

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

In the Matter of)	
)	
Truth-in-Billing)	CC Docket No. 98-170
and)	
Billing Format)	
)	

**Reply Comments of the
Office of Advocacy, U.S. Small Business Administration
on the Final Regulatory Flexibility Analysis,
and the Initial Regulatory Flexibility Analysis of the
First Report and Order and Further Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) submits these Reply Comments to the Federal Communications Commission’s (“FCC” or “Commission”) *First Report and Order and Further Notice of Proposed Rulemaking* (“Report & Order and FNPRM”),¹ in the above-captioned proceeding. Although Advocacy supports the Commission’s goal to reduce unauthorized charges to customers by clarifying information on telephone bills, the FCC’s regulatory flexibility analysis suffers from the same vagueness and lack of basic information as the telephone bills the rulemaking is designed to cure. Both the final and initial regulatory flexibility analyses are fundamentally flawed, as they do not identify any of the compliance requirements contained in the Report & Order and FNPRM nor appraise the cost of these far-reaching and expensive regulations on small businesses.

¹ *In re Truth-in-Billing and Billing Format, First Report and Order, and Further Notice of Proposed Rulemaking*, CC Docket No. 98-170, FCC 99-72 (rel. May 11, 1999).

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305² 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.³ Advocacy also has a statutory duty to monitor and report on the Commission's compliance with the Regulatory Flexibility Act of 1980 ("RFA"),⁴ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act ("SBREFA").⁵

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.⁶ The major objectives of the RFA are: (1) to increase agency awareness and understanding of the impact of their regulations on small business; (2) to require that agencies communicate and explain their findings to the public; 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 does not seek preferential treatment for small businesses. Rather, it establishes an analytical process 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

² Codified as amended at 15 U.S.C. §§ 634 a-g, 637.

³ 15 U.S.C. § 634c(1)-(4).

⁴ Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.) ("RFA").

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

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*, 1998 ("Advocacy 1998 RFA Implementation Guide").

will achieve the rule's objectives while minimizing the burden on small entities.⁸

The goals of the Report & Order and FNPRM are admirable. Advocacy agrees with the Commission and the Comments of the Telecommunications Resellers Association that it is in the best interest of both small telephone providers and small business end users to have accurate and understandable bills.⁹ A clearly organized bill containing descriptions of services provided as well as other important information will likely reduce customer confusion and unauthorized charges from slamming or cramming. However, admirable goals do not excuse the FCC from its statutory duty to analyze or lighten, as appropriate, the compliance burdens that the new regulations would impose on small businesses.

Regrettably, the Commission's Final and Initial Regulatory Flexibility Analyses ("FRFA" and "IRFA" respectively) for the Report & Order and FNPRM are scant, cursory, and contradictory. Specifically, the Commission's FRFA and IRFA do not comply with the RFA because the Commission: (1) failed to identify properly small ILECs as small businesses, (2) did not describe a single one of the compliance requirements adopted or their impacts, and (3) failed to discuss alternatives to minimize inequitable burdens on small entities. The Commission alleges that it is trying to clarify telephone bills for customers. Yet by evading compliance with the RFA, the carriers who must comply with the proposal have not been provided any information about the proposal's impact, cost, or value, leaving the Commission in the dark as to the efficacy of its proposal.

1. Both the Final and Initial Regulatory Flexibility Analysis Failed to Identify Properly Small ILECs as Small Businesses

⁸ 5 U.S.C. § 604.

⁹ Comments of the Telecommunications Resellers Association, to the Further Notice of Proposed Rulemaking in CC Dkt. No. 98-170 (July 9, 1999).

Both the FRFA and the IRFA did not accurately identify all small entities affected because it did not identify small incumbent local exchange carriers (“ILECs”) as small entities.¹⁰ In a recent letter to the Commission, Advocacy advised the Commission that it was violating the RFA in several agency rulemakings by failing to identify small ILECs as small entities in its regulatory flexibility analyses.¹¹ Under the Small Business Act and the RFA, the Small Business Administration (“SBA”) has the statutory authority to determine size standards. Unfortunately, the FCC has ignored the Small Business Act and the RFA to the effect that the size standards used in this proposal are not in compliance.¹² Advocacy fully agrees with the Comments of the United States Telephone Association¹³ which asks the Commission to reconcile its small business definition with the SBA’s definition and recognize small ILECs as small entities. Advocacy again requests that the Commission bring its size standards into accord with the SBA. Continued denial of small ILECs as small entities is contrary to the letter and spirit of the Small Business Act and the RFA and is reviewable on appeal as an integral issue in the Commission’s FRFA.

2. The Final and Initial Regulatory Flexibility Analyses Failed to Describe Compliance Burdens

The FCC’s FRFA and IRFA are deficient because they do not describe the compliance burdens contained in the Report & Order and FNPRM. In the FRFA, the Commission stated that the order did not impose any compliance requirements.¹⁴ This assertion by the Commission is

¹⁰ Report & Order and FNPRM, paras. 8, 108.

¹¹ Letter from Jere W. Glover, Chief Counsel, Office of Advocacy U.S. Small Business Administration, to William Kennard, Chairman, Federal Communications Commission, CC Dkt. 98-147, CC Dkt. 99-68, CC Dkt. 97-181 (May 27, 1999).

¹² Report & Order and FNPRM, Appendix C, para. 8.

¹³ Comments of the United States Telephone Association, to the *Further Notice of Proposed Rulemaking* in CC Dkt. No. 98-170 at 9-11 (July 9, 1999).

¹⁴ Report & Order and FNPRM, para 101.

simply not true. The Report and Order contains numerous compliance requirements,¹⁵ and the FCC must be aware of the fact, because it submitted an information collection to the Office of Management and Budget (“OMB”) for approval under the Paperwork Reduction Act.¹⁶ Surely this submission to OMB was not superfluous. Furthermore, a reference to the OMB request appears directly after the FRFA in the order, making the inherent contradiction readily apparent.

While the FRFA is completely insufficient, the IRFA makes a mockery of the RFA. It can scarcely be characterized as informative. It was not designed to elicit information, impacts, burdens, or alternatives – information that is crucial and an important condition precedent to an FRFA, which by law must address comments received. Although the Commission acknowledges that it is proposing compliance requirements, the agency does not describe them with any specificity. Instead, the FCC gives a vague referral, “We seek comment on a proposal designed to increase the accuracy and understandability of telephone bills to customers.”¹⁷ This is about the same amount of information that is conveyed in the docket’s title. The RFA requires agencies to *describe* the projected reporting, recordkeeping, and other compliance requirements. A mere reference to an undefined requirement – or in this case, series of requirements – does not meet FCC’s statutory obligation under the RFA.

The Congressional intent of the RFA was for federal agencies to use regulatory flexibility analysis as an analytical discipline. If the discipline is followed throughout the rulemaking

¹⁵ Advocacy identified at least nine different requirements placed on carriers: (1) charges are to be displayed according to service provider (para. 31), bills will clearly identify new service providers (para. 33), (2) services must be accompanied by a brief, clear, plain language description of services rendered (para. 38), (3) descriptions must convey enough information to enable a customer to verify services (para. 40), (4) carriers must clarify which charges are deniable (para. 44), (5) federal regulatory charges should be clearly described (para. 49), (6) carriers must identify line item charges associated with regulatory action (para. 50), (7) line items should be uniform and standard across the industry (para. 54), (8) carriers must display a toll-free number for inquiry and dispute of charge (para. 65), and (9) carrier’s agents at toll-free number must have authority to resolve consumer complaints on the carrier’s behalf (para. 65).

¹⁶ Report & Order and FNPRM, para. 104.

process, the agency's analysis will help reach a well-founded decision. As part of the process, the agency will gather information on the costs of compliance as well as the benefits of the rule. The agency can then balance these interests and share the analysis with the public and any reviewing courts. The FCC has inexplicably missed an excellent opportunity to justify its decision, to ward off severe criticism and objections, and to protect the rulemaking from judicial challenges. Instead, by saying the FNRPM has no impact on the CMRS industry when it clearly does, the Commission is destroying any credence that it might be due for fully considering the impact of the regulation on small entities, as Congress mandated that it should.

When considering compliance burdens, the Commission must consider the length of time a small entity has to come into compliance. Although the Commission released a public notice delaying the enforcement of the Report and Order,¹⁸ the original 30-day period before the truth-in-billing rules are enforceable is not enough time for any businesses, let alone small entities, to come into compliance with these far-reaching and expensive regulations.¹⁹ This extremely short period is especially burdensome on small carriers which often do not do their own billing, have limited resources, and limited customer base to spread the costs of compliance. The Commission should have included, as part of its FRFA and IRFA, an analysis of the additional cost that such a short deadline would impose on small carriers (e.g. premium printing costs, billing procedure, re-tooling, etc.).

3. The Final and Initial Regulatory Flexibility Analyses Failed to Discuss Alternatives to Minimize Burdensome Impact on Small Entities

Finally, the Commission did not discuss alternatives in the FRFA and IRFA that would minimize burdensome impact on *small entities*. The FRFA makes some attempt to discuss

¹⁷ Report & Order and FNPRM, para. 109.

¹⁸ Public Notice CC Dkt. 98-170, (rel. July 20, 1999).

alternatives, but the alternatives that are listed are merely rules the FCC decided not to adopt across the board for all carriers. No accommodations are made for the disparate impact on small entities, which have limited resources and ability to respond to drastic changes in their billing practices.

The IRFA makes the FRFA look good by comparison. The Commission flagrantly violated the RFA by failing to discuss any alternatives. The Commission's statement that the proposals made in the FNPRM placed the minimum burden on small entities is unsupported by any analysis of what burdens are imposed or any justification for this conclusion.²⁰ At the very least, the Commission must consider the four alternatives laid out by Congress in the RFA: (1) differing compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) and exemption – either in whole or in part – for small entities.²¹ An analysis of the compliance burdens and alternatives that would minimize burden while still achieving the Commission's goals is an important part of a regulatory flexibility review, and the Commission is required by law to adequately consider these sections of the IRFA.

Conclusion

In light of the FCC's cavalier treatment of the RFA that is apparent in the FRFA and the IRFA, Advocacy would like to remind the Commission that SBREFA amended the RFA to make compliance with the law judicially reviewable.²² Courts can and have vacated and remanded rulemakings to federal agencies for failing to comply with Congress' directives in the RFA.²³

¹⁹ Report & Order and FNPRM, para. 119.

²⁰ Report & Order and FNPRM, Appendix C, para. 12.

²¹ 5 U.S.C. § 603(c)(1)-(4).

²² 5 U.S.C. § 611(a)(1)-(2).

²³ *North Carolina Fisheries v. Daley*, 16 F. Supp. 2d 647 (E.D. Va. 1997); *Northwest Mining Ass'n v.*

In the Report & Order and FNPRM, there wasn't even a modicum of effort to comply with the law. The FRFA and the IRFA failed to identify properly small entities, describe compliance burdens, or discuss alternatives to minimize impact on small entities. What was included was boilerplate language without thought or concern for the impact on small entities or a desire to comply with the law.

This is not to say that the rule is not well-intended. Slamming and cramming take their toll on small business end users as well as residential users. Regrettably, the FCC missed an opportunity to justify its decision, support its conclusions, and garner complete support for this regulation that would have resulted from a thoughtful and objective analysis.

Respectfully submitted,



Jere W. Glover
Chief Counsel for Advocacy



Eric Menge
Assistant Chief Counsel
for Telecommunications

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CERTIFICATE OF SERVICE

I, Eric Menge, do hereby certify that on this 26nd day of July, 1999, I have served a copy of the foregoing document via first class mail to the following:


Eric E. Menge

Chairman William E. Kennard
445 12th St., S.W.
Room 8-B201
Washington, DC 20554

David Konuch
Enforcement Division
445 12th St., S.W.
Washington, DC 20554

Commissioner Susan Ness
445 12th St., S.W.
Room 8-B115
Washington, DC 20554

Francisco Montero, Director
Office of Communications Business
Opportunities
445 12th Street, S.W.
Room 7-C250
Washington, DC 20554

Commissioner Michael Powell
445 12th St., S.W.
Room 8-A204
Washington, DC 20554

Emily Williams
ALTS
888 17th Street, N.W.
Suite 900
Washington, DC 20006

Commissioner Gloria Tristani
445 12th St., S.W.
Room 8-C302
Washington, DC 20554

Lawrence E. Sarjeant
United States Telephone Association
1401 H Street, N.W.
Suite 600
Washington, DC 20005

Commissioner Harold Furchtgott-Roth
445 12th St., S.W.
Room 8-A302
Washington, DC 20554

Margot Smiley Humphrey
NRTA
Koteen & Naftalin, L.L.P.
1150 Connecticut Avenue, N.W.
Suite 1000
Washington, DC 20036

Lawrence E. Strickling
Chief
Common Carrier Bureau
445 12th St., S.W.
Room 5-C450
Washington, DC 20554

L. Marie Guillory
NTCA
4121 Wilson Boulevard
Tenth Floor
Arlington, VA 22203

Stephen Pastorkovich
OPASTCO
21 Dupont Circle N.W.
Suite 700
Washington, DC 20036

Mary McDermott
Todd Lantor
PCIA
500 Montgomery Street
Suite 700
Alexandria, VA 22314

Sylvia Lesse
Rural Cellular Association
Kraskin, Lesse, Cosson
2120 L St., N.W.
Suite 520
Washington, DC 20037

Michael Bennet
Edward Kania
Bennet & Bennet
Rural Telecommunications Group
1019 19th St., N.W.
Suite 500
Washington, DC 20036

Carl Oshiro
Small Business Alliance for Fair Utility
Regulation
100 First St.
Suite 2540
San Francisco, CA 94105

Charles Hunter
Hunter Communications Law Group
Telecommunications Resellers Association
1620 I St., N.W.
Washington, DC 20006

Walter Steimel, Jr.
Pilgrim Telephone
Hunton & Williams
1900 K St., N.W.
Washington, DC 20006

David Zesiger
1300 Connecticut Ave., N.W.
Suite 600
Washington, DC 20036

Genevieve Morelli
Competitive Telecommunications
Association
1900 M St., N.W.
Suite 800
Washington, DC 20036

Michael Altschul
CTIA
1250 Connecticut Ave., N.W.
Suite 200
Washington, DC 20036