



**OFFICE OF ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, DC 20416**

August 24, 2004

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

**RE: Ex Parte Presentation in a Non-Restricted Proceeding
Initial Regulatory Flexibility Analysis for Local Telephone Competition and
Broadband Reporting (WC Docket No. 04-141, FCC 04-81)**

Dear Mr. Chairman:

As part of its statutory duty to monitor and report on agencies' compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),¹ the Office of Advocacy of the U.S. Small Business Administration has reviewed the Federal Communications Commission's ("FCC" or "Commission") compliance with the RFA's requirements for the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.² The Office of Advocacy ("Advocacy") is an independent office within the U.S. Small Business Administration ("SBA"), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

Section 706 of the Telecommunications Act of 1996 requires the FCC to report regularly to Congress on the state of broadband deployment in the United States. To fulfill this mandate, the FCC requires telecommunication carriers to file semi-annual reports (Form 477) on local telephone service and broadband deployment. The NPRM is intended to improve the FCC's mandatory reporting. The Commission is seeking comment on: (1) extending the local competition and broadband reporting program for five years beyond its current sunset in March 2005; and (2) revising the program to improve data collection on broadband deployment. In particular, the FCC requests comment on whether it should lower or eliminate the thresholds that exempt small carriers from reporting. The Commission seeks to improve the data collection by obtaining more detailed data and additional data on broadband deployment in rural areas. Under the current exemption for carriers with fewer than 250 broadband lines, the FCC believes its data

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 et seq.) 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).

² *In the Matter of Local Telephone Competition and Broadband Reporting, Notice of Proposed Rulemaking*, WC Dkt. No. 04-141, FCC 04-81 (rel. April. 16, 2004).

collection “misses several hundred small facilities-based providers,” including rural local exchange carriers.³ With the NPRM, the FCC published a draft Form 477 and instructions, reflecting the proposed requirements to report on broadband deployment by ZIP code, speed, and type of technology used to deliver the service.

Advocacy recommends that the Commission consider simplifying the proposed Form 477 or establishing a “short form” or “Form 477-EZ” for small carriers previously exempt from reporting. Advocacy urges the FCC to consider comments from small carriers and their associations on ways in which the Commission could achieve its improved data gathering objectives while minimizing the impact on small entities under the RFA.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 under Pub. L. No. 94-305 to represent the views and interests of small business within the Federal government. Advocacy’s statutory duties include serving as a focal point for the receipt of complaints concerning the government’s policies as they affect small business, developing proposals for changes in Federal agencies’ policies, and communicating these proposals to the agencies.⁴ Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the RFA.

On August 14, 2002, President George W. Bush signed Executive Order 13272, requiring Federal agencies to implement policies protecting small businesses when writing new rules and regulations.⁵ This Executive Order authorizes Advocacy to provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget.⁶ It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. Agencies are also required to respond to Advocacy’s comments on a proposed rule in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, unless the agency certifies that the public interest is not served by doing so.⁷

2. Analysis of the FCC’s Initial Regulatory Flexibility Analysis

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 (and provides a factual basis supporting the decision to certify), the agency is required to prepare an initial regulatory flexibility analysis (IRFA). The IRFA must include: (1) a description of 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

³ 69 Fed. Reg. 30254 (May 27, 2004).

⁴ 15 U.S.C. § 634(c)(1)-(4).

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

⁶ *Id.* at § 2(c).

⁷ *Id.* at § 3(c).

subject to the requirements and the professional skills necessary to comply; (6) all relevant Federal rules that 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.

The IRFA accompanying the FCC's NRPM addressed the need for, objectives, and legal basis of the proposed rule, and provides a description of those small entities affected. However, rather than an identification and analysis of the impacts of the proposed reporting requirements on currently exempt small entities, the FCC listed the changes proposed in the NPRM and asked for comment. Although the FCC did not identify or analyze significant alternatives that would meet the Commission's objective, Advocacy commends the Commission for including a statement in the IRFA encouraging small entities to comment and for expressing interest in hearing from and working with small entities.

3. Potential Impacts on Small Carriers

By performing an IRFA, the FCC acknowledges that the proposed rule potentially will impose a significant economic impact on a substantial number of small entities. Advocacy reviewed the docket and spoke with representatives of small carriers to obtain information on the proposed rule's potential economic impacts. Our goal was to identify alternatives that would achieve the FCC's objective to gather more data on the deployment of broadband while minimizing the burdens on small carriers.

As the Commission is aware, small carriers have fewer employees than their larger counterparts, so the burdens of information collections fall disproportionately on them and are an expensive proposition, despite having a smaller subscriber base. Representatives of small carriers advised Advocacy that it will be costly for them to collect the information proposed by the FCC, and they believe the FCC underestimates the time required to complete the draft Form 477. Further, the time and expertise of a senior level technician or other high-level professional is required to complete the form under the current program as well as the proposed rule. The possible requirement to report "the information transfer rates actually observed by the end user" caused the greatest concern, raising questions about the burden of having to measure the speed at which the end user receives the service. Regarding the small carrier exemption, comments from the small carriers focused on the broadband threshold rather than the number of access lines.

The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") advised Advocacy that the FCC's request for more detailed data will greatly increase the burden on small carriers. The FCC estimates that the proposed Form 477 will take 15 hours to complete, whereas OPASTCO believes that the new requirements will take 23 to 28 hours to complete.⁸

The National Telecommunications Cooperative Association ("NTCA") noted that the proposed Form 477 requires more information than the current form and is labor intensive. NTCA agreed with OPASTCO's estimates on the time required to complete the proposed form. NTCA recommended that the key to participation by small carriers is to request a limited amount of

⁸ Comments of OPASTCO, to the NPRM in WC 04-141, at 6 (June 28, 2004).

information and to request it in a manner that makes it easy to respond. Members of NTCA with less than 2,500 access lines have an average of ten employees. NTCA recommended a simpler form for small carriers, suggesting that it have no more than ten questions and take less than 30 minutes to complete.⁹

The Cellular Telecommunications Industry Association (“CTIA”) raised concerns about the granularity of the data the FCC proposes to require and recommends that the new form be revised to be technologically neutral – due to its application to wireline and wireless carriers. They further propose removing the requirement to report on the different speeds and instead require carriers to report that they have deployed a high-speed line.¹⁰

The National Cable and Telecommunications Association (“NCTA”) commented that the exemption should not be set below 100 broadband lines per state, which would capture all significant broadband deployment. NTCA believes that reducing the threshold further or eliminating it altogether would result in an unwanted burden on small carriers. NCTA also commented that reporting on the different speeds of broadband deployment is not necessary under Section 706. Also, cable companies do not collect information on broadband deployment by ZIP code and would require new reporting systems that would incur considerable expense. The ZIP code requirement would not be overly burdensome to small carriers in rural areas because they serve few ZIP codes.¹¹

4. Less Burdensome Alternatives Available to the FCC

Advocacy encourages the FCC to review the small entity comments to the docket and explore ways to simplify the proposed data collection requirements to reduce the time and complexity involved in reporting. If the comments suggest confusion regarding a specific data request, such as how to measure the speed of the broadband services provided, Advocacy encourages the FCC to analyze the impacts identified and clarify the requirement accordingly. For instance, if the Commission did not intend for carriers to measure the speed of broadband service at the customer’s premises, Advocacy recommends that it provide clearer instruction to carriers and discuss the use of ranges or estimates for the purposes of Form 477.

Advocacy recommends that the FCC simplify the proposed Form 477 for all carriers reporting under Section 706 or for small carriers previously exempt from reporting. The FCC could further revise its proposed Form 477 to capture more detailed data from carriers above the exemption threshold, and maintain the existing Form 477 (as a Form 477-EZ) for small carriers with fewer than 250 facilities-based high-speed lines. This approach would meet the FCC’s objective of having better data on broadband deployment. Another approach would be for the Form 477-EZ to be tailored to the few questions that apply to small carriers based on the pattern the FCC has observed with voluntary reporting by small carriers. A tailored form based on the relevant questions may make compliance more straightforward. The FCC could also improve the instructions for completing Form 477 to direct carriers to those questions they need to answer based on the type of telecommunications services they provide. In addition, Advocacy

⁹ Comments of NTCA to the NPRM in WC 04-141, at 2-4 (June 28, 2004).

¹⁰ Comments of CTIA to the NPRM in WC 04-141, at 1-5 (June 28, 2004).

¹¹ Comments of NCTA, to the NPRM in WC 04-141, at 3, 13-14 (June 28, 2004).

recommends the FCC publish a small entity compliance guide concurrent with or shortly after publication of the final rule and certainly well in advance of the first reporting cycle.

If the FCC eliminates the small carrier exemption, special attention should be paid to confidentiality issues. Advocacy encourages the Commission to review how other agencies protect the identities of businesses located in rural, sparsely populated areas. For instance, the Bureau of the Census has procedures in place for suppressing data when such data, if published, can be used to identify the actual business from which the data originated. Advocacy recommends that the FCC develop procedures to suppress data if its publication under Section 706 would enable the carrier to be identified and such proprietary and confidential data revealed.

5. Conclusion

Advocacy recognizes the FCC's statutory duty to report to Congress on broadband deployment and appreciates the FCC's desire to obtain more detailed data. Advocacy encourages the FCC to pursue the objectives of the proposed rule in a manner that minimizes the potential burdens on small carriers. The Office of Advocacy is available 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.

Sincerely,

/s/ Shawne McGibbon for
Thomas M. Sullivan
Chief Counsel for Advocacy

/s/ _____
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cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan Adelstein
Dr. John D. Graham, Administrator, Office of Information and Regulatory Affairs
Jeffrey Carlisle, Acting Bureau Chief, Wireline Competition Bureau
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