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

In the Matter of	)	
	)	
Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
	)	
Guidance on Open Internet Transparency Rule Requirements	)	DA 16-569
	)	

COMMENTS ON APPLICATIONS FOR REVIEW

AMERICAN CABLE ASSOCIATION

INTRODUCTION

The American Cable Association ("ACA") submits these comments in response to Applications for Review of the Public Notice issued on May 19, 2016 by the Chief Technologist, Office of the General Counsel, and Enforcement Bureau ("Bureaus") providing guidance for broadband Internet access service ("BIAS") providers for compliance with the Open Internet Transparency Rule ("2016 Advisory Guidance") filed by CTIA and the Competitive Carriers Association ("CCA").[1] CTIA and CCA challenge the process by which the 2016 Advisory Guidance was issued and ask that the Guidance be rescinded or vacated and that any

[1] *Guidance on Open Internet Transparency Rule Requirements*, GN Docket No. 14-28, Public Notice, DA 16-569 (rel. May 19, 2016) ("2016 Advisory Guidance"); *Protecting and Promoting the Open Internet, Guidance on Open Internet Transparency Rule Requirements,* GN Docket No. 14-28, DA 16-569, Application for Review of CTIA (filed June 20, 2016) ("CTIA Application") and Application for Review of the Competitive Carriers Association (filed June 20, 2016) ("CCA Application") (collectively, "Applications").

amendments to the Transparency Rule disclosure requirements be pursued via notice-and-comment rulemaking.[2] Although CCA and CTIA request that the 2016 Advisory Guidance be set aside or rescinded as a whole, the Applications specifically challenge only three aspects of the guidance, two of which are unique to mobile BIAS providers: (i) the requirement that mobile BIAS providers report actual network performance on a Cellular Market Area ("CMA") basis; (ii) the requirement that mobile BIAS providers disclose their actual performance metrics using the mobile Measuring Broadband America ("MBA"); and (iii) the establishment of a new point of sale disclosure obligation that requires BIAS providers to ensure that consumers "actually receive" the Open Internet disclosures.[3] ACA takes no position with regard to CTIA and CCA's arguments as to whether the guidance provided to mobile BIAS providers constitutes a substantive rulemaking; but ACA strongly objects to the CCA and CTIA request that the 2016 Advisory Guidance be set aside or rescinded *as a whole*. Whatever action the Commission takes in response to the Applications, it must not and need not disturb the presently in effect guidance offered by the Bureaus in the 2016 Advisory Guidance with respect to matters which no objection has been raised by CTIA or CCA, particularly the means by which fixed BIAS

[2] CCA Application at 1, 6; CTIA Application at 1-2. CCA maintains that the Guidance "enacts unlawful changes to the existing transparency disclosure rules adopted pursuant to the 2010 Open Internet Order and the 2015 Open Internet Order without first issuing a notice and comment rulemaking proceeding pursuant to the Administrative Procedures Act ("APA")." CCA Application at 1. *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) ("2010 Open Internet Order"), *aff'd in relevant part Verizon v. FCC,* 740 F.3d 623 (D.C. Cir. 2014); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, 30 FCC Rcd 5601 (2015) ("2015 Open Internet Order"), *aff'd USTA v. FCC*, __ F.3d __ (2016); 5 U.S.C. § 553. CCA urges the Commission to "set aside the Public Notice and instead initiate a rulemaking affording appropriate notice and opportunity for comment on these issues." CCA Application at 6. Similarly, CTIA argues that the Guidance includes new flawed and unworkable substantive rules that were improperly issued without notice and comment and requests that the Commission rescind the Guidance and institute a notice-and-comment rulemaking pursuant to the APA to address these issues. CTIA Application at 1.

[3] CTIA Application at 2-10; CCA Application at 4-12. ACA notes that although CTIA specifically references the new point of sale obligation as applicable to "mobile broadband providers," CTIA Application at 2, CCA correctly notes that the language would apply to all "carriers." CCA Application at 10.

providers may disclose accurate information concerning the enhanced performance characteristics.

DISCUSSION

In its 2010 Open Internet Order, the Commission adopted the Transparency Rule, requiring "[a] person engaged in the provision of broadband Internet access service [to] publicly disclose accurate information regarding the 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 and for content, application, service and device providers to develop, market, and maintain Internet offerings."[4] Following receipt of comments on the paperwork burdens associated with the vagueness of the new rule from ACA and others,[5] in 2011 Commission staff released advisory guidance to assist BIAS providers in complying with the Transparency Rule.[6] The FCC's Enforcement Bureau later issued additional guidance.[7] The 2011 Advisory Guidance was particularly useful in offering smaller BIAS providers various alternative means of complying with the requirement to disclose network

[4] 47 C.F.R. § 8.3; 2010 Open Internet Order, ¶¶ 56-59. The 2010 Open Internet Order described certain categories of information within the three main areas of network management practices, performance characteristics, and commercial terms that it expected the disclosures to contain. For example, disclosure of network management practices was to include congestion management, application-specific behavior, device attachment rules, and security measures, performance characteristics were to include information about actual speed and latency and effects of specialized services, if any, on network capacity, and commercial terms were to include pricing, privacy policies and redress options. *Id.*, ¶¶ 56-57, 98.

[5] *See*, *e.g.*, FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule, Public Notice, 26 FCC Rcd 9411, n. 16 (2011) ("2011 Guidance"); *Preserving the Open Internet*, GN Docket 09-191, OMB Control No. 3060-XXXX, Comments of the American Cable Association at 6-9 (filed Apr, 8, 2011); *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Letter from Ross Lieberman, Vice President of Government Affairs, ACA, *et al.*, to Marlene Dortch, Secretary, FCC, at 1 (filed June 8, 2011).

[6] *See* 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 Advisory Guidance"). The Enforcement Bureau issued additional guidance in 2014. *See* FCC Enforcement Advisory, Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers, Public Notice, 29 FCC Rcd 8606 ("2014 Advisory Guidance").

[7] *See* 2014 Advisory Guidance (reminding BIAS providers of that Open Internet disclosures must be are accurate and consistent with other consumer-facing representations).

performance characteristics in terms of actual speed and latency that were not unduly burdensome.

The Commission, in its 2015 Open Internet Order, built "off this baseline" of the Transparency Rule, the 2011 Advisory Guidance, and 2014 Advisory Guidance by adopting certain enhancements to the Transparency Rule.[8] In numerous filings following adoption of the Transparency Rule enhancements, ACA urged the Commission to affirm that the guidance issued in 2011 by the Enforcement Bureau and General Counsel regarding use of various approaches for compliance with the requirement that fixed BIAS providers disclose network performance characteristics for BIAS providers that do not participate in the Measuring Broadband America ("MBA") testing program would apply to the 2015 enhancements.[9] ACA explained the 2011 Advisory Guidance has proven useful for ACA member companies because it clarified the approaches by which these providers can comply with the Transparency Rule's

[8] Enhancements to the Transparency Rule in the 2015 Open Internet Order included, *inter alia*, the obligation to disclose expected and actual packet loss as a measure of network performance and for expected and actual speed, latency and packet loss to be disclosed over reasonable time period and at times of peak usage and by geographic area. 2015 Open Internet Order, ¶¶ 162-171.

[9] *See Protecting and Promoting the Open Internet, Notice of Information Collection*, GN Docket No. 14-28 and OMB Control No. 306-1158, Comments of the American Cable Association (July 20, 2015) ("ACA PRA Comments"); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements (Aug. 5, 2015) ("ACA Small Business Comments"); Reply Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements (Sept. 9, 2015) ("ACA Small Business Reply Comments"). *See also Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Letter from Thomas Cohen, Kelley Drye & Warren, LLP, Counsel to the American Cable Association, to Marlene Dortch, Secretary, FCC (filed Aug. 20, 2015); Letter from Thomas Cohen, Kelley Drye & Warren, LLP, Counsel to the American Cable Association, to Marlene Dortch, Secretary, FCC (filed Nov. 13, 2015); Letter from Thomas Cohen, Kelley Drye & Warren, LLP, Counsel to the American Cable Association, to Marlene Dortch, Secretary, FCC (filed Mar. 14, 2016) ("ACA Mar. 14 Ex Parte") (collectively, "ACA Small Business Exemption Filings"). In its Small Business Exemption Filings, ACA highlighted two of the enhanced transparency requirements that are particularly burdensome for smaller providers: the requirement to disclose additional information about network practices, and the requirement to inform customers directly "if their individual use of a network will trigger a network practice, based on their demand prior to the period of congestion, that is likely to have a significant impact on the end user's use of the service." *See*, *e.g.*, ACA Small Business Comments at 6-7.

network performance disclosure requirement,[10] thus enabling smaller providers to comply with the requirement to disclose expected and actual network performance with greater certainty and without straining their limited resources. As ACA explained in a series of filings supporting extension of the Commission's temporary exemption from the transparency enhancements for small business and its comments on the paperwork burdens associated with the enhancements, if the Commission would affirm the alternative disclosure methodologies contained in the 2011 Advisory Guidance, its members – nearly all of whom use the alternative approaches contained in the 2011 Advisory Guidance to satisfy the 2010 Transparency Rule disclosure obligations – would find that their burdens from disclosing the enhanced performance characteristics adopted in 2015 significantly decreased.[11]

Consistent with ACA's request, the 2016 Advisory Guidance confirmed that, "to the extent they are not superseded by the *2015 Open Internet Order* or this guidance, the *2011 Advisory Guidance* and the *2014 Advisory Guidance* continue to apply to enhancements made to the Transparency Rule," and offers fixed BIAS providers not participating in the MBA project alternative means of compliance to meet the obligation to disclose the enhanced network performance metrics.[12] Specifically, the 2016 Advisory Guidance reiterates that "fixed BIAS providers not using the MBA safe harbor may disclose actual network performance metrics

[10] Smaller BIAS providers, lacking the resources of the largest Internet service providers, "particularly appreciated that the 2011 Guidance made clear that a 'broadband provider may disclose actual performance based on internal testing, consumer speed test data, or other data regarding network performance including reliable, relevant data from third-party sources such as the broadband performance measurement project.'" ACA Mar. 14 Ex Parte at 2.

[11] Nonetheless, ACA stressed that other enhanced transparency requirements would be unduly burdensome – particularly obligations to collect and disclose information about various network practices and their effects on users, which will evolve frequently as new types of traffic and different traffic flows emerge, and to provide direct and advance notification to customers if their usage will trigger a network practice, which will often entail lengthy follow-up discussions with customers. *See*, *e.g.*, ACA Small Business Reply Comments at 1-2. For this reason, ACA continues to support making the small business temporary exemption from the enhanced Transparency Rule permanent.

[12] 2016 Advisory Guidance at n.6 and Section 1.C., Network Performance Metrics, Guidance for BIAS Providers not using the Measuring Broadband America Safe Harbor.

based on the MBA methodology, 'internal testing; consumer speed test data; or other data regarding network performance, including reliable, relevant data from third-party sources.'"[13]

Although neither CTIA nor CCA object to the specific portions of the 2016 Advisory Guidance that pertain to acceptable disclosure methodologies fixed wireline BIAS providers that do not participate in the MBA program can use to comply with the enhancements to the performance characteristics disclosure obligation, CTIA and CCA request that the 2016 Advisory Guidance be set aside or rescinded *as a whole*. ACA takes no position on the question whether the guidance provided to mobile BIAS providers with regard to the matters raised by CTIA and CCA constitutes appropriate guidance or legislative rules, the latter of which could not be done on delegated authority, but rather would require a notice-and-comment rulemaking proceeding. However, ACA strongly objects to setting aside or rescinding the 2016 Advisory Guidance as a whole. Should the Commission accept the position of CTIA and CCA that aspects of the 2016 Advisory Guidance constitute substantive rules that must be promulgated through notice-and-comment rulemaking, the Commission can and should initiate a rulemaking only on those portions of the guidance, leaving intact the portions concerning methodologies fixed BIAS providers can use to comply with the enhanced performance characteristics disclosure requirements.

ACA believes that insofar as fixed BIAS providers are concerned, the 2016 Advisory Guidance constitutes appropriate advisory guidance on methods of compliance with the enhanced Transparency Rule obligation for disclosure of network performance metrics that its

[13] *Id*., *quoting* 2011 Advisory Guidance at 9414-15. Among other things, the 2016 Advisory Guidance also clarified that fixed BIAS providers may meet the enhanced requirement that actual performance metrics be reported with geographic granularity by disclosing actual performance metrics for each broadband service in each geographic area in which the service has a distinctive set of network performance metrics – that is, by "operational area" – and further observed it likely that many fixed BIAS providers will have a single operational area that is determined by the technology used and network management practices employed. 2016 Advisory Guidance, Section 1.A., Network Performance Metrics, Guidance on Disclosure of Network Performance Metrics. This additional clarification should prove useful to smaller BIAS providers subject to the enhanced transparency requirements, once they become effective.

members will find both useful and beneficial. Regardless of any action taken with respect to the guidance offered mobile BIAS providers, ACA asks that guidance offered by the Bureaus in the 2016 Advisory Guidance with respect to means by which fixed BIAS providers may disclose accurate information concerning the enhanced performance characteristics be preserved.

Respectfully submitted,

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July 5, 2016