

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Petition for Declaratory Ruling Regarding) CG Docket No. 17-131
Broadband Speed Disclosure Requirements)

COMMENTS



I. INTRODUCTION

The American Cable Association (“ACA”) submits these comments in response to the Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements, (“Petition”) filed by USTelecom and NCTA – The Internet & Television Association (“Petitioners”).¹ ACA supports the Petition asking the Commission to confirm through a Declaratory Ruling that it has established a national regime for the measurement and disclosure of “actual” speeds for broadband Internet access service (BIAS) through issuance of orders,

¹ *Petition for Declaratory Ruling Regarding Broadband Speed Disclosure Requirements*, Petition for Declaratory Ruling of USTelecom and NCTA – The Internet & Television Association, CG Docket No. 17-131 (filed May 15, 2017) (“Petition”).

rules and other guidance that precludes state level enforcement actions seeking to impose different and/or inconsistent broadband speed metrics under state false advertising laws.²

The Commission has established a unified national approach for BIAS providers to disclose broadband speed information for the purposes of satisfying its Open Internet Transparency Rule that is intended to allow consumers to “make informed decisions” about purchasing this interstate service. In ACA’s view, there is a clear public policy benefit to the Commission’s approach, which is designed to provide consumers across the country with uniform, accurate, and useful information by requiring BIAS providers to disclose the easily understandable metric of average upload and download speeds at peak-usage periods, while avoiding the imposition of undue costs and burdens on smaller entities.

State-level legal actions such as that brought by the New York State Attorney General against Time Warner Cable (now Charter), based on unofficial measurement tools and metrics as the basis for alleging false advertising,³ raise significant concerns and impose substantial burdens for smaller BIAS providers. Whether such state-level actions are ultimately deemed permissible by the courts or not (and we believe they are not), smaller BIAS providers meeting the Commission’s disclosure standards are immediately burdened by the threat of such actions and further burdened by having to respond to such actions when they arise. Moreover, should such state-level actions be deemed permissible, the outcomes of such actions could necessitate smaller BIAS providers to employ new measurement tools to capture additional metrics that could be significantly more burdensome than those tools recognized by the Commission. For smaller BIAS providers, these burdens can be significant and ultimately threaten national goals

² *Id.* at 1-2, 14.

³ *Id.* at 4. See also Complaint, *New York v. Charter Commc’ns*, No. 450318/2017 (N.Y. Sup. Ct. Feb. 1, 2017). The alternative tools cited in the Complaint include speed tests offered to the public by Ookla (Speedtest.net) and M-Labs (the Internet Health Test), as well as the “80/80” metric reported by the Measuring Broadband America program which assesses what 80% of a BIAS provider’s customers experienced 80% of the time during peak broadband traffic periods. Petition at 4.

of greater broadband deployment. Further, obligations on BIAS providers to follow state-specific speed metrics that are inconsistent with those of the Commission, and potentially with one another, would potentially threaten the goals of the Commission in establishing a uniform and harmonious framework for broadband speed disclosure requirements.

It is in the national interest that the smaller BIAS providers that comprise ACA's membership have the certainty that in following the Commission's advisory guidance for measuring and reporting "actual" broadband speeds they are meeting their obligation to disclose accurate information to consumers under the Commission's Open Internet Transparency Rule and, to the extent their advertising claims are consistent with their Open Internet disclosures, provide a defense to false advertising claims based on broadband speed metrics other than the Commission's chosen average peak-hour metric.

II. THE COMMISSION HAS ESTABLISHED A UNIFORM FEDERAL REGULATORY REGIME GOVERNING BROADBAND PERFORMANCE METRICS AND DISCLOSURES THAT ENABLE SMALLER PROVIDERS TO MEET THEIR DISCLOSURE OBLIGATIONS WITHOUT INCURRING UNDUE BURDENS

Through a combination of orders and advisory guidance, the Commission has established a comprehensive and uniform federal policy framework governing broadband network performance, including broadband speed measurement and disclosure. In designing this national framework, the Commission specifically considered the impact of measurement and disclosure requirements for entities large and small, offering advisory guidance and certain safe harbors for compliance with its obligation that disclosures be accurate.

The framework the Commission has developed after assessing the difficulties inherent in measuring and disclosing broadband actual speed reflects a careful balance between the requirement of accuracy in customer-facing statements and the practical realities of trying to give a static representation of "actual" broadband speed achievable in practice. In the Commission's considered judgment, a BIAS provider's disclosure of average speed measured during the peak-usage (primetime) period of weekday evenings would constitute an accurate

representation of “actual” broadband speed for purposes of compliance with the Commission’s Open Internet disclosure obligations. The Commission’s disclosure requirements were informed by the results of its “Measuring Broadband America” (“MBA”) program, which was designed to “measure the actual speed and performance of broadband service,”⁴ in a manner that allows comparison on a nationwide basis “through a harmonious and consistent reporting metric.”⁵

The core of the Commission’s balanced approach is the Commission’s Open Internet Transparency Rule, which requires a BIAS provider to “disclose accurate information regarding network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services[.]”⁶ To that end, the Commission determined that disclosure of average speed measured during the peak-usage period of weekday evenings would constitute an accurate representation of “actual” speed to satisfy the disclosure requirement. Rather than set hard-and-fast requirements about how to convey the information, the Commission chose “to allow flexibility in implementation of the transparency rule, while providing guidance on effective disclosure models.”⁷ Yet as the Commission has come to recognize, in its expert opinion, accurate broadband speed measurement is not a simple activity and is far more complex than simply asking customers to take an online speed test such as that offered by Ookla.⁸ For this

⁴ *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, ¶ 58, n.188 (2010) (“2010 Open Internet Order”), *aff’d in relevant part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁵ FCC, Office of Engineering and Technology and Office of Strategic Planning & Policy Analysis, *2016 Measuring Broadband America Fixed Broadband Report*, 7 (2016), <http://data.fcc.gov/download/measuring-broadband-america/2016/2016-Fixed-Measuring-Broadband-America-Report.pdf> (“2016 MBA Fixed Broadband Report”).

⁶ 2010 Open Internet Order, ¶ 54; 47 C.F.R. § 8.3. Specifically, along with other requirements, BIAS providers are required to disclose “expected and actual access speed and latency.” 2010 Open Internet Order, ¶ 56.

⁷ 2010 Open Internet Order, ¶ 56.

⁸ The Commission has long recognized that actual broadband speed measurements can be subject to considerable variability and that the best way to represent “actual” speed to consumers is to focus on average peak-period speeds. Petition at 11-12; *see, e.g., Local Telephone Competition and Broadband*

reason, at the time it adopted the Transparency Rule, the Commission launched the MBA program to measure key performance metrics, including “actual” speed and performance of broadband service, in addition to other metrics, and to set standards for uniform testing across a variety of providers and technology to address the complexity problem.⁹ One of the aims of the MBA program is to establish “a harmonious and consistent reporting metric for use across all broadband technologies with transparency disclosure obligations” under the Open Internet Transparency Rule.¹⁰

The 2011 Advisory Guidance, which creates a safe harbor for compliance through MBA participation and sets forth alternatives for non-MBA participants, has proven particularly useful for ACA member companies – nearly all of whom use the alternative methodologies outlined in the advisory in meeting their Transparency Rule obligations.¹¹ The Commission found that participation in the MBA program would be too burdensome for smaller operators and, through its guidance, clarified the approaches by which providers not participating in the MBA program can comply with the Transparency Rule’s network performance disclosure requirement, thus

Reporting, Report and Order, 19 FCC Rcd 22340, ¶ 27 (2004). The Commission has consistently concluded that significant variability in customer equipment, network congestion, and issues external to BIAS providers’ networks preclude a precise and uniform measurement of actual speeds. See *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol Subscribership*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, ¶ 36 (2008) (“The record indicates that factors beyond the control of service providers may compromise the ability of service providers to report actual speeds experienced by consumers.”).

⁹ 2010 Open Internet Order, ¶ 58, n.188. Although the MBA reports include various measurements of network performance, including the “80/80” metric, the focus, as Petitioners have noted, has been primarily on average broadband speeds during peak periods of demand. Petition at 11. In its 2015 Open Internet Order, the Commission affirmed that network performance would be “measured in terms of average network performance over a reasonable period of time and during times of peak usage.” *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, ¶ 166 (2015) (“2015 Open Internet Order”).

¹⁰ 2016 MBA Fixed Broadband Report at 7.

¹¹ *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, Public Notice, 26 FCC Rcd 9411 (2011) (“2011 Guidance”).

enabling smaller providers to comply with the requirement to accurately disclose expected and actual network performance, including “actual” broadband speed, with greater certainty and without straining their limited resources.¹² By recognizing the technological and physical limitations to accurately capturing actual speeds, the Commission, as an expert agency, has repeatedly balanced the need for performance testing against the burdens such testing imposes on BIAS providers.

The value of the Commission’s directive in adopting one metric for accurately conveying “actual” speed, coupled with the flexibility afforded smaller BIAS providers by the alternative methodologies specified in the 2011 Advisory Guidance to measure and disclose their network performance characteristics as required by the Transparency Rule, cannot be overstated, particularly for providers that do not participate in the MBA program.¹³ Without that guidance, ACA members would have to expend substantial time and incur significant costs to deploy equipment used by operators that are MBA participants to comply with the transparency requirements – a costly and time-consuming process.

¹² ACA represents approximately 700 BIAS providers serving fewer than 100,000 broadband subscribers. Approximately 680 of these providers have fewer than 20,000 broadband customers. Virtually none of these smaller providers have in-house counsel or other personnel dedicated to addressing regulatory matters, relying instead on outside counsel and consultants to address compliance with the Transparency Rule. In adopting the alternative methodology laid out in the 2011 Advisory Guidance, the Bureau and Office correctly recognized that installing and using devices to measure “actual” performance would be a significant burden for all but the largest broadband providers and that other methodologies could be employed consistent with the intent of the performance disclosure requirement. Virtually all of ACA’s smaller provider members comply with the Transparency Rule’s requirements to measure their BIAS performance characteristics by employing one or more of the permissible alternative methodologies. See, e.g., Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements, GN Docket No. 14-28 at 6, n.16 (filed Aug. 5, 2015).

¹³ ACA representatives have previously explained to Commission staff that BIAS providers that do not participate in the MBA that use DOCSIS technology to provide broadband Internet access service measure and disclose actual speed and latency in various ways. See Letter from Thomas Cohen, Kelley Drye & Warren, LLP, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, and the Consumer and Governmental Affairs Bureau’s Public Notice, DA 15-731, on the Small Business Exemption from the Open Internet Enhanced Transparency Requirements, at 6 (filed Oct. 2, 2015).

III. THE PUBLIC INTEREST WOULD BE SERVED BY A DECLARATORY RULING

The recent state-level enforcement actions described in the Petition indicate that BIAS providers that have been following Commission guidance on how to accurately describe network performance metrics in their Open Internet disclosures are burdened by these actions. They are burdened by the considerable risk of state actors bringing complaints against them, and would be further burdened by having to defend themselves against those actions when they arise and, in the event the state actors prevail, of having to incur significant costs to measure for and disclose different metrics that represent “actual” speed.¹⁴ The burdens of this situation would fall particularly hard on smaller providers, and the resulting costs would generally be passed through to customers in the form of higher subscription prices and/or the decrease in investment by the provider in its network. Moreover, a proliferation of state-level metrics for broadband speed disclosures will lead to inconsistent disclosures that will confuse consumers. For these reasons, ACA supports the Petition.

The action brought by the New York State Attorney General is already problematic for BIAS providers, particularly smaller providers, who reasonably fear their states may follow New York’s lead.¹⁵ Defending oneself in such an enforcement action incurs significant costs, which would be especially burdensome for smaller providers with limited staff and resources. Thus, even if a small provider is not presently facing enforcement action like that brought in New York State, just the risk of such action means a provider must make sure it has funds reserved to incur such costs, which may mean saving money that might otherwise be invested. For smaller

¹⁴ See Petition at 13.

¹⁵ In addition to state-level enforcement actions, smaller providers are concerned that they will be subjected to class action litigation based on claims that state law mandates the disclosure of broadband speeds in terms of metrics that differ from those established by the Commission, like that recently filed in California. See *id.* at 15; Complaint, *Hart v. Charter Commc’ns*, No. 8:17-CV-00556 (C.D. Cal. Mar. 28, 2017), ECF No. 1-1.

providers serving multiple states, the risks and reserves needed to weather such actions are even greater.

It would be particularly deleterious for smaller BIAS providers that comply with the Commission's Transparency Rule and advisory guidance to be the subject of state investigation and enforcement actions and have to respond and defend itself against such actions grounded on alternative views of how BIAS providers should measure and disclose "actual" network performance for consumers.¹⁶ In these cases, the out-of-pocket costs are significant, particularly for smaller operators who depend entirely on outside counsel, far exceeding the costs of just maintaining reserves. Moreover, for operators with few employees, the time and effort needed to oversee such state actions can be highly disruptive to the running of their businesses. For the smallest providers, these burdens can be crippling.

Worse yet, if New York State prevails in its enforcement action, and other states prevail in similar actions as well, BIAS providers would not only have to continue complying with the Commission's requirements, but also incur the costs and burdens of additionally ensuring that they were measuring and reporting "actual" broadband speeds in conformity with the preferences of their states. Given the time and effort expended by the Commission, in consultation with smaller providers, to come up with a low-cost means for smaller providers to comply with its disclosure requirements, the costs of alternative approaches by states are only likely to be greater.

¹⁶ For example, an operator with multiple systems located in different states that uses a measurement methodology pursuant to the Commission's advisory guidance that discloses average peak-usage speeds and bases its truthful advertising claims on these speeds could potentially find itself under investigation in one state for deceptive advertising based on results of "80/80" testing and in another based on results under the M-Labs Internet Health Test. A situation where broadband speed disclosures that are accurate under federal rules but false and deceptive under state law would lead to consumer confusion, be burdensome for providers, and undermine the uniformity of the Commission's framework for measuring and reporting broadband speeds.

In the end, for providers that serve multiple states, New York State's success in its enforcement action could be the first step toward the establishment of a burdensome patchwork of differing standards for speed disclosures across many states which, as Petitioners note, would cause substantial costs for operators and confusion for consumers.¹⁷ Moreover, the Commission's preference for a harmonious and consistent national approach to speed measurement and disclosure and its "one metric" solution to the difficult problem of capturing and disclosing accurate broadband speed – which was intended to provide consumers across the country with uniform, accurate and useful information – would be totally upended if each of the fifty states were free to pick their own preferred metric by which to judge the accuracy of provider representations of "actual" speed, thus relegating the Commission's framework to the trash-heap. Such a situation would be particularly problematic for broadband networks that cross state lines – for example, systems with a single headend in one state that feeds networks in one or more other states. Not only would a BIAS provider potentially be subject to measuring and reporting a different "actual" speed metric for each state that its one system crosses into, it would cause substantial confusion to the public who may see television and newspaper advertisements for service with different sets of speed information listed conforming to each state's required metric that are at odds with both one another and with the provider's Open Internet disclosures.¹⁸

¹⁷ Petition at 15.

¹⁸ For example, for broadband service in the New York tri-state area, a television ad in the New York City market would reach potential customers in New York, Connecticut, and New Jersey. If each state imposed a different "actual" speed metric, customers in all three states could potentially see three different and possibly conflicting speeds as the "actual" speed achieved on the system in a television or newspaper advertisement that's likely to be seen by customers in all three states. If they then compared the advertisements to the provider's Open Internet disclosures, they may find yet a fourth metric reported for "actual" speed.

IV. CONCLUSION

To eliminate the problems that arise from state-level actions imposing conflicting disclosure standards on BIAS providers, the Commission should grant the relief requested in the Petition. Specifically, the Commission should make clear that smaller BIAS providers who act in accordance with the Commission's broadband speed measurement and disclosure requirements are following controlling federal law on the accurate measurement and disclosure of actual network performance to consumers and that this is a defense to false advertising claims based on broadband speed metrics other than the Commission's chosen average peak-hour metric.

Respectfully submitted,

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