

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

In the Matter of)	
)	
Implementation of the Commercial Spectrum)	
Enhancement Act and Modernization of the)	WT Dkt. No. 05-211
Commission’s Competitive Bidding Rules and)	
Procedures)	

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION,
ON THE NOTICE OF PROPOSED RULEMAKING
AND INITIAL REGULATORY FLEXIBILITY ANALYSIS**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these Comments to the Federal Communications Commission (“FCC” or “Commission”) regarding the Second Further Notice of Proposed Rulemaking (“Second FNPRM”) in the above-captioned proceeding.¹ The FCC is seeking comment on a variety of measures to promote the effectiveness of its rules concerning the eligibility of spectrum auction applicants for designated entity² benefits. The Commission identified two directives from Congress: (1) to ensure that designated entities are given the opportunity to participate in the provision of spectrum-based services, and (2) to prevent unjust enrichment.³

Advocacy supports the Commission’s effort to promote small business participation in spectrum auctions and urges the FCC to analyze the impact on small businesses and explore regulatory alternatives. The FCC should publish this analysis in a supplemental initial regulatory flexibility analysis (“IRFA”) to provide small businesses an opportunity to comment.

¹ *Second Report and Order and Second Further Notice of Proposed Rulemaking*, WT Dkt. No. 05-211, FCC 06-52 (rel. April 25, 2006).

² Designated entities are small businesses, businesses owned by minorities and/or women, and rural telephone companies. 47 CFR §1.2100(a).

³ FNPRM at para. 1.

1. Advocacy Background.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (“SBA”), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the Regulatory Flexibility Act (“RFA”) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.⁴

On August 13, 2002, President George W. Bush signed Executive Order 13272 requiring federal agencies to implement policies protecting small entities when writing new rules and regulations.⁵ In accordance with Executive Order 13272, Advocacy may provide comment on draft rules to the agency that has proposed a rule, as well as to the Office of Information and Regulatory Affairs (“OIRA”) of the Office of Management and Budget.⁶ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule’s publication in the *Federal Register*, the agency’s response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁷

2. The Commission Must Analyze the Impact on Small Businesses Before Altering the Designated Entity Program.

When the Telecommunications Act of 1996 authorized the Commission to allocate spectrum licenses through competitive bidding, Congress instructed the FCC to promote

⁴ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996) (codified at 5 U.S.C. § 612(a)).

⁵ Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

⁶ E.O. 13272, at § 2(c).

⁷ *Id.* at § 3(c).

involvement by small businesses, rural telephone companies, and businesses owned by members of minority groups and women.⁸ Congress also directed that the Commission require disclosures and restrictions as needed to prevent unjust enrichment.⁹ In the Second FNPRM, the Commission states that the challenge in carrying out Congress' plan has always been to find a reasonable balance between the competing goals of providing designated entities with reasonable flexibility to obtain financing from investors, and preventing ineligible entities from getting designated entity benefits by circumventing the rules and obtaining those benefits indirectly.¹⁰

Advocacy held a roundtable on August 3, 2006, to discuss upcoming telecommunications issues of importance to small businesses, including the Second FNPRM.¹¹ Advocacy asked the participants to discuss the economic impacts of the proposal and available alternatives that would minimize that impact. Advocacy's comments are based upon the discussions at this roundtable and additional outreach to small businesses.

The Second FNPRM does not contain any concrete proposals on how to handle the balance between promoting the involvement of designated entities and preventing unjust enrichment, but consists of a series of questions on possible actions that the Commission could take. Consequently, the IRFA states that the rule would have no compliance requirements on small businesses; moreover, the IRFA presents no significant alternatives.¹² Without specific proposals, accompanied by an analysis of impacts, affected entities have no way to assess the impact and comment effectively. A series of questions does not serve the purpose of adequate public notice and comment.

⁸ 47 U.S.C. § 309(j)(4)(D).

⁹ 47 U.S.C. § 309(j)(4)(E).

¹⁰ FNPRM at para. 8.

¹¹ Participants in Advocacy's Roundtable included: the Cellular Telephone Industry Association, CompTel, Council Tree, COVAD, National Telecommunications Cooperative Association, USA Datanet, National Federation of Independent Business, and the Voice on the Net Coalition.

¹² FNPRM, Appendix D, at 54.

If adopted, Advocacy believes that the measures discussed in the Second FNRPM would have a significant impact on small businesses. The measures would add reporting requirements, impose regulatory mandates, or place restrictions on a designated entities' ability to negotiate and contract with third parties. Should the FCC decide to adopt rules pertaining to the many questions in the Second FNPRM, it is essential that the Commission analyze the impact on small businesses and explore alternatives as it has not done so in the IRFA. The FCC should publish this analysis in a supplemental IRFA to provide small businesses an opportunity to comment on the impact and alternatives.

Small businesses believe that most, if not all, of the proposals in the Second FNPRM are unnecessary to prevent unjust enrichment. At Advocacy's roundtable, several parties mentioned that the FCC does not provide evidence of systematic abuse of the designated entity program. Since the instances of unjust enrichment are isolated, small businesses recommend that the FCC concentrate on preventing unjust enrichment through enforcement of the current rules. Small businesses noted that the Commission could handle almost every instance of unjust enrichment by scrutinizing the applications of designations in advance of the auction.

Instead of concentrating on preventing unjust enrichment, small businesses believe that the Commission should concentrate on promoting opportunities for designated entities by removing market-entry barriers and creating a regulatory environment that encourages funding for designated entities. In particular, small businesses are concerned that the 10-year limitation on transfer of a spectrum license is overly burdensome, impedes their ability to attract funding, and is unnecessary to prevent unjust enrichment.

3. Conclusion.

Advocacy urges the FCC to analyze the impact on small businesses, explore alternatives before proceeding to a final rule, and publish this analysis in a supplemental IRFA to provide small businesses an opportunity to comment. The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov.

Respectfully submitted,

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September 20, 2006

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Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commissioner Robert M. McDowell
Steven D. Aitken, Acting Administrator, Office of Information and Regulatory Affairs

Certificate of Service

I, Eric E. Menge, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this September 20, 2006, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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