



March 20, 2020

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Modernizing Unbundling and Resale Rules in an Era of Next-Generation Networks and Services Notice of Proposed Rulemaking—WC Docket No. 19-308

Dear Ms. Dortch:

The Office of Advocacy respectfully submits the attached Reply Comments and Initial Regulatory Flexibility Analysis Comments in the above-referenced proceeding. Please do not hesitate to contact me or my staff with any questions.

/s/Major L. Clark, III
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of
Modernizing Unbundling and Resale
Requirements in an Era of Next-Generation
Networks and Services

WC Docket No. 19-308

**REPLY COMMENTS AND INITIAL REGULATORY FLEXIBILITY COMMENTS
U.S. SMALL BUSINESS ADMINISTRATION OFFICE OF ADVOCACY**

About the Office of Advocacy

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy come from input received from outreach to small businesses and do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (RFA) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.¹ Congress crafted the RFA to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or to comply with federal laws.² In addition, the RFA’s purpose is to address the adverse effect that “differences in the scale and resources of regulated entities” has had on competition in the marketplace.³

Background

Congress passed the Telecommunications Act of 1996 to open monopoly-held networks to competition by requiring incumbent carriers to offer unbundled network elements (UNEs), such as bare copper loops and dark fiber, at cost-based rates.⁴ Under the Act, the Federal Communications Commission has the discretion to determine which network elements an incumbent carrier must offer at regulated rates.

The FCC has proposed to remove network unbundling requirements for incumbent local exchange carrier networks as follows: DS1 and DS3 loops in counties and study areas deemed competitive in the BDS Order and the Rate-of-Return BDS Order, with an exemption for DS1 loops used to provide residential broadband service and telecommunications service in rural areas (as defined by census as census blocks

¹ Pub. No. 96-354, 94 Stat. 1164 (1980).

² Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

³ Pub. L. 96-354, Findings and Purposes, Sec. 4, 126 Cong. Rec. S299 (1980).

⁴ The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, amending the Communications Act of 1934 (the Act) (codified at 47 U.S.C. § 151 et seq.)

with fewer than 2500 inhabitants); DS0 loops in urban census blocks; narrowband voice-grade loops; and dark fiber transport in wire centers within a half-mile of alternative fiber.⁵

The FCC has not Published Adequate Regulatory and Economic Analysis

The FCC has not attempted to estimate the impact of its proposal on a substantial number of small entities that will be directly impacted by the proposals, as required Regulatory Flexibility Act.⁶ The initial regulatory flexibility analysis (IRFA) accompanying this proposed rule focuses solely on potential benefits of the proposal to small incumbent providers and seeks public comment on those benefits.⁷ Section 603(a) of the RFA requires agencies to publish an IRFA that “shall describe the impact of the proposed rule on small entities” with any notice of proposed rulemaking.⁸ The IRFA must also include a comparison of various regulatory alternatives that reduce those impacts.⁹ The IRFA that the FCC published does not describe the impact of the FCC’s proposals on small competitive local exchange carriers (CLECs) that currently purchase unbundled network elements (UNEs) at regulated rates. Should the FCC remove incumbent carriers’ obligations to provide UNEs as proposed, small CLECs will face direct and significant economic impacts.

Additionally, the FCC has not published a cost-benefit analysis for the proposal, and has only sought public input about potential costs and benefits. While it is appropriate and beneficial to seek public input before publishing any regulatory analysis, Advocacy believes that best practices for regulatory analysis include providing the public with an opportunity to comment on an agency’s evaluation of costs and benefits.¹⁰ In cases where an agency exercises purely discretionary authority, as here, it is especially important that the agency undertakes a thorough examination of costs and benefits, and subjects that evaluation to public scrutiny. Allowing for public comment on the economic analysis of various alternatives leads to better, data-driven, decision-making.

The Proposed Regulatory Changes Would Have a Significant Negative Impact on Small CLECs

Advocacy has spoken directly with several owners of small CLECs that oppose the proposed regulatory changes. Advocacy has concerns that the current proceeding is injecting uncertainty into the business plans of a significant number of companies that are working to keep Americans connected during an uncertain time. Small competitive carriers are doing their part by using whatever tools they have to keep their customers connected and serve locations that have little or no access to advanced communications service. Many of the small carriers that Advocacy has spoken with oppose the proposed actions and have signed the FCC’s “Keep Americans Connected Pledge”.

⁵ *In the Matter of Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, Notice of Proposed Rulemaking, WC Docket No. 19-308; 85 FR 472 (January 6, 2020).

⁶ 5 U.S.C. § 607

⁷ *Supra* note 5, at 52 (“Beyond the benefits that providers will enjoy from a decreased regulatory burden on their day-to-day operations, these changes would not affect the reporting, recordkeeping, and other compliance requirements of carriers, some of which are small entities”).

⁸ 5 U.S.C. § 603 (a)

⁹ 5 U.S.C. § 603 (c)

¹⁰ *See* OMB Circular A-4, *Regulatory Analysis* (“As you design, execute, and write your regulatory analysis, you should seek out the opinions of those who will be affected by the regulation as well as the views of those individuals and organizations who may not be affected but have special knowledge or insight into the regulatory issues. Consultation can be useful in ensuring that your analysis addresses all of the relevant issues and that you have access to all pertinent data. Early consultation can be especially helpful. You should not limit consultation to the final stages of your analytical efforts.”)

Small CLECs, in both urban and rural areas, have told Advocacy staff that they are particularly concerned about the FCC's proposals to remove unbundling obligations for DS0 loops and dark fiber transport. They have shared stories about how their businesses are meeting consumer demand for competitive services in urban areas, and allowing them to build their own facilities in places where incumbents don't go. Several of these CLECs are deploying fiber-to-the-home using the revenue they raise by offering competitive services over DS0 loops. Others are offering high-bandwidth services over legacy copper in dense urban areas where there are no competitive offerings.

The public comments submitted by small carriers in this proceeding show in greater detail that the FCC's proposals will prevent small carriers from continuing to serve consumers with competitive services, and deploying next generation networks themselves. If the FCC proceeds as proposed, these carriers could face immediate harms, despite the three-year transition period proposed by the FCC.

The Benefits of Adopting the Proposed Changes are Unclear

The FCC has sought comment from the public on the potential costs and benefits of its proposal and various alternative approaches. However, the record does not currently show that deregulating most UNEs will provide significant economic benefits. Incumbents argue that existing regulations harm consumers by slowing network transitions.¹¹ There is little public evidence for that conclusion in the record, but there is ample evidence in the public record that existing regulations are striking the right balance. Indeed, the record indicates that UNEs play an increasingly minor part of the communications market, and that incumbents do not face significant burdens under their existing UNE obligations.

Bare copper loops and dark fiber are, by definition, unused network capacity. Current policies allow incumbents to retire legacy copper facilities when they upgrade their networks, and only require incumbents to provide access to fiber that is not in use in limited circumstances; this incentivizes CLECs to operate with an eye toward deploying their own facilities in anticipation of an incumbent's move to retire copper or utilize its own fiber. The record shows that small CLECs are investing significantly into building their own networks and deploying next generation facilities under the existing regulatory scheme, which has also encouraged incumbents to move their own networks forward.

Without compelling evidence to suggest that it is necessary to move away from the above model, which is currently working to increase service and choice for residential and business customers alike, the FCC should refrain from changing its rules. It is unclear how allowing incumbents to raise prices or restrict access to underutilized infrastructure will spur increased investment in competitive technology; however, the direct and immediate impact of such regulatory changes on small carriers is well-established in the record. The increasingly minor role that UNEs play in the communications market is evidence that existing regulations are moving network transitions forward appropriately, as intended by the Telecommunications Act of 1996.

Conclusion

The proposed action could have a significant economic impact on small entities, competition in the telecommunications markets, and consumers. To satisfy the requirements of the Regulatory Flexibility Act, Advocacy strongly encourages the FCC use the information in the record to publish a further notice of proposed rulemaking seeking public comment on a supplemental IRFA that estimates the impact of the proposal on small CLECs. Advocacy also encourages the FCC to publish its completed cost-benefit

¹¹ See U.S. Telecom *Ex Parte Notice*, November 18, 2019.

analysis for public comment. Both should include comparisons between various regulatory alternatives, including alternatives that minimize impacts to small entities.

As small businesses prepare for a period of unprecedented uncertainty, the FCC should exercise caution about engaging in discretionary regulatory action that will negatively affect small businesses without first demonstrating there is a compelling need to do so. Without such a compelling need, the FCC should maintain the current regulatory environment. The status quo appears to be providing the correct incentives for both incumbent and competitive carriers, and benefiting consumers, including small businesses.

Sincerely,

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/s/Jamie B. Saloom
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