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**Before the
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503**

In the Matter of)

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)

81 Fed. Reg. 53145
OMB Control Number: 3060-1158

COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”)¹ respectfully submits these comments in response to the Notice² filed by the Federal Communications Commission (the “FCC” or the “Commission”) pursuant to the Paperwork Reduction Act (“PRA”) regarding the enhanced transparency requirements adopted by the *2015 Open Internet Order* (the “Enhanced Transparency Rules”).³

¹ CCA is the leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 subscribers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members consisting of small businesses, vendors, and suppliers that provide products and services throughout the mobile communications supply chain.

² *Information Collection Being Submitted for Review and Approval to the Office of Management and Budget*, 81 FR 53145 (Aug. 11, 2016) (“PRA Notice”). The FCC previously submitted an initial estimate in May 2015. See *Information Collection Being Reviewed by the Federal Communications Commission*, 80 FR 29000 (May 20, 2015) (“2015 Initial PRA Notice”).

³ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, 30 FCC Rcd 5601 (2015) (“2015 Open Internet Order”), *aff’d United States Telecom Association, et al. v. FCC*, No. 15-1063 (D.C. Cir. June 14, 2016). Petitions for rehearing of this item are pending before the D.C. Circuit.

I. INTRODUCTION AND SUMMARY

The Office of Management and Budget (“OMB”) should not approve the Enhanced Transparency Rules until the Commission has: (1) settled the scope of the temporary small provider exemption set to expire this December;⁴ (2) addressed the Application for Review filed by CCA, describing the legal infirmities of the guidance on the Enhanced Transparency Rules;⁵ and, (3) revised the burden estimates, as the figures listed in the *PRA Notice* drastically understate the cost and time burdens implied by the Enhanced Transparency Rules.

OMB should not approve the Enhanced Transparency Rules before the small provider exemption is determined, as the result of that decision-making process will impact the Commission’s estimate of total respondents obliged to comply. Any fluctuation in number of respondents will necessarily have an impact on the cost and time estimates, and therefore the current *PRA Notice* should not be considered a final estimate of respondents and burdens. The current small provider exemption is temporary,⁶ and the Commission has not yet provided stakeholders with information regarding the scope of a permanent exemption, yet expects to do so “after the PRA process [is] complete.”⁷ OMB should not accept an approach that does not provide the best, most accurate information possible.

⁴ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order, 30 FCC Rcd 14162, ¶ 1 (CGB 2015) (“*Small Provider Exemption Report and Order*”).

⁵ *See Guidance on Open Internet Transparency Rule Requirements*, GN Docket No. 14-28, Public Notice, DA 16-569 (rel. May 19, 2016) (“*2016 Guidance*”); *see also* Application for Review of Competitive Carriers Association, GN Docket No. 14-28, at 5-6 (filed June 20, 2016) (“*CCA Application for Review*”); *see also* Application for Review of CTIA-The Wireless Association, GN Docket No. 14-28 (filed June 20, 2016) (“*CTIA Application for Review*”).

⁶ *Small Provider Exemption Report and Order* ¶ 4.

⁷ *Id.* ¶ 1.

Next, OMB should not approve the Enhanced Transparency Rules until CCA's Application for Review, and CTIA-The Wireless Association's ("CTIA's") Application for Review (together, "Applications for Review"), are addressed by the Commission. CCA and CTIA raised numerous substantial legal challenges to the *2016 Guidance*, and discussed several aspects of the document that materially obscured compliance requirements. If key aspects of the rules are on uncertain legal grounds, and carriers are unclear how to comply, the Enhanced Transparency Rules are not ready for OMB approval.

Last, the Commission's burden estimates egregiously underestimate the time and cost burdens imposed by the Enhanced Transparency Rules. The Commission's compliance burden estimate—99,466 hours, at \$640,000 for "Total Annualized Capital, Operation, and Maintenance Costs," across 3,188 respondents—equates to 31.2 hours and \$200.75 per provider; this does not reflect the substantial costs imposed by the comprehensive, multi-faceted Enhanced Transparency Rules covering such varied business operations such as network performance measurements and point of sale protocols. In addition, the Commission has never explained how it arrived at its total estimated compliance burden. The presentation of the burden estimate as one lump sum makes difficult meaningful comment and critique, and severely limits the utility of the *PRA Notice*.

II. OMB APPROVAL OF THE ENHANCED TRANSPARENCY RULES WOULD BE PREMATURE

It would be premature for OMB to approve the Enhanced Transparency Rules because the application and compliance burden of the Enhanced Transparency Rules depend on unresolved matters. First, it is currently unknown whether various "small providers," of a size that has yet to be determined, will be required to comply with the Enhanced Transparency Rules. Second, the Commission has not yet responded to CCA's and CTIA's Applications for Review

of the *2016 Guidance* (together, “Applications for Review”).⁸ Therefore, CCA urges OMB to defer approval of the FCC’s estimate of the burdens associated with the Enhanced Transparency Rules until these issues are resolved, and the FCC submits a revised estimate for OMB’s review.

Small Provider Exemption. OMB cannot, as a practical matter, determine the impact of the Enhanced Transparency Rules on the covered parties until the size and scope of the small provider exemption is determined. By way of background, the *2015 Open Internet Order* established a temporary exemption for BIAS providers with 100,000 or fewer broadband subscribers (later changed to 100,000 or fewer broadband connections)⁹ from the Enhanced Transparency Rules due to possible financial and other onerous burdens (the “Small Provider Exemption”).¹⁰ In light of strong support from carriers and industry stakeholders, the Small Provider Exemption was extended until December 15, 2016.¹¹ CCA expects the Commission to revisit application of a small provider exemption to the Enhanced Transparency Rules around that time. It is likely the formulation of any new proposal will be impacted by stakeholders, with the potential for Congress to weigh in as well. In the least, any change to the small provider exemption calculus will change the number of estimated respondents which must be described in a PRA notice; therefore, the Commission’s respondent estimate as listed in the *PRA Notice* will not be accurate unless the Commission makes permanent the current temporary small provider exemption.

⁸ CCA Application for Review; CTIA Application for Review.

⁹ *Small Provider Exemption Report and Order* ¶ 4.

¹⁰ *2015 Open Internet Order* ¶ 171-173.

¹¹ *Small Provider Exemption Report and Order* ¶ 1.

While the future of the Small Provider Exemption is uncertain, so is any applicable threshold that may apply if made permanent, not to mention that the threshold that has been set too low. The FCC’s current definition is not in line with the Small Business Administration’s (“SBA’s”) standards. The SBA considers a “small provider” as one with either 1,500 or fewer employees, or 500,000 or fewer broadband connections.¹² In fact, the FCC failed to abide by statutory guidelines that required it to “consult[] with SBA or obtain[] approval . . . when it opts to use a small business size standard different from SBA’s for regulatory enforcement purposes.”¹³ Many carriers and industry stakeholders have also commented on the scope of the Small Provider Exemption and support incorporating the SBA’s existing standards.¹⁴ In addition, Congress has been exploring adopting a small provider threshold of 250,000 or less subscribers to apply to the Enhanced Transparency Rules.¹⁵

¹² See Reply Comments of Small Business Administration Office of Advocacy, GN Docket No. 14-28, 3 (filed Sept. 8, 2015).

¹³ See *id.*; 13 C.F.R. § 121.903 (2015); see also 15 U.S.C. § 632(a.2.c) (2015).

¹⁴ See, e.g., Letter from Rebecca Murphy Thompson, General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (Sept. 9, 2015); Comments of CTIA – The Wireless Association, GN Docket NO. 14-28, 19 (filed Aug. 5, 2015).

¹⁵ The House of Representatives unanimously passed the Small Business Broadband Deployment Act (the “Act”), which incorporates a five-year sunset provision. The Senate version of the Act is similar with a 250,000 subscriber threshold with a three-year sunset. The Senate version has been reported out of the Senate Commerce Committee by a voice vote. See Small Business Broadband Deployment Act, H.R. 4596, 114th Cong. (2016); see also H. Energy and Commerce Comm., 114th Cong., *Text: H.R. 4596, The Small Business Broadband Deployment Act* (Mar. 14, 2016), <https://www.congress.gov/bill/114th-congress/house-bill/4596/text?q=%7B%22search%3A%5B%22HR4596%22%5D%7D&resultIndex=1>; see also Small Business Broadband Deployment Act, S.2283, 114th Cong., *Text: S.2283, Small Business Broadband Deployment Act*, <https://www.congress.gov/bill/114th-congress/senate-bill/2283/text>.

The PRA Notice specifically seeks to understand how the rules will impact small entities.¹⁶ Considering there are various definitions of “small providers” adopted by the industry in recent years, all of which significantly deviate from the SBA definition, as well as the current proposals on the record, it is difficult to predict which carriers will be exempt from the Commission’s final determination.¹⁷ Indeed, CCA’s members, the vast majority of which serve fewer than 500,000 customers, are effectively in limbo without certainty as to whether they will need to comply with the Enhanced Transparency Rules or whether they will be included under the Small Provider Exemption. As discussed above, the amount of time and the economic resources required to come into compliance with these rules are significant, and small and competitive carriers cannot needlessly expend their oftentimes limited resources. Between the *PRA Notice*, the *2015 Initial PRA Notice*, the *Open Internet* docket, and the separate decision-making process surrounding the Small Provider Exemption, small carriers are continually expending resources to assert the same objections to the Enhanced Transparency rules, and re-describe the burdens the Rules imply. The Commission should make a decision with respect to

¹⁶ *PRA Notice* at 53145.

¹⁷ For instance, in the *Spectrum Frontiers Report and Order*, a small business is defined as an entity with average annual gross revenues of the preceding three years leading up to the auction not exceeding \$55 million, and a very small business is defined as an entity with average annual gross revenues for the preceding three years not exceeding \$20 million. *Use of Spectrum Bands Above 24 GHz For Mobile Radio Services, GN Docket No. 14-177 et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-89, ¶ 249 (rel. July 14, 2016). In addition, in the *Incentive Auction Report and Order*, “small business” captures entities with average annual gross revenues for the preceding three years not exceeding \$40 million, and very small businesses are defined as entities with average annual gross revenues for the preceding three years not exceeding \$15 million. *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567, ¶ 31 (2014).

the Small Provider Exemption before seeking OMB approval of the Enhanced Transparency Rules.

Without a definite size threshold, it is difficult to accurately place an estimate on time and resources for compliance with the Enhanced Transparency Rules, and consequently, so is OMB's ability to effectively assess the FCC's estimate. Therefore, CCA submits that OMB defer its decision on the burden estimates until the size and scope of the Small Provider Exemption is determined.

Pending Applications for Review of the 2016 Guidance. Uncertainty also surrounds what may actually be required to comply with the rules themselves. In the Applications for Review, CCA and CTIA each raised substantial legal and policy issues stemming from the *2016 Guidance*. In the *2016 Guidance*, the FCC enacted unlawful changes to the existing transparency disclosure rules adopted pursuant to the *2010 Open Internet Order*¹⁸ and the *2015 Open Internet Order* without first subjecting such revisions to a notice and comment rulemaking proceeding pursuant to the Administrative Procedures Act ("APA").¹⁹

Specifically, the *2016 Guidance* adopts substantive rule changes to which the APA's notice and comment requirements should have applied, including: (1) the imposition of a network performance measurement standard based upon Cellular Market Areas ("CMAs"); (2) the mobile Measuring Broadband American Safe Harbor ("mobile MBA safe harbor") which will provide certain metrics for enhanced network performance disclosures; and (3) a new

¹⁸ *Preserving the Open Internet*, GN Docket No., 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd 17905 (2010) ("*2010 Open Internet Order*"), *aff'd in relevant part Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

¹⁹ See 5 U.S.C. § 553 (providing for general notice of proposed rulemaking to be published in the Federal Register, along with the opportunity for interested parties to participate in the rulemaking through the submission of comments).

standard of conduct requirement for point of sale disclosures forcing providers to “ensure” consumers receive required disclosures. CCA members are especially concerned by the mobile MBA safe harbor which, derived from a “national” data set and reliant upon CMA-based measurements, is effectively unavailable to non-nationwide carriers. Uncertainty surrounding these rules impacts providers’ burden estimates for these rules. Accordingly, OMB should defer its decision on the FCC’s burden estimate until a final action is taken with respect to the Applications for Review.

III. THE FCC DRASTICALLY UNDERESTIMATED THE TIME AND EXPENDITURE BURDEN FOR THE ENHANCED TRANSPARENCY RULES

The FCC’s estimate of time, resources and finances expected for compliance with the Enhanced Transparency Rules does not reflect a realistic understanding of the burdens and should be rejected. The FCC estimates that annually, a respondent provider will spend an average of 31.2 hours and \$200.75 complying with the Enhanced Transparency Rules.²⁰ Indeed, the estimate is actually below the Commission’s burden estimate for the standard transparency rules that currently are in effect.²¹

²⁰ PRA Notice at 53145 - 46. The FCC estimates that the total annualized capital, operation and maintenance costs for the estimated 3,188 respondents will be \$640,000, or \$200.75 per respondent per year.

²¹ The FCC previously estimated that compliance with the standard transparency rules, as adopted in the *2010 Open Internet Order*, would require 32 hours and \$319.30 per respondent on an annual basis. Initially, the Commission estimated that it would take on average 10.3 hours for providers to comply with the standard transparency rules, however multiple parties filed comments challenging this estimate and the FCC increased it to 32 hours. *See Information Collections Being Submitted for Review and Approval to the Office of Management and Budget*, 76 FR 39873, July 7, 2011; *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comment Requested*, 76 Fed. Reg. 7207 (Feb. 9, 2011); *see also 2010 Open Internet Order*.

The Enhanced Transparency Rules in fact impose significantly greater burdens on carriers than the existing requirements under the *2010 Open Internet Order*, requiring many carriers to overhaul their internal and leased external systems for data compilation and notifications. These expansive changes will cost significant amounts of money and require substantial amounts of time,²² far more than many small businesses can afford in light of their already existing burdens of compliance with numerous other regulatory compliance requirements.

To comply with the Enhanced Transparency Rules, many competitive carriers, especially small carriers that are not eligible for the exemption, will need to invest in new data systems, provide for processing and maintenance of these systems, printing and distribution of new marketing materials, and additional compliance training. Ancillary network performance reporting requirements would prompt frequent internal review and additional recordkeeping. Compliance also will require providers to activate different capabilities throughout their companies (or through affiliates and/or third parties providing valuable services), including, for example, engineers who will take network measurements and incorporate the new required data into their collections; in-store personnel who will need to implement a point-of-sale program; web designers who will need to redesign and update online displays; marketing teams who may need to dispose of and create certain sales materials; and legal counsel who will need to review materials for compliance. More specifically:

- With regard to **performance monitoring, data collection and disclosures**, the Enhanced Transparency Rules require providers to disclose various service and network performance metrics; for example, packet loss, geographic-specific and granular speed and latency measurements, and average estimates for speed, latency,

²² See, *supra*, fn. 32.

and packet loss during peak periods, all on a CMA basis.²³ Such detailed performance metrics are not required under the standard transparency rules, and many of CCA's carriers do not collect or keep this detailed information in the ordinary course of business.²⁴ Many competitive carriers will need to acquire this information for an additional cost through a third party. Acquiring the information and potentially redesigning performance monitoring systems will cost well over the FCC's estimation of \$200.75 a year for these carriers.²⁵

- The FCC's **enhanced point of sale obligations** also would be costly, to the extent that they can be concretely determined. The *2015 Open Internet Order* requires "at a minimum, the prominent display of disclosures on a publicly available website and disclosure of relevant information," which must allow consumers "to make an 'informed choice' regarding the purchase or use of broadband services at the point of sale," but that it "is not sufficient for broadband providers simply to provide a link to their disclosures."²⁶ However, the *2016 Guidance* imposes a new disclosure requirement by providing that "while disclosures may be made via a link to a website, for those disclosures to be meaningful, BIAS providers must ensure that consumers *actually receive* any Open Internet-related information that is relevant to their purchasing decision at all potential points of sale, including in a store, over the phone, and online"²⁷ There are several ways that providers may reasonably interpret the *2016 Guidance's* new substantive point of sale regulation, many of which would require significant time and resources.²⁸ For instance, it would likely be much more expensive for a carrier to redesign its sales model and online interface to require a signature or some other acknowledgement which might prove a carrier will "ensure" customers have the opportunity to review the necessary disclosures and indicate "actual receipt."

²³ See *2015 Open Internet Order* ¶ 166; see also *2016 Guidance* at 5.

²⁴ See *2016 Guidance* at 5; see also CCA Application for Review at 5-6.

²⁵ One CCA Member estimates the necessary equipment and technology upgrades would cost more than \$100,000, a very significant sum to this small carrier, for the purchase of a system component capable of retrieving latency and speeds by CMA. In addition, programming and testing would add approximately 105 hours of an engineer's time initially, with one to two additional hours each time a future update or report is required. Administrative costs would add approximately \$4,000 in time spent by engineers pulling and lawyers filing the reports.

²⁶ *2015 Open Internet Order* ¶ 171.

²⁷ *2016 Guidance* at 10.

²⁸ Unfortunately, the FCC has provided no actual guidance to accompany the new substantive regulation, which may leave providers in the unfortunate position at having to risk running afoul of the new rules.

- Under the Enhanced Transparency Rules, providers also will now be required to **notify** end users directly if their individual use of a network will trigger a network practice, based on their demand prior to a period of congestion that is likely to have a significant impact on the end user’s use of the service.²⁹ This notification requirement will force BIAS providers to completely revamp their monitoring and notification systems to comply, a task that requires significant time and economic resources.³⁰

These changes all take considerable time, and will require substantial funds and administrative resources.

Implementing the Enhanced Transparency Rules will be particularly burdensome for small competitive carriers that often have limited resources. Although the FCC “anticipates that small entities may have less of a burden, and large entities may have more of burden” due to more customers and larger geographic footprints, the opposite is true.³¹ While all carriers may struggle with the challenges presented by these rules, small carriers, by virtue of their size and resources, will have a harder time accommodating the extra required costs, and producing additional personnel and engineering resources. Although smaller providers often successfully operate using fewer financial and administrative tools than nationwide carriers, the cost recovery associated with these operations is allotted across a smaller customer base, and dispersed over a

²⁹ *2015 Open Internet Order* ¶ 171.

³⁰ For example, one CCA member estimates that installing a system to automatically notify customers when features are added to cover overages, instead of using its current manual system, would require a \$150,000 system upgrade. Furthermore, this member notes that it would be required to expend resources updating its website and making the disclosures available at its stores, legal time updating customer communications, and hours for its trainers to retrain employees at its call center and retail stores and modify training manuals. Making additional disclosures to customers at points of sale would take time, which in the aggregate could require the hiring of one or more additional employees. Finally, on mobile networks, demand tendencies vary, so as to make challenging the ability to forecast in advance and notify a particular customer that account modifications will be triggered during some unknown future time, congestion level, and geographic area.

³¹ *PRA Notice* at 53146.

larger area. Indeed, because smaller carriers experience different economies of scale than larger carriers, placing an additional strain on funds will only circumvent the public interest by harming the consumers they serve.

Last, the Commission's presentation of the burden estimate as a consolidated grand total makes comment and critique difficult and limits the usefulness of the *PRA Notice* and comment cycle. A lump sum does not help carriers determine whether the cost of the entire breadth of Enhanced Transparency Rules, or whether one particular rule, may have been under- or over-estimated in the FCC's calculation. Further, the FCC does not explain how its 2016 *PRA Notice* cost estimate retained the same total annual cost estimate of \$640,000 as a year earlier, yet the total annual number of estimated hours rose from 92,133 hours in 2015 to 99,466 hours in 2016. It is difficult to imagine how a 7,333-hour compliance burden increase would not result in a corresponding increase in compliance costs. Accordingly, OMB should refrain from approving the Enhanced Transparency Rules until the Commission is more forthcoming with a breakdown of the total cost estimate and performs a practically realistic cost analysis.

IV. CONCLUSION

For the foregoing reasons, the FCC's burden estimate for complying with the Enhanced Transparency Rules is insufficient and should not be approved by OMB. In addition, it would be premature for OMB to issue an approval of the FCC's estimates as there several outstanding issues relevant to the compliance and application of the Enhanced Transparency Rules. Once these issues are resolved, the FCC should resubmit a revised burden estimate, taking into account the comments submitted in this proceeding as well as the application of a permanent small provider exemption, and new requirements that may be applied pursuant to the *2016 Guidance*.

Respectfully submitted,

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