

**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 UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom)¹ submits these comments in response to the notice released by the Consumer and Governmental Affairs Bureau of the Federal Communications Commission (Commission or FCC)² seeking comment on the small business exemption from the new, enhanced transparency requirements adopted in the *2015 Open Internet Order*.³ The Commission adopted the exemption in response to concerns raised by smaller providers about the compliance burden of the new enhancements. The exemption applies to broadband providers with 100,000 or fewer broadband “connections,” which is the broadband equivalent of telephone subscriber lines.⁴

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecom industry. Its diverse member base ranges from large publicly traded communications corporations to small companies and cooperatives – all providing advanced communications service to both urban and rural markets. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² *Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, Public Notice, DA 15-731 (rel. Jun. 22, 2015) (*Exemption PN*).

³ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015) (*2015 Open Internet Order*).

⁴ See *Exemption PN* at 2.

As noted in USTelecom's recent comments on the compliance burden associated with the enhanced transparency requirements filed pursuant to the Paperwork Reduction Act of 1995,⁵ the burdens that small companies will face in attempting to comply with these enhanced requirements are significant, especially in light of the fact the new requirements go beyond what is necessary for the Commission to ensure that broadband customers have sufficient information to make informed choices about their broadband services.⁶ The Commission therefore should extend permanently the small business exemption so that smaller broadband providers are not unduly and unnecessarily burdened.

I. Summary of the FCC's New Enhanced Transparency Obligations.

In addition to the transparency requirements adopted by the Commission in 2010,⁷ which govern the content and format of disclosures that providers of broadband Internet access service must provide to end-user consumers, edge providers, and the Internet community at large,⁸ the Commission adopted more requirements that affect both content and format:

- Specific disclosures for commercial terms, prices, other fees (including all additional one time and/or recurring fees and/or surcharges the consumer may incur either to initiate, maintain, or discontinue service), and data caps and allowances.
- Disclosure of network performance characteristics, including disclosure of packet loss as a key measurement (in addition to speed and latency); an expectation that disclosures of actual network performance data be geographic-specific and that

⁵ Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (1995), *codified at* 44 U.S.C. § 3501 *et seq.* See also Notice and Request for Comments, *Information Collection Being Reviewed by the Federal Communications Commission*, 80 FR 29000 (May 20, 2015) (*Enhanced Transparency Request for Comments*).

⁶ See generally Comments of the United States Telecom Association, GN Docket No. 14-28, OMB 30-60-1159 (filed Jul. 20, 2015) (*USTelecom OMB Comments*).

⁷ See *Preserving the Open Internet*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905, 17931-51, paras. 43-79 (2010) (*2010 Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom. Verizon v. FCC*, No. 11-1355 (D.C. Cir. Jan. 14, 2014).

⁸ See *2015 Open Internet Order* at paras. 154-181.

network performance will be measured in terms of average performance over a reasonable period of time and during times of peak usage.

- In addition to the existing requirements of prominent display of disclosures on a publicly available website and disclosure of relevant information at the point of sale, a mechanism for directly notifying end users if their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion, that is likely to have a significant impact on the end user's use of the service.⁹

The Commission also created a voluntary safe harbor for the format and nature of the required disclosure to consumers.¹⁰

II. The Burdens and Costs Associated with the New Enhanced Transparency Obligations Will Overwhelm Small Broadband Providers.

The enhancements to the disclosure requirements as we interpret them are quite significant. As a general matter, broadband providers will be required to invest significant time, resources, and personnel to develop and implement programs to comply with the new requirements. In order to implement these programs, broadband providers will need to engage a wide range of personnel – including engineers, network managers, regulatory advisors, in-house and outside counsel, technical writers, marketing, and other employees. As noted by others in the Commission's related transparency proceeding,¹¹ many smaller broadband providers do not retain such personnel in-house, and will be forced to either outsource these tasks at significant

⁹ See *2015 Open Internet Order* at paras. 162-171.

¹⁰ See *id.* at paras. 176-181. Additionally, there is guidance on how the Commission intends to enforce the enhanced transparency rule, including a reminder that providers may seek guidance in the form of advisory opinions from the Enforcement Bureau about any of the open Internet regulations. *Id.* at para. 185.

¹¹ See *e.g.*, Comments of the Wireless Internet Service Providers Association, GN Docket No. 14-28, at 4–5 (filed Jul. 20, 2015) (stating that “Contrary to the Commission's assertion, 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.”).

expense, or assign them to their limited existing in-house personnel who likely do not have the expertise necessary to address some or all of the new requirements.

Regardless of whom smaller broadband providers rely on to implement these programs (*i.e.*, either in-house or external personnel), these individuals will be required to evaluate what additional information must be compiled and disclosed – on top of the existing obligations – and how to disclose it. Just *designing* these additional programs to comply with the enhanced requirements may prove to be too much for some small businesses.

Furthermore, the Commission describes the required frequency of disclosure for the new requirements – without elaboration – as an “on occasion reporting requirement.”¹² Instead of adopting an annual or quarterly requirement, for example, to measure and disclose network performance metrics, the Commission has left it up to small broadband providers who do not participate in the “Measuring Broadband America” (MBA) program¹³ to figure out how often they must measure network performance, disclose the results of those measurements, and then repeat the process.

Providers will have to expend significant resources to meet the additional commercial terms and policies disclosure requirements.

Broadband providers now have to ensure that additional information about price and related terms “always be disclosed,” including: full monthly service charge, noting any promotional rates and the duration of any promotional period, and the full monthly service charge after the promotional period; other one-time or recurring fees and surcharges such as

¹² *FR Notice* at 29001.

¹³ *See infra* note 17, explaining that participation in the Commission’s MBA program is a safe harbor for meeting the network performance disclosure requirements.

modem rental fees, installation fees, service charges, and early termination fees; and plan data caps or allowances and any consequences of exceeding caps or allowances.¹⁴

To meet these expanded requirements, broadband providers, at a minimum, will have to design or redesign promotional materials to reflect the additional information and to explain how any fees, surcharges, data caps, or other charges will apply. This necessarily will include review of such materials by each broadband provider's legal staff and regulatory personnel (to the extent a small provider employs such personnel), as well as members of the company's management team, to determine the accuracy and appropriateness of new promotional and informational materials, and to do so repeatedly, as necessary, and on an ongoing basis to ensure continuing accuracy as promotions may be changed or updated. Broadband providers also must develop new procedures to protect customer privacy,¹⁵ and any revisions to their privacy policies resulting from these new procedures must be disclosed under the transparency rule.

Larger broadband providers with hundreds of thousands or more customers likely can better absorb the costs associated with implementing these changes. But that is not the case for small providers with far fewer customers who typically serve smaller, rural markets.

¹⁴ See *2015 Open Internet Order* at para. 164.

¹⁵ See *FCC Enforcement Advisory, Open Internet Standard, Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps to Protect Consumer Privacy*, Public Notice, DA 15-603 (rel. May 20, 2015).

Providers will have to expend significant resources to meet the additional network performance disclosure requirements.

The *2015 Open Internet Order* contains new data collection and disclosure requirements relating to performance metrics that will significantly impact small broadband providers.

Among other things, the new data collection will potentially require broadband ISPs to disclose information relating to: 1) packet loss; 2) more geographic-specific and granular speed and latency; and 3) average estimates for speed, latency, and packet loss during peak periods. For each of these requirements, small broadband providers would incur substantial costs and expend many man-hours to develop new (or revise existing) systems, software and procedures to capture and analyze the new information associated with the increased transparency obligations.

First, we note that no small broadband providers participate in the MBA program,¹⁶ which the Commission has said may be used to comply with the network performance disclosure obligations,¹⁷ so they will need to develop their own programs to measure the actual performance of their broadband offerings.¹⁸ They may use the same methodology employed for the MBA; however, duplicating the MBA methodology is not likely a viable option given the cost involved.¹⁹

¹⁶ See *2014 Measuring Broadband America Fixed Broadband Report: A Report on Consumer Fixed Broadband Performance in the U.S.*, at 5 (2014) (available at: <http://data.fcc.gov/download/measuring-broadband-america/2014/2014-Fixed-Measuring-Broadband-America-Report.pdf>) (visited August 5, 2015).

¹⁷ The Commission states that participation in the MBA program is a safe harbor available to fixed broadband providers in meeting the network performance disclosure requirements. *2015 Open Internet Order* at para. 166, n.411.

¹⁸ *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance With Open Internet Transparency Rule*, GN Docket No. 09-191, WC Docket No. 07-52, Public Notice, 26 FCC Rcd 9411, 9415 (2011).

¹⁹ See, e.g., *USTelecom OMB Comments* at 7-10 (explaining potential compliance costs).

In its proceeding considering broadband measurement obligations for eligible telecommunications carriers (ETCs) under the Connect America Fund (CAF), the Commission estimated that the total costs for a SamKnows-type performance oversight program *just* for ETCs receiving high-cost support to serve fixed locations would be approximately \$4.2 million, and approximately \$5.9 million each year thereafter.²⁰ This far exceeds the Commission's estimate of \$640,000 for the total annual cost of its enhanced transparency obligations.²¹

Moreover, as USTelecom noted in comments submitted in the CAF proceeding, the Commission's estimate only accounts for the cost of white boxes, core servers and administration expenses,²² and does not take into account the significant costs that would be borne by individual carriers for their administration of the program. Such costs include deploying the designated broadband measuring tool to the consumers' premises (whether through hardware installation or software upgrades), as well as the substantial costs in staffing necessary to set up and maintain their measurement program.²³

USTelecom also emphasized in those comments the challenges many smaller broadband providers would face given the low-density, rural nature of their service territories.²⁴ Moreover, depending on the granularity²⁵ at which all of the additional network performance data would

²⁰ See *Wireline Competition Bureau, Wireless Telecommunications Bureau, and the Office of Engineering and Technology Seek Comment on Proposed Methodology for Connect America High-Cost Universal Service Support Recipients to Measure and Report Speed and Latency Performance to Fixed Locations*, Public Notice, 29 FCC Rcd 12623, 12628 (Oct. 16, 2014) (*ETC Notice*).

²¹ See *Enhanced Transparency Request for Comments* at 29001.

²² *ETC Notice* at 12628.

²³ Comments of the United States Telecom Association, WC Docket No. 10-90, at 3 (filed Dec. 22, 2014).

²⁴ *Id.* at 6–8.

²⁵ See *2015 Open Internet Order* at para. 166.

need to be analyzed – a determination yet to be made by the Commission – the total burden on such companies could increase even more substantially.

With regard to the new requirement to measure network performance during times of peak usage,²⁶ the development and implementation of systems for capturing this information will be particularly burdensome for smaller providers. To the extent such metrics must be computed for several geographic areas (as opposed to only one national figure), that would also increase the burden, as would the need to periodically update. For these reasons, the burden of collecting and disclosing these figures could be substantial and insurmountable for small broadband providers.

Providers will have to expend significant resources to meet the new point of sale requirements.

In a potentially significant change from the FCC’s existing rules, the agency’s new point of sale obligations might be read to eliminate the option for broadband providers only to provide point of sale disclosures directing prospective customers to a web address containing the required disclosures rather than distributing hard copies of disclosure materials. Specifically, the Commission requires that broadband providers “actually disclose information required for consumers to make an ‘informed choice’ regarding the purchase or use of broadband services at the point of sale,” and further explains that it “is not sufficient for broadband providers simply to provide a link to their disclosures.”²⁷ This new language could be interpreted to mean that broadband providers must now provide paper copies of all information required to be disclosed at each point of sale.²⁸

²⁶ *See id.*

²⁷ *2015 Open Internet Order* at para. 171, n. 424.

²⁸ Although the Commission does not define “points of sale,” we presume from context that it is intended to include all brick-and-mortar retail stores, sales kiosks, and every other sales channel,

If broadband providers can no longer comply by providing a link to website disclosures at the point of sale, the Commission's expanded obligations will require them to prepare and distribute paper materials at their point of sale locations. For many smaller, rural broadband providers, website disclosure is likely the most effective means for providing existing and prospective customers with the requisite information. Given the extremely low population densities in many of their expansive service territories, it is far more convenient for consumers to access a website instead of heading to what – in most instances – may be a particular company's remote, single point of sale location. In addition, like their larger counterparts, smaller companies will incur substantial costs in continually monitoring and updating their paper disclosures.

III. There is No Evidence That the Benefits to Consumers of Requiring Small Providers to Comply With the Enhanced Requirements Outweigh the Costs and Burdens.

The Commission has failed to explain how its new transparency requirements will have any practical utility that justifies the immense burden it will impose on all, but especially smaller, broadband providers. For example, the Commission's *2015 Open Internet Order* provides no justification for why packet loss has been added as a necessary component of the network performance disclosures. The *2015 Open Internet Order* simply references comments from a handful of commenters "calling for inclusion of packet loss in disclosures." None of these comments explain how packet loss would actually be useful to consumers or edge providers, and one comment simply states that such information "could" be useful to consumers.

including, but not limited to, telephone contacts between customers and a broadband provider's customer service representatives. In that regard, it is not clear how actual disclosure over the telephone must be accomplished, but we note that the PRA's definition of the term "burden" includes "resources expended" for "transmitting, or otherwise disclosing the information." 44 U.S.C. § 3502(2)(F).

To the contrary, nothing in the record suggests that packet loss metrics would be useful to consumers or edge providers in evaluating service quality or comparing performance among available networks. And, considering the cost to develop and implement methods to measure packet loss for small broadband providers that do not participate in the MBA program, the Commission should make permanent the exemption requiring packet loss measurement.

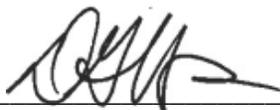
Moreover, given the limited number of customers small broadband providers serve, they should be given more flexibility, not less, in notifying their customers by the most effective means available, including by a website link. The record also lacks evidence that consumers oppose notification via a website link. Thus, there would be little or no offsetting benefits to customers. The flexible approach adopted by the Commission in the *2010 Open Internet Order* better takes into account the considerable expense involved with requiring actual, hard copy point of sale disclosures to all customers militates in favor of a permanent exemption from this potential burden and the other significantly more onerous enhanced transparency requirements.

IV. Conclusion.

For the reasons discussed herein, the Commission should make the small provider exemption permanent.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By:  _____

Diane Griffin Holland
Kevin G. Rupy
B. Lynn Follansbee

607 14th Street, NW, Suite 400
Washington, D.C. 20005
202-326-7300

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