

March 8, 2002

Charlie I. Harper, Jr., Chief
Rural Utilities Service
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Stop 1598
Washington, DC 20250-1598

Dear Mr. Harper:

As part of its statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),ⁱ the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Rural Utilities Service's ("RUS") Regulatory Flexibility Act Certification for final rules in two recent proceedingsⁱⁱ and found that they do not satisfy the requirements of the RFA.

The RFA permits Federal agencies to certify that a final rule does not have a significant economic impact on a substantial number of small entities and avoid conducting a regulatory flexibility analysis. In the two actions referenced above, RUS certified the final rules pursuant to the RFA, but RUS relies on two invalid reasons for these certifications: (1) all entities are affected equally and (2) the benefit to small businesses outweighs the costs. These reasons contradict the language of the RFA and the intention of Congress. Therefore, RUS cannot base a certification on these reasons.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305ⁱⁱⁱ 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.^{iv} 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),^v as amended by the Small Business Regulatory Flexibility Act, Subtitle II of the Contract with America Advancement Act.^{vi}

2. “All Entities Affected Equally” is an Invalid Basis for Certification

In the System Construction Certification, RUS certifies the rule will not have a significant economic impact on a substantial number of small entities because "Small entities are not subject to any requirements which are not applied equally to large entities."^{vii} The idea that compliance with the RFA means not adding additional requirements on small businesses is a common misconception about the requirements of the RFA. Congress specifically addresses this issue in its findings in the RFA:

"[U]niform Federal regulatory and reporting requirements have in numerous instances imposed unnecessary and disproportionately burdensome demands including legal, accounting and consulting costs upon small businesses, small organizations, and small governmental jurisdictions with limited resources."^{viii}

And:

“the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity.”^{ix}

And:

“the practice of treating all regulated businesses, organizations, and governmental jurisdictions as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems, and, in some cases, to actions inconsistent with the legislative intent of health, safety, environmental, and economic welfare legislation.”^x

These three findings show that Congress knew about tendency of agencies to impose “one-size-fits-all” regulations and specifically rejected it. As Congress states, one-size-fits-all regulations are unnecessary and disproportionately burdensome to small businesses. This has been born out by a recent economic study commissioned by Advocacy.^{xi} This study showed that a firm with less than 20 employees shouldered regulatory costs 60 percent greater per employee than firms with more than 500 employees. Because of the disparity of the impact of governmental regulations, the agency cannot certify a rule on the basis that all entities have the small regulatory obligations.

3. “The Benefit to Small Businesses Outweighs the Costs” is an Invalid Basis for Certification

In both the System Construction Certification and the System Installation Certification, RUS certifies the rule will not have a significant economic impact on a substantial number of small entities because the benefit to the regulated entities outweighs the costs. This is an incorrect interpretation of the certification provisions of the RFA. While a cost-benefit analysis might help an agency determine the degree of impact on small entities, the mere fact that the benefits outweigh the cost is not dispositive of impact. In other words, the test for certifications is whether a rule has an impact.

As Congress states in the findings of the RFA, "the process by which Federal regulations are developed and adopted to should be reformed to require agencies to solicit the ideas and comments of small businesses, small organizations, and small governmental jurisdictions to examine the impact of proposed and existing rules on such entities..."^{xii} Congress knew that agencies might not be aware of costs, have the wrong information, or might improperly estimate costs. Agencies cannot certify that the benefits are greater without giving small businesses a chance to comment and share information with the agency.

4. Conclusion

By certifying these two rules, RUS is depriving itself of the opportunity to learn about the rules' impact actions on small businesses. The two listed reasons, (1) that rules affect all businesses equally, and (2) that the benefit outweighs the detriment, are invalid bases for certification as they go against the spirit of the RFA and are contrary to the intention of Congress.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Eric E. Menge
Assistant Chief Counsel for Telecommunications

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- ⁱ 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).
- ⁱⁱ Telecommunications System Construction and Specifications, 66 Fed. Reg. 43,309 (2001) (to be codified at 7 CFR Part 1755)(System Construction Certification); RUS Standard for Service Installations at Customer Access Locations, 66 Fed. Reg. 43,314 (2001). (to be codified at 7 CFR Part 1755)(System Installation Certification).
- ⁱⁱⁱ Codified as amended at 15 U.S.C. §§ 634 (a)-(g), 637.
- ^{iv} 15 U.S.C. § 634(c)(1)-(4).
- ^v Pub. L. No. 96-354, 94 Stat. 1164 (1980) (*codified at 5 U.S.C. § 601 et seq.*).
- ^{vi} Pub. L. No. 104-121, 110 Stat. 857 (1996) (*codified at 5 U.S.C. § 612(a)*).
- ^{vii} System Construction Certification, 66 Fed. Reg. at 43,309.
- ^{viii} RFA, *supra* note 1, Findings (3).
- ^{ix} RFA, *supra* note 1, Findings (4).
- ^x RFA, *supra* note 1, Findings (6).
- ^{xi} W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms* (2001).
- ^{xii} RFA, *supra* note 1, Finding (8).