

April 19, 2001

Michael K. Powell  
Chairman  
Federal Communications Commission  
Washington, DC 20554

RE: Ex Parte Presentation in a Non-Restricted Proceeding  
Supplemental Final Regulatory Flexibility Analysis for Revision of the Commission's  
Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems (CC Dkt.  
No. 94-102)

Dear Mr. Chairman:

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"),<sup>1</sup> the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Federal Communications Commission's ("FCC" or "Commission") treatment of the RFA for the *Fifth Memorandum Opinion and Order* ("5<sup>th</sup> MO&O") in the above-captioned proceeding.<sup>2</sup>

Advocacy has concluded that the Commission's decision to not address the small business issues raised in the petitions for reconsideration does not comply with the RFA. Furthermore, the 5<sup>th</sup> MO&O drew conclusions on issues not raised in an initial regulatory flexibility analysis ("IRFA") and without an opportunity for small businesses to comment on the IRFA. Small businesses brought serious issues to the Commission's attention in petitions for reconsideration that should have been addressed in the supplemental IRFA to solicit comment followed by a supplemental FRFA drawn from the comments received.<sup>3</sup>

**Action requested:** The Commission should issue a supplemental IRFA that requests comment on the effect on small businesses of the Commission's decision to remove the cost recovery mechanism. Once that is done, the Commission should conduct a supplemental FRFA drawn from the comments received. This needs to be undertaken as soon as possible, as the Commission's rulemaking is grievously in violation of the RFA.

## 1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305<sup>4</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 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.<sup>5</sup> Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of 1980,<sup>6</sup> as amended by the SBREFA, Subtitle II of the Contract with America Advancement Act.<sup>7</sup>

The RFA was designed 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>8</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>9</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 FCC 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>10</sup>

## **2. Issue Background**

The purpose of this docket was to ensure that wireless carriers introduced enhanced 911 services ("E911"). The Commission adopted rules in 1996 that, among other things, mandated that wireless carriers would provide 911 operators with the ability automatically locate the position of callers using wireless telephones to obtain emergency service. Carriers were permitted to defer implementation of this mandate until a mechanism was developed where the states would reimburse the carriers for their costs. The Commission modified this rule in the 2<sup>nd</sup> MO&O and removed the precondition of cost recovery from the states to hasten the introduction and rollout of E911.

The Commission's purpose in the 5<sup>th</sup> MO&O was to address two petitions, which requested reconsideration of the Commission's decision in the 2<sup>nd</sup> MO&O to remove the cost recovery mechanism.<sup>11</sup> The 5<sup>th</sup> MO&O upheld the FCC's decision to require wireless carriers to install automatic locator systems ("ALS") regardless of whether they were reimbursed by state governments. The FCC declined to conduct a supplemental FRFA as part of its decision in the 5<sup>th</sup> MO&O.<sup>12</sup>

## **3. The Commission Cannot Conduct a FRFA without Conducting an IRFA and Soliciting Comment on the Impact.**

In the 5<sup>th</sup> MO&O, the Commission did not conduct a supplemental FRFA. Instead, the Commission relied upon the FRFA in the Second Memorandum Opinion and Order<sup>13</sup> ("2<sup>nd</sup> MO&O") as controlling. That FRFA is fundamentally flawed, because the Commission had failed to conduct an IRFA and solicit comment on the impact on small businesses of its decision to strike the cost recovery requirement.

In this docket's First Report and Order, the Commission imposed a requirement that wireless carriers transmit automatic location information to public safety answering points.<sup>14</sup> However, wireless carriers were entitled to cost recovery, which permitted them to receive reimbursement from the states before they were required to provide location information. Three years later, the Commission released a Public Notice on June 9, 2000<sup>15</sup> requesting comment on causes of the delay in implementing wireless E911. The Commission then requested comment just over two months later on an implementation report filed in response to the June 9 Public Notice.<sup>16</sup> The Commission did not attach an RFA analysis with either public notice. Basing its decision upon the public notices and comments received in response, the Commission removed the cost recovery mechanism in the 2<sup>nd</sup> MO&O as a precondition to deploying ALS.<sup>17</sup> The 5<sup>th</sup> MO&O upheld that decision.<sup>18</sup>

Recent case law underscores the importance of conducting an IRFA and soliciting comment on the economic impact. In *Northwest Mining Assoc. v. Babbitt*,<sup>19</sup> the court stated that it "recognizes the public interest in preserving the rights of parties which are affected by government regulation to be adequately informed when their interests are at stake and to participate in the regulatory process as directed by Congress."<sup>20</sup> *Southern Offshore Fishing Assoc. v. Daley*<sup>21</sup> leaves little doubt of the importance of an IRFA to the rulemaking process. In that case, the court stated that the RFA requires that a FRFA contain a summary of public comments raised in response to an IRFA. When the agency never prepares an IRFA, the court said that it was impossible for the agency to summarize these comments and comply with the RFA.<sup>22</sup>

Both of these cases are precedent for the FCC's actions in this docket. The FCC did not conduct an IRFA when it removed the cost recovery requirement. Consequently, it did not solicit comments on the issue and cannot summarize the comments in the FRFA. Accordingly, the FCC's FRFA is fundamentally flawed and does not satisfy the RFA. Advocacy requests that the Commission conduct an IRFA immediately to cure this deficiency.

### **3. The Commission Must Address the Issues Small Businesses Raised in a Supplemental IRFA**

Two parties, CorrComm and the Rural Cellular Association ("RCA"), filed petitions for reconsideration to the 2<sup>nd</sup> MO&O.<sup>23</sup> These petitions raised small business issues concerning the cost of deleting the cost recovery mechanism, and they proposed alternatives. These petitions should have been a red flag to the Commission that its decision to remove the cost recovery mechanism was having a significant impact on small businesses and that a regulatory flexibility analysis was necessary to determine the scope of the impact and how best to minimize it.

Both of the petitions for reconsideration addressed issues that are the heart of the RFA – economic impact on small businesses and alternatives that would minimize such impact. In its petition, CorrComm stated that the Commission had not discussed or recognized the adverse effect that cutting the cost recovery mechanism would have on small businesses.<sup>24</sup> Further, CorrComm stated that the Commission should have recognized that striking the mechanism would disproportionately impact for small carriers.<sup>25</sup> RCA's petition echoed this statement when

it asked the Commission to consider the higher cost of implementation for small rural carriers.<sup>26</sup> RCA also recommended the expedited waiver as an alternative to the FCC, as a way to keep costs down.<sup>27</sup>

The Commission cannot ignore the impact of this rulemaking on small businesses since two parties have raised the issue to the FCC. Furthermore, the fact that two parties raised cost issues for small entities without the FCC conducting an IRFA on the issue and soliciting comment should be a signal to the Commission of the extent of that impact.

FCC improperly dismissed these petitions without performing an RFA analysis on the issues raised. As the Commission did not conduct an IRFA on deleting the cost recovery provision, it cannot settle these issues by relying upon the flawed FRFA from the 2<sup>nd</sup> MO&O. These issues must be addressed through a new supplemental IRFA and a subsequent comment period.

### **Conclusion**

The Commission adopted a rule that has extensive impact on small businesses without conducting an IRFA and requesting comment. The FCC cannot issue a FRFA on a subject on which it never conducted an IRFA. Therefore, the Commission must issue a supplemental IRFA that requests comment on the effect on small businesses of removing the cost recovery mechanism. The FCC should conduct a supplemental FRFA drawn from the comments received. This will bring the Commission back in compliance with the RFA and case law.

Sincerely,

/s/ \_\_\_\_\_  
Susan M. Walthall  
Acting Chief Counsel for Advocacy

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

cc:

Commissioner Susan Ness  
Commissioner Harold Furchtgott-Roth  
Commissioner Gloria Tristani  
Dorothy Attwood, Chief, Common Carrier Bureau  
Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau  
Anthony Bush, Acting Director, Office of Communications Business Opportunities

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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).

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<sup>2</sup> *In the Matter of* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Fifth Memorandum Opinion and Order*, CC Docket No. 94-102, FCC 00-405 (rel. Nov. 22, 2000).

<sup>3</sup> Because this communication is a result of Advocacy's statutory duty, it is exempt from the Commission's rules on ex parte presentations. *See* 47 CFR § 1.1204(a)(5)(1997).

<sup>4</sup> *Id.*

<sup>5</sup> 15 U.S.C. § 634(c)(1)-(4).

<sup>6</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

<sup>7</sup> Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

<sup>8</sup> 5 U.S.C. § 601(4)-(5).

<sup>9</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>10</sup> 5 U.S.C. § 604.

<sup>11</sup> *Petition for Reconsideration of CorrComm, Inc.*, CC Dkt. No. 94-102, RM-8143 (Jan. 28, 2000); *Petition for Reconsideration of the Rural Cellular Association*, CC Dkt. No. 94-102, RM-8143 (Jan. 28, 2000).

<sup>12</sup> 5<sup>th</sup> MO&O para. 1.

<sup>13</sup> *In the Matter of* Revision of the Commissions Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Second Memorandum Opinion and Order*, CC Dkt. No. 94-102 (rel. Dec. 9, 1999).

<sup>14</sup> *In the Matter of* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 94-102 (rel. July 26, 1996).

<sup>15</sup> Public Notice, Commission Seeks to Facilitate Wireless E911 Implementation and Requests a Report, CC Dkt. No. 94-102, FCC 99-132 (rel. June 9, 1999).

<sup>16</sup> Public Notice, Wireless Telecommunications Bureau Requests Comment on Wireless E911 Report Filed by CTIA, PCIA, APCO, NENA, and NASNA on August 9, 1999, CC Dkt. No.94-102, DA 99-1627 (rel. Aug. 16, 1999).

<sup>17</sup> 2<sup>nd</sup> MO&O paras. 19-74.

<sup>18</sup> 5<sup>th</sup> MO&O para. 1.

<sup>19</sup> 5 F. Supp. 2d 9 (D.D.C. 1998).

<sup>20</sup> *Id.* at 16.

<sup>21</sup> 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

<sup>22</sup> *Id.* at 1338.

<sup>23</sup> *See supra* note 11.

<sup>24</sup> CorrComm Petition at page 9.

<sup>25</sup> *Id.*

<sup>26</sup> RCA Petition at page 2.

<sup>27</sup> *Id.* at page 8.