

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

Protecting and Promoting the Open Internet) GN Docket No. 14-28
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**REPLY 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 reply comments in response to the Public Notice issued by the Consumer and Governmental Affairs Bureau (“Bureau”)¹ seeking comment on the small business exemption from the enhanced transparency requirements adopted by the Commission in its *2015 Open Internet Order*.² In its initial comments, ACA explained:

- In light of the *2011 Advisory Guidance* issued by the Enforcement Bureau and Office of General Counsel on implementation of the network performance requirements of the transparency rule and compliance by smaller providers,³ the additional obligations in the

¹ 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”).

² 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”).

³ 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”). The guidance allows smaller providers to have sufficient flexibility to meet the rule’s requirements, specifically by permitting them to use alternative methodologies to measure and disclose information about network performance.

enhanced transparency requirements on network performance⁴ may not be unduly burdensome for smaller broadband Internet access service providers.

- Nonetheless, 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.⁵
- Because smaller providers are highly responsive to their customers, the benefits from application of these requirements for their users are not significant.

Accordingly, because the burdens of the enhanced requirements are tangible and significant and the benefit for users are not material, ACA called on the Bureau to make permanent the exemption for providers with fewer than 100,000 broadband connections. Finally, ACA commented that a time-limited exemption would not be acceptable because many of the enhanced requirements are continuing obligations. It also noted that lowering the threshold from 100,000 connections would not be acceptable because even providers with approximately

⁴ There are several key obligations, including to measure and report on packet loss and measure and report on all performance metrics on a more granular, geographic basic.

⁵ In both instances, ACA does not oppose a general obligation to inform and otherwise interact with customers about important network practices, but smaller providers, who best know their customers and have demonstrated compliance with the rule, should have flexibility in determining the specific information to be provided and how it should be disclosed.

100,000 connections do not have dedicated regulatory personnel and in-house counsel and will need to expend significant additional resources to comply.

ACA's view that the exemption should be made permanent was shared by all other commenters.⁶ There was no opposition. In their comments, other parties made the following points in support of making the exemption permanent, with which ACA agrees:

⁶ See Comments of Alaska Communications Systems, GN Docket No. 14-28, Public Notice DA 15-731 (Aug. 5, 2015) ("ACS Comments"); Comments of CTIA – The Wireless Association, GN Docket No. 14-28 (Aug. 5, 2015); Comments of the Education and Research Consortium of the Western Carolinas, Inc., GN Docket No. 14-28 (Aug. 5, 2015) ("ERC Broadband Comments"); Comments of Gogo Inc., GN Docket No. 14-28 (Aug. 5, 2015); Comments of GVNW Consulting, Inc., GN Docket No. 14-28 (Aug. 5, 2015) ("GVNW Comments"); Comments of the National Cable & Telecommunications Association, GN Docket No. 14-28 (Aug. 5, 2015) ("NCTA Comments"); Comments of NTCA-The Rural Broadband Association, GN Docket No. 14-28 (Aug. 5, 2015) ("NTCA Comments"); Comments of the Rural Broadband Provider Coalition, GN Docket No. 14-28 (Aug. 5, 2015); Comments of the Small Rural Carriers, GN Docket No. 14-28 (Aug. 5, 2015); Comments of the United States Telecommunications Association, GN Docket No. 14-28 (Aug. 5, 2015) ("USTelecom Comments"); Comments of the Wireless Communications Association International, GN Docket No. 14-28 (Aug. 5, 2015) ("WCAI Comments"); Comments of the Wireless Internet Service Providers Association, GN Docket No. 14-28 (Aug. 5, 2015) ("WISPA Comments"); and Comments of WTA-Advocates for Rural Broadband, GN Docket No. 14-28 (Aug. 5, 2015).

The U.S. Small Business Administration Office of Advocacy filed reply comments supporting making the exemption permanent. See SBA Office of Advocacy Reply Comments, GN Docket No. 14-28 (Sept. 8, 2015). Of note, the Office of Advocacy stated (at 2-3), "Small businesses typically are unable to absorb increased operating costs to the same extent as larger businesses, and this is one of the chief reasons that the RFA [Regulatory Flexibility Act] requires agencies to examine alternatives to reduce disproportionate regulatory impacts on small entities. Before requiring small broadband providers to comply with the enhanced transparency requirements in the *2015 Open Internet Order*, it should first attempt to mitigate the cost of compliance for small entities and determine whether such costs are justified in light of consumer benefits."

- Because the existing transparency rule is already vague, smaller broadband providers, who lack in-house staff and must retain outside counsel and consultants, find it challenging to comply with the many requirements. Their challenge will only increase with the enhanced requirements, especially since many of the new requirements are ambiguous. Accordingly, it will be even more difficult for smaller providers to understand their responsibilities, let alone determine how best to comply.⁷
- The burdens of the enhanced transparency requirements are significant and are even greater on a per customer basis because of the fixed costs of compliance.⁸
- In light of the enormous penalties that the Enforcement Bureau has sought for alleged violations of the transparency rule, smaller providers either will engage in unnecessary measures out of an abundance of caution or take on incredible risk.⁹
- The Commission has not identified any evidence that customers of smaller ISPs have been harmed by ISP disclosure practices or have not found them sufficient.¹⁰

⁷ See e.g. NCTA Comments at 3; and WCAI Comments at 6.

⁸ See e.g. ACS Comments at 4-6; ERC Broadband Comments at 5-7; NCTA Comments at 5; US Telecom Comments at 3-8; WCAI Comments at 4-6; and WISPA Comments at 3-8.

⁹ See e.g. NCTA Comments at 4; WISPA Comments at 9.

¹⁰ See e.g. GVNW Comments at 3-5; NCTA Comments at 4.

- The costs of imposing the enhanced requirements on smaller providers outweigh the benefits.¹¹
- Customers of smaller ISPs would pay higher fees as the costs of complying with the enhanced requirements are passed on to them.¹²

ACA believes commenters have presented to the Bureau a compelling case for making the exemption permanent. Most importantly, the record demonstrates unequivocally that the costs for smaller providers far outweigh any benefits for users having access to the additional information. In fact, there is no evidence in the record to the contrary. Thus, the Bureau has no basis to reject a grant of a permanent exemption for providers with 100,000 or fewer broadband connections. In fact, on the record before the Bureau failure to maintain the exemption would be arbitrary, capricious and a failure of reasoned decision making.¹³ Finally, should any material, sufficient user concerns arise, the Commission can revisit the exemption and address these concerns by initiating a new proceeding, which can then focus on addressing actual, rather than hypothetical, issues.¹⁴

¹¹ See e.g. GVNW Comments at 3-5; NTCA Comments at 9-12; and USTelecom Comments at 9-10.

¹² See e.g. WISPA Comments at 10-11.

¹³ The Commission cites the temporary exemption as an example of a step taken to minimize the significant economic impact on small entities of its *2015 Open Internet Order*. See *2015 Open Internet Order*, Appendix B, Final Regulatory Flexibility Analysis, ¶ 60. Failure to make the exemption permanent may adversely impact review of the transparency enhancements under the Paperwork Reduction Act by the Office of Management and Budget.

¹⁴ In adopting the transparency rule in 2010, the Commission concluded that the best approach is to allow flexibility in its implementation while providing from time-to-time

Respectfully submitted,

guidance of effective disclosure models. ACA appreciates the value of this approach in an industry where practices and services are in flux; however, this flexible approach poses a problem for smaller providers who often lack the resources to understand and react to complex and changing regulatory requirements. ACA, therefore, urges the Commission to address this problem by adding another component to its implementation framework for the transparency rule – separate and apart from making permanent the small business exemption: the opportunity for a smaller broadband provider, upon a determination by the Commission that the provider is not in compliance with the transparency rule, to cure within a reasonable time the shortcoming in the information disclosed or the method by which it is disclosed and not be found in violation of the rule. By instituting this procedure, the Commission would create an environment where smaller providers would seek to comply with both the spirit and letter of the transparency rule, which would benefit the provider’s users while alleviating undue burdens on the provider.



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