

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

March 30, 2001

Michael K. Powell  
Chairman  
Federal Communications Commission  
Washington, DC 20554

RE: Ex Parte Presentation in a Non-Restricted Proceeding  
Final Regulatory Flexibility Analysis and Initial Regulatory Flexibility Analysis for  
Numbering Resource Optimization (CC Dkt. No. 99-200)

Dear Mr. Chairman:

As part of its statutory duty to monitor and report on the FCC's compliance with the Regulatory Flexibility Act of 1980 ("RFA"), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"),<sup>1</sup> the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Federal Communications Commission's ("FCC" or "Commission") Final Regulatory Flexibility Analysis ("FRFA") and the Initial Regulatory Flexibility Analysis ("IRFA") for the *Second Report and Order and Second Further Notice of Proposed Rulemaking* ("Order" or "FNPRM") in the above-captioned proceeding.<sup>2</sup> Advocacy has concluded that neither analysis satisfies the requirements of the RFA.<sup>3</sup> The Commission's purpose in this docket is to prevent the possible exhaustion of telephone numbers in the near future. In the Order, the Commission adopted several optimization measures, and the FNPRM proposed several more.

Advocacy reviewed the FRFA and IRFA and found that neither complied with the law as follows: (1) the Commission did not identify a broad segment of the industry that would be affected by the rules – namely telecom service providers and participants in the secondary market; (2) the Commission did not describe the compliance requirements inherent in the Order or the NRPM that would impose substantial costs on small businesses; and (3) the Commission did not consider significant alternatives in either the FRFA or the IRFA that would minimize costs on small businesses while still obtaining the Commission's goal of numbering optimization.

**Action requested:** The Commission should issue a revised FRFA and IRFA that cures the deficiencies cited in this letter. This would bring the Commission into compliance with the RFA and strengthen the Commission's record to support the actions in the Order, while providing a more complete record for the FNPRM.

## **1. Background**

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305<sup>4</sup> to represent the views and interests of small business within the Federal government. Advocacy's statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.<sup>5</sup> Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of 1980,<sup>6</sup> as amended by the SBREFA, Subtitle II of the Contract with America Advancement Act.<sup>7</sup>

The RFA was designed 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>8</sup> The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.<sup>9</sup> The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing any disproportionate burden on small entities.<sup>10</sup>

## **2. The Order's FRFA Does Not Comply with the RFA**

The purpose of the FCC's Order is to prevent depletion of telephone numbers. Because of recent advances in telecommunications, including faxes, the Internet, and wireless technology, the number of lines in the country has been multiplying faster than expected. The Order adopted several strategies to ensure that numbers are used efficiently, such as setting a utilization threshold of numbers assigned to a carrier before the carrier can get more numbers, distributing numbers to carriers in blocks of 1,000, instead of 10,000, and conducting audits of carriers to ensure they are using their numbers efficiently. Unfortunately, the Commission, as required by the RFA, did not adequately assess the economic impacts of these actions on small businesses when it adopted these rules. Specifically, the Commission did not adequately describe all the small entities to which the rule will apply, nor did it adequately discuss the costs of the audit, and did not consider alternatives, such as exemptions, that minimize the impact for small entities. Each of these deficiencies are discussed below. Advocacy recommends that the Commission issue a revised FRFA to address the deficiencies cited.

### **a. The FRFA Does Not Identify Small Telecommunications Service Providers**

While the FRFA lists the traditional classes of small entities, it does not include a description of telecommunications service providers that are directly affected by the audit provisions of this rule.<sup>11</sup> This oversight may be due to inconsistency in the text of the Order

itself. Under Commission's numbering rules, carriers and service providers are two separate classes.<sup>12</sup> The sections in the Order that discuss the audit provisions of the rule repeatedly and overwhelmingly refer to "carriers."<sup>13</sup> However, the Order uses the term "service providers" a few times without any explanation why the Commission changed language.<sup>14</sup> Furthermore, the final rules in Appendix A make the regulations applicable to all "service providers," including those provisions in the text of the Order where the Commission only uses the term "carriers."<sup>15</sup>

Because the language of the Order is inconsistent, it is difficult to tell whether or not the Commission intended to make the rules applicable only to carriers or to include service providers. Advocacy recommends that the Commission issue an order to clarify the issue. Furthermore, Advocacy recommends the Commission issue a revised FRFA, which would identify telecommunications service providers and include a description of this class of small entities. Small service providers are classified under SBA size standards as "Other Telecommunications"(NAICS Code 513390). In addition, the Commission should consider the impact on the following classes when it revises its FRFA: Advertising Agencies (NAICS Code 541810), Marketing Consulting Services (NAICS Code 541613), Media Buying Agencies (NAICS Code 541830), Telephone Call Centers (NAICS Code 561422); Telephone Answering Services (NAICS Code 561421), Telemarketing Bureaus (NAICS Code 561422).

**b. The FRFA Does Not Describe the Costs for Complying with the Audit Requirement**

The Order requires all carriers<sup>16</sup> to use 60 percent of a numbers assigned to the carrier before they could receive additional numbers.<sup>17</sup> This percentage increases each year by 5 percent until a carrier is required to use 75 percent of the numbers assigned.<sup>18</sup> The Commission determined that audits were necessary to verify that carriers were utilizing the required percentage of numbers assigned to them.<sup>19</sup> The Commission adopted both for-cause and random audits;<sup>20</sup> both of which would be conducted by the Audits Branch of the Accounting Safeguards Division in the Common Carrier Bureau.<sup>21</sup>

The FRFA analysis did not contain a description of the costs of the audit and, therefore, was insufficient to comply with the requirements of the RFA. The Commission states that costs to comply with the audit program adopted in the Order are "minimal."<sup>22</sup> Unfortunately, the Commission does not substantiate its conclusion that the costs are minimal. This incomplete analysis raises the following questions that should be answered in a revised FRFA:

- What is the scope of an audit? How much time would be involved for a small company to comply with the audit? How is this compared to a large company? Will small companies that would have fewer blocks of numbers have higher costs per number block?
- How much would it cost for a company to be audited in this manner? How are the costs for small businesses to comply with an audit compared to larger companies? What data does the FCC have on the costs?
- How often will "random" audits be conducted?
- Are subsequent audits less expensive?
- What types of professional skills are necessary to comply with an audit?

- What are the exact federal rules and orders and industry guidelines that the audits will be enforcing?

Advocacy is particularly troubled by the lack of discussion of the issue of using the audits to enforce industry guidelines.<sup>23</sup> The Order does not specify who makes these guidelines and what role small business will play in their creation. Further, the Order does not list which industry guidelines the audits would enforce. Advocacy is extremely concerned about the small business impacts of the Commission agreeing to enforce unspecified industry guidelines. The Order gives no hint as to how these rules are made and who creates them other than “industry.” Both of these aspects raise small business issues and could result in enormous costs on small businesses who need numbers and have to comply with these industry guidelines.

Furthermore, the Commission did not estimate the costs of granting the auditor authority to do “follow-up” audits.<sup>24</sup> Except that the service provider must have been the subject of a previous for cause audit, Advocacy can find no limitations on this authority. A small service provider could find itself audited every month without cause, if it was the subject of a “for cause” audit once before, even if that audit revealed no wrong doing. Such auditing authority raises questions of equity, and Advocacy recommends that the cost and policy implications of this requirement be analyzed when the Commission revises its FRFA.

**c. The FRFA Does Not Adequately Consider Alternatives to the Audit Requirement**

The FRFA did not adequately consider alternatives to the audit program that would minimize the impact on small businesses. While it did provide some discussion on the value of preserving numbers for small businesses,<sup>25</sup> the discussion is a justification for the rules rather than an analysis of alternatives. Advocacy believes that the lack of alternatives stems from (1) the assumption that the audit will not cost much and (2) the FCC’s failure to do an impact analysis.

**3. The FNPRM’s IRFA Does Not Comply with the RFA**

In addition to the regulations adopted in the Order, the Commission simultaneously proposed additional means to further the efficient use of numbers. The most significant of the Commission’s proposals are granting blocks of numbers that would only be used for specific services, assessing fees for number reservations, enforcement mechanisms, and auctioning off the number blocks. There are several omissions in the FCC’s IRFA of the effect of the proposed rules on small businesses. Specifically, the Commission did not identify the secondary market as an affected class, it did not discuss the proposed auction costs, and it did not adequately consider alternatives, such as exemptions or reduced fees. Advocacy recommends that the Commission issue a revised IRFA to address the deficiencies cited below.

**a. The IRFA Does Not Describe Small Entities in the Secondary Market**

As in the FRFA, the Commission lists traditional telecommunications classes of small entities in its IRFA but fails to think beyond the standard classes. The FNPRM explores

developing a market-based approach for optimizing numbering resources, and discusses the importance of the secondary market to the Commission's efforts to optimize numbering.<sup>26</sup> The market-based approach proposed by the Commission would have an immediate and measurable impact on secondary market small businesses. The IRFA should describe the classes that make up the secondary market.<sup>27</sup>

**b. The IRFA Does Not Adequately Describe the Costs of Auctioning Numbering Resources.**

The IRFA fails to meet the requirements of the RFA, as it does not discuss the compliance requirements for the proposed market for numbering resources.<sup>28</sup> The FNPRM proposes an auction as a means for distributing establishing numbering resources as well as recurring fees for holding the numbers.<sup>29</sup> Not only are the fees and bids direct costs on small businesses which need the numbers, but there are administrative costs for participating in an auction. The Commission should consider the following questions about cost when it revises its IRFA:

- What are the types of compliance requirements associated with an auction?
- What are the administrative costs for participating in an auction?
- Are the costs greater or lesser for small companies compared to larger companies? Will small companies that would bid on fewer blocks of numbers have higher costs per number block?
- Is participation in subsequent auctions less expensive?
- What types of professional skills are necessary to compete in an auction?
- What are the compliance requirements for having recurring fees on numbers?

When the Commission revises its IRFA, it should take a hard look at the compliance requirements that are inherent in an auction procedure. The Commission's previous experience with spectrum auctions should provide plenty of data on the costs of participating in an auction.

**c. The IRFA Does Not Adequately Consider Alternatives to the Auctions Costs**

While the section of the IRFA which discusses alternatives appears lengthy, a closer look at what is provided reveals that this discussion is nothing other than a summary of the proposed regulations.<sup>30</sup> Unfortunately, it does not consider significant alternatives that would accomplish the Commission's objectives while minimizing any significant impact on small businesses, which is the purpose of this section and one of the requirements of the RFA.<sup>31</sup>

When the Commission revises its IRFA, Advocacy believes that the Commission should consider exemptions to recurring costs for small businesses that order under a certain threshold of numbers, as well as reduced fees for small businesses participating in the auction. Both of these would reduce costs for small businesses while not interfering with the Commission's objective of promoting efficiency and number optimization.

**4. Conclusion**

The Order's FRFA and the proposed rule's IRFA do not comply with the RFA for the reasons given above. Because the deficiencies are significant, Advocacy strongly recommends that the Commission reconsider the small business concerns raised in this letter and in the public docket. Once it has done so, the Commission should issue a revised FRFA and IRFA. This will bring the Commission into compliance with the RFA, while reducing costs on small businesses and strengthening the Commission's rulemaking in this docket.

Sincerely,

/s/ \_\_\_\_\_  
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Acting Chief Counsel for Advocacy

/s/ \_\_\_\_\_  
Eric E. Menge  
Assistant Chief Counsel for Telecommunications

cc:

Commissioner Susan Ness  
Commissioner Harold Furchtgott-Roth  
Commissioner Gloria Tristani  
Dorothy Attwood, Chief, Common Carrier Bureau  
Anthony Bush, Acting Director, Office of Communications Business Opportunities

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<sup>1</sup> 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).

<sup>2</sup> *In the Matter of Number Resource Optimization, Second Report and Order on Reconsideration and Second Further Proposed Rulemaking*, CC Docket No. 99-200, 96-98, FCC 00-429 (rel. Dec. 29, 2000).

<sup>3</sup> Because this communication is a result of Advocacy's statutory duty, it is exempt from the Commission's rules on ex parte presentations. *See* 47 CFR § 1.1204(a)(5)(1997).

<sup>4</sup> *Id.*

<sup>5</sup> 15 U.S.C. § 634(c)(1)-(4).

<sup>6</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

<sup>7</sup> Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

<sup>8</sup> 5 U.S.C. § 601(4)-(5).

<sup>9</sup> *See generally*, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 1998 ("Advocacy 1998 RFA Implementation Guide").

<sup>10</sup> 5 U.S.C. § 604.

<sup>11</sup> Order, Appendix B paras. 9-20.

<sup>12</sup> 47 U.S.C. § 52.5(g)-(h) (1996).

<sup>13</sup> Order paras. 81-99.

<sup>14</sup> *Id.* paras. 86, 87, 93.

<sup>15</sup> Order, Appendix A, p. 82.

<sup>16</sup> And possibly telecom service providers. *See supra* 2.a.

<sup>17</sup> Order para. 22.

<sup>18</sup> *Id.* para. 25.

<sup>19</sup> *Id.* para. 82.

<sup>20</sup> *Id.* para. 85.

<sup>21</sup> *Id.* para. 90.

<sup>22</sup> Order, Appendix B para. 21.

<sup>23</sup> Order paras. 81-99.

<sup>24</sup> *Id.* para. 87.

<sup>25</sup> Order, Appendix B para. 30.

<sup>26</sup> Order para. 156.

<sup>27</sup> Because the Order and the proposed rulemaking affect the same classes of industry, the classes Advocacy listed that should be included in the FRFA for the Order provide an excellent starting point for the Commission when it revises the IRFA. *See Supra* 2.a.

<sup>28</sup> Order, Appendix C para. 18.

<sup>29</sup> FNPRM paras 156-178.

<sup>30</sup> Order, Appendix C paras. 19-29.

<sup>31</sup> 5 U.S.C. § 603(c).