

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

In the Matter of)	
)	
Unbundled Access to Network Elements)	WC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION,
ON THE NOTICE OF PROPOSED RULEMAKING
AND INITIAL REGULATORY FLEXIBILITY ANALYSIS**

The Office of Advocacy of the U. S. 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 comment on the unbundling obligations for incumbent local exchange carriers (“ILECs”) under the Telecommunications Act of 1996 and what network elements should be unbundled and made available to competitive local exchange carriers (“CLECs”). The FCC states its objective is to encourage facilities-based competition.² The FCC asked how it could accomplish these regulatory goals and be in compliance with the DC Circuit’s recent decision vacating and remanding the Commission’s earlier Triennial Review Order.³

¹ *In the Matter of Unbundled Access to Network Elements, Notice of Proposed Rulemaking*, WC Dkt. No. 04-313, FCC 04-179 (rel. Aug. 20, 2004) [hereinafter referred to as the “NPRM”].

² *Id.*, para. 2.

³ *United States Telecom Ass’n v. Federal Communications Comm’n*, 359 F.3d 554 (D.C. Cir. 2004)[hereinafter USTA II].

Advocacy has reviewed the NPRM and the FCC's initial regulatory flexibility analysis ("IRFA"), which is required by Section 603 of the Regulatory Flexibility Act ("RFA").

Advocacy believes that the FCC did not adequately analyze the impact on small businesses of eliminating unbundled network elements ("UNEs") or describe alternatives that would minimize this impact. Advocacy encourages the FCC to analyze the impact on small businesses and publish alternatives for comment in a revised IRFA.⁴

1. Advocacy Background

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Section 612 of the RFA requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.⁵

Congress crafted the RFA 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.⁶ To this end, the RFA requires agencies to analyze the economic impact of draft regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.⁷

On August 13, 2002, President George W. Bush signed Executive Order 13272 requiring

⁴ The accelerated time table on this rulemaking may necessitate publishing the revised IRFA for comment concurrent with the final regulatory flexibility analysis.

⁵ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) 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).

⁶ Pub. L. 96-354, FINDINGS AND PURPOSES, SEC. 2 (a)(4)-(5), 126 CONG. REC. S299 (1980).

⁷ See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003), available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

federal agencies to implement policies protecting small entities when writing new rules and regulations.⁸ This Executive Order highlights the President’s goal of giving “small business owners a voice in the complex and confusing federal regulatory process”⁹ by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. In addition, Executive Order 13272 authorizes Advocacy to provide comment on draft rules to the agency that has proposed the rule, as well as to the Office of Information and Regulatory Affairs of the Office of Management and Budget.¹⁰ Executive Order 13272 also requires agencies to give every appropriate consideration to any comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule’s publication in the *Federal Register*, the agency’s response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.¹¹

2. The Availability of UNEs Will Significantly Impact Small Businesses

The FCC details which businesses are considered “small” for the purposes of their initial regulatory flexibility analysis (“IRFA”). Unfortunately, a listing of small entities that may be affected falls short of the legal requirements of the RFA, as the IRFA did not analyze the impact of the proposed rule on small businesses.

Section 603 of the RFA requires agencies to consider the economic impact that a proposed rulemaking will have on small entities. Unless the head of the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities, the agency is required to prepare an IRFA. The IRFA must include: (1) a description of

⁸ Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

⁹ White House Home Page, *President Bush’s Small Business Agenda*, (announced March 19, 2002) (last viewed February 2, 2004) <<http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html>>.

¹⁰ E.O. 13272, at § 2(c).

¹¹ *Id.* at § 3(c).

the impact of the proposed rule on small entities; (2) the reasons the action is being considered; (3) a succinct statement of the objectives of, and legal basis for the proposal; (4) the estimated number and types of small entities to which the proposed rule will apply; (5) the projected reporting, recordkeeping, and other compliance requirements, including an estimate of the small entities subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules which may duplicate, overlap, or conflict with the proposed rule; and (7) all significant alternatives that accomplish the stated objectives of the applicable statutes and minimize any significant economic impact of the proposed rule on small entities. In preparing its IRFA, an agency may provide either a quantifiable or numerical description of the effects of a proposed rule or alternatives to the proposed rule, or more general descriptive statements if quantification is not practicable or reliable.

The Commission did ask for comment on the economic effect that various UNE approaches will have on small telecommunications carriers.¹² The RFA encourages the Commission to conduct its own analysis and rely on public comment to improve the quality of analysis prior to making a final decision. To correct this deficiency, Advocacy recommends that the FCC issue a revised IRFA to analyze the impacts of this rule on small businesses.

According to the latest statistics in the FCC's Local Telephone Competition Report, CLECs provide 29.6 million access lines or 16.3 percent of the access lines in the nation.¹³ CLECs provide 23 percent over their own local loop facilities, 61 percent use UNE loops, and 16 percent are from resale.¹⁴ The FCC's report showed that the number of lines provided by CLECs using UNE-Platform ("UNE-P") has increased at a faster rate in the past five years than the

¹² NPRM Appendix, para 39.

¹³ FCC, LOCAL TELEPHONE COMPETITION: STATUS AS OF DECEMBER 31, 2003 (released June 2004).

¹⁴ *Id.* at 2.

number of lines provided by facilities-based CLECs that did not utilize UNE switching.¹⁵ In December 31, 2003, the FCC reported that ILECs provided three times as many UNE-P lines to other carriers as UNE lines.¹⁶ This information indicates that excluding any element from the UNE list will likely impact small businesses significantly.

A study by the Microeconomic Consulting & Research Associates (MiCRA Study), which was sponsored by the CLECs themselves, contains more information on the impact on small competitive carriers.¹⁷ This study showed that UNE-P accounted for 67 percent of CLEC lines and is the primary mode of entry for CLECs.¹⁸ In order to compete effectively, the MiCRA study said that CLECs need unbundled loops and transport to reach customers.¹⁹

The MiCRA study also paid specific attention to DS-1 loops and transport and estimated the nationwide market for DS-1 at slightly more than two million lines.²⁰ The MiCRA study suggests that CLECs have used DS-1 lines in combination with facilities provided by the CLEC or the ILEC to offer service, and small businesses find integrated DS-1 loops and transport economically attractive.²¹ The study stated that special access rates are inflated and are not economical for CLECs.²² The study asserted that a forced migration from UNEs to special access rates would increase the costs to the CLEC by 100 percent and would cost an additional \$2 billion annually.²³

¹⁵ *Id.* at Table 4.

¹⁶ *Id.* (showing that ILECs provided 15,161,000 UNE-P lines and 4,260,000 UNE lines to other carriers).

¹⁷ Mark T. Bryant and Michael D. Pelcovits, *The Economic Impact of the Elimination of DS-1 Loops and Transport as Unbundled Network Elements*, Microeconomic Consulting & Research Associations, Inc. (June 29, 2004).

¹⁸ *Id.* at 3.

¹⁹ *Id.*

²⁰ *Id.* at 7. DS-1 is a digital signal with a bandwidth of 1.544 Mbps in both directions that is capable of transporting data, voice signals or a combination of the two. A DS-1 channel can accommodate up to 24 voice-grade channels. It can also be used to combine voice and data signals or can be cross connected to interoffice transport facilities and carry signals to another local wire center or the CLEC's point of presence on the ILEC's network.

²¹ *Id.* at 1-2.

²² *Id.* at 4.

²³ *Id.* at 9-10.

Advocacy's outreach to small CLECs produced information that echoed the findings of the FCC's Local Competition Report and the MiCRA study. CLECs make use of unbundled access to the local loop and a substantial number of small carriers utilize UNE-P and unbundled access to switching. Many small CLECs make use of unbundled transport, especially DS-1, DS-3, and dark fiber.²⁴ The small CLECs have built their business models around continued access to these elements. Advocacy will continue to reach out to small businesses to gather impact data and will file any additional findings as a reply comment.

3. Alternatives to Minimize the Impact Small Businesses

Regrettably, the FCC did not identify or analyze alternatives in the IRFA to minimize impacts on small businesses.²⁵ To assist the FCC in its consideration of alternatives, Advocacy spoke with several small CLECs about possible alternatives that would minimize the impact on small businesses. Through the course of our outreach, Advocacy learned that small CLECs that rely on UNE-P were concerned that the Commission would eliminate switching from the list of UNEs. To minimize the impact that elimination of switching would have on their businesses, the small CLECs proposed tightening the rules involving "hot cuts," which are the physical transfer of an access line from one carrier to another.

Advocacy notes that the D.C. Circuit mentions two alternatives that involve hot cuts in the USTA II decision. Both of these alternatives were originally proposed by the ILEC petitioners as alternatives to the FCC's Triennial Review Order.²⁶ The first is "rolling" hot cuts, which would require unbundled access to ILECs switching on new lines for 90 days in order to give the ILEC time to perform the accumulated backlog of hot cuts simultaneously. The second

²⁴ DS-3 is a faster version of DS-1 with a bandwidth of 44.736 Mbps. Dark fiber is unused fiber optic cable. Often times companies lay more fiber than they need in order to curb costs of having to do it again and again. Dark fiber can be leased other carriers who want to establish optical connections among their own locations.

²⁵ NPRM, Appendix, paras. 38-9.

²⁶ See USTA II at 570.

alternative would require the ILEC to provide unbundled access to its switch only until it was able to perform the hot cut.²⁷ Advocacy recommends that the Commission take a close look at each of these alternatives and the relief provided small carriers if both are adopted.

If the final rule eliminates a UNE, Advocacy recommends that the Commission consider adopting a transition period before the UNE is phased out. Many small CLECs have built business plans around the assumption of continued access to UNEs. By granting small CLECs a transition period, the FCC may give these small CLECs an opportunity to adjust their business plans, raise the necessary capital, buy and install equipment, and transition customers from a UNE-P service to a facilities-based one.

It is unfortunate that the Commission did not publish alternatives for comment. The absence of analysis by the Commission on regulatory burden and less costly alternatives ignores the basic requirements of the RFA. Instead, the Commission passes that responsibility onto the public through the notice and comment process. My office is offering a few alternatives for consideration and the small business community will too.

4. Conclusion

Advocacy recommends that the FCC fully analyze the impact of the NPRM on small CLECs and consider significant alternatives that minimize the economic impact on small entities in a revised IRFA. The Office of Advocacy will continue to reach out to small CLECs to obtain information on the impacts on small businesses to assist the Commission in these efforts. For additional information or assistance, please contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov.

²⁷ *See Id.* at 570-71.

Respectfully submitted,

/s/ _____
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
Eric E. Menge
Assistant Chief Counsel for Telecommunications

Office of Advocacy
U.S. Small Business Administration
409 3rd Street, S.W.
Suite 7800
Washington, DC 20416

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cc:

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Jeffrey Carlisle Acting Chief, Wireline Competition Bureau
Carolyn Fleming Williams, Director, Office of Communications Business Opportunities
Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs

Certificate of Service

I, Eric E. Menge, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this October 4, 2004, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

/s/ _____
Eric E. Menge

Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, DC 20554

Honorable Jonathan S. Adelstein
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-C302
Washington, DC 20554

Honorable Kathleen Q. Abernathy
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-B115
Washington, DC 20554

Qualex International Portals II
445 12th Street, S.W.
Room CY-B402
Washington, DC 20554

Honorable Michael J. Copps
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A302
Washington, DC 20554

Carolyn Fleming Williams
Director
Office of Communications Business
Opportunities
445 12th Street, S.W.
Room 7-C250
Washington, DC 20554

Honorable Kevin J. Martin
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Room 8-A204
Washington, DC 20554

Jeffrey Carlisle
Acting Chief
Wireline Competition Bureau
445 12th Street, S.W.
Room 5-C450
Washington, DC 20554

Dr. John D. Graham
Administrator
Office of Information and Regulatory
Affairs
Office of Management and Budget
725 17th Street, N.W.
Washington, DC 20503