



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

September 7, 2000

William E. Kennard
Chairman
Federal Communications Commission
445 12th St., S.W.
Room 8-B201
Washington, DC 20554

RE: Ex Parte Presentation in a Non-Restricted Proceeding
Narrowband Personal Communications Services; Competitive Bidding (GN Dkt. No. 90-314, ET Dkt. No. 92-100, PP Dkt. No. 93-253); Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico (WT Dkt. No. 97-112, CC Dkt. No. 90-6); Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Dkt. No. 98-147, CC Dkt. No. 98-11, CC Dkt. No. 98-26, CC Dkt. No. 98-32, CC Dkt. No. 98-78, CC Dkt. No. 98-91); Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations (ET Dkt. No. 00-11); Cable Television Consumer Protection and Competition Act of 1992; Cable Act Reform Provision of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules (CS Dkt. No. 98-82, CS Dkt. No. 96-85).

Dear Chairman Kennard:

As part of its statutory duty¹ to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory enforcement Fairness Act of 1996 ("SBREFA"),² the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Federal Communications Commission's ("FCC" or "Commission") actions in the above-mentioned proceeding.³ In each of these actions, the Commission failed to include the regulatory flexibility analysis when it published the agency's action in the Federal Register. The RFA requires the analyses to be published in the Federal

¹ Because this communication is a result of Advocacy's statutory duty, it is exempt from the Commission's rules on ex parte presentations. See 47 CFR § 1.1204(a)(5)(1997).

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ Narrowband Personal Communications Services; Competitive Bidding (GN Dkt. No. 90-314, ET Dkt. No. 92-100, PP Dkt. No. 93-253); Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico (WT Dkt. No. 97-112, CC Dkt. No. 90-6); Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Dkt. No. 98-147, CC Dkt. No. 98-11, CC Dkt. No. 98-26, CC Dkt. No. 98-32, CC Dkt. No. 98-78, CC Dkt. No. 98-91); Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations (ET Dkt. No. 00-11); Cable Television Consumer Protection and Competition Act of 1992; Cable Act Reform Provision of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules (CS Dkt. No. 98-82, CS Dkt. No. 96-85).

Register and failure to do so frustrates one of the key elements of the RFA and denies small businesses a valuable tool in the regulatory process.

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁴ to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.⁵ Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of 1980,⁶ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act.⁷

The RFA was designed to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁸ The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and consistent with its public policy objectives.⁹ The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate a rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing any disproportionate burden on small entities.¹⁰

The RFA requires all federal agencies to publish both the initial regulatory flexibility analysis¹¹ and the final regulatory flexibility analysis¹² in the Federal Register. As explained above, one of the purposes of the RFA is for agencies to communicate and explain their findings. It is not just a mere procedure but the final step in a process that begins with federal agencies considering the potential impact of their regulations on small businesses, then weighing alternatives, and finally communicating that thought process to affected small businesses. If agencies do not begin their regulatory development process questioning their impact on small businesses, the intent of the RFA is thwarted.

⁴ Codified as amended at 15 U.S.C. §§ 634 a-g, 637.

⁵ 15 U.S.C. § 634(c)(1)-(4).

⁶ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

⁷ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

⁸ 5 U.S.C. § 601(4)-(5).

⁹ See generally, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 ("Advocacy 1998 RFA Implementation Guide").

¹⁰ 5 U.S.C. § 604.

¹¹ 5 U.S.C. § 603 (a) ("The initial regulatory flexibility analysis or a summary shall be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule.").

¹² 5 U.S.C. 604(b) ("The agency shall make copies of the final regulatory flexibility analysis available to the members of the public and shall publish in the Federal Register such analysis or a summary thereof.").

Publication in the Federal Register is an important element of communication between the agency and the affected body. Not every small business can constantly monitor the FCC's Web site, and many small businesses do not have access to the Internet. Moreover, a small business that reads through the Federal Register is informed of any agency's action that affects it, not just the FCC.

Congress recognized the value of the Federal Register as a way of reaching small businesses, which is why it expressly required all federal agencies to publish their regulatory flexibility analyses in the Federal Register. Additionally, Congress saw the need for ensuring small business participation and required all agencies to assure that small entities are given an opportunity to participate in the rulemaking.¹³ This requirement and the requirements to publish the regulatory analyses in the Federal Register are judicially reviewable.¹⁴

The RFA was designed to give small businesses and federal agencies a tool to craft better rules. By failing to include its regulatory analysis in the Federal Register, the Commission is denying small businesses access to that tool that Congress gave them. Furthermore, the FCC is denying itself an important opportunity to notify the public of its analysis and gain public comment.

In the regulatory actions listed below, the FCC failed to include its regulatory flexibility analysis or a summary in the Federal Register.

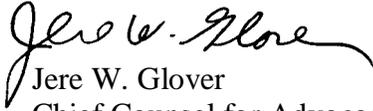
- *In re* Narrowband Personal Communications Services; Competitive Bidding, 65 Fed. Reg. 35,875 (2000).
- *In re* Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico, *Notice of Proposed Rulemaking*, 65 Fed. Reg. 24,168 (2000).
- *In re* Deployment of Wireline Services Offering Advanced Telecommunications Capability, 65 Fed. Reg. 7,744 (2000).
- *In re* Establishment of an Improved Model for Predicting the Broadcast Television Field Strength Received at Individual Locations, 65 Fed. Reg. 4,923 (2000).
- *In re* Cable Television Consumer Protection and Competition Act of 1992; Cable Act Reform Provision of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules, 64 Fed. Reg. 67,193 (1999).

To rectify these omissions and to come into compliance with the law, the FCC must print the regulatory flexibility analyses for the actions listed above in the Federal Register as soon as possible. Furthermore, to comply fully with the RFA, the Commission must publish its regulatory flexibility analyses on all future regulatory actions in the Federal Register.

¹³ 5 U.S.C. § 609(a).

¹⁴ 5 U.S.C. § 611(a)(1).

Sincerely,



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cc:

Commissioner Susan Ness

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Commissioner Gloria Tristani

Anthony Bush, Acting Chief, Office of Communications Business Opportunities

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