

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

In the Matter of)	
)	
The 4.9 GHz Band Transferred from)	WT Docket No. 00-32
Federal Government Use)	
)	

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

The Office of Advocacy of the United States Small Business Administration (“Advocacy”)¹ respectfully submits these Comments to the *Notice of Proposed Rulemaking* (“*NPRM*”) and the regulatory flexibility analysis published in relation to the above-captioned proceeding.² The Federal Communications Commission (“Commission”) proposes rules to govern the 4940-4990 MHz spectrum band, which was transferred from Federal government to private sector use. The Commission proposes auctioning spectrum licenses in this band on a geographic basis, according to Economic Areas (“EA”). Advocacy recommends that the Commission use smaller geographic areas, such as Metropolitan Statistical Areas (“MSAs”) and Rural Service Areas (“RSAs”), in order to encourage small business participation in the spectrum auction and to speed service to rural areas. The Commission also should prepare and publish a supplemental regulatory flexibility analysis, because the Commission’s initial regulatory flexibility analysis fails to identify the significant impact its proposed rules would have on small business and fails to propose any alternative designed to minimize this impact.

¹ 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.

² *Amendments to Parts 1, 2 and 101 of the Commission’s Rules to License Fixed Services at 4940-4990 MHz, Notice of Proposed Rulemaking*, WT Docket No. 99-327, FCC 99-333, released November 10, 1999.

1. The Commission should offer spectrum licenses based on MSA and RSA.

Advocacy recommends that the Commission auction 4940-4990 MHz spectrum licenses based on MSAs and RSAs, in order to encourage small business participation in the auction and assure provision of services to rural areas. The Commission has identified three goals that influence its decision regarding license area: disseminating licenses among a wide variety of applicants, ensuring provision of service to rural areas, and permitting national service.³

Licensing according to RSA and MSA is consistent with all three goals.

First, by offering licenses on an MSA/RSA basis, the Commission would encourage small businesses to seek to provide services in the 4940-4990 MHz spectrum band. Organizing the licenses by EAs, which include both rural and urban areas, would cause the relatively high value of urban areas to influence bidding levels for relatively less valuable rural areas. Bidding levels might simply become too high for small businesses, despite the use of bidding credits. Small businesses would face the prospect of bidding on larger areas than they wish to serve, at prices that would be elevated by the presence of urban areas, and in competition with larger businesses.

By contrast, with smaller MSAs and RSAs, a small business interested in serving one rural locale could bid only on the RSA containing that area. Any business, small or large, interested in serving a particular town or city, could bid on that city. By separating rural areas from metropolitan areas, those companies that wish to serve a rural area, but not the neighboring city, could gain affordable access to the desired community. Thus, licensing smaller areas would tend to increase participation by small and rural businesses, including businesses owned by women and minorities.

³ See *NPRM*, para. 43.

Second, by offering smaller-area licenses, tailored to specific communities, the Commission would promote provision of wireless services to rural communities. If such rural areas are offered as discreet RSAs, entities wishing to serve these areas could enter the market at the auction stage. The price of the RSA license would be measured by bidding competition and not be affected by the value of nearby metropolitan areas.

Including rural areas in the same EA with metropolitan areas runs the risk that a large business, interested in serving only the city, would not serve the rural areas. And local companies wanting to provide wireless services to the rural areas of an EA might be unwilling to bid on the entire EA or unable to bid against large companies. Small businesses may be forced, from a practical point of view, to try to pick off rural areas post-auction. But the small business may have to pay considerably more to partition a rural area than if it had been auctioned as a discreet license area. The price of the rural area would likely reflect the value of the EA's urban areas, or the EA licensee, as a potential competitor to the business seeking partition, might try to exact a higher price. And the EA licensee might not be willing to partition an EA, even if it contains areas the licensee has no current plans to serve, in case the licensee later decides to expand its service. As a result of any of these factors, large rural areas of an EA could remain unserved indefinitely. Auctioning by RSA and MSA would avoid these problems and permit speedy service to rural communities.

Third, MSA/RSA licensing would not unduly deter development of wide-area networks at 4940-4990 MHz, at least on a regional basis. Licensees interested in providing wireless services with a large footprint could connect separate service areas through relationships with neighboring licensees, particularly to provide coverage to heavily traveled roads. This approach might be more expensive for the regional licensee than if its license area covered the whole

region, but would not deter the formation of such networks. On the other hand, EA licensing would be prohibitively expensive for small business and would impede service to outlying rural communities. The choice between the two approaches involves a choice of whom to burden. MSA/RSA licensing would impose costs on larger companies trying to form national networks, and EA licensing would impose higher costs on small and local companies seeking to enter the market and serve rural areas. Licensing by MSA and RSA is more appropriate, because more communities would enjoy service and because large companies could more easily bear the costs of assembling wide-area networks. By contrast, EA licensing could exclude small, minority, and rural companies from the market altogether. Small and rural businesses would lack the resources to obtain EA licenses in bidding competition with large businesses, and partitioning is not likely to become a plausible option because of higher cost or warehousing efforts.

In an EA system, licenses would be more expensive and less tailored to business plan and service need. Small businesses would have to bid against large companies for those EAs that contain areas of interest to each, and post-auction partitioning of a rural area will be more expensive than licensing the rural community on a separate basis. As a result, few small businesses will become service providers and rural areas will go unserved. By contrast, adopting an MSA/RSA licensing scheme would maximize service to rural areas, disseminate licenses among many businesses (including local companies that legitimately wish to serve their rural communities), and still permit service on a wide-area basis.

2. The IRFA Does Not Discuss the Impact on Small Entities or Propose Alternatives.

The Commission's initial regulatory flexibility analysis ("IRFA") is inadequate. The Commission indicates that its rules would affect ninety-six percent of all governmental entities in the united states, and presumes (for lack of better data) that all prospective licensees affected by

the rules would be small businesses.⁴ Yet the Commission does not discuss the significant economic impact its proposal would have on these small entities. Nor does the Commission propose alternatives to minimize this impact, as the Regulatory Flexibility Act (“RFA”) requires.⁵ There is no discussion, for instance, of the burdens EA licensing or partitioning would impose on the ability of small business to compete for 4940-4990 MHz licenses, or ways to lighten these burdens.

The Commission claims it reduces the burdens of rulemaking “whenever possible”, and indicates that it proposes certain incentives to minimize the impact of the rules on small business.⁶ The Commission merely references small business incentives it proposes in the *NPRM*, and seeks comment on “significant alternatives commenters believe [it] should adopt”.⁷ In fact, the Commission fails to propose or discuss a single alternative that would minimize impact on small business.

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, as the presumed expert on the wireless telecommunications industry, is the best source of information on how various approaches would affect the different market segments. Therefore, the Commission should raise and explore ways it could license spectrum at 4940-4990 MHz and analyze how these alternatives would affect entities with varied resources. This is particularly important in a case such as this, where the Commission expects its rules to have an impact on most government entities and all prospective licensees. It is insufficient to simply throw the subject open for proposals by commenting

⁴ See *NPRM, Appendix A*, pages A-3, A-4.

⁵ See 5 U.S.C. § 603(c).

⁶ *NPRM, Appendix A*, page A-5.

⁷ *NPRM, Appendix A*, page A-5.

parties, as the Commission has done, because the RFA requires specific discussion of proposed alternatives.⁸ The Commission is not fulfilling its legal responsibility to analyze options and to share these analyses with the public to elicit informed commentary. This responsibility cannot and should not be passed on to the public.

The Commission's IRFA should discuss whether EA licensing, rather than MSA/RSA licensing, is appropriate for small business, and should discuss the significant impact an EA system would have on the ability of small entities to compete for licenses. The Commission implies that the small business incentives discussed in the *NPRM* are designed to reduce the impact on small business, but this is not true.⁹ No discussion appears, anywhere in the *NPRM* or IRFA, of "significant alternatives to the proposed rule . . . which minimize any significant economic impact of the proposed rule".¹⁰ The *NPRM* tentatively concludes that partitioning "will provide a means to overcome entry barriers through the creation of smaller licenses that require less capital, thereby facilitating greater participation by rural telephone companies and other smaller entities, many of which are owned by minorities and women."¹¹ But the Commission fails to discuss partitioning as an alternative to more suitable geographic license areas. The Commission fails to address the question, why is partitioning a better means than smaller geographic areas. The *NPRM* and IRFA do not compare the two approaches, EA licensing plus partitioning, versus MSA/RSA licensing. The Commission fails to discuss why small businesses should bear the high costs of EA licensing, instead of large businesses bearing

⁸ See 5 U.S.C. § 603(c). The RFA enumerates four alternatives: (1) different compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) exemption – either in whole or in part – for small entities. See 5 U.S.C. § 603(c)(1)-(4). The Commission does not propose or analyze a single one of these alternatives and proposes none of its own.

⁹ The Commission states, "To minimize any negative impact, however, we propose certain incentives for small entities which will redound to their benefit." *NPRM, Appendix A*, page A-5.

¹⁰ 5 U.S.C. § 603(c).

¹¹ *NPRM*, para. 52.

the costs associated with assembling regional networks from MSAs. Similarly, the *NPRM* proposes bidding credits to enable small businesses to compete at auction, but neither the *NPRM* nor the IRFA discusses how bidding credits would minimize the impact of offering larger-area licenses than small businesses would want.

Without such analysis, parties will be unable to prepare cogent and informed comments on the Commission's proposals. The Commission should not promulgate rules in this proceeding until it analyzes the impact they would have on small business and discusses alternatives designed to minimize this impact while serving the Commission's regulatory goals.

Conclusion

The Commission's EA proposal risks excluding small businesses from the 4940-4990 MHz spectrum auction, and from the provision of services over this spectrum. The Commission should adopt smaller geographic areas, such as MSAs and RSAs, to permit applicants to bid on just those areas they wish to serve. This would encourage small business participation in the auction, increase diversity of service providers, and speed service to rural areas.

The Commission fails to analyze the impact of its proposed rules on small business and fails to discuss alternatives designed to minimize this impact, consistent with the Commission's regulatory goals. The Commission should issue a supplemental regulatory flexibility analysis addressing these concerns, prior to issuing rules in this proceeding.

Respectfully submitted,

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