

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Protecting and Promoting the Open Internet) GN Docket No. 14-28
)
)

REQUEST FOR STAY

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JANUARY 13, 2017

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SUMMARY

The American Cable Association, Competitive Carriers Association, NTCA – The Rural Broadband Association, and the Wireless Internet Service Providers Association (collectively, the “Joint Petitioners”) hereby respectfully request an immediate stay of the January 17, 2017 effective date of the enhanced transparency requirements adopted in the *2015 Open Internet Order* for small broadband Internet access service (“BIAS”) providers.¹ This stay should be permanent, or continue until such time as the Commission completes a rulemaking proceeding to determine whether and to what extent the small business exemption should be reinstated and to whom it should apply. Further, if the requested stay is granted *after* January 17, 2017, the Commission should make clear that small BIAS providers will not face liability or enforcement action for failing to comply with the enhanced transparency obligations in the interim.

Under the four-factor standard for a stay, a petitioner must show that (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm if a stay is not granted, (3) other interested parties will not be substantially harmed if the stay is granted, and (4) the public interest favors granting a stay.² All four factors are met here. Even so, “[i]f the last three factors strongly favor the party requesting the stay, the Commission may grant the stay if a petitioner makes a substantial case on the merits, rather than demonstrating likely success.”³

First, it appears likely the Commission will begin the process to provide small providers relief from the enhanced transparency requirements shortly after the effective date. The full

¹ See *Public Notice*, “Notice of OMB Approval of the 2015 Enhancements to the Open Internet Transparency Requirements,” DA 16-1400 (rel. Dec. 16, 2016).

² See, e.g., *Amendment of Parts 73 and 76 of the Commission’s Rules*, 4 FCC Rcd 6476 (1989), citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

³ *In re Fed.-State Joint Bd. on Universal Serv.*, 20 FCC Rcd 5167, 5168–69 (2005), citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

Commission is actively considering a proposed order to that would waive the obligation that on small broadband providers must comply with the enhanced transparency requirements. Further, in a December 19, 2016 letter, Commissioners Pai and O’Rielly, who will comprise the Republican majority of the Commission following Chairman Wheeler’s departure, wrote to the Joint Petitioners that they support “permanently exempting small businesses from the ‘enhanced transparency’ rules.”⁴ It thus seems likely that the exemption for small businesses will soon be reinstated.

Second, the Joint Petitioners’ members will suffer irreparable harm when the enhancements take effect because, for the first time, small providers will be subject to onerous regulatory obligations from which the Commission and its staff twice concluded relief was warranted. The uncontroverted record developed in connection with the Paperwork Reduction Act (“PRA”) review process confirms that costs and burdens arising out of steps that must be taken to comply, even for an interim period, will be significant, especially for small providers that have limited budgets and only a handful of staff.

Third, there is no indication third parties would be harmed by a stay of the effective date. To the contrary, a stay will benefit the public interest by preventing substantial harm to consumers in the form of pass-through costs, distraction from a focus on service delivery, reduced broadband investment and stifled service innovation.

Finally, the Commission acted in the public interest when it adopted the small provider exemption, the Bureau acted in the public interest when it extended the exemption, and there has been no further finding or record evidence that would contradict those two decisions.

⁴ Letter from Commissioner Ajit Pai and Commissioner Michael O’Rielly, to Meredith Attwell Baker, President and CEO of CTIA, *et al.* (Dec. 19, 2016). *See also* Statement of Commissioners

Accordingly, the Commission should grant this request and, in so doing, confirm that small providers will not be liable for any non-compliance with the enhanced transparency requirements.

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REQUEST FOR STAY

The American Cable Association (“ACA”), Competitive Carriers Association (“CCA”), NTCA—The Rural Broadband Association (“NTCA”), and the Wireless Internet Service Providers Association (“WISPA”) (collectively, the “Joint Petitioners”), pursuant to Section 1.41 of the Commission’s Rules,¹ hereby respectfully request an immediate stay of the January 17, 2017 effective date of the enhanced transparency requirements for small broadband Internet access service (“BIAS”) providers.² The Joint Petitioners request a stay on a permanent basis, or until such time as the Commission completes a rulemaking proceeding to determine whether and to what extent the small business exemption approved in the *2015 Open Internet Order* should be reinstated and to whom it should apply.³ If this request is granted *after* the enhanced transparency rules go into effect on January 17, 2017, the Commission should make clear that small BIAS providers will not face liability or enforcement action for failing to comply with the enhanced transparency obligations in the interim. Grant of a stay would provide necessary certainty to

¹ 47 C.F.R. § 1.41.
² See *Public Notice*, “Notice of OMB Approval of the 2015 Enhancements to the Open Internet Transparency Requirements,” DA 16-1400 (rel. Dec. 16, 2016) (“*Public Notice*”). Despite a “DA” number, the *Public Notice* does not indicate the Bureau or Office to which authority to issue the *Public Notice* was delegated. Accordingly, this Request for Stay is being filed with the Commission.
³ See *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5678 (2015) (“*2015 Open Internet Order*”), *aff’d sub nom. US Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir 2016).

small providers that will otherwise be required to comply with the significant, new enhanced transparency rules on January 17, 2017.⁴

I. INTRODUCTION

The Joint Petitioners are trade associations representing the interests of thousands of small businesses that provide fixed and mobile broadband service to millions of consumers across the country.⁵ Most of our members operate on limited budgets, have only a handful of staff, and serve subscribers residing in rural areas with limited alternative access to the Internet. The Joint Petitioners are requesting a stay because our respective small provider members will not be able to affordably or quickly shoulder the compliance costs presented by the enhanced transparency requirements adopted in the *2015 Open Internet Order*.

⁴ Although the Joint Petitioners are concerned primarily with harms to small providers in having to comply with the enhancements by January 17, 2017, the Joint Petitioners do not object to a stay of the effective date for all broadband Internet access providers, regardless of the number of connections or subscribers they serve.

⁵ CCA is the nation's 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 customers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain. WISPA represents the interests of more than 800 members that provide or support the provision fixed broadband access to thousands of small and rural communities across the country, many of which lack terrestrial broadband choice. All of WISPA's operator members are small businesses with fewer than 250,000 subscribers. NTCA represents more than 800 independent, community-based telecommunications companies and cooperatives and more than 400 other firms that support or are themselves engaged in the provision of rural communications services. All of NTCA's service provider members are full service local exchange carriers and broadband providers, and many provide mobile wireless, video, satellite, and long distance and other competitive services in rural America as well. ACA represents over 750 small and medium-sized cable operators, incumbent telephone companies, municipal utilities, and other local providers of BIAS, as well as video and voice communications services. To provide this array of services, ACA's cable operator members employ a variety of robust technology platforms for their networks, including DOCSIS 3.0 over hybrid fiber coaxial networks and IP over passive optical networks. ACA members offer service in smaller communities and rural areas, some of which may otherwise be unserved, as well as in urban and suburban markets by overbuilding other providers. In aggregate, these providers pass nearly 19 million homes and provide BIAS to nearly 7 million homes.

In the *2015 Open Internet Order*, the Commission adopted enhancements to its disclosure obligations requiring BIAS providers to make additional and far more granular disclosures to consumers regarding commercial terms, performance characteristics and network practices.⁶ In recognition of the impact such enhancements may have on small providers, the Commission temporarily exempted providers with 100,000 or fewer connections from compliance with the enhancements.⁷ The exemption expired initially on December 15, 2015.

On that date, acting pursuant to delegated authority, the Consumer and Governmental Affairs Bureau (“Bureau”) extended the exemption until December 15, 2016.⁸ The Bureau indicated that, by that date, “we expect the PRA process will be complete and that the full Commission will be able to consider whether and, if so, how best to address the exemption from the enhanced transparency requirements for small providers with the benefit of more complete information.”⁹ In the days leading up to the December 15, 2016 sunset date, the Joint Petitioners actively urged the Commission to extend the exemption.¹⁰

Despite uncontested record evidence to the contrary, on December 15, 2016 the Office of Management and Budget (“OMB”) approved the enhanced transparency requirements.¹¹ In so

⁶ See *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 sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁷ *2015 Open Internet Order* at 5678.

⁸ See *Protecting and Promoting the Open Internet*, 30 FCC Rcd 14162 (2015) (“*Extension Order*”). BIAS providers, including Joint Petitioners’ BIAS provider members, currently must comply with the *2010 Open Internet Order* transparency rules requiring these providers to disclose information about their network management practices and their services’ performance and commercial terms of service to consumers.

⁹ *Extension Order* at 1 (footnote omitted).

¹⁰ See, e.g., Letter from Steven K. Berry, CCA President & CEO, *et al.*, to Chairman Tom Wheeler, *et al.*, GN Docket No. 14-28 (filed Dec. 13, 2016) (“*Joint Association Letter*”).

¹¹ See Notice of Office of Management and Budget Action, OMB Control No. 3060-1158 (approved Dec. 15, 2016), *available at*

doing, however, OMB wrongly assumed that the exemption for small businesses would exist at the time that the rules would become effective for large BIAS providers.¹² Just a few hours later, however, the Commission allowed the exemption to expire, even though an item addressing the exemption in substance has been on circulation with the Commissioners since October 25, 2016.¹³ The day following OMB's approval of the information collection and the lapse of the exemption, the Commission released the *Public Notice* announcing the effective date of the enhanced transparency rules for all providers.

https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201608-3060-005; Notice of Office of Management and Budget Action, OMB Control No. 3060-1220 (approved Dec. 15, 2016), available at https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201612-3060-012 ("*OMB Approval Notice*"). The OMB approval is valid for three years and requires the following:

Prior to renewal, 1. FCC will continue to refine its current fixed disclosure requirements and methodologies for measuring performance, as may be necessary, to ensure that the disclosures best serve the goals of: a. providing accurate information that is useful to consumers, and b. providing information that is useful for decision-making purposes. 2. When submitting the fixed broadband ICR for renewal, FCC will report to OMB the results of the above evaluations, the analysis of consumer information, and the conclusions FCC reached on the basis of the information. 3. When submitting the fixed broadband ICR for renewal, FCC will include an estimate of burden associated with fixed disclosures specifically taking into consideration any differences in burden associated with the disclosure of fixed versus mobile broadband data. Currently, FCC's *[sic]* burden estimate, for the calculation and disclosure of broadband performance data, is the same for fixed and mobile broadband providers.

¹² The Federal Register notice of approval stated that:

The Commission anticipates that small entities may have less of a burden, and larger entities may have more of a burden than the average compliance burden. This is because larger entities serve more customers, are more likely to serve multiple geographic regions, *and are not eligible to avail themselves of the temporary exemption from the enhancements granted to smaller providers.*

81 Fed. Reg. 93638, 93639 (Dec. 21, 2016) (emphasis added); *see also* Information Collection Being Submitted for Review and Approval to the Office of Management and Budget, 81 Fed. Reg. 53145 (Aug. 11, 2016); Information Collection Being Reviewed by the Federal Communications Commission, 80 Fed. Reg. 29000 (May 20, 2015).

¹³ *See* http://transition.fcc.gov/fcc-bin/circ_items.cgi.

Thus, on December 15, 2016, small broadband providers had the benefit of a twice-approved exemption, comfort in the fact that OMB had not approved the information collection under the PRA and the knowledge that the Commission had not set an effective date for the enhanced transparency obligations. By the afternoon of the next day, small providers lost all of those benefits and, in the absence of a stay, face the substantial challenge of complying with the enhanced transparency obligations by January 17, 2017.

The Joint Petitioners have on many occasions demonstrated that the enhanced transparency obligations will impose substantial compliance burdens on small broadband providers.¹⁴ Yet, despite this uncontroverted record evidence, small providers now face the sudden and extreme hardship of hiring consultants, attorneys and experts; saddling their technical staff – or third party vendors assisting with network monitoring – with new obligations; and spending substantial sums to update their Open Internet disclosure statements to comply with the enhanced transparency obligations, all the while knowing that post-effective date relief is likely to be forthcoming. A stay is warranted, and the Joint Petitioners below show the applicable standard of review is met by the present circumstances.

¹⁴ *See, e.g.*, Comments of WISPA, GN Docket No. 14-28 (filed Sept. 12, 2016) (“WISPA PRA Comments”); Comments of WISPA, GN Docket No. 14-28 (filed July 20, 2015); Comments of Competitive Carriers Association, GN Docket No. 14-28 (filed Sept. 12, 2016) (“CCA PRA Comments”); Comments of NTCA, GN Docket No. 14-28 (filed Sept. 12, 2016); Comments of NTCA, GN Docket No. 14-28 (filed Aug. 5, 2015); Comments of the American Cable Association, GN Docket No. 14-28 (filed Sept. 12, 2015) (“ACA Initial PRA Comments”); Comments of the American Cable Association, GN Docket No. 14-28 (filed July 20, 2015) (“ACA Final PRA Comments”).

II. DISCUSSION

In determining whether to stay the effectiveness of an order, the Commission applies a four-factor test developed by the courts. Under this test, a petitioner must show that (1) it is likely to prevail on the merits, (2) it will suffer irreparable harm if a stay is not granted, (3) other interested parties will not be substantially harmed if the stay is granted, and (4) the public interest favors granting a stay.¹⁵ All four factors are met here. Even so, “[i]f the last three factors strongly favor the party requesting the stay, the Commission may grant the stay if a petitioner makes a substantial case on the merits, rather than demonstrating likely success.”¹⁶ In this filing, the Joint Petitioners make this case relying in part on data and information that has previously convinced the Commission to provide temporary relief from the enhancements on two separate occasions.

a. The Joint Petitioners are Likely to Prevail on the Merits

The Joint Petitioners are likely to prevail on their argument that small BIAS providers should receive an exemption from the enhancements.

Significantly, it appears probable the Commission will begin the administrative process to provide relief from the enhanced transparency requirements soon after the rules are scheduled to become effective. On December 19, 2016, Commissioners Pai and O’Rielly, who will comprise the Republican majority of the Commission following Chairman Wheeler’s departure, wrote a letter to the Joint Petitioners noting their support for “permanently exempting small

¹⁵ See *Amendment of Parts 73 and 76 of the Commission’s Rules*, 4 FCC Rcd 6476 (1989), citing *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *In re Fed.-State Joint Bd. on Universal Serv.*, 20 FCC Rcd 5167, 5168–69 (2005), citing *Holiday Tours*.

¹⁶ *In re Fed.-State Joint Bd. on Universal Serv.*, 20 FCC Rcd 5167, 5168–69 ¶ 4 (2005), citing *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

businesses from the ‘enhanced transparency’ rules.”¹⁷ Further, Commissioners that will be in office as of the first day of the next administration have expressed support for the exemption, either in the *2015 Open Internet Order* itself or in support of the Bureau’s adoption of the *Extension Order*.¹⁸ It thus seems clear that the exemption for small businesses will be reinstated at some point and, for that matter, action could come relatively quickly.

Accordingly, the Joint Petitioners have met the first prong of the test by showing a likelihood of success on the merits that the exemption from the enhanced transparency requirements for small BIAS providers will be reinstated.

b. Joint Petitioners’ Members Will Suffer Irreparable Harm if a Stay Is Not Granted

If the enhanced transparency requirements become effective on January 17, 2017, small BIAS providers will be subject for the first time to onerous regulatory obligations from which the Commission and its staff twice concluded relief was warranted. Compliance will be enormously costly, challenging and distracting, especially for small providers that have limited budgets and only a handful of staff. Indeed, small providers will be treated in exactly the same

¹⁷ Letter from Commissioner Ajit Pai and Commissioner Michael O’Rielly, to Meredith Attwell Baker, President and CEO of CTIA, *et al.* (Dec. 19, 2016) (“Pai-O’Rielly Letter”). *See also* Statement of Commissioners Ajit Pai and Michael O’Rielly on Protecting Small Businesses from Needless Regulation (Dec. 16, 2016) (“Pai-O’Rielly Dec. 16 Statement”) (“We remain committed to protecting small businesses and their customers from the higher costs and disproportionate impact that would accompany the implementation of these requirements”).

¹⁸ *See* Statement of Commissioner Michael O’Rielly on the Small Broadband Provider Exemption (Dec. 15, 2015) (stating that smaller providers “shouldn’t have to comply now or in the future with burdensome requirements that divert limited resources from broadband deployment and provide no real value to customers”); *see also* FCC Commissioner Mignon L. Clyburn Statement on Small Business Exemption from Open Internet’s Increased Transparency Rules (Dec. 15, 2015) (noting that, in voting in favor of the *2015 Open Internet Order*, she “advocated to exempt small providers from heightened transparency requirements because of [...] concerns that additional burdens would be placed on these entities”); *see also Oversight of the Federal Communications Commission: Hearing before the Committee on Commerce, Science, And Transportation, Senate*, 114th Cong. (Mar. 2, 2016).

manner as providers serving millions of customers that have at their disposal entire regulatory compliance departments, complete with in-house counsel. Yet, unlike large providers, small providers will need to scramble to find funds and expertise necessary to comply, even as they hold out hope that the exemption might soon thereafter be reinstated. They will need to correctly revise their Open Internet disclosure statements and coordinate with network engineers to disclose far more granular network performance metrics and network practice information, and coordinate with their marketing staff to disclose far more detailed information about their commercial terms, not to mention implement potentially vast changes to point-of-sale notice procedures.¹⁹ These costs are not recoverable. Moreover, while these small businesses scramble to come into compliance with rules that no one reasonably anticipated taking effect, particularly at the same time as larger BIAS providers, the affected small businesses and their small staffs will undoubtedly and understandably be distracted from delivering services to consumers, answering consumer inquiries, and responding to consumer concerns or trouble reports. These harms are compounded by the fact that the enhanced disclosure requirements may ultimately be subject to an exemption again at some later date. Thus, if a stay is denied, the Joint Petitioners' members – and their consumers as well – will undeniably suffer irreparable harm.

¹⁹ 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*”); Application for Review of CTIA-The Wireless Association, GN Docket No. 14-28 (filed June 20, 2016). The *2016 Guidance* for the first time, without elaborating, requires providers to “ensure” a customer accurately “received” information comprising a required disclosure under the Open Internet Orders. This does not communicate a clear path to compliance, and could be interpreted as requiring a provider to procure evidence of affirmative consent. This would be a heavy burden necessitating many changes in the way most carriers organize point-of-sale transactions. See *CCA Application for Review* at 17-18.

In the two PRA proceedings leading up to OMB approval of the rules, the Joint Petitioners discussed the true costs presented by the rules, which greatly exceed the Commission's unsupported and highly questionable estimate of annual compliance costs,²⁰ and why those costs will overwhelm small providers. To start, the Commission wrongly assumes that providers "will generally use 'in-house' personnel whose pay is comparable to mid-and senior-level federal employees."²¹ Contrary to the Commission's assertion, most small broadband providers have no specialized in-house legal counsel, engineers, technical writers, staff administrators or web administrators, and will need to hire outside expertise to comply, at substantially higher cost than the Commission estimates – with only 30 days' notice.

In countering the Commission's estimates, ACA reported that its' "members have estimated that to develop, draft, and revise the disclosures will require on average annual expenditures of 16-24 hours."²² CCA, in its response to the second *PRA Notice*, alerted the Commission to the equipment-related costs some members would incur to provide the network measurements required by the enhanced transparency rules, and explained that some members would need to pay third parties substantial sums to collect, for example, various network speed

²⁰ See Comments of CTIA – The Wireless Association on Proposed Information collection Requirements, GN Docket No. 14-28 (filed July 20, 2015) at 16 ("the burden estimates in the PRA notice are not realistic"); Comments of the United States Telecom Association, GN Docket No. 14-28 (filed July 20, 2015) at 5 (Commission must employ "a more realistic estimate of burdens of the burdens broadband providers will incur to comply with the new requirements"); WISPA PRA Comments at 1 ("the [2015] *PRA Notice* is predicated on flawed assumptions that grossly underestimate the information collection burdens and costs, especially for small broadband Internet access service providers"); ACA Final PRA Comments at 4-6 ("ACA members continue to believe [the Commission's] estimate understates the amount of time that BIAS providers expect to comply with the new measurement and disclosure requirements").

²¹ See "Initial Paperwork Act Calculations for Transparency Rule Disclosures," provided by Consumer and Governmental Affairs Bureau, FCC, to Steven Morris, Vice President and Associate General Counsel, National Cable & Telecommunications Association by email dated June 23, 2015, attached as Attachment A to WISPA PRA Comments.

²² ACA Final PRA Comments at 7.

measurements on a CMA basis.²³ Gathering network measurements will take time and administrative reorganization,²⁴ and it is unlikely that small providers can mobilize the necessary resources by the time the new requirements come into effect. ACA similarly explained that its members estimated that the enhanced network practices disclosures alone would require average annual expenditures of approximately 20 hours and likely necessitate engaging outside legal counsel to review the wide-ranging and subjective requirements.²⁵

Moreover, because they would be forced to spend scarce resources complying with the enhanced transparency obligations, small providers will not be able to invest those resources upgrading and expanding broadband service. The combination of actual compliance costs and opportunity costs contravene the acknowledged “national priority” of encouraging broadband deployment that Congress codified in Section 706.²⁶ In other words, forcing small providers to comply with the enhanced transparency obligations will slow, not accelerate, broadband deployment and competition.

Notwithstanding a clear and overwhelming record showing the burdens that small providers would undoubtedly face, OMB approved the rules. But OMB’s assessment of the burdens and ultimate approval were predicated in large part on the explicit understanding that small providers would remain “*eligible to avail themselves of the temporary exemption from the*

²³ See CCA PRA Comments at 10 n.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”).

²⁴ See *id.*

²⁵ See ACA Final PRA Comments at 4-5.

²⁶ See 47 U.S.C. § 1302.

enhancements.”²⁷ That understanding proved to be mistaken, calling into question the factual underpinning of OMB’s approval.

The true costs and burdens of compliance, coupled with the likelihood that small providers will not be able to comply with the enhanced transparency requirements by January 17, 2017, show that small providers will be irreparably harmed unless relief is granted. Therefore, the Joint Petitioners have proved the second factor of the test, and further demonstrated the need for a stay.

c. Other Parties Will Not Be Substantially Harmed by a Stay, and a Stay Will Benefit the Public Interest

There is absolutely no indication third parties would be harmed or impacted by a stay.²⁸ Rather, a stay of the effective date of the enhanced transparency obligations for small providers will benefit the public interest by preventing substantial harm to consumers in the form of pass-through costs, distraction in the provision of service, reduced investment in broadband deployment and stifled innovation in services – the “virtuous cycle” in reverse.

It is in the public interest to exempt small businesses from compliance requirements that would severely strain financial and personnel resources without materially advancing consumer protection, especially considering small providers are already required to make disclosures under

²⁷ *OMB Approval Notice* (emphasis added).

²⁸ In the two proceedings preceding OMB approval under the PRA, no commenter opposed the basis for maintaining the exemption. Only a single, 11th hour ex parte letter filed in December 2015 questioned the need to maintain the exemption without any demonstration of consumer harm. *See* Letter from Matthew F. Wood, Free Press, to Marlene H. Dortch, FCC Secretary, GN Docket No. 14-28 (filed Dec. 1, 2015). The Bureau nonetheless extended the exemption for a year. Despite millions of comments filed in the ongoing record, no filer has commented in the record supporting sunset of the exemption on December 15, 2016. *See* Pai-O’Rielly Dec. 16 Statement:

Last night, the small business exemption from the Title II Net Neutrality Order’s expanded reporting requirements expired. We worked hard to reach a consensus with our Democratic colleagues that would have prevented the exemption from lapsing. Unfortunately, those efforts did not bear fruit and now thousands of our nation’s smallest and most competitive Internet service providers are worried that they will be subject to unnecessary, onerous, and ill-defined reporting obligations.

the *2010 Open Internet Order* concerning network practices, performance and commercial terms that have proved to be more than adequate in keeping consumers, Internet edge providers and the Commission informed about the broadband Internet access services offered. The temporary exemption first approved by the Commission and extended by the Bureau in 2015 that remained in place until December 15, 2016 did not result in consumer harm or complaints that small providers were not disclosing granular network metrics. There is no reason to think that a stay – which would leave undisturbed the transparency requirements established in the *2010 Open Internet Order* – would lead to a different outcome.

As discussed above, the public will benefit by avoiding increased service costs and distraction from service delivery, which are likely if small providers must expend extra time, efforts and funds to support new compliance requirements. The Commission acted in the public interest when it adopted a small provider exemption, the Bureau acted in the public interest when it extended the exemption, and there has been no further finding or record evidence that would contravene those two decisions. In fact, the *Extension Order* specifically contemplated the need to “balance the benefit of the transparency rule enhancements to consumers against the impact on small providers of removing the exemption.”²⁹ A stay would promote this balance of harms and benefits, and encourage low service costs to the benefit of consumers.

Further, it is extremely unlikely that broadband providers, especially smaller ones, will have the wherewithal or the time to comply with the enhanced transparency rules by January 17, 2017 in light of the surprising and coincidental loss of the exemption and the effective date of the new obligations. It is contrary to the public interest for the Commission to provide such little lead

²⁹ *Extension Order* at 4-5.

time to implementation where, as here, the imminent effective date creates immediate financial costs and significant uncertainty³⁰ with unproven and unstated benefits.

Therefore, the Joint Petitioners have met the requisite standard for a stay. The Joint Petitioners are likely to prevail on the merits in light of public statements by Commissioners confirming their support for the continued exemption from the enhancements for small providers; small providers will be irreparably damaged if a stay is not granted, and resources are irrevocably diverted to fulfill onerous, unexpected compliance burdens; the requirements would only impose new and substantial costs on providers, and no third parties would be harmed by a stay; and lastly, the public will not be harmed, but will instead benefit if small providers are allowed to invest in customer service and network improvements. Accordingly, all four factors favor of a stay, and the Joint Petitioners urge the Commission to act quickly in granting relief to small providers.

³⁰ See n.28.

III. CONCLUSION

The Joint Petitioners have clearly met the standard for grant of a stay, and have demonstrated the need for relief for small BIAS providers. The Commission should grant a stay of the effective date of the enhanced transparency rules announced in the *Public Notice* until the small business temporary exemption can be reinstated by the Commission, or a permanent exemption is addressed in substance by a rulemaking proceeding. In so doing, the Commission should make clear that small BIAS providers will not face liability for failure to comply with the enhanced transparency obligations.

Respectfully submitted,

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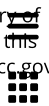
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JANUARY 13, 2017

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