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

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| In the Matter of | ) | |
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| Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets | ) | MM Docket No. 01-317 |
| | ) | |
| Definition of Radio Markets | ) | MM Docket No. 00-244 |

**Comments of the**
**Office of Advocacy, U.S. Small Business Administration**
**on the Initial Regulatory Flexibility Analysis of the**
**Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration ("Advocacy") submits these Comments to the Federal Communications Commission ("FCC" or "Commission") regarding its *Notice of Proposed Rulemaking* ("NPRM")[1] in the above-captioned proceeding. In the NPRM, the Commission seeks to examine the effect that consolidation has had on the radio broadcast industry and to consider possible changes to its local radio ownership rules and policies to reflect the current radio marketplace.[2]

Advocacy recommends that the Commission convert the NPRM to a Notice of Inquiry ("NOI"). The Commission's NPRM seeks extensive comment on issue areas rather than specific proposals or tentative conclusions. These sorts of requests to the public are better suited for an NOI than a proposed rule. Furthermore, when the Commission proposes specific rules, it

[1] *In re* Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets and Definition of Radio Markets, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, MM Dkt. No. 01-317, MM Dkt. No. 00-244, FCC 01-329 (rel. Nov. 9, 2001).
[2] NPRM at para. 1.

must complete a supplemental initial regulatory flexibility analysis ("IRFA") to comply with the Regulatory Flexibility Act of 1980 ("RFA"),[3] as amended by the Small Business Regulatory Enforcement Fairness Act, Subtitle II of the Contract with America Advancement Act.[4]

**1. Advocacy Background**

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305[5] to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for the receipt of complaints concerning the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.[6] Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the RFA.

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.[7] 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 appropriate to its public policy objectives.[8] The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to

[3] Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).
[4] Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).
[5] Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637).
[6] 15 U.S.C. § 634(c)(1)-(4).
[7] 5 U.S.C. § 601(4)-(5).
[8] *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*").

competition. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each 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.[9]

**2. Proposed Rule Is More Suitable for an NOI than an NPRM**

The Commission should not adopt regulations without the necessary information. Since the purpose of an NOI is to gather information and intelligence about the scope of a problem, factors that contribute to a problem, the benefits or limitations of different regulatory alternatives and the different impacts of each alternative, an NOI should be used whenever the Commission lacks information about the industry to be regulated or the exact nature of the problem to be addressed. Advocacy encourages the Commission to use NOIs more often to collect information on regulated industries. They provide an excellent way for the Commission to gather information on an issue before committing to any particular regulatory path. The industry takes Commission inquiries very seriously and responds to them as evidenced by comments received in the Open Cable Access NOI and the Broadband Deployment NOI.[10]

The manner in which the FCC presented the issues is more consistent with an NOI than an NPRM. The Commission did not propose the actual terms or drafts of the proposed rules. In fact, the Commission only made three tentative conclusions in the entire proposed rulemaking.[11] The FCC sought general comment on dozens of issues that addressed the value of diversity to the

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[9] 5 U.S.C. § 604.

[10] *In the Matter of* Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, *Notice of Inquiry*, GN Dkt. No. 00-185, FCC 00-355 (rel. Sept. 28, 2000); *In the Matter of* Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996, Notice of Inquiry CC Dkt. No. 98-146, FCC 00-057 (rel. Feb. 18, 2000).

[11] NPRM at paras. 43, 46, 73.

characteristics of competition. These are valuable questions, and the Commission did an excellent job asking thorough and provocative questions. Advocacy looks forward to reading the comments submitted in response.

However, while the questions might be worthwhile, it does not counter the fact that the Commission is not proposing any rules in its proposed rulemaking. Unless the agency issues another rulemaking addressing specific rules, the Commission would be adopting rules on which the public would not have had a chance to comment because the rules have never been seen by the public. This is not consistent with the Administrative Procedure Act or the RFA. Rather than go straight to a final rule, the Commission should convert this NPRM to an NOI and conduct a second NRPM at a later date. This will allow the Commission to receive comments in response to questions raised in this NPRM while providing small businesses the opportunity to comment on specific rules before they are adopted.

**3. Commission Should Conduct a Second IRFA when Specific Rules Are Proposed.**

The Commission did an excellent job in describing the need for and the objectives of the proposed rules, as well as identifying the affected small businesses, both of which are requirements for an IRFA.[12] The FCC's conclusion that the NPRM proposes no new compliance requirements is correct, but only because the Commission did not propose any rules in the NPRM.[13] Finally, the Commission's discussion of alternatives and steps taken to minimize the impact on small entities identifies the issues of concern for small businesses.[14] However, there is no discussion of alternatives – an understandable result since the Commission did not propose any specific rules in the NPRM.

[12] NPRM, Appendix B, Sections A and C.
[13] NPRM, Appendix B, Section D.
[14] NPRM, Appendix B, Section E.

When the Commission proposes specific rules in this docket, it will need to conduct a supplemental IRFA. The Commission will not need to start from scratch since the Commission has provided some of the information required for an IRFA, such as the information on the need for and objectives of the rules and the estimates of the small entities affected. In the supplemental IRFA, the Commission should examine the impact of the compliance requirements of the proposed rules and explore alternatives. In addition, because of the far-reaching nature of this proceeding, Advocacy encourages the FCC to hold a forum with small businesses to discuss the impact upon small businesses.

**Conclusion**

Because of the general nature and lack of specific proposed rules, Advocacy recommends that the Commission convert the NRPM to a NOI. When the Commission proposes specific rules, it should conduct a supplemental IRFA to assess the impact on small businesses and to consider alternatives.

Respectfully submitted,

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