

August 30, 1999

Virginia Huth
Desk Officer
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building
Room 10236
Washington, DC 20503

RE: OMB Control Number 3060-0854
Notice of Public Information Collection Submitted to OMB for Review and Approval of the Truth-in-Billing Format Report and Order (CC Dkt. 98-170).

Dear Ms. Huth:

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) submits these comments to the Federal Communications Commission’s (“FCC”) *Notice of Public Information Collection Submitted to OMB for Review and Approval*¹ of the Truth-in-Billing Format Report and Order (“TIB Order”).² Advocacy supports the FCC’s goal to reduce unauthorized charges to customers by clarifying information on telephone bills. However, the FCC did not properly balance the compliance burdens upon small wireline carriers, especially in light of Y2K compliance requirements. The FCC also relies improperly the waiver process to ease compliance burdens on small carriers when an exception in the rulemaking would have been more appropriate. Therefore, Advocacy asks the Office of Management and Budget (“OMB”) disapprove the information collection contained in the TIB Order.

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 on the FCC’s compliance with the Regulatory Flexibility Act of 1980 (“RFA”),⁵ as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act (“SBREFA”).⁶

The FCC Did Not Properly Balance the Benefit and the Burden

¹ 64 Fed. Reg. 41,428 (July 30, 1999).

² *In the Matter of Truth-in-Billing and Billing Format, First Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 98-170 (rel. May 11, 1999).

³ Codified as amended at 15 U.S.C. §§ 634 a-g, 637.

⁴ 15 U.S.C. § 634c(1)-(4).

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

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

Advocacy believes that the FCC did not properly balance the benefit of the TIB Order and the burden these regulations would be on small wireline carriers. Advocacy does not dispute FCC's contention that current billing practices confuses consumers. Furthermore, Advocacy agrees that reformation of billing practices is an appropriate action for the FCC to take. However, Advocacy believes that the FCC did not properly balance these goals with the burdens that would be imposed upon small carriers.

The TIB Order placed four requirements on small businesses: (1) clear identification of service providers, (2) separation of charges by services provider and highlighting new service provider information, (3) full and non-misleading billed charges, and (4) clear and conspicuous disclosure of inquiry contacts.⁷ Advocacy has no comment on the validity of the FCC's estimate of the response time and burden. Rather, Advocacy notes that the FCC makes no effort to take into consideration the small carrier's ability to absorb these costs. The FCC has a duty under the Paperwork Reduction Act to reduce, to the extent possible and appropriate, the burden on small entities.⁸

Advocacy's primary concern is the abbreviated timetable for compliance. It is Advocacy's understanding that the FCC intends to make this regulations enforceable upon OMB approval and publication of the date in the Federal Register, which could happen as early as September 6, 1999. The short time period given to small carriers to come into compliance drastically raises the cost of compliance burdens. This burden is further exacerbated by Y2K concerns. An extended timeframe for small wireline carriers to come into come into compliance would greatly reduce the regulatory burden without harming the public interest of clear and understandable bills.

Reliance on the Waiver Process Is Inappropriate to Cure General Policy Issues.

Advocacy also believes that the FCC should not rely upon the waiver process as a means to cure the severe compliance burdens the TIB Order places on small entities. The FCC itself has stated that a waiver is appropriate only when special circumstances warrant a deviation from the general rule.⁹ In this instance, the FCC is proposing using the waiver process as a means to cure a rulemaking deficiency that impacts an entire class of entities.

The standard for a waiver was laid out in *WAIT Radio v. FCC*.¹⁰ The D.C. Circuit held that in judging a request for waiver, the FCC must determine (1) whether such grant would serve the public interest, (2) shows special circumstances warranting a deviation from the general rule, and (3) whether grant would undermine the policy which the rule is intended to serve. In later cases, the D.C. Circuit has upheld the principle that waivers are to be used in specific circumstances.

In *Turro v. FCC*¹¹, the FCC had "concluded that it was preferable to address the policy

⁷ 64 Fed. Reg. 41,428 (July 30, 1999).

⁸ PRA 3506(c)(3)(C)

⁹ *In the Matter of Interactive Video and Data Service (IVDS) Licenses Requests by Lottery Winners to Extend Construction Deadline, Memorandum Opinion and Order*, FCC 96-321 (rel. Aug. 15, 1996).

¹⁰ *WAIT Radio, Inc. v. Federal Communications Comm'n*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969).

¹¹ *Turro v. Federal Communications Comm'n*, 859 F.2d 1498 (D.C. Cir. 1988)

concerns raised by Turro in a rulemaking proceeding and not in the context of an ad hoc waiver proceeding.”¹² The Court defended the FCC’s decision stating that to do otherwise would force the agency to examine an entire range of policy questions that are not unique to Turro and are more appropriately considered in a rulemaking proceeding. The D.C. Circuit has further stated that systemic issues are most appropriately considered in a rulemaking proceeding that gives the agency the opportunity to proceed in a more thorough and fair manner.¹³

Advocacy believes that the FCC’s reliance on the waiver process is inappropriate in this instance. The TIB Order affects a broad category of carriers in a manner that necessitates relief. As can be seen by the waiver requests filed at the FCC in response to the TIB Order, including one for all small incumbent local exchange carriers by the U.S. Telephone Association, the FCC will face numerous waiver requests that address the same issue and circumstances. As the D.C. Circuit has stated, this situation is better handled in the rulemaking instead of relying on a waiver process.

Advocacy also believes that the FCC’s reliance upon the waiver process inappropriately places the burden on small entities. Instead of crafting rules that would balance the public interest with the burdens placed on small entities, the FCC is shirking its duty to promulgate reasoned rules and unlawfully passing that duty onto small entities. Waivers are expensive to prepare, have no guarantee of success, and the carrier must be in compliance until agency grants the waiver. This only further escalates the burden on small wireline carriers. Advocacy does not believe that the FCC should use the waiver process to fulfill its statutory duty to minimize burden. Waivers should not become a crutch for agencies to impose burdensome rules without sufficient justification and balancing on the theory that the waiver process will make amends.

Conclusion

Advocacy asks OMB to disapprove the information collection contained in the TIB Order. The FCC failed to adequately balance the public interest benefit with the compliance burdens and relied solely on the waiver process as a means of providing relief to small entities. The waiver process is an inappropriate method for alleviating the burden because the issue affects a broad category of entities in similar circumstances instead of a special situation. Also, reliance upon the waiver process unlawfully transfers the FCC’s duty to minimize the compliance burden to the small entities from the agency to the small entities. Advocacy recommends that the FCC revise its timeframe and provide alternatives that would minimize burdens on small entities.

Sincerely,

¹² *Turro*, 859 F.2d at 1500.

¹³ *James L. Melcher, et al. v. Federal Communications Commission*, 134 F.3d 1143 (D.C. Cir. 1998) (citing *National Small Shipments Traffic Conference, Inc. v. ICC*, 725 F.2d 1442, 1447-48 (D.C. Cir. 1984) (“Notice-and-comment procedures . . . are especially suited to determining legislative facts and policy of general, prospective applicability.”)).

Eric E. Menge
Association Chief Counsel
for Telecommunications

cc: Judy Boley