CINNAMON MUELLER

BARBARA S. ESBIN
Admitted in the District of Columbia
besbin@CinnamonMueller.com

WASHINGTON, DC
1875 Eye Street, NW
Suite 700
Washington, D.C. 20006

direct: 202-872-6811
fax: 202-683-6791

ST. LOUIS
1714 Deer Tracks Trail
Suite 215
St. Louis, MO 63131

CHICAGO
307 N. Michigan Ave
Suite 1020
Chicago, IL 60601

phone: 312-372-3930

January 27, 2015

VIA ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: American Cable Association Ex Parte Submission on *Protecting and Promoting the Open Internet, GN Docket No. 14-28; Framework for Broadband Internet Service, GN Docket No. 10-127*

Dear Ms. Dortch:

The American Cable Association ("ACA") has explained that reclassifying broadband Internet access service as a telecommunications service subject to regulation under Title II of the Act for small and medium-sized broadband Internet service providers ("ISPs") is unsupported by the facts, the record in the above referenced proceedings, or the statute.[1] The action would therefore be arbitrary, capricious, and contrary to law as well as counterproductive from the perspective of a national policy to encourage the deployment of affordable advanced telecommunications services and broadband infrastructure.[2] In this *ex parte* letter, ACA urges the Commission not to burden small and medium-sized ISPs with additional – and utterly unwarranted – enhanced transparency rules.

ACA demonstrated in its comments and reply comments that small and medium-sized ISPs do not have the incentive or ability to engage in unreasonable or discriminatory practices, much less

[1] *Protecting and Promoting the Open Internet*, Letter of Barbara S. Esbin, Cinnamon Mueller, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 12, 2015); Protecting and Promoting the Open Internet, Reply Comments of the American Cable Association, GN Docket Nos. 14-28, 10-127 (filed Sept. 15, 2014) ("ACA Reply Comments"); Protecting and Promoting the Open Internet, Comments of the American Cable Association, GN Docket Nos. 14-28, 10-127 (filed July 17, 2014) ("ACA Comments"). ACA also joined in an *ex parte* letter filed on behalf several trade associations representing smaller ISPs pointing out the inadequacy of the Commission's Initial Regulatory Flexibility Act analysis in this proceeding. *See Protecting and Promoting the Open Internet*, Letter of ACA, NCTA, and WISPA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 9, 2015).

[2] It continues to be ACA's position that should the Commission nonetheless adopt the reclassification approach, it should extend maximum forbearance of Title II regulatory obligations to small and medium-sized broadband ISPs, including those contained in Sections 201, 202 and 208, deem broadband Internet access to be an interstate telecommunications service and take action to prevent cable ISPs from paying the telecommunications rate for their pole attachments. In addition, ACA filed an *ex parte* letter highlighting the potential for reclassification of the broadband Internet access service provided by its cable operator members to result in increased pole attachment rates under the telecommunications rate formula in certain circumstances. *Protecting and Promoting the Open Internet*, Letter of Thomas Cohen, Kelley Drye & Warren, LLP, Counsel for ACA, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127 (filed Jan. 20, 2015) (addressing pole attachment issues).

anti-competitive acts, which harm consumers and edge providers. In the case of these ISPs, the existing transparency rules are sufficient to protect both consumers and Internet content, applications and services ("edge") providers against potential violations of the Commission's open Internet rules. Further, the additional transparency rules proposed by some in this proceeding, as outlined below, would not only add untenable burdens on these ISPs, but provide no corresponding benefits for consumers or edge providers. For these reasons, if the Commission chooses to forge ahead with adopting additional disclosure requirements, it should exempt small and medium-sized ISPs from such additions.

ACA supports providing consumers with clear and adequate information concerning the services its members offer and provide, and submits that the existing transparency rules accomplish this objective. The current transparency rule strikes an appropriate balance between the perceived need for disclosures and the burdens placed on small and medium-sized ISPs by effectively informing consumers, edge providers, and the Commission as to how these ISPs manage their networks, while affording them the flexibility to make disclosures in the manner they believe is most appropriate. This balanced approach to disclosures, particularly its reliance on a single set of disclosures for both consumers and edge providers, has proven workable and effective, as ACA demonstrated in its comments and reply comments.[3] Nonetheless, it is noteworthy that the Commission understood that implementation of the initial transparency rule as written would be burdensome enough that it provided guidance in a subsequent public notice to minimize the burden.[4] Even with this additional guidance, compliance for smaller ISPs was still a burden.

Nowhere in the Open Internet Notice of Proposed Rulemaking, nor in any of the filings in the voluminous record is there evidence demonstrating otherwise.[5] To the contrary, the record in this proceeding confirms that there is no factual or policy justification to impose network management rules or network management disclosure requirements that are more stringent or go beyond those adopted in the *2010 Open Internet Order*, especially for small and medium-sized ISPs.[6] The few supporters of changes to the transparency rule posit that additional disclosure requirements will better enable the Commission to detect Open Internet rule violations, help consumers to better understand their broadband service, and enhance the ability of edge providers to develop applications. But commenters offering support for changes to the transparency rule provide no demonstration that the current rule has been insufficient or deficient, causing actual harm. Quite the opposite is true: edge providers and other parties have been shown to possess sufficient tools to alert them to whether an ISP is prioritizing its own content or discriminating against unaffiliated content.[7] These parties have not hesitated to publicize suspected violations widely on the Internet, enabling the Commission to launch investigations.[8]

[3] ACA Comments at 26-37; Reply Comments at 53-56.

[4] *FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule*; Public Notice, 26 FCC Rcd 9411 (2011).

[5] *Protecting and Promoting the Open Internet,* Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014) ("Notice" or "NPRM"); *See Wireline Competition Bureau Seeks to Refresh the Record in the 2010 Proceeding on Title II and Other Potential Legal Frameworks*, Public Notice, 29 FCC Rcd 5856 (2014).

[6] *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905 (2010) ("*2010 Open Internet Order*"), aff'd in part, vacated and remanded in part sub nom. *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) ("*Verizon*").

[7] ACA Reply Comments at 60.

[8] *Id.*

In the experience of ACA's small and medium-sized ISP members, most edge providers are indifferent to, or at best put a significantly lower priority on, the quality of service received by customers of smaller operators than larger ones.[9] Notwithstanding this fact, when edge providers have questions about an ISP's network practices, they contact that entity directly. Notably, no party supporting additional disclosures (apart from the few seeking detailed real time congestion disclosures), states that they have tried unsuccessfully to obtain additional network management information from those posted contacts. Further, edge providers are unlikely to seek information from small and medium-sized ISPs for the purpose of developing applications because of the relatively small number of subscribers that each smaller ISP has as compared to larger ISPs. The record also demonstrates that the current transparency rule has successfully informed consumers as to the nature of their service. The relatively small number of anecdotal and unverified consumer complaints cited in the NPRM, none of which are directed at small or medium-sized ISPs, cannot support the adoption of rule enhancements.

Absent evidence that the current rule is inadequate, is failing to protect consumers or edge providers in the marketplace (and there has been no such evidence), any expansion of the rules to smaller ISPs would clearly be a solution in search of a problem.[10] Indeed, it is evident in the record in this and other proceedings that when edge providers argue that ISPs are implementing interconnection or network management practices that in their opinion violate Open Internet principles, their concerns are only focused on a handful of "large eye-ball" ISPs.[11] In fact, in stating their concerns, these commenters explicitly disclaim that small and medium-sized ISPs are part of the problem.[12] For example, in its comments in the Comcast-TWC-Charter merger proceeding, Cogent explains that "smaller residential broadband networks continued to upgrade both peering and transit ports and Cogent has had no congestion problems with those networks."[13]

In light of the fact that small and medium-sized ISPs are not the source of any demonstrable problem, the various disclosure requirements proposed by edge provider commenters would impose unworkable and costly burdens on those ISPs without providing edge providers or consumers with any additional benefits. In fact, much of the information that commenters desire to be included under an "enhanced" transparency rule merely prescribe specific data reporting points that are already covered under the broad, yet flexible requirements of the Commission's existing rules, thereby inadvisably enshrining technical requirements into regulations.[14] Other rules proposed by some edge

[9] For instance, many smaller ISPs are interested in participating in Netflix's OpenConnect program in order to improve the performance of the Netflix service for their customers, but Netflix's program is geared toward medium-sized and larger ISPs. Few smaller ISPs, if any, participate in the program, despite their interest.

[10] *See* ACA Comments at 37-39; ACA Reply Comments at 62-65 and comments cited therein. Small and medium-sized ISPs simply lack the scale necessary to seek commercial prioritization and peering agreements that some commenters hypothesize would violate open Internet principles. *See* ACA Comments at 63-64. Netflix, when raising concerns last summer about the Comcast-TWC merger, noted that small ISPs "cannot charge an [online video distributor] for direct interconnection because failure to reach an agreement with a network that accounts for a very small portion of an OVD's customers would not be financially detrimental [to the OVD]." *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, Comments of Netflix, GN Docket No. 14-57, at 52 (filed Aug. 26, 2014).

[11] ACA Reply Comments at 12 n.23, 63-64.

[12] *Id.*

[13] *Id.* (citing *Applications of Comcast Corp. and Time Warner Cable Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, GN Docket No. 14-57, Comments of Cogent Communications Group, Inc. at 27 (filed Aug. 26, 2014)).

[14] *Id.* at 57.

providers, such as requiring real time congestion notifications or disclosures tailored to edge providers, would require small ISPs, who manage their own networks and may only have a handful of network operators, engineers, and head end staff to make onerous expenditures of both personnel hours and financial resources.[15] Finally, because congestion, as experienced by consumers, could originate from a variety of sources other than the ISP serving that end user, including edge providers,[16] if the Commission determines to impose a greater disclosure requirement regarding the sources of congestion, any expanded disclosure rule should extend to all entities involved, from the edge provider to the last-mile ISP (with an appropriate exemption for smaller providers).[17]

The proposed enhanced transparency rules would impose excessive and costly burdens on small and medium-sized ISPs, which could hamper their further deployment and enhancement of broadband.[18] For this reason, should the Commission adopt enhancements to the existing transparency rule, it must provide small and medium-sized ISPs an exemption from any additional obligations. For these providers, the Commission can confidently rely upon the existing disclosure rule together with its investigation, complaint and enforcement procedures to address any substantial concerns about any individual set of disclosures that may arise.

[15] *Id.* at 59. ACA agrees with the analysis provided by the National Cable and Telecommunications Association ("NCTA") in its Jan. 21, 2015 ex parte letter concerning the difficulties of developing accurate and reliable information on the performance of interconnection links between networks as well as determining the sources of congestion for the purpose of meeting reporting requirements. *See Protecting and Promoting the Open Internet,* Letter from Steven F. Morris, Vice President and Associate General Counsel, National Cable and Telecommunications Association to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 14-28, 10-127, at 3 (filed Jan. 12, 2015) ("NCTA Transparency Letter").

[16] NCTA Transparency Letter at 2 ("As the Commission has acknowledged, the performance experienced by a consumer is affected by many factors beyond the control of an ISP, including the home equipment and network of the consumer, the performance of other network providers, such as transit providers and content distribution networks (CDNs), and choices made by the content provider itself. With rare exception, there is no direct relationship between ISPs and edge providers and consequently no way for an ISP to measure or monitor the performance of a particular edge provider without inspecting all the packets crossing its network.").

[17] *See* ACA Comments at 39-40. *See also* NCTA Transparency Letter at 3 ("[t]here is no basis for imposing mandatory disclosure obligations on the ISP side of those interconnection arrangements without placing a parallel obligation on the network on the other side of the arrangement. ISPs typically have a direct contractual relationship with CDNs and transit providers which set forth the rights and responsibilities of the two parties to the arrangement. Imposing obligations on one side of those arrangements and not the other would be the essence of arbitrary agency decision-making.").

[18] *See* ACA Reply Comments at 56-62.

If you have any questions, or require further information, please do not hesitate to contact me directly. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

Barbara Esbin

Barbara S. Esbin
Counsel for the American Cable Association

cc (*via email*): Priscilla Delgado Argeris
Amy Bender
Nicholas Degani
Rebekah Goodheart
Jonathan Sallet
Julie Veach
Philip Verveer
Stephanie Weiner
Matthew DelNero