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United States Senate  
COMMITTEE ON SMALL BUSINESS  
WASHINGTON, DC 20510-6350

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AUG 2 2000

FEDERAL COMMUNICATIONS COMMISSION  
DEPT OF THE INTERIOR

August 8, 2000

Chairman William Kennard  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

By Facsimile: (202) 418-2801

Re: Amendment of Part 15 of the Commission's Rules Regarding  
Spread Spectrum Devices, ET Docket 99-231, *Ex Parte Filing*

Dear Chairman Kennard:

On July 20, 1999, the Federal Communications Commission (Commission) published a notice of proposed rulemaking (NPRM) to revise the rules under Part 15 governing wireless computer networking equipment that is commonly targeted to the small office and home office user. As recognized in the NPRM, section 603 of the Regulatory Flexibility Act (as amended by the Small Business Regulatory Enforcement Fairness Act of 1996) requires the Commission to prepare an Initial Regulatory Flexibility Analysis (IRFA) on the proposed rule. We are of the opinion that this rulemaking does not meet the statutory requirements of the Regulatory Flex Act, and that the IRFA (attached) clearly does not meet Congress's intention for a full review of the impact of the rulemaking on small businesses. Therefore, we urge you to withhold finalizing this regulation until an acceptable and appropriate IRFA is conducted and published.

At a minimum, as mandated by the Regulatory Flexibility Act, a properly conducted IRFA would accurately describe the reasons for the rulemaking, describe the full impacts on affected small businesses, and provide at least one regulatory alternative for reducing the impacts on small businesses. Affected small businesses could include manufacturers of computer peripheral equipment with less than 1,000 employees, manufacturers of household appliances with less than 500 employees, and manufacturers of communications equipment with less than 750 employees. A properly conducted IRFA would describe these categories of affected small businesses.

The FCC's IRFA fails to meet the requirements of the statute in three ways. First, it states that the "reason for action" is to obtain comment on the proposal. The Regulatory

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Flexibility Act directs the agency, or in this case the FCC, to describe why the action, i.e. the rule change, is being taken. (See Section 603 (b)(1).) FCC's IRFA merely states that the "rule making proceeding is initiated to obtain comment regarding proposed changes to the regulations for non-licensed transmitters." This describes the reason for publication of the NPRM in the Federal Register, but it does not describe the underlying reason for the proposed rulemaking which is the question posed by the Regulatory Flexibility Act. The IRFA also does not discuss the nature and extent of the reporting, recordkeeping and other compliance requirements including the professional skills necessary to satisfy the reporting and recordkeeping requirements as required by the Regulatory Flexibility Act. (See Section 603 (b)(4).) Finally, it fails to offer for consideration even a **single** alternative that would minimize the impact on small businesses, again, as required by Section 603 (c) of the Regulatory Flexibility Act. We thus concur with the comments of the Office of Advocacy that the net result of these failings is that the IRFA, "provides no information to which the public can react in an informed manner." (Comments of the Office of Advocacy, October 4, 1999, page 2, attached.)

Perhaps of even greater importance, a properly conducted IRFA would examine the impacts on the small businesses which purchase and operate this equipment. As operators of telecommunications equipment certified under Part 15, these purchasers are subject to the regulatory authority of the Commission and therefore fall clearly within the scope of the IRFA. The docket for this rulemaking appears to raise serious concerns that devices approved under the rule could cause interference with similar devices already operating - and likely to be purchased in the near future by small businesses. Consumer and industry investment in this technology continues to increase exponentially. For example, it has been estimated by the Small Business Administration that small and home-based businesses spent \$9 billion on computer networking technologies in 1999 alone. The 2.4 GHz wireless equipment industry estimates that consumers spent \$1 billion in 1999 on their wireless equipment, and they project that consumers will spend \$3 billion on such equipment (all of which was developed based on current FCC rules) this year.

As the Chairman and Ranking Member, we have a special interest in compliance with the Regulatory Flexibility Act. While we are not taking a position on, or judging the interference claims raised in the docket, or their merits, we firmly believe that this possible impact on vast numbers of small business purchasers of this equipment must be assessed under the Regulatory Flexibility Act. As a result, we concur with the Office of Advocacy's request that, "the Commission should not establish final rules in this proceeding until it has conducted a proper initial regulatory flexibility analysis and [should] seek comment both on the effect of its proposal on small business and on its analysis of regulatory alternatives." (Comments of the Office of Advocacy, October 4, 1999, page 2.)

We ask that you provide the Senate Committee on Small Business with a copy of a revised IRFA that meets the requirements of the Regulatory Flexibility Act prior to moving forward with this rulemaking, and ask that you submit it to the Committee no later than September 15, 2000. Thank you for your prompt attention to our request. If you have any

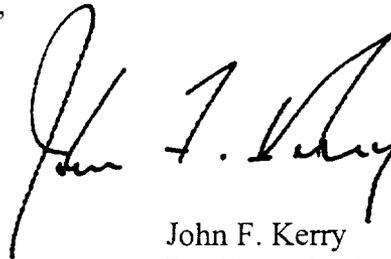
Chairman of the FCC William Kennard  
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questions or concerns, please contact Marc Freedman of Senator Bond's staff at (202) 224-5175,  
or Patricia Forbes for Senator Kerry at (202) 224-8496.

Sincerely,



Christopher S. "Kit" Bond  
Chairman



John F. Kerry  
Ranking Member

cc: Commissioner Harold Furchtgott-Roth  
Commissioner Michael Powell  
Commissioner Susan Ness  
Commissioner Gloria Tristani

Secretary to the Commission,  
Magalie Roman Salas

## APPENDIX A

**Initial Regulatory Flexibility Analysis**

As required by Section 603 of the Regulatory Flexibility Act,<sup>1</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected significant economic impact on small entities by the policies and rules proposed in this *Notice of Proposed Rule Making (Notice)*. Written public comments are requested on the IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice* provided above. The Commission shall send a copy of this *Notice*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

**A. Reason for Action.**

This rule making proceeding is initiated to obtain comment regarding proposed changes to the regulations for non-licensed transmitters.

**B. Legal Basis.**

The proposed action is taken pursuant to Sections 4(i), 301, 302, 303(e), 303(f), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 301, 302, 303(e), 303(f), and 303(r).

**C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply.**

For the purposes of this NPRM, the RFA defines a "small business" to be the same as a "small business concern" under the Small Business Act, 15 U.S.C. § 632, unless the Commission has developed one or more definitions that are appropriate to its activities.<sup>2</sup> Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the Small Business Administration (SBA).<sup>3</sup> SBA has defined a small business for Standard Industrial Classification (SIC) category 4812 (Radiotelephone

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<sup>1</sup> 5 U.S.C. § 603.

<sup>2</sup> *See* 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 5 U.S.C. § 632).

<sup>3</sup> 15 U.S.C. § 632.

Communications) to be small entities when they have fewer than 1500 employees.<sup>4</sup> Given this definition, nearly all such companies are considered small.

**D. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements.**

Part 15 transmitters are already required to be authorized under the Commission's certification procedure as a prerequisite to marketing and importation. See 47 C.F.R. §§ 15.101, 15.201, 15.305, and 15.405. The changes proposed in this proceeding would not change any of the current reporting or recordkeeping requirements. Further, the proposed regulations adds permissible measurement techniques and methods of operation. The proposals would not require the modification of any existing products.

**E. Significant Alternatives to Proposed Rules Which Minimize Significant Economic Impact on Small Entities and Accomplish Stated Objectives.**

None.

**F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule.**

None.

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<sup>4</sup> 13 C.F.R. § 121.201.

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

In the Matter of )  
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Amendment of Part 15 of the Commission's )  
Rules Regarding Spread Spectrum Devices ) ET Docket No. 99-231  
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**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”)<sup>1</sup> respectfully submits these Comments to the *Notice of Proposed Rulemaking* (“NPRM”)<sup>2</sup> 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

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<sup>1</sup> 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.

<sup>2</sup> *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,<sup>3</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act<sup>4</sup> (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.<sup>5</sup> 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."<sup>6</sup> 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.

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

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

<sup>5</sup> See *NPRM*, Appendix A, pages 8-9.

<sup>6</sup> 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”).<sup>7</sup> The IRFA must describe the impact of the proposed rule on small entities.<sup>8</sup> The IRFA also must describe alternatives, consistent with the proposed rules’ stated goals, that would minimize significant economic impact on small entities.<sup>9</sup> 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.<sup>10</sup> But the Commission’s stated reason is to “obtain comment regarding proposed changes to the regulations for non-licensed transmitters.”<sup>11</sup> There must be more to it than that. Obviously the Commission must have substantive reasons for proposing new spread spectrum rules.<sup>12</sup> 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.<sup>13</sup> The IRFA in this instance seems to identify the entities affected as small

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<sup>7</sup> See 5 U.S.C. § 603(a).

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

<sup>9</sup> See 5 U.S.C. § 603(c).

<sup>10</sup> See 5 U.S.C. §§ 603 (a)(1) and (a)(2).

<sup>11</sup> See *NPRM*, Appendix A, page 8.

<sup>12</sup> 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.

<sup>13</sup> See 5 U.S.C. § 603(b)(3).

radiotelephone communications companies, but this is unclear.<sup>14</sup> 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.”<sup>15</sup> 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.<sup>16</sup> The Commission states that the rules would not change current reporting or record-keeping requirements, nor require modification of existing products.<sup>17</sup> 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.”<sup>18</sup> 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

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<sup>14</sup> 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.

<sup>15</sup> See *NPRM*, Appendix A, page 9.

<sup>16</sup> See 5 U.S.C. § 603(b)(4).

<sup>17</sup> See *NPRM*, Appendix A, page 9.

<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup>

The IRFA's proposed alternatives are easy to summarize: none.<sup>21</sup> 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

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<sup>19</sup> See 5 U.S.C. § 603(c).

<sup>20</sup> See 5 U.S.C. § 603(c)(1-4).

<sup>21</sup> 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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for Advocacy



R. Bradley Koerner  
Assistant Chief Counsel  
for Telecommunications

October 4, 1999