

Before the
Federal Communications Commission

**THE CONFLICT BETWEEN THE FCC’S RULEMAKING PROCESS AND THE
STATUTORY REQUIREMENTS OF THE REGULATORY FLEXIBILITY ACT**

**COMMENTS ON THE BROADCAST LOCALISM:
INITIAL REGULATORY FLEXIBILITY ANALYSIS
AND
NOTICE OF PROPOSED RULEMAKING**

In the Matter of)
)
Broadcast Localism) MB Docket No. 04-233
)

The Center for Regulatory Effectiveness
Suite 500
1601 Connecticut Avenue, NW
Washington, DC 20009
202.265.2383
www.TheCRE.com

March 2008

**THE CONFLICT BETWEEN THE FCC’S RULEMAKING PROCESS AND THE
STATUTORY REQUIREMENTS OF THE REGULATORY FLEXIBILITY ACT**

**COMMENTS ON:
BROADCAST LOCALISM
INITIAL REGULATORY FLEXIBILITY ANALYSIS
AND
NOTICE OF PROPOSED RULEMAKING**

The Federal Communications Commission’s (“FCC’s”) Broadcast Localism Initial Regulatory Flexibility Analysis (“IRFA”) and Notice of Proposed Rulemaking (“NPRM”) exemplify the ongoing conflict between the agency’s rulemaking process and the statutory requirements of the Regulatory Flexibility Act (“RFA”) with which the agency is legally-bound to comply.

In its Annual Report to Congress on agency compliance with the RFA released in 2007, the U.S. Small Business Administration’s Office of Advocacy (“Advocacy”) succinctly highlighted one of the reasons for the FCC’s often poor compliance record:

*As stated in previous reports, Advocacy believes one of the reasons the FCC has not had consistent compliance with the RFA is its tendency to issue vague proposed rulemakings or even a series of hypothetical questions to the public, which would be more appropriate for a notice of inquiry. **Without specific rules, the agency cannot accurately estimate the impacts and assess alternatives to the rule, nor can small businesses comment meaningfully.** The FCC has continually rejected Advocacy’s recommendations to propose more concrete rules.¹*

Advocacy also explained “Advocacy has made repeated offers to train the FCC’s media bureau on how to comply with the RFA. The FCC has not responded and no training is currently scheduled.”²

Advocacy’s just released FY 2007 Report on the Regulatory Flexibility Act further explained that

*While the FCC does publish IRFAs and FRFAs for its rulemakings, they are inadequate because they **consistently lack a proper economic analysis of how the rule will affect small entities.** Additionally, **the FCC does not provide meaningful***

¹ Office of Advocacy, U.S. Small Business Administration, “Report on the Regulatory Flexibility Act FY 2006,” February 2007, p. 37. [Emphasis added.]

² Ibid. [Emphasis added.]

*alternatives as required by the RFA, and fails to address the alternatives offered by small businesses in their comments.*³

With respect to Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” the most recent Advocacy report noted that even though the FCC sent Advocacy a letter stating that the agency is “committed to uphold the spirit of the law by examining its rules for small entity impacts,” the “FCC has not made its policies and procedures to promote RFA compliance publicly available as required by section 3(a) of E.O. 13272.”⁴

As detailed below, on specific issues on which the Commission’s IRFA and NPRM requested comment, the FCC’s Broadcast Localism rulemaking demonstrates a continuation of the agency’s pattern on non-compliance with the mandatory requirements of the RFA and with the letter and/or spirit of Executive Order 13272. Specifically, The Commission has not met their RFA legal requirements, and EO 13272 obligations, with respect to Broadcasting Localism issues including:

- ▶ Local Programming Renewal Application Processing Guidelines;⁵ and
- ▶ Main Studio Rule.⁶

Need for FCC Adherence to the Data Quality Act

Since, as discussed in Sections II and III of these comments, the Commission has not complied with specific requirements of the RFA, the agency needs to revise the IRFA and resubmit it for public comment prior to developing any final rules. In developing its revised IRFA, the agency will need to comply with the substantive and procedural requirements of the Data Quality Act and the Commission’s Information Quality Guidelines including their “Pre-Dissemination Information Review and Substantiation Process.”

Advocacy has specifically noted the need for RFA analyses to comply with the requirements of the Data Quality Act.⁷

³ Office of Advocacy, U.S. Small Business Administration, “Report on the Regulatory Flexibility Act FY 2007,” February 2008, p. 48. [Emphasis added.]

⁴ Ibid.

⁵ IRFA request for comment on Renewal Application Processing Guidelines: MB Docket No. 04-233 “Report on Broadcasting Localism and Notice of Proposed Rulemaking,” FCC 07-218, Appendix B, “Initial Regulatory Flexibility Analysis,” para. 17. NPRM request for comment on Renewal Application Processing Guidelines: NPRM, para. 124.

⁶ IRFA, Ibid., Appendix B, para. 17, NPRM: Ibid., para. 41.

⁷ Office of Advocacy, U.S. Small Business Administration, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,” May 2003, p. 14.

Fortunately, the FCC has demonstrated a substantive record of compliance with the DQA and has established rigorous pre-dissemination review procedures.

Applicability of the Paperwork Reduction Act

The first purpose of the Paperwork Reduction Act (“PRA”) is to “minimize the paperwork burden for individuals, small businesses...” and other entities.⁸ Moreover, the PRA requires agencies to:

certify (and provide a record supporting such certification, including public comments received by the agency) that each collection of information submitted to the Director for review under section 3507--

- (C) reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency, **including with respect to small entities**, as defined under section 601(6) of title 5, the use of such techniques as—*
- (i) establishing differing compliance or reporting requirements or timetables that take into account the resources available to those who are to respond;*
 - (ii) the clarification, consolidation, or simplification of compliance and reporting requirements; or*
 - (iii) an exemption from coverage of the collection of information, or any part thereof;⁹*

Unless the FCC develops and provides for comment the small business impact analysis required by the RFA – including the “description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule...” the Commission will not be able to make the required certification (and provide the associated documentary record) to OMB since the Commission would not have provided small businesses the opportunity mandated by the RFA for comment on the paperwork and compliance burdens associated with the Commission’s regulatory proposals.

Therefore, OMB should make explicit to the Commission that they will not approve the Information Collection Request associated with the rules until the Commission’s IRFA complies with the requirements Regulatory Flexibility Act and their own Data Quality procedures and standards.

I. Statutory Information Disclosure Requirements for Initial Regulatory Flexibility Analyses

A. Legal Requirements for Regulatory Flexibility Act Compliance

The Regulatory Flexibility Act requires that agencies provide specified information to the public in the IRFA concerning a proposed rule’s impact on small business. As explained above, the

⁸ 44 U.S.C. § 3501(1).

⁹ 44 U.S.C. § 3506(c)(3). [Emphasis added.]

information needs to be developed in compliance with Commission Data Quality standards and must have passed their Pre-Dissemination Review and Substantiation process. Information which the FCC is required by statute to provide for public comment includes, but is not limited to:

- ▶ **Small Business Impact Assessment.** The IRFA “shall describe the impact of the proposed rule on small entities.”¹⁰
- ▶ **Paperwork Requirements.** The IRFA “shall contain– ...a description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.”¹¹
- ▶ **Significant Compliance/Reporting Alternatives.** The IRFA “shall also contain a description of any significant alternatives to the proposed rule...which minimize any significant economic impact of the proposed rule on small entities. ...the analysis shall discuss significant alternatives such as-- (1) the establishment of differing compliance or reporting requirements or timetables...(2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities;...(4) an exemption from coverage of the rule, or any part thereof, for such small entities.”¹²
- ▶ **Number of Impacted Small Businesses.** The IRFA is also required to include “a description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.”¹³

It is important to reiterate that the FCC is required to provide *their* analyses and estimates of the above information for public comment, not simply seek public comment on these topics.

B. *Policy Benefits From Compliance with the Regulatory Flexibility Act*

The procedural requirements of the RFA are not simply a set of “hoops” that agencies are required to jump through as part of the rulemaking process. Instead, the analyses required by the law can and should be valuable tools for the FCC to use in improving their policies. There are at least three types of stakeholders that would benefit from Commission compliance with the RFA:

¹⁰ 5 U.S.C. § 603(a).

¹¹ 5 U.S.C. § 603(b)(4).

¹² 5 U.S.C. § 603(c).

¹³ 5 U.S.C. § 603(b)(3).

1. Small Broadcasters. FCC compliance with the RFA would provide small broadcasters and other small business and entities impacted by the planned rules an opportunity to voice specific rather than generic concerns and to help shape agency policies. Unless small entities are presented with specific, detailed impact analyses to respond to, they are being deprived of meaningful participation in the rulemaking process since they don't know how they are likely to be impacted by the regulatory proposals. Moreover, the Commission is depriving itself of small businesses' views and insights – which is particularly ironic given the agency's stated interest in promoting the interests of diverse small broadcasting businesses.
2. Communities. The communities served by small broadcasters may be harmed by the FCC if small broadcaster interests are not adequately understood and considered. Moreover, Regulatory Flexibility Act explicitly includes governments “of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand” as well as business and non-profit organizations as “small entities” covered by the Act.¹⁴ Although the impacts on small governmental entities would be indirect, and thus analysis of these impacts is not required by statute, Advocacy has stated that they believe “it is good public policy for the agency to perform a regulatory flexibility analysis even when the impacts of its regulation are indirect.”

The importance of analyzing and considering the views of small governments is particularly important with respect to contemplated Main Studio Rule since it could force broadcasters of various sizes to relocate some facilities from small counties and towns to more larger/more urban areas. Moreover, as discussed below, communities will be impacted by: 1) programming changes resulting from the from Local Programming Renewal Application Processing Guidelines; and 2) from the competitive impact of those programming changes.

3. The FCC. The Commission stands to be among the greatest beneficiaries of the agency adhering to the RFA since the agency is committed to promoting “diversity by increasing and expanding broadcast ownership opportunities for minority- and women-owned businesses and small businesses.”¹⁵ However, unless the agency undertakes the required analyses and uses them to engage diverse small businesses in the rulemaking process, the Commission is at least partially shutting these broadcasters out of meaningful participation in the regulatory process and, by doing so, may unintentionally undermine its own policy goals.

For example, the planned but still undefined Local Programming Renewal Application Processing Guidelines have the potential for encouraging larger stations to compete

¹⁴ 5 U.S.C. § 601(5).

¹⁵ NPRM, para. 3.

directly against smaller stations who focus on specialized public service programming, ethnic and linguistic minority listeners/viewers, and other important niche communities.

Unless the Commission carefully analyzes the small business impacts of specific proposed policies and obtains comment on those analyses, **the FCC may trigger an unintended “Wal-Mart effect” by encouraging larger stations to compete head-on against small, niche-market broadcasters, damaging their competitiveness, viability and unique perspective.** Thus, unless the Commission adheres to the language and spirit of the RFA, they may end up harming the very small business and diverse local programming they seek to promote.

II. Proposed Local Programming Renewal Application Processing Guidelines: IRFA Deficiencies

A. *The IRFA Provides No Description of the Small Business Impact of the Proposed Renewal Application Processing Guidelines*

The NPRM proposes Commission adoption of “specific procedural guidelines for the processing of renewal applications for stations based on their localism programming performance.”¹⁶ The FCC has not, however, either:

- Described these “specific procedural guidelines;” or
- Published in the IRFA any description, quantitative or qualitative, of the specific procedural guidelines’ impact on small businesses.

It should be noted that the planned Guidelines are a rule subject to the RFA. Discussion and request for comment regarding the specific procedural guidelines is included in the Commission’s Notice of Proposed Rulemaking and request for comment on the planned renewal application processing guidelines is included in the IRFA.

Instead of providing the required information and analyses, however, the section of the IRFA titled “Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements” — which, as discussed below, contains no such description — simply asks for comment on the unprovided paperwork requirements associated with the renewal application processing guidelines. No economic impact information is provided.

¹⁶ NPRM, para. 124.

A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act

The U.S. Small Business Administration’s Office of Advocacy has prepared a guidance document which explains to agencies their duties in complying with the RFA. It should be noted that the Forward to the Guide was co-signed by the Administrator of the Office of Information and Regulatory Affairs.

The Advocacy document, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,” explained that the Regulatory Flexibility Act “requires agencies to perform a *detailed* analysis of the potential impact of the proposed rule on small entities”¹⁷ and that the agencies “**must examine the costs and other economic implications** for the industry sectors targeted by the rule.”¹⁸ The Guide notes that if “such data are unavailable, the agency should state why....”

The Guide goes on to explain that:

*Impacts include costs of compliance and economic implications that derive from additional compliance costs such as economic viability (including closure), competitiveness, productivity, and employment. The analysis should identify cost burdens for the industry sector and for the individual small entities affected.*¹⁹

In that the agency has not provided *any* analysis of the proposed Local Programming Renewal Application Processing Guidelines’ impact on small entities, or explained why such data is unavailable, the IRFA is fundamentally deficient and must be revised and resubmitted for public comment following completion of the Commission’s Data Quality pre-dissemination review and substantiation process.

It should also be noted that Executive Order 13272, calls on agencies to “thoroughly review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the” RFA.

Examples of compliance costs and economic impacts include:

- The costs associated with small broadcasters stations purchasing/obtaining the rights to new/additional programming to meet the guidelines;

¹⁷ Office of Advocacy, “Guide” p. 30. [Emphasis added]

¹⁸ Ibid. [Emphasis added.]

¹⁹ Ibid.

- Reduced advertising revenues resulting from any FCC-induced programming changes given a default assumption that stations have already set their programming to maximize revenues based on the specific attributes of their audience and competitive situation; and
- Competitive impacts from other stations, including large broadcasters, intruding into niche markets and making other programming changes in an effort to comply with the guidelines.

Since the FCC has not yet provided the required analysis of small business impact, they have not complied with the legally mandated requirements of the RFA or the spirit of EO 13272.

B. *The IRFA Provides No Description of the Projected Reporting, Recordkeeping and Other Compliance Requirements*

The Regulatory Flexibility Act mandates that the Commission include in the IRFA:

1. A “description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule;”
2. An “estimate of the classes of small entities which will be subject to the requirement;” and
3. An explanation of the type of professional skills necessary for preparation of the report or record.

Advocacy’s Guide explains that detailing the proposed rule’s compliance requirements,

...is one of the two most important elements in the IRFA, because the alternatives the agency examines in the IRFA will be designed to minimize these compliance burdens. Provision of a list in the IRFA enables small entities to more easily identify potential burdens and tailor their comments in the rulemaking process to those burdens that most affect them without wading through many Federal Register pages.²⁰

Furthermore, the Guide details that,

some of the costs the agency must describe in the IRFA include the costs of any recordkeeping; professional expertise, such as lawyer, accountant, or engineering, needed to comply with recordkeeping; and reporting requirements. Section 603 also requires that the agencies examine other compliance requirements, which may include, for example, the following: (a) capital costs for

²⁰ Ibid., p. 34.

*equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.*²¹

Despite the explicit requirements of the Regulatory Flexibility Act to describe the projected reporting, recordkeeping and compliance requirements, the FCC's IRFA does not provide any description or analysis of what requirements and costs the proposed rule would impose on small entities. Similarly, the NPRM also provides no description of the proposed requirements.

Instead of the statutorily mandated discussion of reporting, recordkeeping and compliance requirements, the IRFA notes that the “*Notice* further seeks comment on the Commission’s tentative conclusion that it should adopt specific procedural guidelines for the processing of license renewal applications for stations based upon their localism programming performance during the preceding license term”²² and invites “small entities to comment in response to the rules proposed in the *Notice*.”²³

The IRFA fails to provide any information regarding reporting, recordkeeping and compliance requirements even though it concedes that the NPRM “proposes a number of rule changes that, if adopted and implemented, may affect reporting, recordkeeping, and other compliance requirements on small entities.”²⁴

It is essential to note that no Information Collection Request is publicly available even though the NPRM requested that comments on the proposed information collection requirements under the Paperwork Reduction Act be submitted to OMB.²⁵ Commission staff has informally indicated that the ICR may not be available for comment prior to adoption of the final rule.

The FCC cannot comply with the Regulatory Flexibility Act and proceed with the rulemaking process until and unless it provides the projected reporting, recordkeeping and other compliance requirements – including the cost estimates – of the proposed rule for meaningful public comment.

²¹ Ibid. [Emphasis added, footnote omitted]

²² NPRM, Appendix B, “Initial Regulatory Flexibility Analysis,” para. 17.

²³ Ibid., para. 15.

²⁴ Ibid.

²⁵ NPRM, para. 146.

As discussed above, one of the primary purposes of the PRA is to minimize the paperwork burden on small business and the law contains specific requirements that agencies minimize such burden on small businesses and other stakeholders to the extent practicable and appropriate. The law also requires that the FCC certify – and provide a record supporting their certification – to OMB that the agency has complied with the requirements.

The Commission will not be able to make the required certification or be able to provide the required documentary record until and unless the FCC develops and provides for comment the small business impact analysis required by the RFA – including the “description of the projected reporting, recordkeeping and other compliance requirements of the proposed rule....”

Thus, FCC revision of the IRFA to include the required data and its resubmission for public comment is essential if the Commission is to obtain OMB approval of the planned rules’ paperwork requirements.

C. The IRFA Provides No Description of any Significant Alternatives to the Proposed Rule on Local Programming Renewal Application Processing Guidelines

In lieu of providing the mandated discussion of “significant alternatives to the proposed rule,” the Commission merely notes their legal obligation to do so. Specifically, the IRFA states that the “RFA requires an agency to describe any significant alternatives that might minimize any significant economic impact on small entities.”²⁶ and “As noted, we are directed under law to describe any such alternatives we consider, including alternatives not explicitly listed above.”²⁷ Unfortunately, no alternatives were explicitly listed above or anywhere else in the IRFA or NPRM.

The series of questions asked by the Commission regarding proposed Guidelines do not constitute the statutorily-mandated description of regulatory alternatives to minimize small business impact. Instead, the questions fall within Advocacy’s description of “a series of hypothetical questions to the public, which would be more appropriate for a notice of inquiry.”

CRE seeks to comment on the “significant alternatives” to the proposed Local Programming Renewal Application Processing Guidelines “which minimize any significant economic impact of the proposed rule on small entities” but is unable to do so because no such alternatives have been described.

It is incumbent on the Commission to provide the public for comment a description of the alternatives as specified by the RFA. As the US Court of Appeals for the District of Columbia Circuit explained, “The Regulatory Flexibility Act also imposes procedural requirements on

²⁶ NPRM, Appendix B, “Initial Regulatory Flexibility Analysis,” para. 19.

²⁷ Ibid., para. 20.

agency rulemaking, in particular the preparation of a ‘final regulatory flexibility analysis’ regarding the effect of the rule on small businesses.”²⁸ Moreover, specific to the need for a description of regulatory options, the court explained, “a final regulatory flexibility analysis-which must include an explanation for the rejection of alternatives designed to minimize significant economic impact on small entities....”²⁹

As Advocacy has explained to agencies with respect to the preparation of a Final Regulatory Impact Analysis (“FRFA”), “The RFA mandates that agencies revise their initial regulatory flexibility analysis based on the public comments received.”

Thus, unless the FCC provides a discussion of small business “significant alternatives” for public comment as part of the IRFA, the agency will not be able to prepare an APA-compliant FRFA that considers public comment when providing the mandated explanation for the rejection (or acceptance) of alternatives.

D. *The Number of Impacted Small Businesses*

The FCC estimates that about 70% of commercial television stations³⁰ and 95% of commercial radio stations³¹ are small businesses. The Commission does explain that their estimates “likely overstates” the number of share of television stations which are small businesses and their definition of small radio stations is “over-inclusive.” Should the Commission wish to refine their estimates of impacted small entities, they will need to include any newer calculations in the revised IRFA for public comment. The Commission cannot use their caveats regarding their best estimates for number of small businesses impacted by the proposed rules as a reason to minimize their duties or ignore the impact of their rules on small businesses.

Even if the Commission has overstated the share of broadcast stations which are small businesses to some extent, based on the IRFA, a clear majority of radio and television are small businesses. This highlights the importance of the Commission revising the IRFA to include the small entity impact analyses, description of reporting and compliance requirements, and description of significant alternatives since the proposed rules predominately impact small businesses.

²⁸ U.S. Telecom Ass'n v. F.C.C. 400 F.3d 29 C.A.D.C.,2005. March 11, 2005.

²⁹ Ibid. [Emphasis added.]

³⁰ NPRM, Appendix B, “Initial Regulatory Flexibility Analysis,” para. 6.

³¹ Ibid., para 8.

III. Proposed Main Studio Rule: IRFA Deficiencies

A. *The IRFA Provides No Description of the Small Business Impact of the Proposed Main Studio Rule*

Neither the IRFA nor the NPRM provide any estimated small business impacts that would be triggered by Commission adoption of the proposed Main Studio Rule. This deficiency is particularly significant given the substantial costs associated with the real estate, personnel, transportation, and other costs resulting from moving a main studio. The economic hardships associated with this proposed rule would be particularly harsh for small businesses which may be forced to close/sell out to larger broadcasters who are either better able to bear the moving costs and/or who already have facilities located in, what in the Commission's tentative view, is a more geographically desirable location.

In short, the proposal to revert to the pre-1987 main studio rule may lead to financial hardships for small businesses, media consolidation and a loss of diversity – harms which could be avoided if the Commission conducted the statutorily required economic impact analyses as part of the IRFA.

Thus, avoidance of the mandatory IRFA analyses may result in the Commission adopting rules which are directly counter to their stated intent of promoting localism, diversity and increased ownership by minorities and women.

The Commission needs to revise the IRFA to include the required small entity economic impact analysis and resubmit it for public comment.

B. *The IRFA Provides No Description of the Main Studio Rule's Projected Reporting, Recordkeeping and Other Compliance Requirements*

As was the case with the Local Programming Renewal Application Processing Guidelines proposal, the IRFA does not include the projected reporting, recordkeeping and other compliance requirements. Instead, the section of the IRFA concerning paperwork and compliance requirements simply states, "The *Notice* also seeks comment on whether a licensee should be required to situate its station main studio within the station's community of license to encourage production of locally originated programming, and whether accessibility of the main studio increases interaction between the licensee and its station's community of service."

Asking for comment on an issue is not comparable to providing an estimate of the reporting, recordkeeping and compliance requirements on which the Commission is seeking comment. By not providing the statutorily-mandated description of the reporting and related requirements, the Commission:

- Fails to meet the requirements of the RFA;

- Will not be able to certify to OMB that they have minimized the paperwork burden on small entities to the extent practicable as required by the PRA; and
- Will not be able to provide the documentary record to OMB to support the certification.

Thus, the FCC will have no basis for submitting an ICR to OMB unless they have first complied with the requirements of the RFA by revising the IRFA to include the reporting, recordkeeping and compliance requirements and resubmitting it for public comment.

C. *The IRFA Provides No Description of any Significant Alternatives to the Proposed Main Studio Rule*

The IRFA provides no significant alternatives for small businesses to the proposal to revert to the pre-1987 Main Studio Rule. The IRFA does not claim that such alternatives do not exist or would be contrary to law. Instead, after noting their statutory duty to describe significant alternatives, the IRFA includes amorphous language not clearly specific to any regulatory component of the NPRM, inviting the public to comment on ways to “enhance broadcast localism and diversity...” and “to propose steps that the Commission may take to minimize any significant economic impact on small entities.”³²

In essence, the Commission has turned the requirements of the RFA on their head as it is the FCC which is to propose reducing regulatory alternatives for minimizing small business impacts the public to react to, not the other way around.

CRE seeks to comment on the “significant alternatives” to the proposed Main Studio Rule “which minimize any significant economic impact of the proposed rule on small entities” but is unable to do so because no such alternatives have been described.

As was discussed with respect to the proposed renewal application processing guidelines, unless the FCC provides for public comment a discussion of small business “significant alternatives” as part of the IRFA, the agency will not be able to prepare an APA-compliant FRFA that considers public comment when providing the mandated explanation for the rejection (or acceptance) of alternatives.

D. *The Number of Impacted Small Businesses*

Although the IRFA provided an estimate of the share of commercial radio and television broadcasters which are small businesses, it provided no estimate of the number of small television and radio stations which would be impacted by a reversion to the pre-1987 main studio

³² Ibid., para 20.

rule. Thus, the most basic data element of an Initial Regulatory Flexibility Analysis, the number of impacted small entities, is missing with respect to the proposed Main Studio Rule.

The Commission can not even begin to quantify or otherwise describe the costs or the benefits of re-adopting the old pre-1987 Main Studio Rule without knowing how many stations would be impacted. Thus, adoption of the rule would be arbitrary and capricious.

The FCC needs to provide for public comment their estimate of the number of radio and televisions stations which would be forced to relocate their main studio if the proposed rule is adopted.

IV. Conclusions

- ▶ The FCC has not complied with the requirements of the RFA and has provided virtually no small entity impact data on which the public can provide meaningful comment.
- ▶ Failure to conduct the required small business impact analyses undercuts the Commission's own policy goals of promoting localism, diversity and "broadcast ownership opportunities for minority-and women-owned businesses and small businesses."

V. Recommendation

- ▶ The FCC needs to substantially revise the Broadcast Localism IRFA to include the statutorily-mandated data and resubmit it for public comment. Failure to do so would result in final rules which were not developed in accordance with the requirements of the RFA, PRA and APA and which may fail to meet the Commission's own policy objectives.