

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

In the Matter of	)	
	)	
2000 Biennial Regulatory Review	)	WT Docket No. 01-14
Spectrum Aggregation Limits	)	
for Commercial Mobile Radio Services	)	
	)	

**Comments of the Office of Advocacy, U.S. Small Business Administration**

The Office of Advocacy of the United States Small Business Administration (Advocacy)<sup>1</sup> respectfully submits these comments regarding the regulatory flexibility analysis published in the above-captioned proceeding.<sup>2</sup> The Federal Communications Commission (Commission) is reviewing its spectrum cap and cross-ownership policies for commercial mobile radio services (CMRS) providers. The Commission seeks comment on whether it should modify its limits on the amount of spectrum that any single entity may hold in a market and whether it should modify its restrictions on cross-ownership between cellular telephony providers located in the same market. The Commission published a regulatory flexibility analysis in conjunction with its Notice of Proposed Rulemaking (NPRM), but the analysis is inadequate: the Commission fails to clearly state its regulatory objectives, fails to describe the impact on small businesses, and fails to propose alternatives designed to minimize this impact.

The Commission does not clearly state its regulatory goals in this proceeding.<sup>3</sup> In

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<sup>1</sup> Congress established Advocacy in 1976 by Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government. (Codified as amended at 15 U.S.C. §§ 634 a-g, 637.) Advocacy serves as a focal point for concerns regarding the government's policies as they affect small business, develops proposals for changes in Federal agencies' policies, and communicates these proposals to the agencies. (See 15 U.S.C. § 634c(1)-(4).) Advocacy also monitors agency compliance with the RFA and reports this to Congress.

<sup>2</sup> *2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services, Notice of Proposed Rulemaking*, WT Docket No. 01-14, FCC 01-28, released January 23, 2001 (NPRM).

<sup>3</sup> The Regulatory Flexibility Act (RFA) requires an agency to provide a succinct statement why it considers a

conjunction with its 2000 biennial regulatory review, the Commission explores whether it should alter its CMRS spectrum cap and cellular cross-ownership restrictions. The Commission indicates that the Communications Act requires it to eliminate or modify any rules that it determines are no longer in the public interest.<sup>4</sup> However, the Commission does not indicate that it believes the spectrum cap and cross-ownership restrictions no longer serve the public interest, and does not clearly explain why it believes a revision of these policies might be necessary.<sup>5</sup>

The Commission indicates that its spectrum policies have encouraged healthy levels of competition and expresses its concern that altering these policies may tend to reduce competition.<sup>6</sup> The Commission indicates that some CMRS providers are experiencing spectrum shortages, but acknowledges that lifting the spectrum cap may reduce competition.<sup>7</sup> The Commission seeks comment on these issues throughout its NPRM but fails to clearly express why it believes it should loosen these restrictions, if in fact it holds this view.<sup>8</sup>

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specific regulatory action, and what its goals are. *See* 5 U.S.C. § 603 (b) (1) and (3).

<sup>4</sup> *See NPRM*, page 8.

<sup>5</sup> In fact, the Commission cites a great body of evidence that its spectrum cap and cross-ownership restrictions have promoted competition, which has brought lower prices, new service offerings, and technological innovation to consumers. It would appear from factors cited throughout the NPRM that the spectrum cap and cross-ownership rules continue to serve the public interest.

<sup>6</sup> The Commission points out that its spectrum limitations are necessary to prevent damage to competition that can result from spectrum aggregation. *See NPRM*, page 4. The Commission notes that “substantial consumer benefits had resulted from the dramatic increases in competition in CMRS markets over the previous few years” and has found that its spectrum cap policies have played a “positive role” in developing competition. *Id.* Similarly, the Commission has found its cellular cross-ownership provisions “to be necessary to protect against substantial anticompetitive threats from common ownership between the two cellular carriers in any given geographic area.” *NPRM*, page 6. The Commission points to its waiver process, which companies facing dire spectrum shortages could use to provide “3G” and other advanced services until the Commission makes further spectrum allocations. *See NPRM*, page 5.

<sup>7</sup> *See NPRM*, page 4. With regard to spectrum shortages, the Commission indicates it has recently reconfigured the PCS C-Block, in conjunction with its recent re-auction of spectrum in that band, in order to provide relief to CMRS providers requiring additional capacity. The Commission also has exempted 700 MHz services from the spectrum cap, and has raised the cap in rural areas. *See NPRM*, pages 16 and 19. Perhaps the Commission should permit recent policy changes such as these to bear fruit before revising other spectrum rules.

<sup>8</sup> If the Commission has dual goals, safeguarding competition while easing spectrum shortages, these goals may be in conflict. This is not unusual. For instance, to encourage national networks, the Commission has tended to award spectrum licenses according to Economic Areas (EAs). However, these areas are too large for most small businesses to serve yet often contain areas they would wish to serve. Thus, there may be a conflict between the goal of providing geographic license areas large enough to promote regional or nationwide services, and the goal of

The Commission also fails to describe adequately the impact its proposed rules would have on small businesses, as RFA requires.<sup>9</sup> The Commission writes, “This NPRM could result in rule changes that, if adopted, would affect small businesses that currently are or may become licensees in the cellular, broadband Personal Communications Services (PCS) and/or SMR services.”<sup>10</sup> The Commission proceeds to enumerate the licensees currently involved in these services, but does not describe the impact to which it alludes.

Similarly, the Commission fails to describe alternatives that may minimize impact on small businesses.<sup>11</sup> If the Commission proposes lifting its spectrum cap and cross-ownership restrictions, and the Commission believes these changes may burden small business, the Commission must propose alternatives -- methods other than lifting these restrictions -- that will minimize this impact while serving the Commission’s regulatory goals.

The Commission indicates that its spectrum cap and cross-ownership rules have served the public interest. Now, the Commission reexamines its findings in “light of international and economic developments that have significantly affected CMRS markets. For example, consolidation within the CMRS industry in an effort to create national service footprints has tended to reduce the number of smaller entities providing broadband CMRS on a purely local level.”<sup>12</sup>

The Commission questions whether spectrum caps and cross-ownership restrictions

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encouraging entry by small businesses, at least insofar as the Commission chooses EAs as a tool to pursue the first goal. The Commission should clearly state its goals, even if they are contradictory. This may assist the Commission in fashioning policies that serve all its various goals.

<sup>9</sup> See 5 U.S.C. § 603 (a). “Whenever an agency is required by section 553 of this title . . . to publish general notice of proposed rulemaking for any proposed rule . . . the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe the impact of the proposed rule on small entities.” *Id.*

<sup>10</sup> *NPRM*, page 32.

<sup>11</sup> RFA requires the Commission to describe “significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small business.” 5 U.S.C. § 603 (c).

continue to be necessary to assure new entry by small businesses in CMRS markets. It strikes Advocacy that if the marketplace is experiencing increased consolidation, then rules and policies that encourage entry by small business are more important than ever. It also appears there may be conflicting goals: promoting nationwide services versus encouraging competition and small business participation in the marketplace. The Commission should explore both goals and suggest means of accomplishing them.

### **Conclusion**

Identifying and analyzing the comparative merits of alternatives is a responsibility the RFA imposes on the Commission in order to assure that it proposes the best possible solution to a particular regulatory problem. The Commission is the best source of information on how various approaches would affect different market segments. Therefore, the Commission should raise and explore alternative ways to encourage nationwide networks, alleviate spectrum shortages, or safeguard competition, and analyze how these alternatives would affect entities with varied resources.

The Commission fails to express its regulatory goals in this proceeding. The Commission asks a number of open questions, but does not propose specific rules changes. The Commission expounds upon spectrum caps and cross-ownership restrictions and their impact on competition, mentions the need some providers have for additional spectrum, and discusses consolidation in the CMRS market and its affects on small business entry. However, this discussion leaves the reader with a vague understanding, at best, of the Commission's direction of thought in this proceeding. The Commission does not offer a specific plan and the reader is left wondering what the Commission proposes to do. Without a focused discussion of a specific

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<sup>12</sup> *NPRM*, page 33.

proposal, the public is unable to offer informed comment as to the wisdom on one approach or another. If the Commission has not formulated its regulatory goals, or proposals that might further these goals, perhaps it should issue a notice of inquiry to develop its thoughts in this proceeding. In any event, the Commission should not issue final rules based on comments it may receive to its current NPRM.

If the Commission at some future point does propose to relax its spectrum caps and cross-ownership restrictions, it must describe the impact this step would have on small business. The Commission should explain whether lifting the spectrum cap would tend to discourage small business new entry or drive existing small businesses from the marketplace. The Commission must then propose alternatives to loosening these restrictions that might have less impact on small business, within the context of achieving the Commission's goals of encouraging nationwide networks or providing relief from spectrum shortage. The Commission should issue a supplemental regulatory flexibility analysis addressing these concerns.

Respectfully submitted,

Susan M. Walthall  
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