

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Protecting and Promoting the Open Internet) GN Docket No. 14-28
)

**COMMENTS OF
THE WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL**

The Wireless Communications Association International (“WCA”), by its attorneys and pursuant to Section 1.415(a) of the Commission’s Rules,¹ hereby responds to the *Public Notice* issued by the Consumer and Governmental Affairs Bureau (“CGB”) in the above referenced proceeding seeking comment on the small business exemption from open Internet enhanced transparency requirements.²

I. INTRODUCTION.

In the *2015 Open Internet Order*, the Commission adopted enhancements to the existing transparency rule that governs the content and format of disclosures regarding commercial terms, performance characteristics, and network practices made by providers of broadband Internet access service (“BIAS”).³ Acknowledging the concerns raised by numerous organizations representing small providers, the Commission temporarily exempted providers with 100,000 or fewer broadband subscribers and directed CGB to seek comment on whether to make the

¹ 47 C.F.R. § 1.415(a).

² *Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, Public Notice, 30 FCC Rcd 6409 (2015); 80 Fed. Reg. 38424 (July 6, 2015).

³ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5672-77 ¶¶ 162-171 (2015) (“*2015 Open Internet Order*”).

exemption permanent and, if so, to determine the appropriate subscriber threshold.⁴ CGB is tasked with adopting an order “announcing whether it is maintaining an exemption and at what level by no later than December 15, 2015.”⁵

Most WCA members are small, local or regional companies (often serving rural areas) offering fixed wireless high-speed data and digital voice services to residential and business customers. WCA appreciates the Commission’s consideration of a permanent exemption to the enhanced transparency requirements for small providers. The record is clear that such entities – often short staffed and resource constrained – face substantial challenges in complying with the current transparency rule, let alone the enhanced transparency requirements. For the reasons discussed below, the Commission should make the exemption permanent and should expand the subscriber threshold to a minimum of 250,000 connections. However, if the Commission is not prepared at this time to make the exemption permanent, it should extend it for two years to allow the Commission and providers to assess their ability to comply with the new rules, a period in which the experiences of larger providers may provide valuable lessons learned for smaller operators.⁶

⁴ *Id.* at 5677-79 ¶¶ 172-175.

⁵ *Id.* at 5679 ¶ 174.

⁶ At a minimum, the exemption should remain in place until the Commission finalizes the voluntary safe harbor for the format and nature of the required disclosure to consumers that it has promised to establish. *Id.* at 5679-81 ¶¶ 176-181.

II. THE COMMISSION SHOULD MAKE THE SMALL PROVIDER EXEMPTION PERMANENT AND EXPAND THE SUBSCRIBER THRESHOLD TO A MINIMUM OF 250,000.

A. THE COMMISSION SHOULD MAKE THE SMALL PROVIDER EXEMPTION PERMANENT

As the Commission rightly acknowledged in the *2015 Open Internet Order*, “[t]he record reflects the concerns of some commenters that enhanced transparency requirements will be particularly burdensome for smaller providers.”⁷ Such comments were not limited to BIAS providers, but also included a letter from the U.S. Small Business Administration Office of Advocacy expressing concerns over potential “compliance burdens on internet service providers” and stating that “[s]mall 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.”⁸ The small provider exemption to the enhanced transparency requirements is a perfect example of a policy aimed at the goal of increasing “small business participation in the service of broadband.”

In adopting the exemption, the Commission stated that “[i]t is unclear, however, how best to delineate the boundaries of this exception[,]” but that “[c]learly, it should include those providers likely to be most disproportionately affected by new disclosure requirements.”⁹ To determine which providers are “most disproportionately affected” the Commission must

⁷ *Id.* at 5677 ¶ 172 (citing concerns of smaller providers expressed in comments of the American Cable Association (“ACA”), the Competitive Carriers Association (“CCA”), the Wireless Internet Service Providers Association (“WISPA”), the Western Telecommunications Alliance, and the Rural Wireless Association).

⁸ Letter from Winslow L. Sargeant, Ph.D., Chief Counsel for Advocacy, U.S. Small Business Administration Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, *et al.*, at 3 (filed Sept. 25, 2014).

⁹ *2015 Open Internet Order*, 30 FCC Rcd at 5678 ¶ 173.

recognize the very real concerns expressed by individual companies¹⁰ and associations representing small providers in the wireline, wireless, and cable industries.¹¹ The record on this point was recently supplemented by Paperwork Reduction Act (“PRA”) comments submitted by providers of all sizes detailing the substantial costs to comply with the new transparency rules, particularly for small providers.¹² As WISPA puts it, “most, if not all, small broadband providers have no in-house legal counsel, engineers, technical writers, staff administrators or web administrators, and will need to hire outside legal counsel, engineers and consultants to comply, at substantially higher cost than the Commission estimates.”¹³ ACA adds that “[n]ot only will the initial production of this information involve many hours of time by in-house business and legal personnel, out of an abundance of caution, ACA members will need to engage outside counsel to review these wide-ranging (and often subjective) requirements. Moreover, these practices and their effects on customers and other entities in the Internet ecosystem will

¹⁰ See Joint Petition for Stay of United States Telecom Association, *et al.*, GN Docket No. 14-28, at Exhibits 1-3 & 5-7 (filed May 1, 2015) (Declaration of Nathan Stooke, CEO of Wisper ISP, Inc.; Declaration of L. Elizabeth Bowles, President and Chairman of Aristotle Inc.; Declaration of Kenneth J. Hohhof, President of Express Dial Internet dba KWISP Internet; Declaration of Clay Stewart, CEO of SCS Broadband; Declaration of Forbes H. Mercy, President of Washington Broadband, Inc.; and Declaration of Josh Zuerner, President and CEO of Joink LLC).

¹¹ See, e.g., Comments of American Cable Association, GN Docket Nos. 14-28 & 10-127, at 37-39 (filed July 17, 2014); Comments of Competitive Carriers Association, GN Docket No. 14-28 at 8-9 (filed July 16, 2014); Comments of the Wireless Internet Service Providers Association, GN Docket No. 14-28, at 15-16 (filed July 16, 2014); Comments of WTA – Advocates for Rural Broadband, GN Docket No. 14-28, at 8 (filed July 17, 2014); Letter from Erin P. Fitzgerald, Assistant Regulatory Counsel, Rural Wireless Association, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 1 (filed Nov. 14, 2014); Letter from Stephen E. Coran, Counsel to the Wireless Internet Service Providers Association, to Tom Wheeler, Chairman, FCC, GN Docket No. 14-28, at 8 (filed Feb. 3, 2015).

¹² See generally Comments of the Wireless Internet Service Providers Association regarding the Paperwork Reduction Act, GN Docket No. 14-28 (filed July 20, 2015) (“WISPA PRA Comments”); Comments of the American Cable Association, GN Docket No. 14-28 (filed July 20, 2015) (“ACA PRA Comments”).

¹³ WISPA PRA Comments at 4 (citation omitted).

evolve as new types of traffic and traffic flows emerge as new content and applications are offered and customers alter the services they access, requiring frequent review and revision of each operator's disclosures."¹⁴

WCA agrees. Unlike larger nationwide or regional BIAS providers that have significantly greater financial, human, and technical resources, many BIAS providers, including WCA members, are small, locally owned businesses with limited financial resources and small staff. WCA members have already expended significant time and resources to comply with the existing transparency rule.¹⁵ The enhanced transparency requirements go well beyond the current rule. In addition to expanding disclosure requirements concerning the terms of prices, other fees and data caps and allowances, carriers must disclose, at a minimum, the following network "performance characteristics" and "network practices" to comply with the transparency requirements:

- packet loss;
- actual network performance data that is "reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing the service";
- network performance that is "measured in terms of average performance" over a "reasonable period of time and during times of peak usage";
- separate disclosures on the network performance for each technology offered by a wireless carrier (*e.g.*, 3G and 4G), which can rely on their own or third party testing data to provide actual data on the performance of their networks;
- disclosure of the impact on non-BIAS data services by identifying "whether the service relies on particular network practices and whether similar functionality is available to applications and services offered over [BIAS]"; and
- disclosures of user-based or application-based practices which should include the "purpose of the practice, which users or data plans may be affected, the triggers that activate the use of the practice, the types of traffic that are subject to the practice, and the practice's likely effects on end users' experiences."¹⁶

¹⁴ ACA PRA Comments at 6-7.

¹⁵ 47 C.F.R. § 8.3.

¹⁶ *Open Internet Order*, 30 FCC Rcd at 5673-77 ¶¶ 166-169 (citations omitted).

These new disclosure requirements are complex, extremely detailed and technical, and yet vague at the same time given that the Commission has provided no guidance as to how a provider can ensure compliance. For example, no details have been provided as to how packet loss disclosures should be reported, which will be especially difficult for wireless BIAS providers whose network performance is constantly being monitored and managed by the second to ensure optimum performance as the number and types of uses of the network change.

While the Commission may believe that the enhanced transparency enhancements are “modest in nature”¹⁷ and that most companies will be able to rely on in-house expertise to comply with them, the reality is that small BIAS providers will be forced to expend a substantial amount of time and resources to comply, resources that they either do not have or could be better spent on deploying, maintaining and improving their networks. Therefore, the exemption should be made permanent.

However, if the Commission is not prepared at this time to make it permanent, the exemption should be extended for two years to allow the Commission and providers to assess their ability to comply with the new rules. Such an extended reprieve would allow small providers to learn from the experiences of larger carriers. It would also allow the Commission to assess the record to see if consumers served by these companies are expressing concerns over a lack of transparency to justify the substantial burden of such disclosures.¹⁸

¹⁷ *Id.* at 5678 ¶ 172.

¹⁸ At a minimum, the exemption should remain in place until the Commission finalizes the voluntary safe harbor for the format and nature of the required disclosure to consumers that it has promised to establish.

B. *THE COMMISSION SHOULD EXPAND THE SUBSCRIBER THRESHOLD TO A MINIMUM OF 250,000*

While acknowledging the comments of multiple parties, the determination to establish a threshold of 100,000 subscribers was based on a proposal offered by ACA exactly one week before the *2015 Open Internet Order* was adopted.¹⁹ The Commission arrived at a 100,000 subscriber threshold by accepting ACA's suggestion to base the threshold on a separate small provider exemption adopted in the 2013 *Rural Call Completion Order* which exempted providers with 100,000 or fewer subscriber lines from certain recordkeeping, retention, and reporting rules.²⁰ Presumably due to the temporary nature of the rule, other than the reference to the ACA filing, there is no analysis whatsoever as to whether the 100,000 threshold is appropriate for fixed or mobile BIAS providers.

While the Commission failed to acknowledge it in the order, the reference to the *Rural Call Completion Order* was ACA's second choice for establishing a threshold. In the same letter, ACA first suggested that the Commission look to Section 251(f) of the Communications Act which provides relief for rural and mid-sized carriers from key Title II common carrier obligations in Section 251(c), including interconnection, unbundling, resale, and collocation.²¹ The provision gives an automatic exemption to a rural telephone company until a state commission rules otherwise and enables an incumbent carrier with fewer than 2% of the nation's access lines to petition a state commission for relief, which shall be granted if necessary "to

¹⁹ Letter from Barbara S. Esbin, Counsel for the American Cable Association, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28 & 10-127, at 5-6 (filed Feb. 19, 2015) ("ACA *Ex Parte* Letter").

²⁰ See *Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154 (2013) ("*Rural Call Completion Order*").

²¹ See 47 U.S.C. § 251(f).

avoid imposing a requirement that is unduly economically burdensome.”²² ACA estimated that this approach, which “is probably the closest analogous definition of an entity warranting exemption from regulatory obligations,” would produce *a definition of a small entity as one serving fewer than about 1.6 million broadband subscribers.*²³

Apparently rejecting this approach, the Commission instead chose to rely on the *Rural Call Completion Order* which imposes recordkeeping obligations on providers that initiate long distance voice service to address problems with call completion in rural areas. The rule lays out in explicit detail exactly what information must be recorded, retained and reported.²⁴ Unlike the open Internet enhanced transparency requirements, there is nothing subjective or vague about the rules. Nor is the long distance voice market a rapidly evolving and technologically complex market that requires providers to constantly monitor new or changed service offerings that may require new customer notifications. However, in the *Rural Call Completion Order* the Commission created an exception for covered providers that were deemed small from the recording, retention and reporting rules, in recognition of the fact that compliance “would burden many providers with new obligations without significantly improving the data that are filed with the Commission.”²⁵

If a 100,000 connection threshold is an appropriate measure for a rule that simply requires a provider to record and retain information about call attempts to rural telephone numbers, it stands to reason that a higher threshold is appropriate for a far more complex and burdensome rule like the enhanced transparency requirements. WCA also appreciates that a

²² *See id.* § 251(f)(2)(A)(ii).

²³ ACA *Ex Parte* Letter at 5 (emphasis added).

²⁴ *Id.* §§ 64.2103(e), 64.2105(b).

²⁵ *Rural Call Completion Order*, 28 FCC Rcd at 16169 ¶ 27 (citation omitted).

threshold of over 1.6 million connections, as suggested in ACA's original proposal, may be too high. Therefore, WCA proposes that the Commission adjust the subscriber threshold upward to 250,000.

III. CONCLUSION.

For the foregoing reasons, the Commission should make the small provider exemption permanent and expand the subscriber threshold to a minimum of 250,000 connections.

Respectfully submitted,

THE WIRELESS COMMUNICATIONS
ASSOCIATION

By: /s/ Paul J. Sinderbrand
Paul J. Sinderbrand
Mary N. O'Connor

Wilkinson Barker Knauer, LLP
2300 N Street, NW Suite 700
Washington, DC 20037
202.783.4141

Its Attorneys

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