

**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

November 13, 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: the Connect America Fund, WC Docket No. 10-90; and 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 November 10, 2015, Ross Lieberman, Senior Vice President of Government Affairs, American Cable Association (“ACA”), and the undersigned, Thomas Cohen, Kelley Drye & Warren LLP, Counsel to ACA, met with Rebekah Goodheart, Legal Advisor to Commissioner Clyburn. The purpose of the meeting was to discuss: the Connect America Fund (“CAF”) Phase II competitive bidding process and the order on circulation to establish a framework for that process; and, the Commission’s implementation of the *2015 Open Internet Order*’s enhanced transparency requirements, including the small business exemption.<sup>1</sup>

---

<sup>1</sup> *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, ¶¶ 154-184 (rel. Mar. 12, 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.” ACA considers all transparency requirements set forth in this section to be enhanced transparency

Marlene H. Dortch  
November 13, 2015  
Page Two

### **Connect America Fund Phase II Competitive Bidding Process**

The Commission is considering an order setting forth a framework for the CAF Phase II competitive bidding process. Here, a key concern of the Commission and ACA jibes: both want to maximize participation by service providers in the process. For the Commission, an auction cannot drive prices in all eligible areas to their most efficient level without maximum participation. For ACA, which represents many experienced network and service providers operating in or near eligible areas, the auction presents an opportunity for these providers to offer service to new customers and increase the size of their businesses.

ACA understands that the Commission needs to strike a balance between seeking to maximize participation and maintain the integrity of the process by ensuring that only “serious” applicants participate. In setting forth the framework for the competitive bidding process, the Commission has sought to use lessons learned in the Rural Broadband Experiments process and other auctions to refine the qualifications that service providers must meet to participate. However, from ACA’s understanding of the proposed financial requirements to participate in the auction, they are needlessly onerous for smaller providers, particularly when there are less burdensome options available that also could ensure applicants are “serious.”

For experienced service providers, the Commission is proposing that providers submit in advance of bidding one year of audited financials and that winners submit a Letter of Credit (“LoC”) from a “top 100 bank” that has a Triple B or better credit rating and that is insured by the FDIC or FCSIC. These qualifications may work for larger providers, especially those that are public and have relationships with major banks, but for hundreds of ACA’s smaller providers, they are a “hill too high to climb,” thus effectively eliminating their participation in the auction.

The Commission should understand that many private providers – and virtually all smaller private providers – have not needed audited financials. According to ACA members, audited financials are required from businesses when they request a large loan or some other form of debt (often higher than \$5 million) and they are not willing to sign personally. However, should an ACA member need a smaller-sized loan, it turns to community banks, which have a history of providing loans to long-standing businesses in the community, particularly when the operator is willing to sign personally. Should they need to produce collateral for a government franchiser, they often only need to put money in escrow. These smaller providers have been

---

requirements regardless of whether the text refers to them as enhancements or clarifications or further clarifications.

Marlene H. Dortch  
November 13, 2015  
Page Three

operating this way for decades, successfully providing communications services to their communities. Not having audited financials for these members is not a sign they are not operating financially sound businesses or that they are a credit risk.

Further, producing audited financials is costly and time-consuming. First, an entity needs to re-work its financials to GAAP standards. Then, it undergoes the audit, which can prove especially taxing the first time around. From discussions with ACA members, we understand this initial work will take approximately one year to complete and cost between \$50,000-\$100,000. Subsequent annual audits will cost between \$25,000-\$50,000. According to ACA members, many community banks and others who deal with those without financial audits understand these burdens and are willing to extend credit to these entities without financial audits. That said, the efforts undertaken and costs incurred by smaller providers to produce audited financials should be placed in the proper context: they only permit smaller providers to bid in the auction; if they do not prevail, spending all of this time and money will be for naught.

The LoC process, even with the proposed refinements to lessen the amount required as network infrastructure is deployed and service provided, also is far too burdensome for smaller providers. As noted above, smaller providers have relationships with community – not top 100 – banks. This is not only driven by longstanding relationships within a community, it has a sound financial basis. Big banks do not want to make small loans (or loan commitments); it is inefficient and not that profitable. Smaller providers in turn are loathe to pay the high fees big banks demand. The Commission may want the two parties to conjugate, but short of a shotgun wedding, this will not happen. In the end, the burdens of obtaining the LoC will fall upon smaller providers who will pay to get the attention of large banks that are neither interested nor required to deal with them. This is unfair and not necessary to achieve the Commission's objectives.

ACA understands the Commission's concerns that only serious applicants participate in the competitive bidding process and that providers should not be permitted to bid for substantial amounts of support when they are not required to meet the financial requirements above minimum thresholds. However, for smaller providers, particularly ones committing to seek lower levels of support in nearby areas, the Commission can and should establish qualifications reflecting this status. The Commission, for instance, could require these providers to submit "Reviewed," not "Audited," financials or permit them to place an amount of money in escrow to indicate they have sufficient financial wherewithall to implement the build should they win. As for the LoC, the Commission could permit smaller providers to obtain LoCs from smaller, financially sound banks or to forgo supplying a LoC and place an additional amount in escrow

Marlene H. Dortch  
November 13, 2015  
Page Four

should they win, which would be forfeited if they do not deploy according to the rules.<sup>2</sup> To further limit the risk that smaller providers would not be financially qualified yet encourage their participation, the Commission can limit the opportunity for alternative financial qualifications to providers that qualify as small,<sup>3</sup> commit to seeking a limited amount of support in the auction,<sup>4</sup> and only bid for areas relatively close to their existing service territories.<sup>5</sup> In any event, ACA suggests the Commission, should it not want to adopt one of these proposals immediately, tee up the question in the proceeding that will follow this order. This would give it time to fashion financial qualifications that encourage “serious” smaller providers to participate to the maximum extent in the competitive bidding process.

### **Implementation of the Enhanced Transparency Rule and the Small Business Exemption**

The Commission has a number of proceedings underway dealing with implementation of the enhanced transparency rule, including the Paperwork Reduction Act (“PRA”) proceeding reviewing the enhanced transparency requirements<sup>6</sup> and the proceeding considering the temporary small business exemption from these requirements.<sup>7</sup> In both proceedings, ACA filed comments arguing that the burdens of any transparency obligations imposed on ISPs should be

---

<sup>2</sup> There is almost certain to be some “number” (amount of money) placed in escrow that would properly balance the interests of the Commission and smaller providers.

<sup>3</sup> For instance, these alternative financial qualifications could apply to a small provider with fewer than 5,000 subscribers that seeks to bid on a single census block adjacent to its existing service territory.

<sup>4</sup> For instance, smaller businesses that need to borrow more than \$5 million dollars typically turn to larger banks and produce financial audits. Lesser amounts can be done without audited financials and through community banks.

<sup>5</sup> This requirement will reduce the chances that applicants will be speculators who may bid on areas unfamiliar to them.

<sup>6</sup> *Notice of Information Collection Being Reviewed by the Federal Communications Commission*, 80 Fed. Reg. 29000 (rel. May 20, 2015) (“PRA Notice”).

<sup>7</sup> *Consumer and Government 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. June 22, 2015). Other enhanced transparency-related activities include the Commission’s Chief Technology Officer’s examination of performance measurement methodologies and the Consumer Advisory Committee’s work to develop a consumer-focused disclosure which would act as a “voluntary safe harbor.”

Marlene H. Dortch  
November 13, 2015  
Page Five

balanced against the potential benefits for their users.<sup>8</sup> 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, the 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 owners and employees of these providers tend to be engaged with their communities, and thus more responsive to, their users. Accordingly, ACA called for the Commission to make permanent the small business exemption and, in doing so, affirm that the *2011 Guidance*<sup>9</sup> regarding use of alternative approaches to comply with the performance characteristics set forth in the Transparency Rule applies to the enhanced performance characteristic requirements.

Since filing comments, ACA representatives have met with Commission staff to continue a dialogue on implementation of the enhanced transparency requirements and to argue that the small business exemption, which has met with no opposition from any interested party, be made permanent.<sup>10</sup> These discussions have been productive. Commission staff also have been responsive to recent requests for status updates on the matter. However, with respect to sharing substantive information, the process has been opaque. Even though the December 15th deadline for action on the small business exemption is fast approaching and despite requesting information, ACA and other interested parties with whom it has been in contact have not been informed of any proposals under consideration – or for that matter, whether the Commission

---

<sup>8</sup> See *Protecting and Promoting the Open Internet, Notice of Information Collection*, GN Docket No. 14-28 and OMB Control No. 306-1158, Comments of the American Cable Association (July 20, 2015) (“ACA PRA Comments”); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements (Aug. 5, 2015); *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Reply Comments of the American Cable Association on the Small Business Exemption from Open Internet Enhanced Transparency Requirements (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”).

<sup>9</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, 9415 (2011) (“2011 Guidance”).

<sup>10</sup> See, e.g., Letter from Thomas Cohen, Counsel to the American Cable Association, to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 14-28 (Oct. 2, 2015).

KELLEY DRYE & WARREN LLP

Marlene H. Dortch  
November 13, 2015  
Page Six

staff has any questions about the consequences of particular actions. This is troubling since, should the Consumer and Government Affairs Bureau not extend the temporary exemption, it will have, as demonstrated in the many comments and *ex parte* filings, a deleterious effect on smaller ISPs. Since Commissioner Clyburn was a strong proponent of the exemption, ACA representatives asked that she become involved to assist in ensuring that all Commission actions implementing the enhanced transparency requirement are themselves “transparent.”

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: Rebekah Goodheart