

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554**

Protecting and Promoting the Open Internet ) GN Docket No. 14-28  
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**COMMENTS OF THE AMERICAN CABLE ASSOCIATION  
ON THE SMALL BUSINESS EXEMPTION FROM OPEN INTERNET  
ENHANCED TRANSPARENCY REQUIREMENTS**

The American Cable Association (“ACA”) hereby submits its comments in response to the Public Notice issued by the Consumer and Governmental Affairs Bureau (“Bureau”)<sup>1</sup> seeking comment on the small business exemption from the enhanced transparency requirements adopted

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<sup>1</sup> See *Consumer and Government Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, Public Notice, DA 15-731, GN Docket No. 14-28 (rel. June 22, 2015) (“Notice”). ACA notes that the adoption of the temporary small provider exemption at best appears to be a “fig leaf,” since no broadband provider, large or small, is required to comply with the enhanced transparency requirements until the Commission and the Office of Management and Budget (“OMB”) complete the Paperwork Reduction Act (“PRA”) review. See *Information Collection Being Reviewed by the Federal Communications Commission, Disclosure of Network Management Practices, Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, OMB 3060-1158, 80 Fed. Reg. 29000-29001 (May 20, 2015) (“PRA Notice”). Comments on the *PRA Notice* were submitted to the Commission by July 20, 2015, and the Commission is required to review and respond to concerns raised by interested parties in these comments. See *infra*. n. 13. Afterward, OMB will conduct its review, which may take 90 days, if not longer. Consequently, the PRA review may not be completed until later this year or sometime next year, after the December 15, 2015 date on which the small provider exemption is scheduled to expire. Thus, the temporary small provider exemption appears to offer no real interim relief. Its value is to focus the Bureau on the question of whether permanent relief is warranted. As ACA has argued and submits herein, there is more than sufficient evidence to demonstrate it is.

by the Commission in its *2015 Open Internet Order*.<sup>2</sup> In adopting the exemption, the Commission cited to ACA filings explaining that its members were complying with the transparency disclosure requirements adopted in the *2010 Open Internet Order*<sup>3</sup> and those requirements strike the right balance between broadband Internet access service (“BIAS”) providers and users.<sup>4</sup> While the Commission believes its enhanced requirements are “modest in nature,”<sup>5</sup> ACA submits, as discussed herein, that they are sufficiently burdensome for providers with fewer than 100,000 broadband connections to warrant the Bureau making the exemption permanent.<sup>6</sup>

ACA represents over 800 small and medium-sized cable operators, incumbent telephone companies, municipal utilities, and other local providers of BIAS passing about 19 million locations and serving almost 7 million locations.<sup>7</sup> Over 700 of these providers, who operate

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<sup>2</sup> See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28, ¶¶ 172-175 (rel. Mar. 9, 2015) (“2015 Open Internet Order”).

<sup>3</sup> See *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17936-41 (2010) (“2010 Open Internet Order”) *aff’d in part, vacated in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“2010 Open Internet Order”).

<sup>4</sup> See *2015 Open Internet Order*, ¶ 172.

<sup>5</sup> See *id.*

<sup>6</sup> ACA believes its conclusion holds even if the Commission did not adopt certain proposals, including to require real-time disclosures, in the *2015 Open Internet Order*.

<sup>7</sup> To provide broadband service, ACA’s cable operator members employ a variety of robust technology platforms for their networks, including DOCSIS 3.0 over hybrid fiber coaxial networks and IP over passive optical networks. Cable-based platforms are engineered to provide to all users high-performance broadband service with high speeds, low latency

primarily in smaller communities and rural areas, have fewer than 100,000 broadband connections and, of these, fewer than 10 have more than 20,000 connections. Virtually none of these providers have in-house personnel dedicated to regulatory compliance. To address regulatory compliance matters, they use personnel dedicated to operational and other activities and turn to outside consultants and counsel. For these reasons, ACA and its members have a major interest in ensuring that the Bureau, in examining the small provider exemption issue, properly balances the limited resources of smaller broadband providers, who already are required to comply with the existing transparency rule, with the needs of users to obtain the “enhanced” information.

In the *2010 Open Internet Order*, the Commission adopted the transparency rule,<sup>8</sup> requiring BIAS providers to publicly disclose accurate information for consumers and edge providers to make informed choices regarding use of their broadband service.<sup>9</sup> The Commission stated that the disclosure “will likely include some or all” of the following –

- Commercial Terms, including pricing, privacy policies, and redress options;
- Performance Characteristics, including information about speed and latency and the effects of specialized services, if any, on available capacity; and
- Network Management Practices, including congestion management, application-specific behavior, device attachment rules, and security measures.<sup>10</sup>

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and jitter, and minimal packet loss, and operators use standard industry practices to provide this level of performance on these platforms.

<sup>8</sup> 47 C.F.R. § 8.3.

<sup>9</sup> See *2010 Open Internet Order*, ¶ 53.

<sup>10</sup> See *id.*, ¶ 56.

Thereafter, following receipt of comments on the collection burdens associated with the new rule from ACA and others, the Commission’s Enforcement Bureau and Office of General Counsel reiterated the Commission’s conclusion that the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance concerning effective disclosure models.<sup>11</sup>

In adopting the *2015 Open Internet Order*, the Commission concluded that it should make a series of enhancements to the transparency rule. These enhancements provide clarifications to existing requirements and the adoption of new and more granular disclosure requirements regarding commercial terms, performance, and network practices. Specifically, the enhanced transparency rule includes measures requiring “that broadband providers always must disclose promotional rates, all fees and/or surcharges, and all data caps and data allowances; adding packet loss as a measure of network performance that must be disclosed; and requiring specific notification to consumers that a ‘network practice’ is likely to significantly affect their use of the service.”<sup>12</sup> The Commission found that these enhancements are modest, estimating that a provider will require an additional 4.5 hours on average each year to respond.<sup>13</sup> ACA

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<sup>11</sup> See *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 (2011) (“2011 Advisory Guidance”).

<sup>12</sup> See *2015 Open Internet Order*, ¶ 24.

<sup>13</sup> See *PRA Notice*; see also *Initial Paperwork Reduction Act Calculations for Transparency Rule Disclosures, Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, Response 12 (rel. March 12, 2015) (“Initial PRA Calculations”).

respectfully disagrees; the burden for all providers is far more substantial.<sup>14</sup> Moreover, for smaller broadband providers – those who do not have dedicated regulatory personnel and in-house counsel – the additional time and concomitant cost to comply will be disproportionately greater, and thus a permanent exemption is warranted. Not only will compliance with the enhanced requirements be burdensome for smaller providers, but the benefits from the new requirements for customers of ACA members at best will be marginal. ACA members have an excellent track record of complying with the original transparency rule, and there has been no specific indication in the record that their users are seeking additional information.<sup>15</sup> There is

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ACA also notes that the Commission in its *PRA Notice* states that it “anticipates small entities may have less of a burden...because larger entities serve more customers, are more likely to serve multiple geographic locations, and are not eligible to avail themselves of the temporary exemption from the enhancements granted to smaller providers.” See *PRA Notice*, 80 FR 29000,29001. ACA submits that the Commission is incorrect in judging the burden. It is more accurately judged on a per customer basis, in which case smaller providers would have a much greater burden than larger providers. In addition, the Commission here appears to admit tacitly that smaller providers will face a more significant burden if the exemption is removed. ACA agrees with this conclusion.

<sup>14</sup> See e.g. Comments of the Wireless Internet Service Providers Association Regarding the Paperwork Reduction Act, GN Docket No. 14-28 at 4 (July 20, 2015) (“The burden estimates are predicated on flawed assumptions and suffer from a lack of factual basis, making them entirely unreliable.”); Paperwork Reduction Act Comments of AT&T, GN Docket No. 14-28, OMB Control No. 3060-1158 at 2 (July 20, 2015) (“The [Commission’s] estimates are absurd on their face. With a total cost of \$640,000 and 3,188 respondents, the Commission is estimating that it will cost each company an average of \$200 – that is not a misprint – to comply with *all* of the 2015 *Open Internet Order’s* new collections. Moreover, given that the Commission estimates the collections will take 28.9 hours per company to complete, the Commission is assuming that the mythical engineers and other employees performing these tasks are being paid about \$6.95 – well below the federal minimum wage.”).

<sup>15</sup> ACA is not aware of a Commission finding that any of its members have not complied with the original transparency rule.

thus no basis for extending the enhanced disclosure obligations to them and every reason for adopting a permanent exemption.

Based on discussions with its members,<sup>16</sup> ACA herein highlights two of the enhanced transparency requirements that are particularly burdensome for smaller providers: the requirement to disclose additional information about network practices,<sup>17</sup> and the requirement to inform customers directly “if their individual use of a network will trigger a network practice,

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<sup>16</sup> Assuming the Commission adheres to its *2011 Advisory Guidance* regarding performance characteristics contained in the original and enhanced transparency requirements and does not alter the manner in which they are enforced vis-à-vis smaller broadband providers, it would lessen the burden for these providers. *See 2011 Advisory Guidance* at 5. To elaborate, as a key aspect of this guidance, the Enforcement Bureau and Office of General Counsel set forth different methodologies that a broadband provider could use to meet the requirement to disclose performance characteristics of its network, including 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.” In adopting this alternative methodology, 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. In the *2015 Open Internet Order*, the Commission stated that the enhanced transparency requirements “build off...the transparency rule requirements established in 2010, and interpreted by the *2011* and *2014 Advisory Guidance*.” *See 2015 Open Internet Order*, ¶ 161. ACA members subject to the enhanced transparency requirements, therefore, will take guidance from the *2011 Advisory Guidance* when complying with the additional performance characteristic requirements.

<sup>17</sup> *See 2015 Open Internet Order*, ¶ 169.

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.”<sup>18</sup>

The existing transparency rule requires BIAS providers to make specific disclosures regarding their network practices, including congestion management practices. Under the enhanced transparency rule, BIAS providers must also disclose any practices associated with specific users or groups, and they must include information about “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.”<sup>19</sup> Smaller ACA members have informed us that they already communicate with their customers about triggers related to data plans so customers understand when practices may or will be activated. However, they do not necessarily make other disclosures that are (or potentially are) newly required by the enhanced transparency rule. For instance, few, if any, disclose the purpose of the practice, the likely effect on users’ experiences, or other information regarding use of filters, priorities, or other measures to address network congestion. These practices and their effects on customers and other entities in the Internet ecosystem will evolve

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<sup>18</sup> See *id.*, ¶ 171. Because the Commission in the *Initial PRA Calculations* does not provide a breakout of the time required for specific “enhanced” requirements, ACA cannot know how each of the enhancements contributed to the Commission’s aggregate estimate. In addition, certain assumptions used by the Commission in making its estimate are not correct. For instance, as discussed above, smaller broadband providers do not have sufficient in-house personnel to develop and maintain their disclosures. Instead, they rely on outside personnel, many of which (*e.g.* legal counsel) charge rates far in excess of those used by the Commission. ACA notes the Commission did not attempt to estimate these costs.

<sup>19</sup> See *id.*, ¶ 169.

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. As a result, smaller providers will need to draft and often redraft disclosures with this information. This will require hours of work on the part of in-house business and legal personnel, to the extent they exist, and, out of an abundance of caution, providers will then use outside counsel to review the disclosures' compliance with these wide-ranging (and often subjective) requirements. ACA's smaller members conservatively estimate that to develop, draft, and revise the disclosures will require on average annual expenditures of 16-24 hours.

Under the enhanced requirements, smaller providers that do not notify customers directly when their usage may trigger a network practice must develop and implement an automated mechanism that monitors each customer's usage and sends an email, web browser notice, and/or some other communication.<sup>20</sup> This, of course, will entail material costs. In addition, BIAS providers will incur recurring costs to respond to customers' questions and issues after a notice is received. Moreover, the frequency of notices will not necessarily diminish over time because demand (usage) is growing rapidly and may spike with special events and because customers may move to new data plans. Based on experience, smaller ACA members estimate that

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<sup>20</sup> ACA recognizes that smaller providers that have data usage plans are likely to engage in some form of notification even without the enhanced requirements. However, prior to the adoption of the direct notification requirement, smaller providers have had the flexibility to provide such notifications they believed met customer needs and could be efficiently implemented. That will change with the new requirements, and smaller providers will need to engage in some or all of the additional activities discussed here.

approximately 0.5 percent of customers will call each month with questions about notices and that customer representatives will spend approximately 5 minutes on average to respond to each customer. Thus an ACA member with 100,000 BIAS customers will spend approximately 100 hours each month as a result of the direct notifications. Even if this estimate is much lower – say 50 hours each month – it still represents a substantial expenditure of resources by a smaller provider. Further, customers of smaller providers are unlikely to see much, if any, benefit from this requirement since there is every indication that smaller providers are already giving their customers sufficient notice about usage and activities that would trigger a practice.

Finally, based on the experience of ACA members, this additional required information will be of marginal utility for their customers. As discussed herein, smaller providers already disclose information about their data plans and the triggers that will activate their use of network practices. For providers that are tied so closely to their customers and communities, they view that as simply good customer service, and as they can attest, it produces good results. Accordingly, they should be expected to produce any additional information about their network practices they find their customers require without being mandated to do so.

In the Notice, the Bureau inquires about a number of specific issues related to the exemption:<sup>21</sup>

- *Would a one-time temporary exemption be necessary and sufficient?* No. While a one-time exemption would be better than no exemption, it would be far from sufficient.<sup>22</sup> The

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<sup>21</sup> See Notice at 3.

Bureau should not be under the illusion that the enhanced requirements only impose additional, “start-up” costs. Rather, as discussed above, the burdens on smaller providers to gather, assess, and report material changes are continuing – not one-time. In addition, the purported benefits from the enhanced requirements do not increase over time. For these reasons, a permanent exemption is justified.

- *Would the reduction in compliance burdens for smaller providers benefit consumers?* Yes. As discussed herein, smaller providers do not have personnel dedicated to regulatory compliance. Instead, they detail employees from the operations or administrative jobs to carry out this task, or they use outside consultants and counsel. Without the burden of the enhanced requirements, these resources could be dedicated to “running the business,” including to upgrade broadband facilities and provide additional customer service.

- *Should the provider threshold be lowered from 100,000 broadband connections?* No. Even some ACA members with approximately 100,000 broadband connections do not have dedicated regulatory personnel and in-house counsel. Accordingly, they will need to expend significant additional resources to comply. Moreover, as discussed in *2015 Open Internet Order*,

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<sup>22</sup> While in theory smaller providers could look to the disclosures of larger providers to provide a template to develop their own, the opportunity to review the disclosures of larger operators alone will not mitigate significantly the burden on smaller providers because time and resources are required not just to draft the initial disclosures but to update them regularly so they are tailored to specific current BIAS offerings, business operations and other practices.

there is precedent in the *2013 Rural Call Completion Order* for using this threshold.<sup>23</sup> There is thus a sufficient basis for the Bureau to retain the 100,000 threshold.

In sum, the costs of discontinuing the small provider exemption are significant, and the benefits are *de minimus* at best. Accordingly, the Bureau should make permanent the exemption adopted in the *2015 Open Internet Order*.

Respectfully submitted,



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August 5, 2015

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<sup>23</sup> See *2015 Open Internet Order*, ¶ 173.