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OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416

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February 29, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: Amendment of Part 15 of the Commission's
Rules Regarding Spread Spectrum Devices; ET Docket No. 99-231

Dear Ms. Salas:

The Office of Advocacy of the U.S. Small Business Administration (Advocacy) hereby clarifies its comments criticizing an initial regulatory flexibility analysis (IRFA) that the Federal Communications Commission (Commission) prepared in this proceeding. The proposed rules may have a beneficial impact on small entities, including those that use data networking equipment in home-based businesses, and many small businesses participated in this rulemaking. But this does not reduce the Commission's obligations under the Regulatory Flexibility Act (RFA).[1] Thus, when it issues final rules in this matter, the Commission should conduct a *complete* final regulatory flexibility analysis (FRFA), outlining the impact on small business.

The Commission proposed modified rules to govern frequency hopping systems, in response to a request by the Home RF Working Group (HRFWG).[2] The Commission did not discuss the impact its proposal would have on small business, and Advocacy filed comments regarding the Commission's failure.[3]

However, Proxim, Inc., a member of HRFWG, filed a letter discussing the very impact that the Commission omitted.[4] Proxim, Inc. highlights small business's role in this proceeding and points out the benefits of the proposal for small business. The Commission's IRFA fails to discuss this beneficial impact. But RFA requires the Commission to discuss its proposal's significant economic impact, whether that impact is positive or negative.[5]

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[1] Pub. L. No. 96-354, Stat. 1164 (codified at 5 U.S.C. § 601, et seq.).

[2] *See Amendment of Part 15 of the Commission's Rules Regarding Spread Spectrum Devices, Notice of Proposed Rulemaking*, ET Docket No. 99-231, released June 24, 1999, paragraph 5.

[3] *See Comments of Advocacy*, dated October 4, 1999 (IRFA failed to describe impact on small business or alternatives designed to minimize adverse impact). Today's letter is exempt from the Commission's rules on ex parte presentations. *See* 47 CFR § 1.1204(a)(5) (1997).

[4] *See* ex parte letter filed by Proxim, Inc., dated January 11, 2000.

[5] Congress apparently considered "significant" to refer to both harmful and beneficial impact, therefore suggesting the need to analyze both. The RFA's legislative history provides explicit insights into the

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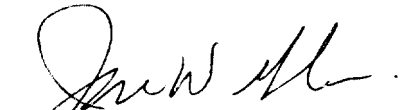
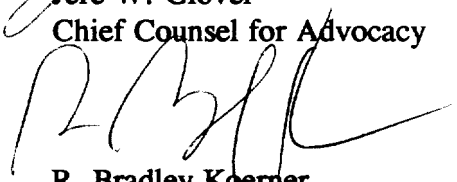
When the Commission fails to share relevant information, it risks blindsiding the public. This is why RFA requires agencies to analyze a rule's impact on small business and disclose that information. An agency's NPRM should contain all information necessary to inform the public on a proposal's impact on small business; it should not simply reference the party requesting the rule change. If a proposed rule may impact small business, the agency must disclose and analyze this impact. In this matter, had the Commission discussed its proposal's positive impact, Advocacy could have avoided filing critical comments.

All Advocacy seeks in this matter is compliance with the analytical processes that RFA mandates. Advocacy does not wish to delay the issuance of final rules while the Commission issues a revised IRFA. Since small business has in fact participated in the rulemaking process and the modified rules will have a beneficial impact on small business, the Commission should rectify its inadequate IRFA by conducting the proper regulatory flexibility analysis in conjunction with the formulation of its final rules.[6]

Respectfully submitted,



Jere W. Glover
Chief Counsel for Advocacy



R. Bradley Koerner
Assistant Chief Counsel for Telecommunications

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treatment of beneficial impact: "Agencies may undertake initiatives which would directly benefit such small entities. Thus, the term 'significant economic impact' is neutral with respect to whether such impact is beneficial or adverse. The statute is designed not only to avoid harm to small entities but also to promote the growth and well-being of such entities." 126 CONG. REC. H8468 (September 8, 1980) (discussion of issues from House consideration of the RFA). Moreover, early drafts of the RFA used the term "substantial adverse" impact, but the final bill used "substantial impact." See S.2147, 96th Congress, 1st Sess. (1979). The RFA does not require the Commission to endeavor to *minimize* beneficial impact; this would be contrary to the law's purpose. But the Commission could mitigate negative impact by discussing positive impact, and discussion of any impact encourages informed public comment.

[6] When the Commission conducts its FRFA, it should describe which companies the rules will affect, and should explain the impact. *See* 5 U.S.C. § 604. If there may be negative effects, the Commission should discuss these too. The Commission should discuss the factual, policy, and legal reasons for modifying its rules, and any alternate approaches it may have considered. *See* 5 U.S.C. § 604(a)(5). The Commission should discuss comments it received regarding the rules' impact on small business, and how the comments affected the final rules. *See* 5 U.S.C. § 604(a)(2).

cc: Chairman Kennard
Commissioner Ness
Commissioner Furchtgott-Roth
Commissioner Powell
Commissioner Tristani
Francisco Montero
Dale N. Hatfield
Rebecca Dorch
Julius Knapp