

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

In the Matter of	)	
	)	
Calling Party Pays Service Offering in	)	WT Docket No. 97-207
the Commercial Mobile Radio Services	)	
	)	
	)	

**Comments of the Office of Advocacy, U.S. Small Business  
Administration on the Notice of Proposed Rulemaking and the Initial  
Regulatory Flexibility Analysis of the Notice of Proposed Rulemaking**

The Office of Advocacy of the United States Small Business Administration (“Advocacy”) respectfully submits these Comments to the *Notice of Proposed Rulemaking* (“NPRM”)<sup>1</sup> in the above-captioned proceeding, which seeks to establish nationwide standards to promote the availability of “Calling Party Pays” (“CPP”) services for Commercial Mobile Radio Service (“CMRS”). The Federal Communications Commission (“Commission”) does not consider the potential impact of the proposed rules on small business, nor does it discuss steps it has taken, or significant alternatives it has considered, to minimize this impact. The Commission also erroneously excludes small incumbent local exchange carriers (“ILECs”) from its definition of small entity. For these reasons, the NPRM and regulatory flexibility analysis do not satisfy the requirements of the Regulatory Flexibility Act of 1980,<sup>2</sup> as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Subtitle II of the Contract with America Advancement Act<sup>3</sup> (collectively “RFA”). Therefore, the Commission should not promulgate new rules at this time but should issue a second notice of proposed rulemaking, including a

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<sup>1</sup> *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Notice of Proposed Rulemaking*, WT Docket No. 99-87, FCC 99-52 (rel. March 25, 1999).

<sup>2</sup> Pub. L. No. 96-354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 et seq.).

<sup>3</sup> Pub. L. No. 104-121, 110 Stat. 857 (1996)(codified at 5 U.S.C. § 612(a)).

revised regulatory flexibility analysis. The second notice should explore the impact of CPP standards on small CMRS providers, small local exchange carriers (“LECs”), including ILECs, as well as other small businesses. The Commission should consider ways to minimize any unintended impact its proposed rules may have on small business, while still serving the Commission’s purpose of increasing competition for wireline and wireless services.

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94-305<sup>4</sup> to represent the views and interests of small business within the Federal government. Its 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.<sup>5</sup> Advocacy also has a statutory duty to monitor and report to Congress on the Commission’s compliance with the RFA.

**1. The NPRM Does Not Consider the Proposal’s Impact on Small Business.**

The Commission offers no discussion regarding the positive or negative impact that its CPP proposal may have on small business. CPP may provide cost savings to those small entities that use wireless phones in their business and may boost subscribers for small CMRS providers. But CPP also may require costly billing changes for LECs and ILECs that handle traffic for CMRS customers; these costs may fall more heavily on smaller LECs and ILECs than on larger entities. There may be ways to minimize these costs while preserving the central benefits of CPP. But the Commission does not discuss or request comment regarding these issues, nor does the Commission demonstrate that it has given any consideration to the potential impact of CPP on small business. There is no indication that small business issues would in any way influence

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<sup>4</sup> Codified as amended at 15 U.S.C. §§ 634 (a)-(g), 637.

<sup>5</sup> 15 U.S.C. § 634(c)(1)-(4).

the Commission’s final rules on CPP. The Commission should analyze the potential effect of its CPP proposal on small business and seek comment on its findings.

**2. The IRFA Does Not Discuss Alternatives Designed to Minimize the Regulatory Burden on Small Entities.**

The Commission’s Initial Regulatory Flexibility Analysis (“IRFA”) does not discuss alternatives to the CPP proposal which might “minimize any significant economic impact of the proposed rule”, as is required by the RFA.<sup>6</sup> Rather, the Commission invites comment on “significant alternatives that commenters believe should be adopted.”<sup>7</sup> The Commission does not *propose or analyze* alternatives, as required by law.<sup>8</sup> For a proper IRFA, the RFA requires, at the very least, that the Commission consider four alternatives: (1) differing compliance requirements or timetables, (2) clarification, consolidation, or simplification of compliance requirements, (3) use of performance rather than design standards, and (4) exemption – either in whole or in part – for small entities.<sup>9</sup> The Commission does not analyze any of these possible alternatives and therefore has not conducted an IFRA. Instead, the Commission requests potential commenting parties to conduct the IFRA for it. The Commission must pay careful attention to its analysis of compliance burdens and alternatives that would minimize impact and still achieve its regulatory goals. This is an important part of regulatory flexibility review.

The Commission also indicates that it has minimized burdens on small business, “to the maximum extent possible”,<sup>10</sup> but without discussing how. The Commission does not indicate what steps it has considered, if any, to minimize these burdens. The Commission does not even explicitly identify potential burdens. The Commission *implies* that its CPP proposal may burden

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<sup>6</sup> 5 U.S.C. § 603(c).

<sup>7</sup> See *NPRM*, Initial Regulatory Flexibility Analysis.

<sup>8</sup> See 5 U.S.C. § 603(c).

<sup>9</sup> 5 U.S.C. § 603(c)(1)-(4).

<sup>10</sup> See *NPRM*, Initial Regulatory Flexibility Analysis.

small business, by mentioning the voluntary nature of CPP and by alluding to billing costs, but it dismisses these concerns with little discussion.

The Commission says that it has minimized burdens: “CPP is an optional CMRS offering that carriers may provide to their wireless subscribers, at the sole discretion of the carrier.” This sentence seems to convey that the voluntary nature of CPP will alleviate some unclear burden CPP might impose on some service providers, but the Commission’s discussion of the subject is confined to that single vague sentence.

The Commission also opines that negotiated billing and collection services would permit LECs to recover new costs imposed by CPP. But anticipating that market forces may protect LECs from costly billing obligations can hardly represent the Commission’s “maximum” effort to minimize burdens. The Commission should revisit the issue of how CPP might burden small business and propose ways to lighten these burdens. The Commission’s IRFA is wholly inadequate on this score.

### **3. The IRFA Fails to Properly Identify Small ILECs as Small Businesses.**

The Commission’s IRFA excludes small ILECs from the definition of small business, as determined by the Small Business Administration (“SBA”) and the RFA.<sup>11</sup> But the Commission has not consulted with Advocacy, nor does it invite public comment, on this exclusion.

A small business is one that is independently owned and operated and not dominant within its field of operations.<sup>12</sup> And “field of operations” is determined on a national level.<sup>13</sup>

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<sup>11</sup> Advocacy has repeatedly brought this matter before the Commission. *See e.g.* Reply Comments of The Office of Advocacy, U.S. Small Business Administration, *Truth in Billing and Billing Format*, CC Dkt. 98-170, FCC 99-72 (July 26, 1999), Letter from Jere W. Glover, Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to William E. Kennard, Chairman, Federal Communications Commission, CC Dkt. 98-147, CC Dkt. 99-68, CC Dkt. 97-181 (May 27, 1999).

<sup>12</sup> *See* 15 U.S.C. § 632(a).

<sup>13</sup> 13 C. F.R. § 121.102(b). *See* Size Appeal of Joan of Arc Electric Supply Co., No. 4237 (1997), Size Appeal of George E. Hill, No. 4222 (1996), Size Appeal of Control Laser – Orlando, Inc. No. 511 (1971).

The Commission has determined that each ILEC is dominant within its field of operations (or is not independently owned) and therefore is not a small business. But the Commission offers no evidence that *any* small ILEC is dominant in a national field of operations. Rather, the Commission likely substitutes its own version of the small business definition by confining “field of operations” to a *local* level. But unless the Commission complies with the RFA, by consulting Advocacy and inviting public comment on this changed definition, the Commission must follow the SBA’s definition and consider dominance on a national basis.<sup>14</sup> Since the Commission’s small business definition will be subject to judicial review,<sup>15</sup> Advocacy urges the Commission to reconcile its definition with the SBA’s and recognize small ILECs as small businesses.

### **Conclusion**

As seems increasingly common of late, the Commission proposes rules without giving adequate attention to their potential impact on small business. The Commission also does not propose alternatives designed to minimize unintended regulatory burdens. Last, the Commission excludes small ILECs from the definition of small business, contrary to the position of the SBA and contrary to law. For these reasons, the Commission should issue a second notice of proposed rulemaking, with a revised regulatory flexibility analysis, to consider the effect on small business of establishing national “Calling Party Pays” standards.

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<sup>14</sup> See 5 U.S.C. § 601(3).

<sup>15</sup> See *Northwest Mining Ass’n v. Babbitt*, 5 F. Supp. 2d 9 (D.D.C. 1998).

Respectfully submitted,

Jere W. Glover  
Chief Counsel  
for Advocacy

R. Bradley Koerner  
Assistant Chief Counsel  
for Telecommunications

Eric E. Menge  
Assistant Chief Counsel  
for Telecommunications

August 18, 1999