

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

In the Matter of	)	
	)	
Communications Assistance for	)	ET Docket No. 04-295
Law Enforcement Act and	)	
Broadband Access and Services	)	RM-10865
	)	

**REPLY 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 Reply Comments to the Federal Communications Commission (“FCC” or “Commission”) regarding its *Notice of Proposed Rulemaking* (“NPRM”)<sup>1</sup> in the above-captioned proceeding. The FCC is seeking comment on a proposed rule that examines issues relating to the applicability of the Communications Assistance for Law Enforcement Act (“CALEA”)<sup>2</sup> to packet-mode services, such as broadband Internet access, as well as implementation and enforcement issues. The FCC is proposing to apply CALEA to facilities-based providers of any type of broadband Internet access service and Voice over Internet Protocol (“VoIP”).

Advocacy agrees with the FCC’s determination and commenters that this proposed rule will have a significant economic impact on small telecommunications carriers. Under the Regulatory Flexibility Act (“RFA”), the FCC must analyze these impacts as well as consider alternatives to minimize the impact on small entities. Advocacy recommends that the FCC

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<sup>1</sup> *In the Matter of* Communications Assistance for Law Enforcement Act and Broadband Access and Services, ET Dkt. No. 04-295, FCC 04-187 (rel. Aug. 9, 2004) [hereinafter referred to as the “NPRM”].

<sup>2</sup> 47 USC §§ 1001-1010 (1994).

publish a revised initial regulatory flexibility analysis (“IRFA”) for comment before proceeding to a final regulatory flexibility analysis (“FRFA”) for the final rule. The FCC should give careful consideration to the impact information and alternatives presented by small entities in their comments.

## **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.<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup>

On August 13, 2002, President George W. Bush signed Executive Order 13272 requiring federal agencies to implement policies protecting small entities when writing new rules and regulations.<sup>6</sup> This Executive Order highlights the President’s goal of giving “small business

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<sup>3</sup> 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).

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

<sup>5</sup> 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>.

<sup>6</sup> Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

owners a voice in the complex and confusing federal regulatory process”<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

## **2. Expansion of CALEA Requirements to Packet-Based Switching Will Have a Significant Economic Impact on Small Businesses**

The FCC is proposing to require that broadband Internet access service and managed VoIP services be CALEA compliant.<sup>10</sup> Rather than analyze the impacts in the IRFA, the Commission refers to paragraphs in the NPRM that generally acknowledge that the proposal “could create potentially heavy burdens for small and rural carriers in particular.”<sup>11</sup> However, the RFA requires that the Commission analyze the rule’s compliance requirements and impacts on small carriers, such as costs of new equipment, training, and hiring of professional services. In addition, the IRFA does not address the economic impact on small carriers of the proposed cost-recovery method for CALEA compliance.<sup>12</sup>

The IRFA should include estimates on the costs that small carriers will have to incur to

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<sup>7</sup> 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>>.

<sup>8</sup> E.O. 13272, at § 2(c).

<sup>9</sup> *Id.* at § 3(c).

<sup>10</sup> NPRM Appendix B, Section D.

<sup>11</sup> *Id.* para. 100.

<sup>12</sup> *Id.* para. 118.

be CALEA compliant under the proposed rule. Small entities would then be able to comment on the accuracy of the estimates and possible ways to minimize the impact. In addition, while the IRFA describes Section 109 petitions as an alternative for small businesses, this petition process has onerous requirements, is impracticable for small carriers, and is part of the statutory scheme. As discussed later, it is not a regulatory alternative as envisioned by the RFA.<sup>13</sup> Advocacy recommends that the Commission develop alternative schemes to allow for the purchase and operation of the equipment to enable small telecommunication carriers to become compliant. This information should be published for comment in a revised IRFA.

In the NPRM, the FCC tentatively concludes that broadband Internet access services and managed VoIP services are subject to CALEA.<sup>14</sup> Advocacy has reviewed the comments filed with the FCC from small entities. In particular, comments filed by the National Telecommunications Cooperative Association (“NTCA”), the United States Telecom Association (“USTA”) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) were helpful in determining that this proposal would require small carriers to purchase and use new equipment for packet-based switching to be CALEA compliant and such equipment is not currently on the market.<sup>15</sup> The available equipment is not capable of distinguishing between voice and data packets. As a result, additional time is needed for the equipment to be developed, tested, and then made available to small carriers.

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<sup>13</sup> 5 U.S.C. Sec. 603(c).

<sup>14</sup> NPRM para. 37.

<sup>15</sup> Comments of the United States Telecom Association to the *Notice of Proposed Rulemaking* in ET Dkt. No. 04-295 at 13 (Nov. 8, 2004) (USTA Comments); Comments of the National Telecommunications Cooperative Association to the *Notice of Proposed Rulemaking* in ET Dkt. No. 04-295 at 8 (Nov. 8, 2004) (NTCA Comments); and Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies to the *Notice of Proposed Rulemaking* in ET Dkt. No. 04-295 at 2 (Nov. 8, 2004) (OPASTCO Comments).

Finally, the FCC proposes making individual carriers responsible for CALEA costs.<sup>16</sup> In particular, the FCC proposes that carriers recover their costs from their customers. The Commission recognized that this proposal could place unique burdens on customers of small, rural carriers<sup>17</sup> and the small carriers agreed.<sup>18</sup> The ability to pass on costs to customers depends heavily on the prevailing elasticities in the particular markets. Small and rural carriers do not have the diversity in their customer base that large carriers have, and small carriers do not have as large a footprint. This is in part why rural carriers receive Universal Service Fund contributions, for example. For those costs that cannot be passed through, small carriers are again at a disadvantage; they do not have the requisite scope to absorb the increase in costs. Advocacy's studies substantiate the concern that small and rural carriers will experience a heavier burden. According to Hopkins (1995)<sup>19</sup> and Crain and Hopkins (2001),<sup>20</sup> small businesses bear a disproportionate share of the federal regulatory burden. The costs per employee incurred by small businesses are 60 percent higher than those faced by their larger counterparts.

As part of its regulatory flexibility analysis, the Commission should analyze the compliance burdens of extending CALEA requirements to broadband Internet access services and managed VoIP services. As Advocacy's studies have shown, small businesses face unique burdens that will cause the regulatory costs of this rule-making to fall disproportionately upon them.

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<sup>16</sup> NPRM para. 118.

<sup>17</sup> *Id.* para. 120.

<sup>18</sup> Comments of the Smithville Telephone Company to the *Notice of Proposed Rulemaking* in ET Dkt. No. 04-295 at 13 (Nov. 8, 2004) (Smithville Comments); NTCA Comments at 11; OPASTCO Comments at 2.

<sup>19</sup> Thomas D. Hopkins, *Profiles of Regulatory Costs*, A Report to the U.S. Small Business Administration (November 1995).

<sup>20</sup> W. Mark Crain and Thomas D. Hopkins, *The Impact of the Regulatory Costs on Small Firms*, A Report to the U.S. Small Business Administration (2001).

### **3. FCC Should Seek Out Alternatives to Minimize Impact on Small Businesses.**

In its IRFA, the FCC states that small entities could petition the FCC under Section 109(b) as a possible safeguard against the economic impacts of CALEA compliance and is unaware of any other alternatives that safeguarded small entities better.<sup>21</sup> As a result of our outreach to small carriers and review of the comments, Advocacy does not believe that the Section 109(b) petition process, as currently described in the NPRM, would provide meaningful relief to small entities. The petition process established under CALEA and as proposed by the FCC is not tailored to address the circumstances of small carriers.<sup>22</sup> In the NPRM, the Commission recognizes that “carriers face a high burden in making an adequate showing to obtain alternative relief pursuant to Section 109(b).”<sup>23</sup> NTCA and OPASTCO advised Advocacy and stated in comments to the FCC that the petition process is burdensome for small companies as it takes substantial resources to prepare a petition.<sup>24</sup>

Section 603 of the RFA requires the FCC to describe and analyze significant alternatives that are consistent with the underlying statute and the agency’s regulatory goals.<sup>25</sup> When considering a Section 109(b) petition, the Commission determines whether compliance would impose significant difficulty or expense on the carrier or on users of the carriers system and to consider 11 other factors.<sup>26</sup> In the NPRM, the Commission tentatively concluded that it should assign greater weight to national security and public safety-related concerns.<sup>27</sup> In order to minimize the impact on small carriers, Advocacy recommends that the FCC consider giving significant weight to factors dealing with economic burdens on carriers and their customers such

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<sup>21</sup> NPRM Appendix B, Section E (citing to the petition process presented in 47 U.S.C. Sec. 1008(b)).

<sup>22</sup> NTCA Comments at 8.

<sup>23</sup> NPRM para. 98.

<sup>24</sup> NTCA Comments at 8-9. OPASTCO also agreed with this assessment as part of Advocacy’s outreach.

<sup>25</sup> 5 U.S.C. Sec. 603(c).

<sup>26</sup> Sec. 109(b)(1).

<sup>27</sup> Sec. 109(b)(1)(A).

as: (1) the effect on rates for basic residential telephone service,<sup>28</sup> (2) the financial resources of the carrier,<sup>29</sup> and (3) other factors that the FCC determines are appropriate.<sup>30</sup> NTCA made similar recommendations which are likely to make Section 109(b) filing requirements less burdensome for small carriers.<sup>31</sup> USTA pointed out that any relaxation of the CALEA process that allows small carriers to take advantage of standards negotiated by large carriers and equipment manufacturers would be good policy<sup>32</sup> and OPASTCO said that relaxing Section 107(c) and 109(b) requirements for small carriers would not jeopardize public safety, as small carriers receive very few intercept requests and most have not received any at all.<sup>33</sup>

Although the FCC did not include the proposal in the IRFA, the FCC proposes a 90-day blanket transition period in the NPRM for packet-based technology which could provide an significant alternative for small carriers.<sup>34</sup> Because of the costs of implementing new technology and the need for the technology to be developed, the Commission should consider an extended transition period for small carriers. A commenter, OPASTCO, recommended that this period should be no less than 180 days or could be tied to the availability of technology.<sup>35</sup>

A third option, presented by NTCA, was based on the Commission's reasoning that under the availability of Section 107(c),<sup>36</sup> the FCC could further reduce the magnitude of the impact on small and rural carriers by allowing them to continue to receive deferrals from Section 107(c)

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<sup>28</sup> Sec. 109(b)(1)(B).

<sup>29</sup> Sec. 109(b)(1)(H).

<sup>30</sup> Sec. 109(b)(1)(K). The Department of Justice also pointed to this section as a means to grant relief to small carriers. Comments of the Department of Justice to the *Notice of Proposed Rulemaking* in ET Dkt. No. 04-295 at 69 (Nov. 8, 2004) (DOJ Comments).

<sup>31</sup> NTCA Comments at 10.

<sup>32</sup> USTA Comments at 14.

<sup>33</sup> *Id.*; OPASTCO Comments at 3.

<sup>34</sup> NPRM para. 101.

<sup>35</sup> OPASTCO Comments at 3. The Department of Justice also raised the possibility of an additional nine months for carriers to become fully compliance so long as they take immediate steps to come into compliance. DOJ Comments at 57-8.

<sup>36</sup> NPRM para. 97.

petitions.<sup>37</sup>

Another alternative that is raised in the NPRM but not addressed in the IRFA is compliance based on the use of a trusted third party.<sup>38</sup> Under this alternative, a trusted third party is an outside company with a system that has access to a carrier's network and remotely manages the intercept process for the carrier. Commenters had mixed feelings about this alternative, but the FCC's IRFA would benefit from an analytical review of this approach.<sup>39</sup>

Advocacy suggests that the FCC clarify in the revised IRFA and FRFA any statutory limitations on its ability to entertain alternatives. The FCC should then analyze alternatives received in comments and others considered by the Commission. The FCC can then discuss why, or why not, those alternatives can be implemented under CALEA's statutory provisions. Should the FCC conclude that the only flexibility available is Section 109 (b), Advocacy recommends that the Commission consider allowing small businesses to file jointly to alleviate the burden of engaging in a Section 109(b) petition, or other solutions to minimize the cost of filing under Section 109(b) to small businesses.

#### **4. Conclusion**

Advocacy believes that the FCC's proposed rule will have a significant economic impact on a substantial number of small telecommunications carriers as the technology to comply with the CALEA requirement on packet-based switching is not yet available for small carriers. The FCC should consider the full scope of these impacts on small carriers and consider significant alternatives presented in this and other comments.

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<sup>37</sup> NTCA Comments at 9.

<sup>38</sup> NPRM para. 69-76.

<sup>39</sup> NTCA Comments at 5; Smithville Comments at 3.



For additional information or assistance, please contact me or Eric Menge of my staff at  
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Respectfully submitted,

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## 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 December 15, 2004, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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