

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

In the Matter of)
)
Amendment of Part 15 of the Commission's)
Rules Regarding Spread Spectrum Devices) ET Docket No. 99-231
)
)

**Comments of the Office of Advocacy, U.S. Small Business
Administration on the Notice of Proposed Rulemaking and the Initial
Regulatory Flexibility Analysis of the Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”)¹ respectfully submits these Comments to the *Notice of Proposed Rulemaking* (“NPRM”)² in the above-captioned proceeding, by which the Federal Communications Commission (“Commission”) would revise its rules (1) to permit frequency hopping systems operating at 2.4 GHz to use wider bandwidths in order to accommodate demand for high-speed data applications, and (2) to modify interference tests for spread spectrum devices in order to increase the accuracy of these tests.

Although the Commission states that it expects its proposed rules to have a significant economic impact on a substantial number of small entities, it does not discuss the nature and extent of this impact anywhere in its NPRM or in its initial regulatory flexibility analysis. The Commission provides no information to which the public can react in an informed manner. The Commission fails to describe the impact its rules would have on small business and fails to

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*Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Notice of Proposed Rulemaking*, WT Docket No. 99-87, FCC 99-52 (rel. March 25, 1999).

estimate the number of affected small businesses. The Commission fails to describe the purpose and objectives of the proposed rules. The Commission fails to propose any alternatives that would minimize the rules' impact on small business, while still serving the Commission's public policy objectives. Last, the Commission misstates the paperwork burden its new rules would place on equipment manufacturers. For these reasons, the NPRM and regulatory flexibility analysis do not satisfy the Regulatory Flexibility Act of 1980,³ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act⁴ (collectively "RFA"). Therefore, the Commission should not establish final rules in this proceeding until it has conducted a proper initial regulatory flexibility analysis and seek comment both on the effect of its proposal on small business and on its analysis of regulatory alternatives.

1. The NPRM Does Not Consider Impact on Small Business.

The Commission expects that its proposed rules might significantly impact all small radiotelephone companies in the United States.⁵ And the Commission is required by law to consider this impact and propose ways to minimize it. But the Commission fails to analyze this impact or suggest ways to lessen it.

The Commission is statutorily required to "assure that small entities have been given an opportunity to participate in the rulemaking."⁶ By failing to analyze the burdens its spread spectrum rules would have on small business, and by failing to actively solicit small business input in this rulemaking, the Commission has not satisfied its statutory obligations.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

⁴ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

⁵ See *NPRM*, Appendix A, pages 8-9.

⁶ See 5 U.S.C. § 609(a)(3).

2. The IRFA is Wholly Inadequate.

Under the RFA, once the Commission determines that a notice and comment rulemaking would have a significant impact on a substantial number of small entities, it must prepare an initial regulatory flexibility analysis (“IRFA”).⁷ The IRFA must describe the impact of the proposed rule on small entities.⁸ The IRFA also must describe alternatives, consistent with the proposed rules’ stated goals, that would minimize significant economic impact on small entities.⁹ In this case, the Commission’s IRFA satisfies none of these statutory requirements.

a. The IRFA does not explain the purpose of the proposed rules.

The RFA requires the Commission to describe why it is considering regulatory action and the objectives of its proposed rule.¹⁰ But the Commission’s stated reason is to “obtain comment regarding proposed changes to the regulations for non-licensed transmitters.”¹¹ There must be more to it than that. Obviously the Commission must have substantive reasons for proposing new spread spectrum rules.¹² The fact that these are not stated suggests that the Commission has not thought through which problem it is trying to correct, how its proposal will address the problem, and how small entities contribute to the problem in a way that warrants regulation.

b. The IRFA does not describe or estimate burdens on small business.

An IRFA must describe and estimate the number of small entities to which its proposed rules would apply.¹³ The IRFA in this instance seems to identify the entities affected as small

⁷ See 5 U.S.C. § 603(a).

⁸ *Id.*

⁹ See 5 U.S.C. § 603(c).

¹⁰ See 5 U.S.C. §§ 603 (a)(1) and (a)(2).

¹¹ See *NPRM*, Appendix A, page 8.

¹² The Commission suggests in the *NPRM* that it wishes to satisfy demand for increased spectrum capacity and accurate interference tests. See *NPRM*, page 3, paragraph 8 and page 5, paragraph 14.

¹³ See 5 U.S.C. § 603(b)(3).

radiotelephone communications companies, but this is unclear.¹⁴ Also, the IFRA does not state whether these would be the only impacted entities. The Commission offers no estimate of how many small businesses the rules would affect. And the Commission gives no reason why it cannot make such an estimate. The Commission does, however, indicate that its rules might impact a substantial number of small radiotelephone communications companies when it states, “nearly all such companies are considered small.”¹⁵ The Commission needs to be more specific. Generalizations do not satisfy its obligation under the law. It must describe what entities would be affected – and how – with some degree of specificity.

c. The IRFA misstates record-keeping requirements.

The Commission must describe projected reporting, record-keeping, and other compliance requirements of the proposed rule, including an estimate of the class of small businesses that will be subject to these requirements, and an estimate of the skills necessary for compliance.¹⁶ The Commission states that the rules would not change current reporting or record-keeping requirements, nor require modification of existing products.¹⁷ But in the last paragraph of the NPRM, the Commission proposes new rules “to require manufacturers of direct sequence spread spectrum systems . . . to submit the results of the jamming margin test as well as a calculation of processing gain to verify compliance.”¹⁸ This seems to contradict the IFRA’s statement to the effect that the rule would impose no new reporting requirements. It certainly is confusing. The Commission should explain precisely what reporting obligations are new and

¹⁴ The Commission states, “SBA has defined a small business for Standard Industrial Classification (SIC) category 4812 (Radiotelephone Communications) to be small entities when they have fewer than 1500 employees.” *See NPRM*, Appendix A, page 8-9.

¹⁵ *See NPRM*, Appendix A, page 9.

¹⁶ *See* 5 U.S.C. § 603(b)(4).

¹⁷ *See NPRM*, Appendix A, page 9.

¹⁸ *See NPRM*, page 6, paragraph 15.

distinguish them from those that are not new.

d. The IRFA does not describe significant alternatives.

The Commission's IRFA must describe significant alternatives, consistent with its stated rulemaking objectives, designed to minimize significant economic impact on small entities.¹⁹ At minimum, the IRFA must discuss four statutorily-mandated alternatives: (1) different compliance requirements or timetables, (2) clarified, consolidated, or simplified compliance requirements, (3) use of performance rather than design standards, and (4) exemption.²⁰

The IRFA's proposed alternatives are easy to summarize: none.²¹ The Commission proposes no alternatives, and does not even address the four listed in the RFA, despite the Commission's expectations that the new rules would significantly impact small business. The statutory obligation to propose alternatives is mandatory; the Commission must seriously consider the impact of the rules on small business and try to minimize unintended impact.

Conclusion

The Commission fails to consider the impact of its proposed rules on small business, even though it expects such an impact to result. The Commission does not estimate the number of small entities the rules would affect. The Commission includes no analysis within its initial regulatory flexibility analysis. The Commission does not explain with specificity and clarity what reporting requirements its new rules might impose. The Commission does not identify alternatives that might minimize the impact of the new rules on small business. The Commission takes a boilerplate approach to its IFRA and appears to pay lip service to the RFA.

For these reasons, the Commission must prepare a proper analysis of the effect its

¹⁹ See 5 U.S.C. § 603(c).

²⁰ See 5 U.S.C. § 603(c)(1-4).

²¹ See *NPRM*, Appendix A, page 9.

proposed rules would have on small business. This analysis must explain the burdens the new rules would impose on which small businesses. The Commission must consider ways it might minimize this impact, while serving the stated objectives of the proposed rule.

The Commission should realize that resources available to large businesses differ significantly from those available to small businesses and therefore they have different capacity to shoulder regulatory burdens. The Commission should avoid a one-size-fits-all approach to rulemaking and should promulgate rules in a way that serves the Commission's goals yet minimizes unintended consequences for small business and competition. The Commission owes it to the public it serves to make its reasons transparent in order to elicit informed commentaries that will facilitate an enlightened decision.

Respectfully submitted,

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October 4, 1999