

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

In the Matter of)
)
Federal-State Joint Board on) CC Docket No. 96-45
Universal Service)
)

**REPLY 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 Reply Comments to the Federal Communications Commission (“FCC” or “Commission”) regarding its *Notice of Proposed Rulemaking* (“NPRM”)¹ in the above-captioned proceeding. In the NPRM, the Commission sought comment on (1) whether to adopt in whole or in part the most recent *Recommended Decision of the Joint Board*,² concerning the process for designation of eligible telecommunications carriers (“ETCs”); and (2) related proposals to streamline FCC rules regarding high-cost universal service support.³ To preserve the long-term viability of the Universal Service Fund, the Joint Board recommended that Universal Service support only apply to a single connection (or “primary line”) that provides access to the public telephone network.⁴

Advocacy has reviewed the NPRM and the FCC’s initial regulatory flexibility analysis

¹ *In the Matter of* Federal-State Joint Board on Universal Service, *Notice of Proposed Rulemaking*, CC Dkt. No. 96-45, FCC 04-127 (rel. June 8, 2004). [hereinafter referred to as the “NPRM”].

² Federal-State Joint Board on Universal Service, CC Dkt. No. 96-45, Recommended Decision, 19 FCC Rcd 4257 (2004) (“*Recommended Decision*”).

³ NPRM, para 1.

⁴ *Recommended Decision*, paras. 56-71.

(“IRFA”), which is required by Section 603 of the Regulatory Flexibility Act. Advocacy believes that the primary line restriction will have a significant impact on small rural carriers, and recommends that the FCC conduct further analysis of the impact and draw on the comments for additional information on the impact on small telecom carriers. Advocacy also recommends that the FCC further analyze the alternative approaches proposed by the Joint Board and determine how the alternatives identified in the NPRM and those suggested in the public comments could reduce the economic impact on small telecom carriers. In addition to the analysis required by the RFA, Advocacy recommends that the Commission take the extra step of analyzing the impact of each regulatory alternative on small business end-users of telecom services.

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 1996.⁵

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.⁶ 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

⁵ 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).

⁶ Pub. L. 96-354, FINDINGS AND PURPOSES, SEC. 2 (a)(4)-(5), 126 CONG. REC. S299 (1980).

goal while minimizing the burden on small entities.⁷

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 regulations.⁸ This Executive Order highlights the President's goal of giving "small business owners a voice in the complex and confusing federal regulatory process"⁹ 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 of the Office of Management and Budget.¹⁰ 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.¹¹

2. The FCC Should Further Analyze the Impact of the Primary Line Limitation on Small Telecom Carriers

The FCC issued an IRFA as part of its NPRM, but the IRFA does not conduct an adequate analysis of the impact on small telecom carriers of restricting Universal Service support to primary lines. Advocacy recommends that the FCC conduct further analysis of the impact and draw on the comments for additional information on the impact on small telecom carriers.

The potential impact on small telecom carriers can be calculated by estimating the

⁷ 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>.

⁸ Exec. Order. No. 13272 at § 1, 67 Fed. Reg. 53,461 (2002).

⁹ 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>>.

¹⁰ E.O. 13272, at § 2(c).

¹¹ *Id.* at § 3(c).

portion of the price increase that cannot be passed on to the customer. The Commission would need to estimate the price elasticity of demand to determine how much of the increase (resulting from support being limited to a primary line) will have to be absorbed by the provider. This type of preliminary analysis will provide a reasonable estimate of the impact of the FCC's proposal on small carriers serving rural communities.

Many comments responded to the Joint Board's recommendation that high-cost universal service support be limited to a primary line that provides access to the public telephone network.¹² The small telecom carriers and their representatives commented that the recommendation would: impose severe economic difficulties for small carriers, greatly increase their operating costs, and discourage investment in the network.¹³ The National Telecom Cooperative Association ("NTCA") commented that the smallest carriers in extremely rural areas are particularly dependent on Universal Service support, as they serve remote areas of the country, which do not have the population density to support a robust network. They contend that a limitation in support to primary lines would reduce these carriers to all but a basic connection in rural areas.¹⁴

Several of the small rural wireline carriers and a wireless association stated that they build networks, not lines, and that the primary line limitation does not relate to what it costs a carrier to deploy network infrastructure and is not tied to the carrier's full network costs.¹⁵ The United States Telecom Association ("USTA") said that carriers do not currently calculate their

¹² *Recommended Decision*, paras. 56-71.

¹³ Comments of the Rural Telecommunications Association, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-45 at 22 (Aug. 6, 2004) (RTA Comments); Comments of Western Wireless, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-45, Exhibit B (Aug. 6, 2004) (Western Wireless Comments).

¹⁴ Comments of the National Telecommunications Cooperative Association to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-45 at 7 (Aug. 6, 2004) (NTCA Comments).

¹⁵ RTA Comments, at 20; NTCA Comments at 3; Comments of the Rural Cellular Association, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-45 at 23-24 (Aug. 6, 2004) (RSA Comments); Comments of the National Exchange Carrier Association, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-45 at 5-6 (Aug. 6, 2004) (NECA Comments).

costs on a per-line basis and to require carriers to do so, would require a change in how carriers allocate costs and recover them, potentially disrupting prices and increasing billing costs.¹⁶ The National Exchange Carrier Association (“NECA”) said that the primary line restriction would make the Universal Service support less predictable. Tariff rates would have to be adjusted at unpredictable intervals and may require new rate elements to recover common line costs.¹⁷

Another issue the FCC should analyze is the impact on small businesses based on how it defines primary lines. Wireline and wireless carriers are concerned about how the primary line would be defined and how the primary line would be selected.¹⁸ Wireless carriers are concerned that the wireline carrier will be made the default primary line provider,¹⁹ putting wireless carriers at a competitive disadvantage since they would have a smaller percentage of primary lines.²⁰

Further, carriers have difficulty distinguishing between primary and secondary lines in their billing systems. USTA says that systems will have to be modified and customer service personnel will have to be retrained to explain this new designation to customers, incurring training and personnel expenses.²¹ The Cellular Telecom Industry Association (“CTIA”) raises the concern that since the carrier who has the primary line will receive compensation, while the carriers of other lines would not, the FCC may need to impose reporting obligations to ensure that support is going to the primary line carrier.²²

The Commission should review all of these potential compliance burdens and analyze their impact on small telecom carriers. The FCC should pay particular attention to reporting

¹⁶ Comments of the United States Telecom Association, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-45 at 20-21 (Aug. 6, 2004) (USTA Comments).

¹⁷ NECA Comments at 8-9.

¹⁸ RTA Comments at 27; Western Wireless Comments, Exhibit B; NTCA Comments at 9; RSA Comments at 23-24.

¹⁹ Comments of CTIA-The Wireless Association, to the *Notice of Proposed Rulemaking* in CC Dkt. No. 96-45 at 20 (Aug. 6, 2004)(CTIA Comments).

²⁰ *Id.* at 5-16.

²¹ USTA Comments at 20.

²² CTIA Comments at 20.

requirements, mandates that require additional equipment or software, and training and personnel expenses.

3. The FCC Should Consider Alternatives that Will Minimize the Impact on Small Rural Carriers

In the IRFA, the FCC mentions three proposals that could avoid or mitigate the impact of the primary line limitation on small telecom carriers, but does not describe how these alternatives would minimize the impacts on the small carriers.²³ The Commission should expand on these alternatives (restatement, lump sum payment, and hold harmless) and more fully analyze their value in minimizing the impact. Several commenters stated that these alternatives would not be effective or would benefit one class of carriers over another. The FCC should give consideration to these possibilities.

One alternative endorsed by many commenters is to adopt a recommendation by the Joint Board to standardize the minimum criteria to become an ETC and qualify for Universal Service support.²⁴ Several commenters recommend that the Commission increase the requirements to become an ETC to include: adequate financial resources, commitment to provide supported services throughout service area to all customers, ability to remain functional in emergency situations, and commitment to utilize funding only to support infrastructure within the designated service area.²⁵

A few commenters also endorse the Joint Board's recommendation²⁶ that the Commission adopt an annual certification process to ensure that ETCs continue to provide the supported services.²⁷ One wireless carrier recommends that the FCC adopt the Joint Board's

²³ NPRM, para. 23.

²⁴ *Recommended Decision*, para 18.

²⁵ RTA Comments at 31-40; NTCA Comments at 16-18; NECA Comments at 18; USTA Comments at 7-10.

²⁶ *Recommended Decision*, paras. 46-48.

²⁷ NECA Comments at 18; USTA Comments at 15.

proposal to freeze per-line support on competitive entry.²⁸

In addition to the Joint Board's recommendations, commenters propose several other alternatives that the FCC should consider. The Rural Telecommunications Association ("RTA") proposes a cost-based system of support for wireless carriers that scales with the size of the wireless carrier and the size of its service area.²⁹ Western Wireless recommends that the Commission adopt a per-line cap for ETC funding, a Universal Service study area funding cap, or base support on forward-looking economic costs. NTCA recommends that ETC support should be based on that carrier's actual costs, not the incumbent wireline carrier's costs.³⁰ CTIA proposes combining study areas within a state or basing incumbent carrier's support on forward looking mechanisms.³¹

4. The FCC Should Consider the Indirect Impact on Small Business Consumers

Under the RFA, the Commission is not required to assess the proposed rule's impact on small business users of telecom service, because the impact on these consumers is indirect.³² However, due to the potentially significant and foreseeable impact on small business consumers in rural areas, Advocacy recommends that the FCC carefully analyze the implications of regulatory approaches on small businesses that have come to rely on Universal Service support for the telecom services they use. In its *Recommended Decision* to the FCC, the Joint Board recognized such impacts, asking the Commission to be mindful of the potential impacts the proposal may have on rural small business:

We also recommend that the Commission further develop the record on the appropriate treatment of businesses with multiple connections, particularly small businesses, under our recommended approach. Historically, the Joint Board and

²⁸ CTIA Comments at 22.

²⁹ RTA Comments at 5-14.

³⁰ NTCA Comments at 5-6.

³¹ CTIA Comments at 23.

³² *Mid-Tex Elec. Coop v. FERC*, 773 F. 2d 327, 342 (D.C. Cir. 1985).

Commission have concluded that universal service concerns are not as great for multi-line business customers. Some commenters, however, have raised concerns that limiting support to a single point of access provided for residential and business customers may discourage operation of businesses, particularly small businesses, in rural areas. Commenters have noted that rural economies are highly dependent on the presence of businesses to provide jobs and services. Restating support should address these concerns to a large extent by avoiding upward pressure on rates for all customers in rural areas. Nevertheless, we believe that these concerns warrant careful consideration. One possible means to address such concerns with regard to small businesses is to allow high-cost support for some designated number of multiple connections for businesses, rather than restricting support to a single business connection.³³

Several of the comments also note that the primary line limitation will have a significant impact on small business consumers. NTCA says that the primary line limitation will result in significant cost increases to unsupported business lines.³⁴ According to NECA, consumers living in high-cost areas may face significant cost increases per month. The primary line limitation would present significant disadvantages to small business consumers in rural areas.³⁵ RTA states that primary line limitation would increase the telecom cost burden on small rural businesses and would threaten their ability to compete and survive. Furthermore, RTA states that these small businesses are often least able to pass on the increase in costs to their customers.³⁶

Because of the significant potential impact on small business customers, Advocacy recommends that the FCC consider the economic impact of the primary line limitation on these small businesses.

5. Conclusion

Advocacy recommends that the FCC fully analyze the impact of the *Recommended Decision* on small entities, the effect of overlapping rules, and consider significant alternatives that minimize the economic impact on small entities. In addition, Advocacy is recommending

³³ *Recommended Decision*, para. 84.

³⁴ NTCA Comments at 7.

³⁵ NECA Comments at 7-8.

³⁶ RTA Comments at 25-26.

that the FCC perform an economic analysis beyond that required by the RFA to assess the implications of this rulemaking for small businesses that consume telecom services which currently receive Universal Service support. 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.

Respectfully submitted,

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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 September 21, 2004, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Reply Comments to the following:

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