



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

February 6, 2001

Michael K. Powell
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8-A204C
Washington, DC 20554

RE: Ex Parte Presentation in a Non-Restricted Proceeding
Initial Regulatory Flexibility Analysis for Children's Television Obligations of Digital
Television Broadcasters (MM Dkt. No. 00-167)

Dear Mr. Powell:

In furtherance of our statutory duty to be a voice for small business, the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the comments and reply comments to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking* ("NRPM") in the above-captioned proceeding.ⁱ

Advocacy believes that the WB Television Network's ("WB") proposal in its reply commentsⁱⁱ to convert the NRPM to a Notice of Inquiry ("NOI") should be implemented by the Commission. A Notice of Inquiry should be used whenever the Commission lacks information about the industry to be regulated or the exact nature of the problem to be addressed, as its purpose 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. This is the kind of information that the Regulatory Flexibility Act ("RFA") requires agencies to have when it proposes regulations and which must be included with transparency in the regulatory flexibility analyses that, as required by law, must accompany proposals published for public comment. Therefore, we support the WB's recommendation to convert the NRPM to an NOI.

Advocacy has a statutory duty to monitor and report on agencies compliance with the Regulatory Flexibility Act of 1980, as amended by the Small Business Regulatory enforcement Fairness Act of 1996 ("SBREFA").ⁱⁱⁱ A full explanation of Advocacy's statutory duties is contained in our January 9, 2001 letter in this docket.

Advocacy is persuaded by the WB's reply comments that the text of the NPRM is more suitable for an NOI.^{iv} The manner in which the FCC presented the issues is more consistent with an NOI than an NPRM since the agency did not propose the actual terms or drafts of the proposed rules. Rather, the FCC discussed many varied topics and sought general comment upon them. Unless changed, 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 is not consonant with the Administrative Procedures Act or the Regulatory Flexibility Act.

In its January 9, 2001 letter, Advocacy advised the Commission that the IRFA accompanying its NPRM did not satisfy the requirements of the RFA, because the agency did not examine the costs of the proposed rules nor explore alternatives that would accomplish the agency's regulatory goals while reducing burdens.^v These deficiencies seem to arise from a lack of cost and economic impact information on the proposed actions. This is similar to other Commission proceedings where Advocacy has submitted comments. The Commission appears to be establishing a pattern of using the NPRM process improperly, namely as a means to gather basic information from industry and, more significantly, without providing specific information on the terms of a regulatory proposal.

Advocacy agrees with the WB's assessment that converting the NPRM to an NOI would serve the mandate of Section 257 to reduce market-entry barriers, since doing so would permit greater opportunity for small businesses to comment on the proceedings.^{vi} An NPRM issued thereafter would include a discussion and impact analysis of various regulatory options suggested by the information obtained in response to the Commission's inquiries. The Commission would be in a better position to craft specific regulatory language and to perform the congressionally mandated regulatory flexibility analysis in support of its proposal on which the public could comment. This will reduce uncertainty and doubt for small businesses and make it easier for them to comment.

Advocacy encourages the Commission to use NOIs more often to collect information on regulated industries. They provide an excellent way for the Commission to gather information on an issue before committing itself to any particular regulatory path, and the Commission should not adopt regulations without the necessary information. The industry takes Commission inquiries very seriously and responds to them as evidenced by comments received in the Open Cable Access NOI and the Broadband Deployment NOI.^{vii}

For the reasons given above, Advocacy supports the WB's recommendation that the FCC convert the NPRM to an NOI. If the FCC converts the NPRM in this proceeding to an NOI, the Commission will have the opportunity to gather sufficient information to answer the questions posed by Advocacy and can issue a well-grounded RFA economic impact analysis when the FCC re-issues the NPRM.

Sincerely,

Mary K. Ryan
Deputy Chief Counsel for Advocacy

Eric E. Menge
Assistant Chief Counsel for Telecommunications

cc:

Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Gloria Tristani
Roy Stewart, Chief, Mass Media Bureau
Anthony Bush, Acting Director, Office of Communications Business Opportunities

ⁱ *In the Matter of Children's Television Obligations of Digital Television Broadcasters, Notice of Proposed Rulemaking*, MM Docket No. 00-167, FCC 00-344 (rel. Oct. 5, 2000).

ⁱⁱ See Reply Comments of the WB Television Network, to the *Notice of Proposed Rulemaking*, MM Dkt. No. 00-167, at 24-6 (Jan. 17, 2001).

ⁱⁱⁱ 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).

^{iv} *WB's Reply Comments* at 25.

^v Letter from Jere W. Glover, Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to William E. Kennard, Chairman, Federal Communications Commission (January 9, 2001).

^{vi} *WB's Reply Comments* at 26.

^{vii} *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Notice of Inquiry*, GN Dkt. No. 00-185, FCC 00-355 (rel. Sept. 28, 2000); *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996, Notice of Inquiry* CC Dkt. No. 98-146, FCC 00-057 (rel. Feb. 18, 2000).