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

In the Matter of	)	
	)	
Small Business Exemption From Open Internet Enhanced Transparency Requirements	)	GN Docket No. 14-28
	)	

ORDER

Adopted: February 23, 2017 **Released: March 2, 2017**

By the Commission: Chairman Pai and Commissioner O'Rielly issuing separate statements; Commissioner Clyburn dissenting and issuing a statement.

I. INTRODUCTION

1. In this order, in light of concerns expressed by smaller broadband Internet access service (BIAS) providers, we grant a waiver from the 2015 enhanced reporting requirements for BIAS providers with 250,000 or fewer broadband connections. The waiver will be effective for five years and will ensure that smaller providers are not required to comply with the enhanced reporting requirements during that time. This time-limited waiver, which applies only to the types of smaller broadband providers identified here, will further the Commission's goal of promoting investment and deployment of broadband infrastructure.

II. BACKGROUND

2. In the *2015 Open Internet Order*, the Commission adopted certain enhancements to the 2010 reporting requirements that govern the content and format of disclosures made by providers of broadband Internet access service.[1] These enhanced requirements built on the earlier requirements[2] to provide information to end-user consumers, edge providers, and the Internet community[3] regarding commercial terms, performance characteristics, and network practices.[4]

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[1] *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5672-77, paras. 162-171 (2015) (*2015 Open Internet Order*).

[2] *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17936-41, paras. 53-61 (2010) (*2010 Open Internet Order*).

[3] *2015 Open Internet Order*, 30 FCC Rcd at 5669, 5671, paras. 154, 161; *see also* 47 CFR § 8.3.

[4] *2015 Open Internet Order,* 30 FCC Rcd at 5672-77, paras. 164-71. The enhanced requirements include disclosure of: (i) commercial terms for prices, other fees, and data caps and allowances; (ii) performance characteristics including packet loss, performance by geographic area, 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, and 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 disclosures in a format that meets the needs of end users. *See id.* at 5672-77, 5679-81, paras. 164-171, 176-181.

3. To proceed with care and in response to smaller provider concerns, the Commission temporarily exempted from the enhanced reporting requirements those BIAS providers "with 100,000 or fewer broadband subscribers as per their most recent Form 477, aggregated over all the providers' affiliates."[5] At the same time, the Commission stated that "both the appropriateness of the exemption and the [subscriber] threshold require further deliberation,"[6] and directed the Consumer and Governmental Affairs Bureau (Bureau or CGB) to seek comment on the exemption and to "adopt an order announcing whether it is maintaining an exemption and at what level by no later than December 15, 2015."[7] Such smaller providers continue to be subject to the requirements applicable under the *2010 Open Internet Order*.

4. On June 22, 2015, by notice published in the Federal Register, the Bureau sought comment on whether to maintain the temporary exemption and, if so, the appropriate size threshold to qualify.[8] The Bureau specifically sought comment on whether the 100,000 subscriber benchmark is "the right threshold for any extension of the exemption," and whether there would be "a more appropriate level to identify those providers 'likely to be most disproportionately affected by the new disclosure requirements.'"[9] Several commenters, representing primarily providers of broadband Internet access services, supported the exemption for smaller providers, contending that the compliance burdens on smaller providers are disproportionately high due to their limited resources.[10] On December 15, 2015, CGB extended the temporary exemption for smaller providers until December 15, 2016 because it could not at that time fully evaluate the impact of removing the temporary exemption, contemplating that the Commission would subsequently "be able to consider whether and, if so, how best to address the exemption."[11]

III. DISCUSSION

5. Although the Commission originally contemplated that the Bureau would need until December 15, 2015 to determine whether to eliminate the temporary exemption, the Bureau was unable to make a final determination within that timeframe and therefore extended the temporary exemption for a year.[12] In these unique circumstances, and in light of the fact the enhancements have just recently gone into effect,[13] we find good cause to waive the enhanced reporting requirements for a limited, specific

[5] *2015 Open Internet Order,* 30 FCC Rcd at 5677-79, paras. 172-75 (emphasizing that all providers of broadband Internet access service, including smaller providers, remain subject to the requirements adopted in 2010).

[6] *Id.* at 5679, para. 174.

[7] *Id.* The Commission's delegation of authority was one-time, rather than a continuing delegation to the Bureau to address the exemption.

[8] *Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements*, Public Notice, 30 FCC Rcd 6409 (2015) (Public Notice), Federal Communications Commission, Protecting and Promoting the Open Internet, 80 Fed. Reg. 38424 (July 15, 2015).

[9] *Id.*

[10] *Protecting and Promoting the Open Internet*, Report and Order, 30 FCC Rcd 14162, 14164-65, para. 5 (CGB 2015) (*CGB Extension Order*).

[11] *Id.* at 14162, *et seq*. The information collections imposed by the enhanced requirements are subject to the Paperwork Reduction Act of 1995 (PRA). 44 U.S.C. §§ 3501-3520. While the Commission had published its initial burden estimates on May 20, 2015 in the Federal Register and sought comment in accordance with the PRA, Federal Communications Commission, Information Collection Being Reviewed by the Federal Communications Commission, 80 Fed. Reg. 29000-29001 (May 20, 2015), the Commission was still proceeding through the PRA process, which involves estimating the burden of complying with the enhanced reporting requirements for providers of all sizes and obtaining approval from the Office of Management and Budget (OMB).

[12] *See CGB Extension Order.*

[13] The enhancements went into effect on January 17, 2017. 81 Fed. Reg. 93638 (Dec. 21, 2016).

period of five years. This waiver will apply only to smaller providers: *i.e.*, those BIAS providers with 250,000 or fewer broadband connections as reported on their most recent Form 477. It will not apply to the larger BIAS providers. In the unique circumstances of this proceeding, we also conclude that the public interest would be served by applying the waiver retroactively to January 17, 2017. In the *2015 Open Internet Order*, the Commission directed the Bureau to resolve the question at issue here by December 15, 2015. Because of difficulties associated with assessing the extent of the burden on smaller providers, as described above,[14] neither the Bureau nor the Commission has been able to resolve the issue as originally contemplated. In these circumstances, and given the *de minimis* impact of a waiver that is retroactive only for a short time, and also in light of the potential burdens and uncertainties associated with imposing the requirement on smaller providers, we conclude that a retroactive waiver is warranted.

6. Generally, the Commission's rules may be waived if good cause is shown.[15] Waiver is appropriate where the particular facts make strict compliance inconsistent with the public interest.[16] In making this determination, we may take into account considerations of hardship, equity, or more effective implementation of overall policy.[17] Waiver of the Commission's rules is therefore appropriate if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.[18] Based on the record of these proceedings, there is substantial evidence that smaller providers – which can serve as vital sources of broadband throughout the country – would face real disincentives to deploying, maintaining, or upgrading that broadband infrastructure in light of the initial costs associated with the enhanced requirements.[19] We also expect that the five-year temporary waiver will afford these smaller providers with the regulatory certainty necessary for them to invest in broadband infrastructure. We further expect that this waiver will give these smaller providers an opportunity to reduce their costs of compliance, should the enhanced requirements stay in effect beyond the five-year period contemplated here, by allowing them to benefit from the experience in the rollout and implementation of the enhanced reporting requirements by those providers that continue to be covered by the requirement. At the same time, the temporary waiver will provide the Commission with an opportunity to revisit the costs and benefits associated with those requirements.

[14] *See supra* para. 4, note 11.

[15] 47 CFR § 1.3.

[16] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[17] *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[18] *Northeast Cellular*, 897 F.2d at 1166.

[19] *See, e.g.*, ACA Comments at 10 ("Without the burden of the enhanced requirements, these resources could be dedicated to 'running the business,' including to upgrade broadband facilities and provide additional customer service."); WISPA Comments at 7 ("Imposing the new disclosure obligations on small providers would raise compliance burdens so much that their limited resources will be spent on compliance rather than investment in network deployment, innovation and service quality. Additional compliance costs will be passed through to the consumer, investment will chill and deployment will slow."); RWA Reply Comments at 4 ("Customers in the rural and remote areas served by these providers would benefit most if those resources were instead expended toward deploying new broadband facilities to bring service to unserved locations or to upgrading facilities in underserved locations."); WCA Comments at 6 ("While the Commission may believe that the enhanced transparency enhancements are 'modest in nature' and that most companies will be able to rely on in-house expertise to comply with them, the reality is that small BIAS providers will be forced to expend a substantial amount of time and resources to comply, resources that they either do not have or could be better spent on deploying, maintaining and improving their networks. Therefore, the exemption should be made permanent."); CTIA Comments at 15 ("While the Commission is not the subject of that Notice and Request for Comment, it too should take measures to reduce impediments to broadband deployment. One of those impediments is burdensome and unwarranted transparency requirements on deployment in areas where economics already make it challenging to provide a competitive service.").

7. We find that, for purposes of the more extensive BIAS enhanced reporting requirements at issue here, it is appropriate to provide relief to those providers serving no more than 250,000 subscribers.[20] A number of industry groups support this threshold in light of the substantial burden associated with the requirement,[21] although it is substantially lower than the one advocated by some commenters earlier in the proceeding.[22] Additionally, we note that the House unanimously passed and the Senate Committee on Commerce, Science, and Transportation reported out bills that would have exempted businesses with no more than 250,000 subscribers from the enhanced requirements last year.[23] Earlier this year, the House passed the Small Business Broadband Deployment Act, which would also exempt businesses with no more than 250,000 subscribers from the enhanced requirements for five years.[24] A similar bill was introduced in the Senate.[25]

8. For the reasons stated above, the combination of these unique circumstances and the public interest in preventing these potentially unnecessary compliance costs for smaller providers compels us to provide a limited waiver of the enhanced reporting requirements so as to avoid causing unnecessary disruption to smaller providers.[26]

[20] Consistent with staff interpretation of the term and for purposes of this waiver, we refer to "subscribers" as broadband connections reported on a provider's most recent Form 477. *See infra* para. 9, note 27; *Protecting and Promoting the Open Internet*, Report and Order, 30 FCC Rcd 14162 (CGB 2015).

[21] *See* The Wireless Communications Association International Comments at 7-9 (Aug. 5, 2015) ("If a 100,000 connection threshold is an appropriate measure for a rule that simply requires a provider to record and retain information about call attempts to rural telephone numbers, it stands to reason that a higher threshold is appropriate for a far more complex and burdensome rule like the enhanced transparency requirements."); Letter from Elizabeth Barket, Law & Regulatory Counsel, Competitive Carriers Association et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Dec. 7, 2016) (signed by CCA, WISPA, ACA, and NTCA—The Rural Broadband Association).

[22] CTIA and CCA, among others, previously advocated for a 500,000 connection threshold, asserting that the Commission's temporary exemption threshold of 100,000 connections was too low. *See* CTIA Comments at 18-19 (Aug. 5, 2015) ("Many broadband providers may have greater than 100,000 connections, but may not have the resources necessary to comply with the enhanced disclosures."); Letter from Rebecca Murphy Thompson, General Counsel, CCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Sept. 9, 2015) at 4 ("some service providers that surpass the current '100,000 or fewer broadband connections' standard will nonetheless also find it challenging to comply with the Commission's reporting requirements").

[23] *See* Small Business Broadband Deployment Act, H.R. 4596, 114th Cong. § 2(d)(2) (2016); Small Business Broadband Deployment Act, S. 2283, 114th Cong. § 2(a)(4); Letter from Senator Steve Daines, Senator Joe Manchin III, Senator Heidi Heitkamp, Senator James E. Risch, Senator Dan Sullivan, Representative Greg Walden, Representative Dave Loebsack, and Representative Robert E. Latta, to the Honorable Tom Wheeler, Chairman, FCC (Dec. 13, 2016).

[24] *See* Small Business Broadband Deployment Act, H.R. 288, 115th Cong. § 2(d)(2) (2017).

[25] *See* Small Business Broadband Deployment Act of 2017, S. 228, 115th Cong. § 2(b) (2017).

[26] The dissent suggests that "[t]wice, the Commission found 100,000 connections to be the right number, but today you will not find any rational discussion as to why this cutoff has been revisited." Dissenting Statement of Mignon L. Clyburn at 2. That is not quite accurate. In the *2015 Open Internet Order*, the Commission specifically said it was "unclear . . . how best to delineate the boundaries of this exception" and that the "threshold require[s] further deliberation." 30 FCC Rcd at 5678–79, paras. 174–75. And in the *CGB Extension Order*, the Bureau specifically found that "[u]ntil the PRA process is complete . . . we cannot fully evaluate th[e] impact" of the enhanced transparency requirements on small providers. 30 FCC Rcd at 14165–66, para. 8. Thus the Commission is not revisiting anything—it is instead completing the further deliberation and full evaluation previously promised, and deciding that a threshold of 250,000 subscribers best reflects the trade-off between the benefit of the requirements for consumers and the cost imposed on small providers (and their subscribers).

IV. ORDERING CLAUSE

9. **IT IS ORDERED,** pursuant to the authority contained in section 1.3 of the Commission's rules, 47 CFR § 1.3, that a waiver of the 2015 enhanced reporting requirements for providers with no more than 250,000 broadband connections as reported on their most recent Form 477,[27] from January 17, 2017 to March 2, 2022 **IS GRANTED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[27] Thus, a provider that has no more than 250,000 broadband connections based on its Form 477 filed most recently prior to the release date of this order is covered by the waiver and will remain covered during the five-year term as long as its subsequent Forms 477 report that the provider has no more than 250,000 broadband connections. If, however, that same provider were to gain sufficient connections so as to report more than 250,000 connections on a future Form 477, that provider would no longer be covered by this waiver and therefore would be required to comply with the enhanced requirements thereafter for as long as its subsequently-filed Forms 477 continue to report that the provider has more than 250,000 broadband connections. Conversely, if a provider that currently or during the five-year waiver period reports more than 250,000 connections on its most recent Form 477 were in the future to file a Form 477 reporting that it had 250,000 or fewer connections, that provider would be covered by this waiver for as long as its subsequently-filed Forms 477 continue to report 250,000 or fewer connections.

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Small Business Exemption From Open Internet Transparency Requirements*, GN Docket No. 14-28.

Two months ago, the small business exemption from the expanded reporting requirements in the *Title II Order* expired. That lapse left thousands of our nation's smallest and most competitive Internet service providers—mom-and-pop wireless Internet service providers (WISPs), small cable operators, municipal broadband providers, electric cooperatives, rural telephone companies, and others—worried that they would be subject to unnecessary, onerous, and ill-defined reporting obligations.[1]

Today, we are taking action to exempt small businesses from these burdensome requirements—requirements that impose serious and unnecessary costs on small providers. I'm particularly pleased that we do so consistent with the bipartisan compromise reflected in the Small Business Broadband Deployment Act of 2017, which unanimously passed the House earlier this year.[2] Our decision will help the country's smaller providers—namely, those with 250,000 or fewer broadband subscribers—better serve their communities. For I firmly believe that these ISPs should spend their limited capital building out better broadband to rural America—not hiring lawyers and accountants to fill out unnecessary paperwork demanded by Washington, DC. With this action, the small businesses that are critical to injecting competition into the broadband marketplace will be better able to do just that.

I'd like to thank John B. Adams, Micah Caldwell, Alison Kutler, Karen Schroeder, Kurt Schroeder, and Mark Stone from the Consumer and Governmental Affairs Bureau, and Rick Mallen and Bill Richardson from the Office of General Counsel for their hard work on this order and their continued dedication to the public interest.

[1] Statement of Chairman Ajit Pai on Voting to Protect Small Businesses from Needless Regulation, http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0127/DOC-343229A1.pdf (Jan. 27, 2017).

[2] *See* Small Business Broadband Deployment Act, H.R. 4596, 114th Cong. § 2(d)(2) (2016); Small Business Broadband Deployment Act, S. 2283, 115th Cong. § 2(a)(4) (2017); Small Business Broadband Deployment Act, H.R. 288, 115th Cong. § 2(d)(2) (2017).

DISSENTING STATEMENT OF
COMMISSIONER MIGNON L. CLYBURN

Re: *Small Business Exemption From Open Internet Transparency Requirements*, GN Docket No. 14-28

In an ongoing quest to dismantle basic consumer protections for broadband services, the majority has decided to exempt billion dollar public companies from being transparent with consumers. This represents yet another in a series of steps being taken to jettison pro-consumer initiatives, and we should not stand silent as consumer protections "go gentle into that good night."

If you have not picked up on it already, I must respectfully dissent from today's Order.

From the beginning of the Open Internet proceeding, I have been consistent in my commitment to ensuring that our nation's smallest broadband service providers are not unduly burdened by the enhancements to our transparency rule. Indeed, I championed an exemption from the enhanced transparency rule, included in the Commission's *2015 Open Internet Order*. And two months ago, I voted to protect small providers with 100,000 or fewer subscribers, when the small provider exemption was on the precipice of lapsing.

But in late January, the newly constituted Commission proposed a vastly different Order than what had been on circulation for several months.

In the interest of finding common ground I made multiple attempts at compromise, as late as yesterday afternoon. But I could not compromise on having consumers clearly know the price they pay for service, what below-the-line fees are charged, and what data allowances apply to their broadband service.

We have been criticized in the past for not basing our decisions on facts. Well, if that were true, then very little has changed. While my colleagues describe this Order as a reflection of Congressional intent, one of the *Small Business Broadband Deployment Act*'s original co-sponsors, Rep. Dave Loebsack, described the bill as giving "the FCC . . . flexibility to find a more tailored solution, that best balances the needs of consumers, with the needs of small businesses." Despite this statement, the Order we adopt today contains no analysis, no tailored solution, and in fact, does not even mention the American consumer at all.

If we were to actually conduct an analysis, we would find the claims of burdensome regulation lacking. Our original exemption was based on our actions in the rural call completion context, and the instant Order cites with approval comments that seem to suggest the transparency rule is stupendously more burdensome than our rural call completion requirements. So let us compare the two proceedings.

In assessing the burden of complying with our rural call completion information collection, the Office of Management and Budget (OMB) determined that compliance would take each long-distance provider *64 hours, annually*. There, the Commission exempted providers with 100,000 or fewer subscriber lines. On the other hand, the OMB determined that compliance with the enhancements to the transparency rule would take each broadband provider *6.8 hours annually*. Yet, we are minutes away from exempting providers with 250,000 connections—including billion dollar public companies—while claiming that the rules are burdensome regulation, of small Internet Service Providers.

In other words, the Order doubles down here, by allowing the biggest broadband providers in the country, to exempt their subsidiaries, that have under 250,000 connections. You see, many of the nation's largest broadband providers are actually holding companies, comprised of many smaller operating

companies. So what today's Order does, is exempt these companies' affiliates that have under 250,000 connections by declining to aggregate the connection count at the holding company level.

And if all of that were not enough, the Order runs roughshod over past precedent, with no discussion as to why the Commission is changing its mind. Twice, the Commission found 100,000 connections to be the right number, but today you will not find any rational discussion as to why this cutoff has been revisited. Burdens that the Commission discounted in the past are now given credence without evaluating why prior decisions are being jettisoned. And, most importantly, there is absolutely no evaluation of the impact the exemption will have on consumers.

There is also a bigger issue at play, because the enhanced transparency rules are just one aspect of the Open Internet rules adopted by the Commission in 2015. These rules were adopted to prevent broadband providers from blocking, throttling, favoring or discriminating against traffic, or extracting tolls from any user, for any reason, or for no reason at all. And at a time when the majority on this Commission is talking about gutting these broader rules, I cannot in good conscience support this vastly increased exemption without knowing what core protections will remain in place for consumers and small businesses in the years to come.

As I close, my single request today is a simple one: that this Commission, and these Internet Service Providers put #ConsumersFirst. If you and your companies have the resources, then do the right thing, be transparent with consumers about what prices you charge, what fees you assess, what data caps you impose, and your network performance practices. Your customers, I am confident, will thank you.

While I cannot support the item, I must acknowledge and thank the diligent staff of the Consumer and Governmental Affairs Bureau for their years of toil on this issue. You worked with me when I first requested this exemption years ago, and have been nothing but professional and helpful ever since.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Small Business Exemption From Open Internet Enhanced Transparency Requirements,* GN Docket No. 14-28

This item establishes a sensible and soundly justifiable exemption for small Internet Service Providers (ISPs) from unnecessary and expensive so-called "enhanced transparency" reporting mandates. It sets the threshold at a reasonable level of 250,000 broadband customers, which is a lower number than many, including myself, would have preferred.

Some may try to critique the threshold level as too generous or excluding too many broadband companies. These arguments ultimately fail for numerous reasons. It is important to note that the item conforms to compromises contained in both bipartisan House and Senate legislation on the topic. On that point, the respective legislation passed the House by voice vote – meaning every Republican and Democrat supported it. If any single Member of the House had any objection, they were free to raise it, but they did not. While some complain that too few subjects can find common ground in such a legislatively charged environment, this bill did – and did so spectacularly. Again, bipartisan approval was had on a voice vote. Admittedly, House passage alone does not make law, but it does provide a very good indication that the level we are setting is exceptionally rational.

In terms of substance, the Commission previously approved a level of 100,000 subscribers. Thus, any disagreement with this item is really over exempting those companies between 100,000 and 250,000. But, the data show that approximately 17 total wireline and wireless companies nationwide have customer levels between these points – and none with vast coverage areas or market share. So, this is far, far from providing big broadband companies with an exemption. Moreover, no one has been able to make a viable case as to why any of the specific companies that fall between the 100,000 and 250,000 subscriber thresholds are so different or have distinguishable features to justify disparate treatment or these added burdens.

Similarly, the argument may be made that absent these reporting mandates, consumers of smaller ISPs will be without the necessary information to make a thoughtful decision. In essence, they argue that consumers would ultimately be hoodwinked into becoming subscribers. This is pure hyperbole. Smaller ISPs generally make much, if not all, of the commercially available data points freely and openly available to prospective customers. What they rightfully object to is the Commission's heavy-handed and expensive data collection and reporting mandates, including the specified form of disclosure and specific deadlines.

In the end, this is a balanced effort to find an acceptable and defensible landing spot. But to be clear, it doesn't address a far more fundamental matter: whether these reporting requirements should exist at all. That will have to wait for another day in the near future.

I thank the Chairman for his leadership and diligence on this effort and look forward to working with him to bring greater sanity to our rules.