

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

In the Matter of)	
)	
Developing a Unified Intercarrier)	CC Dkt. No. 01-92
Compensation Regime)	
)	

**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 the Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding.¹ The FCC is seeking comment on a variety of plans that would reform the Commission’s Intercarrier Compensation regime and create a single unified system governing how telecommunications carriers compensate each other for termination of traffic on each other’s networks.

Advocacy agrees with the FCC’s determination that this proposed rule will have a significant economic impact on small telecommunications carriers. Under the Regulatory Flexibility Act (“RFA”), the FCC must analyze the impacts as well as consider alternatives to minimize the impact on small entities. For the purposes of the RFA and Advocacy’s comments, the terms “small entities” and “small businesses” refer solely to providers (such as telecommunications carriers) and not to consumers. The FCC should give careful consideration to the impact information and alternatives presented by small entities. To assist the FCC in its

¹ See *Further Notice of Proposed Rulemaking*, CC Dkt. No. 01-92, FCC 05-33 (rel. March 3, 2005).

analysis, Advocacy has solicited input from a variety of small entities, reviewed their proposals, and prepared these comments reviewing the impacts and available alternatives.

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 Regulatory Flexibility Act (“RFA”) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996.²

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.³ 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.⁴

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.⁵ This Executive Order highlights the President’s goal of giving “small business owners a voice in the complex and confusing federal regulatory process”⁶ by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their

² 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).

³ Pub. L. 96-354, FINDINGS AND PURPOSES, SEC. 2 (a)(4)-(5), 126 CONG. REC. S299 (1980).

⁴ 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>.

⁵ Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

⁶ 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>>.

regulations on small entities. 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.⁷

2. Advocacy Outreach on Intercarrier Compensation.

Advocacy held a roundtable in February 2004 to identify upcoming telecommunications issues of importance to small businesses. A vast majority of the small carriers, both incumbent and competitive, present at the roundtable said that intercarrier compensation was one of the most important issues pending before the Commission and would have far-reaching effects on their ability to compete in the telecommunications marketplace. Small carriers stressed to Advocacy that this rulemaking could fundamentally change how carriers interact with each other and could affect some of the foundational rules for telecommunications services.

Advocacy held a second roundtable specifically on intercarrier compensation in May 2005 to discuss the various plans. Advocacy heard from representatives of the Cost-Based Intercarrier Compensation Coalition ("CBICC"), Home Telephone Company and PBT Telecom ("Home/PBT"), the Intercarrier Compensation Forum ("ICF"), the Cellular Telecommunications Industry Association ("CTIA"), the Rural Alliance, and Western Wireless. Advocacy asked each of the participants to discuss the economic impacts of the proposals before the FCC and available alternatives that would minimize that impact. Advocacy's comments are based upon the discussions at these roundtables and additional outreach to small businesses.

⁷ *Id.* at § 3(c).

3. The Need for Intercarrier Compensation Reform.

In its IRFA, the FCC states that the goal of the proposed rule is to reform intercarrier compensation and create a more uniform regime that promotes efficient facilities-based competition in the marketplace.⁸ The FCC provides evidence of why reform is needed, citing the difficulty of maintaining technical differences in an era of converging technologies, the opportunity for regulatory arbitrage, and the introduction of new technologies.⁹

Every small business Advocacy contacted agreed with the Commission's assessment that the intercarrier compensation regime needs to be unified and updated to address changes in the telecommunications industry. Accordingly, Advocacy agrees with the FCC that a uniform intercarrier compensation regime would be beneficial to small telecommunications carriers regardless of whether they are rural, competitive, or wireless.

4. Intercarrier Compensation Regime Will Have a Significant Impact on Small Entities.

In the IRFA, the Commission recognized "the unique needs and interests of small entities" and asks for comment on issues and measures applicable to them.¹⁰ The FCC also notes that any intercarrier compensation reform could create new burdens for small businesses.¹¹ Small carriers have stressed to Advocacy that intercarrier compensation reform could fundamentally change how carriers interact with each other and could affect some of the foundational rules for telecommunications services.

Advocacy agrees that this rulemaking will have a significant economic impact on small businesses. The FCC divides its analysis in the IRFA to address the two categories of proposals: (1) bill and keep, in which the compensation rate is set to zero and both carriers recover their

⁸ FNPRM, para. 146.

⁹ *Id.* paras. 147-8.

¹⁰ *Id.* para. 209.

¹¹ *Id.* para. 192.

costs from their customers, and (2) unified calling-party's-network pays (CPNP), in which there is a single compensation rate for terminating traffic regardless of class of service. In the course of conducting outreach, Advocacy found that there is a significant overlap in the impact of the two categories. Accordingly, we address them together and note where they diverge.

a. Regulatory Complexity Is Detrimental to Small Business.

Every small business that Advocacy spoke with concerning this issue stated that the regulatory complexity inherent in the current intercarrier compensation regime was detrimental to small businesses. The current regime is a patchwork of different compensation schemes that has evolved over time. Charges depend upon the carrier's classification and the nature of the traffic. This jumble of regulatory compensation is more difficult for smaller carriers to comply with than larger carriers as it requires sophisticated technology and significant technical expertise. In addition, small carriers said there is substantial regulatory arbitrage inherent in the current system. Wireless carriers said that the current regime is inherently unfair and anti-competitive. Small competitive carriers said that the current system is unnecessarily complicated which increases their costs. The ICF, which has both small and large business members, stated at Advocacy's roundtable that regulatory simplicity is good for small business while extensive regulatory oversight is detrimental to small business. Advocacy agrees with these assessments that the burden of a complex compensation system will fall most heavily on small carriers (rural, competitive, and wireless).¹²

b. Cost Recovery Is a Major Concern for Small Business.

Cost recovery is a major point in many of the intercarrier compensation plans,

¹² Advocacy's studies substantiate the concern that 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. They have a smaller number of employees, fewer resources, and any equal amount of regulation stands to affect their bottom line disproportionately. (Hopkins (1995), Crain and Hopkins (2001)), www.sba.gov/advo/stats.

particularly those proposed by the rural carriers. The FCC identified that under a bill and keep system carriers might have to modify their systems and processes to reflect change in cost recovery.¹³ The FCC also noted under a unified CPNP system, carriers may need to perform cost studies to set costs of compensation and would have to track the origin and destination of traffic.¹⁴ The FCC also sought comment on the impact of reduced intercarrier revenues to small business that will result from a bill and keep system.¹⁵

According to small rural carriers and small competitive carriers, bill and keep forces them to incur inbound network costs without reimbursement while the financial gain goes to another carrier. These small carriers pointed out that bill and keep presumes similar costs between carriers. While this may be the case between large carriers or carriers in metropolitan areas, the interconnections between rural carriers and others exhibit more asymmetries. Aside from the distance factors, rural networks cost more to build and maintain and have lower traffic volumes. The costs are not equal, requiring the rural carrier to cover a greater share of the costs of a call, which the carrier would have to recoup from its customers. Similarly, small competitive carriers state that a compensation rate of zero (essentially what is happening with bill and keep) will drive some competitive carriers out of business as they serve high-cost customers.

Small rural carriers and small competitive carriers are also concerned with the impact of higher subscriber line charges (“SLC”) to cover any reduction in intercarrier compensation. Rural carriers have fewer customers and higher costs, so a cost averaging does not work for them. Small competitive carriers are concerned that higher SLC rates would put them at a competitive disadvantage. If cost recovery for inbound traffic is moved to the carriers and the SLC cap increased, then small rural carriers would have to keep the SLC rates at the highest

¹³ FNPRM para. 194.

¹⁴ *Id.* para. 198.

¹⁵ *Id.* para. 209.

allowed, leading customers in rural areas to having higher SLC rates than those in metropolitan areas.

A unified CPNP system also has its inherent costs. As the ICF explained to Advocacy, there are costs to track traffic terminating on other networks and there are costs to bill those carriers. An intercarrier compensation regime that is strictly bill and keep would simplify billing and remove other administrative burdens on small carriers. The Rural Alliance countered that rate of return carriers must do cost studies regardless of which intercarrier compensation regime is adopted so there are no regulatory cost savings for avoiding them. Further, the Rural Alliance said that small rural carriers receive a significant portion of their cost recovery from intercarrier compensation. Small wireless carriers recommended to Advocacy that revenue neutrality should not be a goal of intercarrier compensation and there are enough inefficiencies in the system that their removal will absorb any costs.

Advocacy believes that there are costs to both plans that will have an impact on small carriers. A pure bill and keep system will require small carriers to reassess how they recover their costs, which may involve an increase in rates, an increased reliance on the universal service fund, or another method of absorbing cost. A pure unified CPNP, on the other hand, will require continued reliance on costs studies and continued costs to track and bill. A mixture of the two plans would have a mixture of the costs.

c. Interconnection Is Necessary for Small Business.

Regardless of whether the FCC adopts a bill and keep system or a unified CPNP, the Commission recognizes that the interconnection rules may need to be revised or replaced¹⁶ which could necessitate changes in interconnection agreements.¹⁷ Small rural carriers said that

¹⁶ *Id.* paras. 195, 199.

¹⁷ *Id.* paras. 195, 200.

interconnection requirements are necessary and should remain, as they have no ability to negotiate interconnection agreements with larger carriers. Small wireless carriers stated interconnection should be negotiated, and competitive carriers said that interconnection everywhere may not be feasible.

Advocacy believes that interconnection is a concern for small businesses. To compete effectively in the telecommunications marketplace, a small carrier (whether rural, competitive, or wireless) must interconnect with other larger carriers. Since interconnection is a necessity, smaller carriers will be a disadvantage when negotiating with a larger carrier. Similarly, wireless carriers may be at a disadvantage when negotiating interconnection agreements with wireline carriers.

d. Universal Service Closely Tied to Intercarrier Compensation.

In the IRFA, the FCC recognizes that intercarrier compensation and universal service are intertwined. For both bill and keep proposals and unified CPNP proposals, small carriers must determine their costs and demonstrate a shortfall between their costs and revenues in order to receive universal service. Furthermore, the Commission stated that some small carriers may no longer be eligible for universal service support.¹⁸

Small rural carriers said that adoption of a bill and keep system would lead to either large increases in end-user chargers or increases in the amount that they would need to draw from universal service as the costs to cover the network would shift from access charges or to other sources. Many small rural carriers are already dependent on universal service to cover a significant portion (which they approximate at 50 percent) of their costs. They are concerned that additional costs would overburden the universal service fund.

Small wireless carriers are also deeply concerned about universal service and do not

¹⁸ *Id.* paras. 196, 201.

believe that it is currently fair and even, as the benefits flow primarily to the incumbent rural carriers. The small wireless carriers state that this unbalanced flow benefits one class of carrier and one type of technology.

Advocacy believes that any reform of intercarrier compensation will have a significant impact upon carriers reliant upon universal service. Also, treating different classes of technology differently under universal service could have an impact on developing technologies and act as a barrier to entry for new entrants into the rural marketplace.

5. Possible Alternatives that Could Minimize the Impact on Small Businesses.

The FCC gave consideration to several alternatives in its IRFA that would minimize the impact of reforming the intercarrier compensation regime. The FCC discussed the possibility of a five-year transition period,¹⁹ as well as an incremental cost approach.²⁰ The FCC also raises the possibility of adopting separate intercarrier compensation rules and separate cost recovery mechanisms for small carriers.²¹

Advocacy believes that these are all valid alternatives and the FCC should consider adopting them to minimize the impact on small businesses. In particular, an extended transition period and the separate cost recovery mechanisms could provide needed relief for small businesses who are dependent upon the revenues from intercarrier compensation to support their networks. After speaking with small businesses through individual outreach and at our roundtables, Advocacy recommends that the Commission consider the following alternatives in addition to those proposed by the FCC.

a. Make Bill and Keep Optional.

Advocacy recommends that the Commission encourage carriers to negotiate agreements

¹⁹ *Id.* para. 207.

²⁰ *Id.* para. 208.

²¹ *Id.* paras. 210-11

whenever possible. Bill and keep is a fine system for intercarrier compensation when both carriers are of approximately equal size and have equal costs. Bill and keep may be attractive even when carriers are of unequal size and costs, because of the added costs of tracking and billing inherent in a unified CPNP system. Advocacy believes that the best entities to make the determination as to whether bill and keep make sense in a particular relationship are the carriers themselves. Therefore, the FCC should permit carriers to enter into bill and keep arrangements if both sides are willing.

However, bill and keep should not be mandatory. Instead, small carriers should have the option of using a unified CPNP. A CPNP system makes sense for small carriers (rural, competitive, and wireless) who rely upon the intercarrier compensation to recover their costs and are unable to do so through increased rates to customers or through universal service support. Advocacy believes that unifying rates between all types of carriers and classes of traffic would simplify intercarrier relations and minimize the regulatory impact on small businesses.

b. Provide an Interconnection Safety Net.

Advocacy recommends that Commission allow carriers to negotiate the terms of interconnection, but a minimum level of interconnection should continue to be required. Interconnection is crucial to building a viable network and larger carriers have a significant advantage over small ones when negotiating because of the differences in size and number of customers. It is essential that small carriers be permitted to interconnect with other, larger networks.

Therefore, the FCC should set a safety net that establishes a baseline for interconnection. Carriers are welcome to negotiate additional interconnection beyond this point, but a minimal requirement assures that all carriers will be able to interconnect and create a viable business.

c. Make Universal Service Portable and Equitable.

Advocacy believes that any revision of the universal service system done in conjunction with intercarrier compensation reform must make universal service portable and equitable. Universal service should be technologically neutral and available to all classes of carriers. Having a portable and equitable universal service system will result in the most cost effective and efficient way to support high cost areas, as well as providing support to new entrants and entrepreneurs.

d. Move to a Capacity-Based Intercarrier Compensation Regime.

More and more traffic on the network is data, and carriers are increasingly relying on packet-based switching. Therefore, Advocacy recommends that the FCC consider updating the intercarrier compensation scheme to account for this new system for transmitting traffic and recognize that packet-based switching is inefficient to bill on a per-minute basis. The FCC should allow carriers to bill on a capacity-based regime, rather than per minute. Capacity is simpler to calculate and easier to administer, which will result in regulatory cost savings for small carriers.

6. Conclusion.

Advocacy urges the FCC to consider the comments from small entities and consider the regulatory impact of reforming the intercarrier compensation regime. Additional alternatives may be received through small business comments on the IRFA and the FNPRM. Advocacy recommends that the FCC analyze the alternatives recommended above and other significant alternatives presented by commenters to reduce the impact on small businesses.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov.

Respectfully submitted,

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May 23, 2005

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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 May 23, 2005, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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