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

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In the Matter of	)	
	)	
Communications between Applicants in Commission Spectrum Auctions	)	WT Docket No. 97-82
	)	
	)	

Comments of the Office of Advocacy, U.S. Small Business Administration

The Office of Advocacy of the United States Small Business Administration respectfully submits these Comments in the above-captioned proceeding,[1] in which the Federal Communications Commission proposes to amend its anti-collusion rules to require applicants to report communications an applicant makes or receives regarding any applicant's bid or bidding strategy.[2] Advocacy filed previous comments in this proceeding because the Commission certified that the amended rule would have no significant impact on small business, without providing the factual basis for this conclusion.[3] In response to Advocacy's comments, the Commission published an initial regulatory flexibility analysis, but this analysis does not satisfy the requirements of the Regulatory Flexibility Act (RFA).[4]

First, the Commission fails to describe the impact its rules would have on small business. The Commission outlines the types of entities that the rule change would affect, but does not describe the rule's impact, as RFA requires.[5] As Advocacy points out in its original comments,

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[1] *Communications between Applicants in Commission Spectrum Auctions, Notice of Proposed Rulemaking,* WT Docket No. 97-82, FCC 99-384, 65 Fed. Reg. 154 (August 9, 2000) (to amend 47 C.F.R. § 1.2105(c)(1)).
[2] *See* 47 C.F.R. § 1.2105(c)(1).
[3] *See* 5 U.S.C. § 605(b).
[4] Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601 et seq.).
[5] *See* 5 U.S.C. § 603(a). In fact, the Commission maintains that the rule change would not have a significant impact on small business. This conclusion raises the obvious question, why was the Commission unable to provide the requisite factual basis to support its earlier conclusion that the rule would not have a significant impact on a substantial number of small businesses.

the Commission's proposal would expand the obligations that applicants must meet when they participate in an auction. The amended collusion rule would impose reporting requirements on applicants and would cover a broader range of communications. The new rule also would increase the risk of punitive action, which could include monetary forfeitures. But small businesses generally have far fewer financial resources than their larger counterparts do, and thus have less ability to absorb the costs of forfeitures. The Commission's proposed expansion of the collusion rule increases the risk of punishment. The Commission does not discuss this potential burden, as it should.

Second, the Commission does not propose any alternatives designed to minimize the impact of the rule on small business, consistent with the agency's goals in this proceeding, as RFA requires.[6] Instead, the Commission summarizes its proposal and concludes that it will have no significant impact on small business.

Unfortunately, the Commission consistently treats RFA as if it imposes a procedural checklist, which the agency runs through, but only after rulemaking proposals have been drafted. RFA's goal is to alter how the agency formulates proposals and reaches policy conclusions. Under RFA, policymakers must consider the impact of their ideas on small business as they develop rules, so that the rules reflect or respond to this impact. RFA does not permit policymakers to complete proposals and hand over the resulting notice of proposed rulemaking to other parties to conduct an "analysis" that the law obligates the Commission itself to do. The FCC must change the way it formulates policy, so that it considers small business interests from the outset of each rulemaking proceeding.

[6] *See* 5 U.S.C. § 603(c).

Conclusion

To reiterate, the Commission's initial certification was fatally flawed. The subsequent regulatory flexibility analysis also is fatally flawed. The FCC is inexplicably developing a very impressive record of flaunting RFA. It is not clear what it will take for the Commission to begin to take its legal responsibilities seriously. The noncompliance of the FCC will be highlighted in Advocacy's next report to Congress.

Respectfully submitted,

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