

September 25, 2014

Via Electronic Filing

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

**Re: *Ex Parte Communication*
Protecting and Promoting the Open Internet, GN Docket No. 14-28; Special
Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25,
RM-10593; Technology Transitions Policy Task Force, GN Docket No. 13-5;
Petitions to Launch a Proceeding Concerning the TDM-to-IP Transition, GN
Docket No. 12-353; Connect America Fund, WC Docket No. 10-90.**

Dear Ms. Dortch:

The Office of Advocacy (Advocacy) respectfully submits this *ex parte* letter to encourage the Federal Communications Commission (FCC) to reach out to small businesses as it works through the above referenced dockets, and to encourage the FCC to utilize the Regulatory Flexibility Act (RFA) as a tool for analyzing the small business impacts of its decision making.

About the Office of Advocacy

Congress established 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 do not necessarily reflect the views of the SBA or the Administration. Part of our role under the 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

The Office of Advocacy has a history of advocating on behalf of both small business providers and small business consumers of broadband before the FCC. The current debate regarding the FCC's net neutrality regulations has focused largely on the question of the FCC's legal authority

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

² *Id.*, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

³ *Id.*, Findings and Purposes, Sec. 4, 126 Cong. Rec. S299 (1980).

to ensure that users of the internet can exchange information free from discrimination by their internet service providers (ISPs). From a small business perspective, Advocacy is chiefly concerned with how small businesses will maintain their ability to provide consumers with innovative products and services in markets where their competitors own and operate the networks they are using to conduct their businesses.

The FCC is in the difficult position of deciding the best course for achieving its regulatory goals, given the constraint of its legal authority under the Telecommunications Act, as interpreted by the D.C. Circuit.⁴ The FCC must also balance its approach to net neutrality regulations with its obligations to work diligently to protect and foster competition in the service of broadband. In recent remarks to the small business start-up hub 1776, FCC Chairman Wheeler stated that “New technologies, innovation, and market developments will continually redefine the reality of broadband service. Our goal is that whatever the new realities may be, competition must be the North Star.” This statement is true on both sides of the small business equation and is the Office of Advocacy’s guiding principle in approaching small business telecommunications issues as well.

Comments

It is clear that there is a compelling need for the FCC to preserve neutrality of our communications networks—as Chairman Wheeler indicated in his recent testimony before the House Small Business Committee, information has become the key activity of every business in today’s economy.⁵ The importance of protecting small businesses’ ability to utilize the internet to share and receive information with their customers is impossible to overstate; however, the FCC should exercise appropriate caution in tailoring its final rules to mitigate any anti-competitive pressure on small broadband providers as well. Without rules to ensure fair competition in the broadband marketplace, small businesses in every industry will continue to face steeper climbs than their larger counterparts.⁶

Absent decisive legislative direction from Congress, the FCC has done an admirable job engaging the public regarding possible solutions to this difficult problem. Advocacy believes there are tools the FCC can use to carefully analyze the public record and find a way forward. One such tool is the Regulatory Flexibility Act (RFA), which requires that agencies to assess the impact of regulations on the businesses they propose to regulate. The RFA is an important analytical process that the FCC may be underutilizing that could help it cut through at least part of the Gordian knot of net neutrality regulation. Costs to small ISPs are only one part of this complex problem, but a better understanding might ultimately help the FCC judge where the appropriate competitive balance lies, between protecting small business broadband users and supporting business broadband providers. The FCC should also conduct targeted and direct

⁴ *Verizon v. Federal Communications Commission*, 740 F.3d 623; 11-1355 (D.C. Cir. 2014).

⁵ *See Is the FCC Responding to the Needs of Small Business and Rural America?: Hearing before the H. Committee on Small Business*, 113th Cong. (2014) (testimony of Tom Wheeler, Chairman, Federal Communications Commission), <https://www.youtube.com/watch?v=NRQBaJdl4Ew&feature=youtu.be>.

⁶ *See* Office of Advocacy study, “The Impact of Broadband Speed and Price on Small Business” (Columbia Telecommunications Corporation, 2010), available at www.sba.gov/advocacy. The study concluded that small businesses believe broadband service is as important to their businesses as basic utilities like electricity and that small businesses are largely dissatisfied with the affordability and choices offered to them in the broadband market.

outreach with small businesses, particularly small ISPs, to determine what their real concerns are regarding the FCC's proposed regulations, and how those concerns might be mitigated. Direct engagement with small entities should be a priority for the FCC in any rulemaking proceeding, and Advocacy encourages the FCC to ensure that small businesses have a seat at the table.

The FCC has proposed to adopt regulations imposing compliance burdens on internet service providers (ISPs). Small business participation in the service of broadband is vitally important for achieving the goal of greater consumer access and choice, and Advocacy has consistently supported FCC policies aimed at that goal. Advocacy notes that small ISPs have commented to the FCC regarding deficiencies in the FCC's Initial Regulatory Flexibility Analysis (IRFA).⁷ Advocacy recognizes the difficulty in developing a thorough regulatory flexibility analysis in an instance, like the current one, where the FCC has not proposed one specific regulatory solution. Rather, the FCC and public stakeholders have proposed a broad range of options for public comment, and the FCC has received a deluge of opinions, data, and analysis from various stakeholders.⁸ Before the FCC can finalize its net neutrality regulations, it must complete a thorough Final Regulatory Flexibility Analysis (FRFA) addressing the concerns raised by small businesses in comments, and detailing what steps it has taken to minimize impacts to regulated small businesses.⁹ If the FCC does not have the data it needs to complete a thorough FRFA, it should publish a supplemental IRFA for an abbreviated comment period limited to comments regarding the analysis. Through this process, Advocacy believes the FCC will find clarity in its decision-making and ultimately craft a better set of rules.

Engagement with stakeholders will be the key to the FCC's success. Advocacy is pleased that the FCC has plans to continue to engage with stakeholders through workshops and roundtables over the next month.¹⁰ For example, last week the FCC hosted a roundtable featuring a significant number of consumer voices, titled "Policy Approaches to Ensure an Open Internet" and will host a final roundtable in October regarding the theories of legal authority and the legal basis for the construction of Open Internet rules.¹¹ In that same spirit of public engagement, the FCC should follow up its roundtable series with a roundtable specifically for small business ISPs to better understand their relationships with each other, their places in the competitive landscape, their incentives to engage in any anti-competitive behavior, and any possible regulatory alternatives to mitigate adversarial impacts of any final regulations the FCC chooses to adopt. This roundtable would be an opportunity for the FCC to see how other FCC-deferred regulatory priorities affecting the ability of small companies to enter and compete meaningfully in the broadband marketplace may be affecting their views of net neutrality proposals on the table.

⁷ See comments of The Wireless Internet Service Providers Association, In the Matter of Preserving and Protecting the Open Internet, GN Docket No. 14-28 (July 16, 2014).

⁸ See *supra* note 5, http://smallbusiness.house.gov/uploadedfiles/9-17-2014_wheeler_testimony.pdf (indicating that the FCC has received over 3 million comments from the public, the vast majority of which Chairman Wheeler indicated supported net neutrality regulations).

⁹ 5 U.S.C. § 604.

¹⁰ See Public Notice, "FCC Schedules Series of Open Internet Roundtable Discussions", GN Docket 24-28, <http://www.fcc.gov/document/fcc-schedules-series-open-internet-roundtable-discussions>.

¹¹ See Public Notice, "Exploring New Ideas for Protecting and Promoting the Open Internet", <http://www.fcc.gov/blog/exploring-new-ideas-protecting-and-promoting-open-internet>.

Small businesses have unique perspectives that are often lost in larger policy debates, and giving them their own forum to discuss their concerns with the FCC could be very useful. Advocacy believes the FCC should be doing more to engage with small businesses in a focused way for every rulemaking, and encourages the FCC to host similar roundtables on a regular basis so that actual small businesses can have a consistent and visible voice at the FCC.

Conclusion

The FCC has a broad range of options available to mitigate anti-competitive harms to small businesses resulting from any final net neutrality rules, but they should be discussed with small businesses themselves in a way that cuts through the competing voices in the process. That is what Congress intended when it created the Regulatory Flexibility Act and the Office of Advocacy. Advocacy remains the independent voice of small businesses in government and looks forward to assisting the FCC in its engagement with small businesses. Please do not hesitate to contact me or Jamie Saloom at 202-205-6533 should you require our office's assistance.

Best regards,



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