

including information establishing the spectrum lessee's eligibility to lease the spectrum pursuant to the rules applicable to this type of leasing arrangement. In addition, the licensee is responsible for making all required filings (e.g., applications, notifications, and correspondence) associated with the license authorization that are directly affected by the lessee's use of the licensed spectrum. Licensees may use agents (such as counsel and engineering consultants) to complete these electronic filings, just as they do now under current policies.

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

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

precise terms and provisions of their contract, consistent with, and except as otherwise reflected in, the mandates, requirements, and other obligations set out in this *Report and Order*. We note, however, that to the extent that parties' leasing arrangements entered into pursuant to this revised *de facto* control standard do not in fact embody the principles set forth above, the Commission may determine that the lease constitutes an unauthorized transfer of control and pursue appropriate enforcement action.

#### c. Consistency of the New *De Facto* Control Standard for Spectrum Leasing With Section 310(d) Requirements

21. Neither the specific language of Section 310(d) nor the general statutory framework of the Communications Act requires that the Commission apply a facilities-based *de facto* control analysis when interpreting section 310(d) requirements. Rather, the specific factors employed in that type of analysis were derived from the Commission's determination, at that time, that there were a particular set of powers and responsibilities that the licensee should not relinquish in holding a license in order that the Commission conclude that the licensee had not "transferred, assigned or disposed of in any manner" a "construction permit or station license, or any rights thereunder."

22. Section 310(d)'s purpose generally is to ensure that a licensee that the Commission has already passed upon as qualified in a particular service retains both *de jure* and *de facto* control over the licensed spectrum pursuant to the Act and applicable policies and rules, remains directly accountable to the Commission for ensuring that the licensed spectrum is used in compliance with applicable policies and rules, and prevents ultimate control of the license from being delegated to a non-licensee without Commission approval. We conclude that providing licensees with the flexibility to lease certain of their spectrum usage rights to third parties, without the need for Commission approval, is consistent with the section 310(d) requirements so long as the licensee exercises both *de jure* control and *de facto* control, as we have refined that latter standard in the spectrum leasing context.

23. While the refined *de facto* control standard adopted above departs from the specific factors set forth in *Intermountain Microwave*, the two approaches share a fundamental interpretation of statutory requirements under section 310(d). Under both approaches, a licensee's continued control over the licensed use of

spectrum lies at the heart of what it means to retain the license and the rights thereunder. Where the two standards differ is in the significance attached to certain non-licensed activities that relate to the license, and in the degree of control that a licensee must retain over its license and specific license rights to avoid a determination that it has "transferred, assigned, or disposed of in any manner" such license or rights.

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

25. We observe that even under *Intermountain Microwave*, a non-licensee's mere use of licensed spectrum does not necessarily imply that the licensee has transferred, assigned or disposed of the license or any license rights. The linchpin is control. If the licensee continues to hold a sufficient degree of control over the non-licensee's use, there has been no transfer, assignment, or disposition. The necessary degree of control that the licensee exercises with regard to the third party's spectrum use need not be complete; so long as the licensee retains the requisite degree of control over a license right, the licensee may permit a third party certain use of the licensed spectrum without disposing of that right, even if the third party uses the