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

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

To: The Commission

PETITION FOR WAIVER OF THE RURAL WIRELESS ASSOCIATION, INC.

Pursuant to Section 1.3 of the Commission's rules,[1] The Rural Wireless Association, Inc. ("RWA")[2] submits this request for a waiver of the enhanced transparency requirements adopted by the Commission in its *2015 Open Internet Order*[3] for all Internet Service providers ("ISPs") with 100,000 or fewer broadband connections. Grant of this request will maintain the status quo and avoid imposing substantial and needless regulatory burdens on small ISPs who provide competitive broadband Internet access services ("BIAS") and who continue to face substantial obstacles in expanding broadband services to rural and underserved areas of this country.

[1] 47 C.F.R. §1.3.

[2] RWA is a 501(c)(6) trade association dedicated to promoting wireless opportunities for rural telecommunications companies who serve rural consumers and those consumers traveling to rural America. RWA's members are small businesses serving or seeking to serve secondary, tertiary, and rural markets. RWA's members are comprised of both independent wireless carriers and wireless carriers that are affiliated with rural telephone companies. Each of RWA's member companies serves fewer than 100,000 subscribers.

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

I. BACKGROUND

In its *2015 Open Internet Order*, the Commission adopted certain enhancements to its existing transparency rule that governs the content and format of disclosures made by providers of BIAS.[4] In doing so, the Commission responded to concerns raised by smaller providers about the compliance burdens of the enhanced transparency rule and temporarily exempted from the enhanced transparency requirements those providers "with 100,000 or fewer broadband subscribers, as per their most recent Form 477, aggregated over all of the providers' affiliates."[5] At the same time, the Commission stated that "both the appropriateness of the exemption and the [subscriber] threshold require further deliberation," and directed the Consumer and Governmental Affairs Bureau ("CGB") to seek comment on the exemption and to "adopt an order announcing whether it is maintaining an exemption and at what level by no later than December 15, 2015."[6]

On December 15, 2015, CGB released a Report and Order extending the enhanced transparency exemption for smaller BIAS providers for one year, until December 15, 2016, in order to allow the Office and Management and Budget to review the information collection and

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[4] The enhanced requirements include disclosure of: (i) commercial terms for prices, other fees, and data cap allowances; (ii) performance characteristics including packet loss, performance by geographic area, and average performance over a reasonable time and during peak usage; (iii) network practices including practices that are applied to traffic associated with a particular user or group, including any application agnostic degradation of service, user based or application based practices should include the purpose of practice, which users or data plans may be affected, the triggers that activate the use of the practice, the types of traffic that are subject to the practice, and the practice's likely effects on the end users' experience; and (iv) a voluntary safe harbor that providers may use in meeting the existing requirement to make transparency disclosures in a format that meets the needs of end users. *2015 Open Internet Order* at paras. 164-70, 176-81.

[5] *2015 Open Internet Order* at paras. 172-75. The Commission subsequently clarified that the exemption would be calculated on the basis of 100,000 or fewer broadband "connections."

[6] *Id.* at para 174.

disclosure requirements imposed by the rules under the Paperwork Reduction Act of 1995 ("PRA")[7] and to develop a record to assist CGB in making a recommendation to the full Commission with respect to the continued need for and scope of the transparency exemption, including whether or not to make the exemption permanent.[8] In issuing the *Extension Order*, CGB expressly acknowledged that it was unable to "fully evaluate the impact of removing the temporary exemption for smaller broadband Internet access service providers from the enhancements to the Open Internet transparency rule" and indicated that once the PRA process was complete, the full Commission would "be able to consider whether and, if so, how best to extend the temporary exemption from the enhanced transparency requirements with the benefit of more complete information."[9]

On December 16, 2016, the Commission released a public notice announcing OMB approval for the enhanced transparency requirements (with two limited exceptions) and indicated that these new requirements would go into effect January 17, 2017.[10] The public notice made no mention of the exemption, and, without any analysis or explanation, the exemption was allowed to expire on December 16, 2016.

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[7] 44 U.S.C. §§ 3501-3520.

[8] *Protecting and Promoting the Open Internet,* GN Docket No. 14-28, Report and Order, DA 15-1425 (2015) ("*Extension Order*").

[9] *Extension Order* at para. 1.

[10] *Notice of OMB Approval of the 2015 Enhancements to the Open Internet Transparency Requirements*, FCC Public Notice, GN Docket No. 14-28, DA 16-1400 (rel. December 16, 2016).

II. WAIVER STANDARD

The Commission has authority to grant a waiver under Section 1.3 of the rules if the petitioner demonstrates good cause for such action.[11] Good cause, in turn, may be found, and a waiver granted, "where particular facts would make strict compliance inconsistent with the public interest."[12]

In the present case, the public interest clearly favors granting a waiver from the enhanced transparency rules for BIAS providers serving 100,000 or fewer connections.[13] From the very inception of the enhanced transparency rules, the Commission acknowledged that the benefits of enhanced transparency might well be outweighed by the significant burdens and costs that such rules would impose on smaller providers and thus exempted them until an appropriate balancing of the benefits and costs could be undertaken. The Commission also delegated responsibility to CGB to develop a record and make recommendations to the Commission on whether to make the exemption permanent and whether to expand the exemption to larger providers. CGB extended the original exemption for a period of one year, from December 15, 2015 to December 15, 2016, precisely because it did not have sufficient information to undertake the required cost/benefit analysis required by the Commission and deferred this process until after the PRA information

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[11] 47 C.F.R. § 1.3. *See also ICO Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264 (D.C. Cir. 2005); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

[12] *Northeast Cellular*, 897 F.2d at 1166; *see also ICO Global Communications*, 428 F.3d at 269 (quoting Northeast Cellular); *WAIT Radio*, 418 F.2d at 1157-59.

[13] RWA's waiver request effectively seeks to preserve the status quo with respect to the entities that have been exempted by the Commission from compliance with the enhanced transparency rules from the time they were adopted. RWA is also aware that many parties filing comments in this proceeding have asked the Commission to expand the exemption to cover larger providers and have presented justification for such expansion. While RWA is not seeking to expand the exemption by this waiver request, it is not opposed to any such expansion that the Commission may find is warranted.

collection review had been completed so that the Commission would have sufficient information to make this determination and issue an order dealing with the continued need for the exemption. It stated:

> In determining whether and, if so, how to best to address the exemption, we must balance the benefit of the transparency rule enhancements to consumers against the impact on small providers of removing the exemption. Until the PRA process is complete, however, we find that we cannot fully evaluate this impact.
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> To avoid making a premature determination prior to PRA approval, the Bureau therefore extends the exemption until December 15, 2016. At that time, we expect that 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.[14]

Despite receiving OMB approval on December 15, 2016 to allow most of the enhanced transparency rule to take effect, neither CGB nor the Commission has undertaken the balancing of interests that they have repeatedly indicated is required by the public interest. Instead, the Commission has announced a January 17, 2017 effective date to the enhanced transparency rules and its inaction with respect to its promised review of the exemption has allowed the exemption to expire without explanation or analysis. This inaction falls far short of the public interest determination that was promised to the affected industry and certainly does not support a conclusion that the regulatory burdens are outweighed by any purported benefits of enhanced transparency. In fact, just the opposite is true.

RWA's membership, as well as other similarly-situated smaller BIAS providers, already faces significant constraints in deploying broadband services in high cost and often predominantly rural areas of the country in order to serve small numbers of customers spread over large service territories. These smaller providers have very limited financial and personnel

[14] *Extension Order* at paras. 8-9.

resources at their disposal and the enhanced transparency requirements would divert these limited resources away from overcoming the very real deployment issues, including challenging terrain and fierce weather conditions, that they must cope with in deploying broadband and BIAS to serve small pockets of customers that are spread out in rural and remote areas.

The burdens of the enhanced transparency rules are far from modest. The new rules will require smaller providers to purchase new equipment and software, hire additional staff and/or engage in additional staff training in order to implement the new monitoring and reporting capabilities at an increased level of granularity that the new rules will require. Additionally, these companies will be required to incur additional outside legal and consulting fees to meet these new requirements. Simply put, collecting additional data is a technically difficult and time-consuming process, requiring significant resources that smaller providers simply do not have. Adding to their already substantial workload will divert important resources that would otherwise be used to ensure the optimum performance of providers' networks.

Nor is there any real harm to the public in continuing to exempt smaller operators from the enhanced transparency rules. To the contrary, the exemption has allowed smaller and rural providers to focus their limited resources on maximizing deployment of the high quality broadband facilities that are so necessary for economic development and public safety in rural areas. Furthermore, there are significant differences between large and small providers both from a customer service standpoint and from a competitive standpoint. Unlike large or national broadband providers, small rural providers are located in the very same communities that they serve, and their business decisions are directly influenced by community need, not solely by profit. Customer service is always a top priority and the primary mission of these community-based providers is to offer vital communications links to consumers who live, work and travel in rural and remote areas that other providers decline to serve.

Smaller providers also lack the market power enjoyed by larger broadband providers and historically have not sought to inhibit the open Internet experience on their networks. These smaller providers lack any leverage to interfere with edge providers such as Netflix, Amazon or Hulu and have little or no incentive to block or degrade traffic for purposes other than reasonable network management and network security. Accordingly, any risks to the public in continuing to exempt smaller providers from the burdens of the enhanced transparency rules are very limited to non-existent.

As a final matter, the Commission should note that Congress has expressed its support for continuance of the exemption and the Commission should not use the ongoing transition of administrations following the recent Presidential and Congressional elections as an excuse for its failure to act to reinstate the exemption prior to January 17, 2017 when the new rules become effective. The House of Representatives has passed a bill that would extend the small provider exemption for five more years as well as expand the exemption to cover small businesses serving up to 250,000 subscribers.[15] In the Senate, a similar bill that would extend the exemption for three years and expand it to cover small businesses serving up to 250,000 customers was reported favorably out of the Committee on Commerce, Science, and Transportation.[16] Given the clear direction of Congress on this issue, the Commission should act affirmatively to deal

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[15] *See* Communications Act Update Act of 2016, S. 253, 114th Cong. § 301 (2016) (as passed by the House Sept. 27, 2016); Small Business Broadband Deployment Act, H.R.4596, 114th Cong. (2016).

[16] *See* Small Business Broadband Deployment Act of 2015, S.2283, 114th Cong. (2015).

with the exemption issue and should not allow new burdensome regulatory requirements to take effect by reason of its own inaction.

III. CONCLUSION

For the reasons set forth above, RWA respectfully requests that the Commission act promptly to waive the enhanced transparency requirements scheduled to take effect on January 17, 2017 for all BIAS providers serving 100,000 or fewer connections until December 31, 2017.

Respectfully submitted,

RURAL WIRELESS ASSOCIATION, INC.

By: /s/ *Caressa D. Bennet*

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Caressa D. Bennet, General Counsel
5185 MacArthur Boulevard, NW Suite 729
Washington, DC 20016
(202) 551-0010

December 22, 2016