Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Promoting Investment in the 3550-3700 MHz Band;	)	GN Docket No. 17-258
	)	
	)	
Petitions for Rulemaking Regarding the Citizens Broadband Radio Service	)	RM-11788 (Terminated)
	)	RM-11789 (Terminated)

To: The Commission

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

Chuck Hogg, Chairman
Mark Radabaugh, FCC Committee Chair
Fred Goldstein, Technical Consultant

Stephen E. Coran
S. Jenell Trigg
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
(202) 429-8970
Counsel to the Wireless Internet Service Providers Association

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Summary

It is very unfortunate that some of the ill-conceived and destructive proposals regarding the Citizens Broadband Radio Service ("CBRS") advanced by CTIA and T-Mobile have been formalized in the Notice of Proposed Rulemaking ("*NPRM*"). Adopting the contemplated rule changes regarding the Priority Access License ("PAL") licensing scheme would effectively foreclose small entities from participating in PAL auctions and completely obliterate a primary benefit of the rules adopted in the *CBRS Order*, which have led many small broadband providers to make significant investments and deployment in reliance on those rules.

However, the Initial Regulatory Flexibility Analysis ("*IRFA*") adopted by the Commission with the *NPRM* does nothing to identify and address these significant economic harms, contrary to the congressional mandate that the Commission conduct an analysis that describes the impact of the proposed rules on small entities and consider alternatives to reduce the harm. WISPA is concerned that the Commission has ignored the significant detrimental economic impact that the contemplated rule changes will have on a substantial number of small providers already documented in the voluminous public record.

The Commission failed to comply with the RFA in four material ways. First, the *IRFA* fails to include a current and accurate description of and, where feasible, an estimate of the number of small entities to which the contemplated rule changes would apply. Significantly, the *IRFA* fails to recognize the holders of thousands of active licenses and registrations that would be directly and adversely impacted if the contemplated rules are adopted.

Second, notwithstanding Chairman Pai's recent pronouncement that small providers are "critical to providing a more competitive marketplace," the *IRFA* fails to conduct an analysis of the significant impact on a substantial number of small entities, particularly those that have already invested and deployed in the adjacent 3650-3700 MHz band in reliance on the 2015

CBRS Order. If adopted, the contemplated rules will strand such investments, resulting in a compounded detrimental impact because many small providers reduced overall investments due to the uncertainties associated with Title II regulations. The problem with the *IRFA* is that it does not acknowledge or adequately explain the Commission's radical shift from the *CBRS Order* and its final regulatory flexibility analysis, which were designed to lower barriers to license acquisition for the benefit of small businesses. The contemplated rules would completely undercut this reasoned policy decision.

Third, the *IRFA* also fails to contain a description and analysis of any significant alternatives which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. The *IRFA* falls far short of meeting these requirements by ignoring obvious alternatives and the detrimental impact of the contemplated rules already explained in the administrative record. For example, the *CBRS Order* expressly stated that its rules regarding small geographic areas at auction "strongly support[ed]" its goal of providing economic opportunity to a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women, as required under Section 309(j) of the Communications Act of 1934, as amended. Section 309(j) also requires the balancing of interests to avoid an excessive concentration of licenses. But there is zero acknowledgement of the Commission's previous rationale for adopting census tracts, nor is there any explanation of why the previous balancing of interests under Section 309(j) may no longer be valid.

And finally, the Commission seeks to impose an unreasonable high standard for rejecting an alternative proposal "if the record indicates that a particular proposal would have a significant and unjustifiable adverse impact on small entities." This purported standard regarding an

agency's consideration of significant alternatives is inconsistent with the RFA. The Commission is required to consider all alternatives, not just those that are raised on the record, as opposed to alternative proposals that the Commission may offer *sua sponte*. Nor does the RFA require rejection of alternatives that are deemed to be "unjustifiable." The standard for review of significant alternatives is that they minimize any significant impact on small businesses subject to the proposed rules. The Commission cannot impose its own standard and maintain compliance with the RFA.

These deficiencies in the *IRFA* cannot be cured with a final regulatory flexibility analysis. WISPA submits that the Commission's failure to prepare an IRFA that complies with the RFA is an independent basis for the Commission to reject the changes to the PAL licensing rules contemplated in the *NPRM*. At minimum, the Commission should engage small providers in extensive outreach to address the issues raised herein and in WISPA's concurrently filed main Comments in order to foster a PAL licensing scheme that does not impose significant economic harm on a substantial number of small entities. Such an outcome is inconsistent with the RFA and the Communications Act, as well as the Commission's priority efforts to bridge the digital divide.

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The Wireless Internet Service Providers Association ("WISPA"), pursuant to Sections 1.415 and 1.419 of the Commission's Rules[1] and the Initial Regulatory Flexibility Analysis ("*IRFA*") the Commission adopted in connection with its Notice of Proposed Rulemaking in the above-captioned proceeding,[2] hereby comments on the major deficiencies of the *IRFA*[3] and the Commission's non-compliance with the Regulatory Flexibility Act, as amended ("RFA").[4]

Background

WISPA is the trade association that represents the interests of wireless Internet service providers ("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

[1] *See* 47 C.F.R. §§ 1.415 and 1.419.
[2] *Promoting Investment in the 3550-3700 MHz Band*, Notice of Proposed Rulemaking and Order Terminating Petitions, 32 FCC Rcd 8071 (2017) ("*NPRM*"), Appendix B, *IRFA*, at 8100 (¶ 1).
[3] In addition to these *IRFA* Comments, WISPA is concurrently filing separate Comments in response to the issues raised and rules contemplated in the *NPRM*.
[4] 5 U.S.C. §§ 601 *et seq*.

affordable and competitive fixed broadband services. WISPs use unlicensed spectrum primarily in the 600 MHz (unlicensed TV white space), 900 MHz, 2.4 GHz and 5 GHz unlicensed bands and, of particular relevance, the "lightly licensed" 3650-3700 MHz band.

WISPA estimates that WISPs serve more than 4,000,000 people, many of whom reside in rural areas where wired technologies like FTTH, DSL and cable Internet access services are not available or consumer choice is lacking. Such technology, pioneered by WISPA's members, is a vital and important solution to America's digital divide problem because of its low start-up costs, low deployment costs relative to other technology platforms, and ability to reach areas that are not served by traditional providers. 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[5], and/or under All Other Telecommunications, Code 517919.[6] Neither the NAICS nor Economic Census have been updated to adequately reflect changes in technology nor 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. In short, the overwhelming majority of WISP's are small entities.

[5] *IRFA* at 8103 (¶ 10) and n.22, *citing* 13 C.F.R. § 121.201, NAICS Code 517210 (1,500 or fewer employees).
[6] *Id.* at (¶ 12) and n.28, *citing* 13 C.F.R. §121.201, NAICS Code 517919 (gross annual receipts of $32.5 million or less).

Introduction

There are several major deficiencies in the *IRFA*. First, the Commission has failed to provide current and accurate classifications and reasonable estimates of the substantial number of small entities subject to the rules proposed in the *NPRM*. Second, the Commission has not conducted a meaningful analysis of the significant economic impact of proposed changes to its Priority Access License ("PAL") rules on small entities. These proposed rules would dramatically increase the license term and enable perpetual renewal of PAL licenses, and the Commission also asks whether and to what extent the geographic area for PALs should be enlarged. These considerations clearly depart from existing rules that the Commission itself said "constitute a significant benefit for small businesses"[7] and "should benefit small entities by giving them more information, more flexibility, and more options for gaining access to valuable wireless spectrum."[8] Nor does the *IRFA* provide a description and analysis of various significant alternatives to the proposed rules, which include alternatives already identified by various commenters in the administrative record below. Finally, the legal standard used to determine if and when the Commission will consider an alternative is flawed and thus unlawful under the RFA.

Adopting the contemplated rule changes would effectively foreclose small entities from participating in PAL auctions and completely undo a primary benefit of the rules adopted in the *CBRS Order*, which have led small broadband providers to make significant investments and deployment in reliance on those rules. WISPA is concerned that the Commission has ignored the

[7] *See generally Amendment of the Commission's Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FCC Rcd 3959, 4120 (2015) ("*CBRS Order*"). The FRFA for the *CBRS Order* is found in Appendix B thereof ("*FRFA*") at 4122.
[8] *FRFA* at 4127.

significant detrimental economic impact that the proposed rules will have on a substantial number of small providers.

In preparing the *IRFA*, there can be little doubt that the Commission ignored the substantial record developed in connection with petitions for rulemaking filed by CTIA and T-Mobile SA, Inc.[9] Had the Commission complied with its obligations under the RFA, it would have acknowledged the record and asked specific questions about the contemplated changes to the PAL rules instead of simply making general statements about the questions the Commission poses in the *NPRM*. As the U.S. Small Business Administration's Office of Advocacy ("Advocacy") has stated, "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 an IRFA."[10]

The deficiencies in the *IRFA* cannot be cured with a final regulatory flexibility analysis ("FRFA"). Rather, the Commission's failure to prepare an IRFA that complies with the RFA is an independent basis for the Commission to reject the changes to the PAL rules that are under consideration in the *NPRM*.

Discussion

The RFA was designed to require federal agencies to reduce the economic impact of regulations on small businesses and acts as a "statutorily mandated analytical tool" to assist

[9] *See* CTIA Petition for Rulemaking, GN Docket No. 12-354 (filed June 16, 2017); T-Mobile Petition for Rulemaking, GN Docket No. 12-354 (filed June 19, 2017) (collectively, "Petitions").

[10] Office of Advocacy, U.S. Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (Aug. 2017), at 68 (citations omitted) ("Advocacy RFA Guide"). "Small businesses cannot provide informed comments if the agency fails to identify the rule as one that will have a significant impact on a substantial number of small businesses. In turn, informed comments provide useful tools for the agency to construct the least burdensome, most effective regulations." *Id.* at 16.

agencies in rational decision making processes.[11] Moreover, "a regulatory flexibility analysis is, for [Administrative Procedure Act] purposes, part of an agency's explanation for its rule."[12] In today's economic environment, it is especially important for agencies "to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation."[13]

The deficiencies in this *IRFA* are strong indicators of the overall problems with the entire rulemaking process and tentative conclusions reached by the Commission in this proceeding. Notwithstanding a robust administrative record in comments and reply comments filed in connection with the Petitions that spawned the *NPRM*,[14] the *IRFA* fails to acknowledge, much less address, the harm and significant economic impact imposed on thousands of entities (the vast majority of which are small broadband providers) if the proposals in the *NPRM* to change the PAL licensing rules are adopted.

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[11] *Id.* at 2.

[12] *National Telephone Cooperative Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir 2009) (citing to *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).

[13] The White House, Presidential Memoranda of January 18, 2011, *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 Memoranda"). The Presidential Memoranda was issued concurrently with Executive Order 13563, which reinforced the importance of compliance with the RFA for all executive federal agencies. 76 Fed. Reg. 3821 (Jan. 21, 2011). President Obama issued subsequent Executive Order 13579 that expressly imposed the obligations of Executive Order 13563 on independent regulatory agencies. 76 Fed. Reg. 41587, § 1(c) (July 14, 2011) ("Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.").

[14] Public Notice, *Wireless Telecommunications Bureau and Office of Engineering and Technology Seek Comment on Petitions for Rulemaking Regarding the Citizens Broadband Radio Service*, GN Docket No. 12-354, RM-11788 and RM-11789, DA 17-609 (rel. June 22, 2017).

I. THE *IRFA* FAILS TO REASONABLY IDENTIFY AND ESTIMATE THE TYPES OF SMALL BUSINESSES SUBJECT TO THE CONTEMPLATED RULES

The *IRFA* fails to include a current and accurate "description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply."[15] This threshold requirement under Section 603 of the RFA is important because it identifies the specific classes and number of small entities that will be directly impacted by the proposed rules.[16] Instead, the *IRFA* contains an outdated laundry list of generic classifications and communications services whether or not the entity or service is subject to this proceeding.[17] Notably, the *IRFA* makes no mention of licensees in the 3650-3700 MHz band, the very classification of entities that are mostly likely to suffer the negative effects of changes to the PAL licensing rules.

The Commission's rote recitation of these classifications and services in the *IRFA* bears no relation to the *FRFA* adopted with the *CBRS Order*, where the Commission made clear that its rules were intended to accommodate a number of different use cases:

> *As a result of the Commission's actions in the R&O, small business will have access to spectrum that is currently unavailable to them*. The potential uses for this spectrum are vast. For example, wireless carriers can deploy small cells on a GAA basis where they need additional capacity. Real estate owners can deploy

[15] 5 U.S.C. § 603(b)(3). WISPA has raised this continuing deficiency in previous proceedings. *See, e.g.*, Comments of the Wireless Internet Service Providers Association Regarding the Initial Regulatory Flexibility Analysis, Protecting and Promoting the Open Internet, GN Docket No. 14-28 (filed July 16, 2014), at 5-6.

[16] "Agencies should identify and examine various economically similar small regulated entities so that they will have a baseline from which to determine whether a significant regulatory cost will have an impact on a substantial number of small entities. An understanding of the differences in economic impacts across the various regulated communities often generates different regulatory alternatives. A sound analysis requires that agencies examine the various subsectors of the regulated community, the differences among them, and additional appropriate regulatory alternatives that can achieve the statutory mission while mitigating unnecessary economic impacts on small entities." Advocacy RFA Guide at 17.

[17] *See IRFA* at 8103-04 (¶¶ 10-14). For example, the *IRFA* includes generic listings for "Wireless Telecommunications Carriers (except Satellite)," "Satellite Telecommunications," "All Other Telecommunications," and "Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing" without any recognition whether these classifications are directly subject to the proposed rules.

> neutral host systems in high-traffic venues, allowing for cost-effective network sharing among multiple wireless providers and their customers. Manufacturers, utilities, and other large economic sectors, can construct private wireless broadband networks to automate industrial processes that require some measure of interference protection and yet are not appropriately outsourced to a commercial cellular network. All of these applications can potentially share common wireless technologies, providing economies of scale and facilitating intensive use of the spectrum. *The Commission's actions in the R&O thus constitute a significant benefit for small businesses*.[18]

Notwithstanding the Commission's "actions" to adopt short license terms, one-time renewal and census tracts for PALs to facilitate access to "spectrum that is currently unavailable to them," the *IRFA* makes no effort to identify the classifications of entities that might be directly affected by the proposed changes to the PAL licensing rules. Notably absent from the *IRFA* is any mention of the 3650-3700 MHz licensees that were discussed in the *FRFA*. Given the Commission's dramatic contemplated change in direction, current providers and other entities already active in the 3650-3700 MHz band are subject to the greatest harm in this proceeding and should have been identified.[19] The *IRFA* is entirely silent with respect to these stakeholders.

WISPA well appreciates that the Commission's existing rules do not permit PALs in the 3650-3700 MHz band and that the *NPRM* does not propose licensing of PALs in that band. However, the existing 3650-3700 MHz band has been subsumed into the CBRS and thus users of that band are directly impacted by all CBRS rule changes. The Commission cannot now ignore inconvenient truths about the direct impact changes to the PAL licensing rules will have on the same small entities that were key and intentional beneficiaries of the rules adopted in the 2015 *CBRS Order*.

[18] *FRFA* at 4123 (emphases added).

[19] The *IRFA* discusses also unnecessarily lists "Small Businesses, Small Organizations and Small Governmental Jurisdictions." *Id.* at 8101-02 (¶¶ 7-9). The inclusion of these listings, although a waste of time and paper, are harmless error because none are *directly* regulated by these proposed rules. *See Mid-Tex Elec. Coop. v. FERC*, 773 F.2d 327 (D.C. Cir. 1985).

In the *CBRS Order*, the Commission specifically stated that "[w]e strongly encourage Grandfathered Wireless Broadband Licensees to procure equipment with an eye toward complying with the Part 96 technical rules once the transition period is completed. . . . On the other hand, the use of technology that is capable of, or can be upgraded to, operation throughout the band will provide for the possibility of much greater spectrum access."[20] Given this encouragement, the Commission should have reviewed its ULS and experimental license databases to see the level of activity related to the transition of existing 3650-3700 MHz users to Part 96. Indeed, the Commission is required to consider its own data collection and resources in its compliance with the RFA.[21]

Since the Commission first began accepting 3650-3700 MHz license applications in November 2008, ULS shows that the Commission has granted 2,774 Regular (i.e., not STA or developmental) licenses that remain in "Active" (i.e., not cancelled or expired) status as of November 30, 2017. The Commission has "Accepted" more than 63,000 registrations since 2008. But more importantly, since April 2015 when the Commission adopted the *CBRS Order* encouraging licensees to acquire equipment that can be upgraded to operate across the entire 3550-3700 MHz band, the Commission has "Accepted" more than 19,000 of these Registrations – roughly 30 percent of the total. This evidence of reliance on the 2015 rules is readily available in the ULS database, and it takes just a few minutes to enter the search parameters and access the information.

The Commission also should have expected that its experimental license database would illustrate the interests of those potentially affected by the contemplated PAL license rule

[20] *CBRS Order* at 4079.
[21] *See North Carolina Fisheries Ass'n, Inc. 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).

changes. Since April 2015, dozens of experimental licenses have been granted to 3650-3700 MHz licensees that are trialing equipment that is "capable of, or can be upgraded to, operation throughout the band [to] provide for the possibility of much greater spectrum access," consistent with the *CBRS Order*, and many more applications are pending. Commissioners Rosenworcel[22] and Clyburn[23] both noted the large number of trials in their separate statements accompanying the *NPRM*. But Commission staff drafting the *IRFA* apparently made no effort to undertake any review of its own database to see the potential effect the contemplated rules would have on 3650-3700 MHz licensees.

The Commission also should have reviewed the record, which is replete with dozens of comments filed by small broadband providers expressing concern that changing the PAL licensing rules would have a harmful impact on their plans to access adjacent CBRS spectrum as intended by the *CBRS Order*. Easily accessible in the Commission's ECFS database, many of these comments were cited and discussed in WISPA's Reply Comments and show the clear relationship between existing licensees in the 3650-3700 MHz band and potential bidders for PAL spectrum.[24] Yet the *IRFA* ignores this voluminous public record.

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[22] *NPRM* at 8114, Statement of Commissioner Jessica Rosenworcel, Dissenting ("[m]ore than 200 experimental authorizations have been granted").

[23] *Id.* at 8108, Concurring Statement of Commissioner Mignon Clyburn (noting that "[a]t least a dozen firms have obtained experimental authorizations to trial equipment and technology in the band. They are developing private networks to support an open architecture operating system for the Industrial Internet as well as smart grid, rural broadband, small cell backhaul, and other point-to-multipoint networks").

[24] *See, e.g.*, Letter from Anthony Will, Vice President, Broadband Corp, to Marlene H. Dortch, FCC Secretary, GN Docket No. 12-354 (filed July 24, 2017); Letter from Patrick Parks, President, SmartBurst LLC, to Marlene H. Dortch, FCC Secretary, GN Docket No. 12-354 (filed July 24, 2017), at 1 ("We have invested in and deployed equipment and currently provide services to users in this 3650-3700 MHz band and plan to continue to do so *unless the Commission adopts the proposal of the CTIA and T-Mobile due to the uncertainty it proposes*") (emphasis added); Comments of Vivint Wireless, Inc., GN Docket No. 12-354 (filed July 24, 2017), at 1, 2; Letter from Richard Bernhardt, Managing Director, Bernhardt Communications Company, to Marlene H. Dortch, FCC Secretary, GN Docket No. 12-354 (filed July 24, 2017), at 2 ("These proffered changes [by the Petitions] would devastate opportunities for WISPs and many others smaller and varied entities (than large providers) ability to enter, use and provide services under CBRS"); Letter from Craig Brown, Chief Executive Officer, Blueriver Networking Services, Inc.,

In preparing the *IRFA*, the Commission did not even mention the classification of small businesses that it specifically identified in 2015 and apparently did not even consult its own public databases. As a result, it cannot possibly know how many small entities would be directly impacted by the PAL rule changes contemplated by the *NPRM* and cannot make a reasonable assessment of the benefit of those proposals relative to the harm. Such information is also a material factor in a cost-benefit analysis as a good foundation for any proposed rule, or alternatively, it is part of "a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable."[25] These analyses and reviews should be conducted at the NPRM stage, but none was provided in either the *IRFA* or the *NPRM*.

II. THE *IRFA* FAILS TO IDENTITY THE SIGNIFICANT ECONOMIC IMPACT THAT THE CONTEMPLATED RULES WILL HAVE ON A SUBSTANTIAL NUMBER OF SMALL PROVIDERS

Reducing the economic impact of regulation on small businesses is very important. Chairman Pai recently stated that small providers are "critical to providing a more competitive marketplace."[26] The Chairman and other Commissioners have acknowledged this in other recent

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to Marlene H. Dortch, FCC Secretary, GN Docket No. 12-354 (filed July 24, 2017), at 2 ("To have this investment obsoleted in the short term by adopting the recommendations in the CTIA and T-Mobile petitions would be a devastating financial blow for a company such as ours"); Letter from Mike Boley, President and CEO, Wabash Communications, Inc., to Marlene H. Dortch, FCC Secretary, GN Docket No. 12-354 (filed July 24, 2017), at 2 ("If adopted, the mobile industry's proposals would undermine our existing investment in 3650-3700 GHz spectrum and inhibit further investment and deployment in the entire 150 Megahertz of spectrum").

[25] Advocacy RFA Guide at 74. Although the RFA itself does not specifically require a CBA or some form of economic modeling, an analysis of the economic impact is required. *Id.* A CBA *is* required under the Paperwork Reduction Act, as amended (44 U.S.C. § 3506(c)), therefore, a CBA conducted early in the rulemaking process can benefit agency decision-making overall under various statutes. *See* 5 U.S.C. § 605(a).

[26] Oral Statement of Chairman Ajit Pai, *Restoring Internet Freedom*, WC Docket No. 17-108 (Dec. 14, 2017) at 2.

proceedings,[27] but the Commission has nonetheless initiated this proceeding that considers rules that would undo the benefits to small businesses the Commission adopted less than three years ago and make it more difficult for small providers to compete.[28] Further, the Commission has called into question its pledge to implement a flexible regulatory scheme that "should make the 3.5 GHz Band hospitable to a wide variety of users, deployment models, and business cases, including some solutions to market needs not adequately served by our conventional licensed or unlicensed rules."[29] The proposed rules would make it very difficult, if not impossible for small users to compete for PALs because increasing the size of PAL license areas and lengthening the license terms will undoubtedly and dramatically increase the costs of PALs so as to effectively foreclose small entities from participating in PAL auctions. In his Statement accompanying the *NPRM*, Commissioner O'Rielly noted that "[w]e have wireless networks that are the envy of the

[27] *See e.g.*, Statement of Chairman Ajit Pai, *Small Business Exemption From Open Internet Transparency Requirements*, GN Docket No. 14-28 (March 2, 2017) ("With this action [referring to Commission's adoption of small provider exemption from transparency requirements], the small businesses that are critical to injecting competition into the broadband marketplace will be better able to do just that."); Remarks of FCC Chairman Ajit Pai at The Newseum, *The Future of Internet Freedom* (April 26, 2017) ("Our nation's smallest providers simply do not have the means or the margins to withstand the Title II regulatory onslaught. And remember—these are the kinds of small companies who are critical to meeting consumers' hope for a more competitive broadband marketplace and closing the digital divide."); and Statement of Commissioner Mignon L. Clyburn, *Updating Part 1 Competitive Bidding Rules, WT Docket No. 14-170, Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions, GN Docket No. 12-268, Petition of DIRECTV Group, Inc. and EchoStar LLC for Expedited Rulemaking to Amend Section 1.2105(a)(2)(xi) and 1.2106(a) of the Commission's Rules and/or for Interim Conditional Waiver, RM-11395, Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures*, WT Docket No. 05-211 (July 16, 2015) (citing to the story of a "small, innovative company identifying an underserved market, developing an inventive business model, growing into a significant market player, and – in the process – providing competition and innovation in a dynamic marketplace").

[28] In fact, the Commission acknowledges that the *CBRS Order* was an accumulation of extensive public notice and comments over multiple proceedings since 2013. *See CBRS Order* at 3961-64. "Starting from some of the recommendations of the President's Council of Advisors on Science and Technology . . ., these rules incorporate a wide range of viewpoints and information *collected through three rounds of comments*." *Id.* at 3961 (emphasis added).

[29] *Id.* at 3962.

world because of our tried and true auction procedures and rules that promote investment."[30] But "tried and true" is the antithesis of the spirit and intent of CBRS as an innovation band, one that would be hospitable to small businesses as well as the large wireless carriers.

The problem with the *IRFA* is that it does not acknowledge or adequately explain this radical shift from the *CBRS Order* and *FRFA.* For example, the Commission expressly stated in the *CBRS Order* that one of its goals was to "establish the geographic component of PALs in a way that allows flexible and targeted network deployments, promoting intensive and efficient use of the spectrum, but also allowing easy aggregation to accommodate a larger network footprint."[31] The accompanying *FRFA* similarly emphasized that "the rules the Commission adopts should benefit small entities by giving them more information, more flexibility and more options for gaining access to valuable wireless spectrum."[32] But the *IRFA* fails to acknowledge these points, much less recognize how the contemplated rules might undermine these objectives.

Nor does the Commission appear to understand that the contemplated rule changes would negate the business plans and strand the investments of a substantial number of small providers that have relied on the *CBRS Order* to provide service in the 3650-3700 MHz band. The Commission asserted that one of the reasons for the proposed rules is to "encourage robust investment in network deployment."[33] In reliance on the current rules that offer low barriers to license acquisition and promote flexibility, many small entities have already made investments to deploy service in the 3650-3700 MHz band to unserved and underserved communities.[34] Such

[30] *NPRM* at 8112, Statement of Commissioner Michael O'Rielly.
[31] *CBRS Order.* at 3991.
[32] *FRFA* at 4127.
[33] *NPRM* at 8072 (¶1).
[34] *See, e.g.*, Comments of The Wireless Internet Service Providers Association, General Docket No. 12-354 (filed July 24, 2017) ("WISPA Comments"); and Joint Comments of The Rural Wireless Association, Inc. and NTCA The Rural Broadband Association, GN Docket No. 12-354 (filed July 24, 2017) ("RWA/NTCA Comments").

investments are very important, as many small providers reduced overall investment given the uncertainties presented by Title II regulation. According to a recent survey of WISPA's operator members, more than 63 percent reported that they had invested and deployed equipment in reliance on the rules adopted in 2015, and 60 percent reported that they had reduced investment and/or curtailed investment and deployment based on the threat of changes to the PAL licensing rules.[35] The proceeding is *already* having a chilling effect on small entities. Given that this is the case with *contemplated* rules, adopting *final* rules undoubtedly will enshrine a "disparity in impact on small entities [that] may make it difficult for them to compete in a particular sector of the economy than large business"[36] and prohibit the ability "to make future capital investments, thereby severely harming its competitive ability, particularly against large firms."[37]

The Commission's neglect of the record established in response to the Petitions demonstrates a disparity in regulatory impact on the contemplated rules between large and dominant wireless carriers and their equally large vendors/suppliers compared to small providers and smaller vendors/suppliers. This contradicts the very reason the RFA was first adopted by Congress – to ensure that federal agencies (including independent agencies) do not ignore the significant economic impact of regulations on small business. Congress acknowledged that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity."[38] It stated further that "[a]gencies should not give a narrow reading to what constitutes a 'significant economic impact' . . . a determination of

[35] WISPA's concurrently filed Comments provide a more fulsome discussion of the survey results.
[36] Advocacy RFA Guide at 18.
[37] *Id.* at 19.
[38] Congressional Findings and Declaration of Purpose, § (a)(4), 5 U.S.C. §§ 601 *et seq.*

significant economic effect is not limited to easily quantifiable costs."[39] Examples of such significant economic impacts identified by Congress include "a rule that provides a strong disincentive to seek capital . . . and new capital requirements beyond the reach of the entity."[40] Both examples are relevant in this proceeding.

The Trump Administration has recently targeted regulations as a burden on small businesses. Just two weeks ago, President Trump recognized that small businesses bear an "enormous ongoing burden" to comply with regulations.[41] The President recognizes that over-regulation costs American jobs, productivity and the ability to grow. The contemplated rules would exacerbate this problem for small providers, in addition to lessening their ability to continue to deploy service in unserved and underserved areas.

III. THE *IRFA* FAILS TO ADEQUATELY RECOGNIZE AND ANALYZE THE VARIOUS SIGNIFCANT ALTERNATIVES THAT WILL REDUCE THE ECONOMIC HARM TO SMALL PROVIDERS

The *IRFA* also fails to "contain a description of any significant alternatives . . . which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[42] It falls far short of meeting these requirements by ignoring obvious alternatives and impact of the proposed rules already in the administrative record. The *IRFA* lists a few alternatives,[43] but it did not provide a description with a meaningful analysis as required by the RFA,[44] or acknowledge the issues already raised in comments responsive to the Petitions. For example, the Commission asks "whether to increase

[39] Advocacy RFA Guide at 20, *quoting* 126 Cong. Rec. S10,942 (Aug. 6, 1980)).
[40] *Id*.
[41] Tim Haines, *President Trump Cuts Red Tape: On Deregulation, Winning 22-1*, Real Clear Politics, Dec. 14, 2017, *available at* https://www.realclearpolitics.com/video/2017/12/14/president_trump_cuts_red_tape_on_deregulation_winning_22-1.html (last visited Dec. 20, 2017).
[42] 5 U.S.C. § 603(c) (emphasis added).
[43] *IRFA* at 8105-06 (¶¶ 20-21).
[44] 5 U.S.C. § 603(c); *see also* Advocacy RFA Guide at 37-40.

the PAL geographic licensing area from census tracts to a larger area, such as PEAs, and seeks comment on the effect this would have on small entities, including how it could affect small entities' access to spectrum, particularly in rural areas."[45] This question has already been addressed in the proceeding below, where WISPA clearly stated that:

> simply put, requiring PALs to be auctioned by PEAs will exponentially increase the geographic area and population of auctioned spectrum, dramatically increase the cost of PALs, and assuredly foreclose participation by smaller providers that have a desire to serve smaller areas and lack the ability to bid against T-Mobile and its multi-billion dollar mobile wireless competitors for areas that far exceed the size of smaller, targeted areas.[46]

Other commenters agreed that the economic harm to small entities would be significant. RWA and NTCA, trade associations for small rural telecommunications companies commented that:

> [c]hanging the geographic area licensing scheme at this late date all but ensures that *no small providers will successfully utilize the spectrum*. Only large carriers (*i.e.*, the Petitioners) have the resources necessary to offer service on a PEA basis. It would be a mistake, ultimately harming rural consumers and the objectives of competition, *to deny rural providers the opportunities afforded by the spectrum at issue*.[47]

In its *CBRS Order*, the Commission itself noted that the smaller geographic areas "strongly supports our goal, particularly in 'prescribing area designations,' of providing economic opportunity to a wide variety of applicants," as mandated under Section 309(j) of the Communications Act of 1934, as amended.[48] It further remarked that "[t]hat mandate is particularly compelling in light of opportunities for participation with much lower capital

[45] *IRFA* at 8105 (¶ 20).
[46] WISPA Comments at 20. WISPA adds that "[t]his problem is exacerbated by orders of magnitude when combined with the petitioners' proposals to lengthen the license terms to 10 years and to add a renewal expectancy that would essentially make PALs permanent. The Commission should reject this proposal." *Id*.
[47] RWA/NTCA Comments at 6 (emphases added).
[48] *CBRS Order* at 3992.

investment requirements associated with smaller service areas, as we have previously recognized in other services trying to address the substantial challenges faced by new entrants."[49]

Notwithstanding, there is no discussion or analysis in the *IRFA* that explains why the Commission proposes to change course to the detriment of the same small entities it encouraged in the *CBRS Order*. There is zero acknowledgement of its previous rationale for the smaller geographic areas, nor is there any explanation of why the previous balancing of interests may no longer be valid. The Commission explained in the *CBRS Order* that "larger, traditional license areas favored by some commenters are inconsistent with our desire to promote innovative, low power uses in this band, such as small cells, which align well with small, targeted geographic areas such as census tracts."[50] The Commission also heralded its adoption of census tracts in the *CBRS Order's FRFA* by stating that "[t]he Commission's actions in the *R&O* thus constitute a significant benefit for small businesses."[51] But the Commission mentions nothing in this *IRFA*.[52]

Significantly, the Commission also fails to explain in the *IRFA* and the *NPRM* how its new licensing proposals for larger geographic licenses, ten-year license terms and renewal expectancies meet the mandates of Section 309(j) to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural

[49] *Id.*, *citing* to AWS-1 and AWS-3 Reports and Orders).
[50] *Id.* at 3993.
[51] *FRFA* at 4123.
[52] The Commission also acknowledged in 2015 that secondary market transactions to divest large swaths of spectrum "could impose significant transaction costs" (*CBRS Order* at 3993), but in the *IRFA*, it merely requests comment whether it should allow licensees to disaggregate or partition their PALs without any mention of the potential high costs for small entities, or proposing its own alternatives or ways to reduce the high transaction costs. *IRFA* at 8105 (¶ 20).

telephone companies, and businesses owned by members of minority groups and women."[53] Section 309(j) is an applicable statute to which any proposed rule *and* an alternative must be measured.

The Commission thus has failed to meet its obligations under the RFA (and Executive Orders) to identify and discuss "significant alternatives" at the *IRFA* stage, a preliminary step that is critical to preparing an adequate FRFA and reasonable substantive rules that will not harm small entities.[54]

IV. THE COMMISSION'S STANDARD FOR CONSIDERATION OF ALTERNATIVES TO A PROPOSED RULE VIOLATES THE RFA

The last paragraph of the *IRFA* includes a deeply flawed and unlawful standard of when and what alternatives to a proposed rule will be considered by the Commission. The *IRFA* states that:

> [w]ith respect to these specific proposals on which the Commission seeks comment in the Notice, the Commission has not at this time excluded any alternative proposal, but would do so in this proceeding *if the record indicates that a particular proposal would have a significant and unjustifiable adverse economic impact on small entities*.[55]

First, this sentence abdicates the Commission's statutory obligation by indicating that the Commission will only consider proposed alternatives that are raised in the record, as opposed to alternative proposals that the Commission may offer *sua sponte*. The RFA requires the Commission to identify significant alternatives at the outset of a rulemaking proceeding, not simply rely on a record that lacks a proper foundation for small businesses. Simply put, without any discussion of economic impact and alternatives, many commenters cannot properly prepare

[53] 47 U.C.S. § 309(j)(3)(B).
[54] *See Southern Offshore Fishing*, 995 F. Supp. at 1437 ("the [RFA] compels the [agency] to make a 'reasonable, good-faith effort,' prior to issuance of a final rule, to inform the public about potential adverse effects of [its] proposals and about less harmful alternatives").
[55] *IRFA* at 8106 (¶ 22) (emphasis added).

meaningful comments. The RFA requires the Commission to consider *all* proposals and to identify its own proposals at the IRFA stage.[56] The Commission's sole reliance on the administrative record in consideration of significant alternatives clearly violates the RFA.

Second, contrary to the RFA, the Commission seeks to impose an unreasonable high standard for rejecting an alternative proposal based on an "unjustifiable adverse impact on small entities."[57] This purported standard regarding an agency's consideration of significant alternatives is inconsistent with the RFA. The RFA requires the Commission to consider significant alternatives that accomplish the stated objectives of the applicable statutes *and* which minimize any significant economic impact.[58] It does not require rejection of alternatives that are deemed to be "unjustifiable." Rather, alternatives could simply fail to reduce the economic harm to small businesses subject to the contemplated rules. The Commission cannot impose its own standard and maintain compliance with the RFA.

[56] 5 U.S.C. 603(c) ("Each initial regulatory flexibility *shall contain a description of any significant alternatives to the proposed rules* which accomplish the stated objectives of the applicable statutes and which minimize any significant economic impact of the proposed rules on small entities")(emphasis added); *see also* Advocacy RFA Guide at 37-38 ("Analyzing alternatives establishes a process for the agency to evaluate proposals that achieve the regulatory goals efficiently and effectively without unduly burdening small entities, erecting barriers to competition, or stifling innovation. This process provides an additional filter by which the agency conducts rational rulemaking mandated by the APA. . . . [T]he RFA requires the agency to undertake an analysis in order to discover less costly methods of attaining the statutory objectives of the rulemaking agency.").

[57] A previous Presidential Memoranda stated that, "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 comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action." Presidential Memoranda at 3828, *supra* note 13. This statement refers to regulatory actions overall; it does not refer to a significant alternative to a burdensome regulation.

[58] 5 U.S.C. §§ 603(c), 604(6).

Conclusion

The material flaws in the *IRFA* exacerbate the demonstrated harmful impact that contemplated changes to the PAL licensing rules will have on small entities – the same small entities that the Commission sought to specifically empower in the *CBRS Order* by enabling them to access licensed spectrum. The Commission has failed to recognize small providers directly subject to the *NPRM*, failed to review and consider information available in its own public databases, and failed to conduct the requisite analysis regarding the significant detrimental economic impact that the proposed rules will impose on a substantial number of small entities by effectively foreclosing them from participating in PAL auctions. The *IRFA*, regrettably, does nothing to help prevent such an outcome. This is certainly not what Congress intended.

The defective *IRFA* constitutes an independent basis to reject the contemplated changes to the PAL rules. At a minimum, the Commission should conduct extensive outreach, also mandated by the RFA,[59] and carefully address the concerns of small entities in its deliberations.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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By: */s/ Chuck Hogg, Chairman*
/s/ Mark Radabaugh, FCC Committee Chair
/s/ Fred Goldstein, Technical Consultant

Stephen E. Coran
S. Jenell Trigg
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
(202) 416-6744
Counsel to the Wireless Internet Service Providers Association

[59] *See* 5 U.S.C. § 609.