

**Before the  
Federal Communications Commission  
Washington, DC 20554**

In the Matter of	)	
	)	
Amendments to Part 4 of the Commission’s Rules Concerning Disruptions to Communications	)	PS Docket No. 15-80
	)	
New Part 4 of the Commission’s Rules Concerning Disruptions to Communications	)	ET Docket No. 04-35
	)	
The Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers	)	PS Docket No. 11-82

To: The Commission

**COMMENTS OF  
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION  
REGARDING THE INITIAL REGULATORY FLEXIBILITY ANALYSIS**

The Wireless Internet Service Providers Association (“WISPA”), pursuant to Sections 1.415 and 1.419 of the Commission’s Rules and the Initial Regulatory Flexibility Analysis (“*IRFA*”) adopted in the above-captioned proceeding,<sup>1</sup> hereby requests the Commission to release a supplemental IRFA that complies with the Regulatory Flexibility Act, as amended (“RFA”),<sup>2</sup> by including a reasonable estimate of the number of small fixed wireless Internet providers, by considering broadband providers that use unlicensed spectrum to deliver fixed service to consumers, and by discussing “significant alternatives” that “minimize any significant economic impact of the proposed rules on small entities.”<sup>3</sup> As described below, the *IRFA* lacks the necessary completeness by failing to identify and consider the impact that the Commission’s

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<sup>1</sup> See *Amendments to Part 4 of the Commission’s Rules Concerning Disruptions to Communications, et al.*, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 16-63, PS Docket No. 15-80, ET Docket No. 04-35 and PS Docket No. 11-82 (rel. May 26, 2016) (“*FNPRM*”), Appendix E (“*IRFA*”).

<sup>2</sup> 5 U.S.C. §§ 601, *et seq.*

<sup>3</sup> 5 U.S.C. § 603(c).

proposed outage reporting rules will have on small entities that provide broadband service over unlicensed spectrum. Further, the Commission cannot comply with its obligations under Section 706 of the Telecommunications Act of 1996 if it does not consider rules that would “accelerate deployment of [broadband] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications marketplace.”<sup>4</sup>

The defective *IRFA* continues a disturbing trend in which the Commission largely ignores the interests of small broadband providers. The *IRFA* includes outdated information,<sup>5</sup> unsupported estimates<sup>6</sup> and conclusory statements,<sup>7</sup> suggesting the Commission has already decided to apply its proposed rules in a “one size fits all” manner. It mentions one possible “notion of a waiver for small entities,” but quickly dismisses that suggestion.<sup>8</sup> By prejudicing the record in this fashion, the Commission thumbs its nose at small providers and the statutory requirements of the RFA, encouraging a record that supports its pre-conceived ideas of the effects its rules will have on small providers.

### **Introduction**

WISPA is the trade association that represents the interests of WISPs that provide IP-based fixed wireless broadband services to consumers, businesses and anchor institutions across the country. WISPA’s members include more than 800 WISPs, equipment manufacturers, distributors and other entities committed to providing affordable and competitive fixed

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<sup>4</sup> 47 U.S.C. § 1302(b).

<sup>5</sup> As one example, the *IRFA* cites data from its own Universal License Service database from April 2010 in its summary of the 3650-3700 MHz service. *See IRFA* at ¶ 32. It would take Commission staff about 15 minutes to collect up-to-date information from its own database.

<sup>6</sup> The Commission states that voice providers submit 11,000 outage reports annually and anticipates that there will be fewer than 2,000 broadband outage reports filed annually. *See IRFA* at ¶ 47. This projection is unsupported, and represents fewer than one outage report each year for each of the 3,000 WISPs, not to mention other providers that will be submitting broadband reports. Without any data, the Commission’s estimate of 2,000 broadband outage reports lacks credibility.

<sup>7</sup> *See, e.g., IRFA* at ¶ 50 (“the magnitude of the outages needed to trigger the proposed reporting requirements . . . is set sufficiently high as to make it unlikely that small businesses would be impacted significantly by the proposed rules). The Commission cannot arrive at this conclusion without the benefit of a record.

<sup>8</sup> *Id.*

broadband services. WISPs use unlicensed spectrum in the 600 MHz (unlicensed TV white space), 900 MHz, 2.4 GHz and 5 GHz unlicensed bands and the 3650-3700 MHz “lightly licensed” band which, because the spectrum is not exclusively licensed, can lower barriers to entry so that WISPs can expeditiously deploy high-quality and affordable service in unserved, underserved and competitive areas.

WISPA estimates that WISPs serve more than 3,000,000 people, many of whom reside in rural areas where wired technologies like FTTH, DSL and cable Internet access services are not available. In many of these areas, WISPs provide the only terrestrial source of fixed broadband access. In areas where other broadband options are available, WISPs provide a local-access alternative that benefits customers by fostering competition, lowering costs and improving features. All but one or two of WISPA’s members are considered to be “small entities” under the Small Business Act and the U.S. Small Business Administration’s size standards as applied to the North American Industry Classification system (“NAICS”) codes for Wireless Telecommunications Carriers (except Satellite), Code 517210,<sup>9</sup> and/or under All Other Telecommunications, Code 517919.<sup>10</sup> In addition, all of WISPA’s members currently would be eligible for the exemption from the enhanced Open Internet disclosure obligations passed by a 411-0 vote in the U.S. House of Representatives.<sup>11</sup> Under any definition, the overwhelming majority of WISPs are small businesses.

WISPA is concerned that the *IRFA* does not consider the impact the rules proposed in the *FNPRM* will have on WISPs and small entities generally. The *IRFA* makes no mention

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<sup>9</sup> *IRFA* at ¶ 17 and n.44 (*citing* 13 CFR § 121.201).

<sup>10</sup> *Id.* at ¶ 11 and n.26 (*citing* 13 CFR § 121.201). Neither the NAICS nor Economic Census have been updated to adequately reflect changes in technology or to recognize the increasing number of unlicensed fixed wireless providers of broadband services over the provider’s own telecommunications facilities. Nonetheless, these two NAICS codes are the closest in application.

<sup>11</sup> H.R. 4596, 114<sup>TH</sup> Cong. (2016). The “Small Business Broadband Deployment Act” passed in the House of Representatives on March 16, 2016. A similar bill is pending in the Senate.

whatsoever of broadband providers that use unlicensed spectrum<sup>12</sup> and thus fails to provide any reasonable estimate on the number of such small broadband providers or the reporting burdens. Moreover, the *IRFA* merely recites the statutory language of the RFA without considering reasonable alternatives – save one, waiver, which it quickly dispatches by claiming that it would “run counter to the objectives of the Further Notice.”<sup>13</sup>

“[A] proper IRFA is necessary to provide the foundation for a good [Final Regulatory Flexibility Analysis]. . . Further, without an adequate IRFA, small entities cannot provide informed comments on regulatory alternatives that are not adequately addressed in the IRFA.”<sup>14</sup> Accordingly, WISPA requests that the Commission conduct and release a supplemental IRFA.<sup>15</sup>

## Discussion

### I. THE *IRFA* DOES NOT COMPLY WITH THE REGULATORY FLEXIBILITY ACT.

The RFA was designed to reduce the economic impact of regulations on small business and acts as a statutorily mandated analytical tool to assist federal agencies in rational decision making processes.<sup>16</sup> Moreover, “a regulatory flexibility analysis is, for APA purposes, part of an agency’s explanation for its rule.”<sup>17</sup> Section 603 of the RFA requires the Commission to prepare and make available for public comment an IRFA that describes the significant economic impact of the proposed rules on small entities subject to the proposed rules. An IRFA must include “a description of and, where feasible, an estimate of the number of small entities to which the

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<sup>12</sup> *IRFA* at ¶ 13.

<sup>13</sup> *Id.* at ¶ 50.

<sup>14</sup> Office of Advocacy, U.S. Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (May 2012), at 68 (citations omitted) (“Advocacy RFA Guide”).

<sup>15</sup> In addition to these Comments, WISPA is filing separate Comments in response to the issues raised and rules proposed in the *FNPRM*.

<sup>16</sup> *See* Advocacy RFA Guide, at 1-2.

<sup>17</sup> *National Telephone Cooperative Assoc. v. FCC*, 563 F.3d 536, 540 (D.C. Cir 2009) (citing *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539 (D.C. Cir. 1983) (“a reviewing court should consider the regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable”) (additional citations omitted)).

proposed rule will apply.” In addition, an IRFA must include “a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rules, including an estimate of the classes of small entities which will be subject to the requirement.”<sup>18</sup> An IRFA also “*shall*” discuss “significant alternatives . . . which minimize any significant economic impact of the proposed rule on small entities.”<sup>19</sup> These alternatives include:

- (1) the establishment of *differing compliance or reporting requirements or timetables* that take into account the resources available to small entities;
- (2) the clarification, consolidation, or *simplification of compliance and reporting requirements* under the rule for small entities;
- (3) the use of performance rather than design standards; and
- (4) *an exemption from coverage of the rule, or any part thereof, for such small entities.*<sup>20</sup>

The *IRFA* released in this proceeding falls far short of meeting these requirements. Although the *IRFA* discusses “several different types of entities that might be currently providing interconnected VoIP service, broadband Internet access service, or business data services,”<sup>21</sup> its summary of numerous technology platforms and spectrum bands entirely excludes small entities that provide broadband Internet access service over unlicensed spectrum.<sup>22</sup> Without any such discussion of small providers that use unlicensed spectrum, the Commission necessarily cannot provide the required “description of and *where feasible*, an estimate of the number of small

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<sup>18</sup> 5 U.S.C. §§ 603(b)(3) and (4).

<sup>19</sup> 5 U.S.C. § 603(c) (emphasis added).

<sup>20</sup> *Id.* (emphasis added); *see also* Regulatory Flexibility, Small Business and Job Creation, Memorandum for the Heads of Executive Departments and Agencies, 76 Fed. Reg. 3827, 3828 (Jan. 21, 2011) (“Presidential Memorandum”). The Presidential Memorandum was issued contemporaneously with Executive Order 13563, which reinforced the importance of compliance with the RFA for all federal agencies. 77 Fed. Reg. 3821 (Jan. 21, 2011). President Obama issued a subsequent Executive Order that expressly imposed the obligations of Executive Order 13563 on independent regulatory agencies. 76 Fed. Reg. 41587 (July 14, 2011).

<sup>21</sup> *IRFA* at ¶ 19.

<sup>22</sup> In this regard, the *IRFA* is even more defective than the *IRFA* appended to the Open Internet NPRM, which at least acknowledged that “we have no specific information on the number” of such entities.” *Open Internet IRFA* at ¶ 13.

entities to which the proposed rule will apply.”<sup>23</sup> The Commission’s ability to estimate the number of small fixed wireless Internet providers is indeed feasible and, frankly, long overdue given the demonstrable growth of fixed wireless broadband providers over the past decade and the important role they play in providing broadband services to underserved and unserved communities. Moreover, small entities that provide service over unlicensed spectrum often have unique technical and practical challenges and barriers inherent in the nature of shared spectrum.

The Commission is required to consider its own data collection and resources in its compliance with the RFA.<sup>24</sup> In fact, through FCC Form 477, Terrestrial Fixed Wireless providers – a category that includes WISPs that use unlicensed spectrum – the Commission has ready access to information on the number of entities using wireless technology to provide broadband service. Although Form 477 does not differentiate between licensed and unlicensed spectrum, this does not excuse the Commission’s failure to use its own resources and other readily available data to provide a good faith estimate of the number of small fixed wireless broadband providers that use unlicensed spectrum not to complete the analysis required by the RFA. To provide a more accurate profile of the fixed wireless broadband industry using unlicensed spectrum, the Commission should supplement its own data with industry presented by WISPA in a number of Comments filed with the Commission.<sup>25</sup> The Commission also could rely on industry information presented by WISPA in a number of Commission proceedings as a starting point.<sup>26</sup>

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<sup>23</sup> 5 U.S.C. § 603(b)(3) (emphasis added). The Merriam-Webster Dictionary defines “feasible” as “capable of being done or carried out.” Merriam-Webster.com, available at <http://www.merriam-webster.com/dictionary/feasible> (last visited August 26 2016).

<sup>24</sup> See *North Carolina Fisheries Assoc. v. Daley*, 27 F. Supp. 2d 650, 659 (E.D. Va. 1998) (agency failed to comply with the RFA when it completely ignored “readily available” data in determining the number of small entities impacted by the agency’s actions).

<sup>25</sup> See, e.g., Comments of WISPA, GN Docket No. 14-28 (filed July 16, 2014) (estimating that 3,000 WISPs serve approximately 3,000,000 people); Comments of WISPA, GN Docket No. 12-354 (filed Feb. 20, 2013) (same).

<sup>26</sup> See, e.g., Comments of WISPA, GN Docket No. 12-354 (filed Feb. 20, 2013).

The Commission can craft rules to satisfy its statutory mandate only by identifying the number of small fixed wireless broadband providers using unlicensed spectrum and considering them in the *IRFA*.<sup>27</sup> The Commission did neither.

The Commission also failed to conduct a “quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule” as required by Section 607 of the RFA.<sup>28</sup> The Commission is “expected to make reasonable efforts to acquire quantitative or other information to support analysis of the rules under sections 603 [IRFA] and 604 [FRFA] of the RFA.”<sup>29</sup> This quantitative analysis is also required under the Paperwork Reduction Act, as amended (“PRA”) for the Commission’s justification of additional recordkeeping and reporting requirements.<sup>30</sup> The PRA requires the Commission to certify that each collection of information under review “reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, *including with respect to small entities*.”<sup>31</sup> The Commission’s failure to conduct a cost-benefit analysis of the requirements of its proposed rules or engage the public in this process renders the *IRFA* deficient under both the RFA and PRA. The *IRFA* (and the *FNPRM* itself) also disregards discussion of the “significant alternatives” the Commission has *considered* in reaching its proposals.<sup>32</sup> To the contrary, the *IRFA* merely parrots the four alternatives listed in Section 603(c) of the RFA and then states that the

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<sup>27</sup> See generally *Southern Offshore Fishing Ass’n v. Daley*, 995 F Supp. 1411 (M.D. Fla. 1998).

<sup>28</sup> 5 U.S.C. § 607 See also Executive Order 13563, *supra* note 20 (Federal agencies “must take into account benefits and costs, both quantitative and qualitative”). The RFA allows for a general descriptive statement but only if such quantification is not practicable or reliable. *Id.*

<sup>29</sup> Advocacy RFA Guide, at 13 (emphasis added).

<sup>30</sup> 44 U.S.C. § 3506(c)(1)(B)(iii)(III). “The PRA requires agencies to justify any collection of information from the public by establishing the need and intended use of the information, estimating the burden that the collection will impose on respondents, and showing that the collection is the least burdensome way to gather the information.” Maeve P. Carey, Cong. Research Serv., R41974, Cost-Benefit and Other Analysis Requirements in the Rulemaking Process, 15 (2014).

<sup>31</sup> 44 U.S.C. § 3506(c)(3)(C) (emphasis added). The PRA also suggests differing compliance, reporting requirements or timetables that take into account resources available to a regulated entity, or exemption from coverage of the collection of information, or any part thereof. *Id.*

<sup>32</sup> 5 U.S.C. § 603(c).

Commission “anticipate[s] that the record will suggest alternative ways in which the Commission could increase the overall benefits for, and lessen the overall burdens on, small entities.”<sup>33</sup> Notwithstanding the *IRFA*’s statement that the Commission “carefully considered the notion of a waiver for small entities from coverage of the proposed rules, but declined to propose one, as a waiver of this type would unduly frustrate the purpose of the proposed requirements and run counter to the objectives of the Further Notice,” the *IRFA* remains woefully deficient.<sup>34</sup>

There are at least two serious defects in the Commission’s approach. First, the Commission apparently did not consider *other* alternatives such as exemption from the rules, deferred implementation or relaxed reporting obligations. Second, of the single alternative the Commission says it considered, it immediately dismissed the waiver “notion,” in effect telling potential commenters to not bother with suggesting the only alternative the Commission supposedly considered. The Commission’s general request for comment on possible alternatives<sup>35</sup> illustrates the inadequacy of the *IRFA* by failing to provide the public with sufficient notice of the alternatives that may be available to small entities.

In short, the *IRFA* lacks the completeness necessary for it to comply with the RFA. The Commission therefore should adopt a supplemental *IRFA* that considers small entities that use unlicensed spectrum to provide broadband access and present alternatives that would “minimize any significant impact” on small businesses, as the RFA requires.<sup>36</sup>

## **II. THE COMMISSION SHOULD CONSIDER ALTERNATIVES THAT MINIMIZE THE IMPACT ON SMALL BUSINESSES.**

In its separate concurrently filed Comments in response to the *FNPRM*, WISPA presents alternatives to the proposed rules that would minimize the economic impact on its members,

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<sup>33</sup> *IRFA* at ¶ 51.

<sup>34</sup> *Id.* at ¶ 50.

<sup>35</sup> *See id.* at ¶¶ 52-54.

<sup>36</sup> 5 U.S.C. § 603(c).

particularly when such regulations are cumulative and overlapping with the proposed privacy rules and the imposition of Title II regulations and enforcement – known and unknown – under its *2015 Open Internet Order*, a grand slam of regulations within a short amount of time that compounds the significant economic impact imposed on a substantial number of small BIAS providers. When adopting a supplemental IRFA, the Commission should specifically discuss and seek comment on these alternatives, as well as others that the Commission should consider pursuant to its obligations under Section 603(c) of the RFA.

In particular, as required by Sections 603(c)(1), (2) and (4) of the RFA, the Commission should discuss whether small entities should be exempt from the proposed rules and reporting obligations. The proposed outage reporting obligations for broadband providers will create new obligations that will be more difficult for small entities to meet, a significant economic impact that should have been discussed in the *IRFA*. To comply with new rules, it may be necessary for broadband providers to purchase and install new equipment to enable them to monitor outages and service degradation and to hire personnel to watch for indicators of events that would trigger reporting. The supplemental IRFA should specifically seek comment on the costs and burdens associated with these possibilities. The Commission also should invite comment on whether small providers should be given additional time to comply with the new rules, or should be subject to relaxed reporting obligations that will not distract them from restoring service.

Pursuant to the 2011 Presidential Memorandum, RFA compliance serves the important task of reducing regulatory burdens on small businesses through increased flexibility.<sup>37</sup>

Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public comments, they are less likely to be based on intuition and guesswork and more

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<sup>37</sup> See Presidential Memorandum, at 3828.

likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action.<sup>38</sup>

The Commission failed to meet its obligations under the RFA to identify and discuss “significant alternatives” a preliminary step that is critical to preparing a FRFA that complies with the RFA.<sup>39</sup>

### **Conclusion**

The *IRFA* is deficient in four respects. First, it fails to provide a reasonable good faith estimate of the number of small entities that provide broadband service via unlicensed spectrum. Second, it fails to consider the impact of the proposed rules on such small entities. Third, it fails to adequately discuss “significant alternatives” that would minimize the economic impact of the rules on small fixed wireless broadband providers. Fourth, it fails to develop a quantitative cost-benefit analysis of the effects of its rules and specific alternatives using available data.

Therefore, the Commission should adopt a supplemental IRFA that addresses these shortcomings and allow the public an opportunity for further, and more informed and meaningful, comment.

Respectfully submitted,

### **WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

August 26, 2016

By: */s/ Alex Phillips, President*  
*/s/ Mark Radabaugh, FCC Committee Chair*

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<sup>38</sup> *See id.*

<sup>39</sup> *See Southern Offshore Fishing*, 995 F. Supp. at 1434 -36.