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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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November 25, 1997

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW Suite 222
Washington, DC 20554

RE: ERRATA - Notice of *Ex parte* Presentation in a Non-Restricted Proceeding
In re Access Charge Reform CC Dkt. No. 96-262; Price Cap Performance Review for Local Exchange Carriers (CC Dkt. No. 94-1); Transport Rate Structure and Pricing (CC Dkt. No. 91-213): End User Common Line Charges (CC Dkt. No. 95-72).

Dear Ms. Salas:

The Office of Advocacy, U.S. Small Business Administration (SBA), by its undersigned representative and in accordance with Sections 1.415, 1.419 of the Commission's rules, hereby respectfully submits a revised copy of our *ex parte* comments for the above-referenced proceeding which were initially filed on November 24, 1997. Enclosed are 5 revised copies to be distributed accordingly.

Please note that this erratum amends the second full paragraph on page 11. The increased telephone costs of certain small businesses is $209, not $276. The amount in corresponding footnote 20 was correct.

Thank you for your assistance in this matter. Please call with any questions.

Very truly yours,

S. Jenell Trigg
Assistant Chief Counsel for
Telecommunications
Office of Advocacy
U.S. Small Business Administration
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Enclosure

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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

November 21, 1997

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, NW Suite 814
Washington, DC 20554

RE: *Ex parte* Comments and Petition for Reconsideration for Access Charge Reform, *et al.*, CC Docket. No. 96-262

Dear Chairman Kennard:

The Office of Advocacy of the United States Small Business Administration (SBA) submits this *ex parte* comment and petition for reconsideration in the Federal Communications Commission's (FCC or Commission) above-captioned proceeding. In May, the FCC issued new rules for access charge reform.[1] There have been two subsequent *Orders on Reconsideration*, the first on the Commission's own motion and the second after review of the petitions for reconsideration.[2] The Commission's effort to reform access charges is a laudatory goal. However, this process should not be done at the expense of small businesses while subsidizing the rates of residential and large business users of telecommunications services.

The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) 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, and developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). The Office of Advocacy also has statutory authority to monitor and report on the FCC's compliance with the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). 5 U.S.C. § 612.

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[1] *In re* Access Charge Reform (CC Dkt. No. 96-262), Price Cap Performance Review for Local Exchange Carriers (CC Dkt. No. 94-1), Transport Rate Structure and Pricing (CC Dkt. No. 91-213), End User Common Line Charges (CC Dkt. No. 95-72), *First Report and Order*, FCC 97-158, (rel. May 16, 1997) (*First Report and Order*).

[2] *In re* Access Charge Reform (CC Dkt. No. 96-262) *et al.*, *Order on Reconsideration*, 12 FCC Rcd. 10119 (1997); *In re* Access Charge Reform (CC Dkt. No. 96-262) *et al.*, *Second Order and Memorandum Opinion and Order*, FCC 97-368 (rel. Oct. 9, 1997) (*Second Order on Reconsideration*).

The Office of Advocacy has three primary concerns with the FCC's actions in this proceeding. The FCC has violated, and continues to violate the Regulatory Flexibility Act, as amended, by 1) its failure to implement the RFA properly so that the economic impact on all affected small entities would be sufficiently addressed in the public record and thus, provide the necessary foundation for the final regulatory flexibility analysis; 2) its failure to identify properly, describe, and reasonably estimate the number of all small entities to which these rules will apply; and 3) to analyze the impact of its rules on small interexchange carriers (IXC), and small business end users - including an examination of less burdensome alternatives. 5 U.S.C. § 601 *et seq.* A proper regulatory flexibility analysis, in the *First Report and Order* and in subsequent orders, would have uncovered, *inter alia*, the disproportionate impact of the elimination of the unitary rate structure option for tandem-switched transport on small IXCs, as well as the tremendous increase in telephone service costs due to FCC-imposed flat rate charges for certain small business end users.

Advocacy had hoped that the Commission would have corrected the deficiencies from the *First Report and Order* in its recently released *Second Order on Reconsideration*, as requested in a timely manner by many commenters.[3] In fact, expedited review was requested, *inter alia*, to help eliminate the disproportionate burden on small entities that a January 1, 1998, effective date of the Presubscriber Interexchange Carrier Charge (PICC) assessment would impose.[4] Regrettably, the Commission did not act on this request and noted that it would address additional petitions for reconsideration at a later date. *Second Order on Reconsideration*, para. 1. Therefore, the Office of Advocacy is compelled to document its concerns on the record given the urgent need to have these important issues reviewed and altered by the Commission before 1/1/98.

The RFA, as amended, does not seek preferential treatment for small businesses, nor does it require agencies to adopt regulations that impose the least burden on small entities or mandate exemptions for small entities. Rather, it establishes an analytical process for determining how public issues can best be resolved without erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. 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

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[3] *See e.g.*, America's Carriers Telecommunication Association (ACTA) Petition for Expedited Reconsideration, July 11, 1997 (ACTA Expedited Petition); ACTA Petition for Expedited Reconsideration, Reply Comments, Sept. 3, 1997 (ACTA Reply Comments); Competitive Telecommunications Association (CompTel) Expedited Petition for Reconsideration, July 11, 1997, at 3 (citing to comments of Telecommunications Resellers Association, U.S. Long Distance, Inc., WorldCom, Inc., and Frontier Corporation that assert that the FCC failed to conduct a proper analysis of the effect of the *First Report and Order* on small businesses) (CompTel Expedited Petition).

[4] ACTA Expedited Petition, at 2; ACTA Reply Comments, at 2; CompTel Expedited Petition, at 2.

addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing the burden on small entities. 5 U.S.C. § 604. This analysis, as a matter of law, is required when there is a "significant economic impact on a substantial number of small entities." *See* 5 U.S.C. § 605.

By its nature, changes in access charge rules apply to incumbent local exchange carriers (ILEC) and interexchange carriers (IXC). Both parties are affected by a regulatory adjustment in compensation for the cost of using the local loop or "common line" - one group as payee and the other as payor. While we appreciate the Commission's analysis of small ILECs (payee), the Commission failed, among other things, to analyze fully the impact of the final rule on small IXCs (payor).

The third party in this regulatory scheme is the customer of both ILECs and IXCs - "end user" using the FCC's vernacular. Changes in the access charge compensation scheme influence the cost of local telephone and toll service, a cost ultimately borne by the end user. However, in the instant proceeding, the end user is also the payor through the direct assessment of increased Subscriber Line Charges (SLC) on all multi-line businesses and the new PICC on non-presubscribed small businesses. Therefore, the rules set forth in the *First Report and Order* have a direct significant economic impact on a substantial number of small business end users and yet small business end users were virtually ignored in the rulemaking process and RFA analysis. This significant economic impact on small IXCs and small business end users will be discussed separately below.

I. The FCC's Overall Implementation of the Regulatory Flexibility Act in this Proceeding Was Deficient in Creating an Adequate Public Record for a Proper Final Regulatory Flexibility Analysis and Equitable Rules for Small Businesses.

Congress recognized that "small businesses bear a disproportionate share of regulatory costs and burdens." SBREFA, § 202(2), codified at 5 U.S.C. § 601 Note. Therefore, the first stage of a sufficient regulatory flexibility analysis of a final rule is the Initial Regulatory Flexibility Analysis (IRFA) in which the FCC "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603. Done properly, the IRFA provides the foundation for an adequate Final Regulatory Flexibility Analysis (FRFA) because it will have informed small entities of the detrimental or beneficial impact of the proposed rule.[5] It is also incumbent on the agency to identify significant alternatives to the proposed rule that would minimize the burden on small entities, at the NPRM stage, so

[5] 126 Cong. Rec. 24,588 (Sept. 8, 1990) ("the term 'significant economic impact' is neutral with respect to whether such impact is beneficial or adverse").

that such alternatives will have the opportunity for public notice and comment. 5 U.S.C. § 603.[6]

The IRFA in the first NPRM for this proceeding was deficient in providing any analysis of the rule's impact on small IXCs or on small business end users. In fact, the FCC abrogated its responsibility of including a discussion of small business impact by stating that it was "unable to ascertain, at this time, what the significant economic impact would be on small entities as defined by the SBA." NPRM, para. 337. There was no mention, much less than an analysis, of the Federal-State Joint Board on Universal Service's recommendation that end users be assessed an increase in rates if they were not presubscribed to an IXC, nor the potential elimination of the unitary rate structure and its impact on small IXCs, nor the economic affect of increased SLCs on all multiple-line business end users.[7] The economic impact of these recommendations are obvious and did not need to be first identified by public comment. Therefore, the IRFA fell far short of the statutory requirements of the IRFA, making the need for the Commission's execution of a proper FRFA even more important. Given the FCC's lack of full disclosure of the impact on small IXCs and small business end users in the IRFA, it is not surprising that only one comment was filed in direct response to the IRFA, and that comment was from the Rural Telephone Coalition representing its ILEC members. *First Report and Order*, para. 421.

The Commission also released a *Further Notice of Proposed Rulemaking* (FNPRM) with the *First Report and Order* and pursuant to 5 U.S.C. § 603, issued an IRFA. *First Report and Order*, paras. 444-453. The IRFA is also flawed for similar reasons. We recognize that the FNPRM's scope is limited to proposals for incumbent price cap LECS, however small IXCs are still affected. To be in compliance with the Administrative Procedures Act (APA) and the RFA, the Office of Advocacy encourages the Commission to include small IXCs and end users, where appropriate, in its FRFA for this final rule.

II. The FCC Was Obligated By The RFA And The Administrative Procedures Act To Discuss The Obvious And Asserted Impact On Small Entities As Documented By Public Comment.

The FCC was obligated by the RFA and the APA, 5 U.S.C. § 706, to discuss this obvious and asserted impact on small IXCs and small business end-users, whether or not these issues were raised as separate IRFA comments. The Commission is required to

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[6] It is important to note that these requirements of the IRFA are not new under the SBREFA amendments, but have been staples of the RFA since 1980. Pub. L. No. 96-354, § 2(b), 94 Stat. 1164 (1980).

[7] *In re* Access Charge Reform (CC Dkt. No. 96-262), *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, 11 FCC Rcd 21354 (1996) (NPRM).

"includ[e] a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(5) (emphasis added). The statute does not stipulate in this section that only alternatives raised in response to the IRFA must be considered. *See id.*

Although only one comment was filed specifically on the IRFA, the general comments were replete with small business issues that should have been addressed in the FRFA. Several commenters recommended significant alternatives to the proposed rules that would have minimized the burden on small entities that should have been discussed in the "Significant Alternatives" section of the FRFA. *See e.g., First Report and Order*, Comment Summary, Appendix B at paras. 7 (Illinois Commission, US West and the Pennsylvania Internet Service Providers proposed that SLC increases be phased in over time to reduce the economic burden on end users), 13 (instead of imposition of additional flat rate charges on end users, NARUC recommended that "a per line charge could be divided among all carriers using the common line on the basis of relative use by the carrier").

The Commission's failure to examine less burdensome alternatives on the "whole record" and to follow the necessary procedural FRFA requirements is also a violation of the APA. *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). Pursuant to the APA, the FCC is required to issue rational rules. *Motor Vehicle Manufacturers Association*, 463 U.S. 29, 43 (1983); *see also Bowen v. American Hospital Association*, 476 U.S. 610, 643-45 (1986). To determine whether the results of informal rulemaking meet that standard, the rulemaking record must support the factual conclusions underlying the rule, the policy determinations undergirding the rule must be rational, and the agency must adequately explain its conclusions. *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1194 (D.C. Cir. 1994). Failure to undertake a proper regulatory flexibility analysis as part of the rulemaking could result in arbitrary and capricious rulemaking. *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983). The Office of Advocacy asserts that the Commission has failed to explain its final rules adequately in light of the significant economic impact on small IXCs and small end-users that is documented on the record.

A. The Holding of *Mid-Tex Electric Cooperative* Is Not Applicable in This Proceeding.

In its Access Charge Reform FRFA, the FCC should have included an analysis on the direct and indirect significant economic impact on all small business entities. *A Guide to the Regulatory Flexibility Act*, Office of Advocacy, U.S. Small Business

Administration, May 1996, at 11. This analysis should have included the impact on the ultimate small business consumer (end user), particularly those small businesses with multiple lines, of the increased SLC, the PICC charged to IXCs (potentially passed through to the end-user), the direct assessment of the PICC on non-presubscribers, and the elimination of the unitary transport rate's affect on rates in rural areas.

Conversely, the U.S. Court of Appeals of the District of Columbia in *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, 773 F.2d 327 (D.C. Cir. 1985), held that an analysis of secondary impact is not required by the agency. *Id.* at 343. The D.C. Circuit ruled that FERC did not need to prepare a regulatory flexibility analysis on the economic affect of the agency's decision on "ultimate" wholesale and retail customers to allow electric utilities to recover their investments in construction work in progress (CWIP) in their rate bases. *Id.* at 343.

The Office of Advocacy disagrees with the court's interpretation but no court case has presented itself in which the issue can be reexamined. We assert that this decision is contradictory to congressional intent in that an agency must analyze both the direct and indirect affect of a rule. 126 Cong. Rec. 21,558-59 (1980) (statement of Sen. Culver); *but see Mid-Tex*, at 342-43 (characterizing the congressional intent as ambiguous).

Nonetheless, *Mid-Tex* is distinguishable from the instant proceeding based on the facts and the interpretation of "regulated entities," as well as the Commission's statutory obligations of the Communications Act of 1934, as amended. 47 U.S.C. § 151 *et seq.* In *Mid-Tex*, the increase of rates of the wholesale/retail customer would have been due to the electric utilities' "passing on some of the cost impact attributable to consumers throughout the construction period." *Id.* at 334. The electric utilities were clearly the regulated entities in *Mid-Tex* given FERC's decision to allow them to include CWIP in their rate base. FERC successfully argued that the wholesale customers were "non-jurisdictional entities whose rates are not subject to the rule." *Id.* at 341. Thus, a "regulated entity" is an entity who is <u>subject to the agency's rule or regulations</u> and is not limited to an entity in a field that is traditionally controlled by a pervasive regulatory scheme, such as railroads, telephone companies, or broadcasters. *See also* 5 U.S.C. §§ 603(b)(3), 604(a)(3) (defining small entities to be identified in an IRFA and FRFA as those "to which the rule will apply").

However, in the FCC's *First Report and Order*, the SLC and the PICC for non-presubscribed lines is not a "pass-through" but a <u>direct assessment</u> on end users. Therefore, end users become regulated entities because the end user's rates <u>are</u> "subject to the rules." Unlike FERC, end users in this instance are with-in the FCC's jurisdiction. ILEC would not, on their own, have the authority to assess the SLC on end users nor impose a PICC. It is only by direct Commission action, a federal regulatory body, that an

end user must pay the SLC and PICC. ILEC involvement is necessary as a means to collect the fees from the end users. Therefore, the direct assessment of the SLC and PICC by the ILEC on its small business end users pursuant to Commission mandate brings end users within the scope of the RFA as small entities to "which the rule will apply." 5 U.S.C. §§ 603, 604. Thus, the holding of *Mid-Tex* is not applicable in this instance.

The Office of Advocacy also asserts that the statutory mandate pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act), to serve the public interest, *see* 47 U.S.C. § 151, and "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies," Pub. L. No. 104-104, 110 Stat. 56 (1996), also renders *Mid Tex's* prohibition on an analysis of the indirect impact of the Commission's action on small entities irrelevant in this context.

Unlike *Mid-Tex*, the rules in the Access Charge Reform proceeding and related proceedings are not just rate setting or cost recovery rules – they are rules changing the entire telecommunications landscape and have a cumulative effect on competition. Predicting the outcome of such extensive deregulation on competition is difficult to do with any certainty, even among the best and brightest economists and regulators. This is why it is in the public interest, as well as part of reasoned decision-making, to address the economic impact, direct and indirect, on all affected entities: incumbents, new entrants, residential and small business consumers, as well as collateral industries such as tower construction, equipment manufacturers and suppliers, when appropriate. The Commission's implementation of the 1996 Act cannot be in a vacuum. There must be an expansive look at the practical effects of rules and regulations if the 1996 Act is to live up to its promise of true competition and the public interest is to be served.

III. The Significant Economic Impact on Small Interexchange Carriers.

Congress recognized that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity." 5 U.S.C. § 601(4) (emphasis added). This is particularly true in the access charge reform proceeding. Small IXCs are the predominant users of tandem-switching.[8] Therefore, the FCC's elimination of the unitary pricing option for tandem-switched users is patently discriminatory and disproportionately burdens small IXCs and their customers. The record clearly supports these differences in economic structure and operations between

[8] This circumstance is due to long-standing Commission policy. ACTA Petition for Expedited Reconsideration, Reply Comments, Sept. 3, 1997, at 3.

large and small IXCs.[9] Even if such data were not on the record, the FCC's extensive knowledge of the industry should have been sufficient to conduct a proper analysis of the rules' impact on small IXCs.

There are several material flaws in the FRFA. First, *Section C. Description and Size of Entities To Which the Rule Will Apply* does not include a reasonable estimate of small IXCs. Only a cursory mention of IXCs is buried in paras. 426 and 427 which are generic listings of Telephone Companies (SIC 4813), and interstate carriers, respectively. The RFA requires that the FCC provide a description of and an estimate of the number of small entities in which the rule will apply. 5 U.S.C. § 604. Although only an estimate is required, proper completion of this section is guided by a good faith effort to use available data with some specificity. Specific data on IXCs was not only available to the Commission, but has been included in previous FRFAs.[10] Furthermore, the Commission traditionally collects data on the number of presubscribed lines by carrier.[11] Therefore, the data required to ascertain the number of small IXCs impacted by the assessment of PICCs was available.[12]

Second, the Commission neglected to include small IXCs in *Section D. Summary Analysis of the Projected Reporting, Recordkeeping, and Other Compliance Requirements.* The Commission only discusses the requirements that ILECs will have to undertake. *First Report and Order*, paras. 431-32. There is no discussion regarding IXC compliance requirements, such as payment to the ILECs for the newly created PICC. *Id.* para. 91. The entire access charge scheme has also changed, certainly creating internal processing or reporting requirements on small IXCs. These IXC administrative matters due to regulatory changes should have been discussed in both the FRFA for *the First Report and Order* and the *Second Order on Reconsideration*. For example, the *Second Order on Reconsideration*, *inter alia*, mandated that the interstate interLATA carrier shall be assessed a PICC and thus, shall pay for both interLATA and intraLATA presubscribed

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[9] *See e.g.*, ACTA Reply Comments, at 3-4; Competitive Telecommunications Association *Ex Parte* Letter to Reed E. Hundt, Chairman, Federal Communications Commission, Apr. 28, 1997.

[10] *See e.g.*, *In re* Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, para. 897 (1997) (citing TRS Worksheet data).

[11] *Long Distance Market Shares*, Industry Analysis Division, Common Carrier Bureau, FCC, July 1997 (reporting number of long distance providers and NECA collected data on the number of lines presubscribed to each long distance carrier from each local telephone company) (Long Distance Report).

[12] The Long Distance Report states that "more than 600 companies were providing long distance service to their own presubscribed customers. If all resellers were included, the number of long distance providers would exceed 800." *Id.* at 4. We acknowledge that the release of this report was two months post the *First Report and Order* however, the data was available internally given NECA's collection timetable. Moreover, this is an annual report and the Commission could have referred to the 1996 report if the new data was not yet available for public release.

lines even if the intraLATA line is through another carrier. *Second Order on Reconsideration*, para. 18.

Finally, *Section E. Burdens on Small Entities and Significant Alternatives Considered and Rejected* is woefully absent of any analysis of the significant economic impact on small IXCs, either quantifiable, numerical, or general descriptive statements. 5 U.S.C. § 607. "Ascertaining the impact on small entities is the heart of the regulatory flexibility analysis." 126 Cong. Rec. H 8468 (Sept. 8, 1980) emphasis added. The Commission was obligated to analyze the FCC's elimination of the unitary rate structure, the new tandem-switched transport rate, and the imposition of the PICCs on small IXCs. Again, the Commission focuses primarily on ILECs when the impact of these changes are also significant on all small IXCs and their customers. For example, CompTel, who represents more than two hundred competitive long distance carriers, argues that the abolition of the unitary pricing option for tandem-switched transport users "will make it more expensive for long distance carriers to serve rural areas by forcing them to pay (i) two sets of fixed charges for transport routing; and (ii) additional mileage rates." CompTel Expedited Petition, at Summary, iii; *see also* CompTel Ex parte Notice, Apr. 29, 1997 (Attachment). It is also asserted that the abolition of the unitary rate structure for small IXCs, in effect, will cause a 400% net increase in tandem switching charges. *See e.g.*, CompTel Expedited Petition, at 1; ACTA Reply Comments, at 5 n.9 (a trade organization representing 215 members). By any standard, a 400% increase is a "significant economic impact" that deserved to be addressed by the Commission.

We recognize that the unitary rate structure was an interim measure and reliance on its preservation may not be reasonable. Nonetheless, the absence of justification for its demise and a discussion on its impact on small IXCs in the regulatory flexibility analysis is more troubling given, by the Commission's own admission, "[e]xcept for AT&T, IXC commenters addressing the issue generally support the unitary rate structure and argue that the Commission should retain the pricing option." *First Report and Order*, Appendix B Comment Summary, para. 54 (emphasis added) (summary also lists the benefits of the unitary rate structure).

The Commission admits that the unitary rate structure "has facilitated the growth of small IXCs to compete with larger carriers." *Id.* para. 180. However, if the assertions of 400% increases in tandem switch charges and the inability of small IXCs to compete fairly have some validity, the Commission has not reconciled with the record its claim that "that such protective rules [unitary rate structure] are no longer necessary." *Id.* para. 180. Moreover, the Commission's justification for the elimination of the unitary rate structure in that "its rules should promote competition, not protect certain competitors" is confusing. *Id.* para. 180. Advocacy finds it difficult to understand why a potential wholesale loss of active competitors would not affect competition. At the end of 1996,

the top four (4) long distance carriers, AT&T, MCI, Sprint, and WorldCom served 88% of the nation's presubscribed lines, with over 600 smaller carriers serving the remaining 12%. FCC Long Distance Market Shares Report, at 4. The mere presence of the smaller carriers promotes competition and surely had some influence on the Commission's ruling on non-dominant status for the world's largest IXC. *See In re* Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1996).

Several commenters also assert that small IXCs, if they attempt to absorb the costs of the PICC "they place in jeopardy their already perilously thin profit margins, and, as a result, many will be forced to go out of business." *See e.g.*, ACTA Petition for Expedited Reconsideration, July 11, 1997, at 7; CompTel *Ex parte* Communication, April 29, 1997 (illustrating a 68.7% increase in operating expenses, creating a negative operating margin of $117,577). The practical impact of the FCC's decision is that rural areas, most likely served by small IXCs that use tandem switches (due to lack of traffic), will see increases in long distance rates. The Commission has not demonstrated in the FRFA how this alternative is "consistent with the stated objectives of applicable statutes," 5 U.S.C. § 604, namely, the Telecommunications Act of 1996's mandate to promote competition, and ensure comparable rates and services for <u>all</u> consumers, especially those in rural and insular areas. 47 U.S.C. § 254(b)(3).

<u>IV. The Significant Economic Impact on Small Business End Users.</u>

The majority of businesses in the country are small businesses with annual gross revenues under $5.0 million dollars, 94.9% of 4, 677,075 firms.[13] Significantly, these firms only garner 17.1% of total business receipts,[14] yet they pay a disproportionate share of the cost of the local loop due to implicit business/residential subsidies. Although exact numbers on the number of small businesses located in rural, insular, high cost areas are not available, we are confident that mostly all the businesses in such areas are small, numbering in the tens of thousands. Small business end users are indeed a "substantial number of small entities" under the RFA. 5 U.S.C. § 601 *et seq*.

The Commission has acknowledged that the average small business has four telephone lines.[15] Several studies also report that small businesses use multiple telephone

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[13] *Ex parte* Comments of the Office of Advocacy *In re* Universal Service (CC Dkt. No. 96-45), Apr. 4, 1997, at 11 (citing U.S. Census Bureau Data).
[14] *Id.*
[15] FCC Press Release, *Commission Reforms Interstate Access Charge System*, CC Dkt. No. 96-262, Rpt. No. 97-23 (*The Average Small Business is A Winner* chart citing results from PNR Associates study) (FCC Access Charge Press Release).

lines.[16] As previously addressed in the Office of Advocacy's filing in this docket and the companion Universal Service proceeding, the cumulative impact of regulations on small business multi-line end users is a great concern.[17] In her separate statement on Access Charge Reform, former Commissioner Rachelle B. Chong, also expressed some concern that "the new flat charges fall disproportionately upon the shoulders of multi-line customers and may have a disparate impact on small businesses . . . ."[18]

Today, these concerns are magnified because of the cumulative impact of increased SLCs, new PICCs, increased long distance rates, non-documentable pass through of access charge savings to customers, and now - the severe repercussions of transport rate charge increases incurred by small IXCs that will most likely be passed on to their small business customers.[19]

The goal of competition and increased services to consumers as promised in the Telecommunications Act of 1996 is lost on certain small businesses whose telephone expenses will increase <u>at least</u> $209 in 1998 - <u>without</u> making one additional phone call.[20] The fact is that many small businesses, even those with multiple lines, do not reach the volume of toll calls that will offset the flat rate charges imposed by the Commission. Granted, the data reported by the California Small Business Association is that an average small business spends $300 per month on long distance calls. CSBA Telephone Poll at 6. However, the Commission ignores the reality behind these numbers. "There are substantial and sometimes significant differences depending on the location of the company and the type of small business." *Id.* The $300 figure can be reached by averaging small businesses with the same number of telephone lines - but with a widely varying use of long distance. For example, the dry cleaners, whose customers are inherently local, may make $150 in toll calls per month and the kitchen supplies wholesaler, whose customers may be all over the country, may make $450 in toll calls per month. The combined total of $600 still averages to be $300 per month, but the full benefit of lower long distance rates due to the lowering of access charges (due to the

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[16] Office of Advocacy *Ex parte* Comments, at 4 (citing CSBA 1997 Telephone Use Poll); *see also* National Federation of Independent Business Foundation, *Who Will Connect Small Businesses To The Information Superhighway* 7 (December 1994).

[17] Letter from Jere W. Glover, Chief Counsel, Office of Advocacy, SBA, to Reed E. Hundt, Chairman, FCC 2 (April 29, 1997) (CC Dkt. Nos. 96-94, 96-262, 94-1, 91-213 and 96-263).

[18] Press Statement of Commissioner Rachelle B. Chong, Re: Access Charge Reform, May 7, 1997.

[19] ACTA Expedited Petition, at 7.

[20] Effective January 1, 1998, the PICC will be $2.75 per line/per month for end-users that are not presubscribed to an IXC. *First Report and Order*, para. 99. In 1998, the SLC is expected to increase $1.61 per line/per month for multi-line businesses served by price cap ILECs. FCC Access Charge Press Release, Attachment, at 1. For an average small business with 4 lines, these combined charges would be an increase of $209.28 annually. For small businesses that are presubscribed to an IXC, the pass through of the PICC by its IXC would have the same economic impact.

supposed pass through of these savings to the end user) is only received by the high volume caller. Also, as detailed in Advocacy's Universal Service comments, certain industries have different local and long distance calling patterns.[21] Therefore, small businesses with a local client base or in certain industries, will not save money, but may pay even higher rates than they do now. This scenario is neither consistent with the Telecommunications Act's mandate under Section 254(b)(3) to ensure comparable rates for all consumers nor the Regulatory Flexibility Act in which the differences in small businesses subject to the regulations should be considered. 5 U.S.C.§ 601 note.

The Office of Advocacy recognizes that there are often countervailing interests between small telecommunications providers and their small business customers that requires a balancing of benefits and burdens for all. However, the Commission has not even acknowledged that small IXCs or small business customers are specific classes of small entities affected by this rulemaking in addition to ILECs, and thus, are impacted disproportionately compared to their larger counterparts, much less than attempted to balance the interests between IXCs, ILECs, and their customers.

V. Conclusion.

The Commission's overall objective and Telecommunications Act of 1996's mandate to promote competition will be undermined by the Access Charge rule changes imposed in the *First Report and Order* because it imposes substantial economic harm on small IXCs, making it difficult for these entities to compete in the fiercely competitive long distance marketplace. There is also significant economic impact on small business end users, due to the direct action of the Commission, that is also disproportionately burdensome. The regulatory impact of access charge reform on these classes of small entities deserves to be addressed prior to the January 1, 1998 implementation deadline.

The Office of Advocacy appreciates the difficult task and time constraints faced by the FCC in implementing an extremely complex regulatory scheme as a companion piece to the Universal Service proceeding which was under the May 8 statutory deadline. Nevertheless, the Commission cannot simply disregard the analytical and procedural requirements imposed on it by the APA and the RFA. There are fundamental problems with the FCC's decision, substantively and procedurally, that should have been addressed in the *First Report and Order.* Alternatively, these issues should have been resolved in its *Second Order on Reconsideration* in which the FCC was not on a deadline.

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[21] April 29 Letter from Jere W. Glover to Chairman Hundt, at 5.

Given the flawed, if not absent, analysis of the complete impact of these rules, we respectfully request that this Commission 1) undertake a regulatory flexibility analysis on small IXCs and small business end users, and 2) act expeditiously on the petitions for reconsideration of the unitary rate structure, and if appropriate, revise the access charge rules to minimize the significant economic burden on small entities.

Respectfully submitted,

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The Honorable Susan Ness
The Honorable Michael K. Powell
The Honorable Gloria Tristani