



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

February 5, 2003

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

RE: Ex Parte Presentation in a Non-Restricted Proceeding
Initial Regulatory Flexibility Analysis for Triennial Review of Unbundled Network
Elements (CC Dkt. No. 01-338; CC Dkt. No. 96-98; CC Dkt No. 98-147)

Dear Mr. Chairman:

As part of its statutory duty to monitor and report on an agency'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 ("Advocacy") 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 is an independent entity within the U.S. Small Business Administration ("SBA"), so the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

In the NPRM, the Commission seeks to review the Commission's policies on unbundled network elements. The Commission explored the issues involved in continuing unbundling obligations imposed on incumbent local exchange carriers ("ILECs") for different network elements. While the Commission conducted an Initial Regulatory Flexibility Analysis ("IRFA"), the Commission did not consider the impact of delisting unbundled network elements ("UNEs")³ on small competitive local exchange carriers ("CLECs"). To comply with the RFA, Advocacy

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 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Notice of Proposed Rulemaking*, CC Dkt. No. 01-338, CC Dkt. No. 96-98, CC Dkt. No. 98-147, FCC 01-361 (rel. Dec. 20, 2001).

³ Section 251(c)(3) of the Telecommunications Act of 1996 requires ILECs to make elements of their network available to competitors on an unbundled basis. The FCC has created a list of seven unbundled network elements that were determined to be necessary for the provision of telecommunications services without which competitors would be impaired in their ability to provide service. These UNEs are available at rates set by a formula, created by the FCC and adjudicated by the states. NPRM at paras. 5-10.

recommends that the Commission publish for comment a revised IRFA with an analysis of what impact that delisting of UNEs would have on small competitive carriers. If the Commission declines to revise its IRFA, we strongly encourage the Commission to address the impact in the Final Regulatory Flexibility Analysis (“FRFA”) when it adopts the final rule.

Furthermore, Advocacy urges the Commission to consider proposals suggested by small businesses that would further the Commission’s regulatory goal of encouraging competition and investment in facilities while minimizing the impact on small businesses and their ability to compete.

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305⁴ 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.⁵ Advocacy also has a statutory duty to monitor and report to Congress on agencies’ compliance with the RFA.

The RFA was designed to ensure that, while accomplishing their intended purposes, regulations do not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁶ 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.⁷ The RFA requires the agencies 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 burden on small entities.⁸

On August 14, 2002, President George W. Bush signed Executive Order 13272 that requires federal agencies to implement policies protecting small businesses when writing new rules and regulations.⁹ 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.¹⁰ It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. The agency shall include, in any explanation or discussion accompanying publication in the

⁴ Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637).

⁵ 15 U.S.C. § 634(c)(1)-(4).

⁶ 5 U.S.C. § 601(4)-(5).

⁷ See generally, Office of Advocacy, U.S. Small Business Administration, *The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies*, 2002 (“*Advocacy 2002 RFA Implementation Guide*”), available at <http://www.sba.gov/advo/laws/rfaguide.pdf>.

⁸ 5 U.S.C. § 604.

⁹ Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

¹⁰ *Id.* at § 2(c).

Federal Register of a final rule, 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.¹¹

2. The FCC's Rulemaking Is More Suited for a Notice of Inquiry than an NPRM

The manner in which the FCC presented the issues in the Triennial Review is more consistent with a Notice of Inquiry ("NOI") than an NPRM. The purpose of an NOI is to gather information and intelligence about the scope of a problem, factors that contribute to a problem, the benefits, or limitations of different regulatory alternatives and the different impacts of each alternative. An NOI should be used whenever the Commission lacks information about the industry to be regulated or the exact nature of the problem to be addressed.

The Commission's NPRM did not propose the actual terms or drafts of regulatory text and the FCC did not single out particular network elements to be removed from the unbundled network checklist. Instead, the FCC sought comment on numerous issues that addressed local competition, deployment, and universal service. While the questions are worthwhile, it does not counter the fact that the Commission is not proposing any concrete rules in its proposed rulemaking. Unless the agency issues another rulemaking detailing specific rules, the Commission would be adopting rules on which the public would not have had a chance to comment.

This lack of specificity is not consistent with the Administrative Procedure Act and frustrates the spirit of the RFA, as it is difficult for small businesses to comment meaningfully. We believe that by proceeding this way, the Commission is limiting the ability of small businesses to provide the agency with needed information on the impacts of the rule and possible alternatives that will lessen any impacts.

Rather than immediately publish a final rule, Advocacy recommends that the Commission treat this NPRM as an NOI and issue a further notice of proposed rulemaking. This will allow the Commission to receive comments in response to questions raised in this NPRM while providing small businesses the opportunity to comment on specific rules before they are adopted.

3. The FCC Has Changed the Nature of the Proposed Rulemaking

Many small businesses have brought to Advocacy's attention that the Commission is considering rules that were not proposed in the NPRM. Of particular concern, is the possibility that the FCC is considering removing elements from the list of ILEC's UNE obligations. If the Commission is considering this step, then the current IRFA is inadequate, because it does not analyze the impact of delisting UNEs on small CLECs.

The RFA anticipates that a proposed rule provides notice to small businesses of the regulations the federal agency is considering adopting. In the current proceeding, however, the NPRM provided little such information. We are concerned that the FCC signaled its intent through the

¹¹ *Id.* at § 3(c).

press and not through the notice and comment process. We fear that this will diminish the FCC's ability to receive the benefit of small business comments on the FCC's proposal.

We believe that it is essential that the Commission issue a further NPRM and a revised IRFA and publish specific proposed rules that the Commission is considering. A revised IRFA will provide an opportunity for small businesses to comment meaningfully on all the elements of the proposed rule, including those that may have entered into the FCC's consideration subsequent to the publication of the rule. If the Commission declines to issue a revised IRFA, Advocacy encourages the Commission to address the impact on small competitive carriers in the FRFA when it adopts the final rule.

4. Proposed Rule Has a Significant Impact on Small Businesses

Based on the feedback that Advocacy has received from small entities and their representatives, as well as information gathered from reviewing comments to the Commission, Advocacy believes that the adoption of a rule that leads to the delisting of UNEs will have a significant economic impact on small CLECs. Removing UNEs from the list of "leasable" equipment changes the basic business model in existence today. Such a change in the operating environment alters the basis for competition in the telecommunications industry.

As many of the comments to this docket by small telecommunications providers state, their very existence is predicated on the availability of UNEs. Small business groups have vouched that absent transport and interconnection, their continued operation in the market is not sustainable, and their business model would have to change. With hundreds of CLECs operating on a similar business model, the viability of this small business sector is jeopardized if UNEs were removed from the list.

Comments by the industry and FCC reports show that competition is starting to burgeon in the telecommunication market, resulting in an increase in the level and quality of customer service, and, more importantly, lowered prices. With a less than ten percent penetration rate, there is hardly a perfectly competitive situation in the local telecommunications market, but there is evidence that it is starting to take hold. Removing the UNEs from the list is likely to chill competitive entry and set the market in reverse, perhaps ensuring a continued monopoly at the local wireline level.

Small business end users also stand to be affected by this proposal. CLEC groups have suggested that the majority of their customer base for local exchange service consists of small businesses. Our discussions with small business end-user groups have corroborated this assertion. The main concerns of small business end users, namely price, customer service, and flexibility, are readily addressed by CLEC offerings. In addition, the presence of alternative carriers have placed competitive pressure on ILECs to lower prices and offer increased services.

5. Alternatives Available to the FCC

Because the removal of UNEs and UNE-P would have such a drastic effect on small businesses, the Commission should consider alternatives that would minimize the impact upon small businesses while achieving the FCC's regulatory goals of increasing competition at the local level. Advocacy recommends that the Commission consider some of the alternatives proposed by small business commenters in the docket.

In particular, if the Commission insists upon phasing out UNEs, a policy decision that Advocacy does not support at this time, it should set up objective performance requirements for the removal of UNEs and allow the state public utility commissions ("PUCs") to determine when those conditions are met. This will take into account the varying circumstances from state to state and region to region. Furthermore, it will give the incumbent incentive to encourage competition on a particular switch.

Incumbent carriers often mentioned that the pricing of UNEs was one of their major concerns. The incumbent carriers stated that they were dissatisfied with rates calculated by the state public utility commissions. If pricing is the concern, and if the Commission would like to address it, we believe that the removal of UNEs and UNE-P are not the answer; rather, the FCC should address the pricing concerns in a separate rulemaking, where the Commission can review the rates established for unbundled network elements.

The Office of Advocacy recommends that the Commission delay its consideration of elimination of UNEs pending publication of a thorough analysis of the small business impact. This will give small businesses notice to alter their business plans and make arrangements, which will help minimize some of the impacts on small businesses. To minimize the impact on small businesses, Advocacy is happy to assist the Commission in developing additional alternatives or further developing the ones listed here.

6. Conclusion

Having competition in the provision of local exchange services is squarely in the public interest. The ongoing proceedings are extremely important for a variety of reasons. As discussed in this letter, the effect that the ruling will have on small businesses is significant. If the Commission is proposing to change the competitive rules governing the industry, the RFA requires the FCC to analyze the impact of its actions on small business and identify alternatives. A policy decision to redefine the UNE obligations of the incumbent carriers would have a significant economic impact on small CLECs, and we believe that the IRFA did not analyze this impact. Thousands of small businesses providers and millions of small businesses end users stand to be affected by this rulemaking. It is our recommendation that the Commission revise and publish for comment a further NPRM and an IRFA with an analysis of this impact.

If the Commission declines to take this step, we counsel the Commission to analyze the issues raised by commenters in a FRFA. In particular, the Commission should review the impact upon small businesses and consider alternatives proposed by commenters. Doing so will likely accomplish the Commission's regulatory goal of encouraging competition, while minimizing the impact on small businesses.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff at (202) 205-6533 or eric.menge@sba.gov if you have questions, comments, or concerns.

Sincerely,

/s/ _____

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/s/ _____

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/s/ _____

Radwan Saade, Ph. D.
Regulatory Economist

cc:

Commissioner Kathleen Q. Abernathy

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