

Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPORT AND ORDER

Adopted: December 15, 2015

Released: December 15, 2015

By the Acting Chief, Consumer and Governmental Affairs Bureau:

I. INTRODUCTION

1. With this Report and Order, the Consumer and Governmental Affairs Bureau (CGB or Bureau) finds that at this time it cannot fully evaluate the impact of removing the temporary exemption for smaller broadband Internet access service providers from the enhancements to the Open Internet transparency rule previously adopted by the Commission in the *2015 Open Internet Order*.¹ The information collection and disclosure requirements imposed by the transparency rule are subject to the Paperwork Reduction Act of 1995 (PRA).² Accordingly, on May 20, 2015, the Commission published in the Federal Register and sought comment on its initial burden estimates in accordance with the PRA.³ The Commission is proceeding through the PRA process, which involves estimating the burden of complying with the transparency rule enhancements for providers of all sizes and obtaining approval from the Office of Management and Budget (OMB). To avoid acting prematurely in advance of that approval, CGB therefore extends the temporary exemption for smaller providers until December 15, 2016. At that time, we expect that the PRA process will be complete and that the full Commission will be able to consider whether and, if so, how best to extend the temporary exemption from the enhanced transparency requirements with the benefit of more complete information.⁴

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 at 5669-81, paras. 154-81 (2015) (*2015 Open Internet Order*). A summary of the *2015 Open Internet Order* was published in the Federal Register. See 80 Fed. Reg. 19738-01 (Apr. 13, 2015). As noted in the *2015 Open Internet Order*, all providers of broadband Internet access service remain subject to the transparency rule adopted in 2010. The exemption applies only to the enhanced transparency requirements adopted in 2015. *Id.* at 5679, para. 175.

² 44 U.S.C. §§ 3501-3520.

³ Federal Communications Commission, Information Collection Being Reviewed by the Federal Communications Commission, 80 Fed. Reg. 29000-29001 (May 20, 2015). The Commission has not yet prepared its final burden estimate.

⁴ After approval by OMB, the Commission will publish a notice in the Federal Register announcing when the enhancements will become effective.

II. BACKGROUND

A. 2015 Open Internet Order

2. In the *2015 Open Internet Order*, the Commission adopted certain enhancements to the existing transparency rule that governs the content and format of disclosures made by providers of broadband Internet access service.⁵ These enhanced transparency requirements built upon the original transparency rule the Commission adopted in 2010⁶ to provide critical information to end-user consumers, edge providers, and the Internet community⁷ regarding commercial terms, performance characteristics, and network practices.⁸ The Commission declined to adopt many of the enhancements to the 2010 transparency rule that were proposed in the *2014 Open Internet NPRM*,⁹ noting that its approach appeared to address the bulk of objections from smaller providers.¹⁰ In the *2015 Open Internet Order*, the Commission concluded that the enhanced requirements adopted were “modest in nature,”¹¹ yet critical to consumers,¹² and, indeed, that some may have already been required by the 2010 rule.¹³

3. In order to proceed with care and in response to concerns from smaller providers about the compliance burdens, the Commission temporarily exempted from the enhanced transparency requirements those providers “with 100,000 or fewer broadband subscribers, as per their most recent Form 477, aggregated over all of the providers’ affiliates.”¹⁴ At the same time, the Commission stated that “both the appropriateness of the exemption and the [subscriber] threshold require further deliberation,” and directed the Bureau to seek comment on the exemption and to “adopt an order

⁵ *2015 Open Internet Order*, 30 FCC Rcd at 5669-81, paras. 154-81.

⁶ *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17936-41 (2010).

⁷ *2015 Open Internet Order*, 30 FCC Rcd at 5669, 5671, paras. 154, 161; *see also* 47 C.F.R. § 8.3.

⁸ *Id.* at 5672-77, paras. 164-70. The enhanced requirements include disclosure of: (i) commercial terms for prices, other fees, and data cap allowances; (ii) performance characteristics including packet loss, performance by geographic area, and average performance over a reasonable time and during peak usage; (iii) network practices including practices that are applied to traffic associated with a particular user or group, including any application-agnostic degradation of service, user based or application based practices should include the purpose of practice, which users or data plans may be affected, the triggers that activate the use of the practice, the types of traffic that are subject to the practice, and the practice’s likely effects on the end users’ experience; and (iv) a voluntary safe harbor that providers may use in meeting the existing requirement to make transparency disclosures in a format that meets the needs of end users. *See id.* at 5672-77, paras. 164-70; 5679-81, paras. 176-81. As noted in the *2015 Open Internet Order*, the transparency rule has always required that broadband providers disclose information “sufficient to allow consumers to make informed choices,” which could include the information expressly required by the enhancements. *See id.* at 5681, para. 182.

⁹ *See Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 at 5585-92, paras. 66-85 (2014) (*2014 Open Internet NPRM*).

¹⁰ *2015 Open Internet Order* at 5669, 5677-78, paras. 155, 172. For example, the Commission declined to adopt disclosures relating to the source of congestion, packet corruption, and jitter in recognition of commenter concerns with difficulties of making those particular disclosures.

¹¹ *Id.*

¹² *Id.* at 5669, 5672, paras. 154, 162.

¹³ *Id.* at 5672-73, para. 164.

¹⁴ *Id.* at 5677-79, paras. 172-75 (emphasizing that all providers of broadband Internet access service, including smaller providers, remain subject to the transparency rule adopted in 2010).

announcing whether it is maintaining an exemption and at what level by no later than December 15, 2015.”¹⁵

B. Public Notice

4. On June 22, 2015, CGB released a Public Notice seeking comment on whether to maintain the temporary exemption and, if so, the appropriate threshold for whether a provider qualified for such an exemption.¹⁶ The Public Notice also clarified that the threshold should be measured in terms of broadband connections, rather than in terms of subscribers or subscriber lines.¹⁷ For this reason, the Public Notice made clear that the current exemption from the enhanced transparency requirements applied to providers with 100,000 or fewer broadband *connections*.¹⁸

5. Several commenters, representing primarily providers of broadband Internet access services, filed comments arguing that the temporary exemption from the enhanced transparency requirements should be made permanent.¹⁹ In general, these commenters contend that the compliance burdens on smaller providers are disproportionately high due to their limited resources, the benefits are minimal, and there is no record evidence that subscribers are not already receiving sufficient information.²⁰ A few commenters address the possibility of a one-time extension of the exemption by suggesting that while a temporary extension of the exemption would be preferable to no extension, it would only delay and not eliminate the increased costs associated with compliance.²¹ Some commenters address the threshold for determining which providers would qualify for the smaller provider exemption. Some of these commenters support use of the 100,000 or fewer connections threshold.²² Others, however, contend that the threshold should be expanded to utilize the Small Business Administration’s (SBA) standard of 500,000 or fewer subscribers or 1,500 or fewer employees.²³ The Office of Advocacy of the Small Business Administration argues that the Commission must obtain its approval to use a small business standard that differs from SBA’s for regulatory enforcement purposes.²⁴ Another commenter

¹⁵ *Id.* at 5679, para. 174.

¹⁶ *Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, GN Docket No. 14-28, Public Notice, 30 FCC Rcd 6409 (2015) (Public Notice). A summary of the Public Notice was published in the Federal Register. *See* 80 Fed. Reg. 38424 (July 6, 2015).

¹⁷ Public Notice, 30 FCC Rcd at 6410-11.

¹⁸ *Id.*

¹⁹ *See, e.g.*, ACA Comments at 4; CTIA Comments at 16-17; NCTA Comments 1; USTA Comments at 10; ATA Reply Comments at 3; SBA Advocacy Reply Comments at 1-2; SouthernLINC Reply Comments at 1; Letter from Thomas Cohen, counsel for ACA, to Marlene Dortch, Secretary, FCC, GN Docket Nos. 10-90, 14-28 at 4-6 (dated Nov. 13, 2015) (ACA *Ex Parte* Letter); Letter from Fred Upton, et al, House of Representatives, to Thomas Wheeler, Chairman, FCC, GN Docket No. 14-28 (dated Nov. 17, 2015).

²⁰ *See, e.g.*, ACS Comments at 4-6; CTIA Comments at 1, 10-13; Gogo Comments at 4; NCTA Comments at 4; GVNW Comments at 5; RBPC Comments at 3-8; WCA Comments at 5-6; SBA Advocacy Reply Comments at 1-2.

²¹ *See, e.g.*, ACA Comments at 9; WCA Comments (suggesting that if the exemption is not made permanent it should be extended for two years); WISPA Comments at 7-8; RWA Reply Comments at 5-6.

²² *See, e.g.*, ACA Comments at 10; GVNW Comments at 6; WTA Comments at 7.

²³ *See, e.g.*, CTIA Comments at 4-5; SBA Advocacy Reply Comments at 3; SouthernLINC Reply Comments at 6; WISPA Reply Comments at 4. CTIA notes that the SBA has approved a definition of a small telecommunications carrier as one with 500,000 or fewer subscribers. CTIA Comments at 19-20 (citing Letter from Hector V. Barreto, Administrator, SBA, to Blaise Scinto, Acting Chief, Policy Division, Wireless Telecommunications Bureau, FCC (dated Jan. 21, 2003) (approving the “Tier III” wireless classification as a small business size standard)).

²⁴ *See* SBA Advocacy Reply Comments at 3.

disagrees with extending the extension at all, noting that the burden of the enhanced transparency requirements is small and the benefit is high.²⁵

III. DISCUSSION

6. Smaller Provider Exemption. For the reasons discussed below, we hereby extend the temporary exemption for smaller providers from the enhanced transparency requirements until December 15, 2016. At that time, we expect that the PRA process will be complete and that the full Commission will be able to consider whether and, if so, how best to address the exemption from the enhanced transparency requirements for small providers with the benefit of more complete information.²⁶

7. To begin with, we cannot agree with those commenters that claim that the enhanced transparency requirements offer no tangible benefit to customers of smaller providers.²⁷ As the Commission stated in the *2015 Open Internet Order*, the enhanced transparency requirements, while modest,²⁸ are critical to enable end-user consumers to make informed choices about broadband Internet access services by providing them with timely information tailored to their needs.²⁹ Similarly, the Commission stated that such requirements provide edge providers with the information necessary to develop new content, applications, services, and devices that promote the virtuous cycle of investment and innovation.³⁰ The Commission noted in the *2015 Open Internet Order* that it received numerous complaints from consumers after the 2010 rules took effect, suggesting that broadband providers were not providing the information that end users and edge providers need to receive and the Commission continues to receive such complaints.³¹ Commenters critical of the enhanced transparency requirements offer no evidence that Internet customers do not have the same complaints today that they raised in the period following the 2010 rules, nor do they present evidence that customers of smaller providers are less in need of these essential informational disclosures than are customers of larger providers. It is a matter of historical record that Open Internet issues do not necessarily concern the actions of only large broadband providers.³² Furthermore, we agree with the commenter who stated that “[r]ural subscribers deserve the benefits of transparency no less than any others.”³³

8. In determining whether and, if so, how to best to address the exemption, we must balance the benefit of the transparency rule enhancements to consumers against the impact on small providers of

²⁵ See, e.g., Letter from Matthew F. Wood, Policy Director, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28, at 2-3 (filed December 11, 2015) (Free Press *Ex Parte*).

²⁶ After approval by the Office of Management and Budget, the Commission will publish a notice in the Federal Register announcing when the enhancements will become effective.

²⁷ See, e.g., ACA Comments at 5-7; CTIA Comments at 1-2; SRC Comments at 4.

²⁸ *2015 Open Internet Order*, 30 FCC Rcd at 5669, 5677-78, paras. 155, 172.

²⁹ *Id.* at 5669, 5672, paras. 154, 162.

³⁰ *Id.*

³¹ See *id.* at 5672, para. 163 (noting that consumers continue to express concerns that the speed of their service falls short of advertised speeds, that billed amounts are greater than advertised rates, and that consumers are often unable to determine the source of slow service; in addition, the Commission noted that end users are often surprised that providers slow or terminate service based on “excessive use” or other practices). The enhancements to the transparency rule adopted in the *2015 Open Internet Order* have not yet become effective.

³² *Id.* at 5620, para. 65, n.69 (discussing 2005 consent decree requiring DSL service provider Madison River to discontinue its practice of blocking Voice over Internet Protocol (VOIP) telephone calls).

³³ Free Press *Ex Parte* at 3 (stating additionally that transparency requirements “serve the same accountability and performance goals as would more stringent government oversight, but with a more limited regulatory regime”).

removing the exemption. Until the PRA process is complete, however, we find that we cannot fully evaluate this impact. Despite the Commission's finding that the enhancements adopted in the *2015 Open Internet Order* are modest,³⁴ a few commenters cite specific requirements as being particularly burdensome for smaller providers.³⁵ The Commission is currently evaluating comments in response to the initial burden estimates and is preparing final burden estimates. In addition, in response to requests for additional clarity regarding the enhanced compliance obligations,³⁶ we anticipate that the Commission may release a public notice in the near future, similar to the guidance provided in 2011 on interpreting the transparency requirements.³⁷ Such guidance may provide greater certainty as to the enhanced disclosure obligations and alleviate commenter concerns regarding potential liability for inadvertent non-compliance.³⁸

9. As noted above, the *2015 Open Internet Order* directed the Bureau to seek comment on the smaller provider exemption and to "adopt an order announcing whether it is maintaining an exemption and at what level by no later than December 15, 2015."³⁹ To avoid making a premature determination prior to PRA approval, the Bureau therefore extends the exemption until December 15, 2016. At that time, we expect that the PRA process will be complete and that the full Commission will be able to consider whether and, if so, how best, to address the exemption from the enhanced transparency requirements for small providers with the benefit of more complete information.

10. *Smaller Provider Threshold.* The Commission set the exemption threshold at "100,000 or fewer broadband [connections] as per [providers'] most recent Form 477, aggregated over all of the providers' affiliates."⁴⁰ We agree with those commenters who support the use of this threshold.⁴¹ As the Commission noted, this threshold is analogous to that which was used in the *2013 Rural Call Completion Order* and advocated for by parties who sought such an exemption in this proceeding.⁴² Although some parties advocate that we should broaden this exemption to include entities that serve 500,000 or fewer broadband connections,⁴³ we are concerned from our internal review of the relevant Form 477 data that this change would substantially increase the number of consumers who would be temporarily excluded from receiving the information that the Commission has deemed essential for them to make informed choices about broadband services.⁴⁴ Absent a more compelling reason than a desire to protect such providers from burdens that the Commission has concluded are modest in nature, we believe the Commission's threshold of "100,000 or fewer broadband connections as measured by their most recent

³⁴ *2015 Open Internet Order*, 30 FCC Rcd at 5669, 5677-78, paras. 155, 172.

³⁵ See, e.g., ACA Comments at 7; NTCA Comments at 4; WISPA Comments at 5; WTA Comments at 4.

³⁶ See, e.g., ACA Oct. 2 *Ex Parte* at 6-7.

³⁷ 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).

³⁸ See, e.g., ACA Oct. 2 *ex parte* at 6-7.

³⁹ *2015 Open Internet Order*, 30 FCC Rcd at 5679, para. 174.

⁴⁰ See *Id.* 30 FCC Rcd at 5677, paras. 172-75; Public Notice, 30 FCC Rcd at 6410-11.

⁴¹ See, e.g., ACA Comments at 10; GVNW Comments at 6; WTA Comments at 7.

⁴² See *2015 Open Internet Order*, 30 FCC Rcd at 5678, para. 173.

⁴³ See, e.g., CTIA Comments at 4-5 (advocating the SBA-approved 500,000 connections); WCA Comments at 7 (advocating a threshold of 250,000 connections); CCA Reply Comments (500,000); SBA Advocacy Reply Comments (500,000).

⁴⁴ We note, for example, that moving from a threshold of 100,000 to 500,000 or fewer connections to qualify for the exemption would nearly double the number of connections served by exempted providers.

Form 477, aggregated over all affiliates⁴⁵ remains a reasonable basis to delineate which providers are likely to be most affected by the burden of complying with the enhanced disclosure requirements. Furthermore, we note that providers with between 100,000 and 500,000 connections were not covered by the exemption established by the Commission in the *2015 Open Internet Order* and, presumably, have already begun the process of coming into compliance. We do not agree with the SBA's Office of Advocacy and CTIA that the Commission has adopted a size standard that differs from the SBA's size standard and thus requires SBA approval for regulatory enforcement purposes.⁴⁶ The 100,000 connection threshold is not a business size. Rather it exempts businesses (both larger and smaller) based on an analysis of the relative costs of requiring compliance. By our action here, we are extending the exemption already set by the Commission in the *2015 Open Internet Order*, using a threshold which itself is analogous to a threshold the Commission has used in the past.⁴⁷

11. *Form 477*. In the Public Notice, we sought comment on whether smaller providers that fail to file a Form 477 should be ineligible for the exemption.⁴⁸ One commenter notes that not all providers are required to submit Form 477 and suggests that these providers be allowed to offer an alternative reporting mechanism to avail themselves of the exemption.⁴⁹ We agree, in this limited circumstance, that providers that are not required to file a Form 477 can avail themselves of the exemption by demonstrating that they served 100,000 or fewer broadband connections aggregated over all the providers' affiliates at the relevant time should any complaint arise.⁵⁰ In all other instances, however, the exemption will be tied to the information provided on Form 477. In the *2015 Open Internet Order*, the Commission expressly linked the exemption to the number of connections reported via the Form 477. We find no basis in the record to revisit that decision herein.⁵¹ As a result, providers obligated to file Form 477 that do not fulfill their obligation to file such information in a timely manner will be ineligible for the exemption, even if they serve 100,000 or fewer broadband connections aggregated over all of the providers' affiliates.

IV. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED that, pursuant to sections 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), and section 8.3 of the Commission's rules, 47 C.F.R. § 8.3, and the authority delegated in sections 0.141 and 0.361 of the Commission's rules, 47 C.F.R. §§ 0.141, 0.361, and in *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015), that this Report and Order in GN Docket No. 14-28 IS ADOPTED.

⁴⁵ Public Notice, 30 FCC Rcd at 6411.

⁴⁶ See SBA Advocacy Reply Comments at 3; CTIA Comments at 17-21.

⁴⁷ See, e.g., *Rural Call Completion*, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16154 (2013), cited in *2015 Open Internet Order*, 30 FCC Rcd at 5678, para. 173 & nn.430-431.

⁴⁸ See Public Notice, 30 FCC Rcd at 6411.

⁴⁹ See Gogo Comments at 3 (noting, for example, that providers of air-to-ground service are not required to file Form 477) citing *FCC Form 477 Local Telephone Competition and Broadband Reporting*, Instructions available at <https://transition.fcc.gov/form477/477inst.pdf> at 5.

⁵⁰ Facilities-based providers of broadband connections to end users, as defined in the Form 477 Instructions, are required to file a Form 477. *FCC Form 477 Local Telephone Competition and Broadband Reporting*, Instructions available at <https://transition.fcc.gov/form477/477inst.pdf> at 5-6.

⁵¹ See *2015 Open Internet Order*, 30 FCC Rcd at 5678, para. 173. We also note that no commenter in response to the public notice suggests that we should use any mechanism other than the Form 477 filing to determine eligibility for the exemption.

13. IT IS FURTHER ORDERED that this Report and Order shall be EFFECTIVE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER.

FEDERAL COMMUNICATIONS COMMISSION

Alison Kutler
Acting Chief
Consumer and Governmental Affairs Bureau

**APPENDIX
List of Commenters**

The following parties have filed comments in response to the June 22, 2015 Public Notice (GN Docket 14-28):

<u>Commenter</u>	<u>Abbreviation</u>
Alaska Communications Systems	ACS
Alaska Telephone Association	ATA
American Cable Association	ACA*
Competitive Carriers Association	CCA
CTIA – The Wireless Association	CTIA
Education and Research Consortium of the Western Carolinas	ERC
Gogo, Inc.	Gogo
GVNW Consulting, Inc.	GVNW*
National Cable & Telecommunications Association	NCTA
NTCA – The Rural Broadband Association	NTCA*
The Rural Broadband Provider Coalition	RBPC
Rural Wireless Association, Inc.	RWA
Small Business Administration	SBA
Small Rural Carriers	SRC
SouthernLINC Wireless	SouthernLINC
United States Telecom Association	USTA
Wireless Communications Association International	WCA
Wireless Internet Service Providers Association	WISPA*
WTA – Advocates for Rural Broadband	WTA

* filing both comments and reply comment (bold - reply comments only).