Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Empowering Broadband Consumers Through Transparency	)	CG Docket No. 22-2
	)	

To: The Commission

JOINT COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION AND THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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I. SUMMARY AND INTRODUCTION

NTCA–The Rural Broadband Association ("NTCA") and the Wireless Internet Service Providers Association ("WISPA") (together, "Joint Commenters") hereby respond to the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding,[1] which seeks comment on the Commission's proposals to adopt a broadband consumer label, as mandated by Section 60504(a) of the Infrastructure Investment and Jobs Act ("Infrastructure Act").[2]

Although our associations' respective members recognize the importance of ensuring consumers have meaningful information about the services available to them, it is essential, as with similar efforts in the past, to strike a balance in implementing disclosure requirements. Of particular relevance to the Joint Commenters, it will be critical to identify and mitigate the costs and administrative burdens that will arise out of changing the format of their members' disclosure statements. From a consumer's perspective, the Joint Commenters submit that the

[1] *Empowering Broadband Consumers Through Transparency*, Notice of Proposed Rulemaking, CG Docket No. 22-2, FCC 22-7 (rel. Jan. 27, 2022) ("*NPRM*").

[2] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 60504(a) (2021) ("Infrastructure Act").

basis for comparison shopping that the Infrastructure Act intends to establish will be ill-served by broadband labels that venture beyond clear and "actionable" information on critical aspects such as pricing and speed. The Joint Commenters therefore appreciate the Commission's receptiveness to proposals that would "minimize the economic impact on smaller service providers while achieving the Commission's transparency objectives,"[3] consistent with the Regulatory Flexibility Act, as amended ("RFA").[4] The Commission also seeks comment on how it could further reduce information collection burdens on businesses with fewer than 25 employees.[5]

In these Comments, the Joint Commenters make the following recommendations to meet the requirements of the Infrastructure Act and the RFA:

- Requiring a simple, consumer-friendly broadband label that includes clear information on speed and pricing but without additional obligation to capture periodic rate reductions, mandated discounts, or other information (e.g., Lifeline and Affordable Connectivity Program ("ACP")) that providers are required to publicize elsewhere or that consumers would not find useful in order to make informed decisions.

- Replacing the existing disclosure requirements with the simplified broadband label Joint Commenters recommend.

- Establishing a two-year education and compliance period prior to subjecting providers to enforcement action.

- Allowing small providers to have additional time to comply with the new rules adopted in this proceeding.

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[3] *NPRM* at 10, ¶ 32.

[4] Regulatory Flexibility Act, 5 U.S.C. § 603 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) and The Small Business Jobs Act of 2010, Pub. L. No. 111–240, Title I, § 1601 (2010).

[5] *See NPRM* at 12, ¶ 41, *citing* 44 U.S.C. § 3506(c)(4).

Together, the Joint Commenters include more than 1,500 of the country's smallest broadband providers, operating in rural and exurban areas throughout the country. Their members are often the only providers of terrestrial broadband service in their local communities, which are typically overlooked by larger carriers focusing on densely populated urban areas. The vast majority of the members of the Joint Commenters are small businesses. All but a handful of our members are considered to be "small entities" under the Small Business Act and the U.S. Small Business Administration's size standards as established by the North American Industry Classification System ("NAICS") codes for Wireless Telecommunications Carriers (except Satellite) Code 517210,[6] and/or under All Other Telecommunications, Code 517919.[7] Only a few of the Joint Commenters' members have more than 500 employees.[8]

These comments are not the first time that NTCA and WISPA have joined together to provide recommendations on how to balance the promotion of consumer welfare and transparency while mitigating burdens on small providers. Of relevance here, NTCA and WISPA worked together and alongside other associations in urging the Commission to extend an exemption from the 2015 rules for providers with 250,000 or fewer subscribers.[9] The Joint Commenters may take different positions on other aspects of communications policy, but are united in advocating for the interests of small, community-based broadband providers that seek

[6] 13 C.F.R. § 121.201, NAICS Code 517210 (1,500 or fewer employees).

[7] *Id.*, NAICS Code 517919 (annual receipts of $25 million or less).

[8] *See* SBA, Office of Advocacy, "What's New With Small Business?", https://cdn.advocacy.sba.gov/wp-content/uploads/2019/09/23172859/Whats-New-With-Small-Business-2019.pdf (Sept. 2019).

[9] *See, e.g.*, Letter from Elizabeth Barket, CCA, *et al.*, to Marlene H. Dortch, FCC Secretary, GN Docket No. 14-28 (filed Dec. 1, 2016); Letter from Elizabeth Barket, CCA, et al., to Marlene H. Dortch, FCC Secretary, GN Docket No. 14-28 (filed Dec. 7, 2016); Letter from Steven K. Berry, CCA, et al., to Hon. Tom Wheeler, et al., GN Docket No. 14-28 (filed Dec. 1, 2016). *See also* Request for Stay filed by CCA, et al., GN Docket No. 14-28 (filed Jan. 17, 2016).

to ensure that our respective members do not bear disproportionate regulatory burdens in meeting congressional and Commission transparency objectives.

NTCA–The Rural Broadband Association represents approximately 850 independent, community-based companies and cooperatives that provide advanced communications services in rural America and more than 400 other firms that support or are themselves engaged in the provision of such services. NTCA members provide broadband and telecommunications services across approximately one-third of the U.S. landmass and serve less than 5% of the U.S. population. On average, NTCA members serve about 6,500 customer accounts in areas with a population density of about seven subscribers per square mile. NTCA members on average employ 30 people. The latest NTCA survey report reveals that 75% of NTCA members' customer locations are served by fiber-to-the-home and can obtain broadband rates of 100 Mbps.[10] More than 200 NTCA members have been independently validated as Gigabit Certified providers. While focused on fiber, NTCA members combine technology platforms effectively, including fixed wireless deployments, to bring advanced broadband services to the far reaches of the Nation.

WISPA is a trade organization that represents the interests of hundreds of small fixed-wireless broadband providers ("WISPs") that deliver internet connectivity services to approximately seven million consumers, businesses, first responders and community institutions in areas of the country where other service providers have declined to invest. The majority of WISPs provide fixed broadband access as a standalone service, though many offer interconnected VoIP where there is consumer demand or where required by universal service

[10] Broadband/Internet Availability Survey Report, NTCA–The Rural Broadband Association, Arlington, VA, at 2, 6 (Dec. 2021).

rules. To provide their services, WISPs use unlicensed, shared and licensed spectrum at low-band, mid-band and high-band frequencies, predominantly in rural, unserved, and underserved areas. In many areas, WISPs provide the only terrestrial source of fixed broadband access. In areas with other broadband options, WISPs provide a community-based alternative that benefits customers by fostering competition, thereby lowering costs and improving the quality of broadband services.[11]

II. DISCUSSION

A. THE INFRASTRUCTURE ACT DOES NOT COMPEL ADOPTION OF THE ENTIRE 2016 BROADBAND LABEL AND MUST BE CONSIDERED ALONGSIDE OTHER FEDERAL STATUTES

The Infrastructure Act requires the Commission to "promulgate regulations to require the display of broadband consumer labels, as *described* in the Commission's Public Notice issued on April 4, 2016 (DA 16–357)."[12] The text of this congressional mandate does not require the Commission to adopt the identical broadband label it approved and released in 2016; Congress used the word "described" instead of "adopted." This interpretation is further supported by the Commission's numerous questions in the *NPRM* seeking public comment on what modifications should be made to the 2016 label.[13] Importantly as well, neither does any part of Section 60504

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[11] *See Liftoff! Internet Service Providers Take Flight with Fixed-Wireless and Hybrid Networks: The 2021 Fixed-Wireless and Hybrid ISP Industry Report*, The Carmel Group (2021) at 6, Fig. 1 (depicting typical fixed wireless network architecture). *See also US fixed wireless access subscriptions will capture 9% of broadband accounts by 2026 driven by user demand and government intervention, says GlobalData* (Jan. 25, 2022), *available at* US fixed wireless access subscriptions will capture 9% of broadband accounts by 2026 driven by user demand and government intervention, says GlobalData - GlobalData ("GlobalData Report") ("Subscriptions for fixed wireless internet are gaining momentum in the United States, driven by a perfect storm of enabling factors.").

[12] Infrastructure Act, § 60504 (citing to *Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels*, Public Notice, DA 16-357 (rel. April 4, 2016) ("*2016 Public Notice*") (emphasis added).

[13] *See, e.g., NPRM* at 2, ¶ 4.

of the Infrastructure Act exempt the Commission from complying with other important statutory mandates in its implementation of the regulations for the broadband label, such as the RFA. Congress stated specifically that the Commission "shall promulgate regulations,"[14] and compliance with the RFA is *required* when the Commission publishes a general notice of proposed rulemaking pursuant to Section 553 of the Administrative Procedure Act ("APA").[15] The RFA "established in law the principle that government agencies must consider the effects of their regulatory actions on small entities and mitigate them where possible. The RFA arose from years of frustration with ever-increasing federal regulation that disproportionately harmed large numbers of smaller entities."[16]

Congress has recognized that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity."[17] Therefore, any steps taken by the Commission to minimize the burdens and economic impact of the proposed broadband label under the RFA would also be consistent with the Commission's statutory obligations under the RAY BAUM's Act.[18]

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[14] Infrastructure Act, § 60504.

[15] 5 U.S.C. § 601(2).

[16] *Report on the Regulatory Flexibility Act FY 2020*, Annual Report of the Chief Counsel for Advocacy on Implementation of the Regulatory Flexibility Act and Executive Order 13272, Office of Advocacy, U.S. Small Business Administration (July 2021) ("Advocacy 2020 RFA Report") at 1.

[17] RFA, Congressional Findings and Declaration of Purpose, § (a)(4).

[18] Among other requirements, Congress mandated that the Commission assess the state of competition and identify any law, regulation, or regulatory practice that poses a barrier to entry or to the competitive expansion of existing providers of communications services. 47 U.S.C. § 163(a) and (b). The Commission is also directed to take special consideration of market entry barriers for entrepreneurs and other small businesses in accordance with the national policy to promote the diversity of media voices, vigorous economic competition and technological advancement under Section 257(b) of the Communications Act of 1934, as amended (the "Act"). *See id.* at § 163(d)(3).

Significantly, as noted in the *NPRM*, the broadband label adopted by Commission staff in 2016 was informed by the work of the Commission's Consumer Advisory Committee ("CAC").[19] Although some aspects of the CAC's work were open to the public, the CAC did not operate under the statutory requirements of an APA rulemaking, which requires compliance with the RFA's statutory requirement to also consider the significant economic impact on a substantial number of small providers subject to the rules.[20] Accordingly, it is not clear the CAC considered the economic impact of the label on small providers when it developed the label six years ago. Given a congressional mandate, this makes the Commission's full compliance with the RFA all the more necessary now to balance the two statutory requirements. The Commission therefore confronts two critical issues at this juncture: (1) an evaluation of the effectiveness of the labels, generally, and whether the instant proposals are consistent with statutory intent, and (2) if that threshold is passed, then whether the implementation of the rules as they may be applied to small providers is inconsistent with the requirements under the RFA.[21]

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[19] *NPRM* at 2, ¶ 4.

[20] 5 U.S.C. § 609(a). Although there were industry representatives on the CAC, *2016 Public Notice* at 1, it is questionable whether the CAC considered the impact and costs of the broadband label on small business providers.

[21] The Initial Regulatory Flexibility Analysis ("IRFA"), as required by the RFA, should provide the foundational support necessary for any necessary adjustments to the final rule that will minimize the significant economic impact on small providers consistent with the stated objectives of the applicable statute. *See* 5 U.S.C. § 603(c). However, the IRFA fails in this regard in several material aspects. The IRFA does not provide an estimate of the small providers subject to the proposed rules, identify all of the proposed rules that impose major burdens and excludes any discussion of the type of professional skills necessary to comply with the proposed rules (such as proposals to require a machine-readable format and accessibility for disabled persons) as required by the RFA. *Id*. § 603(b)(4). Moreover, the IRFA is missing the "description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities." *Id*. § 603(b)(4). The absence of this important information makes it more difficult for small providers to fully assess the impact of the *NPRM*. "[W]ithout an adequate IRFA, small entities cannot provide informed comments on regulatory alternatives that are not adequately addressed in the IRFA." Office of Advocacy, U.S. Small Business Administration, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act* (Aug. 2017), at 68 (citation omitted) ("Advocacy RFA Guide"). "Small businesses cannot provide informed comments if the agency fails to identify the rule as

B. THE SCOPE OF INFORMATION SUGGESTED BY THE COMMISSION EXCEEDS THAT WHICH WILL BE USEFUL TO CONSUMERS IN A LABEL AND WILL IMPOSE UNNECESSARY ADMINISTRATIVE AND FINANCIAL BURDENS ON SMALL PROVIDERS.

1. Consumers are Best Served by Labels that Convey Compact and Discrete Sets of Information

As an overall matter, the Joint Commenters support the elemental intent of the broadband label approach, specifically, to provide basic information about the price and service level of various broadband offerings. However, and as discussed below, the Joint Commenters suggest that the inclusion of far-reaching and broad categories of additional information will be counterproductive. In the first instance, an honest analysis of how often and to what extent customer typically request that information must be made. If the category of information is not typically requested by the consumer, then including it in the label will not serve any measured goal. These costs would be disproportionately borne by smaller providers.

Having described the legal framework guiding the Commission's consideration of the proposed rules, the Joint Commenters now address the potential impacts of certain of the Commission's proposals. The Joint Commenters begin this analysis from the starting point of the prior recommendations of the CAC. Overall, the Joint Commenters submit that the general goal of the broadband label requirements serve a useful purpose, but that the totality of the potential rules surfaced in the *NPRM* reach beyond both congressional intent and consumer usefulness. Members of the Joint Commenters' associations currently undertake reasonable and consumer-focused efforts to ensure that prospective and current subscribers can evaluate broadband plans effectively. In fact, the basic template of a simple broadband label is not

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one that will have a significant impact on a substantial number of small businesses. In turn, informed comments provide useful tools for the agency to construct the least burdensome, most effective regulations." *Id.* at 16.

inconsistent with the general perspective of small broadband providers, specifically, to share information clearly with users. However, the Commission's proposal to adopt substantive "modifications"[22] to the 2016 template risks clouding the effectiveness of a simple label by including so much information as to beset by needless, and ultimately ineffective, "infobesity."

The original intent of the CAC was to "recommend a disclosure format that should be clear and easy to read – similar to a nutrition label – to allow consumers to easily compare the services of different providers."[23] Like a basic nutrition label that typically lists several broad categories of information, the "Broadband Facts" template provided by the Commission in 2016 portrayed data plan prices, other charges and terms, government taxes and fees, typical performance metrics, and network management practices. However, certain of the outcomes appear to run counter to certain of Commission intent by obscuring a clear, simple comparison of services among various providers. The general preliminary approach of the Commission was a mostly straightforward matter. The instant *NPRM*, however, includes proposals that would unnecessarily depart from the directives of the Infrastructure Act, which mandates that the Commission adopt broadband consumer labels "as described" in the prior notice.[24] While "as described" does not mean "adopted," it certainly does not suggest an open door through which additional burdens should be imposed.

The Commission seeks comment on "how consumers evaluate broadband service plans" and how the 2016 labels might assist consumers in their selection process.[25] The Joint Commenters submit that consumers evaluate broadband service plans largely on the basis of two

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[22] *NPRM* at 4, ¶ 14.

[23] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, 30 FCC Rcd 5601, 5881, ¶ 585 (2015).

[24] *NPRM* at 4, ¶ 12.

[25] *Id.*

basic criteria: price and capability. Accordingly, the Joint Commenters urge the Commission to "keep it simple," and to implement labels that are "similar to a nutrition label" – focused, basic, and clear. As recounted by the Commission, the 2016 labels that the Commission now proposes to adopt would contain information pertaining to (1) price, (2) monthly data allowances, (3) overage charges, (4) equipment fees, (5) other monthly fees, (6) one-time fees, and (7) early termination fees.[26] These categories, as well as basic information relating to broadband speed, are reasonably within the scope of information that consumers would typically seek.[27] The Commission itself recognized that prospect of "information in the contained in the 2016 labels that . . . might overwhelm consumers with too much information."[28]

2. Packet Loss and Latency

As a threshold matter, the 2016 broadband label recommended different standards among mobile wireless and fixed providers by not requiring mobile wireless providers to report packet loss.[29] The Joint Commenters submit that even if principles of regulatory parity were to be set aside, the goal of facilitating comparison shopping among consumers is not served by establishing requirements that lead to disparate labels among service providers. The inclusion of

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[26] *Id.*

[27] The Joint Commenters note, as well, the 2016 directive that labels include "promotional offers or discounts," as opposed to introductory rates. *NPRM* at 5, ¶ 18. The Joint Commenters suggest that this would be unnecessary, as providers will in all events have every incentive to advertise discounted sale or promotional rates, and will accordingly be encouraged to reflect those prices accordingly in the labels. However, small firms such as the members of the Joint Commenters typically have small staff and often do not have dedicated marketing staff. Accordingly, the burden of updating labels to reflect periodic promotions is one that can create unnecessary work and administrative effort for constrained staff pools. The Joint Commenters accordingly recommend that labels include *regular* pricing *without an obligation to update* periodic promotions or sales that offer lower prices to consumer. No harm accrues to a consumer who expects to pay one price but is then billed for a lower price. Regulatory intervention to require providers to share information about lower prices is neither necessary nor warranted.

[28] *NPRM* at 5, ¶ 17.

[29] *See id.* at 9, ¶ 29.

a metric on one label, and its absence on another, could ultimately sow confusion among customers. Moreover, the internet is based upon the principal design of packet switched transport. Messages are broken into "packets' and dispatched individually across the most efficient routes. The packets are then reassembled at their destination point.[30] Packet loss refers to the failure of one or more packets to reach its destination while traversing the network. While it may seem a facially reasonable measure of performance, the internet was designed to withstand a certain level of packet loss. More subtly, but critically, the very design of the TCP/IP protocol stack *depends* upon packet loss. There is no explicit mechanism in the internet protocols for managing transmission speed. Instead, devices using TCP traditionally obey the so-called Van Jacobson Slow Start algorithm, in which transmission rates increase until a packet is lost, then drop, then ramp up again. The fact that a customer's device has a 1 gigabit link into a home router that has an uplink rate of less than a gigabit means that the home router itself, or the ISP's first device after the home router, necessarily drops packets as part of the speed-matching algorithm. TCP then gracefully retransmits from the lost packet and the application is unaware of the loss. Such packet loss is not an error or a degradation of service; it is necessary feature of ISP networks.

Labelling requirements that obligate providers to report packet loss could well encourage providers to aim for a reported number closer to zero. But, in order to achieve that rate, *all* traffic would be slowed in order to capture all packets – including those that could be lost without meaningful adverse impact. A proper balance may be struck, then, by not requiring, but

[30] The design reflects the origin of the internet, which was grounded in the Defense Advanced Research Projects Agency (DARPA) goal to create a redundant communications network that could withstand malicious attack.

permitting, carriers to report packet loss. And, recognizing the dynamic nature of packet loss, to qualify its listing on the label with a prefix of "Not greater than [*y*]".

In similar vein, latency is a factor in overall network performance, and consumers seeking a nuanced understanding of service options may presumably inquire after that factor. As a dynamic factor (unlike static metrics such as price), however, the Joint Commenters recommend that providers may convey latency in their label with a prefix qualifier of "Not greater than." The Commission opted for a similar approach in adopting its rules for the broadband data collection, requiring providers simply to indicate whether their latency "for a particular geographic area is less than or equal to 100 ms, based on the 95th percentile of measurements."[31] For purposes of the label, the provider would be permitted to provide a firm latency number or aver that network performance is "Latency at a level no greater than [*X*] ms." The Commission's rules here should balance the Commission's interest in providing users with reasonable bases for comparison while recognizing the dynamic nature of latency.

3. Network Management Practices

For many of the same reasons why packet loss and latency would depart from the "keep it simple" approach the Joint Commenters believe will be best for consumers, the Commission should not require the broadband label to display or include links to a narrative explaining application-specific network management practices of subscriber-triggered network management practices.[32] Detailed explanations of how a provider manages congestion or how often certain network management practices may be triggered are beyond the typical metrics that consumers would expect in a simple label. The Joint Commenters submit that consumers sensitive to

[31] *Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, Third Report and Order, 36 FCC Rcd 1126, 1138 (2021).

[32] *NPRM* at 5, ¶ 16 and 9, ¶ 28.

potential network management practices will undertake relevant inquiries with providers. And, providers who believe it would be helpful to their marketing efforts to disclose certain aspects of their network management – for example, that a certain speed package may not support certain applications – would have every incentive to provide that information on its web site and other marketing materials, but complicating the label with links or detailed information strays from the central purpose of the label. In addition, such disclosures impose costs on providers to draft network management practices, an exercise that necessarily involves hiring engineers and attorneys. Given that including network management practices in the label itself would be expected to have little impact on consumers and imposes costs on providers, there is no legitimate reason for the Commission to require providers to display on the label or include links to an explanation of application-specific network management practices of subscriber-triggered network management practices.

4. Bundled Services, ACP, and Other Notifications

The Commission asks whether the labels should include information about bundled services.[33] Here, too, to avoid customer confusion, the Joint Commenters recommend the Commission to demur from requiring providers to provide to all consumers information in which only a subset may be interested. Prospective users who are interested in a more detailed discussion about the quality of bundled services and whether they support, as the Commission offers, "480i or . . . 1080p or 4K"[34] will always have the ability to dialogue with knowledgeable sales personnel, particularly when working with small, community-based providers such as are the members of the Joint Commenters. In contrast, overloading the labels with this sort of

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[33] *NPRM* at 6, ¶ 19.

[34] *Id.*

information risks collapsing their usefulness beneath the unnecessary weight of extensive length and verbiage. As stated by the Commission, the intent of the labels is to provide a "simple-to-understand format describing the key factors consumers need to know when considering broadband service . . . ."[35] Suggestions to include information about bundled services, or the suitability of particular services for specific applications, portend the possibility of an endless catalogue of information providers could be prescribed to pack into a label. The *NPRM* begins with an example of video,[36] but could as easily be extended ineffectively to include applications such as gaming, multi-end video conferencing, telemedicine or other high demand uses: "there is no end to the matter."[37]

This same concern attends other information the Commission identifies for possible inclusion in the labels, including limitations that may apply when multiple devices are used, paperless billing, equipment rental, etc.[38] The Joint Commenters urge the Commission to hew to the original recommendation of the CAC, specifically, to create a plain, simple label that provides basic information to enable comparative shopping. The Commission should refrain from dictating the inclusion of excessive additions that would ultimately undermine the very intent envisioned by a quick-to-read label. The Joint Commenters similarly oppose a "direct notification of term changes" requirement.[39] Consumers are in all events informed of term changes in the normal and ordinary course of business and in accordance with applicable regulations or standard terms of service. Alerting consumers with a secondary notice that

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[35] *Id.* at 3, ¶ 7.

[36] *Id.* at 6, ¶ 19.

[37] Kehati, Pinhas, *Mishna Pesahim* 1:2 (1994).

[38] *NPRM* at 6, ¶ 20.

[39] *Id.* at 6, ¶ 22.

changes have also been made to point-of-sale labels is unnecessary, redundant, likely confusing, and of little value to subscribers – but is burdensome to providers, especially small providers.

This view toward simplicity, as well, argues against displaying the Affordable Connectivity Program ("ACP") discount on the label.[40] Rather, consumers can be informed generally of programs such as Lifeline and the ACP as Commission rules already require. Providing the raw discounted rate on the label could lead to confusion or incorrect assumptions among consumers who do not qualify for the program. Eligible telecommunications carriers are currently required to provide information about low-income programs and can be relied upon to fulfill those obligations without incorporating additional confusing and redundant information on the label.

5. Machine-Readable Format and Point of Sale Locations

Similarly, requiring labels to be "provided in a machine-readable format"[41] expands and complicates an effort that is intended at its essence to promote simplicity. As articulated by the CAC, the intent of the labels is to provide a "simple to understand format" conveying key aspects of the broadband service.[42] Toward that end, the recommendations of 2016 that carry over to the instant proceeding include label designs that mimic a nutrition label – "clear and easy to read."[43] This additional proposal to require machine-readable format seems to suggest (carrying the nutrition label model forward) that consumers, while grocery shopping, invoke

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[40] *Id.*

[41] *NPRM* at 7, ¶ 24.

[42] *See id.* at 3, ¶ 7. Significantly, the CAC did *not* recommend that the labels be in a machine-readable format. *See FCC Consumer Advisory Committee Recommendations Broadband Consumer Disclosure* (adopted Oct. 26, 2015), *available at* https://www.fcc.gov/consumer-advisory-committee-recommendations-2014-thru-2016 (visited March 7, 2022).

[43] *Protecting and Promoting the Open Internet: Report and Order on Remand, Declaratory Ruling, and Order,* Docket No. 14-28, 30 FCC Rcd 5601, 5881, ¶ 585 (2015).

machine-reading technology to compare sugars, carbohydrates, proteins and calories among competing cans of beans or boxes of cereal. The intrinsic value of the nutrition label is that it offers a basis for rapid and comprehensible comparison among products; the label is not designed to serve as on-ramp to electronic comparison shopping. The very source of the nutrition label, the Nutrition and Labeling and Education Act of 1990, is instructive: to "enable[] the public to readily observe and comprehend" the information portrayed therein.[44] The Commission notes that Federal agencies are required by the OPEN Government Data Act of 2018 to make information available in machine-readable formats.[45] But the capabilities of the Federal government and its extensive resources to implement the technological protocols, including hardware, software, and personnel training, should not be confused with the capabilities and resources of small businesses. And, to reiterate, the heart of the labeling requirement is to afford prospective and current users a simple, easy to read statement of basic terms and conditions. Proposals to expand that requirement in both content and form run counter to the original intent of the mandate and risk creating labels so bloated with information and technical administrative requirements as to render them difficult to implement and less useful for the consumers they are intended to serve.

The Joint Commenters recommend the Commission should not implement an Application Program Interface data collection approach, as this would place additional burdens on small ISPs.[46] At most, the Commission can accept an annual filing from the provider, and/or accept

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[44] Nutrition Labeling and Education Act of 1990, H.R. 3562, (101 Cong. 1989-1990) (". . . nutrition information on labels to be conveyed in a manner which enables the public to readily observe and comprehend it and to understand its significance in the context of a total daily diet"). The latter clause of the mandate is fulfilled by denoting the percentage of a recommended daily diet the product represents.

[45] *NPRM* at 3, ¶ 7.

[46] *See id.* at 7-8, ¶ 25.

the information displayed on the provider's website as sufficient data. A link to the labels on the section of the provider's website that promotes internet tiers will be sufficient. Moreover, the Commission should not impose any requirements related to search engine optimization programming, which may be difficult for smaller ISPs to implement. Additionally, electronic access to the labels, rather than a formal requirement for printed copies, at the point-of-sale should be sufficient. Alternatively, smaller providers may rely on QR codes at point-of-sale locations. The presence of a computer, tablet, or similar device with a screen upon which the label may be displayed should be accepted as sufficient for point-of-sale locations.

The Commission also asks whether a telemarketing representative should be required to email or otherwise make the label available to consumers prior to a purchase.[47] These proposed requirements are also unnecessary and burdensome. Consumers have ready access to the website of the provider before, during and after speaking to a customer service representative ("CSR") via phone where the consumer can fully review the label and other important service information. Requiring a provider to send an email is particularly burdensome because it would require the CSR to collect the personal information of a consumer *before* they initiate the process to become a customer. Such a requirement for sending an email at this very early stage of the consumer-provider relationship may require a small provider to upgrade or purchase new hardware and/or software for its service systems. The Joint Commenters submit that the cost of any additional affirmative notice requirement is not worth the benefit.

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[47] *Id.* at 8, ¶ 26.

6. Relationship to Transparency Rule

The Commission seeks comment on "the interplay between our existing transparency rule and the proposed broadband labels."[48] The Commission correctly observes that "there may be differences between the information required by the transparency rule and the proposed broadband labels."[49] As the foregoing section makes clear, the Commission is not statutorily bound to incorporate Section 8.1 of its rules into the broadband label, nor would it be good policy to do so. The Joint Commenters have explained that certain network management practices and other characteristics are unnecessary to include in the label to achieve the purposes intended by the Infrastructure Act.

To that end, the problems of a burdensome and potentially confusing broadband label would be compounded if the Commission also retained the requirements in Section 8.1 and required broadband providers to display both a label *and* a narrative statement along the lines compelled by the enhanced transparency rules the Commission adopted in 2018. Providers would need to keep two sets of documents current and consistent, and an honest oversight would lead to consumer confusion and potential enforcement action against the provider. Congress has not mandated retention of the existing requirements, and the previous sections articulate compelling reasons why the Commission should stay true to implementing a "simple-to-understand format describing the key factors consumers need to know when considering broadband service . . . ."[50] The broadband label, on its own, and with the Joint Commenters' recommendations, achieves that objective.

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[48] *Id.* at 9, ¶ 28 (citation omitted).

[49] *Id.* at 9, ¶ 29.

[50] *Id.* at 3, ¶ 7.

C. THE COMMISSION'S COMPLIANCE AND ENFORCEMENT EFFORTS MUST ACCOUNT FOR THE BURDENS ON SMALL PROVIDERS

The Commission asks a number of questions related to enforcement of the broadband label rules it will adopt.[51] In considering the record, the Commission must remain mindful of the RFA's recognition that "the practice of treating all regulated businesses…as equivalent may lead to inefficient use of regulatory agency resources, *enforcement* and, in some cases, to actions inconsistent with legislative intent…."[52]

The Joint Commenters propose several recommendations regarding enforcement of the broadband label requirement, which are intended to avoid the imposition of disproportionate burdens on small providers. As an overarching theme, the Commission should focus on compliance and not enforcement in the first two years following the effective date of the new rules. During this two-year period, the Commission should periodically issue enforcement advisories and contact broadband providers that are not in full compliance to remind them of their obligations. This approach follows the model established in the performance measurements testing proceeding, acknowledging the usefulness of so-called beta-test periods in which entities dry-run their compliance obligations as, essentially, a learning tool for both Commission staff and providers.[53] In addition, the Commission should provide a fillable PDF of the broadband label to make it easier for providers to meet their compliance obligations.

After the second year following the effective date, the Commission should be authorized to enforce its rules against small providers that have not displayed their broadband label or have material deficiencies in their broadband labels. Enforcement penalties should correspond to the

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[51] *See id.* at 9, ¶¶ 30-31.

[52] RFA, Section 2 (emphasis added); *see generally* 5 U.S.C. §§ 601 *et seq.*

[53] *See Connect America Fund: Order on Reconsideration,* 34 FCC Rcd 10109, at ¶ 67 (2019).

level of deficiency. Minor deficiencies should be enforced via citation or admonishment with a requirement that the provider take corrective action with a certain time period. Penalties should escalate based on the materiality of the deficiency – for instance, a provider that has not displayed its label should be sanctioned more severely than one who has omitted a required item.

With respect to how the Commission should "evaluate and enforce the accuracy of the information presented in the broadband consumer labels,"[54] the Joint Commenters recommend that the Commission should do so only if presented with evidence from a consumer in an informal complaint attesting to deficiencies in the provider's label disclosures. At that point, the provider would have an opportunity to present evidence in response to the informal complaint. If the response does not resolve the dispute, then the Commission can seek further information from the parties and issue a decision. By initiating review based upon input from consumers – the intended beneficiaries of the broadband label requirement – the Commission will not need to expend scarce resources initiating enforcement actions. Moreover, this approach allows for a demonstration of actual harm to consumers affected by non-compliant labeling.

Any enforcement penalties should be clearly stated. Uncertainty in how the rules will be enforced will translate to uncertainty in the marketplace – broadband providers must know whether the violation is sanctionable by citation, admonishment or forfeiture, the base amount of any forfeiture and when a decision will be issued. The upshot of this uncertainty arises in the context of a transaction where a buyer or investor in a broadband provider cannot quantify the

[54] *NPRM* at 9, ¶ 31.

compliance risk. The undefined nature of the risk has the effect of chilling investment; regulatory uncertainty reduces investment incentives.[55]

The Joint Commenters also urge the Commission to exempt small broadband providers from the formal complaint process. As described above, small broadband providers are typically self-funded small businesses with few employees. Complying with onerous and time-consuming complaint, discovery and hearing processes would seriously disrupt a small provider's ability to serve its customers, maintain its network and expand to new service areas.

D. THE COMMISSION SHOULD AFFORD SMALL PROVIDERS ADDITIONAL TIME TO COMPLY WITH ANY NEW RULES THE COMMISSION ADOPTS IN THIS PROCEEDING

The Commission proposes to make its broadband label rules effective six months following Federal Register publication and approval by the Office of Management and Budget, and asks if that is sufficient "for both large and small providers."[56] The Commission also seeks comment "on whether there are alternative ways, other than different implementation timeframes, to minimize the economic impact on smaller service providers while achieving the Commission's transparency objectives."[57]

The RFA recognizes that "the practice of treating all regulated businesses…as equivalent may lead to inefficient use of regulatory agency resources, enforcement problems and, in some cases, to actions inconsistent with legislative intent…."[58] The RFA expressly requires the

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[55] *See, e.g.,* Fabrizio, Kira R., "The Effect of Regulatory Uncertainty on Investment: Evidence From Renewable Energy Generation," 29 Journal of Law, Economics, and Organization Vo. 4, 765-798 (Aug. 2013).

[56] *NPRM* at 10, ¶ 33.

[57] *Id.*

[58] Regulatory Flexibility Act of 1980, Pub. L No. 96-354 Section 2 (1980); *see generally* 5 U.S.C. §§ 601 *et seq.*

Commission and other federal agencies to adopt an IRFA that "contain[s] a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize[s] any significant economic impact of the proposed rule on small entities."[59] The analysis "shall" discuss "significant alternatives" such as:

> (1) *the establishment of differing compliance or reporting requirements* or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) *and exemption from coverage from the rule*, or any part thereof, for small entities.[60]

The Joint Commenters recommend that small providers have at least one year following the effective date to comply with the new rules. Unlike large companies, the vast majority of the Joint Commenters' members do not have in-house attorneys and compliance departments to assist in preparing their broadband labels and will need to engage outside legal resources to implement several proposed requirements.[61] Affording small providers at least one year to comply allows them to budget for the additional expense.

Historically, the Commission has adopted rules for small businesses that differ from general rules that apply to larger companies. For example, the Commission exempted broadcast stations with fewer than five full-time employees from certain equal employment opportunity ("EEO") requirements, while station employment units having five to ten full-time employees and/or located in an entirely smaller market only have to perform two, rather than four, EEO

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[59] 5 U.S.C. § 603(c).

[60] *Id.* at §§ 603(c)(1)-(4) (emphases added).

[61] The Joint Commenters understand the importance of making the labels accessible to persons with disabilities, as proposed. *NPRM* at 8, ¶ 27. Nonetheless, following the guidance of the Web Accessibility Initiative and any other requirements of the Americans with Disabilities Act to implement such requirements will require consultation with both legal and technical professionals. This will take additional time and financial resources.

outreach initiatives every two years. The Commission has also exempted from its EEO requirements and provided similar relief for small multichannel video programming distributors ("MVPDs").[62]

In addition, following the adoption of the 1992 Cable Act,[63] the Commission implemented a regulatory framework that incorporated several features designed to reduce administrative burdens on smaller cable systems. As one example, the Commission adopted a streamlined approach to rate reductions[64] and abbreviated Cost of Service filings[65] for smaller systems.[66] The Commission also granted small cable operators serving 15,000 or fewer subscribers not affiliated with larger operators "transition relief," which permitted small operators a longer period of time to comply with the rules than the time period applicable for larger companies.[67]

Further, in its implementation of the Commercial Advertisement Loudness Mitigation Act, the Commission adopted a streamlined waiver request process for small television stations

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[62] *See* 47 C.F.R. §§ 76.75-77. MVPDs with five or fewer full-time employees are exempt from EEO reporting requirements, while MVPDs with 6-10 full-time employees or located in a smaller market only have to engage in one EEO supplemental initiative rather than two annually. *Id.*

[63] Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543(i).

[64] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd 4119, 4221-26 (1994) ("*Rate Regulation Fifth Notice*").

[65] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 9 FCC Rcd 4527, 4671 (1994) ("*Rate Regulation Report and Order*").

[66] In both of these instances "smaller MSOs" are defined as "multiple system operators that (1) serve 250,000 or fewer subscribers, (2) own only mall systems with less than 10,000 subscribers, and (3) have an average system size of 1,000 or fewer subscribers." *See Rate Regulation Fifth Notice* at 4225; *Rate Regulation Report and Order* at 4671.

[67] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Fifth Order on Reconsideration and Further Notice of Proposed Rulemaking, 9 FCC Rcd 5327, 5328 (1994).

and small MVPDs that would suffer financial hardship in implementing the new technical standards required to reduce the noise level of commercial advertisements.[68] Qualified small TV stations ($14.0 million or less in annual receipts) and small MVPDs (fewer than 400,000 subscribers as of December 31, 2011) had one additional year to acquire the necessary loudness measuring equipment under the waiver process.[69] In addition, small television stations ($14.0 million or less in annual receipts or located in television markets 150-210) and small MVPDs (fewer than 15,000 subscribers as of December 31, 2011, and not affiliated with a larger operator servicing more than 10 percent of all MVPD subscribers) are exempt from performing annual spot checks for noncertified programming or channels as part of the "safe harbor" requirements.[70] The Commission also took into consideration the obstacles and difficulties experienced by small entities in securing certification in contracts with larger programmers to ensure that programming with embedded commercials complied with the new regulations and therefore modified significantly its proposed reliance on contractual provisions as an indicator of compliance with the new standards.[71]

As another example, following the adoption of the Twenty-first Century Communications and Video Accessibility Act ("CVAA"),[72] the Commission adopted rules to implement CVAA

[68] *Implementation of Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, FCC 11-182, 26 FCC Rcd 17222, 17253 (2011) ("*CALM Act Report and Order*").

[69] *Id.* at 17253-54.

[70] *Id.* at 17244-45; *see also* 47 C.F.R. §§ 73.682(e)(3)(iii) and 76.607(a)(3)(iii).

[71] *CALM Act Report and Order*, at 17253 ("FCC adopted a regulatory scheme that does not require small MVPDs to audit programming and relieves them of the need to negotiate with programmers for contractual certifications").

[72] Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of the Act). See also Amendment of the Twenty-first Century Communications and Video Accessibility Act, Pub. L. No. 111-265, 124 Stat. 2795 (2010) (making technical corrections to the CVAA).

Section 205 requirements for navigation devices.[73] The Commission set a general three-year compliance deadline for covered entities, but allowed certain mid-sized and smaller MVPDs five years to comply.[74] The Commission explained, "smaller operators generally lack market power and resources to drive independently the development of MVPD and customer premises equipment" and "small systems have a smaller customer base across which to spread costs."[75] In the telecommunications space, the Commission's Local Number Portability rules afford small carriers a longer period of time to comply with one-day porting requirements.[76] The Commission also adopted certain exemptions for manufacturers or service providers with less than 750 employees that offer two or fewer digital wireless headsets and extended compliance deadlines for non-nationwide CMRS providers under its hearing aid compatibility rules.[77]

These examples reflect the Commission's historical fidelity to the RFA's principles and its acknowledgement that regulations should minimize the economic impact on smaller service providers. The Commission should follow its precedent and practice and afford small providers a longer period of time to comply with any new broadband label requirements adopted in this proceeding.

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[73] *Accessibility of User Interfaces, and Video Programming Guides and Menus*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330 (2013).

[74] *Id.* at 17334, 17401. For purposes of the CVAA, mid-sized and smaller MVPDs are defined as: (1) MVPD operators with 400,000 or fewer subscribers (i.e., MVPD operators other than the top 14), and (2) MVPD systems with 20,000 or fewer subscribers that are not affiliated with an operator serving more than 10 percent of all MVPD subscribers. *See id.* at 17401.

[75] *Id.* at 17402.

[76] *See Local Number Portability Porting Interval and Validation Requirements*, Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6084 (2009); *Local Number Portability Porting Interval and Validation Requirements*, Report and Order, 25 FCC Rcd 6953 (2010).

[77] *See generally* 47 C.F.R. § 20.19.

III. CONCLUSION

The Joint Commenters urge the Commission to ensure that the broadband label achieves its principal purpose of informing consumers of information they need to compare and purchase retail broadband services. Encumbering the label with extraneous and unnecessary information irrelevant to promoting choice creates confusion among consumers and drives up the compliance costs for providers. For smaller providers such as NTCA's and WISPA's members, those costs create disproportionate burdens. In this same vein, the Commission's enforcement regime should focus first on compliance by establishing an initial period in which the Commission does not exercise enforcement and by deferring implementation of the new rules for small providers.

Respectfully submitted,

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