

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Protecting and Promoting the Open Internet) GN Docket No. 14-28
)

**REGULATORY FLEXIBILITY ACT COMMENTS OF
THE NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION**

The National Cable & Telecommunications Association (NCTA) submits these comments in response to the Initial Regulatory Flexibility Analysis (IRFA) attached to the Notice of Proposed Rulemaking (*Notice*) in the above-referenced proceeding.¹ As explained in these comments, there is no basis for imposing the Commission’s proposed rules on small companies, nor is there any basis for the Commission’s alternative proposal to regulate providers of broadband Internet access as telecommunications carriers under Title II of the Communications Act. If the Commission adopts any rules in this proceeding, it should exempt smaller entities or, at a minimum, provide substantially more flexibility than proposed in the *Notice*.

INTRODUCTION

The RFA requires the Commission to prepare an analysis of the effect its proposed rules would have on small entities and alternatives that might minimize the economic impact of the rules on such entities.² As described in the IRFA, the majority of the roughly 2000 ISPs in the United States, including the vast majority of cable operators offering broadband Internet access

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, FCC 14-61 (rel. May 15, 2014) (*Notice*), Appendix B- Initial Regulatory Flexibility Analysis (IRFA).

² 47 U.S.C. § 603.

service, are defined as small entities for purposes of the RFA.³ While most discussion of net neutrality in the popular press and social media is heavily focused on the largest ISPs, the RFA requires the Commission to consider these issues from the perspective of the hundreds of smaller companies that must comply with any new rules it adopts.

As demonstrated in these comments, there is no factual basis for imposing any new rules on small ISPs. These companies have no history of engaging in the type of behavior the rules are intended to prevent and no incentive or ability to do so going forward. As a result, the proposed rules would be of no benefit to consumers or edge providers. They would, however, impose significant new burdens on companies that already are overburdened by federal regulation. The Commission's alternative proposal to impose Title II regulation would be even more burdensome and is therefore even more inappropriate for small companies. Under either approach, the Commission has not proposed sufficient means by which to minimize these burdens on small companies as required under the RFA.

I. THERE IS NO FACTUAL BASIS FOR IMPOSING ANY RULES ON SMALL ISPS, INCLUDING SMALL CABLE OPERATORS

As NCTA explains in its comments on the *Notice*, the factual basis for imposing any rules on ISPs is slim. The *Notice* cites a handful of incidents over a period of many years and asserts that this record demonstrates that ISPs have both the ability and the incentive to restrict the open nature of the Internet that only can be stopped by the adoption of new rules.⁴

While the merits of the Commission's analysis are questionable as applied to ISPs generally, they miss the mark completely as applied to small ISPs, particularly small cable operators. None of the incidents cited in the *Notice* as the justification for regulation involved a

³ IRFA at ¶ 12 (“[W]e estimate that the majority of ISP firms are small entities.”); ¶¶ 45, 46 (all but ten cable operators are small entities).

⁴ *Notice* at ¶¶ 40-53.

small cable ISP and there is not a shred of evidence that any small ISP has engaged in behavior designed to hamper the delivery of content by edge providers,

Even if the Commission were to rely on its predictive judgment as to what might happen in the future, rather than a record of events that have occurred in the past, there still is no basis for imposing rules on small ISPs. Small ISPs have every incentive to meet the needs of their retail customers and there is no evidence suggesting that any small ISP would have the leverage to dictate terms to edge providers in a manner that would be harmful to competition or to consumers. Simply put, the Commission has not made the case that regulation of small ISPs is necessary to prevent any harms or that such regulation would produce any benefits.

II. THE IRFA DOES NOT PROVIDE A MEANINGFUL DISCUSSION OF THE BURDENS THE PROPOSED RULES WOULD HAVE ON SMALL ISPs

The fundamental purpose of the IRFA is for the agency to explain the basis for its proposed rules and identify the compliance burden such rules would place on small entities. The IRFA attached to the *Notice* in this proceeding falls well short of this objective. The Commission's IRFA includes only one paragraph describing the compliance obligations that would be imposed on small entities and that paragraph ignores key features of the proposed rules (as well as the alternative proposal to impose Title II regulation) and substantially downplays the effect of other proposals.

With respect to transparency, for example, the Commission acknowledges that the enhancements it proposes would “impose additional reporting, recordkeeping, or other compliance requirements on some small entities,” but it also notes that the *Notice* “does not propose specific revisions to the existing transparency rule.”⁵ Not only does the IRFA fail to offer any explanation for why small ISPs should be subjected to additional transparency

⁵ IRFA at ¶ 48.

requirements, the Commission's cursory description fails to provide any meaningful discussion of the substantial burdens the proposed transparency regime would place on small ISPs. The IRFA fails to explain that requiring small ISPs to develop special disclosures geared toward edge providers, or possibly different disclosures for different types of edge providers,⁶ will impose burdens far in excess of the current requirement to provide a single disclosure geared toward consumers.⁷ It also ignores the burden on small ISPs that would result from new reporting or certification requirements, as well as the proposed new requirement to disclose detailed information regarding network congestion.⁸

The burdens associated with the Commission's alternative proposal to treat ISPs as telecommunications carriers under Title II of the Act would be even greater, but the IRFA barely mentions this alternative proposal at all, let alone provide any analysis of the effect it would have on small entities. From the perspective of small cable operators, the imposition of Title II requirements on broadband would create overwhelming burdens with no corresponding benefit. Cable operators have never been subject to Title II with respect to their broadband services and consequently every aspect of Title II regulation would be new for small cable operators. For example, the initial costs of compliance with Title II, such as tariff obligations and rate regulation, would be overwhelming because cable operators have never had to file tariffs or perform cost studies with respect to their broadband services. The Commission has identified no

⁶ Notice at ¶¶ 68, 75.

⁷ Public Notice, *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*, GN Docket No. 09-191, DA 11-1148 (rel. June, 30, 2011) at 7 (“Based on the record developed in the *Open Internet* proceeding, we anticipate that disclosures sufficient to enable ‘consumers to make informed choices regarding use of [broadband] services’ will also generally satisfy the portion of the transparency rule regarding disclosures to edge providers.”).

⁸ Notice at ¶¶ 83-87.

potential harm to edge providers or consumers that would justify imposing this type of burdensome regulation on small ISPs.

III. IF THE COMMISSION IMPOSES ANY RULES ON SMALL ISPs, IT SHOULD PROVIDE SUBSTANTIAL FLEXIBILITY WITH RESPECT TO COMPLIANCE

The Commission suggests that its proposals “contemplate a certain amount of flexibility that may be helpful to small entities.”⁹ But the flexibility contemplated in the proposed rules is insufficient assurance that small entities will not be overwhelmed by the burdens of the rules proposed by the Commission. For example, the enhanced transparency rules proposed in the *Notice* plainly would be more burdensome for small ISPs than the current transparency rules, but the Commission has not suggested any significant exemptions or safe harbors that would ease these burdens.

The IRFA points to a question in the *Notice* on ways that industry associations might help reduce the burden of enhanced disclosure rules on small ISPs (e.g., by developing standardized glossaries or dashboards) as evidence of the type of flexibility the Commission is considering.¹⁰ The IRFA reads far too much into this question. As an initial matter, it is only a question, not an affirmative proposal or a tentative conclusion like most of the new obligations that the Commission identifies in the item. Furthermore, this proposal would not meaningfully reduce the burden on ISPs. There is substantial variety in how different providers offer broadband services and consequently those services do not lend themselves to uniform industrywide definitions or presentation formats. The task of attempting to develop such uniformity would add to the burden faced by small ISPs, who still would be responsible for ensuring the accuracy and usefulness of the disclosures they make to their customers.

⁹ IRFA at ¶ 51.

¹⁰ IRFA at ¶ 51; *Notice* at ¶ 86.

The IRFA also mentions that the Commission solicited comment on the possibility that it might forbear from certain obligations if Title II regulation were imposed.¹¹ Without any details, however, it is impossible to assess whether forbearance would meaningfully reduce any of these burdens that might arise under a Title II regime. If the Commission is serious about imposing any Title II obligations on ISPs, it should adopt a Further Notice of Proposed Rulemaking (and Further Regulatory Flexibility Analysis) in which it solicits input on a substantive proposal which identifies the specific provisions that would be imposed on small ISPs.

IV. IF AN OMBUDSPERSON IS APPOINTED, IT SHOULD REPRESENT THE INTERESTS OF ALL SMALL COMPANIES, INCLUDING SMALL CABLE OPERATORS

The *Notice* solicits comments on various dispute resolution mechanisms, including a proposal to create an ombudsperson that would assist edge providers and consumers if they have concerns about the conduct of ISPs.¹² Given that the Commission is supposed to provide a neutral forum for resolving policy matters within its jurisdiction, it is questionable whether an ombudsperson would serve a meaningful role. But if the Commission decides to appoint an ombudsperson, it should not assume that edge providers will always be at a disadvantage in dealing with ISPs. Small ISPs frequently must deal with edge providers and transport networks that are far larger and that may have significant marketplace leverage. Large companies like Google and Amazon simply do not need an ombudsperson to represent their interests against small ISPs. If the Commission believes an ombudsperson is necessary to protect the interests of small companies, small ISPs should be eligible for the same assistance as small edge providers.

¹¹ IRFA at ¶ 7.

¹² *Notice* at ¶ 171.

CONCLUSION

The Commission has not made the case that any additional regulation of small ISPs is warranted. If it does adopt new rules of general applicability, it must provide small ISPs with significant flexibility as to compliance with those rules as required by the RFA.

Respectfully submitted,

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