subscribers that do not hold the 800 equivalent but want the 888 or 877 version. There are major conflicting interests between both classes therefore, a benefit to one is obviously a detriment to the other.

In fact, the Commission erroneously states that this rule "will not have an adverse impact on toll free subscribers, including small business entities, because it will open the toll free market to all toll free subscribers on an equal basis." *Fourth Report and Order*, Appendix 3, para. 30 (emphasis added). This statement does nothing to address the concerns that small subscribers do not have "equal access" nor that an incumbent 800 subscriber could be harmed by misdials or a dilution of investments. The Commission's "refusal to recognize the impacts of its regulations on small businesses also raises serious question about its efforts to minimize those impacts through less drastic alternatives."[33]

Advocacy asserts that in its refusal to identify and reconcile the significant economic impact on a substantial number of incumbent toll free subscribers, the Commission attempted to "agreeably decorate a stubborn conclusion," *Southern Offshore Fishing*, at 21, that there was no significant economic impact on small business subscribers. *Fourth Report and Order*, Appendix B, para 30.

Advocacy also believes that a good faith implementation of the RFA to analyze fully the asserted impact on small entities could have prevented the difficulties surrounding the roll out of 877 on April 5. *See* Appendix B. It is Advocacy's understanding that an investigation is underway to determine how 10,000 numbers could have been allocated when the system was supposedly

[33] *Southern Offshore Fishing*, at 21.

frozen. *Id.* These problems were not only foreseen by Advocacy and other small business entities, but also raised before the Commission in several *ex parte* meetings and letters. Yet the Commission did nothing to address these problems.

D. The FRFA Violates The RFA Because It Failed To Analyze All Significant Alternatives And Include A Statement That Adequately Justifies The Rejection Of Significant Alternatives.

In the FRFA, the Commission is obligated by the RFA (and the APA) to discuss the obvious and asserted impact on all affected small entities raised by administrative record evidence, whether or not these issues were raised as separate IRFA comments. The Commission is required to "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 RFA does not state in this section that only comments and alternatives raised in response to the IRFA must be considered. *Ex parte* comments are also part of the whole administrative record, and the Commission is obligated to review and address all significant issues.[34]

A discussion of several significant alternatives proposed by the Commission and commenters, but subsequently rejected, have not been included in the FRFA in violation of the RFA. 5 U.S.C. § 604 (a)(5). Advocacy acknowledges that § 604 "does not require that an FRFA address every alternative, but only that it address significant ones."[35]

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[34] *Bechtel v. FCC*, 957 F.2d 873 (D.C. Cir.), *cert denied*, 113 S. Ct. 57 (1992); *Flagstaff Broadcasting Foundation v. FCC*, 979 F.2d 1566 (D.C. Cir. 1992); *David Ortiz Radio Corp. c. FCC*, 941 F. 2d 1253 (D.C. Cir. 1991); *City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153 (D.C. Cir. 1987).
[35] *Associated Fisheries of Maine, Inc., v. Daley*, 127 F.3d 104, 115 (1st Cir. 1997).

In addition to the market entry barriers and conflict of interest issues previously discussed, the Commission also neglected to justify its rejection of the Lottery/Auction proposal in the FRFA. Advocacy also believes that the ReponseTrak/New England 800 petition should not have been summarily dismissed. *Fourth Report and Order*, para 40 n.78; but *see* Dissenting Statement of Commissioner Harold Furchtgott-Roth, *Re: Toll Free Service Access Codes*, CC Docket No. 95-155 ("I believe that th[e New England 800] proposal has some merit."). For the record, Advocacy has not endorsed any petition on its merits, including ResponseTrak's. We simply argue that all alternatives that purport to minimize the impact on small entities should have been fully considered under the procedures established by the APA and RFA.

Even if ResponseTrak's *Ex parte* Petition was not different than the partitioning proposal previously rejected in the *Second Report and Order* (however, we believe that it was materially different and was relevant to this proceeding), the Commission expressly states in its *Fourth Report and Order* that the Common Carrier Bureau "issued a Public Notice on July 2, 1997, requesting comments to refresh the record on issues relating to the treatment of toll free vanity numbers." *Fourth Report and Order*, para. 10 (emphasis added). ReponseTrak responded to this request.

III. There Are Material Inconsistencies Between the Commission's Fourth Report and Order and its Opposition To ResponseTrak Call Center's Emergency Motion For Stay That Raises Serious Questions About the Commission's Compliance With The RFA.

Finally, Advocacy questions the material inconsistency between the Commission's *Fourth Report and Order* and the Commission's responsive pleading to ResponseTrak Call Center's Emergency Request for Stay before the United States Court of Appeals for

the District of Columbia Circuit. *ResponseTrak Call Centers v. Federal Communications Commission*, Case No. 98-1195 (D.C. Cir. April 16, 1998) (emergency request for stay denied). ResponseTrak argued, *inter alia*, that the Commission's "first-come, first-served" allocation policy for new toll free codes is unfair to small business subscribers. ResponseTrak Emergency Motion for Stay Pending Review, April 9, 1998.

In its response to this argument, the Commission has set forth two conflicting explanations for the application of its "first-come, first-served" allocation process. The Commission argues in its responsive pleading that the "first-come, first-served" allocation process applies to RespOrgs, and not toll free subscribers. Opposition of Federal Communications Commission to ReponseTrak Call Center's Emergency Motion for Stay Pending Review, April 13, 1998, at 8 "ReponseTrak is wrong, in any event, when it asserts that RespOrgs are obligated to process their subscribers' requests for particular toll free numbers on a first-come, first-served basis." (emphasis in original) ("FCC Opposition").

This statement is directly contrary to the Commission's pronouncements in the *Fourth Report and Order* and its FRFA. "A first-come, first-served assignment method, as apples to vanity numbers in general, best serves our goal to assign toll free numbers fairly because it does not discriminate against new subscribers. All subscribers would be given an equal opportunity to reserve desirable toll free numbers as new codes are opened." *Fourth Report and Order*, para. 25 (emphasis added). The Commission reiterated, "[w]e permit subscribers to engage in that process [of reserving numbers of their choice] on a first-come, first-served basis." *Id.*, para. 27 (emphasis added). Finally, in the FRFA the Commission alleges that the first-come, first-served policy "is in the public interest, and

will not have an adverse impact on toll free subscribers, including small business entities, because it will open the toll free market to all toll free subscribers on an equal basis." *Id.*, Appendix B, para. 30 (emphasis added).

This inconsistency raises serious questions about the Commission's compliance with the APA and the RFA, and whether its rules actually minimize the adverse impact on small businesses. If the FCC Opposition is the true application of the policy and this policy was not adopted to minimize the burden on small subscribers as claimed, then the *Fourth Report and Order* is arbitrary and capricious because it includes minimal, if any, discussion of the impact (adverse or beneficial) of the first-come, first-served policy on RespOrgs, large or small. Moreover, the FRFA is disingenuous and was a cursory attempt to satisfy the RFA and appease small entities. In effect, the purported efforts of the Commission to minimize the economic burden on small subscribers would be illusory. Conversely, if the Commission stands by the *Fourth Report and Order* and the FRFA, then it appears that the Commission has mis-characterized its decisions in an unacceptable post hoc rationalization before the court as a means to evade judicial review.[36] Either scenario is untenable because small businesses have been injured under both.

Nonetheless, for the record, Advocacy requests that the Commission clarify its position of whether or not the first-come, first-served allocation process is for subscribers or RespOrgs. This clarification is critical because this inconsistency also frustrates future

[36] *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962) ("The courts may not accept appellate counsel's post hoc rationalization for agency action.").

enforcement and/or legal action because the rights and responsibilities of subscribers and RespOrgs are not clearly defined. Advocacy also requests that the Commission make the appropriate adjustments in its regulatory flexibility analysis.

IV. Conclusion

As the forgoing comments make clear, the Commission has not adequately rationalized its adoption of the "first-come, first-served" allocation policy for new toll free codes. The Commission has not taken into full consideration the comments of small businesses on the administrative record in its *Fourth Report and Order*, nor its Final Regulatory Flexibility Analysis regarding the issues of conflict of interest, market entry barriers, and adverse impact on incumbent toll free subscribers. Furthermore, the Commission has set forth inconsistent statements on whether its allocation policy applies to subscribers or RespOrgs.

Therefore, the Office of Advocacy respectfully requests that the Commission: 1) fully consider these issues and revise its policy for the deployment of future codes; 2) revise or clarify its position on whether the allocation policy applies to subscribers or RespOrgs; and 3) revise and correct its FRFA to reflect a full discussion of the adverse impact on each class of small business as identified in this Petition for Reconsideration.

Respectfully submitted,

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Chief Counsel for Advocacy

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

May 4, 1998

Appendix A

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

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

March 25, 1998

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

RE: *Ex Parte* Comment - *In re* Toll Free Service Access Codes, CC Docket No. 95-155

Dear Chairman Kennard:

The Office of Advocacy of the U.S. Small Business Administration ("Advocacy") is concerned about the potential adverse economic impact on small businesses subject to the Federal Communications Commission's ("FCC" or "Commission") rules in the Toll Free Service Access Code proceeding. Many of the unresolved issues regarding the general administration of toll free numbers, the implementation of the new toll free code 877, and the replication of vanity numbers can be classified as market entry barriers for small businesses.

The Telecommunications Act of 1996 ("1996 Act") mandates that the FCC eliminate and identify market entry barriers "for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services." 47 U.S.C. § 257. Responsible Organizations ("RespOrgs") are providers of toll free numbers, which is an essential telecommunications service, and thus, fall within the scope of small businesses identified by Congress in the 1996 Act. For the record, all providers of toll free numbers and service including new entry and incumbent RespOrgs, carriers, or secondary market providers are small businesses pursuant to the mandates of Section 257.[1] Therefore, the Commission has a statutory duty and an obligation in the public interest to identify and eliminate market entry barriers for small telecommunications businesses affected in this proceeding.

In general, the Commission has interpreted market entry barriers to include, *inter alia*, "barriers that impede entry into the telecommunications market by existing small businesses, and obstacles that small telecommunications businesses face in providing service or expanding within the telecommunications industry . . . ."[2] The Commission has also noted that not all market entry barriers require governmental intervention under Section 257.[3] However, the instant proceeding does not fall under this limitation. The market entry barriers to small entities in this proceeding have been either caused by regulatory action or have been acerbated by regulatory action and therefore, must be solved by regulatory action.

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[1] For a definition of "secondary market providers," please see Office of Advocacy, U.S. Small Business Administration, Ex parte Petition for Reconsideration, Dec. 12, 1997, at 10-13.
[2] In re Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses, Report, GN Dkt. No. 96-113, 12 FCC Rcd 16802, para. 1 (1997) ("257 Report").
[3] Id. para. 16.

The Commission has a statutory obligation to "administer telecommunications numbering and to make such numbers available on a equitable basis." 47 U.S.C. § 251(e)(1) (emphasis added). Therefore, the Commission has a duty to oversee the functions of organizations such as SNAC who have a substantial and significant role in the allocation and administration of toll free numbers. Whenever SNAC's implementation of the 877 plan adversely impacts small business (i.e. reduction in the allocation of numbers and inadequate modems for access to the database), the Commission has an unambiguous obligation under Sections 251 and 257 to intervene.

Additional Commission action has adversely affected small businesses. First, the inherent conflict of interest between the multiple functions of large carriers which are 1) carrier; 2) RespOrg; 3) SNAC member; and 4) subscriber, was created by FCC's regulatory structure. The administration and allocation of toll free numbers is implemented pursuant to FCC policy and is governed by FCC tariff. Second, the Commission's Second Report Order in this docket prohibits a small business subscriber from acquiring a desired toll free number on the private market as a means to mitigate its harm if that number has purposefully or mistakenly been allocated to another subscriber.[4] Finally, the Commission's 2-year delay in issuing final rules for vanity number replication has in itself stifled the ability of many small RespOrgs, carriers, and subscribers from expanding their businesses.

The first step in compliance with Section 257 which is the "identification" of market entry barriers has been accomplished in part by this letter in addition to the ex parte comments filed by several small businesses and the Office of Advocacy.[5] The second step - " elimination"- can be accomplished in part by a 30 day delay in the roll out of 877 until the allocation of numbers and access to the database issues have been sufficiently addressed and final rules have been issued regarding replication.

We sincerely hope that the Commission will take all necessary steps to eliminate the market entry barriers in this proceeding for small businesses. Thank you for your consideration.

Sincerely,

Jere W. Glover, Esq.
Chief Counsel for Advocacy

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

cc: The Honorable Susan Ness
The Honorable Michael Powell
The Honorable Harold Furchtgott-Roth
The Honorable Gloria Tristani

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[4] In re Toll Free Service Access Codes, Second Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 11162 (1997); see also 47 C.F.R. § 52.107.

[5] Written Ex Parte Presentation Adverse Economic Impact on Small Businesses Resulting From Proposed April 5 Implementation of 877, Joint Comments of the Office of Advocacy, TLDP Communications, Inc., ICB Inc., Response Trak Call Centers, and New England 800 Company, Mar. 17, 1998.

Appendix B

1 877 DISARRAY

April 6, 1998 New York, NY (ICB TOLL FREE NEWS) 877 opened on April 5, 1998, as scheduled.

It opened in predictable -- but inexcusable -- disarray.

About 2 seconds after the opening bell, most RespOrgs found their systems frozen -- locked up -- for over an hour. By the time smaller RespOrgs gained gradual (hense inequitable) access, a reported 10,000 numbers were already taken.

The following report was filed for ICB by a small RespOrg based on the west coast. Portions of the narration refer to the marathon conference call maintained during the day for RespOrgs to check in with, and presumably resolve, reservation problems. Individual names have been changed and/or deleted to protect the innocent...

"We logged on with all of our computers to the SMS data base at about 5:00 am central standard time to get a place in line for the 12:00 opening. At the opening bell we all entered our first numbers.... we waited ....and waited ....and waited. Finally, approximately 12 minutes later, we called the SMS (help desk) and was told there were unusually long wait times and to be patient.

... called back and was told three (only 3!) of our numbers were reserved. Half an hour into 877 implementation, we have three numbers reserved... our computer screens remained locked with an impenetrable blinking cursor...

Spoke with [3 other RespOrgs], all experiencing similar problems. Calls to SNAC monitoring conference call recorded more RespOrgs with more problems. Some people were reserving and not getting messages, others were reserving and getting messages, and others were reserving and not getting reservations."

Another RespOrg corroborated to ICB that about 2 seconds after the opening bell, everything froze - locked up. This seemed to be the case for most RespOrgs for at least an hour. However, at least one RespOrg was NOT having problems, as by the time that first hour had gone by, 10,000 numbers were gone.

Furthermore, rather than all RespOrgs unlocking simultaneously, it seems that different RespOrgs gained access after the initial frozen period gradually, at varying times, compounding the inequity in how these 877 numbers were distributed.

P.S. One small victory for small business-kind - we're told 877 CALL ATT was not snagged by the #1 carrier. Will wonders never cease.

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