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

In the Matter of	)	RM 9210
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charges	)	CC Docket No. 95-72

REPLY COMMENTS OF THE OFFICE OF ADVOCACY, THE UNITED STATES SMALL BUSINESS ADMINISTRATION IN SUPPORT OF THE PETITION FOR RULEMAKING

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The Office of Advocacy ("Advocacy") of the United States Small Business Administration ("SBA") submits these Reply Comments in support of the Petition for Rulemaking of the Consumer Federation of America, International Communications Association, and National Retail Federation (collectively the "Petitioners"), relating to Access Charge Reform (RM No. 9210) filed on December 9, 1997.[1] Advocacy supports the Petitioners' request that the Federal Communications Commission ("FCC or Commission") initiate a new rulemaking to revisit access charge reform.

[1] FCC Public Notice, Office of Public Affairs Reference Operations Division Petition for Rulemaking Filed, Federal Communications Commission, Report No. 2246, RM No. 9210 (rel. Dec. 31, 1997) ("CFA Petition").

I. INTRODUCTION.

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 a statutory duty 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"). Pub. L. No. 104-121, § 243(b) (1), 110 Stat. 866 (1996), codified at 5 U.S.C. § 612(a).

As previously addressed in Advocacy's comments in this proceeding, particularly those comments dated November 21, 1997,[2] Advocacy is concerned about the significant economic impact that the Commission's *First Report and Order*[3] has on small entities - including small Interexchange Carriers (IXC) and especially small business end-users.[4] Today, Advocacy's concerns are magnified given the current status of competition - or more appropriately - the absence of full and effective competition for local exchange services.

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[2] Letter from Jere W. Glover, Chief Counsel, and S. Jenell Trigg, Assistant Chief Counsel for Telecommunications, Office of Advocacy, U.S. Small Business Administration, to William E. Kennard, Chairman, FCC (Nov. 21, 1997) ("Advocacy's *Ex parte* Comments").

[3] *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*, 12 FCC Rcd 15,982 (1997); *review pending sub nom. Southwestern Bell Telephone Co. v. FCC*, Nos. 97-2866/2873/2875/3012 (8th Cir.).

[4] *See generally* Advocacy's *Ex parte* Comments. For the convenience of the Commission and interested parties, Advocacy attaches a copy of its November 21, 1997 comments to this filing. Appendix A.

There are approximately 22.0 million small businesses, representing 95% of the total businesses in this country.[5] Small businesses have contributed handsomely to the economy. Small businesses provide virtually all of the new jobs; represent 99.7% of all employers; employ 53% of the private work force; provide 47% of sales receipts; provide 55% of innovations; account for 28% of jobs in high technology sectors; and account for 51% of private sector output.[6] If small business is to continue to be the engine that drives this country's strong economy, then the FCC must do all that is possible to ensure that small businesses also have affordable telephone service.

II. IT IS UNLIKELY THAT MARKET FORCES WILL REDUCE ACCESS CHARGES IN THE FORESEEABLE FUTURE - FURTHER HARMING SMALL BUSINESS END-USERS.

The primary goal of the Telecommunications Act of 1996 ("1996 Act ") is to "open[ ] all telecommunications markets to competition."[7] Advocacy believes that the 1996 Act is working to promote competition for telecommunications services, but at a much slower pace than expected by Congress and the FCC. We concur with the Petitioners that "meaningful levels of local telephone service competition will not develop in the foreseeable future."[8]

Today, there is some tangible evidence of competition, albeit minimal. The predominant form of competition is resale. Resale has been an interim entry strategy for a new competitor to build a customer base while its plant and network are under

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[5] The 23,295,000 total businesses include corporations, partnerships and sole proprietorships. 1997 Small Business Answer Card (citing 1996 Internal Revenue Service projections). Note that not all small businesses report to the IRS.

[6] 1997 Small Business Answer Card.

[7] Joint Explanatory Statement of the Committee of the Conference, S. Conf. Rep. No. 104-230, at 1 (1996).

[8] CFA Petition, at 2.

construction. However, AT&T and MCI, two of the largest potential competitors for local service, have recently retreated from offering resale services citing the enormous cost of entry and very low profit margins.[9] Although AT&T and MCI plan to invest their efforts into providing facilities-based competition, viable facilities-based competition is a long way off.

Another form of resale competition, especially for residential service, is Centrex resale that is now serving hundreds of thousands of customers at very competitive local rates. This form of resale, when used to provide service to a wide range of customers, is currently being challenged by Incumbent Local Exchange Carriers (ILEC) and State Public Utility Commissions ("PUC") as a threat to an ILEC's fulfillment of its commitment to universal service.[10] As a result, if the FCC's preemption of resale restrictions is affirmed on reconsideration and upheld on appeal, then Centrex resale as a competitive option for local service could be withdrawn completely by State PUCs to protect the customer base of the ILEC. Unfortunately, this would eliminate yet another means of bringing choice to consumers and would also eliminate a competitive small business telecommunications provider.

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[9] *See e.g.*, Nancy Dunne, *AT & T Gives Up Local Service Bid*, Financial Times, Feb. 11, 1998, at 5.

[10] Southwestern Bell Telephone Company (SWBT) and the Texas PUC argue that elimination of the continuous property restriction imposed by the Texas Public Utility Regulatory Act of 1995 on SWBT's tariff would increase the characteristics and number of customers that are bypassing switched access charges. SWBT projects that such degree of bypass will jeopardize its ability to provide affordable service to all customers. *See generally In re* Public Util. Comm. of Texas (CCB Pol 96-13), et al., Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, *Memorandum Opinion and Order*, FCC 97-346, (rel. Oct. 1, 1997) (The FCC pre-empted the State's prohibition of Centrex resale to non-continuous properties as an unreasonable barrier to entry pursuant to 47 U.S.C. § 253. The FCC found that the State law was not necessary to preserve and advance universal service.). *See also* Competition Policy Institute *Ex parte* Comments, Nov. 21, 1997 (arguing against a Motion for Stay of the FCC's MO&O requested by SWBT).

Advocacy is hopeful that the seeds of local service competition as sown by new entrants such as Cox Enterprises and RCN Corporation,[11] will continue to develop and spread like "wildflowers." Vigorous competition will provide lower rates, increased services and increased choices for all classifications of end users. However, Advocacy is not convinced that enough communities across the country, especially in rural areas, will see an "expeditious introduction of pervasive competition into local phone markets"[12] in the next few years given extensive litigation, adverse court decisions, overt and subtle measures by incumbents to preserve market share, and regulatory obstacles at the local, state, and federal levels. If not eliminated or reduced, these indefatigable market entry barriers may kill or stifle the growth of the few emerging buds of competition for lack of sunshine and nourishment, in a figurative sense.

Moreover, new entrants providing competitive local exchange service (long distance as well) have targeted high volume users (i.e. large businesses) predominantly as a profitable customer base. Advocacy certainly understands the need, even for a small business telecommunications provider, to implement a business plan that targets large volume business users which is a consumer group that generates the most revenue. The preservation of a new entrant's investment and financial support may also be dependent on marketing and selling to the most profitable customer group available - which is simply not residential customers nor likely to be small businesses in urban or rural areas. Therefore, Advocacy believes that viable choices for local service providers will be limited to select

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[11] Testimony given by representatives of competitive local exchange carriers at the FCC's *En Banc* on the Status of Local Telephone Competition, Jan. 29, 1998.

[12] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *amended on reh'g*, No. 96-3221 et al. (8th Cir. Oct, 14, 1997), *cert. granted*,__ U.S.L.W. (U.S. Jan. 26, 1998) (No. 98-_____).

consumer groups which will not generate enough marketplace activity to drive down the cost of access to the local network.

The Petitioners state that the Commission depended not just on the interim measures adopted in the *First Report and Order* to bring access charges down to their forward looking economic costs, but also relied on a "'primarily market-based approach to reforming access charges'" as the ultimate approach.[13] The Commission expected that this "market-based approach . . . may take several years to drive costs to competitive levels."[14] Advocacy acknowledges that two, even five years, is a relative short time to install vigorous, effective competition into a century old monopolistic industry. Conversely, two years is a lifetime for small businesses whose success (or failure) is often measured day-by-day. Therefore, there is a need for immediate relief for small business end users from the Commission's current access charge scheme because small businesses currently pay a disproportionate share of access costs.[15]

Most importantly, the FCC's dependence on marketplace forces was prior to several adverse court decisions including the repeal of the FCC's pricing methodology for interconnection and its unbundled network element platform policy,[16] as well as a successful challenge to the constitutionality of Sections 271-275 of the

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[13] CFA Petition, at 5 (citing *First Report and Order*, para. 263).

[14] *First Report and Order*, para. 45 (emphasis added).

[15] The majority of businesses in this country are small businesses, *supra* page 3, and the average small business has four telephone lines. Advocacy *Ex parte* Comments, at 10 n.15 (citing FCC PNR Associates study). It is also undisputed that businesses with multiple lines pay a higher share of access charges than residents with either single or multiple lines, or businesses with single lines, given the FCC's imposition of increased SLCs and the new PICCs on multiple line businesses. Therefore, by the sheer number of small businesses, and the financial burden imposed by the FCC on businesses with multiple lines, small businesses pay a disproportionate share of fees for access to the local loop unrelated to their actual cost of use.

[16] *See generally Iowa Utils. Bd.*, 120 F.3d 753.

Telecommunications Act of 1996.[17] To compound the current economic impact on small businesses, these setbacks in stimulating effective competition in the local exchange market means that there is no relief in sight for small businesses.

III. A NEW RULEMAKING IS NECESSARY TO CORRECT THE DEFICIENCES CAUSED BY THE CURRENT ACCESS CHARGE SCHEME AND THE ABSENCE OF IDENTIFIABLE RATE REDUCTIONS FOR ALL END USERS.

A. Large IXCs May Be Assessing Unnecessary and Excessive Universal Service Surcharges On Business Customers - Further Burdening Small Business End Users.

Advocacy is concerned that the nation's largest IXCs which have a combined 85% of presubscribed lines[18] (i.e., AT&T, MCI, and Sprint) could have very high profits in 1998 due to a windfall of revenue earned on the backs of small businesses. Supposedly, the Commission's rules for access charge reform were to help facilitate lower payments for use of the local network by IXCs, lower rates for long distance, and make explicit universal service support without burdening end users.[19] However, in addition to the IXCs pass through of PICCs to the end user (some higher than others),[20] the largest IXCs have also assessed an additional universal service fund ("USF") surcharge on all business customers.[21]

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[17] *SBC Communications, Inc. v. FCC*, 981 F.Supp. 996 (N.D. Tex. 1997), *SBC Communications, Inc. v. FCC, No.* ___ (N.D. Tex. Feb.11,1998) (order granting stay).

[18] Long Distance Market Shares, Industry Analysis Division, Common Carrier Bureau, FCC, July 1997, at 4 ("FCC Long Distance Market Shares Report").

[19] *See First Report and Order*, para. 16 (access charge changes will "provide far-reaching benefits to the American people" and "foster competition and economic prosperity").

[20] FCC Investigates Huge Boost in Universal Service Fees Set by IXC, Comm. Daily, Feb. 2, 1998, at 4 (electronic version) (reporting MCI's unusual billing scheme for PICCs based on a fixed percentage of a business customer's monthly long distance bill.).

[21] Press reports indicate that AT&T and Sprint's USF surcharge is 4.9% and the MCI surcharge for small businesses is 5% and for large businesses 4.4% of their total monthly long distance bill. Comm. Daily, Feb.2, 1998. MCI argues that the higher percentage for small businesses is compensation for the 42% of small business lines that have zero toll charges. Other sources indicate that residential customers may also be subject to such surcharges. Letter from Rural Telephone Coalition to William E. Kennard,

The pass through of PICCs to end users, although not "required" by the FCC, was reasonably foreseeable, if not expected, by the FCC - except for MCI's creative scheme of assessing PICCs based on a fixed percentage of a business customer's monthly long distance charges. However, this additional USF surcharge was certainly not foreseeable, nor is it reasonable. Furthermore, the significant economic burden on small business end users caused by PICCs and USF surcharges is compounded by the absence of universal, identifiable long distance rate reductions. Although IXCs received a reduction in the per minute access charges paid to ILECS of $1.7 billion in July 1997,[22] many small business customers have not received a rate reduction.[23] This $1.7 billion reduction was supposed to "guarantee that long distance prices w[ould] fall."[24]

In the consideration of this Petition for Rulemaking, Advocacy requests that the Commission investigate the billing practices of the largest IXCs to first ascertain whether rate reductions have indeed been passed through to all classes of end users commensurate with the per minute access charge reductions. In addition, the FCC should investigate whether these IXCs are reaping a windfall of combined access charge savings, with the pass through of PICCs and USF surcharges and take corrective measures in a new rulemaking or, if necessary, immediately by a separate Order.

Chairman, FCC 1 (Feb. 3, 1998) (rate-of-return ILECs in rural areas "have received communiqués and invoices from IXCs that include, announce or 'explain' new or planned itemized charges on residential and business customers' bills") ("RTC Letter").

[22] *In re* Price Cap Performance Review for Local Exchange Carriers (CC Dkt. No. 94-1), *Fourth Report and Order*, 12 FCC Rcd. 16,642 (1997).

[23] *See infra* page 16.

[24] *First Report and Order*, Statement of Chairman Reed E. Hundt (emphasis added).

B. Advocacy Questions Whether The IXCs' USF Surcharge On All Business End Users Is Excessive Given The Designated Source of Support For Each Universal Service Fund And In Light Of The FCC's Modified Collection Schedule.

Advocacy questions whether the IXCs' imposition of a national USF surcharge on all business customers is assessed on the total long distance bill or just the interstate/international portion. If the USF surcharge is on the total bill which includes interstate and intrastate toll charges, Advocacy questions the appropriateness of this surcharge since collection for the individual universal service funds are to be made from different pools of a telecommunications provider's revenue. The schools/libraries, and rural health care providers funds are based on interstate, international, and intrastate end-user telecommunications revenues.[25] Conversely, the high cost and low income funds are to be collected only from interstate and international end user revenue, not intrastate.[26]

Moreover, Advocacy shares the Rural Telephone Coalition's concerns that the USF surcharges, billed as "national" fees, are being assessed unlawfully on rural customers served by rate-of-return ILECs who are currently under an interim universal plan in which no change in rates nor additional federal charges have been imposed.[27]

Advocacy also questions whether such IXC USF surcharges are excessive in light of the FCC's reduction in the amount to be collected from telecommunications carriers for the high cost/low income, schools/libraries, and rural health care provider funds in 1998. In December 1997, the FCC reduced the maximum amount of money to be collected for the first six months of 1998 for the schools/ libraries fund to better correspond with

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[25] In re Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776 para. 837 (1997) (*"Universal Service Report and Order"*).
[26] *Universal Service Report and Order,* paras. 824, 831.
[27] RTC Letter, at 2.

anticipated demand.[28] Support for schools and libraries was reduced from an estimated $1.12 billion (based on $2.25 billion for the full year as adopted in the *First Report and Order*) to no more than $625 million for the first half of 1998.[29] Additional reductions for first quarter 1998 were also issued by the Common Carrier Bureau consistent with the FCC's *Third Order on Reconsideration*. For example, the rural health care support mechanism was reduced from $100 million to $25 million and the high cost support mechanism was reduced from $136.3 million to $125 million.[30] It is reasonable to project that subsequent quarters will also be less, culminating in a significant reduction from previous estimates in the collection of universal service funds for calendar year 1998.

Advocacy does not take issue with the amount of the various universal service funds. We are primarily concerned with the need and process in which such funds are collected by telecommunications carriers from end users in light of the FCC's decision to reduce the collection amounts significantly. The FCC concluded in its *Third Order on Reconsideration* that it would be unreasonable to "impose unnecessary financial burdens on service provider contributors to universal service by collecting funds that exceed demand."[31] Certainly it is even more unreasonable for a service provider (i.e. IXCs) to collect more funds than it needs from its end users - in the name of universal service.

A total of $35.7 billion in total end user revenue (including intrastate revenue) was generated by the IXC industry in the first half of 1997 - $26.6 billion for interstate and

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[28] *In re* Federal-State Joint Board on Universal Service, *Third Order on Reconsideration*, CC Dkt. 96-45, FCC 97-411 (rel. Dec. 16. 1997) ("*Third Order on Reconsideration*").
[29] *Id.*, para. 1.
[30] FCC Public Notice, *First Quarter 1998 Universal Service Contribution Factors Revised and Approved*, CC Dkt. No: 96-45, DA 97-2623 (rel. Dec. 16, 1997) ("FCC Universal Service Contributions Public Notice").
[31] *Id.*, at 2.

international revenues.[32] Conservatively based on 1997 data, Advocacy estimates that $553.6 million will be collected from all IXCs for the first quarter of 1998 to support the combined universal service funds. This includes collections from AT&T, MCI, Sprint, WorldCom and 600 smaller carriers that serve 12% of the industry's presubscribed lines.[33] The issue is whether the USF surcharge imposed by AT&T, MCI, and Sprint on all business end users is excessive given the total amount needed from the entire industry and whether the surcharge imposes payment by end users for services not yet billed to the IXC?

Type of Fund	**FCC Contribution Factor**[34]	**Est. IXC Contribution for First QTR of 1998**
1. Schools/Libraries/Rural Health	0.0072%	$ 128.5 million *
2. High Cost/Low Income	0.0319%	$ 425.1 million **
	Total to be collected from all IXCs	**$ 553.6 million**
	Amount Collected from End Users via AT&T, MCI, Sprint USF Surcharge	**??????????????**

* Contribution factor x 1997 IXC Total End User Revenue ($35,697,962,000 divided by two.)
** Contribution factor x 1997 IXC Interstate and International End User Revenue ($26,654,989,000 divided by two).

Assuming that AT&T, MCI, and Sprint's USF surcharge is appropriate and covers the IXCs' universal service obligations - this issue still remains: Why hasn't there been identifiable decreases in long distance rates commensurate with the major access charge reductions received from the Commission? There is no need for an IXCs to preserve its access charge savings since its universal service obligations have been paid by end users. Advocacy is aware that IXCs are unregulated and can charge any rate they desire to be

[32] FCC Form 457 Universal Service Worksheet, Sum of Revenue in 1st Half of 1997 (lines 48 and 50 on FCC Form 47).

restricted only by marketplace competitive pressures. Nonetheless, it appears that the Commission's current access charge scheme has enabled large IXCs to "have their cake and eat it too." A new rulemaking is necessary to correct these deficiencies.

C. A New Rulemaking Is Necessary To Ensure That End Users Across the Country Will Have Viable Choices For Long Distance Carriers.

The Commission has heralded the ability for an end user to change long distance providers if the end user is not satisfied by the service or the rates of its current IXC. In fact, in response to excessive fees passed on to the end user by the larger IXCs effective this January, the Commission has advised end users to "[u]se your buying power wisely and shop around."[35]

Advocacy is concerned that such end user choice, in reality, is limited if not illusory. First, all of the larger IXCs are passing through PICCs in some form or another and assessing an USF surcharge. Second, the survival of many smaller IXCs is doubtful directly due to the Commission's current access charge rules. For example, small IXCs serving rural areas are the predominant users of tandem-switching. These IXCs will need to increase long distance rates because the Commission: 1) adopted a new tandem switching rate structure that will increase "tandem switching rates by 400% *after* any 'offsetting' access rate reductions;"[36] and 2) eliminated the unitary rate structure which forces small IXCs to pay two sets of fixed charges and additional mileage rates.[37] These actions by the Commission are expected to result in rate increases to the end user.

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[33] FCC Long Distance Market Shares Report, at 4.

[34] FCC Universal Service Contributions Public Notice, at 3.

[35] *FCC Consumer Information, The FCC's Interstate Access Charge System*, at *Tips for Consumers*, (Feb. 10, 1998) <http://www.fcc.gov/Bureaus/Common_Carrier/Factsheets/access2.html> ("Access Charge Fact Sheet").

[36] ACTA Comments, at 6.

Furthermore, those rural customers served by price cap ILECs will also be assessed PICCs by their small IXCs because small IXCs cannot afford to absorb this cost.[38]

The Commission needs to revisit its access charge rules to ensure that small IXCs remain viable competitive choices for both residential and business end users.

IV. A NEW RULEMAKING MUST INCLUDE A PROPER REGULATORY FLEXIBILITY ANALYSIS OF THE SIGNIFICANT ECONOMIC IMPACT ON ALL SMALL ENTITIES IN COMPLIANCE WITH THE RFA.

A. A New Rulemaking Is The Best Remedy To Cure The FCC's Violations of The Regulatory Flexibility Act In Its *First Report and Order.*

The Commission is currently considering several timely petitions for reconsideration of its *First Report and Order* that assert that it was not in compliance with the RFA, including the comments from the Office of Advocacy and the Chairman and Ranking Member of the Senate's Small Business Committee.[39] The Commission has not yet acted on these Petitions, although it has issued two subsequent Orders on Reconsideration. The major RFA issues are that the Commission did not properly identify small IXCs and small business end users as entities that are affected by its access charge reform rules. Furthermore, the Commission did not undertake a proper analysis of the significant economic impact caused by: 1) the cumulative effect of the FCCs imposition of PICCs and SLCs on small businesses with multiple lines; and 2) the elimination of the unitary rate structure and new tandem switching rates on small IXCs.[40] Advocacy also asserts that subsequent Orders are also in violation of the RFA until the Commission

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[37] Advocacy *Ex Parte* Comments, at 9; *see also* ACTA Comments, at 7.

[38] *See* Advocacy *Ex parte* Comments, at 10 (citing to Comptel's projections of a 68.7% increase in operating expenses for small IXCs).

[39] *Id.*, at 2 (citing all commenters that raised RFA issues). *See also* Letter from Sen. Christopher S. Bond, Chairman, and Sen. John F. Kerry, Ranking Member, U.S. Senate Committee on Small Business, to William E. Kennard, Chairman, FCC (Nov. 20, 1997).

identifies small IXCs and small end users properly as affected entities. Therefore, at this time, it is Advocacy's opinion that the best way to remedy the Commission's extensive violations of the RFA in this proceeding is to start from scratch.[41]

Advocacy supports ACTA's comments in support of this Petition for Rulemaking that if a new rulemaking is initiated, the Commission must also undertake a proper regulatory flexibility analysis pursuant to the RFA, as amended, by SBREFA. 5 U.S.C. § 601 et seq.[42] Advocacy further reiterates that for any rulemaking related to access charge reform, whether it is the Commission's grant of this Petition, future reform for rate-of-return companies, or subsequent Orders under the current plan, it is imperative that a complete analysis of the economic impact on all small entities is done, including small IXCs, ILECs, CLECs, wireless providers, and small business end-users. In particular, this analysis must be undertaken at both the Notice of Proposed Rulemaking ("NPRM") and final rule stages.

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 Commission to analyze the economic

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[40] See generally Advocacy *Ex parte* Comments.

[41] A new rulemaking would also avoid a potential claim that a revised Final Regulatory Flexibility Analysis (FRFA) in a Order on Reconsideration of the *First Report and Order* would be an impermissible post hoc rationalization that would render the revised FRFA itself arbitrary and capricious. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The analysis of the economic impact on small businesses is to be done during the Commission's deliberations, not after the fact.

[42] *See generally* ACTA Comments.

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 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. Significantly, the FRFA is now judicially reviewable. 5 U.S.C. § 611.

Given the increases that have come to light with the January 1, 1998 effective date of the FCC imposed PICC , there is no question that the current access charge plan is a significant economic burden on small business end-users that was discoverable in advance if a proper regulatory flexibility analysis had been done. Advocacy illustrates this point with a real life example. A small business located in Washington, D.C. with seven lines has contacted Advocacy with a concern that the new flat rate charges assessed on businesses with multiple lines are "quite a large increase in monthly telephone charges for absolutely no new services or benefits."[43] (From this point forward, this small business is called "Small Business A.")

In December, Small Business A was informed that it will be assessed a PICC of $2.75 for each line. This pass through of the PICC by the IXC results in a total of $19.25 per month to be paid by Small Business A - $231.00 annually. In addition, an increase of $1.32 per line per month since May 1997 for the Subscriber Line Charge ("SLC")[44] will

[43] Letter from Sharon L. Wilson, Wilson and Wilson, to William E. Kennard, Chairman, FCC (Jan. 29, 1998) (copy sent to Jere Glover, Chief Counsel for Advocacy, SBA) (emphasis added)..

[44] The Commission reports that the average SLC is $6.92 per month for multiple line businesses. Access Charge Fact Sheet, at 5. This is an increase of $1.32 per line since adoption of the *First Report and Order* in May 1997. But see FCC News, Commission Reforms Interstate Access Charge System CC Dkt Nos. 96-262; 94-1; 91-213;95-272, Report No. CC 97-23, Attachment, at 1 (rel. May 7, 1997), that projects the SLC for 1998 to be $7.61, an increase of $2.01 since May 1997 and $1.61 since July 1997.

also be assessed by Small Business A's ILEC effective January 1, 1998, a total of $9.24 per month - $111.88 annually. The monthly long distance charges incurred by Small Business A are approximately $60-$90.00. It is also important to note that not all seven lines are used for long distance calls.[45] The bottom line is that Small Business A writes a check for almost $30 more per month for telephone service which is the cumulative effect of increased SLCs and new PICCs (PLUS TAXES!) - $341.88 annually - and it has received no new service and made no additional calls. Worse yet, this increase does NOT include the USF surcharge!!

More importantly, Small Business A stated that is has not seen a reduction in per minute long distance rates in two years, much less than since July 1997 when the FCC reduced per minute charges paid by IXCs by $1.7 million. Access charge reform has added an approximate $30.00 per month to a $60-90.00 long distance bill - at least 30% of the actual long distance charges. The Commission's promise that long distance savings would offset the flat rate charges has not been fulfilled for this small business.

Given that the majority of businesses in this country are small businesses, *supra* page 3, it is not unreasonable to assume that there are millions of small businesses that have also started the New Year with a net increase in their telephone bills. These small businesses deserve an immediate re-evaluation of the FCC's access charge reform rules.

[45] One of the seven lines is dedicated to a fax machine, and two lines are dedicated to computer modems. *See also* profile of small business characteristics in Advocacy *Ex parte* Comments dated April 29, 1997, at 5 and comments dated Nov. 21, 1997, at 10-12 (arguing that not all small businesses have a high enough volume of calls on each of their lines to offset a substantial increase in flat rate charges).

V. CONCLUSION.

In summary, for the reasons enumerated above, the Office of Advocacy supports the Petition for Rulemaking and respectfully requests that the FCC undertake a new rulemaking for access charge reform. A new rulemaking is necessary to: 1) adjust the FCC's access charge reform to better reflect current marketplace realities and the projected delay in full and effective competition for local service; 2) correct the measures that have placed significant economic burdens on America's small businesses including the assessment of SLCs, PICCs, and USF surcharges; 3) complete a regulatory flexibility analysis that properly identifies all affected small entities; 4) complete a regulatory flexibility analysis of the significant economic impact on all affected small entities; and 5) re-evaluate the elimination of the unitary rate structure for small IXCs and new tandem switching rates.

Respectfully Submitted,

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Chief Counsel

S. Jenell Trigg, Esq.
Assistant Chief Counsel
for Telecommunications

February 17, 1998

CERTIFICATE OF SERVICE

I, S. Jenell Trigg, Esq., do hereby state and affirm that copies of the forgoing "Reply Comments of the Office of Advocacy, U.S. Small Business Administration," CC Dkt. Nos. 96-262, 94-1, 91-213 and 95-72 were served via hand delivery or first class mail, as designated, this 17th day of February, 1998, on the following:

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Chairman
Federal Communications Commission
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Washington, DC 20554 *

The Honorable Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, NW Suite 832
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The Honorable Harold W. Furchtgott-Roth
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1919 M Street, NW Suite 802
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The Honorable Gloria Tristani
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The Honorable Michael K. Powell
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REPLY COMMENTS
OFFICE OF ADVOCACY,
U.S. SMALL BUSINESS ADMINISTRATION

APPENDIX A

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").