



**OFFICE OF ADVOCACY  
U.S. SMALL BUSINESS ADMINISTRATION  
WASHINGTON, DC 20416**

April 9, 2003

Honorable Michael K. Powell  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Room 8-B201  
Washington, DC 20554

RE: *Ex Parte* Presentation in a Non-Restricted Proceeding  
Initial Regulatory Flexibility Analysis for 2002 Biennial Review – Review of the  
Commission’s Broadcast Ownership Rules (MB Dkt. No. 02-277)

Dear Mr. Chairman:

As part of its statutory duty to monitor and report on an agency’s compliance with the Regulatory Flexibility Act of 1980 (“RFA”), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”),<sup>1</sup> the Office of Advocacy of the U.S. Small Business Administration (“Advocacy”), has reviewed the Federal Communications Commission’s (“FCC” or “Commission”) compliance with the RFA’s requirements for the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.<sup>2</sup> The Office of Advocacy is an independent entity within the U.S. Small Business Administration (“SBA”), so the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

In the NPRM, the Commission seeks to review its broadcast ownership rules as required by Section 202 of the Telecommunications Act of 1996.<sup>3</sup> The Commission conducted an Initial Regulatory Flexibility Analysis (“IRFA”), which stated that there was no impact on small businesses from the proposed rulemaking. Advocacy disagrees with the Commission’s assessment that the rule will have no impact on small businesses.

Advocacy recommends that the Commission treat this NPRM as a Notice of Inquiry (“NOI”) and

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<sup>1</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

<sup>2</sup> *In the Matter of* 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, MB Dkt. No. 02-227, MM Dkt. No. 01-235, MM Dkt. No. 01-317, MM Dkt. No. 00-244, FCC 02-249 (rel. Sept. 23, 2002).

<sup>3</sup> NPRM, paras. 1-8.

issue a further notice of proposed rulemaking (“FNRPM”). The Commission’s NPRM seeks extensive comment on issue areas rather than specific proposals or tentative conclusions. These sorts of requests to the public are better suited for an NOI than a proposed rule. Furthermore, when the Commission proposes specific rules in an FNPRM, it should complete a supplemental initial regulatory flexibility analysis (“IRFA”) to comply with the RFA.<sup>4</sup>

## 1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305<sup>5</sup> to represent the views and interests of small business within the Federal government. Advocacy’s statutory duties include serving as a focal point for the receipt of complaints concerning the government’s policies as they affect small business, developing proposals for changes in Federal agencies’ policies, and communicating these proposals to the agencies.<sup>6</sup> Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the RFA.

Congress designed the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.<sup>7</sup> 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.<sup>8</sup> The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the agencies 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.<sup>9</sup>

On August 14, 2002, President George W. Bush signed Executive Order 13272 that requires federal agencies to implement policies protecting small businesses when writing new rules and regulations.<sup>10</sup> This Executive Order authorizes Advocacy to provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget.<sup>11</sup> It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. The agency shall include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency’s response to any written comments submitted by

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<sup>4</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

<sup>5</sup> Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637).

<sup>6</sup> 15 U.S.C. § 634(c)(1)-(4).

<sup>7</sup> 5 U.S.C. § 601(4)-(5).

<sup>8</sup> 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*”).

<sup>9</sup> 5 U.S.C. § 604.

<sup>10</sup> Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

<sup>11</sup> Id. at § 2(c).

Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.<sup>12</sup>

## **2. The NPRM Does Not Propose Any Concrete Rules and Is Better Suited as a Notice of Inquiry**

In the NPRM the Commission does not propose the actual terms or drafts of any proposed rules. Instead, the Commission sought general comment on dozens, if not hundreds, of issues that addressed the value of diversity, competition, and localism. This is valuable information, and the Commission did an excellent job asking thorough and provocative questions. While the questions are certainly worthwhile, it does not counter the fact that the Commission is not proposing anything concrete in its proposed rulemaking.

This manner of soliciting information from commenters is more consistent with an NOI than an NPRM. The purpose of an NOI is to gather information and intelligence about the scope of a problem, factors that contribute to a problem, the benefits, or limitations of different regulatory alternatives and the different impacts of each alternative. The FCC should use an NOI whenever the Commission lacks information about the industry to be regulated or the exact nature of the problem to be addressed.

This style of rulemaking is very costly to the telecommunications industry. By issuing an NPRM that lacks specific proposals, the FCC creates uncertainty in the industry, resulting in thousands of comments that, at best, can only speculate as to what action the FCC may take and the potential impacts. Commenters spend resources answering hundreds of questions, and do so repeatedly over the comment period, the reply comment period, and the *ex-parte* period. Consequently, the lack of specificity is costly and potentially harmful to the industry and its customers. Small businesses, in particular, are often overwhelmed by the scope of a vague NPRM and cannot contribute meaningfully to the rulemaking process. If the FCC instead issues an NOI, interested parties would have answered the questions raised with the added comfort of knowing that they would later have the opportunity to comment on a more detailed and specific proposed rule, reducing anxiety and the need to address all possible iterations of regulatory approaches the FCC could conceivably adopt.

This is the not the first time the Commission has issued an NPRM when an NOI is more appropriate. Advocacy has sent letters to the Commission in other proceedings, commenting that the Commission is using the NPRM process to gather basic information from industry and without providing specific information on the terms of the regulatory proposal.<sup>13</sup> Consistent with

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<sup>12</sup> Id. at § 3(c).

<sup>13</sup> Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in MM Dkt. Nos 01-317, 00-244 (March 27, 2002); Letter from Thomas M. Sullivan, Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in CC Dkt. No. 01-338; CC Dkt. No. 96-98; CC Dkt No. 98-147 (February 5, 2003); Letter from Mary K. Ryan, Deputy Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in MM Dkt. No. 00-167 (February 6, 2001); Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 01-92 (November 6, 2001).

our earlier statements, Advocacy encourages the Commission to utilize NOIs and reserve NPRMs for when the Commission is prepared to propose rules as opposed to soliciting information.

### **3. The IRFA Does Not Address the Impact on Small Businesses**

In its IRFA, the Commission described the need for and the objectives of the proposed rules, as well as identified the affected classes of small businesses.<sup>14</sup> However, the FCC did not analyze the impact that the proposed rule would have on small businesses.<sup>15</sup> Instead, the Commission limits its review of the impact to reporting and recording keeping requirements of which it says there are none.<sup>16</sup>

The requirements of an IRFA are more than reporting and record keeping requirements. The RFA requires the Commission to describe all impacts, not just reporting and record keeping.<sup>17</sup> Therefore, the Commission must analyze effects such as the impact on small broadcast affiliates, the impact on small advertisers, or the impact on small program providers, if there is further consolidation.

The Commission's failure to conduct a complete analysis of the impact on small businesses is a direct result of the Commission not proposing specific rules in the NPRM. Because there are no concrete rules, it is difficult for the Commission, Advocacy, or small businesses to accurately predict and analyze what the impacts of the rules will be. As a consequence, any substantive analysis of the proposed rule is nearly impossible. We believe that by not proposing specific rules, the Commission is limiting the ability of small businesses to provide the agency with needed information on the impacts of the rule and possible alternatives that will lessen any impacts.

### **4. Commission Should Issue an FNPRM and Conduct a Supplemental IRFA After Specific Rules Are Proposed**

Unless the Commission issues a supplemental rulemaking, the next step in the Commission process would be a final rule adopting specific language on which the public would not have had a chance to comment. This lack of specificity is not consistent with the Administrative Procedure Act and frustrates the spirit of the RFA, as it is difficult for small businesses to comment meaningfully.

Rather than immediately publish a final rule, Advocacy recommends that the Commission issue an FNPRM. This will allow the Commission to utilize the comments gathered in this NPRM while providing small businesses the opportunity to comment on specific rules before the Commission adopts them.

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<sup>14</sup> NPRM, Appendix A, p. 56.

<sup>15</sup> Advocacy has identified several issues that would have an impact on small businesses in paragraphs. 39, 50, 55, 59, 70, 97, 107, 144, and 151 of the NPRM. Advocacy does not intend this list to be exhaustive.

<sup>16</sup> NPRM, Appendix A, p. 62.

<sup>17</sup> 5 U.S.C. § 603(a).

Even if the Commission does not issue a FNPRM, the Commission should issue a supplemental IRFA to examine any rules that the Commission decides to adopt in a final rule. The Commission stated that the proposed rule had no impacts on small businesses in the current IRFA, and consequently the Commission has done no analysis of impacts on small businesses. If the FCC releases a final rule that does contain small business impacts, it will be adopting rules on which small businesses have not been had the opportunity to comment. This is a violation of the RFA and could result in the courts remanding the entire rule.<sup>18</sup> The Commission must inform small businesses of the regulatory impacts that will result from the rulemaking and give them a chance to respond. The proper avenue for this is a supplemental IRFA.

### **Conclusion**

The Commission's NPRM seeks comment on issue areas rather than specific proposals or tentative conclusions. Because of a lack of specific regulatory proposals in the proposed rulemaking, Advocacy recommends that the Commission treat this NPRM as an NOI and issue an FNRPM when the FCC is in a position to consider concrete rules. When the Commission proposes specific rules in an FNPRM, it should complete a supplemental IRFA to comply with the RFA.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6933 or eric.menge@sba.gov if you have questions, comments, or concerns.

Sincerely,

/s/ \_\_\_\_\_  
Thomas M. Sullivan  
Chief Counsel for Advocacy

/s/ \_\_\_\_\_  
Eric E. Menge  
Assistant Chief Counsel for  
Telecommunications

/s/ \_\_\_\_\_  
Radwan Saade, Ph. D.  
Regulatory Economist

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<sup>18</sup> Northwest Mining Assoc. v. Babbitt, 5 F. Supp. 2d 9 (D.D.C. 1998) (recognizing the public interest in preserving the right of parties which are affected by government regulation to be adequately informed when their interests are at stake and participate in the regulatory process as directed by Congress).

cc:

Commissioner Kathleen Q. Abernathy

Commissioner Michael J. Copps

Commissioner Kevin J. Martin

Commissioner Jonathan S. Adelstein

W. Kenneth Ferree, Chief, Media Bureau

Carolyn Fleming Williams, Director, Office of Communications Business Opportunities

John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of  
Management and Budget.