

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Reallocation of the 216-220 MHz,)	WT Docket No. 02-08
1390-1395 MHz, 1427-1429 MHz,)	RM-9267
1429-1432 MHz, 1432-1435 MHz,)	RM-9692
1670-1675 MHz, and 2385-2390 MHz)	RM-9797
Government Transfer Bands)	RM-9854
)	RM-9882

**Reply Comments of the
Office of Advocacy, U.S. Small Business Administration
on the Initial Regulatory Flexibility Analysis and the
Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) submits these Reply Comments to the Federal Communications Commission (“FCC” or “Commission”) regarding its *Notice of Proposed Rulemaking* (“NPRM”)¹ in the above-captioned proceeding. In the NPRM, the Commission proposes new service rules for licensing a total of 27 megahertz of spectrum in seven different bands that were transferred from government to non-government use.² The Commission proposes to license several of the spectrum bands in single blocks on a nationwide basis.³

Advocacy recommends that the Commission not license on a nationwide basis as it will create a nearly impenetrable bar for small businesses to become licensees. Advocacy recommends that the Commission use smaller geographic areas, such as Metropolitan Statistical Areas (“MSAs”) and Rural Service Areas (“RSAs”), in order to encourage small business participation in the spectrum auction and to speed service to rural areas.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁴ to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.⁵ Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of 1980 ("RFA"),⁶ as amended by the Small Business Regulatory Enforcement Fairness Act, Subtitle II of the Contract with America Advancement Act ("SBREFA").⁷

The RFA is designed to ensure that, while accomplishing their intended purposes, regulations do not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁸ The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.⁹ The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how a regulatory scheme can best be implemented without erecting barriers to competition. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing any disproportionate burden on small entities.¹⁰

2. Commission Should Offer Spectrum Licenses Based on Smaller Licensing Areas

In the NPRM, the Commission tentatively concluded to license the 1670-1675 MHz band

on a nationwide basis and sought comment on this conclusion.¹¹ The Commission also inquired if nationwide licensing is appropriate for the paired 1392-1395 MHz and 1432-1434 MHz bands as well as the unpaired 1390-1392 MHz and 2385-2390 MHz bands.¹²

Advocacy agrees with commenters that recommend that the Commission auction the spectrum bands based on smaller license areas to encourage small business participation in the auctions and ensure service to rural areas. The American Mobile Telecommunications Association (“AMTA”) and the United Telecom Council (“UTC”) recommended the Regional Economic Area Groupings as the appropriate service area.¹³ AMTA said that small, localized users may be overlooked by band managers with nationwide responsibility, while UTC said that a single nationwide license will make it unlikely that the spectrum will be available to a wide variety of applicants.¹⁴ The National Telecommunications Cooperative Association (“NTCA”) went a step further and urged the FCC to use MSAs and RSAs, as these will allow small and rural carriers to obtain licenses for territory they actually seek to serve.¹⁵

Advocacy notes there are several benefits to offering licenses on smaller areas. First, by offering licenses on a smaller license area basis, the Commission will encourage small businesses to provide services in these spectrum bands. Nationwide licensing will have the opposite effect. Bidding levels will simply become too high for small businesses, despite the use of bidding credits. Small businesses will face the prospect of bidding on an area that is likely larger than they are capable of serving, at prices that will be elevated by the presence of urban areas, and in competition with larger businesses for the only license in the band being auctioned.

Second, by offering smaller-area licenses, the Commission will promote provision of wireless services to rural communities. Local companies that want to provide wireless services to the rural areas are unlikely to bid on a license that covers the entire country and are unable to

bid against large companies. In addition, larger companies with a nationwide footprint will likely target the larger markets first, as those areas have the highest concentration of potential customers. If a nationwide licensee deploys in rural areas, it will be years after the urban areas.

Third, smaller area licensing will not unduly deter development of nationwide networks. Licensees interested in providing wireless services with a large footprint can connect separate service areas through relationships with neighboring licensees, particularly to provide coverage to heavily traveled roads. This approach might be more expensive for the licensee than if its license area covered the whole Nation, but will not deter the formation of such networks. On the other hand, having a single nationwide license area will be prohibitively expensive for small business, which will exclude them completely, and could impede service to outlying rural communities.

Smaller area licensing will impose costs on larger companies trying to form national networks, and nationwide licensing will completely restrict small businesses seeking to enter the market and serve rural areas. Licensing by MSA and RSA is the most appropriate, because more communities will enjoy service and because large companies could more easily bear the costs of assembling nationwide networks. By contrast, nationwide licensing could exclude small and rural companies from the market altogether.

3. The Commission Cannot Rely upon Partitioning to Lessen Impact of Nationwide Licensing

In the Initial Regulatory Flexibility Analysis, the Commission suggests that post-auction partitioning of the spectrum will minimize the economic impact of having a single nationwide license per band.¹⁶ Unfortunately, small businesses may have to pay considerably more for a partition of a license in rural areas than if it is auctioned as a discreet license area, as the cost of a partitioned rural area will likely reflect the value of the urban areas. The nationwide licensee, as

a potential competitor to the business seeking partition, might try to exact a higher price, or the nationwide licensee might not be willing to partition the license, even if it contains areas the licensee has no current plans to serve. As a result of any of these factors, large rural areas could remain unserved indefinitely, and small businesses could be shut out of providing service. The Commission cannot rely upon partitioning of the licenses as a cure for granting a single nationwide license that restricts small business participation in the industry.

Conclusion

If the Commission adopts a nationwide licensing system, small businesses will not become service providers in these bands, and rural areas will go unserved. Licenses will be more expensive and less tailored to a business plan and service need than if the Commission used a MSA/RSA licensing basis. Small businesses will have to bid against large companies for a single license. Post-auction partitioning of a rural area will be more expensive than licensing the rural community on a separate basis. By contrast, adopting an MSA/RSA licensing scheme maximizes service to rural areas, disseminates licenses among many businesses, and still permits service on a nationwide area basis. Advocacy therefore urges the Commission to use smaller license areas such as MSAs and RSAs and avoid using single nationwide licenses.

Respectfully submitted,

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¹ *In re* Reallocation of the 216-220 MHz, 1390-1395 MHz, 1427-1429 MHz, 1429-1432 MHz, 1432-1435 MHz, 1670-1675 MHz, and 2385-2390 MHz Government Transfer Bands, *Notice of Proposed Rulemaking*, WT Dkt. No. 02-08, FCC 02-15 (rel. Feb. 6, 2002).

² NPRM at para. 1.

³ NPRM at para. 33.

⁴ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637).

⁵ 15 U.S.C. § 634(c)(1)-(4).

⁶ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

⁷ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

⁸ 5 U.S.C. § 601(4)-(5).

⁹ *See generally*, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 (“*Advocacy 1998 RFA Implementation Guide*”).

¹⁰ 5 U.S.C. § 604.

¹¹ NPRM at para. 33.

¹² *Id.*

¹³ Comments of AMTA to the NPRM in WT Dkt. 02-081, at 6 (March 4, 2002); Comments of AMTA to the NPRM in WT Dkt. 02-081, at 6 (March 4, 2002); Comments of UTC to the NPRM in WT Dkt. 02-081, at 15 (March 4, 2002).

¹⁴ Comments of AMTA to the NPRM in WT Dkt. 02-081, at 6 (March 4, 2002); Comments of AMTA to the NPRM in WT Dkt. 02-081, at 6 (March 4, 2002); Comments of UTC to the NPRM in WT Dkt. 02-081, at 15 (March 4, 2002).

¹⁵ Comments of NTCA to the NPRM in WT Dkt. 02-081, at 2-3 (March 4, 2002).

¹⁶ NPRM, Appendix A, p. 62.