

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400

3050 K STREET, NW

WASHINGTON, D.C. 20007-5108

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

NEW YORK, NY

LOS ANGELES, CA

CHICAGO, IL

STAMFORD, CT

PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES

MUMBAI, INDIA

DIRECT LINE: (202) 342-8518

EMAIL: tcohen@kelleydrye.com

October 2, 2015

Via ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Filing of the American Cable Association on Protecting and Promoting the Open Internet, GN Docket No. 14-28, and the Consumer and Government Affairs Bureau's Public Notice, DA 15-731, on the Small Business Exemption from the Open Internet Enhanced Transparency Requirements

Dear Ms. Dortch:

On September 30, 2015, Ross Lieberman, Senior Vice President of Government Affairs, and Mary Lovejoy, Vice President of Regulatory Affairs, American Cable Association (ACA),¹ Barbara Esbin, Cinnamon Mueller, Counsel to ACA, and Thomas Cohen, Kelley Drye & Warren LLP, Counsel to ACA, met with the following Commission staff: Claude Aiken, Office of General Counsel, Scott Jordan, Office of Strategic Planning & Policy Analysis, Mark Stone, Consumer & Governmental Affairs Bureau, Madeleine Findley, Wireline Competition Bureau, Michael Janson and Daniel Ball, Wireless Telecommunications Bureau, and Jennifer Epperson, Enforcement Bureau. The purpose of the meeting was to discuss the Commission's

¹ ACA represents approximately 800 local broadband service providers (Internet service providers (ISPs)), 700 of which have fewer than 100,000 broadband customers and that approximately 680 of these providers have fewer than 20,000 broadband customers. Virtually none of these smaller providers have in-house counsel or other personnel dedicated to addressing regulatory matters, and thus they would need to hire outside attorneys and consultants to address compliance with the enhanced transparency requirements.

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Transparency Rule² and implementation of the *2015 Open Internet Order's* enhanced transparency requirements.³ Earlier this year, ACA filed comments in the Commission's Paperwork Reduction Act (PRA) proceeding reviewing the enhanced transparency requirements⁴ and in the Commission's proceeding considering the temporary small business exemption from these requirements.⁵ For this meeting, ACA focused on two proposals: first, the Commission should affirm that the *2011 Guidance*⁶ regarding use of alternative approaches to comply with the performance characteristics set forth in the Transparency Rule applies to the enhanced

² 47 C.F.R. § 8.3.

³ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28, ¶¶ 154-184 (rel. Mar. 9, 2015) ("2015 Open Internet Order"). The Commission's discussion of the enhanced transparency requirements is contained within Section III.C.3.b of the *2015 Open Internet Order* ("Enhancing the Transparency Rule," ¶¶ 162-181) and includes Section III.C.3.b.i, "Enhancements to Content of Required Disclosures," Section III.C.3.b.ii, "Enhancements to the Means of Disclosure," Section III.C.3.b.iii, "Small Business," and Section III.C.3.b.iv, "Safe Harbor for Form of Disclosure to Consumers." Accordingly, ACA considers all transparency requirements set forth in this section to be enhanced transparency requirements regardless of whether the text refers to them as enhancements or clarifications or further clarifications.

⁴ *Notice of Information Collection Being Reviewed by the Federal Communications Commission*, 80 Fed. Reg. 29000 (rel. May 20, 2015) ("PRA Notice"). See Comments of the American Cable Association, *Protecting and Promoting the Open Internet and Notice of Information Collection*, GN Docket No. 14-28 and OMB Control No. 306-1158 (July 20, 2015) ("ACA PRA Comments").

⁵ *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). See Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements, GN Docket No. 14-28 (Aug. 5, 2015); Reply Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements, GN Docket No. 14-28 (Sept. 9, 2015) ("ACA Reply Comments"). See also *Ex Parte* Filing of the American Cable Association on *Protecting and Promoting the Open Internet et al.*, GN Docket No. 14-28 *et al.* (Aug. 20, 2015). (Collectively, "ACA Small Business Exemption Filings")

⁶ 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 at 5 (2011) ("2011 Guidance").

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performance characteristic requirements; and, second, the Commission should adopt a process whereby ISPs can cure a failure to comply with Transparency Rule, including the enhanced requirements.

ACA's Longstanding Concerns about the Transparency Rules's Burdens on Smaller ISPs –

From the start of the Open Internet proceedings in 2009, ACA has argued that the transparency obligations impose substantial burdens on ISPs and these burdens must be balanced against the potential benefits for their users. For smaller ISPs, who often do not have dedicated in-house regulatory personnel and who tend to follow the technology leadership of larger providers and to invest fewer resources in network equipment than larger providers, burdens associated with extensive and complex transparency requirements can be particularly onerous. In addition, the benefits achieved from imposing the panoply of requirements on smaller ISPs are less because these providers tend to have a closer relationships with, and thus are already more responsive to, their users. Further, smaller ISPs cannot leverage upstream edge providers.

ACA raised its concerns that the transparency requirements would impose undue burdens on smaller ISPs when the Transparency Rule was adopted in 2010 and then in 2011 during the Paperwork Reduction Act review process.⁷ ACA believes the Commission provided a reasonable response when it issued the *2011 Guidance* covering, among other things, alternative means of compliance to measure and disclose performance characteristics. ACA again raised its concerns about the burdens on smaller ISPs as the Commission considered enhancements to the Transparency Rule. The Commission sought to address these concerns in the *2015 Open Internet Order* by providing a temporary exemption from the enhancements and is considering making the exemption permanent in the proceeding underway.

ACA's Concerns Regarding Implementation of the Enhanced Transparency Requirements and Enforcement of the Transparency Rule –

The FCC has a series of efforts underway and may initiate others to address implementation of the enhancements to the Transparency Rule and to provide further direction on the implementation and enforcement of the Transparency Rule. These include the PRA and small business exemption proceedings, as well as the Commission's Chief Technology Officer's examination of performance measurement methodologies⁸ and the

⁷ See Letter from Ross Lieberman, Vice President of Government Affairs, ACA, *et al.* to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 (June 8, 2011).

⁸ See *2015 Open Internet Order*, ¶ 166. ACA notes that the Commission is regularly updating the information it collects and analyzes as part of its *Measuring Broadband America Reports*, which it relies upon to some extent in implementing the transparency requirements.

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Consumer Advisory Committee’s work to develop a consumer-focused disclosure which would act as a “voluntary safe harbor.”⁹

As discussed above, ACA filed comments in the PRA proceeding and small business exemption proceeding. In the PRA proceeding, ACA explained that ISPs that do not participate in the Measuring Broadband America process use the *2011 Guidance* to comply with the existing performance characteristics requirements and that application of this guidance to the enhanced performance characteristics requirements will lessen burdens for these ISPs.¹⁰ ACA also explained that the enhanced disclosures on commercial terms and network practices place burdens upon, and therefore pose concerns for, smaller ISPs in their own right.¹¹ For the small business exemption, ACA demonstrated in its filings that a permanent exemption is warranted.¹² ACA also noted that both comment rounds in the small business exemption proceeding have been completed and that every commenter favored a permanent exemption, i.e. there was no opposition, and therefore the Commission has no record to decline to make the exemption permanent.¹³

As the Commission continues its implementation of the enhanced transparency requirements – and its efforts to refine collections and disclosures pursuant to the Transparency Rule, ACA believes it should adopt the following two proposals – one dealing with implementation and one enforcement.

⁹ See *id.*, ¶¶ 179-181.

¹⁰ See ACA PRA Comments at 4-5.

¹¹ See *id.* at 5-8.

¹² See ACA Small Business Exemption Filings.

¹³ See ACA Reply Comments at 5 (“More 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.). ACA notes that all reply comments also supported making the exemption permanent.

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1) The Commission should affirm that the 2011 Guidance applies to the enhanced requirements for disclosure of performance characteristics.

The Commission noted in the *2015 Open Internet Order* that the enhanced transparency requirements were built off a baseline of the 2010 transparency requirements and the *2011 Guidance* and *2014 Guidance*.¹⁴ The *2011 Guidance* set forth alternative methodologies smaller providers could use to measure and report on network performance:

“Providers that have not participated in the performance measurement project to date may use the methodology developed through the project – which will be released along with the project’s initial results – to measure the actual performance of their broadband offerings. Alternatively, 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.”

Use of these alternative methodologies has proven beneficial for these providers and has not harmed consumers or undermined the aims of the Transparency rule, as demonstrated by the lack of consumer complaints about the disclosures.

The enhanced requirements for performance characteristics include – requirements to measure and report on packet loss and on performance metrics on a localized basis and over a reasonable period of time and during times of peak usage. Because in the *2015 Open Internet Order* the Commission sought to “build off” the *2011 Guidance*, it appears to be the Commission’s intent that guidance’s discussion of using alternative approaches to comply with the performance characteristics requirements applies to the enhancements.¹⁵ So long as this is the case, ISPs who

¹⁴ See *2015 Open Internet Order*, ¶ 161 (“Today, we build off of this baseline: the transparency rule requirements established in 2010, and interpreted by the *2011* and *2014 Advisory Guidance*.”).

¹⁵ The *2015 Open Internet Order* also relies on the *2011 Guidance* in footnote 411 discussing the Measuring Broadband America program and alternative testing methodologies. See also ¶ 185 (“The *2011* and *2014 Advisory Guidance* documents illustrate the role of further guidance from Commission staff in interpreting and applying the general requirements of the transparency rule. We anticipate that as technology, the marketplace, and the needs of consumers, edge providers, and other stakeholders evolve, further such guidance may be appropriate concerning the transparency rule, including with respect to the enhancements adopted today. The most immediate example concerns ongoing improvements and evolutions in the methodologies for measuring broadband providers’ actual performance.”).

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use the alternative approaches will find that their burdens from implementing the enhanced transparency requirements related to performance characteristics will be significantly less than they would be otherwise. However, even with the Commission's statement in the *2015 Open Internet Order*, ISPs have informed ACA that should the *2011 Guidance* not apply as expected, they would need to expend substantial time and incur substantial costs to deploy equipment used by ISPs that are part of the Measuring Broadband America program to comply with the enhanced performance characteristics. Given that this task will be so time-consuming and costly, ACA and its members believe it would be in the public interest for the Commission to make it inarguably clear that the *2011 Guidance* applies to all the enhanced network performance requirements, i.e. the measurement of packet loss and actual performance in terms of speed, latency and packet loss over a reasonable time and a times of peak usage and by geographic area.

During the discussion of this proposal at the meeting, Commission staff inquired about the manner by which different ISPs that do not participate in the Measuring Broadband America program measure and disclose their network performance characteristics as required by the Transparency Rule. Cable operators that do not participate in the Measuring Broadband America program and that use DOCSIS technology to provide broadband Internet access service measure and disclosure actual speed and latency in various ways. For instance, some operators may have a disclosure that discusses their network's engineered performance characteristics, notes that actual network conditions can vary, and refers to the results in the Measuring Broadband America for cable operators using similar technology to disclose actual speed and latency. Other operators might provide internal testing data on mean performance and enables their customers to use a performance speed test installed on their network, which can be accessed without charge. From discussions with its members, ACA has found that, in addition to posting a disclosure, operators are responsive to customer inquiries and issues regarding the performance of their broadband service. This has proven to be particularly useful to determine whether the source of a problem is the ISP's network or equipment on the customer's premises, allowing the operator to better address the issue.

2) The Commission should issue an advisory providing ISPs, particularly smaller ISPs, with an opportunity to cure an alleged failure to comply with the transparency requirements.

To date, the Commission has treated implementation of the Transparency Rule and the enhanced transparency requirements as a process and has provided ISPs with flexibility to fashion their own disclosures with occasional Commission guidance.¹⁶ ACA recognizes there are advantages to this approach in the dynamic broadband sector; however, ISPs find that this flexible approach

¹⁶ See e.g. *2011 Guidance* at 1.

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does not provide sufficient certainty as to their disclosure obligations – and the potential liability for non-compliance may be substantial. In addition, smaller ISPs usually lack personnel dedicated to following Commission decisions and other actions and thus may face additional uncertainty because they are not cognizant of the latest rulings and interpretations. Accordingly, ACA proposes that the Commission issue an advisory providing that an ISP can cure a failure to comply with the transparency requirements within a reasonable time so long as its failure to comply is not due to any malfeasance or willful and repeated act. For example, the Commission could apply the cure process to FCC-initiated investigations and require that the Enforcement Bureau, upon issuance of a Notice of Apparent Liability identifying the specific violation, give the ISP a reasonable time to come in compliance before it moves to the next phase in the enforcement process.

Should you have any questions about the discussion and proposals set forth herein, please contact me.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules.

Sincerely,



Thomas Cohen
Kelley Drye & Warren, LLP
3050 K Street N.W.
Washington, DC 20007
202-342-8518
tcohen@kelleydrye.com
Counsel for the American Cable Association

cc: Claude Aiken
Scott Jordan
Mark Stone
Madeleine Finley
Michael Janson
Daniel Ball
Jennifer Epperson