

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554**

Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
Notice of Information Collection)	OMB Control No. 306-1158
)	

COMMENTS OF THE AMERICAN CABLE ASSOCIATION

The American Cable Association (“ACA”) hereby submits its comments in response to the Federal Communications Commission’s (“Commission”) notice¹ seeking comment on Paperwork Reduction Act (“PRA”)² implications of the enhanced transparency requirements adopted by the Commission in its *2015 Open Internet Order*.³ ACA represents over 800 small and medium-sized cable operators, incumbent telephone companies, municipal utilities, and other local providers of broadband Internet access service (“BIAS”), as well as video and voice communications services. To provide this array of services, ACA’s cable operator members employ a variety of robust technology platforms for their networks, including DOCSIS 3.0 over hybrid fiber coaxial networks and IP over passive optical networks. Cable-based platforms are

¹ *Notice of Information Collection Being Reviewed by the Federal Communications Commission*, 80 Fed. Reg. 29000 (rel. May 20, 2015) (“PRA Notice”).

² Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 84 Stat. 2812 (1980); Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified at 44 U.S.C. 3501 *et seq.*).

³ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, GN Docket No. 14-28, ¶¶ 154-184 (rel. Mar. 9, 2015) (“2015 Open Internet Order”).

engineered to provide to all users high-performance broadband service with high speeds, low latency and jitter, and minimal packet loss, and operators use standard industry practices to provide this level of performance on these platforms. ACA members offer service in smaller communities and rural areas, some of which may otherwise be unserved, as well as in urban and suburban markets by overbuilding other providers. In aggregate, these providers pass nearly 19 million homes and provide BIAS to nearly 7 million homes. As such, ACA and its members have a major interest in ensuring that any collection associated with the enhanced transparency requirements complies with the PRA,⁴ which requires the Commission to address public comments and minimize paperwork burdens, especially on small businesses.⁵

In the *2010 Open Internet Order*,⁶ the Commission adopted the transparency rule,⁷ requiring BIAS providers to publicly disclose accurate information regarding –

- Commercial Terms, including pricing, privacy policies, and redress options;
- Performance Characteristics, including information about speed and latency and the effects of specialized services, if any, on available capacity; and

⁴ 5 C.F.R. § 1320. ACA participated in the Commission’s 2011 Paperwork Reduction Act review of the transparency rule. *See e.g.* Paperwork Reduction Act Comments of the American Cable Association, *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7206, 7207, OMB Control Number 3060-XXXX; Letter from Ross J. Lieberman, Vice President of Government Affairs, American Cable Association *et al.* to Ms. Marlene Dortch, Secretary, Federal Communications Commission, GN Docket No. 09-191 and WC Docket No. 07-52 (June 8, 2011) (“Lieberman Letter”).

⁵ 44 U.S.C. §§ 3501(1), 3506(c)(2).

⁶ *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17936-41 (2010) (“2010 Open Internet Order”) *aff’d in part, vacated in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁷ 47 C.F.R. § 8.3.

- Network Management Practices, including congestion management, application-specific behavior, device attachment rules, and security measures.

Thereafter, following receipt of comments on the collection burdens associated with the new rule from ACA and others, the Commission's Enforcement Bureau and Office of General Counsel reiterated the Commission's conclusion that the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance concerning effective disclosure models.⁸

In adopting the *2015 Open Internet Order*, the Commission concluded that it should make a series of enhancements to the transparency rule. This includes clarifications to existing requirements and the adoption of new and more granular disclosure requirements regarding commercial terms, performance, and network practices. These clarifications and new requirements are the focus of this proceeding.

Because they provide BIAS, ACA members have been subject to and have complied with the transparency rule adopted by the Commission in the *2010 Open Internet Order*. As discussed above, a critical aspect of this rule is the Commission's *2011 Advisory Guidance*, setting forth different methodologies that a broadband provider could use to meet the requirement to disclose performance characteristics of its network.⁹ In its discussion of

⁸ *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) ("2011 Advisory Guidance").

⁹ As noted at the beginning of the comments, ACA's cable operator members employ technology platforms engineered to deliver high-performance broadband service. Cable operators additionally monitor their networks to ensure this level of performance is maintained and, where necessary, address issues. These providers also are responsive to customer concerns about broadband performance when they may arise and work with them to diagnose and address any problems. This may include helping customers use

acceptable methodologies, the Enforcement Bureau and Office of General Counsel stated that “a broadband provider may disclose actual performance based on internal testing; consumer speed test data; or other data regarding network performance, including reliable, relevant data from third-party sources such as the broadband performance measurement project.”¹⁰ In adopting this alternative methodology, the Enforcement Bureau and Office of General Counsel correctly recognized that installing and using devices to measure actual performance would be a significant burden for all but the largest broadband providers and that other methodologies could be employed consistent with the intent of the performance disclosure requirement.¹¹ Virtually all ACA members comply with the transparency rule’s requirements to measure their broadband Internet access service performance characteristics by employing one or more of the permissible alternative methodologies.¹²

In the *2015 Open Internet Order*, the Commission stated that the enhanced transparency requirements “build off...the transparency rule requirements established in 2010, and interpreted

speed tests to analyze performance problems. These tests assist users and providers in pinpointing the source of any problem in the local network, at the customer premises, or upstream with transit or peering providers.

¹⁰ See *2011 Advisory Guidance* at 5.

¹¹ See *id.* at 3. In the *2011 Advisory Guidance*, the Enforcement Bureau and Office of General Counsel specifically recognized the *Lieberman Letter*, stating: “In the absence of greater clarity regarding expected disclosures, commenters stated, the transparency rule could be interpreted to require burdensome disclosures, particularly for small providers that may not have resources comparable to the largest providers.”

¹² One ACA member, Mediacom Communications Corporation, participates in the Commission’s Measuring Broadband America project.

by the *2011 and 2014 Advisory Guidance*.¹³ ACA members subject to the enhanced transparency requirements, therefore, will take guidance from the *2011 Advisory Guidance* when complying with the additional performance characteristic requirements.

The enhanced transparency rule includes “a requirement that broadband providers always must disclose promotional rates, all fees and/or surcharges, and all data caps and data allowances; adding packet loss as a measure of network performance that must be disclosed; and requiring specific notification to consumers that a ‘network practice’ is likely to significantly affect their use of the service.”¹⁴ The Commission estimates these will cause providers to take an additional 4.5 hours on average each year to respond.¹⁵ From discussions with ACA

¹³ See *2015 Open Internet Order*, ¶ 161. The Commission also states in making its initial PRA calculations that it “does not expect this [the enhanced disclosure of performance metrics] to require additional measurement devices.” See Initial Paperwork Reduction Act Calculations for Transparency Rule Disclosures, *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, Response 13 (rel. March 12, 2015) (“Initial PRA Calculations”).

See also *id.*, ¶ 166 and n. 412 (“We decline to otherwise codify specific methodologies for measuring the ‘actual performance’ required by the existing transparency rule. We find that, as in 2010, there is benefit in permitting measurement methodologies to evolve and improve over time, with further guidance from Bureaus and Office – like in 2011 – as to acceptable methodologies.”).

¹⁴ See *2015 Open Internet Order*, ¶ 24.

¹⁵ See Initial PRA Calculations, Response 12.

Before examining the new collection requirements created by the enhancements to the transparency rule, ACA suggests that the Commission review whether its current estimate of the burden from compliance with the existing requirements is accurate based on the actual experience of BIAS providers. By doing so, the Commission can ensure that its “Estimated Time Per Response” of 28.9 hours on average for the enhanced rule has a sound basis. Undertaking such a review should be viewed as simply “good practice,” as it will give the Commission an accurate and complete understanding of the costs of compliance and the burdens that BIAS providers – particularly smaller providers – face. See *Disclosure of Network Management Practices, Preserving the Open Internet and*

members, this number significantly understates the amount of time that BIAS providers expect to spend to effectively and accurately collect and disclose additional information about network practices,¹⁶ and to inform customers directly “if their individual use of a network will trigger a network practice, based on their demand prior to the period of congestion, that is likely to have a significant impact on the end user’s use of the service.”¹⁷

With respect to the collection and disclosure of additional information about network practices, ACA members already provide specific disclosures of their network practices, including congestion management practices. The Commission now clarifies that these disclosures apply to traffic associated with specific users or groups and must include information about “the purpose of the 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 end users’ experiences.”¹⁸ Not only will the initial production of this information involve many hours of time by in-house business and legal personnel, out of an

Broadband Industry Practices, Report and Order, GN Docket No. 09-191 and WC Docket No. 07-52, Response 12 at 9 (July, 2011) (“2011 PRA Submission”) (“We expect respondents will expend an average of approximately 24.4 hours to update disclosures in year three. Thus, over the course of three years, respondents will expend an average of approximately 32 hours per year ($46.4 + 25.1 + 24.4 = 95.9/3 = 32$ hours/year.”).

¹⁶ See *2015 Open Internet Order*, ¶ 169.

¹⁷ See *id.*, ¶ 171. Because the Commission in the *Initial PRA Calculations* does not provide a breakout of the time required for specific “enhanced” requirements, ACA cannot know how each of the enhancements contributed to the Commission’s aggregate estimate. In addition, certain assumptions used by the Commission in making its estimate are not correct. For instance, smaller broadband providers do not have sufficient in-house personnel to develop and maintain their disclosures. Instead, they rely on outside personnel, many of which (*e.g.* legal counsel) charge rates far in excess of those used by the Commission. ACA notes the Commission did not attempt to estimate these costs.

¹⁸ See *id.*, ¶ 169.

abundance of caution, ACA members will need to engage outside counsel to review these wide-ranging (and often subjective) requirements. Moreover, these practices and their effects on customers and other entities in the Internet ecosystem will evolve as new types of traffic and traffic flows emerge as new content and applications are offered and customers alter the services they access, requiring frequent review and revision of each operator's disclosures. ACA members have estimated that to develop, draft, and revise the disclosures will require on average annual expenditures of 16-24 hours.

As for direct notification to customers when their usage may trigger a network practice, ACA members expect to accomplish this task by developing and implementing an automated mechanism that monitors each customer's usage and sends an email, web browser notice, and/or some other communication. This, of course, will entail material costs. In addition, they will incur recurring costs to respond to customers' questions and issues after a notice is received. Based on experience, ACA members estimate that approximately .5 percent of customers will call each month with questions about notices and that customer representatives will spend approximately 5 minutes on average to respond to each customer. For an ACA member with 100,000 BIAS customers, that means they will expend approximately 100 hours each month as a result of the direct notifications. Even for a provider with only 10,000 customers, the time would be much greater than the Commission estimates.

ACA submits that the Commission, as part of the PRA review, should alleviate burdens imposed by the network practice and notification requirements discussed above. First, the Commission should amend the network practice requirement to require that providers only disclose the trigger that will activate use of the practice for a particular type of traffic – and not the information about the purpose of the practice and the effect on a user's experience. Second,

regarding direct notification, ACA does not oppose the practice for its medium-sized members (those with more than 100,000 but less than 400,000 BIAS customers), but the Commission should provide guidance stating these providers have sufficient flexibility to craft the notification and determine the best way to respond to customer inquiries. As for smaller providers (those with fewer than 100,000 customers), the Commission should continue the exemption adopted in the *2015 Open Internet Order*.¹⁹

Respectfully submitted,



AMERICAN CABLE ASSOCIATION

Matthew M. Polka
President and Chief Executive Officer
American Cable Association
Seven Parkway Center
Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Ross J. Lieberman
Senior Vice President of Government Affairs
Mary Lovejoy
Vice President of Government Affairs
American Cable Association
2415 39th Place, NW
Washington, DC 20007
(202) 494-5661

Thomas Cohen
Kelley Drye & Warren LLP
3050 K Street, NW
Suite 400
Washington, DC 20007
Tel. (202) 342-8518
Fax (202) 342-8451
tcohen@kelleydrye.com
Counsel to the
American Cable Association

July 20, 2015

¹⁹ See *id.*, ¶¶ 172-175.