

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

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

91. *Management agreements.* The Commission has long permitted the use of management agreements and other agency arrangements by its licensees as a means to manage their authorized services and facilities. The issue of whether a licensee has retained *de facto* control vis-à-vis a manager in turn has long been premised on the *Intermountain Microwave* decision and our related *Motorola* decision. This assessment of management agreements is inherently a case-by-case determination as well as strongly tied to the control of facilities and operations implemented pursuant to a Commission authorization. Should we adopt the new *de facto* control standard for management agreements as well? Is there anything in the new standard that would forbid elements of management agreements previously entered into in reliance on the *Intermountain Microwave* and *Motorola* standards?

Could extending a revised *de facto* control standard to management agreements allow parties to enter into a purported management agreement—which would not be subject to the notification and other obligations applicable to spectrum leasing—when in fact the arrangement should be considered under spectrum leasing policies? Would this allow parties to undercut our efforts to obtain adequate information for enforcement purposes as well as facilitating the efficient functioning of secondary markets?

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

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

93. The Commission's designated entity and entrepreneur policies were adopted to further statutory requirements and to promote participation in the provision of spectrum-based services by certain designated entities. These policies were created in 1994 as one component of the Commission's implementation of the competitive bidding policies and procedures mandated by sections 309(j)(3) and 309(j)(4) of the Act. Historically, the Commission's designated entity policies have sought to ensure that small businesses were given the opportunity to participate in the provision of spectrum-based services.

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

95. From the outset, the Commission has also been determined to ensure, pursuant to section 309(j)(4)(E), that the designated entity and entrepreneur policies would not be abused. As the Commission has explained, these

policies are designed, among other reasons, to “deter speculation and participation in the licensing process by those who do not intend to offer service to the public, or who intend to use our preferences to obtain a license at a lower cost than they otherwise would have to pay and later sell it at the market price.” The Commission has also indicated that the unjust enrichment rules were designed to recapture for the government a portion of the value of the bidding credit or other special provision if a designated entity prematurely transfers its licenses to an ineligible entity. The Commission's unjust enrichment provisions have been codified in section 1.2111 of the Commission's rules.

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

IV. Procedural Matters

A. Initial Regulatory Flexibility Analysis Regarding the Further NPRM

97. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), see 5 U.S.C. 603, the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *Further NPRM*. Written public comments are requested on this IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Further NPRM*, and they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Commission will send a copy of the *Further NPRM*, including this IRFA, to the Chief Counsel for Advocacy of the Small