

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

In the Matter of )  
 )  
IP-Enabled Services ) WC Docket No. 04-36  
 )  
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**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 its *Notice of Proposed Rulemaking* (“NPRM”)<sup>1</sup> in the above-captioned proceeding. In the NPRM, the Commission sought comment on the impact of services and applications making use of Internet Protocol (“IP”) and what, if any, regulatory oversight the FCC should extend to IP-enabled services.<sup>2</sup>

Advocacy has reviewed the NPRM and the FCC’s initial regulatory flexibility analysis (“IRFA”) and notes that the proposed rule does not contain concrete proposals and is more akin to an advance notice of proposed rulemaking (“ANPRM”) or a notice of inquiry (“NOI”). Because of the vagueness of the NPRM, the IRFA does not provide an analysis of proposed compliance burdens, consideration of alternatives, or discussion of overlapping regulations.

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<sup>1</sup> *In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, WC Dkt. No. 04-36, FCC 04-28 (rel. March 10, 2004).

<sup>2</sup> IP-enabled services includes any service or application that relies upon Internet Protocol. It can include digital communications of increasingly higher speeds or higher-level software that provides communications services. NPRM, para 1, note 1.

Should the FCC decide to adopt regulations for IP-enabled services after consideration of the comments to the NPRM, Advocacy recommends that the FCC publish for public comment a further notice of proposed rulemaking with a supplemental IRFA to consider the impact of the proposed requirements on small entities, to provide analysis of significant alternatives that minimize the economic impact on them, and to review overlapping regulations.

## **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.<sup>3</sup>

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.<sup>4</sup> To this end, the RFA requires agencies to analyze the economic impact of proposed 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.<sup>5</sup>

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

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<sup>3</sup> 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).

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

<sup>5</sup> 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>.

regulations.<sup>6</sup> This Executive Order highlights the President’s goal of giving “small business owners a voice in the complex and confusing federal regulatory process”<sup>7</sup> by directing agencies to work closely with the Office of Advocacy and properly consider the impact of their regulations on small entities. In addition, Executive Order 13272 authorizes Advocacy to provide comment on draft rules to the agency that has proposed the rule, as well as to the Office of Information and Regulatory Affairs (“OIRA”) of the Office of Management and Budget.<sup>8</sup> 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.<sup>9</sup>

## **2. The IRFA Contains No Analysis of Compliance Burdens**

In the NPRM’s IRFA, the FCC states that the rule will have “no impact at this time” on small entities.<sup>10</sup> As Advocacy has stated in prior comments to the FCC,<sup>11</sup> the FCC’s practice of publishing notices of proposed rulemaking to solicit information and comments from the regulated entities and interested public without providing specific proposed regulations for

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<sup>6</sup> Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

<sup>7</sup> 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>>.

<sup>8</sup> E.O. 13272, at § 2(c).

<sup>9</sup> *Id.* at § 3(c).

<sup>10</sup> NPRM, para. 72.

<sup>11</sup> Reply Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 95-116 (Feb. 4, 2004); Letter from Thomas M. Sullivan, Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in MB Dkt. No. 02-227 (April 9, 2003); Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in MM Dkt. Nos 01-317, 00-244 (March 27, 2002); Letter from Thomas M. Sullivan, Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in CC Dkt. No. 01-338; CC Dkt. No. 96-98; CC Dkt. No. 98-147 (Feb. 5, 2003); Letter from Mary K. Ryan, Deputy Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in MM Dkt. No. 00-167 (Feb. 6, 2001); Comments of the Office of Advocacy, U.S. Small Business Administration, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 01-92 (Nov. 6, 2001).

comment is more consistent with an ANPRM or a NOI than a notice of proposed rulemaking.

The purpose of these two types of agency actions is to gather information on different regulatory approaches and the potential impacts of various alternative approaches. Advocacy recommends that the FCC use an ANPRM or a NOI whenever the Commission lacks information about the industry it is regulating, the exact nature of the problem to be addressed or specific regulatory proposals to achieve the policy objective.

Should the FCC decide to adopt regulations that impose requirements or regulations on small entities, the Commission must reevaluate the economic impact and the compliance burdens on small entities. Before adopting any regulations, Advocacy recommends that the FCC issue a further notice of proposed rulemaking with a supplemental IRFA identifying and analyzing the economic impacts of the regulations on small entities and less burdensome alternatives.

### **3. The FCC Should Consider Regulatory Alternatives when Encouraging a New Technology**

In the consideration of alternatives portion of its IRFA, the FCC notes that regulation may be inappropriate to most, if not all, IP-enabled Services, but the Commission also notes that the FCC has not reached any conclusions on what regulatory requirements, if any, would apply to IP-enabled services.<sup>12</sup> The Commission does not provide any concrete alternatives or steps taken to minimize the potential impact of the rule.

Therefore, if the FCC decides to regulate IP-enabled services, the RFA requires that it should consider alternatives to minimize impact on small businesses in a supplemental IRFA. Advocacy notes that many Voice over IP providers (one of the principle users of IP-enabled services) are likely to be small. These small providers are developing a nascent technology and are especially vulnerable to disproportionate regulatory costs. Advocacy advises the FCC to

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<sup>12</sup> NPRM, para. 74.

strongly consider establishing differing compliance requirements or exemptions for small entities to common carrier regulations applied to IP-enabled services.

#### **4. IP-Enabled Services Overlap with Other FCC Regulations**

Advocacy notes that the FCC states no federal rules overlap, duplicate or conflict with the NPRM.<sup>13</sup> However, several issues that have immediate and direct impact on IP-enabled services are being considered in other FCC dockets. The Commission referenced many of these issue areas in the NPRM itself, including enhanced 911 requirements,<sup>14</sup> disability access,<sup>15</sup> intercarrier compensation,<sup>16</sup> and universal service.<sup>17</sup>

In response to Advocacy's outreach,<sup>18</sup> Advocacy received input from a variety of small entities with an interest in the NPRM. Small business incumbent wireline carriers informed Advocacy that they are concerned about the impact of IP-enabled services on universal service. Carriers using alternative platforms stressed the importance of interconnection and its necessity for IP-enabled services to flourish. Competitive carriers said that they must have continued access to last mile and bottleneck facilities to provide competitive service. Small Voice over IP providers believe that intercarrier compensation has the potential to discriminate against nascent technologies and a competitively neutral form of compensation must be developed before imposing the system on IP-enabled services.

Advocacy encourages the FCC to consider how the NPRM overlaps with other requirements placed upon small wireline carriers, small IP-enabled services providers, and other small entities, as required by the RFA. Small business representatives have informed Advocacy

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<sup>13</sup> NPRM, para. 75.

<sup>14</sup> NPRM, paras. 50-57 (citing CC Dkt. No. 94-102).

<sup>15</sup> NPRM, paras. 58-60 (citing CC Dkt. No. 98-67).

<sup>16</sup> NPRM, paras. 61-62 (citing CC Dkt. No. 01-92).

<sup>17</sup> NPRM, paras. 63-66 (citing CC Dkt. No. 96-45).

<sup>18</sup> Advocacy hosted a roundtable on May 18, 2004 to discuss the regulatory impact of the NPRM. The roundtable was attended by nearly two-dozen representatives of small incumbent local exchange carriers, competitive local exchange carriers, cable providers, Internet Service Providers, and Voice over IP providers.

that the public interest and the development of IP-enabled services would be best served if the FCC resolved these outstanding issues before the Commission proceeds further in this docket.

## **5. Conclusion**

The NPRM does not contain concrete proposals and is more akin to an ANPRM or a NOI, and the IRFA does not provide an analysis of proposed compliance burdens or consideration of alternatives. If the FCC decides to adopt regulations for IP-enabled services, Advocacy recommends that the FCC issue a further notice of proposed rulemaking with a supplemental IRFA to consider the impact of the specific regulatory requirements on small entities, significant alternatives that minimize the economic impact on them, and the effect of overlapping rules.

Respectfully submitted,

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May 28, 2004

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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 28, 2004, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Reply Comments to the following:

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