

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

In the Matter of)
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)
Automatic and Manual Roaming Obligations) WT Docket No. 00-193
Pertaining to Commercial Mobile Radio Services)
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Comments of the Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy of the United States Small Business Administration respectfully submits these Comments in the above-captioned proceeding,¹ in which the Federal Communications Commission considers whether to adopt a new automatic roaming rule for commercial mobile radio service systems and whether to sunset its existing manual roaming requirements. An “initial regulatory flexibility analysis,” prepared in conjunction with the notice of proposed rulemaking, is significantly flawed and does not address the mandates of the Regulatory Flexibility Act (RFA).² What is missing is a core element of an RFA analysis, namely a description of the impact of the rule on small business.³

The FCC takes an unusual approach to rulemaking in this proceeding. Rather than identifying a problem and proposing a solution to redress the problem, the FCC does the reverse. First it suggests a possible solution, an automatic roaming rule, and then asks the public to identify whether a problem exists that might require such a solution. The FCC states, “To the extent the record evidence establishes the existence of a problem that an automatic rule could

¹ *Automatic and Manual Roaming Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rulemaking*, (“NPRM”) WT Docket No. 00-193, FCC 00-361, 65 Fed. Reg. No. 225 (November 21, 2000) (to amend 47 C.F.R. § 22.901).

² Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 et seq.).

³ See 5 U.S.C. § 603(a).

remedy, we then must weigh the potential benefits of regulation against its costs.”⁴ The FCC does not describe the impact an automatic roaming rule would have on businesses, particularly small businesses. In fact, the FCC implies that such a rule might be costly,⁵ but also suggests it might actually benefit small businesses.⁶ The FCC is remarkably vague on this issue and fails to comply with the RFA in this regard.

In the past, the FCC anticipated that imposing an automatic roaming rule would be costly, and determined that competition might eliminate the need for such a rule.⁷ Revisiting the issue in this proceeding, the FCC notes that competition has increased over the past few years,⁸ and that consolidation of the wireless marketplace has continued.⁹ The FCC notes a trend toward regional and national networks, even among some smaller operators.¹⁰ Handsets are becoming more interoperable.¹¹ Automatic roaming is commonplace, and roaming prices have dropped.¹²

For all this, the FCC again explores whether an automatic roaming rule remains unnecessary. The FCC indicates that it would not require automatic roaming unless “market forces alone are not sufficient to ensure the widespread availability of competitive roaming services.”¹³ The FCC would not adopt automatic roaming, “unless it is clear that providers’ current practices are unreasonably hindering the operation of the market to the detriment of

⁴ *NPRM*, paragraph 21.

⁵ *See NPRM*, paragraph 17 and Appendix, Section E.

⁶ In its initial regulatory flexibility analysis, the FCC states, “Furthermore, we inquire whether adoption of an “automatic roaming” rule would in fact be in the best interests of small businesses. Specifically, in considering whether or not to adopt an “automatic roaming” rule, we inquire of smaller carriers whether such a rule would be most beneficial to such carriers to the extent they may have difficulty obtaining agreements from larger carriers absent such a rule.” *NPRM*, Appendix, Section E.

⁷ *See NPRM*, paragraph 17.

⁸ *See NPRM*, paragraph 10.

⁹ *See NPRM*, paragraph 11.

¹⁰ *See NPRM*, paragraph 11.

¹¹ *See NPRM*, paragraph 12.

¹² *See NPRM*, paragraph 13.

¹³ *NPRM*, paragraph 16.

consumers.”¹⁴ Pursuant to this inquiry, the FCC seeks comment on whether carriers are unreasonably refusing to enter roaming arrangements with consumers, and whether “incumbent or large providers [are] more likely to deny roaming agreements than small providers or new entrants”.¹⁵

This discussion seems to imply that the FCC has some information tending to suggest that market forces have been insufficient to promote roaming and that some entities may be refusing to enter roaming arrangements with consumers. The FCC even seems to have some sense that some entities are more culpable than others. But the FCC does not explicitly indicate that it perceives a problem. If the FCC believes it should change its roaming rules, the FCC should inform the public of specific problems that may need regulatory action. The public should be given the opportunity to question or comment on the FCC’s specific perception of roaming in the wireless market, particularly if new rules would disproportionately burden some licensees. It is a basic principle of administrative law that an agency must identify a problem, with some specificity, before it proposes a solution, rather than proposing a solution prior to defining the problem.

The RFA requires the FCC to describe any significant alternatives, consistent with its stated objectives, which might minimize a proposal’s impact on small business.¹⁶ And indeed, the FCC indicates it might consider fashioning rules only for larger businesses, if it turns out that automatic roaming might disproportionately burden small businesses. This would be laudable, certainly. But it is difficult for Advocacy to comment substantively on any of this, without the benefit of the expert agency’s thoughts on the impact of automatic roaming on small businesses.

¹⁴ *NPRM*, paragraph 18.

¹⁵ *NPRM*, paragraph 18.

¹⁶ *See* 5 U.S.C. § 603(c).

The FCC is unclear what impact it believes automatic roaming will have on small business, or even whether there will be an impact. But it is the FCC's responsibility under RFA to analyze and describe impact. It is not the responsibility of the public.

Respectfully submitted,

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