

May 3, 2001

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

RE: Ex Parte Presentation in a Non-Restricted Proceeding
Final Regulatory Flexibility Analysis for Implementation of the Subscriber Carrier
Selection Change Provisions of the Telecommunications Act of 1996 and Policies and
Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers (CC
Dkt. No. 94-129)

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"),¹ the Office of Advocacy, U.S. Small Business Administration ("Advocacy") has reviewed the Federal Communications Commission's ("FCC" or "Commission") treatment of the RFA for the *Third Report and Order* ("3rd R&O" or "Order") in the above-captioned proceeding.²

The Commission's 3rd R&O did not comply with the RFA for a number of reasons. First, the Commission adopted the "drop-off requirement" in the Order without raising the issue in an Initial Regulatory Flexibility Analysis ("IRFA") or soliciting comment on compliance costs and significant alternatives. Furthermore, the 3rd R&O's Final Regulatory Flexibility Analysis ("FRFA") did not analyze compliance costs of the drop-off requirement or significant alternatives to lessen the regulatory impact on small businesses.

Action Requested: The Commission should issue a supplemental IRFA that requests comment on the effect on small businesses of the Commission's decision to require that carrier employees drop-off the phone call during a third party verification. Once that is done, the Commission should conduct a supplemental FRFA drawn from the comments received. The Commission can undertake this action as part of its response to Petitions for Partial Stay and Reconsideration filed in response to the Order. Advocacy recommends that the Commission grant the partial stay so that small businesses are not unfairly harmed while the agency conducts the supplemental regulatory flexibility analysis.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305³ 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.⁴ Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the Regulatory Flexibility Act of 1980,⁵ as amended by the SBREFA, Subtitle II of the Contract with America Advancement Act.⁶

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.⁷ 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.⁸ 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.⁹

2. Issue Background

The purpose of this docket was to implement Section 258 of the Telecommunications Act of 1996¹⁰ and reduce unauthorized changes of consumers' long distance carriers – a practice commonly known as slamming. In this docket's Second Report and Order and Further Notice of Proposed Rulemaking¹¹ ("2nd R&O"), the Commission adopted a comprehensive framework to close loopholes used by carriers to slam customers and increase penalties to carriers that do slam.¹² In addition, the Commission proposed to clarify third-party verification.¹³ Third party verification ("TPV") was one of the means adopted by the Commission to put a check on slamming. Carriers using telemarketing to subscribe a new customer would transfer the customer to a third-party verifier who would confirm that the customer did indeed want to change long distance carriers. The Commission prepared an IRFA for the 2nd R&O,¹⁴ which mentioned TPV, but the IRFA did not identify, describe, or discuss the drop-off requirement nor did it identify significant alternatives to the drop-off requirement.¹⁵

In the 3rd R&O, the Commission adopted additional measures to discourage slamming, including the "drop-off requirement."¹⁶ The drop-off requirement mandates that telephone carrier representatives must drop off the line while the customer speaks with the third-party verifier. The Commission stated that this would help ensure the independence of third-party verification and prevent the carrier's sales representative from improperly influencing subscribers.¹⁷ The Commission prepared a FRFA for the 3rd R&O that identified the drop-off requirement but did not analyze compliance costs or significant alternatives.¹⁸

3. The Commission Cannot Conduct a FRFA on a Issue without Conducting an IRFA and Soliciting Comment on the Impact of the Issue.

As Advocacy discussed in our recent letter to the Commission regarding its decision to drop the enhanced 911 services cost recovery requirement, the Commission must raise issues in an IRFA before it can address them in a FRFA.¹⁹ Courts have held that the public must be given a chance to comment on the proposed rule, and it is impossible for the Commission to summarize comments in the FRFA in response to an IRFA when the issues were not raised in the IRFA.²⁰

The Commission did not raise the drop-off requirement in the IRFA. Therefore, small businesses did not have the opportunity to comment on the proposal, and the Commission did not provide an analysis of the compliance costs or alternatives to the drop-off requirement. Without these opportunities, small businesses were hampered in their ability to provide the Commission with important cost information on the drop-off requirement and proposals for less costly alternatives – two crucial parts of the RFA.

One of the requirements of Section 604 of the RFA is for the Commission to summarize significant issues raised by public comment.²¹ Because the Commission never raised the issue in the IRFA, it is impossible for the agency to summarize comments raised in response as required by the courts.²² Therefore, the Commission cannot conduct a FRFA on the drop-off requirement, as this issue was never raised in the IRFA.

4. The Commission Did Not Describe the Compliance Requirements or Regulatory Alternatives to the Drop-off Rule in the FRFA.

In addition to the issue of the insufficient IRFA as stated above, the FRFA itself is flawed as the Commission does not describe the compliance requirements or regulatory alternatives to the drop-off rule. While the Commission did list the drop-off rule in the FRFA, it did not discuss the costs inherent in this activity, including professional skills necessary – a requirement of the RFA.²³ While it is simple to declare that carrier representatives must drop off the line during the TPV, there are substantial costs involved. These costs include upgrading the network and revising internal processes for signing up new customers, implementing a means of getting back in touch with the customer after the TPV, and retraining employees on how to use the new network upgrades and internal processes. All of these factors will add substantial costs to small businesses.

Also, the FRFA did not consider alternatives that would minimize the significant economic impact on small businesses as required by the RFA. Advocacy's review of the comment letters revealed that the Commission had several alternatives to a strict drop-off rule. These options included allowing the carrier's representative to remain on the line but remain silent, or record all TPV conversations which could be reviewed if there was an allegation of undue interference by the carrier's representative. The Commission should have described these options in its FRFA and why the Commission declined to adopt them.

5. The Commission Should Grant the Petition for a Partial Stay and Address the Issues Raised in this Letter in a Supplemental IRFA.

VoiceLog LLC (“VoiceLog”) filed a petition seeking reconsideration and a partial stay pending reconsideration of the 3rd R&O.²⁴ The FCC should grant the partial stay and conduct a new IRFA which addresses the issues that VoiceLog raises in its petition for reconsideration. The FCC can draw upon the suggestions made in the petitions for cost information and alternatives when the Commission revises its FRFA. By combining its revision of the IRFA with its actions upon reconsideration, the FCC will satisfy the requirements of the RFA at the same time it addresses VoiceLog’s petitions.

Conclusion

The Commission’s FRFA in the 3rd R&O does not comply with the RFA. As a consequence, the FCC’s rules have a substantial detrimental impact on small businesses. Advocacy recommends that the Commission grant VoiceLog’s petition for a partial stay and conduct a new regulatory flexibility analysis as part of its actions upon reconsideration.

Sincerely,

/s/ _____
Susan M. Walthall
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

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 Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, Third Report and Order and Second Order on Reconsideration*, CC Dkt. No. 94-129, FCC 00-255 (rel. Aug. 15, 2000).

³ *Id.*

⁴ 15 U.S.C. § 634(c)(1)-(4).

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

⁶ Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

⁷ 5 U.S.C. § 601(4)-(5).

⁸ 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*”).

⁹ 5 U.S.C. § 604.

¹⁰ 47 U.S.C. § 258. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (“1996 Act”).

¹¹ *In the Matter of Implementation of Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996 and Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, Second Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 94-129, FCC 98-334 (rel. Dec. 23, 1998).

¹² *Id.* para. 1.

¹³ *Id.* para 165-8.

¹⁴ *Id.* paras. 222-40.

¹⁵ *Id.* para. 229.

¹⁶ 3rd R&O para 38.

¹⁷ *Id.*

¹⁸ *Id.* paras. 89-119.

¹⁹ Letter from Susan M. Walthall, Acting Chief Counsel for Advocacy, to Michael K. Powell, Chairman, Federal Communications Commission, CC Dkt. No. 94-102 (April 19, 2001).

²⁰ *Northwest Mining Assoc. v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998); *Southern Offshore Fishing Assoc. v. Daley*, 55 F. Supp. 2d 1336 (M.D. Fla. 1999).

²¹ 5 U.S.C. § 604(a)(2).

²² See *supra* note 20.

²³ 5 U.S.C. § 604(a)(4).

²⁴ *Petition for Reconsideration of VoiceLog LLC*, CC Dkt. No. 94-129 (March 28, 2001); *Petition for Partial Stay Pending Reconsideration of VoiceLog LLC*, CC Dkt. No. 94-129 (March 28, 2001).