

advisory guidance from the Office of General Counsel and Enforcement Bureau in 2011 (an additional eight pages) and the Enforcement Bureau in 2014 (two more pages) providing additional detail on what is expected of ISPs under the rule.⁴ Notably, although the Commission made clear in the *2010 Open Internet Order* that ISPs could meet their disclosure obligations by making “a single disclosure” on a “publicly available, easily accessible website” and “at the point of sale,”⁵ it subsequently expanded those obligations to any public statements or public-facing documents that include information about ISPs’ broadband Internet access services, including “mailings, on the sides of buses, on website banner ads, [and] in retail stores.”⁶

In the *2015 Open Internet Order*, the Commission made no changes to the text of the rule, but adopted six pages of “enhancements” with respect to what is required of ISPs under the rule. Throughout the discussion, the Commission suggests that many of these enhancements may in fact be required under the original rule,⁷ although it provides no specific examples and no meaningful guidance as to where it draws the line between what is required under the original rule (which is in effect today) and what is now required under the enhancements (which do not take effect until they are approved by the Office of Management and Budget pursuant to the PRA).

Recognizing that the enhanced transparency rule might place significant burdens on small ISPs, the Commission adopted a temporary exemption from the enhanced requirements for ISPs

⁴ *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, GN Docket No. 09-191, Public Notice, 26 FCC Rcd 9411 (2011) (*2011 OGC Guidance*); *FCC Enforcement Advisory, Open Internet Transparency Rule: Broadband Providers Must Disclose Accurate Information to Protect Consumers*, Public Notice, 29 FCC Rcd 8606 (2014) (*2014 EB Guidance*).

⁵ *2010 Open Internet Order*, 25 FCC Rcd at 17939-40, ¶¶ 57-58.

⁶ *2014 EB Guidance*, 29 FCC Rcd at 8607.

⁷ *See, e.g., 2015 Open Internet Order*, 30 FCC Rcd at 5673, ¶ 164 (“To be clear, these disclosures may have been required in certain circumstances under the transparency rule . . . we now require that this information always be disclosed.”).

that serve fewer than 100,000 broadband connections.⁸ The Commission also directed the Consumer and Governmental Affairs Bureau to seek comment on the exemption and “adopt an order announcing whether it is maintaining an exemption and at what level no later than December 15, 2015.”⁹ In a *Public Notice* issued on June 22, 2015, the Bureau acted on the direction to seek comment on whether to retain the exemption and at what level.¹⁰ For the reasons explained below, NCTA strongly encourages the Commission to make the exemption permanent.

THE RULES IMPOSE SIGNIFICANT BURDENS ON SMALL COMPANIES AND A PERMANENT EXEMPTION IS WARRANTED

As the discussion above suggests, compliance with the one sentence contained in rule section 8.3 alone is an exceedingly complex undertaking. An ISP cannot simply read the rule and know what is expected. Rather, the ISP must be familiar with the discussion in the *2010 Open Internet Order*, the *2011 OGC Guidance*, the *2014 EB Guidance*, and the *2015 Open Internet Order* – a total of 22 pages of text describing all the expectations apparently contained in the single codified sentence of section 8.3. Even that is not sufficient, however, because various ambiguities and inconsistencies make it difficult, if not impossible, for an ISP to be sure that it is in full compliance with the rule.¹¹ Thus, it is beyond dispute that the transparency rules

⁸ *Id.* at 5677-79, ¶¶ 172-75.

⁹ *Id.* at 5679, ¶ 174.

¹⁰ *Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28, Public Notice, DA 15-731 (rel. Jun. 22, 2015).

¹¹ For example, the *2011 OGC Guidance* made clear that ISPs could comply with the “point of sale” rule by directing prospective customers at the point of sale to a website link to the company’s disclosures. *2011 OGC Guidance*, 26 FCC Rcd at 9413-14. In a footnote to the *2015 Open Internet Order*, however, the Commission stated, without explanation, that “[i]t is *not* sufficient for broadband providers simply to provide a link to their disclosures.” *2015 Open Internet Order*, 30 FCC Rcd at 5677, ¶ 171 n.424. It is not at all clear whether the Commission intended this footnote to reverse the Office of General Counsel’s prior guidance. The fact that the Commission provided no explanation in the order and did not account for the increased burdens such a change would have on all ISPs in its PRA notice strongly suggests that there has been no change and that ISPs may continue to rely on the *2011 OGC Guidance* as they have for the past four years.

adopted in the *2010 Open Internet Order* – as interpreted in the *2011 OGC Guidance* and *2014 EB Guidance* – and *2015 Open Internet Order* have imposed (and will continue to impose) significant burdens and costs on ISPs, burdens and costs that the Commission vastly underestimated in its PRA notice. And, given the overwhelming penalties that the Enforcement Bureau has sought for alleged violations of the transparency rule,¹² failure by the thousands of ISPs that are subject to the rule to take all possible steps to attempt to comply is an incredibly high-stakes exercise.

Against this backdrop, the question asked in the *Public Notice* – should the Commission make permanent the exemption for ISPs with less than 100,000 broadband connections – must be answered in the affirmative. In the decade that the Commission has been considering Open Internet issues, it has not identified any evidence that customers of small ISPs have been harmed in any way by ISP disclosure practices, nor does it have any basis for any sort of predictive judgment that such harm is likely to occur in the absence of the 2015 enhancements to the transparency rule. These ISPs have demonstrated a consistent track record of working hard to attract and retain customers and there is simply no basis whatsoever to suggest that consumers would be harmed in any way if the exemption were extended.

In addition to there being no evidence of actual or potential consumer harm attributable to small ISP disclosure practices, the record is crystal clear that the transparency rule places significant burdens and risks on all ISPs, contrary to the Commission’s suggestion that the enhancements are “modest in nature.”¹³ For example, as AT&T recently noted, “the true cost to implement all of the *2015 Open Internet Order*’s new transparency rule collections will likely be

¹² FCC Press Release, *FCC Plans to Fine AT&T \$100 Million for Misleading Consumers about Unlimited Data Plans, Violating Transparency Obligations* (rel. June 17, 2015).

¹³ *2015 Open Internet Order*, 30 FCC Rcd at 5678, ¶ 172.

millions, if not tens of millions, of dollars *for AT&T alone*, depending on how the new requirements are ultimately interpreted.”¹⁴

The costs for smaller providers could be even more onerous on a per customer basis given their lack of scale and existing internal resources needed to implement the requirements. Small ISPs have demonstrated that they would face particularly daunting challenges in attempting to comply with the enhancements to the rule. For example, as described by the American Cable Association and the Wireless Internet Service Providers Association, small ISPs necessarily will be required to consult outside attorneys and other outside experts to assess whether their disclosures would be considered consistent with the Commission’s expectations.¹⁵ As a result, the time and resources needed to comply with the rules would far exceed the Commission’s unrealistically low estimates. Extending the exemption would avoid the need for small ISPs to engage in this expensive and burdensome paperwork exercise.

NCTA’s support for retention of the current exemption for small ISPs should in no way be read to suggest that the rules are appropriate or necessary for larger ISPs. As demonstrated in recent comments submitted by AT&T, USTelecom, and CTIA pursuant to the PRA,¹⁶ the burdens and risks associated with the enhancements adopted in the *2015 Open Internet Order* far exceed both the Commission’s estimate of the burdens and the purported benefits. Given the significant concerns that have been raised by these parties under the PRA, the Commission should make a concerted effort to identify changes or clarifications that would reduce the burden imposed by these rules for any companies that do not qualify for the small ISP exemption.

¹⁴ PRA Comments of AT&T at 4 (filed July 20, 2015) (emphasis added) (AT&T PRA Comments).

¹⁵ PRA Comments of the American Cable Association at 6-7 (filed July 20, 2015); PRA Comments of the Wireless Internet Service Providers Association at 4-5 (filed July 20, 2015).

¹⁶ AT&T PRA Comments; PRA Comments of the United States Telecom Association (filed July 20, 2015); PRA Comments of CTIA – The Wireless Association (filed July 20, 2015).

CONCLUSION

There is no basis for subjecting small ISPs to the burdens imposed by the Commission's enhanced transparency rules. The Commission should make permanent the current exemption and it should consider ways to significantly reduce the burden for all other ISPs.

Respectfully submitted,

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August 5, 2015

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