies and they are not foreclosed from applying for authorizations by the existence of another licensee in the same geographic area. Although we sought comment on whether there might nonetheless be reasons to extend spectrum leasing to shared services, commenters opposed extension of the leasing rules to services/authorizations involving shared frequencies services.

42. *Various part 90 services.* We determine not to revise current spectrum leasing policies with regard to part 90 services. In particular, we will not extend these policies to Private Land Mobile Radio (PLMR) stations below 470 MHz (including those with ''FB8'' status). These stations share spectrum below 470 MHz, and while there is some degree of ''exclusivity'' (because the stations are trunked and cannot share in the usual way), the operations nonetheless are still on shared spectrum often occupied by others. Accordingly, we determine that, consistent with our current policies regarding shared services/ authorizations, these stations should not be included among those services to which the spectrum leasing policies apply. In addition, we do not extend our spectrum leasing policies to non-multilateration Location and Monitoring Service (LMS) services because licensing in these services is shared and non-exclusive. Entities seeking access to spectrum for these non-multilateration LMS uses can gain access to spectrum without the need to enter into spectrum leasing arrangements with licensees.

43. *Other services.* We decline, at this time, to extend the spectrum leasing policies to any additional services on which we had sought comment, including the 700 MHz Guard Band Service, Amateur Services, Personal Radio Services, Aviation Services, Cable Television Relay Services, and satellite services.

44. We do not believe it appropriate to extend the spectrum leasing policies adopted in the *First Report and Order* to the Guard Band Manager Service. This service already has its own distinct set of policies and rules regarding leasing arrangements, and no commenters proposed replacing those policies. Accordingly, we see no reason at this time to replace those policies at this time. Nor do we extend spectrum leasing policies to the part 97 Amateur Radio Services. An individual Amateur Radio licensee gains access to particular bands of spectrum after obtaining an operator license by successfully completing the relevant exam requirements for those particular bands. The amateur licensee must share access to the spectrum with all amateur operators who have also successfully passed examinations for the same privileges.

45. We also do not extend our spectrum leasing policies to additional services among the part 95 Personal Radio Services. Apart from the 218–219 MHz service (to which spectrum leasing policies already apply), the Personal Radio Services are either licensed by rule and/or operate on shared spectrum. For example, Citizens Band Radio operators are authorized by rule to operate without individual licenses on any of 40 channels nationwide (choosing one at a time). Radio Control operators are authorized by rule to operate without individual licenses on any of the radio control channels nationwide.

46. Nor do we extend our spectrum leasing policies to our part 87 Aviation Services. No commenter proposed that the spectrum leasing policies be applied to these services. In addition, most of the spectrum in these services is licensed on a shared basis, and thus is not assigned for the exclusive use of any particular licensee. Finally, aviation safety concerns among the Aviation Services that do involve exclusive use rights—*i.e.*, aeronautical advisory stations (unicoms) at uncontrolled airports and aeronautical enroute stations—recommend against extending our spectrum leasing policies to these services. In particular, the Commission has determined that the licensees in these services should, for aviation safety purposes, be limited to one operator at any one location.

47. Finally, we do not extend our spectrum leasing policies applicable to Wireless Radio Services to two services, the Cable Television Relay Service and satellite services, that are administered by bureaus outside of the Wireless Telecommunications Bureau. No commenters proposed extending the spectrum leasing policies to these two services, and the general policies applicable to these two services differ, in many respects, from those administered by the Wireless Bureau. Accordingly, we will not extend our spectrum leasing policies to these two services at this time.

3. Spectrum Leasing Policies Applicable to Designated Entity/Entrepreneur Licensees

48. In the *First Report and Order,* we decided that designated entity and entrepreneur licensees would be permitted to enter into a spectrum manager lease with any qualified lessee, regardless of the lessee's designated entity or entrepreneur eligibility, and avoid the application of our unjust enrichment rules and transfer restrictions, so long as the lease did not result in the lessee's becoming a ''controlling interest'' or affiliate of the licensee that would cause the licensee to lose its designated entity or entrepreneur eligibility under section 1.2110 of our rules. We further determined that, to the extent that any conflict arose between the revised *de facto* control standard for spectrum leasing arrangements as set forth in the *First Report and Order* and the controlling interest standard in our rules for determining designated entity and entrepreneur eligibility, we would apply the latter in determining whether the licensee had maintained the requisite degree of ownership and control to allow it to remain eligible for the licenses or for other benefits such as bidding credits and installment payments. We also decided in the *First Report and Order* that designated entity and entrepreneur licensees would be allowed to enter into long-term *de facto* transfer leasing arrangements subject to any existing transfer restrictions and unjust enrichment payment obligations.

49. *Affirmation of existing rules.* We affirm the rules we established in the *First Report and Order* for spectrum leasing by designated entity and entrepreneur licensees, declining requests that we provide such licensees with the unfettered right to lease spectrum to any entity, without regard to our eligibility rules for designated entities and entrepreneurs.

50. We decline to adopt the suggestion of some commenters (one of which is also a petitioner) that we allow designated entity and entrepreneur licensees to lease spectrum to any

entity, without regard to how the spectrum lease might affect the licensee's designated entity or entrepreneur eligibility. We believe that adopting such a change to our rules would contravene the requirements and objectives of Section 309(j) of the Act. Section 309(j) requires, among other things, that the Commission ensure that small businesses are given the opportunity to participate in the provision of spectrum-based services and that, to further this goal, it consider the use of bidding preferences. These statutory directives were not intended to provide generalized economic assistance to small businesses, but rather to facilitate their ability to acquire licenses, build out systems, and provide service. In such a way, Congress sought to promote diversity among service providers, as well as the rapid deployment of new technologies for the benefit of, among others, rural customers.

51. Section 309(j) also directs the Commission to prescribe anti-trafficking restrictions and payment schedules as necessary to prevent designated entity benefits from giving rise to unjust enrichment. If we were to allow designated entities and entrepreneurs to enter into spectrum manager leasing arrangements without considering whether the spectrum lessee had acquired an attributable interest in the licensee, we would run the risk that designated entity and entrepreneur incentives would benefit, indirectly, entities that do not qualify for such incentives in the primary market. In other words, we would be paving the way for the very unjust enrichment Congress wanted us to prevent.

52. We also reject recommendations that we allow licensees to avoid unjust enrichment payment obligations and transfer restrictions in situations where the spectrum lessee will use the spectrum lease to serve rural areas. Section 309(j) requires that the Commission ''seek to promote,'' as one of many, sometimes conflicting goals, the objective that service be developed and rapidly deployed to rural customers, and requires further that the Commission ensure that rural telephone companies be given the ''opportunity'' to participate in the provision of spectrum-based services.

53. To facilitate these ends within the context of competitive bidding, the Commission has provided small businesses with bidding credits and entrepreneurs with license set-asides, while specifically declining to establish an independent bidding credit for large telephone companies serving rural areas. When initially considering whether to create a separate bidding credit for rural telephone companies, the Commission determined that telephone companies providing service in rural areas do not *per se* have the same difficulty accessing capital as other groups, such as small businesses. In subsequent decisions considering this issue, the Commission has not changed its determination. If we provided small businesses and entrepreneurs with the unrestricted ability to enter into spectrum leasing arrangements with non-eligible entities planning to serve rural areas, without regard to our eligibility rules, we would, in effect, be allowing small business and entrepreneur incentives to benefit, indirectly, the very entities which we had expressly found no basis for assisting in that fashion in the primary market.

54. For similar reasons, we also reject a suggestion that we lift unjust enrichment repayment obligations and entrepreneur transfer restrictions for licensees owned and controlled by Alaska Native Corporations and Indian tribes that lease rural area spectrum rights to non-eligible entities pursuant to long-term *de facto* transfer leasing arrangements. Indian tribes and Alaska Regional or Village Corporations already enjoy enhanced access to designated entity and entrepreneur benefits through an exclusion from our affiliation rules available only to them.

55. To summarize, in affirming our rules and in declining to adopt proposals to the contrary, we have determined that we will continue to rely on our existing attribution rules, including our definitions of controlling interest and affiliation, for all determinations of whether a licensee undertaking a lease has maintained its designated entity and/or entrepreneur eligibility. We, nonetheless, recognize that further guidance on the application of those rules in the context of leasing might be useful. Accordingly, we offer such guidance below.

56. *Application of Existing Attribution Rules to Spectrum Manager Leasing Arrangements.* In response to requests from two commenters (one of which is also a petitioner), we clarify here how our attribution rules, including the criteria set forth in *Intermountain Microwave,* 12 FCC Rcd 2d 559 (1963), are applied in determining whether spectrum manager leasing arrangements by designated entity and entrepreneur licensees satisfy our eligibility requirements. We note, as a preliminary matter, that we expect a licensee to conduct an analysis of possible control by, or affiliation with, the proposed spectrum lessee before entering into a spectrum manager leasing arrangement and before certifying that the spectrum lease does not affect the licensee's continued designated entity or entrepreneur eligibility. That analysis should take into account the Commission's definitions of control and affiliation, which will help to determine, as they do in non-spectrum leasing contexts, whether the gross revenues (and, in the case of entrepreneurs, the total assets) of a spectrum lessee are to be attributed to a designated entity or entrepreneur licensee. Such a determination will be made by evaluating the licensee's Commission-regulated business in the context of a spectrum lessee's involvement with the licensee. For example, a spectrum lessee would become an attributable interest holder in the licensee if the lessee were to become an officer or director of the licensee. An attributable affiliation might also be created if a lease called for the licensee and spectrum lessee ''to combine their efforts, property, money, skill and knowledge.'' Similarly, a spectrum lease might create a contractual affiliation between licensee and spectrum lessee if the leasing arrangement represented a significant portion of the licensee's day-to-day business operations. While one commenter suggests that a licensee can preserve its designated entity or entrepreneur eligibility simply by maintaining day-to-day control over a spectrum leasing business, we believe that, in order to satisfy the requirements of section 309(j) of the Act and avoid unjust enrichment obligations or transfer restrictions, the licensee cannot make spectrum leasing its primary business and must, as discussed above, continue to provide facilities-based network services under its licenses.

57. In examining whether a spectrum lessee would, under a spectrum manager lease, become a controlling interest or affiliate of the licensee, the licensee should look to all of the relevant circumstances, including how large a portion of its total capacity to provide spectrum-based services would be leased, what involvement it would have with the spectrum lessee as a result of the spectrum lease, and what relationship the two parties have with one another apart from the lease. Referring to an example provided by one commenter, we conclude that a spectrum manager lease between a designated entity or entrepreneur licensee and a non-designated entity/entrepreneur spectrum lessee with a prior business relationship where substantially all of the spectrum capacity of the licensee is to be leased

would cause the spectrum lessee to become an attributable affiliate of the licensee. Such affiliation would render the licensee ineligible for designated entity or entrepreneur benefits and, therefore, would make such a spectrum lease impermissible. On the other hand, a spectrum manager lease involving a small portion of the designated entity or entrepreneur licensee's spectrum capacity where no relationship existed between the licensee and spectrum lessee apart from the lease would likely be permissible. Situations falling somewhere between these two examples would have to be evaluated according to the individual circumstances involved.

58. While we direct licensees to continue to rely on our existing attribution rules to determine whether a proposed spectrum manager leasing arrangement would affect their continuing eligibility for designated entity or entrepreneur benefits, we recognize that certain of our affiliation criteria do not contemplate spectrum leasing and are therefore incompatible with spectrum manager leasing arrangements. For instance, under our attribution rules, affiliation generally arises where another entity shares office space, employees, or other facilities with a designated entity or entrepreneur licensee and, through these sharing arrangements, gains control or potential control of the licensee. In addition, under *Intermountain Microwave,* one indication of affiliation is the use by another entity of the licensee's facilities and equipment. However, because spectrum leasing arrangements, by their very nature, always involve the spectrum lessee's construction or use of facilities in the licensee's service area and/or operation of those facilities over the licensee's bandwidth, it would be unworkable to apply our facilities-related indicia of affiliation in the customary manner to spectrum leasing situations. We clarify, therefore, that a spectrum lessee's construction or use of facilities in the licensee's service area or over its bandwidth does not, by itself, transform the lessee into a controlling interest or affiliate of the licensee. On the other hand, joint use of office space, employees, or equipment or other facilities by the licensee and the spectrum lessee might indicate affiliation and would require an analysis of whether the spectrum lessee would, through such use, acquire control or potential control of the licensee.

59. Likewise, we clarify that the existence of spectrum manager leasing arrangement does not, by itself, create an ''identity of interest'' between the licensee and lessee resulting in an attributable affiliation under 47 CFR 1.2110(c)(5)(i)(D). However, every designated entity or entrepreneur licensee should take care to examine, and we will continue to review, whether there is an identity of interest between the licensee and its spectrum lessee beyond the mere existence of the spectrum lease that confers attributable affiliation under our rules. For example, members of the same family or entities with common investments should be considered affiliates and treated, for purposes of attribution, as one person or entity. Similarly, we clarify that a spectrum manager leasing arrangement does not, per se, constitute a management agreement or joint marketing arrangement resulting in the spectrum lessee's being considered a controlling interest of the licensee under 47 CFR 1.2110(c)(2)(ii)(H) through (c)(2)(ii)(I). We, nonetheless, caution designated entities and entrepreneurs that specific provisions in spectrum manager leasing arrangements, or other agreements with their spectrum lessees, might constitute management agreements or joint marketing arrangements. As our rules state, ''affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control or potential control, of the other concern.''

60. When entering into a spectrum manager leasing arrangement, the licensee must retain both *de jure* and *de facto* control over the leased spectrum pursuant to the updated *de facto* control standard. Consistent with this requirement, a designated entity or entrepreneur licensee cannot use this spectrum leasing vehicle to circumvent our attribution rules. The designated entity or entrepreneur must, if it wishes to undertake a spectrum manager lease, preserve its existing eligibility. As we have discussed, to do so, the designated entity or entrepreneur must evaluate and certify that nothing concerning its spectrum manager lease alters its ongoing eligibility for the benefits it has received. Leasing arrangements that would create a controlling interest or attributable affiliation that altered the designated entity or entrepreneur licensee's eligibility are prohibited. In lieu of using a spectrum manager leasing arrangement in such a situation, designated entities or entrepreneurs are free to undertake a *de facto* transfer lease, subject to the Commission's unjust enrichment requirements and any applicable transfer restrictions.

61. We will also amend the language of our rules to clarify that, subject to the other eligibility restrictions set forth in the *First Report and Order* and in 47 CFR 1.9020(d) of our rules, including those discussed above, a designated entity or entrepreneur licensee may enter into a spectrum manager leasing arrangement with any spectrum lessee, regardless of the lessee's eligibility for designated entity or entrepreneur benefits.

62. *Application of Controlling Interest Standard to Designated Entity and Entrepreneur Eligibility Determinations.* Insofar as we have determined to continue to rely upon our existing attribution rules (including our definitions of controlling interest and affiliation) as well as existing Commission precedent for all determinations of designated entity and entrepreneur eligibility, we decline to follow recommendations that we should instead rely on the new *de facto* control standard adopted for leasing for our eligibility determinations. As we have earlier explained, Congress specifically intended that, in order to prevent unjust enrichment, the licensee receiving designated entity benefits actually provide facilities-based services as authorized by its license.

4. Application of the *De facto* Control Standard for Spectrum Leasing With Regard to Other Issues and Types of Arrangements

63. In the *First Report and Order,* we limited the application of the revised *de facto* control standard to the context of spectrum leasing arrangements, while leaving in place the existing *de facto* control tests—including those based on *Intermountain Microwave* and other facilities-based analyses—for designated entity and entrepreneur eligibility issues, management agreements, and other similar types of agreements. We sought comment on whether and how the revised *de facto* control standard should be extended to apply in these and any other contexts.

64. Based on the record before us, we decline in this proceeding to extend the revised *de facto* transfer standard applicable to spectrum leasing arrangements to other types of arrangements outside the context of spectrum leasing. Although commenters supported applying the revised standard more broadly, there are significant legal and practical difficulties that commenters have failed to address. It is not clear from the sparse record how such a change would affect existing rules and policies relating to management agreements or other spectrum transactions, or what benefits would be achieved, and we are concerned that revising our rules in these areas may cause a host of

unintended consequences or ambiguities.

B. Policies To Facilitate Advanced Technologies

65. In the *FNPRM,* we emphasized the benefits of ''smart'' or ''opportunistic'' technologies, especially the potential for increased access to unused spectrum. In addition, the Commission's recently issued notice of proposed rulemaking in the Cognitive Radio proceeding, on the use of advanced technologies, ET Docket No. 03–108, 69 FR 7397 (February 17, 2004), describes how they may enable devices to search across many bands, sense the level of emissions, and then operate in spectrum that is either not in use by other parties or below a certain level of emissions. The *FNPRM* sought comment on the use of advanced technologies in licensed bands in the context of secondary markets and, in particular, requested comment on whether the Commission should focus on advancing and improving access to spectrum by opportunistic devices through a secondary markets approach, at least in the near term. The *FNPRM* also inquired as to whether the *First Report and Order* provided sufficient flexibility for more ''dynamic'' leasing arrangements made possible by opportunistic devices.

1. Facilitating Advanced Technologies Within Existing Regulatory Frameworks, Including Dynamic Spectrum Leasing Arrangements

66. We clarify that our spectrum leasing policies and rules permit parties to enter into a variety of dynamic forms of spectrum leasing arrangements that take advantage of the capabilities associated with advanced technologies. Such a clarification generally accords with comments we received. For example, one commenter specifically recommended that the Commission's secondary markets policies and rules be expanded to accommodate ''dynamic'' spectrum leasing arrangements, and other commenters also endorsed adoption of spectrum leasing policies in which licensees could take fuller advantage of technological advances, including opportunistic use devices, through secondary markets arrangements. Consistent with these views, we clarify that parties may enter into spectrum leasing arrangements in which licensees and spectrum lessees share use of the same spectrum, on a non-exclusive basis, during the term of the lease. For example, a licensee and spectrum lessee may enter into a spectrum manager or *de facto* transfer lease in which use of the same spectrum is shared with each other by employing opportunistic devices. In another variation, a licensee could enter into a spectrum manager lease with one party that has access to the spectrum on a priority basis, while also leasing use of the same spectrum to another party on a lower-priority basis, with the requirement that the lower-priority spectrum lessee employ opportunistic technology to avoid interfering with the priority lessee. Of course, the licensee may not lease spectrum usage rights that exceed the rights it currently holds and, as these examples illustrate, the licensee may choose to lease a more restricted bundle of usage rights.

67. Significantly, these arrangements could facilitate opportunistic use by parties operating at the same power level and under similar technical parameters as the licensee, or they could promote such use at lower power levels. We also emphasize that neither scenario would affect unlicensed operations to the extent they are permitted in that particular licensed band pursuant to Commission rules under part 15. For example, as set forth in § 15.209 of the Commission's rules and augmented on a band-by-band basis, part 15 users (*e.g.,* Ultra-Wide Band operators) can operate pursuant to applicable technical and operational rules whether or not opportunistic use or other advanced technologies are employed or authorized by the licensee. We would also expect that new and innovative radiofrequency devices would be agile enough to function on an unlicensed basis or as part of licensed operations.

2. Private Commons

68. 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).

69. 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. In these bands, users then can create their own networks—such as those that are *ad hoc* or ''mesh'' in nature—using equipment that complies with Commission-established requirements. The private commons option provides a potentially complementary access model, in which licensees (or spectrum lessees) would determine to make 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). 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.

70. 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), and retain both *de facto* control of the use of the spectrum within the private commons and direct responsibility for compliance with the Commission's rules. 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.

71. 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. 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.

72. 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.

73. 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 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. We examine this notification requirement, and the continued need for the notification, in the *Second FNPRM.* 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 *FNPRM,* 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.

C. License Assignments and Transfers of Control

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

74. In the *First 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 FNPRM, 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. 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.

75. 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 previously. This decision comports with the comments we received. 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. In such cases, we will not require prior public notice or additional individualized Commission review before the transaction is approved. 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. 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. 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.

76. *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.

77. *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

78. In the *First 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. In the *FNPRM,* we inquired whether we should expand these streamlined processing rules to include additional services.

79. We will apply the streamlined processing procedures adopted in the *First 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. Thus, under the policies we are adopting herein, 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 *First 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. 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

80. In the *FNPRM*, 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. 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. 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.

81. 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 *First 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.

82. 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. Our decision is consistent with most of the comments we received on this question. 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 *First Report and Order*, we will not gather or provide additional information at this time. We take no action at this time 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. 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.

IV. Order on Reconsideration

83. Five groups—rural carriers represented by the Blooston Law Firm (Blooston Rural Carriers), Cingular Wireless, First Avenue Networks, National Telecommunications Cooperative Association (NTCA), and Verizon Wireless—filed petitions for reconsideration seeking clarification or revision of a number of different issues addressed in the *First Report and Order*. Four parties filed responses to these petitions.

84. 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, while Verizon Wireless sought clarification of the licensee's ability to terminate a spectrum lease for non-compliance by the lessee. 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, 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. Blooston Rural Carriers also sought clarification of Commission policies regarding the licensee's responsibility for meeting application construction requirements when entering into spectrum leasing arrangements. 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. We address these issues and petitions below. 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, an issue we addressed in the *Second Report and Order*, above. Cingular Wireless sought clarification of the Commission's policies regarding spectrum leasing by designated entities and entrepreneurs, which we also have addressed in *Second Report and Order*. 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

85. *Background.* In the *First Report and Order,* we provided that licensees in spectrum manager leasing arrangements will be held directly accountable for lessee violations. 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. 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 that the licensee ''must use all legal means necessary to enforce the order,'' as codified in 47 CFR 1.9010(b)(1)(iii).

86. 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.'' 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.

87. *Discussion.* We affirm the *First 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. Spectrum lessees in this type of leasing arrangement are not held directly accountable, but instead are secondarily liable. 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.

88. In addition, consistent with the concerns raised by Blooston Rural Carriers, we modify 47 CFR 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 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

89. *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.''

90. 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. 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. 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. 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.

91. *Discussion.* We affirm the *First Report and Order* and deny the petitions

for reconsideration on this issue. We believe that the language in the *First 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.

92. In the *First 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 *First Report and Order,* spectrum lessees are primarily and directly responsible for ensuring such compliance, 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 Communications Act. 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.

93. 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. 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. 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

94. *Background.* In the *First Report and Order,* we required that the licensee always retain broad authority to terminate a lease if the spectrum lessee was violating Commission rules. Section 1.9040(a)(i) of our rules 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.''

95. In its petition, Verizon Wireless asserted that the wording of 47 CFR 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 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.

96. *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 47 CFR 1.9040(a)(1), 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 47 CFR 1.9040(a)(1) 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.

97. 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. 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 previously. 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.

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 Arangements

98. *Background.* Under the spectrum leasing policies we adopted in the *First 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). As we explained in the *First 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. 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.

99. 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, including notice and opportunity to be heard, prior to the Commission deciding to terminate a spectrum manager lease.

100. *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.

101. 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 qualify for immediate processing under the procedures discussed in the *Second Report and Order.* As noted above, leasing parties that seek to enter into spectrum manager leases pursuant to the policies established in the *First 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. 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. 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. 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. 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.

b. *De facto* Transfer Leasing Arrangements

102. *Background.* In the *First 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 Communications Act. 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.

103. *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).

104. 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-a-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

105. *Background.* In the *First 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.

106. 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. 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 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. 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. RTG, in reply to the latter two petitions, generally supported Blooston Rural Carriers' and NTCA's contentions.

107. *Discussion.* Because we conclude that the *First 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. Since spectrum lessees do not hold the authorization, they do not, as spectrum lessees, have the same rights as licensees. 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.

108. 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 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.

C. Licensee Responsibility for Meeting Construction Obligations

109. *Background.* The spectrum leasing rules adopted in the *First 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. 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. RTG supported this petition.

110. *Discussion.* We reaffirm the *First 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.

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

111. *Background.* The *First 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 47 CFR 24.239 through 24.253 of the Commission's rules, which govern the relocation of microwave incumbents from certain frequencies in the 1850–1990 MHz Broadband PCS band, 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.

112. 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. 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. 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, 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.

113. *Discussion.* We clarify that broadband PCS licensees are the ''PCS entities'' responsible, under §§ 24.239 through 24.253 of our rules, 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. 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. We recognize that a licensee may, by contract, account for a spectrum lessee's obligations to the licensee should the 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

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

115. *Term of a spectrum leasing arrangement.* Under the spectrum leasing policies established in the *First 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. 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.

116. *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 47 CFR 101.603(b) for private operational fixed services and 47 CFR 101.701 for common carriers. Nothing in our secondary markets rules established in the *First Report and Order* supplants the excess capacity leasing rules for part 101 services, and licensees may continue to lease excess capacity consistent with 47 CFR 101.603(b) and 101.701 of our rules.

117. *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, or require a licensee to load a channel to full capacity before it can request additional spectrum. An applicant must demonstrate a genuine need for the number of mobile units for which it seeks authorization, and the uses for which those channels can be obtained are governed by the rules governing the channel in question.

118. The spectrum leasing rules do not relax or otherwise modify the initial eligibility requirements for any Commission license. Indeed, we specifically stated in the *First 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. 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 *First Report and Order*.

119. *Definition of ''spectrum lessee.''* We revise the definition of ''spectrum lessee,'' as set forth in the under 47 CFR 1.9003 of our rules, 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.

120. *Section 1.9045(b).* We revise the language of 47 CFR 1.9045(b) of our rules 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 *First 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.

121. *Requirements relating to cellular cross-interests.* The *First Report and Order* applied the existing policies relating to cellular cross-interests to spectrum leasing arrangements. Because we have recently eliminated the cellular cross-interest rule in another proceeding, we also will eliminate reference in our spectrum leasing rules to these policies and their applicability to such arrangements.

122. *Spectrum leasing forms.* In the rules adopted to implement the *First Report and Order*, we required that spectrum leasing parties file spectrum manager lease notifications and *de facto* transfer lease applications using a modified FCC Form 603, 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.

V. Procedural Matters

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

A. Need for, and Objectives of, the Second Report and Order and Order on Reconsideration

124. In the *Second Report and Order* and the *Order on Reconsideration*, we build on the framework established in the *First Report and Order*, in which we adopted policies, rules, and procedures designed to facilitate the ability of many Wireless Radio Services licensees, including many small businesses, to lease spectrum usage rights and to transfer and assign licenses to third parties. In this *Second Report and Order*, we take additional steps to further reduce regulatory delay so that spectrum leasing parties in our Wireless Radio Services can implement certain classes of spectrum leasing arrangements and can transfer and assign licenses in a more timely fashion, in accordance with evolving marketplace demands and customer needs. In the *Order on Reconsideration*, we address a variety of issues addressed in the *First Report and Order*, including the respective responsibilities of licensees and spectrum lessees regarding particular service rules.

125. As with the underlying *First Report and Order*, these actions take us further down the path toward greater reliance on the marketplace, thus expanding the scope of available wireless services and devices and enabling more efficient and dynamic use of spectrum to the ultimate benefit of consumers throughout the country. The steps taken in the *Second Report and Order* and in the *Order on Reconsideration* to facilitate the development of secondary markets in wireless spectrum expand upon and complement several of the Commission's major policy initiatives and public interest objectives. These include our efforts to encourage the development of broadband services for all Americans, promote increased facilities-based competition among service providers, enhance economic opportunities and access for the provision of communications services by designated entities, and enable development of additional and innovative services in rural areas.

126. *Second Report and Order.* Consistent with the proposals set forth in the *FNPRM*, the *Second Report and Order* further streamlines our processing of certain classes of spectrum leasing transactions—both *de facto* transfer and spectrum manager leases—by adopting immediate processing procedures (*i.e.*, overnight processing through the Universal Licensing System (ULS)) for transactions that do not raise certain specified potential public interest concerns. Thus, leasing parties submitting qualifying spectrum leasing transactions will be able to proceed immediately with implementation of their spectrum leases, instead of having to wait 21 days (10 days if a short-term lease), as required under existing spectrum leasing rules for both *de facto* transfer and spectrum manager leases.

127. With respect to both long-term and short-term *de facto* transfer leasing, we adopt immediate approval procedures for certain categories of *de facto* transfer leasing arrangements that do not raise potential public interest concerns relating to eligibility and use, foreign ownership, designated entity/entrepreneur matters, or competition. For transactions that involve telecommunications carriers subject to the Commission's section 10 forbearance authority, the *Second Report and Order* forbears from the 21-day prior public notice requirements (10 days for short-term *de facto* transfer spectrum leasing). For transactions that do not involve telecommunications carriers (and thus are not subject to forbearance), we permit spectrum leases to proceed under the immediate approval procedures because their application establishes all of the requisite elements necessary for determining that approval is consistent with the public interest. The *Second Report and Order* also adopts similar immediate processing for qualifying spectrum manager lease notifications. Post-approval reconsideration procedures (for *de facto* transfer leases) and post-notification reconsideration procedures (for spectrum manager leases) apply, providing interested parties an opportunity to seek reconsideration, and similarly providing the Wireless Telecommunications Bureau (Bureau) 30 days, and the Commission 40 days, to reconsider whether the spectrum leasing is in the public interest. The Bureau (or Commission) also retains the right to take appropriate action for any false certifications that leasing parties make in their application or notification.

128. The *Second Report and Order* affirms and further clarifies the policy set forth in the *First Report and Order* that permits designated entity (DE) and entrepreneur licensees to enter into spectrum manager leases with any entity, but only provided that the lease does not cause the DE or entrepreneur licensee to lose its eligibility under the applicable Commission policies and rules. DE and entrepreneur licensees must therefore undertake the same kind of determination required when evaluating eligibility for auctions or license transfers prior to certifying that their spectrum leasing arrangement is in compliance with our rules. Because spectrum leasing arrangements entered into by DE and entrepreneur licensees are not subject to the immediate processing procedures, the Commission

will have the ability to review, on a case-by-case basis, any leasing certification that it believes gives rise to a question of the licensee's continued eligibility.

129. Also, the *Second Report and Order* extends spectrum leasing policies to three additional services. Specifically, it permits public safety licensees in the part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. In addition, it extends the spectrum leasing policies to the Multichannel Video Distribution and Data Service (MVDDS) and Automated Maritime Communications Systems (AMTS) Services in which licensees hold exclusive use rights. It does not, however, extend the spectrum leasing policies to other wireless radio services that involve sharing of the authorizations or to services in which the spectrum leasing policies might undermine policies related to the underlying authorization.

130. Furthermore, the *Second Report and Order* establishes the new regulatory concept of a ''private commons'' that would be available to individual users or groups of users that do not fit squarely within the current options for spectrum leasing or within traditional end-user models associated with subscriber-based services and network architectures. The private commons option is similar to ''public'' commons of the kind associated with the current uses and applications of unlicensed devices under part 15 rules, except that it would involve licensed spectrum in which the licensee (or spectrum lessee) would not necessarily offer services over its own end-to-end physical network of base stations, mobile stations, and other elements; as manager of the commons, the licensee (or lessee) sets the terms and conditions for users, notifies the Commission about the private commons prior to users' operations, and retains direct responsibility for users' compliance with the rules.

131. In addition, the *Second Report and Order* extends immediate approval procedures for certain classes of license assignments and transfers of control. The order adopts the same immediate approval procedures for license assignments and transfer of control transactions that would not raise specified public interest concerns (*i.e.*, those relating to eligibility and use, foreign ownership, designated entity, or competition), consistent with the policies adopted in the order for *de facto* transfer leases. The *Second Report and Order* also extends the applicable streamlined approval procedures—either the immediate approval or 21-day streamlined approval (or longer if additional review is necessary)—to all wireless radio services regulated by the Bureau, regardless of whether spectrum leasing is permitted.

132. Finally, in the *Second Report and Order* we conclude that the information already provided by spectrum leasing parties when they file applications or notifications relating to entering into spectrum leasing arrangements is sufficient for enabling secondary markets the development of efficient markets in spectrum usage rights. Accordingly, we determine that we will not, at this time, require the spectrum leasing parties to provide the Commission with any additional information than that already required under existing rules. We also decline, at this time, to take action to establish the Commission as either a market-maker or exchange.

133. *Order on Reconsideration.* In the Order on Reconsideration, we address five petitions for reconsideration that we received with regard to the *First Report and Order.* These petitions touched on a variety of issues, including the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules, protections for the licensee or spectrum lessee in the event a spectrum lease or a license is terminated, and the respective responsibilities of licensees and spectrum lessees regarding particular service rules. In the *Order on Reconsideration*, we provide additional clarification to our spectrum leasing policies and rules.

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

134. *Second Report and Order.* We received no comments in response to the previous IRFA. We note, however that several commenting parties that represent small entities or rural carriers expressed support for the Commission's efforts to provide additional streamlining of our processing of certain categories of spectrum leasing arrangements and license assignments and transfers of control.

135. For instance, the Rural Telecommunications Group (RTG) supported additional streamlining of Commission processing of certain classes of spectrum leasing arrangements and licensee transfer and assignments. It asserted that such a process would help stimulate secondary market transactions by substantially lowering the cost of such transactions and decreasing the time in which such transactions may be completed. Similarly, Blooston Rural Carriers supported the Commission's general proposal, set forth in the *FNPRM*, to remove unnecessary regulatory barriers to the development of secondary markets, and believed that the kinds of rules proposed, and ultimately adopted in the *Second Report and Order*, would further facilitate broader access to spectrum resources. In addition, Blooston Rural Carriers supported that Commission's decision to forbear from certain categories of spectrum leases and assignments, stating that such forbearance would beneficially affect a significant number of arrangements without undermining the Commission's public interest objectives.

136. In addition to these general observations, we inquired in the *FNPRM* whether the Commission should alter the *de facto* transfer leasing policies adopted in the *First Report and Order* and allow a designated entity or entrepreneur licensee to lease some or all of its spectrum usage rights to any entity, regardless of whether that entity would qualify for the same eligibility status as that of the licensee. In particular, we sought comment on how, if such a policy change were made, the Commission could ensure continued compliance with our statutory obligations to prevent unjust enrichment. We also sought comment on whether to use the new *de facto* control standard, rather than the existing controlling interest standard (including the criteria set forth in *Intermountain Microwave*, 12 FCC 2d 559 (1963)), when evaluating affiliation and eligibility for designated entity and entrepreneur benefits. We specifically asked whether this latter change would be consistent with the statutory objectives of section 309(j).

137. Some commenters, including AT&T Wireless, Cingular Wireless (which also is a petitioner), Council Tree, and Salmon PCS, suggested that the Commission should permit designated entity and entrepreneur licensees to enter into spectrum leasing arrangements with any entity, regardless of how that arrangement might affect the licensee's designated entity or entrepreneur eligibility. One of these commenters, Council Tree, further suggested that the Commission should eliminate unjust enrichment obligations and entrepreneur transfer restrictions for licensees owned and controlled by Alaska Native Corporations and Indian tribes. These commenters argued generally that designated entity and entrepreneur licensees should benefit from the same flexibility with regard to entering into spectrum leasing

arrangements as any other licensees. In addition, while two commenters acknowledged the importance of ensuring the spectrum leasing by designated entity and entrepreneur licensees did not undermine the Commission's designated entity or entrepreneur policies, Blooston Rural Carriers and RTG recommended that if such licensees enter into spectrum leasing arrangements that serve rural areas, they should not be subject to any unjust enrichment obligations or transfer restrictions. They generally contended that such a result would be consistent with the purpose of those policies to promote services in rural communities.

138. The Commission devoted significant consideration to the applicability of its designated entity qualification rules to potential spectrum lessees seeking access to spectrum licensed to designated entities, as well as the applicability of its unjust enrichment policies. Reaching a decision on these issues required a balancing of complex competing considerations. The Commission concluded, however, that its statutory obligations under section 309(j) of the Communications Act and its goals to promote opportunities for designated entities (which includes a significant number of small businesses) would be better served by affirming, but clarifying, its designated entity and unjust enrichment policies adopted in the *First Report and Order* in the context of spectrum leases involving both spectrum manager leasing arrangements and long-term *de facto* transfer leasing arrangements.

139. *Order on Reconsideration*. Five parties petitioned the Commission seeking revision or clarification of the *First Report and Order* on several particular issues pertaining to the spectrum leasing policies that were adopted. These included Cingular Wireless' and NTCA's petitions for clarification of the licensee's responsibility for ensuring that spectrum lessees comply with Commission policies and rules, Verizon Wireless' petition for Cingular Wireless' and Verizon Wireless' petitions for clarification of the licensee's ability to terminate a spectrum lease for non-compliance by the lessee, Blooston Rural Carriers' petition for clarification of Commission policies regarding the licensee's responsibility for meeting application construction requirements when entering into spectrum leasing arrangements, and Cingular Wireless's petition for clarification with respect to the licensee's responsibility for the cost-sharing obligations associated with relocation of incumbent microwave licensees in broadband PCS spectrum. Four parties, requested additional procedural protections for licensees and spectrum lessees. Specifically, Cingular Wireless and Verizon Wireless sought additional protections for licensees in the event the Commission sought to terminate a spectrum lease, while Blooston Rural Carriers, Cingular Wireless, and NTCA requested 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. In the *Order on Reconsideration*, the Commission generally affirmed, and further clarified, the spectrum leasing policies adopted in the *First Report and Order* with regard to these issues. None of these petitioners noted that revisions or clarifications should be made in order to better accommodate the needs of small businesses.

140. In addition, as noted above, Cingular Wireless petitioned the Commission, requesting that it permit designated entity and entrepreneur licensees to enter into spectrum leasing arrangements with any entity, regardless of how that arrangement might affect the licensee's designated entity or entrepreneur eligibility. Because this issue was addressed in the *Second Report and Order*, it will not be discussed again here.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

141. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

142. In the following paragraphs, we further describe and estimate the number of small entity licensees that may be affected by the rules we adopt in the *Second Report and Order*. Since this rulemaking proceeding applies to multiple services, we will analyze the number of small entities affected on a service-by-service basis. Because we have adopted streamlined processing procedures for all license assignment and transfer of control applications involving Wireless Radio Services authorizations regulated by the Bureau, we describe all of the services regulated by the Bureau.

143. As adopted, the *Second Report and Order* will further streamline the processing of certain spectrum leasing arrangements and license assignments and transfers of control, as well as create new opportunities and obligations for three additional Wireless Radio Services licensees to enter into spectrum leasing arrangements with third parties. When identifying small entities that could be affected by our new rules, we provide information describing auctions results, including the number of small entities that are winning bidders. We note, however, that the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily reflect the total number of small entities currently in a particular service. The Commission does not generally require that applicants provide business size information, except in the context of an assignment or transfer of control application where unjust enrichment issues are implicated.

144. *Cellular Licensees.* The SBA has developed a small business size standard for small businesses in the category ''Cellular and Other Wireless Telecommunications.'' Under that SBA category, a business is small if it has 1,500 or fewer employees. According to the Bureau of the Census, only twelve firms out of a total of 977 cellular and other wireless telecommunications firms that operated for the entire year in 1997 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers are small businesses under the SBA's definition.

145. *220 MHz Radio Service—Phase I Licensees.* The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a definition of small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, we apply the small business size standard under the SBA rules applicable to ''Cellular and Other Wireless Telecommunications'' companies. This category provides that a small business is a wireless company employing no

more than 1,500 persons. According to the Census Bureau data for 1997, only twelve firms out of a total of 977 such firms that operated for the entire year in 1997, had 1,000 or more employees. If this general ratio continues in the context of Phase I 220 MHz licensees, the Commission estimates that nearly all such licensees are small businesses under the SBA's small business standard.

146. *220 MHz Radio Service—Phase II Licensees.* The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service is subject to spectrum auctions. We adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years. The SBA has approved these small size standards. Auctions of Phase II licenses commenced on September 15, 1998, and closed on October 22, 1998. In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold. Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses. A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.

147. *Lower 700 MHz Band Licenses.* We adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. We have defined a small business as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Additionally, the lower 700 MHz Service has a third category of small business status that may be claimed for Metropolitan/Rural Service Area (MSA/RSA) licenses. The third category is entrepreneur, which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years. The SBA has approved these small size standards. An auction of 740 licenses (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)) commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business or entrepreneur status and won a total of 329 licenses. A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: 5 EAG licenses and 476 CMA licenses. Seventeen winning bidders claimed small or very small business status and won sixty licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.

148. *Upper 700 MHz Band Licenses.* The Commission released a *Report and Order*, authorizing service in the upper 700 MHz band. This auction, previously scheduled for January 13, 2003, has been postponed.

149. *Paging.* We adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An auction of Metropolitan Economic Area (MEA) licenses commenced on February 24, 2000, and closed on March 2, 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. An auction of Metropolitan Economic Area (MEA) and Economic Area (EA) licenses commenced on October 30, 2001, and closed on December 5, 2001. Of the 15,514 licenses auctioned, 5,323 were sold. 132 companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs commenced on May 13, 2003, and closed on May 28, 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. Currently, there are approximately 24,000 Private Paging site-specific licenses and 74,000 Common Carrier Paging licenses. According to one 2002 study, 608 private and common carriers reported that they were engaged in the provision of either paging or ''other mobile'' services. Of these, we estimate that 589 are small, under the SBA-approved small business size standard. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

150. *Broadband Personal Communications Service (PCS).* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 ''small'' and ''very small'' business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. On March 23, 1999, the Commission re-auctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

151. *Narrowband PCS.* The Commission held an auction for Narrowband PCS licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, ''small businesses'' were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard. A ''small business'' is an entity that, together with affiliates and controlling

interests, has average gross revenues for the three preceding years of not more than $40 million. A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

152. *Specialized Mobile Radio (SMR).* The Commission awards ''small entity'' bidding credits in auctions for Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands to firms that had revenues of no more than $15 million in each of the three previous calendar years. The Commission awards ''very small entity'' bidding credits to firms that had revenues of no more than $3 million in each of the three previous calendar years. The SBA has approved these small business size standards for the 900 MHz Service. The Commission has held auctions for geographic area licenses in the 800 MHz and 900 MHz bands. The 900 MHz SMR auction began on December 5, 1995, and closed on April 15, 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 geographic area licenses in the 900 MHz SMR band. The 800 MHz SMR auction for the upper 200 channels began on October 28, 1997, and was completed on December 8, 1997. Ten bidders claiming that they qualified as small businesses under the $15 million size standard won 38 geographic area licenses for the upper 200 channels in the 800 MHz SMR band. A second auction for the 800 MHz band was held on January 10, 2002 and closed on January 17, 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.

153. The auction of the 1,050 800 MHz SMR geographic area licenses for the General Category channels began on August 16, 2000, and was completed on September 1, 2000. Eleven bidders won 108 geographic area licenses for the General Category channels in the 800 MHz SMR band qualified as small businesses under the $15 million size standard. In an auction completed on December 5, 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were sold. Of the 22 winning bidders, 19 claimed ''small business'' status and won 129 licenses. Thus, combining all three auctions, 40 winning bidders for geographic licenses in the 800 MHz SMR band claimed status as small business. In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues of no more than $15 million. One firm has over $15 million in revenues. We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is established by the SBA.

154. *Private Land Mobile Radio (PLMR).* PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we could use the definition for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. Moreover, because PMLR licensees generally are not in the business of providing cellular or other wireless telecommunications services but instead use the licensed facilities in support of other business activities, we are not certain that the Cellular and Other Wireless Telecommunications category is appropriate for determining how many PLMR licensees are small entities for this analysis. Rather, it may be more appropriate to assess PLMR licensees under the standards applied to the particular industry sub-sector to which the licensee belongs.

155. *Fixed Microwave Services.* Fixed microwave services include common carrier, private-operational fixed, and broadcast auxiliary radio services. Currently, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not yet defined a small business with respect to microwave services. For purposes of this FRFA, we will use the SBA's definition applicable to ''Cellular and Other Wireless Telecommunications'' companies—that is, an entity with no more than 1,500 persons. The Commission does not have data specifying the number of these licensees that have more than 1,500 employees, and thus is unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer small common carrier fixed licensees and 61,670 or fewer small private operational-fixed licensees and small broadcast auxiliary radio licensees in the microwave services that may be affected by the rules and policies adopted herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

156. *Wireless Communications Services.* This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these definitions. The FCC auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity. An auction for one license in the 1670–1674 MHz band commenced on April 30, 2003 and closed the same day. One license was awarded. The winning bidder was not a small entity.

157. *39 GHz Service.* The Commission defines ''small entity'' for 39 GHz licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these definitions. The auction of the 2,173 39 GHz licenses began on April 12, 2000, and closed on May 8, 2000.

The 18 bidders who claimed small business status won 849 licenses.

158. *Local Multipoint Distribution Service.* An auction of the 986 Local Multipoint Distribution Service (LMDS) licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined ''small entity'' for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional classification for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These regulations defining ''small entity'' in the context of LMDS auctions have been approved by the SBA. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small business winning bidders that won 119 licenses.

159. *218–219 MHz Service.* The first auction of 218–219 MHz (previously referred to as the Interactive and Video Data Service or IVDS) spectrum resulted in 178 entities winning licenses for 594 Metropolitan Statistical Areas (MSAs). Of the 594 licenses, 567 were won by 167 entities qualifying as a small business. For that auction, we defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years. We defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years. A very small business is defined as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years. The SBA has approved of these definitions. At this time, we cannot estimate the number of licenses that will be won by entities qualifying as small or very small businesses under our rules in future auctions of 218–219 MHz spectrum. Given the success of small businesses in the previous auction, and the prevalence of small businesses in the subscription television services and message communications industries, we assume for purposes of this FRFA that in future auctions, many, and perhaps all, of the licenses may be awarded to small businesses.

160. *Location and Monitoring Service (LMS).* Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For purposes of auctioning LMS licenses, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million. A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million. These definitions have been approved by the SBA. An auction for LMS licenses commenced on February 23, 1999, and closed on March 5, 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses. We cannot accurately predict the number of remaining licenses that could be awarded to small entities in future LMS auctions.

161. *Rural Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies adopted herein.

162. *Air-Ground Radiotelephone Service.* We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and the Commission estimates that almost all of them qualify as small entities under the SBA definition.

163. *Offshore Radiotelephone Service.* This service operates on several ultra high frequency (UHF) TV broadcast channels that are not used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. We use the SBA definition applicable to cellular and other wireless telecommunication companies, *i.e.,* an entity employing no more than 1,500 persons. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by the SBA.

164. *Multiple Address Systems (MAS).* Entities using MAS spectrum, in general, fall into two categories: (1) those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. With respect to the first category, the Commission defines ''small entity'' for MAS licenses as an entity that has average gross revenues of less than $15 million in the three previous calendar years. ''Very small business'' is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three calendar years. The SBA has approved of these definitions. The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of January 20, 1999, there were a total of 8,670 MAS station authorizations. Of these, 260 authorizations were associated with common carrier service. In addition, an auction for 5,104 MAS licenses in 176 EAs began November 14, 2001, and closed on November 27, 2001. Seven winning bidders claimed status as small or very small businesses and won 611 licenses.

165. With respect to the second category, which consists of entities that use, or seek to use, MAS spectrum to accommodate their own internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the definitions developed by the SBA would be more appropriate. The applicable definition of small entity in this instance appears to be the ''Cellular and Other Wireless Telecommunications'' definition under the SBA rules. This definition provides that a small entity is any entity employing no more than 1,500 persons. The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

166. *Incumbent 24 GHz Licensees.* The rules that we adopt could affect incumbent licensees who were relocated

to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. The Commission did not develop a definition of small entities applicable to existing licensees in the 24 GHz band. Therefore, the applicable definition of small entity is the definition under the SBA rules for ''Cellular and Other Wireless Telecommunications.'' This definition provides that a small entity is any entity employing no more than 1,500 persons. We believe that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

167. *Future 24 GHz Licensees.* With respect to new applicants in the 24 GHz band, we have defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million. ''Very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years. The SBA has approved these definitions. The Commission will not know how many licensees will be a small or very small business until the auction, if required, is held.

168. *700 MHz Guard Band Licenses.* We adopted size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years. Additionally, a ''very small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. SBA approval of these definitions is not requires. An auction of 52 Major Economic Area (MEA) licenses commenced on September 6, 2000, closed on September 21, 2000. Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.

169. *Broadband Radio Service (formerly Multipoint Distribution Service) and Educational Broadband Service (formerly Instructional Television Fixed Service).* Multichannel Multipoint Distribution Service (MMDS) systems often referred to as ''wireless cable,'' transmit video programming to subscribers using the microwave frequencies of the Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS). In an order issued in July 2004 in WT Docket No. 03–66, the Commission comprehensively reviewed our policies and rules relating to the ITFS and MDS services, and replacing the Multipoint Distribution Service (MDS) with the Broadband Radio Service and Instructional Television Fixed Service (ITFS) with the Educational Broadband Service. In connection with the 1996 MDS auction, the Commission defined ''small business'' as an entity that, together with its affiliates, has average gross annual revenues that are not more than $40 million for the preceding three calendar years. The SBA has approved of this standard. The MDS auction resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 claimed status as a small business. At this time, we estimate that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than $40 million and are thus considered small entities.

170. In addition, the SBA has developed a small business size standard for Cable and Other Program Distribution, which includes all such companies generating $12.5 million or less in annual receipts. According to Census Bureau data for 1997, there were a total of 1,311 firms in this category, total, that had operated for the entire year. Of this total, 1,180 firms had annual receipts of under $10 million, and an additional 52 firms had receipts of $10 million or more but less than $25 million. Consequently, we estimate that the majority of providers in this service category are small businesses that may be affected by the rules and policies in the *Second Report and Order*.

171. Finally, while SBA approval for a Commission-defined small business size standard applicable to ITFS is pending, educational institutions are included in this analysis as small entities. There are currently 2,032 ITFS licensees, and all but 100 of these licenses are held by educational institutions. Thus, we tentatively conclude that at least 1,932 ITFS licensees are small businesses.

172. *Multichannel Video Distribution and Data Service.* MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. Licenses in this service were auctioned in January 2004, with 10 winning bidders for 192 licenses. Eight of these 10 winning bidders claimed small businesses status for 144 of these licenses.

173. *Aviation and Marine Services.* Small businesses in the aviation and marine radio services use a very high frequency (VHF) marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category ''Cellular and Other Telecommunications,'' which is 1,500 or fewer employees. Most applicants for recreational licenses are individuals. Approximately 581,000 ship station licensees and 131,000 aircraft station licensees operate domestically and are not subject to the radio carriage requirements of any statute or treaty. For purposes of our evaluations in this analysis, we estimate that there are up to approximately 712,000 licensees that are small businesses (or individuals) under the SBA standard. In addition, between December 3, 1998 and December 14, 1998, the Commission held an auction of 42 VHF Public Coast licenses in the 157.1875–157.4500 MHz (ship transmit) and 161.775–162.0125 MHz (coast transmit) bands. For purposes of the auction, the Commission defined a ''small'' business as an entity that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $15 million dollars. In addition, a ''very small'' business is one that, together with controlling interests and affiliates, has average gross revenues for the preceding three years not to exceed $3 million dollars. There are approximately 10,672 licensees in the Marine Coast Service, and the Commission estimates that almost all of them qualify as ''small'' businesses under the above special small business size standards.

174. *Public Safety Radio Services.* Public Safety radio services include police, fire, local government, forestry

conservation, highway maintenance, and emergency medical services. There are a total of approximately 127,540 licensees in these services. Governmental entities as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.

D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

175. The projected reporting, recordkeeping, and other compliance requirements resulting from the *Second Report and Order and the Order on Reconsideration* will apply to all entities in the same manner, consistent with the approach we adopted in the *First Report and Order.* We believe that applying the same rules equally to all entities helps to promote fairness in the spectrum leasing process, as well in the license assignment and transfer of control process, and we do not believe that the costs and/or administrative burdens associated with the rules, as revised for certain classes of spectrum leasing and license transfer and assignment transactions will disproportionately or unduly burden small entities. The revisions we adopt today should benefit small entities by giving them more information, more flexibility, and more options for gaining access to valuable wireless spectrum.

176. *Immediate processing procedures for qualifying transactions.* One of our goals is to further streamline Commission processing of certain spectrum leasing arrangements and of license assignment and transfer of control applications in order to minimize administrative delays, reduce transaction costs, encourage more efficient use of spectrum, and otherwise facilitate the movement of spectrum toward new and higher valued uses. Additional streamlining, including adoption of immediate processing procedures for certain categories of these transactions that do not raise specified potential public interest concerns, 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.

177. Under the rules adopted in the *Second Report and Order,* parties seeking to benefit from the Commission's immediate processing procedures for spectrum leasing arrangements and for license transfers and assignments must submit filings with the Commission using our Universal Licensing System (ULS), just as such filings were required under the procedures adopted in the underlying *First Report and Order.* In order to qualify for such immediate processing under these new procedures, we require parties to make certain additional certifications. Otherwise, the reporting requirements are not substantially different that those already required when parties seek to enter into spectrum leasing arrangements, as already established under the underlying *First Report and Order.* If parties qualify, they benefit by having their arrangements processed immediately, and thus have less delay in gaining access to the spectrum by implementing the transactions.

178. *Extending spectrum leasing policies to additional spectrum-based services.* We extend the spectrum leasing policies to permit public safety licensees in the part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. We also extend the spectrum leasing policies to two other services in which licensees hold exclusive use rights, the Multichannel Video Distribution and Data Services (MVDDS) and the Automated Maritime Communications Systems (AMTS) Services. The reporting requirements for these services are no different from the reporting requirements already required for all other services to which our spectrum leasing policies apply.

179. *Adoption of the ''private commons'' option.* In the *Second Report and Order,* we adopt the private commons option under which licensees and spectrum lessees may make licensed spectrum available to individuals or groups of users employing certain advanced wireless technologies in a manner similar to that by which unlicensed users gain access to spectrum, and to do so without the need for entering into individual spectrum leasing arrangements. While we do require that licensees or spectrum lessees that establish a private commons to notify the Commission, we do not require the same amount of information as required for spectrum leasing arrangements.

180. *Immediate approval procedures for certain categories of license assignment and transfer of control applications.* We adopt streamlined application processes for license assignments and transfers of control involving Wireless Radio similar to those we have adopted for *de facto* transfer spectrum leasing arrangements. As with *de facto* transfer leasing arrangements, in order to qualify for such immediate processing under these new procedures, we require parties to make certain additional certifications. Otherwise, the reporting requirements are not substantially different that those already required when parties seek to enter into spectrum leasing arrangements.

181. *Extending the streamlined processing policies relating to license assignments and transfers of control to additional wireless services.* We also determine to apply the streamlined processing procedures adopted in the *First Report and Order* for license assignments and transfer of control applications, as well as the immediate approval processing for qualifying transactions as adopted in this Second Report and Order, to all of the Wireless Radio Services authorizations regulated by the Bureau. Thus, while new services now may benefit from more streamlined processing of license transfer and assignment applications, the reporting requirements do not differ from those already required for licensees and assignees/transferees under the policies established in the *First Report and Order.*

182. *Order on Reconsideration.* In the Order on Reconsideration, we generally affirm the spectrum leasing policies and rules established in the underlying *First Report and Order,* and do not impose any additional reporting requirements on licensees and spectrum lessees.

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

183. The RFA requires an agency to describe any significant alternatives that it considered in reaching its final decision, which may include the following four alternatives, (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.''

184. *Immediate processing of certain categories de facto transfer leasing arrangements.* Consistent with the broad support by commenters, we generally adopt the forbearance proposal set forth in the *FNPRM* with a few modifications. We do not anticipate any adverse impact on small entities as a result of our decision to adopt immediate processing of certain categories of spectrum leasing arrangements, both *de*

facto transfer leases and spectrum manager leases.

185. In particular, we permit all *de facto* transfer leases involving telecommunications services that are subject to the Commission's forbearance authority to proceed pursuant to the application and immediate grant procedures set forth in the *Second Report and Order.* In particular, we require that, in the spectrum leasing application submitted to the Commission, the spectrum lessee must make certain additional certifications (*e.g.*, those in which the spectrum leasing arrangement involves license authorizations that permit interconnected mobile voice and/or data services) in order to qualify for immediate approval processing (in lieu of the general 21-day processing procedures under the rules adopted in the *First Report and Order*). Consistent with the general proposal set forth in the *FNPRM,* we will no longer require prior public notice and individualized Commission review of these leases that meet the requirements specified above. Specifically, if the spectrum leasing parties file their *de facto* transfer lease application in the Universal Licensing System (ULS), and the application established the requisite elements explained above, and are otherwise complete, the Bureau will process the application and provide immediate approval through ULS processing, reflected on the next business day after filing the application. We believe that forbearing from pubic notice and additional Commission review of the qualifying *de facto* transfer spectrum leasing arrangements that do not raise potential public interest concerns, is consistent with the public interest and will benefit all entities, including small entities, by allowing them gain immediate access to spectrum to implement their business plans with reduced regulatory delay and transaction costs.

186. We also permit *de facto* transfer leases that involve spectrum leasing arrangements not subject to forbearance to proceed under the same application/immediate approval policies as adopted above for *de facto* transfer leases subject to forbearance, so long as the leasing parties can establish that the arrangements are consistent with the public interest because they establish the same specified qualifications. As above, permitting entities that seek to enter into these leasing arrangements that qualify for immediate approval serves to benefit all such entities, including small entities.

187. In addition, we revise our rules for processing short-term *de facto* transfer leases so that they may be approved pursuant to the immediate approval procedures. Because such short-term *de facto* transfer leasing arrangements, under the policies applicable to them, would qualify for immediate approval processing because they do not potential public interest concerns that merit prior public notice or additional review, we no longer will require such applications to be processed pursuant to our Special Temporary Authority (STA) 10-day review procedures. These immediate processing procedures benefit all entities entering into short-term *de facto* transfer leases, including small entities.

188. *Immediate processing of certain categories of spectrum manager leasing arrangements.* We also revise our policies for spectrum manager lease notifications to be consistent with the policies for *de facto* transfer leases as described previously. Accordingly, where parties seek to enter into spectrum manager leases that do not raise specified potential public interest concerns (*e.g.*, potential competition concerns), we will permit them to commence operations under those leasing arrangements once they have notified the Commission of the lease, and have made the necessary certifications to qualify for immediate processing. If the spectrum manager lease satisfies the qualifying elements, we do not believe it necessary to review these notifications in advance of operations. The immediate processing procedures adopted for these qualifying spectrum manager leases will benefit all entities that qualify, including small entities, and will facilitate more rapid and efficient use of wireless radio spectrum.

189. *Extending spectrum leasing policies to additional spectrum-based services.* We extend the spectrum leasing policies to permit public safety licensees in the part 90 Radio Safety Pool to lease spectrum to other public safety entities and to entities that provide communications in support of public safety operations. We also extend the spectrum leasing policies to two other services in which licensees hold exclusive use rights, the Multichannel Video Distribution and Data Services (MVDDS) and the Automated Maritime Communications Systems (AMTS) Services. For these public safety licensees, we facilitate more efficient and effective use of public safety communications, foster interoperability, and further our various homeland security initiatives. For MVDDS and AMTS, we permit the same benefits of spectrum leasing to be extended to these services as well. Extension of our spectrum leasing policies in these services will benefit all entities in these services, both small and large.

190. *Clarification of the spectrum leasing policies applicable to designated entity and entrepreneur licensees.* We affirm and clarify the rules established in the *First Report and Order* for spectrum leasing by designated entity and entrepreneur licensees. On so doing, we decline requests that we choose an alternative providing such licensees with the right to lease spectrum to any entity, without regard to our eligibility rules for designated entities and entrepreneurs. Although a few commenters suggest that we adopt the alternative policy, we believe that adopting such a change would contravene the requirements and objectives of section 309(j) of the Act. Under section 309(j), Congress sought to promote diversity among service providers, as well as the rapid deployment of new technologies for the benefit of, among others, rural customers. If we allow designated entities and entrepreneurs to enter into spectrum manager leasing arrangements without considering whether the spectrum lessee acquires an interest in the licensee, we run the risk that entities that do not qualify for such incentives in the primary market will be unjustly enriched.

191. We also reject recommendations that we allow licensees to maintain their designated entity and/or entrepreneur eligibility without the imposition of unjust enrichment payment obligations and transfer restrictions in situations where the spectrum lessee will use the lease to serve rural areas. The Commission is not required to ensure both the rapid deployment of service to telecommunications service to rural areas and the participation of rural telephone companies. Section 309(j) only requires that the Commission seek to promote the objective that service be developed and rapidly deployed to rural customers and only ensure that rural telephone companies are given the opportunity to participate. The Commission has provided small businesses with bidding credits and entrepreneurs with license set-asides in order for them to have the opportunity to participate in the provision of spectrum based services. The Commission has determined that telephone companies providing service in rural areas do not have *per se* the same difficulty accessing capital as other groups and allowing unrestricted ability to lease to non-eligible entities planning to serve rural areas would be allowing the larger entities to benefit indirectly from small businesses.

192. *Clarification that ''dynamic'' spectrum leasing arrangements are permitted.* We clarify that our spectrum leasing policies and rules permit spectrum leasing parties to enter into a variety of dynamic forms of spectrum leasing arrangements that take advantage of the capabilities associated with advanced technologies. Thus, spectrum leasing parties may enter into spectrum leasing arrangements in which licensees and spectrum lessees share use of the same spectrum, on a non-exclusive basis, during the term of the spectrum lease. For example, a licensee and spectrum lessee may enter into a spectrum manager or *de facto* transfer lease in which use of the same spectrum is shared with each other by employing opportunistic devices. In another variation, a licensee could enter into a spectrum manager lease with one party that has access to the spectrum on a priority basis, while also leasing use of the same spectrum to another party on a lower-priority basis, with the requirement that the lower-priority spectrum lessee employ opportunistic technology to avoid interfering with the priority lessee. Both small and large entities will benefit from these dynamic leasing arrangements.

193. *Adoption of the ''private commons'' option.* We adopt the private commons option in the *Second Report and Order* to facilitate the use of advanced technologies and thus better promote access to and the efficient use of spectrum. The private commons option will allow licensees or spectrum lessees to make spectrum available to individual users or groups of users that may not fit squarely within the current options for spectrum leasing or within the traditional models associated with subscriber-based services and network architectures. The private commons would be similar to ''public'' commons of the kind associated with the current uses and applications of unlicensed devices under part 15 rules, except that is would involve licensed spectrum in which the licensee (or lessee) would not necessarily offer services over its own end-to-end physical network of base stations, mobile stations, and other elements. As manager of the commons, the licensee (or lessee) would set terms and conditions for users, retain direct responsibility for users' compliance with the rules, and notify the Commission about the private commons prior to users' operations. The private commons option will help small (and large) entities by allowing for more flexible uses of licensed spectrum to incorporate new means of implementing advanced technologies and provides an important complement to the spectrum leasing policies we have already adopted to facilitate spectrum access.

194. *Immediate approval procedures for certain categories of license assignment and transfer of control applications.* We adopt streamlined application processes for license assignments and transfers of control involving Wireless Radio similar to those we have adopted for *de facto* transfer spectrum leasing arrangements. This policy will help all entities, including small entities, by reducing transaction costs, minimizing administrative delay, and encouraging more efficient use of spectrum.

195. *Extending the streamlined processing policies relating to license assignments and transfers of control to additional wireless services.* We will apply the streamlined processing procedures adopted in the *First Report and Order* for license assignments and transfer of control applications, as well as the immediate approval processing for qualifying transactions as adopted in this Second Report and Order, to all of the Wireless Radio Services authorizations regulated by the Bureau. This decision enables all license transfers and assignments involving these Wireless Radio Services, not just those Wireless Radio Services for which spectrum leasing is permitted, to benefit from streamlined processing or immediate processing, whichever is applicable. This ensures that an addition set of Wireless Radio Services licensees, both small entities and large ones, may now take advantage of these procedures that minimize administrative delays and reduce transaction costs.

196. *Clarification of spectrum leasing policies and rules in the Order on Reconsideration.* The *Order on Reconsideration* addresses petitions that seek clarification on a variety of issues, including: (1) the licensee's responsibility to ensure its spectrum lessee's compliance with Commission policies and rules; (2) protections for the licensee or spectrum lessee in the event of a spectrum lease or a license is terminated; and (3) the respective responsibilities of licensees and spectrum lessees regarding particular service rules. As a general matter, the Order on Reconsideration affirms and further clarifies the policies adopted in the underlying *First Report and Order.* We do not anticipate any adverse impact on small entities as a result of this action. Our approach here should benefit small entities by reducing regulatory uncertainty and further enhancing the development of a more robust secondary markets and access to spectrum.

F. Report to Congress

197. The Commission will send a copy of the *Second Report and Order* and the *Order on Reconsideration,* including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Second Report and Order* and the *Order on Reconsideration,* including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *Second Report and Order,* the *Order on Reconsideration,* and the FRFA (or summaries thereof) will also be published in the **Federal Register**.

198. In addition, the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, *shall send* a copy of this *Second Report and Order* and the *Order on Reconsideration,* including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

VI. Ordering Clauses

199. Pursuant to sections 1, 4(i), 8, 9, 10, 301, 303(r), 308, 309, 310, 332, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 158, 161, 301, 303(r), 308, 309, 310, 332, and 503, 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 CFR parts 1, 24, and 90, are *amended,* as specified in the discussion of ''Rule Changes'' below, to revise rules and procedures to further facilitate spectrum leasing arrangements under the policies enunciated in the *Second Report and Order* and *Order on Reconsideration,* to establish rules and procedures applicable to private commons arrangements established in the *Second Report and Order,* and to further streamline the processing of license assignment and transfer of control applications under the policies enunciated in the *Second Report and Order,* effective February 25, 2005, except for §§ 1.913(a)(5), 1.948(j)(2), 1.2003, 1.9003, 1.9020(e)(2), 1.9030(e)(2), 1.9035(e), and 1.9080, which contain information collection requirements that have not been approved by the Office of Management and Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

200. Pursuant to the authority of 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 revised forms necessary to implement the policies adopted in this *Second Report and Order.*

201. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 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.

202. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 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.

203. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 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.

204. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 155(b), 155(c)(1), and 303(r), NTCA's Petition for Partial Reconsideration is *denied.*

205. Pursuant to the authority of sections 4(i), 5(b), 5(c)(1), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 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.

206. The Commission's Consumer Information Bureau, Reference Information Center, *shall send* a copy of the *Second Report and Order* and *Order on Reconsideration,* including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects

47 CFR Part 1

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

47 CFR Part 24

Personal communications services, Radio.

47 CFR Part 90

Business and industry, Common carriers, Radio, Reporting and recordkeeping requirements.

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Rule Changes

■ For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 24, and 90, 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 paragraphs (a)(3), (b) introductory text, and (d)(1) introductory text, and by adding paragraph (a)(5), 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.

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(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).

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(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. For each Wireless Radio Service that is subject to mandatory electronic filing, this paragraph is effective on July 1, 1999, or six months after the Commission begins use of ULS to process applications in the service, whichever is later. The Commission will announce by public notice the deployment date of each service in ULS.

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(d) * * *

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

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

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

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(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.

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) *Immediate approval procedures.* Applications that meet the requirements of paragraph (j)(2)(i) of this section qualify for the immediate approval procedures.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (j)(1) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if assigned or transferred, create a geographic overlap with spectrum in any licensed Wireless Radio Service (including the same service) in which the proposed assignee or transferee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the assignee or transferee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The assignment or transfer of control does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules, and there is no pending issue as to whether the license is subject to revocation, cancellation, or termination by the Commission.

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the assignment or transfer of control will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after the filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data in the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after the grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

■ 4. Amend § 1.2003 by revising the paragraph entitled ''FCC 603'' and by adding a paragraph entitled ''FCC 608,'' in numerical order, to read as follows:

§ 1.2003 Applications affected.

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FCC 603 Wireless Telecommunications Bureau Application for Assignment of Authorization and Transfer of Control;

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FCC 608 Notification or Application for Spectrum Leasing Arrangement;

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■ 5. Amend § 1.9001 by revising paragraph (a) to read as follows:

§ 1.9001 Purpose and scope.

(a) The purpose of part 1, subpart X is to implement policies and rules pertaining to spectrum leasing arrangements between licensees in the services identified in this subpart and spectrum lessees. This subpart also implements policies for private commons arrangements. These policies and rules also implicate other Commission rule parts, including parts 1, 2, 20, 22, 24, 26, 27, 80, 90, 95, and 101 of title 47, chapter I of the Code of Federal Regulations.

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■ 6. Amend § 1.9003 by removing the definition of ''FCC Form 603,'' revising the definitions of ''Long-term *de facto* transfer leasing arrangement,'' ''Short-term *de facto* transfer leasing arrangement,'' and ''Spectrum lessee,'' and by adding the new definition ''Private commons,'' in alphabetical order, to read as follows:

§ 1.9003 Definitions.

* * * * *

FCC Form 608. FCC Form 608 is the form to be used by licensees and spectrum lessees that enter into spectrum leasing arrangements pursuant to the rules set forth in this subpart. Parties are required to submit this form electronically when entering into spectrum leasing arrangements under this subpart, except that licensees falling within the provisions of § 1.913(d), may file the form either electronically or manually.

Long-term de facto transfer leasing arrangement. A long-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual term, or series of combined terms, of more than one year.

Private commons. A ''private commons'' arrangement is an arrangement, distinct from a spectrum leasing arrangement but permitted in the same services for which spectrum leasing arrangements are allowed, in which a licensee or spectrum lessee makes certain spectrum usage rights under a particular license authorization available to a class of third-party users employing advanced communications technologies that involve peer-to-peer (device-to-device) communications and that do not involve use of the licensee's or spectrum lessee's end-to-end physical network infrastructure (*e.g.*, base stations, mobile stations, or other related elements).

Short-term de facto transfer leasing arrangement. A short-term *de facto* transfer leasing arrangement is a *de facto* transfer leasing arrangement that has an individual or combined term of not longer than one year.

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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.

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■ 7. Section 1.9005 is revised to read as follows:

§ 1.9005 Included services.

The spectrum leasing policies and rules of this subpart apply to the following services in the Wireless Radio Services in which commercial or private licensees hold exclusive use rights:

(a) The Paging and Radiotelephone Service (part 22 of this chapter);

(b) The Rural Radiotelephone Service (part 22 of this chapter);

(c) The Air-Ground Radiotelephone Service (part 22 of this chapter);

(d) The Cellular Radiotelephone Service (part 22 of this chapter);

(e) The Offshore Radiotelephone Service (part 22 of this chapter);

(f) The narrowband Personal Communications Service (part 24 of this chapter);

(g) The broadband Personal Communications Service (part 24 of this chapter);

(h) The Broadband Radio Service (part 27 of this chapter);

(i) The Educational Broadband Service (part 27 of this chapter);

(j) The Wireless Communications Service in the 698–746 MHz band (part 27 of this chapter);

(k) The Wireless Communications Service in the 746–764 MHz and 776–794 MHz bands (part 27 of this chapter);

(l) The Wireless Communications Service in the 1390–1392 MHz band (part 27 of this chapter);

(m) The Wireless Communications Service in the paired 1392–1395 MHz and 1432–1435 MHz bands (part 27 of this chapter);

(n) The Wireless Communications Service in the 1670–1675 MHz band (part 27 of this chapter);

(o) The Wireless Communications Service in the 2305–2320 and 2345–2360 MHz bands (part 27 of this chapter);

(p) The Wireless Communications Service in the 2385–2390 MHz band (part 27 of this chapter);

(q) The Advanced Wireless Services (part 27 of this chapter);

(r) The VHF Public Coast Station service (part 80 of this chapter);

(s) The Automated Maritime Telecommunications Systems service (part 80 of this chapter);

(t) The Public Safety Radio Services (part 90 of this chapter);

(u) The 220 MHz Service (excluding public safety licensees) (part 90 of this chapter);

(v) The Specialized Mobile Radio Service in the 800 MHz and 900 MHz bands (including exclusive use SMR licenses in the General Category channels) (part 90 of this chapter);

(w) The Location and Monitoring Service (LMS) with regard to licenses for multilateration LMS systems (part 90 of this chapter);

(x) Paging operations under part 90 of this chapter;

(y) The Business and Industrial/Land Transportation (B/ILT) channels (part 90 of this chapter) (including all B/ILT channels above 512 MHz and those in the 470–512 MHz band where a licensee has achieved exclusivity, but excluding B/ILT channels in the 470–512 MHz band where a licensee has not achieved exclusivity and those channels below 470 MHz, including those licensed pursuant to 47 CFR 90.187(b)(2)(v));

(z) The 218–219 MHz band (part 95 of this chapter);

(aa) The Local Multipoint Distribution Service (part 101 of this chapter);

(bb) The 24 GHz Band (part 101 of this chapter);

(cc) The 39 GHz Band (part 101 of this chapter);

(dd) The Multiple Address Systems band (part 101 of this chapter);

(ee) The Local Television Transmission Service (part 101 of this chapter);

(ff) The Private-Operational Fixed Point-to-Point Microwave Service (part 101 of this chapter);

(gg) The Common Carrier Fixed Point-to-Point Microwave Service (part 101 of this chapter); and,

(hh) The Multipoint Video Distribution and Data Service (part 101 of this chapter).

■ 8. Amend § 1.9010 by revising the last sentence of paragraph (b)(1)(iii), and by revising paragraph (b)(2)(i), to read as follows:

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

* * * * *

(b) * * *

(1) * * *

(iii) * * * If the spectrum lessee refuses to resolve the interference, remedy the violation, or suspend or terminate operations, either at the direction of the licensee or by order of the Commission, the licensee must use all reasonable legal means necessary to enforce compliance.

(2) * * *

(i) The licensee must file the necessary notification with the Commission, as required under § 1.9020(e).

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■ 9. Section 1.9020 is amended by revising paragraphs (a) and (d) through (l), and by adding paragraph (m) to read as follows:

§ 1.9020 Spectrum manager leasing arrangements.

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a spectrum manager leasing arrangement, without the need for prior Commission approval, provided that the licensee retains *de jure* control of the license and *de facto* control, as defined and explained in this subpart, of the leased spectrum. The licensee must notify the Commission of the spectrum leasing arrangement pursuant to the rules set forth in this section. The term of a spectrum manager leasing arrangement may be no longer than the term of the license authorization.

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(d) *Applicability of particular service rules and policies.* Under a spectrum manager leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization, with the following exceptions. A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Educational Broadband Service (*see* § 27.1201 of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee meets the other eligibility and qualification requirements applicable to part 27 services (*see* § 27.12 of this chapter). A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Public Safety Radio Services (*see* part 90, subpart B

and § 90.311(a)(1)(i) of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee is an entity providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (*see* sections 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to the denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of subpart P of this part).

(v) The licensee may reasonably rely on the spectrum lessee's certifications that it meets the requisite eligibility and qualification requirements contained in the notification required by this section.

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a spectrum manager leasing arrangement with a spectrum lessee, regardless of whether the spectrum lessee meets the Commission's designated entity eligibility requirements (*see* § 1.2110) or its entrepreneur eligibility requirements to hold certain C and F block licenses in the broadband personal communications services (*see* § 1.2110 and § 24.709 of this chapter), so long as the spectrum manager leasing arrangement does not result in the spectrum lessee's becoming a ''controlling interest'' or ''affiliate'' (*see § 1.2110) of the licensee such that the licensee would* lose its eligibility as a designated entity or entrepreneur. To the extent there is any conflict between the revised *de facto* control standard for spectrum leasing arrangements, as set forth in this subpart, and the definition of controlling interest (including its *de facto* control standard) set forth in § 1.2110, the latter definition governs for determining whether the licensee has maintained the requisite degree of ownership and control to allow it to remain eligible for the license or for other benefits such as bidding credits and installment payments.

(5) *Construction/performance requirements.* Any performance or build-out requirement applicable under a license authorization (*e.g.,* a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable performance or build-out requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a Private Mobile Radio Service (PMRS), private, or non-commercial basis.

(7) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152). Where, however, regulatory fees are paid annually on a per-unit basis (such as for Commercial Mobile Radio Services (CMRS) pursuant to § 1.1152), the licensee and spectrum lessee are each required to pay fees for those units associated with its respective operations.

(8) *E911 requirements.* If E911 obligations apply to the licensee (*see* § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum.

(e) *Notifications regarding spectrum manager leasing arrangements.* A licensee that seeks to enter into a spectrum manager leasing arrangement must notify the Commission of the arrangement in advance of the spectrum lessee's commencement of operations. The spectrum manager lease notification will be processed pursuant either to the general notification procedures or the immediate processing procedures, as set forth herein. The licensee must submit the notification to the Commission by electronic filing using the Universal Licensing System (ULS) and FCC Form 608, except that a licensee falling within the provisions of § 1.913(d) may file the notification either electronically or manually.

(1) *General notification procedures.* Notifications of spectrum manager leasing arrangements will be processed pursuant the general notification procedures set forth in this paragraph unless they are submitted and qualify for the immediate processing procedures set forth in paragraph (e)(2) of this section.

(i) To be accepted under these general notification procedures, the notification must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those of the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules in this chapter and any rules pertaining to the specific service for which the notification is filed. No application fees are required for the filing of a spectrum manager leasing notification.

(ii) The licensee must submit such notification at least 21 days in advance of commencing operations unless the arrangement is for a term of one year or less, in which case the licensee must provide notification to the Commission at least ten (10) days in advance of operation. If the licensee and spectrum lessee thereafter seek to extend this leasing arrangement for an additional term beyond the initial term, the licensee must provide the Commission with notification of the new spectrum leasing arrangement at least 21 days in advance of operation under the extended term.

(iii) A notification filed pursuant to these general notification procedures will be placed on an informational public notice on a weekly basis (*see* § 1.933(a)) once accepted, and is subject

to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(2) *Immediate processing procedures.* Notifications that meet the requirements of paragraph (e)(2)(i) of this section qualify for the immediate processing procedures.

(i) To qualify for these immediate processing procedures, the notification must be sufficiently complete and contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership) required for notifications processed under the general notification procedures set forth in paragraph (e)(1)(i) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if the spectrum leasing arrangement were consummated, create a geographic overlap with spectrum in any licensed Wireless Service (including the same service) in which the proposed spectrum lessee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the spectrum lessee to provide interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The spectrum leasing arrangement does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules.

(ii) Provided that the notification establishes that the proposed spectrum manager leasing arrangement meets all of the requisite elements to qualify for these immediate processing procedures, ULS will reflect that the notification has been accepted. If a qualifying notification is filed electronically, the acceptance will be reflected in ULS on the next business day after filing of the notification; if filed manually, the acceptance will be reflected in ULS on the next business day after the necessary data from the manually filed notification is entered into ULS. Once the notification has been accepted, as reflected in ULS, the spectrum lessee may commence operations under the spectrum leasing arrangement, consistent with the term of the arrangement.

(iii) A notification filed pursuant to these immediate processing procedures will be placed on an informational public notice on a weekly basis (*see* § 1.933(a)) once accepted, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date of a spectrum manager leasing arrangement.* The spectrum manager leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, as of the beginning date of the term as specified in the spectrum leasing notification.

(g) *Commission termination of a spectrum manager leasing arrangement.* The Commission retains the right to investigate and terminate any spectrum manager leasing arrangement if it determines, post-notification, that the arrangement constitutes an unauthorized transfer of *de facto* control of the leased spectrum, is otherwise in violation of the rules in this chapter, or raises foreign ownership, competitive, or other public interest concerns. Information concerning any such termination will be placed on public notice.

(h) *Expiration, extension, or termination of a spectrum leasing arrangement.* (1) Absent Commission termination or except as provided in paragraph (h)(2) or (h)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the spectrum leasing notification.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing notification provided that the licensee notifies the Commission of the extension in advance of operation under the extended term and does so pursuant to the general notification procedures or immediate processing procedures set forth in this section, whichever is applicable. If the general notification procedures are applicable, the licensee must notify the Commission at least 21 days in advance of operation under the extended term.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(i) *Assignment of a spectrum leasing arrangement.* The spectrum lessee may assign its spectrum leasing arrangement to another entity provided that the licensee has agreed to such an assignment, is in privity with the assignee, and notifies the Commission before the consummation of the assignment, pursuant to the applicable notification procedures set forth in this section. In the case of a non-substantial (*pro forma*) assignment that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the licensee must file notification of the assignment with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the assignment, whether substantial or *pro forma,* on public notice.

(j) *Transfer of control of a spectrum lessee.* The licensee must notify the Commission of any transfer of control of a spectrum lessee before the consummation of the transfer of control, pursuant to the applicable notification procedures of this section. In the case of a non-substantial (*pro forma*) transfer of control that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the licensee must file notification of the transfer of control with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the transfer of control, whether substantial or *pro forma,* on public notice.

(k) *Revocation or automatic cancellation of a license or a spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have any authority to operate under the license, except as provided in paragraph (j)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931) to provide the spectrum

lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(l) *Subleasing.* A spectrum lessee may sublease the leased spectrum usage rights subject to the licensee's consent and the licensee's establishment of privity with the spectrum sublessee. The licensee must submit a notification regarding the spectrum subleasing arrangement in accordance with the applicable notification procedures set forth in this section.

(m) *Renewal.* Although the term of a spectrum manager leasing arrangement may not be longer than the term of a license authorization, a licensee and spectrum lessee that have entered into an arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, renew the spectrum leasing arrangement to extend into the term of the renewed license authorization. The Commission must be notified of the renewal of the spectrum leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the renewal of the license authorization and the extension of the spectrum leasing arrangement into the term of the renewed license authorization.

■ 10. Section 1.9030 is amended by revising paragraphs (a) and (d) through (k), and by adding paragraph (l) to read as follows:

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

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a long-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A ''long-term'' *de facto* transfer leasing arrangement has an individual term, or series of combined terms, of more than one year. The term of a long-term *de facto* transfer leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(d) *Applicability of particular service rules and policies.* Under a long-term *de facto* transfer leasing arrangement, the service rules and policies apply in the following manner to the licensee and spectrum lessee:

(1) *Interference-related rules.* The interference and radiofrequency (RF) safety rules applicable to use of the spectrum by the licensee as a condition of its license authorization also apply to the use of the spectrum leased by the spectrum lessee.

(2) *General eligibility rules.* (i) The spectrum lessee must meet the same eligibility and qualification requirements that are applicable to the licensee under its license authorization. A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Educational Broadband Service (*see* § 27.1201 of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee meets the other eligibility and qualification requirements applicable to part 27 services (*see* § 27.12 of this chapter). A spectrum lessee entering into a spectrum leasing arrangement involving a licensee in the Public Safety Radio Services (*see* part 90, subpart B and § 90.311(a)(1)(i) of this chapter) is not required to comply with the eligibility requirements pertaining to such a licensee so long as the spectrum lessee is an entity providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

(ii) The spectrum lessee must meet applicable foreign ownership eligibility requirements (see sections 310(a), 310(b) of the Communications Act).

(iii) The spectrum lessee must satisfy any qualification requirements, including character qualifications, applicable to the licensee under its license authorization.

(iv) The spectrum lessee must not be a person subject to denial of Federal benefits under the Anti-Drug Abuse Act of 1988 (*see* § 1.2001 *et seq.* of subpart P of this part).

(3) *Use restrictions.* To the extent that the licensee is restricted from using the licensed spectrum to offer particular services under its license authorization, the use restrictions apply to the spectrum lessee as well.

(4) *Designated entity/entrepreneur rules.* (i) A licensee that holds a license pursuant to small business and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) and continues to be subject to unjust enrichment requirements (*see* § 1.2111 and § 24.714 of this chapter) and/or transfer restrictions (*see* § 24.839 of this chapter) may enter into a long-term *de facto* transfer leasing arrangement with any entity under the streamlined processing procedures described in this section, subject to any applicable unjust enrichment payment obligations and/or transfer restrictions (*see* § 1.2111 and § 24.839 of this chapter).

(ii) A licensee holding a license won in closed bidding (*see* § 24.709 of this chapter) may, during the first five years of the license term, enter into a spectrum leasing arrangement with an entity not eligible to hold such a license pursuant to the requirements of § 24.709(a) of this chapter so long as it has met its five-year construction requirement (*see* §§ 24.203, 24.839(a)(6) of this chapter).

(iii) The amount of any unjust enrichment payment will be determined by the Commission as part of its review of the application under the same rules that apply in the context of a license assignment or transfer of control (*see* § 1.2111 and § 24.714 of this chapter). If the spectrum leasing arrangement involves only part of the license area and/or part of the bandwidth covered by the license, the unjust enrichment obligation will be apportioned as though the license were being partitioned and/or disaggregated (*see* § 1.2111(e) and § 24.714(c) of this chapter). A licensee will receive no reduction in its unjust enrichment payment obligation for a spectrum leasing arrangement that ends prior to the end of the fifth year of the license term.

(iv) A licensee that participates in the Commission's installment payment program (*see* § 1.2110(g) may enter into a long-term *de facto* transfer leasing arrangement without triggering unjust enrichment obligations provided that the lessee would qualify for as favorable a category of installment payments. A licensee using installment payment financing that seeks to lease to an entity not meeting the eligibility standards for as favorable a category of installment payments must make full payment of the remaining unpaid principal and any unpaid interest accrued through the effective date of the spectrum leasing arrangement (*see* § 1.2111(c)). This requirement applies regardless of whether the licensee is leasing all or a portion of its bandwidth and/or license area.

(5) *Construction/performance requirements.* Any performance or

build-out requirement applicable under a license authorization (*e.g.*, a requirement that the licensee construct and operate one or more specific facilities, cover a certain percentage of geographic area, cover a certain percentage of population, or provide substantial service) always remains a condition of the license, and the legal responsibility for meeting such obligation is not delegable to the spectrum lessee(s).

(i) The licensee may attribute to itself the build-out or performance activities of its spectrum lessee(s) for purposes of complying with any applicable build-out or performance requirement.

(ii) If a licensee relies on the activities of a spectrum lessee to meet the licensee's performance or build-out obligation, and the spectrum lessee fails to engage in those activities, the Commission will enforce the applicable performance or build-out requirements against the licensee, consistent with the applicable rules.

(iii) If there are rules applicable to the license concerning the discontinuance of operation, the licensee is accountable for any such discontinuance and the rules will be enforced against the licensee regardless of whether the licensee was relying on the activities of a lessee to meet particular performance requirements.

(6) *Regulatory classification.* If the regulatory status of the licensee (*e.g.*, common carrier or non-common carrier status) is prescribed by rule, the regulatory status of the spectrum lessee is prescribed in the same manner, except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis.

(7) *Regulatory fees.* The licensee remains responsible for payment of the required regulatory fees that must be paid in advance of its license term (*see* § 1.1152). Where, however, regulatory fees are paid annually on a per-unit basis (such as for CMRS services pursuant to § 1.1152), the licensee and spectrum lessee each are required to pay fees for those units associated with its respective operations.

(8) *E911 requirements.* To the extent the licensee is required to meet E911 obligations (*see* § 20.18 of this chapter), the spectrum lessee is required to meet those obligations with respect to the spectrum leased under the spectrum leasing arrangement insofar as the spectrum lessee's operations are encompassed within the E911 obligations.

(e) *Applications for long-term de facto transfer leasing arrangements.* Applications for long-term *de facto* transfer leasing arrangements will be processed either pursuant to the general approval procedures or the immediate approval procedures, as discussed herein. Spectrum leasing parties must submit the application by electronic filing using ULS and FCC Form 608, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.913(d) may file the application either electronically or manually.

(1) *General approval procedures.* Applications for long-term *de facto* transfer leasing arrangements 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 (e)(2) of this section.

(i) To be accepted for filing under these general approval procedures, the application must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those of the spectrum lessee relating to eligibility, basic qualifications, and foreign ownership) required by the rules in this chapter and any rules pertaining to the specific service for which the application is filed. In addition, the spectrum leasing application must include payment of the required application fee(s); for purposes of determining the applicable application fee(s), the application will be treated as a transfer of control (*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 and any required application fee has been paid (*see* § 1.1102).

(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, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(viii) If any petition to deny is filed, and the Bureau grants the application, the Bureau will deny the petition(s) and issue a concise statement of the reason(s) for denial, disposing of all substantive issues raised in the petition(s).

(2) *Immediate approval procedures.* Applications that meet the requirements of paragraph (e)(2)(i) of this section qualify for the immediate approval procedures.

(i) To qualify for the immediate approval procedures, the application must be sufficiently complete, contain all necessary information and certifications (including those relating to eligibility, basic qualifications, and foreign ownership), and include payment of the requisite application fee(s), as required for an application processed under the general approval procedures set forth in paragraph (e)(1)(i) of this section, and also must establish, through certifications, that the following additional qualifications are met:

(A) The license does not involve spectrum licensed in a Wireless Radio Service that may be used to provide interconnected mobile voice and/or data services under the applicable service rules and that would, if the spectrum leasing arrangement were consummated, create a geographic overlap with spectrum in any licensed Wireless Service (including the same service) in which the proposed spectrum lessee already holds a direct or indirect interest of 10% or more (*see* § 1.2112), either as a licensee or a spectrum lessee, and that could be used by the spectrum lessee to provide

interconnected mobile voice and/or data services;

(B) The licensee is not a designated entity or entrepreneur subject to unjust enrichment requirements and/or transfer restrictions under applicable Commission rules (*see* §§ 1.2110 and 1.2111, and §§ 24.709, 24.714, and 24.839 of this chapter); and,

(C) The spectrum leasing arrangement does not require a waiver of, or declaratory ruling pertaining to, any applicable Commission rules.

(ii) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the *de facto* transfer spectrum leasing arrangement will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data from the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application, as reflected in ULS.

(iii) Grant of consent to the application under these immediate approval procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date* of a *de facto transfer leasing arrangement.* If the Commission consents to the *de facto* transfer leasing arrangement, the *de facto* transfer leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(g) *Expiration, extension, or termination of spectrum leasing arrangement.* (1) Except as provided in paragraph (g)(2) or (g)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the application. The Commission's consent to the *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) A spectrum leasing arrangement may be extended beyond the initial term set forth in the spectrum leasing application pursuant to the applicable application procedures set forth in § 1.9030(e). Where there is pending before the Commission at the date of termination of the spectrum leasing arrangement a proper and timely application seeking to extend the arrangement, the parties may continue to operate under the original spectrum leasing arrangement without further action by the Commission until such time as the Commission shall make a final determination with respect to the application.

(3) If a spectrum leasing arrangement is terminated earlier than the termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(4) The Commission will place information concerning an extension or an early termination of a spectrum leasing arrangement on public notice.

(h) *Assignment of spectrum leasing arrangement.* The spectrum lessee may assign its lease to another entity provided that the licensee has agreed to such an assignment, there is privity between the licensee and the assignee, and the assignment is approved by the Commission pursuant to the same application and approval procedures set forth in this section. In the case of a non-substantial (*pro forma*) assignment that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the parties involved in the assignment must file notification of the assignment with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the assignment, whether substantial or *pro forma*, on public notice.

(i) *Transfer of control of a spectrum lessee.* A spectrum lessee seeking the transfer of control must obtain Commission consent using the same application and Commission consent procedures set forth in this section. In the case of a non-substantial (*pro forma*) transfer of control that falls within the class of *pro forma* transactions for which prior Commission approval would not be required under § 1.948(c)(1), the parties involved in the transfer of control must file notification of the transfer of control with the Commission, using FCC Form 608 and providing any necessary updates of ownership information, within 30 days of its completion. The Commission will place information related to the transfer of control, whether substantial or *pro forma,* on public notice.

(j) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* (1) In the event an authorization held by a licensee that has entered into a spectrum leasing arrangement is revoked or cancelled, the spectrum lessee will be required to terminate its operations no later than the date on which the licensee ceases to have authority to operate under the license, except as provided in paragraph (i)(2) of this section.

(2) In the event of a license revocation or cancellation, the Commission will consider a request by the spectrum lessee for special temporary authority (*see* § 1.931) to provide the spectrum lessee with an opportunity to transition its users in order to minimize service disruption to business and other activities.

(3) In the event of a license revocation or cancellation, and the required termination of the spectrum lessee's operations, the former spectrum lessee does not, as a result of its former status, receive any preference over any other party should the spectrum lessee seek to obtain the revoked or cancelled license.

(k) *Subleasing.* A spectrum lessee may sublease spectrum usage rights subject to the following conditions. Parties entering into a spectrum subleasing arrangement are required to comply with the Commission's rules for obtaining approval for spectrum leasing arrangements provided in this subpart and are governed by those same policies. The application filed by parties to a spectrum subleasing arrangement must include written consent from the licensee to the proposed arrangement. Once a spectrum subleasing arrangement has been approved by the Commission, the sublessee becomes the party primarily responsible for compliance with Commission rules and policies.

(l) *Renewal.* Although the term of a long-term *de facto* transfer spectrum leasing arrangement may not be longer than the term of a license authorization, a licensee and spectrum lessee that have entered into an arrangement whose term continues to the end of the current term of the license authorization may, contingent on the Commission's grant of the license renewal, extend the spectrum leasing arrangement into the term of the renewed license authorization. The Commission must be notified of the renewal of the spectrum

leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949). The spectrum lessee may operate under the extended term, without further action by the Commission, until such time as the Commission shall make a final determination with respect to the renewal of the license authorization and the extension of the spectrum leasing arrangement into the term of the renewed license authorization.

■ 11. Section 1.9035 is amended by revising paragraphs (a) and (d) through (m), and by adding paragraph (n) to read as follows:

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

(a) *Overview.* Under the provisions of this section, a licensee (in any of the included services) and a spectrum lessee may enter into a short-term *de facto* transfer leasing arrangement in which the licensee retains *de jure* control of the license while *de facto* control of the leased spectrum is transferred to the spectrum lessee for the duration of the spectrum leasing arrangement, subject to prior Commission consent pursuant to the application procedures set forth in this section. A ''short-term'' *de facto* transfer leasing arrangement has an individual or combined term of not longer than one year. The term of a short-term *de facto* transfer leasing arrangement may be no longer than the term of the license authorization.

* * * * *

(d) *Applicability of particular service rules and policies.* Under a short-term *de facto* leasing arrangement, the service rules and policies apply to the licensee and spectrum lessee in the same manner as under long-term *de facto* transfer leasing arrangements (*see* § 1.9030(d)), except as provided herein:

(1) *Use restrictions and regulatory classification.* Use restrictions applicable to the licensee also apply to the spectrum lessee except that § 20.9(a) of this chapter shall not preclude a licensee in the services covered by that rule from entering into a spectrum leasing arrangement with a spectrum lessee that chooses to operate on a PMRS, private, or non-commercial basis, and except that a licensee with an authorization that restricts use of spectrum to non-commercial uses may enter into a short-term *de facto* transfer leasing arrangement that allows the spectrum lessee to use the spectrum commercially.

(2) *Designated entity/entrepreneur rules.* Unjust enrichment provisions (*see* § 1.2111) and transfer restrictions (*see* § 24.839 of this chapter) do not apply with regard to a short-term *de facto* transfer leasing arrangement.

(3) *Construction/performance requirements.* The licensee is not permitted to attribute to itself the activities of its spectrum lessee when seeking to establish that performance or build-out requirements applicable to the licensee have been met.

(4) *E911 requirements.* If E911 obligations apply to the licensee (see § 20.18 of this chapter), the licensee retains the obligations with respect to leased spectrum. A spectrum lessee entering into a short-term *de facto* transfer leasing arrangement is not separately required to comply with any such obligations in relation to the leased spectrum.

(e) *Spectrum leasing application.* Short-term *de facto* transfer leasing arrangements will be processed pursuant to immediate approval procedures, as discussed herein. Parties entering into a short-term *de facto* transfer leasing arrangement are required to file an electronic application with the Commission, using FCC Form 608, and obtain Commission consent prior to consummating the transfer of *de facto* control of the leased spectrum, except that parties falling within the provisions of § 1.913(d) may file the application either electronically or manually.

(1) To be accepted for filing under these immediate approval procedures, the application must be sufficiently complete and contain all information and certifications requested on the applicable form, FCC Form 608, including any information and certifications (including those relating to the spectrum lessee 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 required. In addition, the application must include payment of the required application fee; for purposes of determining the applicable application fee, the application will be treated as a transfer of control (*see* § 1.1102). Finally, the spectrum leasing arrangement must not require a waiver of, or declaratory ruling, pertaining to any applicable Commission rules.

(2) Provided that the application establishes that it meets all of the requisite elements to qualify for these immediate approval procedures, consent to the short-term *de facto* transfer spectrum leasing arrangement will be reflected in ULS. If the application is filed electronically, consent will be reflected in ULS on the next business day after filing of the application; if filed manually, consent will be reflected in ULS on the next business day after the necessary data from the manually filed application is entered into ULS. Consent to the application is not deemed granted until the Bureau affirmatively acts upon the application, as reflected in ULS.

(3) Grant of consent to the application under these procedures will be reflected in a public notice (*see* § 1.933(a)) promptly issued after grant, and is subject to reconsideration (*see* §§ 1.106(f), 1.108, 1.113).

(f) *Effective date of spectrum leasing arrangement.* The spectrum leasing arrangement will be deemed effective in the Commission's records, and for purposes of the application of the rules set forth in this section, on the date set forth in the application. If the Commission consents to the arrangement after that specified date, the spectrum leasing application will become effective on the date of the Commission affirmative consent.

(g) *Restrictions on the use of short-term de facto transfer leasing arrangements.* (1) The licensee and spectrum lessee are not permitted to use the special rules and expedited procedures applicable to short-term *de facto* transfer leasing arrangements for arrangements that in fact will exceed one year, or that the parties reasonably expect to exceed one year.

(2) The licensee and spectrum lessee must submit, in sufficient time prior to the expiration of the short-term *de facto* transfer spectrum leasing arrangement, the appropriate application under the rules and procedures applicable to long-term *de facto* leasing arrangements, and obtain Commission consent pursuant to those procedures.

(h) *Expiration, extension, or termination of the spectrum leasing arrangement.* (1) Except as provided in paragraph (h)(2) or (h)(3) of this section, a spectrum leasing arrangement entered into pursuant to this section will expire on the termination date set forth in the short-term *de facto* transfer leasing arrangement. The Commission's approval of the short-term *de facto* transfer leasing application includes consent to return the leased spectrum to the licensee at the end of the term of the spectrum leasing arrangement.

(2) Upon proper application (*see* paragraph (e) of this section), a short-term *de facto* transfer leasing arrangement may be extended beyond the initial term set forth in the application provided that the initial term and extension(s) together would not result in a leasing arrangement that exceeds a total of one year.

(3) If a spectrum leasing arrangement is terminated earlier than the

termination date set forth in the notification, either by the licensee or by the parties' mutual agreement, the licensee must file a notification with the Commission, no later than ten (10) days after the early termination, indicating the date of the termination. If the parties fail to put the spectrum leasing arrangement into effect, they must so notify the Commission consistent with the provisions of this section.

(i) *Conversion of a short-term spectrum leasing arrangement into a long-term de facto transfer leasing arrangement.* (1) In the event the licensee and spectrum lessee involved in a short-term *de facto* transfer leasing arrangement seek to extend the spectrum leasing arrangement beyond the one-year limit for short-term *de facto* transfer leasing arrangements, the parties may do so provided that they meet the conditions set forth in paragraphs (i)(2) and (i)(3) of this section.

(2) If a licensee that holds a license that continues to be subject to transfer restrictions and/or requirements relating to unjust enrichment pursuant to the Commission's small business and/or entrepreneur provisions (*see* § 1.2110 and § 24.709 of this chapter) seeks to extend a short-term *de facto* transfer leasing arrangement with its spectrum lessee (or related entities, as determined pursuant to § 1.2110(b)(2)) beyond one year, it may convert its arrangement into a long-term *de facto* transfer spectrum leasing arrangement provided that it complies with the procedures for entering into a long-term *de facto* transfer leasing arrangement and that it pays any unjust enrichment that would have been owed had the licensee filed a long-term *de facto* transfer spectrum leasing application at the time it applied for the initial short-term *de facto* transfer leasing arrangement.

(3) The licensee and spectrum lessee are not permitted to convert a short-term *de facto* transfer leasing arrangement into a long-term *de facto* transfer leasing arrangement if the parties would have been restricted, in the first instance, from entering into a long-term *de facto* transfer leasing arrangement because of a transfer, use, or other restriction applicable to the particular service (*see* § 1.9030).

(j) *Assignment of spectrum leasing arrangement.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(g)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(k) *Transfer of control of spectrum lessee.* The rule applicable to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(h)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(l) *Revocation or automatic cancellation of a license or the spectrum lessee's operating authority.* The rule applicable to long-term *de facto* transfer leasing arrangements (see § 1.9030(i)) applies in the same manner to short-term *de facto* transfer leasing arrangements.

(m) *Subleasing.* A spectrum lessee that has entered into a short-term *de facto* transfer leasing arrangement is not permitted to enter into a spectrum subleasing arrangement.

(n) *Renewal.* The rule applicable with regard to long-term *de facto* transfer leasing arrangements (*see* § 1.9030(l)) applies in the same manner to short-term *de facto* transfer leasing arrangements, except that the renewal of the short-term *de facto* transfer leasing arrangement to extend into the term of the renewed license authorization cannot enable the combined terms of the short-term *de facto* transfer leasing arrangements to exceed one year. The Commission must be notified of the renewal of the spectrum leasing arrangement at the same time that the licensee submits its application for license renewal (*see* § 1.949).

■ 12. Amend § 1.9045 by revising paragraph (b) to read as follows:

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

* * * * *

(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.

■ 13. Add § 1.9048 to read as follows:

§ 1.9048 Special provisions relating to spectrum leasing arrangements involving licensees in the Public Safety Radio Services.

Licensees in the Public Safety Radio Services (*see* part 90, subpart B and § 90.311(a)(1)(i) of this chapter) may enter into spectrum leasing arrangements with other public safety entities eligible for such a license authorization as well as with entities providing communications in support of public safety operations (*see* § 90.523(b) of this chapter).

■ 14. Add § 1.9080 to read as follows:

§ 1.9080 Private commons.

(a) *Overview.* A ''private commons'' arrangement is an arrangement, distinct from a spectrum leasing arrangement but permitted in the same services for which spectrum leasing arrangements are allowed, in which a licensee or spectrum lessee makes certain spectrum usage rights under a particular license authorization available to a class of third-party users employing advanced communications technologies that involve peer-to-peer (device-to-device) communications and that do not involve use of the licensee's or spectrum lessee's end-to-end physical network infrastructure (*e.g.*, base stations, mobile stations, or other related elements). In a private commons arrangement, the licensee or spectrum lessee authorizes users of certain communications devices employing particular technical parameters, as specified by the licensee or spectrum lessee, to operate under the license authorization. A private commons arrangement differs from a spectrum leasing arrangement in that, unlike spectrum leasing arrangements, a private commons arrangement does not involve individually negotiated spectrum access rights with entities that seek to provide network-based services to end-users. A private commons arrangement does not affect unlicensed operations in a particular licensed band to the extent that they are permitted pursuant to part 15.

(b) *Licensee/spectrum lessee responsibilities.* As the manager of any private commons, the licensee or spectrum lessee:

(1) Establishes the technical and operating terms and conditions of use by users of the private commons, including those relating to the types of communications devices that may be used within the private commons, consistent with the terms and conditions of the underlying license authorization;

(2) Retains *de facto* control of the use of spectrum by users within the private commons, including maintaining reasonable oversight over the users' use of the spectrum in the private commons so as to ensure that the use of the spectrum, and communications equipment employed, comply with all applicable technical and service rules (including requirements relating to radiofrequency radiation) and maintaining the ability to ensure such compliance; and,

(3) Retains direct responsibility for ensuring that the users of the private

commons, and the equipment employed, comply with all applicable technical and service rules, including requirements relating to radiofrequency radiation and requirements relating to interference.

(c) *Notification requirements.* Prior to permitting users to commence operations within a private commons, the licensee or spectrum lessee must notify the Commission, using FCC Form 608, that it is establishing a private commons arrangement. This notification must include information that describes: the location(s) or coverage area(s) of the private commons under the license authorization; the term of the arrangement; the general terms and conditions for users that would be gaining spectrum access to the private commons; the technical requirements and equipment that the licensee or spectrum lessee has approved for use within the private commons; and, the types of communications uses that are to be allowed within the private commons.

PART 24—PERSONAL COMMUNICATIONS SERVICES

■ 15. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

■ 16. Amend § 24.239 by adding the following sentence at the end of the paragraph, to read as follows:

§ 24.239 Cost-sharing requirements for broadband PCS.

* * * If a licensee in the Broadband PCS Service enters into a spectrum leasing arrangement (as set forth in part 1, subpart X of this chapter) and the spectrum lessee triggers a cost-sharing obligation, the licensee is the PCS entity responsible for satisfying the cost-sharing obligations under §§ 24.239 through 24.253.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 17. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), and 332(c)(7).

■ 18. Amend § 90.20 by adding a new paragraph (h) to read as follows:

§ 90.20 Public safety pool.

(h) *Spectrum leasing arrangements.* Notwithstanding any other provisions of this section to the contrary, licensees in the Public Safety Radio Services (*see* part 90, subpart B) may enter into spectrum leasing arrangements (*see* part 1, subpart X of this chapter) with entities providing communications in support of public safety operations.

[FR Doc. 04–27817 Filed 12–23–04; 8:45 am]

BILLING CODE 6712–01–P