



Statement by

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On behalf of the

National Telecommunications Cooperative Association

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In the Matter of

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Modernizing the Regulatory Flexibility Act”*

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INTRODUCTION

Thank you for the invitation to participate in today's discussion on controlling the reach of federal agencies, and considering modifications to the Regulatory Flexibility Act (RFA) that may help effectuate that objective. Clearly, there will be little, if any, argument from America's small business community anytime attempts are made to appropriately limit unnecessary burdens and costs that often emerge in the wake of regulatory initiatives no matter how well intentioned.

For the past ten years I have served as the Senior Vice President and General Counsel of Blackfoot Telecommunications Group, which is headquartered in Missoula, Montana. For almost ten years prior to that I served as outside counsel to Blackfoot and similar small communications companies as well as the Montana Telecommunications Association. I also serve on the National Telecommunications Cooperative Association's (NTCA) Industry Committee, which is the entity that considers federal regulatory policy. My remarks today are on behalf of Blackfoot, as well as NTCA and its more than 570 small, rural, community-based members that provide a variety of communications services throughout the rural far reaches of the nation.

We believe our industry is uniquely qualified to participate in today's discussion because we are consumer-centric small businesses operating in a highly regulated environment. Blackfoot, similar to nearly half NTCA's other members, operates and functions as a cooperative. In a cooperative structure, the consumers are also the owners, so every idea and every action is made from both an owner and a consumer perspective – the two are truly one in the same. Likewise, with regard to the other half of NTCA's members, those that are family or commercially owned and operated, again their focus is consumer-centric because they are locally owned and operated. And, very importantly, in both cases these companies exist to provide service rather than to generate owner value.

So, again Blackfoot is organized as a cooperative, and our top priority has always been to provide every one of our consumers, who are also our owners, with the very best communications and customer service possible. Blackfoot has several lines of business, including ILEC, CLEC and ISP. Make no mistake – while our headquarters are in Missoula, we

in fact serve over 21,000 customer lines across our 6,500 square mile rural service area that is spread across the western-central portion of the state of Montana. This constitutes about 3.2 customers per square mile. We employ a total of 140 people and in 2010 our annual operating revenue was about \$34 million dollars. Our beautiful part of the country is accented by tall mountains, and steep, deep canyons, requiring cutting through solid granite to get advanced services to our customers. In our industry's parlance, as a small rural provider of this size, Blackfoot is a Tier 3 carrier, yet even so, our system is considered to be one of the larger carriers among the Tier 3 small carrier set.

Let me give you a quick snapshot of how Blackfoot compares with several other industry entities. CenturyLink, as a midsized, or Tier 2 carrier, operates in 33 states, has a work force of approximately 20,000 and annual revenues of \$7 billion. Verizon, AT&T, and Qwest are classified as large, or Tier 1 carriers, and also operate in multiple states. Verizon has a workforce of nearly 194,000 and annual revenues of \$106.6 billion. AT&T has a workforce of 266,590 and annual revenues of more than \$123 billion. Qwest has a workforce of 29,000 and annual revenues of more than \$11 billion. Of course, after the pending close of the CenturyLink/Qwest merger, this combined entity will rank among the industry giants in Tier 1. Clearly with operations of this size, the priorities, objectives, and ability to comply with regulatory directives are generally far different from Blackfoot's community-based limited-scale approach to doing business.

The entrepreneurial spirit of Blackfoot is representative of our approximately 1,100 small rural counterparts in the industry, who together serve 50% of the nation's land mass, yet less than 10% percent of the population. Like the vast majority of our rural colleagues, Blackfoot has always been an early adopter of new technologies and services. Blackfoot currently has 15 Megabit broadband service available to 98% of our service area and we are currently working on a strategic network plan to deliver even higher speed services that our members are demanding. Rural Americans throughout Blackfoot's service area, and indeed throughout the markets of NTCA members, are enjoying universal voice service, access to broadband Internet services, and

enhanced emergency preparedness. Many NTCA members are also introducing advanced video services and in many cases the first true local video competition to their areas.

THE SMALL BUSINESS CIRCUMSTANCE

Now, more than ever, our domestic, economic, and personal security needs are intricately linked to our national universal service policy that envisions the ubiquitous availability of advanced communications infrastructure and services for all Americans. Likewise, this national statutory policy envisions such services being of a reasonably comparable nature in terms of price and scope.

Obviously, when considering such policies, it is apparent that a multitude of entities with very diverse abilities and resources will be involved in their ultimate achievement. This is particularly the case with regard to the communications industry where technological evolution is rapid and research, development, and deployment costs can be multiples of what are experienced in an urban environment. To respond to such realities, through the years policymakers have attempted to develop a unique mix of legislative and regulatory initiatives to ensure that competition is able to flourish, varying technologies are neither advantaged nor disadvantaged over one another, operational options are available to ensure carriers of all sizes have a practical environment in which to function, and above all, consumers needs are effectively met.

Yet, policymakers have also recognized a truism that applies virtually across the spectrum of legislative and regulatory development – that a natural inclination to develop “one size fits all” approaches to policy will always emerge and generally prevail. To counteract this natural inclination, in 1980 Congress and the President enacted the Regulatory Flexibility Act (RFA). The RFA had the specific mission of attempting to balance the societal goals tied to federal regulations with the specific needs of small businesses such as Blackfoot and its rural communications brethren.

The RFA, which has historically enjoyed bipartisan support, has been strengthened through the years of its existence. Since the federal government began calculating the RFA's economic impact 13 years ago, it is said to have saved small businesses more than \$200 billion, all the while without undermining the regulations it was simultaneously impacting.

So, everything is working fabulously and our work here today is done, right? Unfortunately, the answer is no from the perspective of the small businesses comprising the rural communications sector. It is the view of our sector that the RFA is not doing what it was designed to do in terms of its application and interaction with regulations that emerge from within the Federal Communications Commission (FCC). And this view is backed up by a litany of regulatory proceedings. Far too often, rulemakings are issued by the FCC that appear to have given little real regard to the RFA and its requirements to thoroughly review the impact of proposed regulatory orders on America's small community-based communications providers.

As I noted, the RFA exists to protect small businesses. The largest U.S. companies employ roughly half of this country's private sector employees. The other half work for small businesses like Blackfoot. The RFA exists to ensure that policymakers don't impose costly rules designed for the large half – those companies with the scope and scale to absorb the cost of new requirements and that need more customer safeguards – on the small half.

Under the RFA, as part of every rulemaking proceeding, agencies must publish an initial and final regulatory flexibility analysis. The public is afforded the opportunity to comment on the burden to small businesses and offer alternatives that accomplish the regulatory goal, while protecting the small businesses. It is intended that agencies specifically consider rules that are less burdensome to small businesses and explain why alternative regulation is rejected.

Regrettably, the law doesn't always work as intended. In the recent FCC Notice of Proposed Rulemaking (FCC 11-13) the FCC devoted a scant few paragraphs to its initial regulatory flexibility analysis of this sweeping regulatory reform. Ironically, this same NPRM asserted that the corporate operations expenses of small companies may be too high. In doing so it never

hinted at reality – that FCC imposed regulations significantly drive up the corporate overhead costs of small telecommunications firms.

When the FCC performs an RFA analysis, rather than offering creative alternatives, the agency simply punts the issue to us small companies – placing the burden on us to suggest alternatives. The RFA is supposed to force agencies such as the FCC to be creative. There are ways to accomplish goals while minimizing the financial impact on small businesses. Sometimes, an extended compliance period is all that is necessary, other times – it's lesser reporting requirements. On occasion, small companies require completely different regulation than large companies. This analysis, and proposed solutions and alternatives, should be part of the rulemaking process each and every time a federal regulation is proposed, but as is no secret to any of us, it is generally not. Routinely all we are afforded is a couple of paragraphs tacked onto the end of a rulemaking that states that alternative regulation was considered, but rejected. This is all the effort we see given to this requirement. The law simply does not seem to compel anything more than a nod to the fact that it exists.

THE NTCA EXPERIENCE

For years this has been the experience of NTCA and its members with regard to FCC regulatory proceedings. I should note that the association does not routinely cite the need to go overboard on RFA review with regard to each and every FCC rulemaking. Because we know how it is viewed and applied by the agency, we approach it judiciously with the hope that now and then perhaps our comments will be taken seriously and ultimately bear the much-needed fruit that is so necessary and could be so helpful to our small business members. Unfortunately, I believe that the requests of small businesses for lesser regulation are often lost in all the comments from the largest players in the industry that the regulations are not needed at all. Following is a list of several of the FCC's rules or proposed rules that have or would have a significant and unnecessarily damaging financial impact on small carriers: truth in billing, bill shock, slamming/carrier change verification, Customer Proprietary Network Information (CPNI), Communications Assistance for Law Enforcement Act (CALEA), marking and lighting of antenna structures, E911, and voice and data roaming. In the instances where final rules have

been adopted, the Commission did not fully analyze the impact of its rules on small businesses and did not fully explain why alternatives were rejected.

Frustrated with the FCC's ongoing flagrant disregard of the RFA and the disparate impact its rules were having on small rural community-based communications providers, in 2004 NTCA sued the FCC. The agency had imposed new number portability obligations on telephone companies. The rules created costly new obligations, compliance required expensive equipment upgrades and, in NTCA's opinion, the rules were heavily skewed in favor of large competitive providers that the agency had again and again bent over backward to accommodate.

At any rate, no analysis of the impacts of the number portability rules on small business had been performed by the FCC. The court sided with NTCA's small business perspective and remanded the order back to the FCC for a proper regulatory flexibility analysis. It was a victory, but it was a victory short lived.

The FCC subsequently performed its initial regulatory flexibility analysis and small businesses, including NTCA and its members, offered suggestions about how the FCC could lessen the impact and burden of its rules while still accomplishing its number portability goals. The suggestions were rejected or otherwise ignored in the FCC's final regulatory flexibility analysis as had so often happened in the past and continues to happen today.

NTCA sued again, arguing that the analysis was deficient. However, ultimately we learned just how weak the Regulatory Flexibility Act truly is because it has no teeth. The court stated that the RFA's requirements are "purely procedural." It requires the agency to do no more than state, summarize and describe issues and situations.

GOING FORWARD

In addition to the legal blow described above, it is interesting that there may be other issues at play with regard to the FCC's attitude toward the RFA. The agency does not appear to claim that the RFA doesn't apply to it because it in fact definitely does. However, because the FCC is

an independent agency, it is largely not subjected to direct oversight by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) as most other federal agencies are. The OIRA was created by Congress with the enactment of the Paperwork Reduction Act of 1980 and as such carries out several important functions, including reviewing Federal regulations, reducing paperwork burdens, and overseeing policies relating to privacy, information quality and statistical programs.

Interestingly, there is an entity within the U.S. Small Business Administration known as the Office of Advocacy (OA) that was established to be the independent voice for small business within the federal government and the watchdog of the RFA. In addition, the OA has the specific objective of advancing the views and concerns of small business before Congress, the White House, federal agencies, federal courts, and state policymakers. Through the years, NTCA has maintained a close relationship with the OA, which has often filed comments that sided with the rural communications perspective in terms of seeking regulatory variations designed to provide the sort of flexibility that is envisioned for small businesses by the RFA.

Nevertheless, again, because the FCC is an independent federal agency, it is not required to comply with Executive Order 13272, which specifically deals with cooperation between the OA and other federal agencies regarding implementation of the RFA, or Executive Order 12866, which requires a cost benefit analysis for all significant rules. The result is that the OA in dealing with the FCC has a few more challenges in terms of making the case for small businesses. At the very least, the OA simply does not enjoy the same sort of interagency relationship with the FCC that it does with any other non-independent federal agency where such an entity is required to submit draft rules to the OIRA for interagency review. Despite these hurdles we understand the OA has continued to persistently encourage the FCC to reach out to the OA earlier in the rulemaking process.

There is an Office of Communications Business Opportunities (OCBO) within the FCC that many believe could be better utilized to bring small business perspectives to the regulatory process within the agency. Apparently, this entity is responsible for overseeing compliance with

the RFA for every agency rule, but our observation is that they are just not closely enough involved at the ground level of regulatory conception and development. It is the impression of some that the office doesn't currently work very closely with the various FCC bureaus until late – far too late – in the regulatory process.

WHAT TO DO

More needs to be done to protect and promote small telecommunications companies. The largest companies are getting larger and the small companies are becoming fewer. The FCC should be looking at regulation with an eye toward enhancing small business participation in the dynamic communications sector. We believe the following legislative actions would go a long way toward making that a reality:

- Codify the appropriate provisions of Executive Orders 13272 and 12866 in a manner to make them applicable to independent agencies in the same manner that they now apply to all other Executive agencies;
- Require all agencies to explain whether and how each rulemaking decision promotes and/or protects small businesses;
- Amend the RFA to clarify that all agencies are required to suggest and analyze alternatives that account for the nature and competitive position of small businesses when conducting rulemakings;
- Consult with the Small Business Administration's OA well in advance of rules being adopted and specifically address any suggested additions or modifications;
- Provide the FCC's OCBO with specific authority and responsibility to require agency bureaus to coordinate regulatory initiatives with the office from the very conception of action on any proceeding.

CONCLUSION

“Economic freedom is the foundation for individual success and prosperity. This freedom is evident in the entrepreneurial small business sector, which creates most of the new jobs and a large share of the innovations in the American economy. When government takes small

businesses into consideration in developing regulations, it saves time and money for the nation's most productive sector.”

Folks that is a direct quote from the pamphlet that was ordered to be distributed to all federal agencies regarding the implementation and compliance with Executive Order 13272 that was signed by President Bush on August 13, 2002. We hope this serves as further inspiration to you and your colleagues to pursue to its conclusion, the objective of this hearing today which is so clearly stated via today's hearing title – “Reducing Federal Agency Overreach: Modernizing the Regulatory Flexibility Act.”

Mr. Chairman, we are excited to have someone with your knowledge of our industry and your commitment to rural America in a position to affect leadership and develop policies that will ensure America's small businesses are again able to flourish. With your leadership we have the confidence to continue to pursue our aggressive broadband deployment objectives that will ensure America's ongoing global communications preeminence. Thank you for the opportunity to testify today, and I look forward to answering any questions you or your colleagues might have.