

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Protecting the Privacy of Customers of Broadband) WC Docket No. 16-106
and Other Telecommunications Services)
)

To: The Commission

MOTION FOR EXTENSION OF TIME

The American Cable Association, Consumer Technology Association, CTIA[®], Internet Commerce Coalition, National Cable & Telecommunications Association, U.S Telecom Association, and Wireless Internet Service Providers Association (collectively “Petitioners”), pursuant to Section 1.46 of the Commission’s rules,¹ respectfully requests a 45-day extension of the time for filing comments and a reply comment period of 75 days in the above-captioned proceeding. The Notice of Proposed Rulemaking (“*Notice*”)² provides a mere 57 days for initial comments and only an additional 30 days for reply comments for an extremely complex and far-reaching *Notice* with over 500 questions³ that has ramifications for the entire online ecosystem – a significant driver of the U.S. economy.

I. INTRODUCTION

Petitioners agree with the Association of National Advertisers (“ANA”) that an extension of time is warranted because the *Notice* “contains numerous proposed requirements with

¹ 47 C.F.R. § 1.46.

² *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106, FCC 16-39 (rel. Apr. 1, 2016) (“*Notice*”).

³ See *Notice* at 137 (Statement of Commissioner Jessica Rosenworcel).

potentially complex impacts regarding the privacy of collected and user data” and that “[b]ecause the potential implications of the NPRM for advertising and marketing interests are significant and far-reaching, they require sufficient and thoughtful analysis.”⁴ Contrary to the claims made in the lone opposition filed,⁵ ANA’s request is far from “extraordinary” given the potentially substantial impact of the proposed rules on consumers and broadband Internet access service (“BIAS”) providers, many other entities participating in the online advertising system (e.g., advertisers, ad networks, thousands of companies that offer online promotions and discounts to consumers), and the public interest. The *Notice* proposes to establish sweeping and unprecedented privacy, data security, and data breach rules for BIAS providers that raise difficult and complex legal, technical, and policy issues with broader implications for the complicated Internet ecosystem and online advertising marketplace.⁶ The Commission seeks to impose comprehensive and onerous requirements on a service that never before was subject to FCC privacy, data security, or data breach rules, let alone a set of rules as prescriptive and burdensome as those proposed in the *Notice*.⁷ Moreover, many of the issues teed up in the

⁴ Request for Extension of Time, Assoc. of Nat’l Advertisers, WC Docket No. 16-106 (filed Apr. 12, 2016).

⁵ Opposition to Request for Extension of Time, WC Docket No. 16-106 (filed Apr. 14, 2016).

⁶ See, e.g., the White House, *Consumer Data Privacy in a Networked World: A Framework for Protecting privacy and Promoting Innovation in the Global Digital Economy*, at 23 (Feb. 2012) (noting that the technical and policy dimensions of Internet policy issues often are intertwined and that “the United States will need to confront a *broad, complex, and global set of consumer data privacy issues for decades to come*”) (emphasis added); see also *Notice* at 137 (Statement of Commissioner Jessica Rosenworcel) (noting contradictions that “make privacy complicated”); *id.* at 142 (Dissenting Statement of Commissioner Michael O’Rielly) (“[T]hese issues can be very complex.”).

⁷ Commenters had no way to know – and no way to prepare for – the specifics and level of granularity of the proposals and questions in the *Notice* based on a six-paragraph discussion of forbearance in the Commission’s *Open Internet Order* last year. See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd

Notice are detailed and complicated, such as how to define key technical terms⁸ and how to address aggregation, de-identification, and re-identification of data.⁹ By way of comparison, when the Federal Trade Commission last updated its Children’s Online Privacy Protection Rule – a proceeding involving complex, but far more narrow privacy issues and not involving the creation of an entirely new regime – the agency provided 99 days for comment on proposed amendments, extended from 78 days due to commenters’ concerns regarding “the nature and complexity of the questions and issues raised by the proposed amendments.”¹⁰

In addition to the complex and novel issues raised, an extension of time is also appropriate in recognition of the hardship placed on commenters, particularly smaller providers, who are simultaneously subject to comment deadlines falling around the same date in several

5601, 5820-24 ¶¶ 462-467 (2015) (“*Open Internet Order*”). Adding to the complexity of the legal issues involved in this proceeding, the D.C. Circuit could rule imminently on the *Open Internet Order*, impacting whether Section 222 of the Communications Act even can be applied to BIAS providers.

⁸ For example, the *Notice* seeks comment on issues that require technical, legal, and other considerations, such as whether port information, application headers, application usage, and customer premises equipment information should be included in the definition of customer proprietary network information. *See Notice* ¶ 48. Moreover, the *Notice* acknowledges the “interplay between commenters’ proposals about what substantive rules [the Commission] should adopt to protect BIAS customers’ privacy interests and how [the Commission] should define key terms,” a fact that necessarily makes commenters’ responses that much more nuanced and complicated. *See id.* ¶ 28.

⁹ *See id.* ¶ 154 (acknowledging the “complexity of issues surrounding aggregation, de-identification, and re-identification”).

¹⁰ Press Release, FTC, *FTC Extends Deadline for Comments on Proposed Amendments to the Children’s Online Privacy Protection Rule Until Dec. 23* (Nov. 18, 2011), <https://www.ftc.gov/news-events/press-releases/2011/11/ftc-extends-deadline-comments-proposed-amendments-childrens>. Prior to proposing amendments, the FTC had provided 90 days for comment on the narrow question whether the FTC should retain, eliminate, or modify sections of the Rule, which had been extended a month further in light of mistaken deadline on the comment submission form. Press Release, FTC, *FTC Extends Public Comment Period for COPPA Rule Review until July 12, 2010* (July 2, 2010), <https://www.ftc.gov/news-events/press-releases/2010/07/ftc-extends-public-comment-period-coppa-rule-review-until-july-12>.

additional significant FCC proceedings.¹¹ For these reasons, the Commission should grant the requested extension.

II. THE COMPLEX AND UNPRECEDENTED NATURE OF THE ISSUES RAISED IN THE *NOTICE* WARRANT AN EXTENSION OF TIME

While 47 C.F.R § 1.46(a) establishes that the Commission does not routinely grant extensions of time, the agency has demonstrated a willingness under past and current leadership do so on multiple grounds – all of which are present here. The Commission has historically granted extensions in proceedings with far lengthier initial comment deadlines than the current proceeding – including in proceedings where the initial comment deadline had not yet passed, and intervening facts had not changed.¹² The agency has based such decisions on a number of considerations, including, for example, the need to produce a full and complete record,¹³ to allow parties to better address technically complex and complicated questions,¹⁴ and to ensure that

¹¹ See *infra* Section III.

¹² See, e.g., *Closed Captioning of Video Programming et al.*, Order, 29 FCC Rcd 7336, 7337 ¶ 2 (2014) (granting a petition to extend a 90-day comment deadline to accommodate the fact that a number of parties to the proceeding were also “currently working on a separate Commission proceeding”); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges*, 26 FCC Rcd 15645, 15645-46 ¶ 2 (2011) (granting a two-week extension to a 90-day reply comment period due to adjacency – not even overlap – of the deadline with a NASUCA conference).

¹³ *Appropriate Method for Determining the Protected Contours for Grandfathered 3650-3700 MHz Band Licensees*, Public Notice, 30 FCC Rcd 14049, 14050 ¶ 3 (2015) (extending the 48/14 day comment/reply deadline by 18 and 14 days, respectively, to obtain “a complete and thorough record on the issues”); *Close Captioning of Internet Protocol-Delivered Video Programming*, Order, 28 FCC Rcd 12338, 12339 ¶ 2 (2013) (extending both the 90-day comment deadline and the 120-day reply comment deadline by two weeks each to facilitate the “development of a more complete record”).

¹⁴ *Expanding Consumers’ Video Navigation Choices et al.*, Order, MB Docket No 16-42, CS Docket No. 97-80, DA 16-289, at 2 ¶ 3 (Mar. 17, 2016) (extending the 48-day comment deadline by 18 days to “ensure that parties have enough time to file comments” and to “ensure that the Commission obtains a complete and thorough record on the issues”); *Special Access for Price Cap Local Exchange Carriers et al.*, 30 FCC Rcd 12298, 12300 ¶ 7 (2015) (extending the 63-day

parties can meet competing deadlines in other ongoing proceedings.¹⁵ On more than one occasion, the Commission has even granted requests for extensions to accommodate deadlines falling on or around related trade shows.¹⁶

As discussed in more detail below, all four of these criteria that the agency has previously found independently sufficient to justify an extension are present in this proceeding. Where one rationale is sufficient, four is a surfeit. Allowing parties to this proceeding adequate time to develop a record is particularly important in this case, as it brings into the fold new entities and services that historically have not been regulated by the Commission. Especially given the lack of a *Notice of Inquiry* in this proceeding – and the impossibility of knowing the details that would be contained in the agency’s actual proposal – it is critical the Commission extend the comment deadlines.

comment deadline by 47 days to “improve the quality of analysis of issues and data being considered”); *Appropriate Method for Determining the Protected Contours for Grandfathered 3650-3700 MHz Band Licensees*, Public Notice, 30 FCC Rcd 14049, 14050 ¶ 3 (2015) (extending the 48-day comment deadline by 18 days to “allow parties to fully address the complicated issues”).

¹⁵ *2014 Quadrennial Regulatory Review et al.*, Order, 29 FCC Rcd 7911, 7913 ¶ 5 (2014) (extending the 45/75 day comment/reply comment deadlines by 30 and 35 days, respectively, given the “complexity of the pending issues” and “competing deadlines in other proceedings”); *Closed Captioning of Video Programming et al.*, Order, 29 FCC Rcd 7336, 7337 ¶ 2 (2014) (granting a petition to extend a 90-day comment deadline to accommodate the fact that a number of parties to the proceeding were also “currently working on a separate Commission proceeding”).

¹⁶ *Extension of Deadlines for Comments and Reply Comments on Interpretation of the Term “Multichannel Video Programming Distributor” and “Channel” as Raised in Pending Program Access Complaint Proceeding*, 27 FCC Rcd 4190, 4190 ¶ 2 (2012) (granting a two-week extension to a 30-day comment deadline due to overlap with the NAB trade show); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges*, 26 FCC Rcd 15645, 15645-46 ¶ 2 (2011) (granting a two-week extension to a 90-day reply comment period due to adjacency – not even overlap – of the deadline with a NASUCA conference); *Review of the Emergency Alert System*, Order, 25 FCC Rcd 1849, 1849 ¶¶ 2-3 (granting a two-week extension both to the comment and reply comment deadlines of a proceeding due to its overlap with a joint NAB and National Alliance of State Broadcasters summit).

In light of the extensive precedent favoring extensions of time in circumstances comparable to and even less compelling than those presented here, granting the instant request would not be “extraordinary” in any way.¹⁷ In contrast, denying this extension would be an unexplained departure from established Commission practice. Further, the undisputed importance of these issues is no justification for rushing to the finish line without ample opportunity for public comment and discussion of the issues raised in the *Notice*.¹⁸ Rather, it is precisely *because* this proceeding is so significant that the Commission should ensure adequate opportunity for all stakeholders to properly analyze and comment on its proposals. Furthermore, while the Commission is seeking comment on detailed privacy and data security rules in this proceeding, BIAS providers are currently subject to Section 222 of the Communications Act and the Enforcement Bureau has indicated its intention to enforce Section 222 “during the time between the effective date of the Open Internet Order and any subsequent Commission action providing further guidance and/or adoption of regulations applying Section 222 more specifically to BIAS.”¹⁹ Thus, moving forward with undue haste under the guise of consumer protection is unnecessary and should not be done at the expense of providing ample time for public comment.

Finally, it is inaccurate to suggest that the public has had any sort of meaningful longstanding notice about the Commission’s proposals, such that its tight schedule poses no burdens. The opponents of an extension of time rely on paragraph 462 of the *Open Internet Order*, in which the Commission declined to forbear from applying Section 222 of the Act to

¹⁷ Opposition to Request for Extension of Time, WC Docket No. 16-106, at 1 (filed Apr. 14, 2016).

¹⁸ *Id.* at 2.

¹⁹ *FCC Enforcement Advisory, Enforcement Bureau Guidance: Broadband Providers Should Take Reasonable, Good Faith Steps to Protect Consumer Privacy*, Enforcement Advisory No. 2015-03, DA 15-603 (EB Rel. May 20, 2015).

broadband Internet access service.²⁰ However, a statement that some as-yet-unadopted rules will at some point apply is *not* the same as constructive notice of the shape and contour of what rules the agency will propose or how they might apply – as indicated by the Commission’s 500-plus questions on substance and implementation. If the scant six paragraphs addressing this subject in the *Open Internet Order* were enough,²¹ the voluminous *Notice* itself would be entirely redundant. Even if one could have foreseen the extensive and complex issues that would be raised in the *Notice* with respect to the proposed rules for BIAS providers, which again, we respectfully submit was not possible, especially in light of the unprecedented, complex, and onerous nature of the proposed rules, the *Notice* goes much further by asking whether these rules should also be extended to legacy voice CPNI rules and cable and satellite providers in the name of “harmonization” – something which the *Open Internet Order* never contemplated, let alone communicated to the public. These points alone raise entirely new, complex, and disconcerting issues that stakeholders need to study before they can provide thoughtful comment. Thus, there is nothing of substance that would preclude the Commission from adhering to its precedent and granting the relief sought here.

III. COMPETING DEADLINES IN SEVERAL CONCURRENT PROCEEDINGS OF WIDESPREAD IMPORTANCE WILL IMPOSE SIGNIFICANT HARDSHIPS ON ALL STAKEHOLDERS, PARTICULARLY SMALL AND MID-SIZED ENTITIES

These deadlines are even less reasonable in light of the number of other concurrent proceedings in which many if not most of the same parties simultaneously will be submitting comments or pursuing other actions in response to Commission initiatives. Indeed, the current pleading cycle overlaps with a variety of competing deadlines in dockets that rival this one in

²⁰ *Open Internet Order* 5820 ¶ 462 (2015).

²¹ *Id.* 5820-24 ¶¶ 462-67.

terms of their complexity and that represent some of the Commission’s top priorities and the most pressing issues in communications policy today, including the following:

- The rulemaking on the Commission’s proposals concerning video navigation devices – itself a highly complex matter that implicates the interests of a wide array of stakeholders and a number of difficult policy challenges (including important issues of privacy)²² – for which comments are due on April 22 and reply comments on May 23 (the same week as initial comments in this proceeding).
- The rulemaking on the Commission’s proposed revisions to strengthen the Emergency Alert System, including a focus on “several issues that reflect the extent to which evolving technologies are changing the alerting landscape”²³ – for which comments are due May 9 and reply comments are due June 7.
- The anticipated rulemaking intended to usher in a “new regulatory framework” for special access services (or “business data services”),²⁴ which is expected to be on the agenda for the April 28 meeting with a comment cycle commencing not long thereafter.
- A period of substantial incentive auction-related activity, including the expected announcement of the initial spectrum clearing target in late April to early May, the release of a public notice announcing the status of forward auction applications soon after that announcement, reverse auction bidding that is anticipated to occur in late May through early June, and the likely deadline for upfront payments due from forward auction applicants in early to mid-June.
- The National Telecommunications and Information Administration’s (“NTIA’s”) inquiry concerning the benefits, challenges, and potential roles for the government in fostering the advancement of the Internet of Things,²⁵ for which comments are due on May 23 (the

²² See, e.g., *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, Notice of Proposed Rulemaking and Memorandum Opinion and Order, MB Docket No. 16-42; CS Docket No. 97-80 (rel. Feb. 18, 2016), Statement of Commissioner Jessica Rosenworcel (“This rulemaking is complicated. . . . Important questions have been raised about copyright, privacy, diversity – and a whole host of other issues.”).

²³ See e.g., *Amendment of Part 11 of the Commission’s Rules Regarding the Emergency Alert System, Wireless Emergency Alerts*, Notice of Proposed Rulemaking, PS Docket Nos. 15-94, 15-91, (rel. Jan. 29, 2016).

²⁴ Chairman Tom Wheeler, *Out with the Old, In with the New*, FCC (Apr. 8, 2016), <https://www.fcc.gov/news-events/blog/2016/04/08/out-old-new>.

²⁵ *The Benefits Challenges, and Potential Roles for the Government in Fostering Advancement of the Internet of Things*, Nat’l Telecomm’s & Info. Admin., 81 Fed. Reg. 19956 (2016).

same date as reply comments in the navigation device docket and the same week as the current deadline for opening comments in this one).

The same time period also encompasses several key, annual industry events, all of which will further curtail the ability of stakeholders to work collaboratively on these matters within the tight schedule set forth by the Commission.²⁶

While the current schedule in this docket would be aggressive even when considered in isolation, it is even less tenable when these other matters are taken into account. These proceedings, both in isolation and collectively, have the combined potential to impact or even overhaul the business models of a diverse array of entities in the communications and online ecosystems and thus warrant careful and thorough attention. But the appropriate degree of focus simply will not be possible as a practical matter under present circumstances, when parties in the public and private sectors alike will be required to prepare comments, digest voluminous records, and make decisions that will determine the future of these industries.

The burdens of balancing these competing obligations will be onerous across the board, but particularly so for smaller companies and their representative associations, which may lack the internal and external resources to manage them one at a time let alone all at once.²⁷ The Commission should not prejudice smaller entities through fealty to artificial deadlines, especially when the stakes are so high. Moreover, whereas the Commission currently has the ability to adjust its schedule in this proceeding without significant consequence, it lacks such flexibility

²⁶ These include the National Association of Broadcasters' conference (April 16-April 21), the Federal Communications Bar Association's annual seminar (May 13-15), the National Cable and Telecommunications Association Internet & Television Expo (May 16-May 18), IEEE's 37th Annual Symposium on Security and Privacy (May 23-25, with associated workshops on May 26), as well as holidays including Passover and Memorial Day.

²⁷ See e.g. Motion of Extension of Time of American Cable Association, MB Docket No. 16-42, CS Docket No. 97-80 (filed Mar. 16, 2016).

with the others, where the deadlines are more established, intertwined with other proceedings, or outside of its control completely. In short, granting an extension here would enable all stakeholders – and the Commission itself – to pursue policymaking at a more rationale and productive pace.

IV. CONCLUSION

For the foregoing reasons, the Commission should grant the extensions specified above.

Respectfully submitted,

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