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To: Cathy Williams
Cc: PRA
Subject: ITTA Open Internet PRA Comments (Docket Nos. 09-191 & 07-52)
Attachments: ITTA Open Internet PRA Comments.pdf

Attached please find a copy of the comments submitted by the Independent Telephone & Telecommunications Alliance regarding the Paperwork Reduction Act.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Preserving the Open Internet)	GN Docket No. 09-191
)	
Broadband Industry Practices)	WC Docket No. 07-52
)	

To: The Commission

**PAPERWORK REDUCTION ACT COMMENTS OF
INDEPENDENT TELEPHONE &
TELECOMMUNICATIONS ALLIANCE (ITTA)**

The Independent Telephone & Telecommunications Alliance (ITTA),¹ hereby responds to Commission's request for comment on whether certain information collection obligations adopted in its *Open Internet Order* in the above-captioned proceeding satisfy the requirements of the Paperwork Reduction Act of 1995 ("PRA").² In fact, the proposed regulations will produce burdens that are excessive and out of proportion to the potential benefits of the regulations, particularly for mid-sized carriers such as ITTA's members, which include a number of rural-focused incumbent local exchange carriers. As such, they are inconsistent with the PRA. The Commission should therefore modify the regulations to reduce the burden to a level more consistent with the very remote risk of harm.

I. The PRA and President Obama's Recent Memorandum on Regulation Limit the Commission's Authority to Impose Paperwork Burdens on Broadband Service Providers.

¹ ITTA is an alliance of mid-sized local exchange carriers that collectively operate 19.5 million access lines in 44 states, offering subscribers a broad range of high-quality wireline and wireless voice, data, Internet and video services.

² See Preserving the Open Internet, GN Docket 09-191, *Report and Order*, 25 FCC Rcd 17905 (2010) ("*Open Internet Order*").

These comments address two information collection requirements adopted in the *Open Internet Order* and published under separate titles in the Federal Register: (1) “Disclosure of Network Management Practices”³ and (2) “Formal Complaint Procedures.”⁴ In the former, the Commission asks for comment on the information collection resulting from the Commission’s “transparency” rule requirement that broadband service providers disclose an undefined amount of information to end users and “edge providers.”⁵ In the latter, the Commission asks for comment on the information collection resulting from the formal complaint procedures adopted in the *Open Internet Order*.⁶

Importantly, pursuant to the limits set forth in the PRA, the Commission does not have unlimited authority to impose paperwork burdens on broadband service providers.⁷ Where a Federal agency seeks to collect information from the public, the PRA mandates that the process minimize the paperwork burden on regulated entities while minimizing the government’s cost of collecting, using and maintaining the information at issue.⁸ Accordingly, the PRA mandates that

³ See *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7207 (Feb. 9, 2011) (“*Transparency PRA Notice*”). As discussed in greater detail *infra*, the transparency rule requires that a provider of broadband service publicly disclose to its customers accurate information regarding its network management practices, performance, and commercial terms of its service. See *Open Internet Order*, 25 FCC Rcd at 17937 ¶ 54.

⁴ See *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7206 (Feb. 9, 2011) (“*Complaint Procedures PRA Notice*”).

⁵ See *Open Internet Order*, 25 FCC Rcd at 17936-41 ¶¶ 53-61.

⁶ *Id.* at 17987-89 ¶¶ 154-159

⁷ See Paperwork Reduction Act, Pub. L. 104-13, 109 Stat. 163, 163 (1995) (Congress adopted the PRA to “have Federal agencies become more responsible and publicly accountable for *reducing* the burden of Federal paperwork on the public”) (emphasis added).

⁸ See 44 U.S.C. § 3501(1), (5).

the Commission certify to the Office of Management and Budget (“OMB”) that, *inter alia*, a proposed information collection:

- “is necessary for the proper performance of the functions of the agency, including that the information has practical utility”;⁹
- “reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency . . .”;¹⁰ and
- “is to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and record keeping practices of those who are to respond.”¹¹

President Obama recently reaffirmed the Administration’s commitment to “getting rid of absurd and unnecessary paperwork requirements that waste time and money.”¹² In an Executive Order issued on January 18, 2011, the President directed each Federal agency covered thereunder to “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs” and “tailor its regulations to impose the least burden on society”¹³ Chairman Genachowski has committed that the FCC will comply with the Executive Order.¹⁴

⁹ 47 U.S.C. § 3506(c)(3)(A).

¹⁰ *Id.* § 3506(c)(3)(C).

¹¹ *Id.* § 3506(c)(3)(E).

¹² President Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, Wall St. J., Jan. 18, 2011, at A17.

¹³ Improving Regulation and Regulatory Review, Exec. Order No. 13563, 76 Fed. Reg. 3821, 3821 (Jan. 21, 2011).

¹⁴ Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, Broadband Acceleration Conference, Washington, D.C. (Feb. 9, 2011) at 4, *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A1.pdf.

As shown below, the Commission cannot demonstrate that its proposed information collection obligations satisfy the PRA’s criteria or the Executive Order, and thus cannot certify to OMB that the information collection requirements in question comply with the statute.

II. The Commission’s Proposed Information Collections Are Overbroad and Unsupported.

A. *The Transparency Disclosures*

Under the FCC’s *Report and Order* and the rules adopted therein, a broadband service provider “shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.”¹⁵ “Sufficient” and “informed choices” are undefined terms, and the Commission otherwise did not provide any guidance as to precisely what amount and type of information broadband service providers must disclose to consumers. Instead, the FCC suggested that broadband service providers choose what they will disclose from a long laundry list of possible data points, with the following proviso: “We emphasize that this list is not necessarily exhaustive, nor is it a safe harbor—there may be additional information, not included above, that should be disclosed for a particular broadband service to comply with the rule in light of relevant circumstances.”¹⁶

At a minimum, the Commission’s approach fails to satisfy the PRA criteria for several reasons. First, because the exact amount and type of information a broadband service provider must disclose is unknown, it is impossible to sensibly estimate an upper limit on the provider’s cost of identifying, assembling, producing, maintaining, and disseminating that information to

¹⁵ *Open Internet Order*, 25 FCC Rcd at 17937 ¶ 54; *see also id.* at 17992, App. A § 8.3.

¹⁶ *Id.* at 17939 ¶ 56.

end users and edge providers.¹⁷ This is particularly true for smaller providers that often do not have the same infrastructure and capacity for information gathering and dissemination. Just as providers cannot now know how burdensome the disclosure obligation is, it therefore is equally impossible for the Commission to demonstrate that its information collection “reduces to the extent practicable and appropriate the burden on persons who shall provide information to or for the agency”;¹⁸ The burden may and, ITTA believes, will in many cases be very onerous, depending on how each provider interprets and attempts to comply with the rule, given its resources, personnel, customer base, type(s) of service and a potentially endless number of other factors that are beyond the Commission’s control and virtually unknowable in advance.

Second, and for similar reasons, the Commission cannot demonstrate that the proposed information collection “is necessary for the proper performance of the functions of the agency, including that the information has practical utility.”¹⁹ The Commission draws no distinction between information which is “necessary” versus that which is “unnecessary,” instead leaving which information to disclose to the broadband service provider’s discretion, and thus it is impossible to know whether the information disclosed at any given time is “necessary for the proper performance” of the Commission’s functions or even has any “practical utility” in that context. Indeed, the Commission fails to make the case why the listed areas are necessary or have any practical utility. Nor does it explain why they are necessary across the board, including

¹⁷ This is especially so given that the Commission also has provided no guidance as to how often such disclosures must be updated to reflect changed circumstances. In some cases, the information in question may change on a daily or even an hourly basis (e.g., actual network speed and latency). The multiplicity of required disclosures increases even further of a broadband service provider tailors its services to the specific needs of its customers. *See Open Internet Order*, 25 FCC Rcd at 17938 ¶ 56 n.175 (“If the provider tailors its terms of service to meet the requirements of an individual end user, those terms must at a minimum be disclosed to the end user in accordance with the transparency principle.”).

¹⁸ 47 U.S.C. § 3506(c)(3)(C).

¹⁹ *Id.* § 3506(c)(3)(A).

for providers with far fewer subscribers than other providers. Moreover, it appears that some of the information listed by the Commission has at best a dubious relationship to promoting disclosures that are “sufficient to enable end users and edge providers to understand the capabilities of broadband” (e.g., consequences of exceeding data caps, pricing information, procedures for resolving customer complaints, etc.).²⁰

The proposed reporting requirement is also entirely out of proportion to the potential benefits of the regulation. The only support for the rule in the *Open Internet Order* consists of a small handful of anecdotal examples of potential benefits.²¹ It is inconsistent with the PRA to impose such a burdensome rule without a more concrete showing of need for the regulation. This concern is particularly strong for smaller providers where the proportionate impact of the reporting obligations is likely much higher on a per-subscriber basis.

Finally, the Commission must demonstrate that the proposed information collection obligation “is to be implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and record keeping practices of those who are to respond.”²² Neither the *Open Internet Order* nor the *Transparency PRA Notice* offers any analysis on this point – the Commission has failed to indicate how (if at all) its disclosure requirements are “consistent and compatible, to the maximum extent practicable” with what broadband service providers are already doing. In fact, it is unclear whether the Commission took broadband service providers’ existing disclosure practices into account at all. To ITTA’s knowledge, very few of its members have consumer disclosure policies (either at the wholesale

²⁰ *Open Internet Order*, 25 FCC Rcd at 17938-39 ¶ 56.

²¹ *Id.* at 17925-27 ¶¶ 35-37.

²² 44 U.S.C. § 3506(c)(3)(E).

or retail level) that in any way approach the unprecedented requirements the Commission appears to call for in the *Open Internet Order*. ITTA is also unaware of any situation in which end users, edge providers and/or regulators have raised concerns about the disclosure practices of its member companies or otherwise suggested that they are not being provided with enough information to make informed decisions.

As a result, the Commission must reconsider its disclosure requirements to bring them into conformance with the PRA.

B. *The Formal Complaint Procedures*

The Commission adopted formal complaint procedures “to address open Internet disputes.”²³ In so doing, the Commission “agree[d] that such procedures should be available in the event an open Internet dispute cannot be resolved through other means.”²⁴ In virtually the same breath, however, the Commission also acknowledged that end users, edge providers, and others *already* have an efficient vehicle for bringing potential open Internet violations to the Commission’s attention, *i.e.*, the informal complaint process under Section 1.41 of the Commission’s rules.²⁵ It is difficult to see how layering a formal complaint process (and the associated information collection burden) on top of the Commission’s informal complaint process can be viewed as an effort to *reduce* the paperwork burden on broadband service providers, particularly as there does not appear to be anything in the Commission’s open Internet rules that would preclude a complainant from filing a formal complaint if its informal

²³ *Open Internet Order*, 25 FCC Rcd at 17987 ¶ 154.

²⁴ *Id.*

²⁵ *Id.* at 17986-87 ¶ 153.

complaint does not yield the desired results.²⁶ This concern is heightened as well for smaller providers as the cost of responding to a complaint, particularly a formal complaint, is higher per subscribers.

The Commission also states that it modeled its open Internet formal complaint procedures on those it already uses for “cable access” disputes under Part 76 of its rules, as if “cable access” were a single, generic concept covered by a single set of formal complaint procedures.²⁷ That, of course, is not the case. There are, in fact, multiple types of disputes under Part 76 that might be considered “access” related, and they are governed by different types of complaint procedures, some significantly less burdensome than others. For example, the Commission notes that a local television station may bring a Part 76 complaint if it believes it was a wrongfully denied carriage on a cable system under the Commission’s must-carry rules.²⁸ The Commission goes on to observe that “[s]ome complaints alleging open Internet violations may be analogous.”²⁹ The must-carry complaint procedures, however, are far less complex and impose far fewer paperwork burdens on defendants than the “litigation on paper” approach the Commission has adopted for open Internet complaints.³⁰ Here again, it is hard to understand how the Commission’s adoption of a more burdensome formal complaint process under these

²⁶ *Id.* at 17994, App. B § 8.12 *et seq.*

²⁷ *Id.* at 17987 ¶ 155.

²⁸ *Id.* at 17987 n.486.

²⁹ *Id.*

³⁰ Compare 47 C.F.R. § 76.61 with *Open Internet Order*, 25 FCC Rcd at 17994, App. B § 8.12 *et seq.*

circumstances complies with the PRA's mandate that agencies *reduce* paperwork burdens as much as possible.³¹

III. The Commission Radically Underestimates the Cost Burdens Its Information Collections Will Impose on Broadband Service Providers.

Compounding the problem, the Commission provides dubious numerical estimates of the cost burdens its proposed information collection requirements will impose on broadband service providers. For example, in the *Notice of Proposed Rulemaking* for this proceeding, the Commission estimated that its disclosure requirements would impose a burden of 327 hours per response, a total annual burden of 546,840 hours, and total annual costs of \$4,687,000.³² In the *PRA Notice*, however, the Commission projects an average burden of 10.3 hours per response, a total industry burden of 15,646 hours, and *no* annual costs.³³ The Commission does not explain why it decided to reduce its estimate to a tiny fraction of its original estimate. Instead, it speculates that the burden “will be minimal because (1) the rule gives broadband Internet access service providers flexibility in how to implement the disclosure rule, and (2) the rule gives providers adequate time to develop cost-effective methods of compliance.”³⁴

Neither justification is valid. As shown above, the “flexibility” afforded to broadband service providers is actually more likely to *increase* the cost burdens of the disclosure

³¹ The Commission also has not offered any data as to the typical cost burdens of its “cable access” complaint procedures, or explain how that data can be extrapolated with any accuracy to the open Internet context. In this regard, the FCC has failed to tailor its formal complaint procedures in a manner that minimizes potential burdens on broadband service providers that must respond to open Internet complaints.

³² See *Preserving the Open Internet, Broadband Industry Practices*, 74 Fed. Reg. 62638, 62639 (Nov. 30, 2009).

³³ See *Transparency PRA Notice*, *supra* note 3.

³⁴ *Open Internet Order*, 25 FCC Rcd at 17990 ¶ 166.

requirements because of the lack of clarity regarding whether any given disclosure is actually consistent with the rule. Moreover, the Commission's estimates do not fully account for the burden of preparing and distributing even a single disclosure statement – the manpower commitment alone will far exceed 10.3 hours per response (and the associated annual costs will far exceed \$0) when one considers how often disclosures must be updated and the number of new and existing end users and service providers that must receive disclosures. Particularly for ILECs like ITTA's members, which typically sign up new customers over the phone, it is unclear whether it will be at all feasible to provide the kind of disclosures contemplated in the *Open Internet Order*. And, even if feasible, compliance will take a significant amount of time. And, as explained above, that compliance will be relatively greater for smaller providers, which the Commission also fails to take into account.

With regard to complaint procedures, the FCC estimates only a total of 15 responses annually, with an estimated time of 2 to 40 hours per response, and a total industry-wide burden of only 239 hours and \$40,127 in outside costs.³⁵ This minimal estimate simply cannot be reconciled with the fact that “any person” may file a formal complaint under the Commission's open Internet rules. There are millions of end users, edge providers and others that use broadband service in one way or another, and there are thousands of entities that provide that service. The notion that this universe of potential parties will produce only 15 formal complaints a year seems fanciful at best. Furthermore, it does not appear that the Commission's cost estimate accounts for the significance of formal complaint obligations.

CONCLUSION

³⁵ See *Complaint Procedures PRA Notice*, supra note 4.

The disclosure requirements and complaint procedures, as adopted, are inconsistent with the PRA, and the Commission radically underestimates the burdens they will impose on regulated entities. The Commission must reconsider the rules, reducing the burden to conform to the PRA's requirements.

Respectfully submitted,

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