Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	

To: The Commission

COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION
REGARDING THE INITIAL REGULATORY FLEXIBILITY ANALYSIS

The Wireless Internet Service Providers Association ("WISPA"), pursuant to Sections 1.415 and 1.419 of the Commission's Rules[1] and the Initial Regulatory Flexibility Analysis ("*IRFA*") released by the Commission in connection with its Notice of Proposed Rulemaking in the above-captioned proceeding,[2] hereby requests that the Commission conduct and release a supplemental IRFA that complies with the Regulatory Flexibility Act, as amended ("RFA"),[3] by including a reasonable estimate of the number of small fixed wireless Internet providers, by analyzing broadband Internet access providers that use unlicensed spectrum to deliver fixed wireless broadband services to consumers, and by discussing "significant alternatives" that "minimize any significant economic impact of the proposed rules on small entities."[4] As described below, the *IRFA* lacks the required completeness by failing both to provide an estimate of the number of small fixed wireless Internet providers and to identify and consider the impact that the Commission's proposed open Internet rules will have on small entities that provide broadband Internet access service over unlicensed spectrum. Further, the

[1] *See* 47 C.F.R. §§ 1.415 and 1.419.
[2] *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, GN Docket No. 14-28, FCC 14-61 (rel. May 15, 2014) ("*NPRM*"), Appendix B, *IRFA*, at ¶ 1.
[3] 5 U.S.C. §§ 601 *et seq.* The RFA was amended in March 1996 by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub L. No. 104-121, 110 Stat. 857, and in September 2010 by the Small Business Jobs Act, Pub. L. No. 111-240, 124 Stat. 2551.
[4] 5 U.S.C. § 603(c).

Commission cannot comply with its obligations under Section 706 of the Telecommunications Act of 1996 if it does not consider rules that would "accelerate deployment of [broadband] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."[5]

Introduction

WISPA is the trade association that represents the interests of WISPs that provide IP-based fixed wireless broadband services to consumers, businesses and anchor institutions across the country. WISPA's members include more than 800 WISPs, equipment manufacturers, distributors and other entities committed to providing affordable and competitive fixed broadband services. WISPs use unlicensed spectrum in the 600 MHz (unlicensed TV white space), 900 MHz, 2.4 GHz and 5 GHz unlicensed bands and the 3650-3700 MHz "lightly licensed" band which, because the spectrum is not exclusively licensed, can lower barriers to entry so that WISPs can expeditiously deploy high-quality and affordable service in unserved, underserved and competitive areas.

WISPA estimates that WISPs serve more than 3,000,000 people, many of whom reside in rural areas where wired technologies like FTTH, DSL and cable Internet access services are not available. In many of these areas, WISPs provide the only terrestrial source of fixed broadband access. In areas where other broadband options are available, WISPs provide a local-access alternative that benefits customers by fostering competition, lowering costs and improving features. All but one or two of WISPA's members are considered to be "small entities" under the Small Business Act and the U.S. Small Business Administration's size standards as applied to the North American Industry Classification System ("NAICS") codes for Wireless

[5] 47 U.S.C. § 1302(b).

Telecommunications Carriers (except Satellite) Code 517210[6], and/or under All Other Telecommunications, Code 517919.[7] Neither the NAICS nor Economic Census have been updated to adequately reflect changes in technology nor to recognize the increasing number of unlicensed fixed wireless providers of broadband services over the provider's own telecommunications facilities. Nonetheless, these two NAICS codes are the closest in application. In short, the overwhelming majority of WISP's are small entities.

WISPA is concerned that the *IRFA* does not consider the impact the rules proposed in the *NPRM* will have on WISPs and small entities generally. The *IRFA* makes only passing mention of broadband providers that use unlicensed spectrum, but fails to provide any reasonable estimate on the number of such small broadband providers.[8] Moreover, the *IRFA* fails to adequately discuss significant alternatives to the rules or proposals that would potentially adversely affect small entities, and thus lacks the completeness necessary for the *IRFA* to comply with the RFA. Although the *IRFA* is not judicially reviewable, "a proper IRFA is necessary to provide the foundation for a good [Final Regulatory Flexibility Analysis]. . . . Further, without an adequate IRFA, small entities cannot provide informed comments on regulatory alternatives that are not adequately addressed in the IRFA."[9] Accordingly, to remedy the defects in the *IRFA*, WISPA requests that the Commission conduct and release a supplemental IRFA.[10]

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[6] *IRFA*, at ¶ 23 and n.47 (citing 13 C.F.R. § 121.201, NAICS Code 517210 (1,500 or fewer employees).
[7] *Id.* at ¶ 12 and n.21 (citing 13 C.F.R. §121.201, NAICS Code 517919 (annual receipts of $25 million or less).
[8] *IRFA*, at ¶ 13.
[9] Office of Advocacy, U.S. Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (May 2012), at 68 (citations omitted) ("Advocacy RFA Guide").
[10] In addition to these *IRFA* Comments, WISPA is filing separate Comments in response to the issues raised and rules proposed in the *NPRM*.

Discussion

I. THE *IRFA* DOES NOT COMPLY WITH THE REGULATORY FLEXIBILITY ACT.

The RFA was designed to reduce the economic impact of regulations on small business and acts as a "statutorily mandated analytical tool" to assist federal agencies in rational decision making processes.[11] Moreover, "a regulatory flexibility analysis is, for APA purposes, part of an agency's explanation for its rule."[12] Section 603 of the RFA requires the Commission to prepare and make available for public comment an initial regulatory flexibility analysis that describes the significant economic impact of the proposed rules on small entities subject to those proposed rules.[13] First, an IRFA must include "a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply."[14] In addition, an IRFA must include "a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rules, including an estimate of the classes of small entities which will be subject to the requirement . . . ."[15] An IRFA "*shall* also contain a description of any significant alternatives . . . which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities."[16] The required discussion of these alternatives includes:

> (1) the establishment of *differing compliance or reporting requirements or timetables* that take into account the resources available to small entities;
> (2) the clarification, consolidation, or *simplification of compliance and reporting requirements* under the rule for small entities;
> (3) the use of performance rather than design standards; and

[11] Advocacy RFA Guide, at 2.
[12] *National Telephone Cooperative Ass'n v. FCC*, 563 F.3d 536, 540 (D.C. Cir 2009) (citing to *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 539 (D.C. Cir. 1983) ("a reviewing court should consider the regulatory flexibility analysis as part of its overall judgment whether a rule is reasonable") (additional citations omitted)).
[13] 5 U.S.C. § 603(a).
[14] 5 U.S.C. § 603(b)(3).
[15] 5 U.S.C. § 603(b)(4).
[16] 5 U.S.C. § 603(c) (emphasis added).

(4) *an exemption from coverage of the rule, or any part thereof, for such small entities*.[17]

The *IRFA* released in this proceeding falls far short of meeting these requirements. Although the *IRFA* discusses "several different types of entities that *might* be providing Internet access service"[18] and purports to include "small entities that provide broadband Internet access service over unlicensed spectrum," the Commission states that "*we have no specific information on the number*" of such entities."[19] Over several pages, the *IRFA* proceeds to discuss several different categories of broadband Internet access service providers – cable, satellite, wireline, mobile and others. But conspicuously absent from this discussion is any mention whatsoever of the "small entities that provide broadband Internet access service over unlicensed spectrum" that the Commission initially mentioned.

As a threshold matter, the Commission fails to make a reasonable good-faith effort to estimate how many small broadband providers use unlicensed spectrum. As noted above, the IRFA requires "a description of and, *where feasible*, an estimate of the number of small entities to which the proposed rule will apply."[20] The Merriam-Webster Dictionary defines the word feasible as "capable of being done or carried out."[21] The Commission's ability to estimate the number of small fixed wireless Internet providers is indeed feasible and, frankly, is long overdue

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[17] *Id.* (emphases added); *see also* Presidential Memorandum of January 18, 2011, *Regulatory Flexibility, Small Business, and Job Creation, Memorandum for the Heads of Executive Departments and Agencies*, 76 Fed. Reg. 3827, 3828 (Jan. 21, 2011) (when initiating a rulemaking give "serious consideration to whether and how it is appropriate, consistent with law and regulatory objectives, to reduce regulatory burdens om small businesses, through increased flexibility") ("Presidential Memorandum"). The Presidential Memorandum was issued concurrently with Executive Order 13563, which reinforced the importance of compliance with the RFA for all federal agencies. 76 Fed. Reg. 3821 (Jan. 21, 2011). President Obama issued subsequent Executive Order 13579 that expressly imposed the obligations of Executive Order 13563 on independent regulatory agencies. 76 Fed. Reg. 41587, § 1(c) (July 14, 2011) ("Executive Order 13563 set out general requirements directed to executive agencies concerning public participation, integration and innovation, flexible approaches, and science. To the extent permitted by law, independent regulatory agencies should comply with these provisions as well.").

[18] *IRFA*, at ¶ 13 (emphasis added).

[19] *Id.* (emphasis added).

[20] 5 U.S.C. § 603(b)(3) (emphasis added). There is no "where feasible" qualifier for the FRFA pursuant to Section 604 of the RFA. *See* 5 U.S.C. § 604(a)(4). Instead, the Commission must provide an explanation of why no such estimate is available. *Id.*

[21] Merriam-Webster.com, available at http://www.merriam-webster.com/dictionary/feasible (last visited June 28, 2014).

given the demonstrable growth of fixed wireless broadband providers over the past decade and the important role they play in providing broadband service to underserved and unserved communities.

The Commission is required to consider its own data collection and resources in its compliance with the RFA.[22] Significantly, through FCC Form 477, Terrestrial Fixed Wireless providers – a category that includes WISPs that use unlicensed spectrum – the Commission has ready access to information on the number of entities using wireless technology to provide broadband services. Twice annually, broadband providers are required to file Form 477 with the Commission to report data on broadband subscribership, speed tiers and other information.[23] The Commission also has access to the National Broadband Map, which includes a "fixed wireless" layer. Although these data sources do not delineate between licensed and unlicensed spectrum, this does not excuse the Commission's failure to use its own resources and other readily available data to provide a good-faith estimate of the number of small fixed wireless broadband providers that use unlicensed spectrum nor to complete the analysis required by the RFA. To provide a more accurate profile of the fixed wireless broadband industry using unlicensed spectrum, the Commission should also supplement its own data with industry information presented by WISPA in a number of Comments filed with the Commission.[24] Only by identification of the number of small fixed wireless broadband providers that use unlicensed

[22] *See North Carolina Fisheries Ass'n, Inc. v. Daley*, 27 F. Supp. 2d 650, 659 (E.D. Va. 1998) (agency failed to comply with the RFA when it "completely ignored readily available" data in determining the number of small entities impacted by the agency's actions).
[23] *See* FCC Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2013* (June 2014) at 25 (Table 7 showing five-fold increase since 2009 in the number of fixed wireless connections with speeds of at least 3 Mbps downstream and 768 Kbps upstream reported on FCC Form 477).
[24] *See, e.g.*, Comments of WISPA, GN Docket No. 12-354 (filed Feb. 20, 2013) (estimating that 3,000 WISPs serve approximately 3,000,000 people).

spectrum can the Commission craft rules that "reduce regulatory burdens on small businesses, through increased flexibility."[25]

The Commission cannot be found to have adequately completed an IRFA where, as here, the *IRFA* merely mentions that broadband providers using unlicensed spectrum are considered in the analysis but then fails to consider the significant economic impact the proposed rules would have on this specific class of small broadband providers.[26] Reducing the economic impact on small businesses is very important: "In the current economic environment, it is especially important for agencies to design regulations in a cost-effective manner consistent with the goals of promoting economic growth, innovation, competitiveness, and job creation."[27]

The *IRFA* (and the *NPRM* itself) also lack discussion about any "significant alternatives" that the Commission may have considered in reaching its proposals.[28] To the contrary, the *IRFA* merely parrots the four alternatives listed in Section 603(c) of the RFA and then states that the Commission "expect[s] to consider all of these factors when we have received substantive comment from the public and potentially affected entities."[29] Such consideration and discussion of any factors should have been at the *IRFA* stage and then made subject to public notice and comment. Of the "six key areas" of the *NPRM* summarized in the *IRFA*,[30] the Commission only discusses the impact of its proposed rules on one of those proposed rules – transparency.[31] The *IRFA* does not discuss alternatives to other proposed rules, such as those concerning the proposed "no blocking" and "no discrimination" rules and, with one irrelevant exception,[32] those

[25] Presidential Memorandum, at 3828.
[26] *See generally Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411 (M.D. Fla. 1998).
[27] Presidential Memorandum, at 3828.
[28] 5 U.S.C. § 603(c).
[29] *IRFA*, at ¶ 49.
[30] *Id.* at ¶ 2.
[31] *See id.* at ¶ 51.
[32] Summarizing the *NPRM*, the *IRFA* notes that the Commission asks how it "can ensure that the [enforcement] process is accessible by end users and edge providers, including small entities." *See id.* at ¶ 8. But this statement

related to changes to the enforcement process and remedies. Though it generally seeks comment on the "various proposals" described in the *NPRM* and the "effect alternative rules would have" on small entities, there is no discussion of any significant alternatives, such as exemption from the transparency or deferred implementation, "no blocking" and "no discrimination" rules or streamlined processing of complaints against small broadband providers. Deferring discussion of these alternatives until after the record is complete renders the *IRFA* inadequate and fails to provide the public with sufficient notice of the significant alternatives that may be available to small entities.[33]

II. THE COMMISSION SHOULD CONSIDER ALTERNATIVES THAT MINIMIZE THE ECONOMIC IMPACT ON SMALL BUSINESSES.

In its separate Comments in response to the *NPRM* filed concurrently with these *IRFA* comments, WISPA presents alternatives to the proposed rules that would minimize the economic impact on its members. In adopting a supplemental IRFA, the Commission should specifically discuss and seek comment on these alternatives, as well as any others that the Commission should take into account pursuant to its obligations under Section 603(c) of the RFA.

In particular, as required by Sections 603(c)(1), (2) and (4) of the RFA, the Commission should discuss whether and to what extent small entities should be exempt from certain of the proposed rules and reporting obligations.[34] For instance, the proposed enhanced transparency obligations will create numerous new disclosure and reporting obligations that will be more difficult for small entities to meet, which is a significant economic impact that should have been be discussed in the *IRFA*. The Commission also should discuss whether and to what extent "no

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does not seek input on how the proposed rules can ensure access by small broadband providers, or whether there should be different rules for small providers as required by Section 603(c) of the RFA.

[33] *See Southern Offshore Fishing*, 995 F. Supp. at 1436 ("With notice of [the agency's] position, the public could have engaged the agency in the sort of informed and detailed discussion that has characterized this litigation.").

[34] 5 U.S.C. §§ 603(c)(1), (2), and (3); *see also* Executive Order 13579, 76 Fed. Reg. 41587, § 1(a) ("Wise regulatory decisions depend on public participation, and on careful analysis of the likely consequences of regulation.").

blocking" and "no discrimination" rules would have on small broadband providers that lack market power to extract payments from edge providers; indeed, edge providers are more likely to withhold providing content services to small broadband providers that compete with larger broadband providers that can negotiate carriage fees.

Notably, the Commission seeks comment on ways that trade associations could adopt industry standards that "could reduce burdens on broadband providers," but this inquiry applies to *all* broadband providers without any recognition that different rules could apply to small entities.[35] Under the RFA, exemption from requirements that the Commission may impose on larger broadband providers must be considered, and should not be lumped together with the universe of broadband providers generally. Small providers also may lack the bandwidth to handle high-capacity applications and services, in which case the reasonableness of network management practices should be defined in a more lenient fashion or additional "safe harbors" should be adopted.

As stated in the Presidential Memorandum, compliance with the RFA serves the important task of reducing regulatory burdens on small businesses through increased flexibility.[36] As President Obama reiterated:

> Adherence to these requirements is designed to ensure that regulatory actions do not place unjustified economic burdens on small business owners and other small entities. If regulations are preceded by careful analysis, and subjected to public comment, they are less likely to be based on intuition and guesswork and more likely to be justified in light of a clear understanding of the likely consequences of alternative courses of action.[37]

Regrettably, in this proceeding the Commission failed to meet its obligations under the RFA (and Executive Orders) to identify and discuss "significant alternatives" at the *IRFA* stage, a

[35] *IRFA*, at ¶ 51.
[36] *See* Presidential Memorandum, at 3828.
[37] *See id.*

preliminary step that is critical to preparing an adequate FRFA and reasonable substantive rules that will not harm small entities.[38]

Conclusion

The *IRFA* adopted in this proceeding is incomplete in three respects. First, it fails to provide a reasonable good-faith estimate of the number of small entities that provide broadband service via unlicensed spectrum based on readily available resources. Second, it fails to consider the significant impact of the proposed rules on such small entities. Third, it fails to identify and discuss "significant alternatives" that would minimize the economic impact of the rules on small fixed wireless broadband providers. These material flaws will impact the Commission's ability to collect adequate public comment in preparation for its final regulatory flexibility analysis and impede its ability to comply with its Section 706 obligations. Therefore, the Commission should conduct a supplemental IRFA that addresses these shortcomings and allow the public an opportunity for further, and more informed and meaningful, comment.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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[38] *See Southern Offshore Fishing*, 995 F. Supp. at 1437 ("the [RFA] compels the [agency] to make a 'reasonable, good-faith effort,' prior to issuance of a final rule, to inform the public about potential adverse effects of [its] proposals and about less harmful alternatives").