

SMALL BUSINESS BROADBAND DEPLOYMENT ACT

MARCH 10, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce,
submitted the following

SUPPLEMENTAL REPORT

[To accompany H.R. 4596]

MINORITY VIEWS

Democratic members provide these supplemental and minority views to the Committee Report on H.R. 4596, the Small Business Broadband Deployment Act, for additional background and context surrounding those issues and matters being presented in and purportedly addressed by the legislation. While Democratic members do not oppose the end result of the reported version of H.R. 4596, the record is not sufficient at present to determine what the size of a small business is in this context, whether the underlying Federal Communications Commission (FCC) enhanced transparency rules are unduly burdensome on small Internet Service Providers (ISPs), or the effect of an exemption on consumers. Moreover, the FCC is currently evaluating whether such rules are needed.

The question underlying H.R. 4596 is narrow: is there a way to relieve truly small service providers from some burdens of the FCC's enhanced transparency rules while minimizing the impact on consumers? To answer this question, Congress and the FCC must collect adequate data to analyze the benefits of the enhanced transparency rules to consumers and the real burdens on ISPs. The FCC's data analysis is on-going and this bill provides certainty to smaller ISPs in the interim.

H.R. 4596, as reported, ensures that consumers will continue to receive essential disclosures under the 2010 FCC transparency rules, while temporarily exempting smaller ISPs from the 2015 enhanced transparency rules. The bill also directs the FCC to report to Congress so that future decisions about this rule are data-driven.

I. BACKGROUND

As part of the FCC’s Protecting and Promoting the Open Internet Order, the FCC enhanced its preexisting broadband transparency rule. In doing so, the Commission noted that “consumers continue to express concern that the speed of their service falls short of advertised speeds, that billed amounts are greater than advertised rates, and that consumers are unable to determine the source of slow or congested service.”¹

At that time, the FCC chose to exempt temporarily smaller ISPs from the transparency rule enhancements, citing an abundance of caution regarding concerns that the requirements might be burdensome for small providers.² For the purposes of the temporary exemption, the FCC adopted the proposal from the American Cable Association (ACA) that smaller ISPs be defined as those with 100,000 or fewer subscribers.³

The FCC further directed its Consumer and Governmental Affairs Bureau to adopt an order by December 15, 2015, on whether to make the exemption permanent and whether to modify the Commission’s definition of a smaller broadband provider. The Bureau issued an order on December 15, 2015, extending the smaller broadband provider exemption for another year so it could complete the process of estimating the burden the enhancements will place on providers of all sizes, and to obtain approval from the Office of Management and Budget, as is required under the Paperwork Reduction Act of 1995 (PRA).⁴

II. ANALYSIS OF THE SMALL BUSINESS BROADBAND DEPLOYMENT ACT

A. *The effects of H.R. 4596*

The original text of H.R. 4596 would have increased the definition of a smaller provider five-fold and made the exemption from the enhanced transparency rule permanent. Specifically, the draft would have applied to any ISP with 500,000 or fewer subscribers or with fewer than 1,500 employees. At the legislative hearing on January 12, 2016, where the discussion draft of H.R. 4596 was considered, Democrats raised concerns that these thresholds for small business were too high and that the permanent exemption may not be warranted without additional data to reveal burdens imposed on small ISPs and their magnitude. Democrats argued that to make this type of determination, Congress must have robust data about the impact on consumers as well as the true costs to service providers.

If the bill were enacted as introduced, tens of millions of consumers would permanently lose the benefit of the FCC’s enhanced transparency rules. This would be an undesirable outcome as the

¹Federal Communications Commission, *Protecting and Promoting the Open Internet*, GN Docket No. 14–28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, at ¶ 164 (2015).

²*Id.* at ¶ 172–175.

³*Id.* at ¶ 174 (“One metric to which ACA points is the approach that the Commission used in its 2013 Rural Call Completion Order, which excepted providers with 100,000 or fewer subscriber lines, aggregated across all affiliates, from certain recordkeeping, retention, and reporting rules. We adopt this definition for purposes of the temporary exemption that we adopt today.”).

⁴*Protection and Promoting the Open Internet*, Report and Order, GN Docket No. 14–28 (Feb. 26, 2015) (online at transition.fcc.gov/Daily_Releases/Daily_Business/2015/db1215/DA-15-1425A1.pdf).

record that the FCC has compiled on these matters clearly show tangible and calculable consumer-related benefits associated with these rules. Testimony provided at the Subcommittee on Communications and Technology’s legislative hearing on January 12, 2016, estimated that 21 million consumers are currently served by smaller ISPs.⁵ The FCC has collected data on FCC Form 477 that shows 1,913 companies currently serve 500,000 or fewer subscribers. These providers have a total of approximately 11.4 million connections that would qualify for the exemption outlined in the discussion draft (and later incorporated into the introduced version of H.R. 4596).⁶ At a minimum, the introduced version of H.R. 4596 represents a nearly 45 percent increase over those approximately 6.6 million connections that are now subject to the FCC’s exemption.

Further, the proposed thresholds have no basis in the legislative record. One witness at the January 12 hearing indicated that for her association, the largest member was a wireless ISP with approximately 200,000 subscribers, with the average member providing service to 1,500 subscribers.⁷ No record evidence in Congress or at the FCC supports extending the exemption to cover entities with 500,000 subscribers or with 1,500 employees.

B. Modifications made during markup to H.R. 4596, as introduced

At the subcommittee markup, Republican members offered to work with Democrats to improve the bill. Ultimately, Congressman Loeb sack (D–IA) and Chairman Walden (R–OR) offered an amendment at the full Committee markup to address many of the concerns raised by Democrats. The amendment would significantly modify the bill to create a five-year sunset for the exemption and lowers the exemption threshold to companies with 250,000 or fewer subscribers. Additionally, the amendment would direct the FCC to report to Congress to provide data to help determine an appropriate threshold going forward. The amendment was adopted by voice vote, and H.R. 4596 was reported favorably by voice vote from the full Committee on February 25, 2016.

The changes made by the Loeb sack–Walden amendment could significantly mitigate potentially negative impacts on consumers while still providing certainty for smaller ISPs. Because Congress will rely on data reported by the expert agency, the FCC should include in its report: data specific to how the exemption affects consumers; information on how many consumers would be exempted at different thresholds; and a recommendation on whether any definitions should be modified based on the data collected. Additionally, although the language requires the FCC to send its report within 180-days after enactment, the FCC should consider updating the report to Congress in the interim before the sunset expires.

⁵See Written Statement of L. Elizabeth Bowles, Legislative Committee Chair, Wireless Internet Service Providers Association President, Aristotle, Inc. (January 12, 2016) (online at docs.house.gov/meetings/IF/IF16/20160112/104317/HHRG-114-IF16-Wstate-BowlesE-20160112-U1.pdf).

⁶The FCC does not collect data on employees, so it is impossible to estimate the impact on consumers of the proposed language that would exempt companies with 1,500 or fewer employees.

⁷See archived webcast of *A Legislative Hearing on Four Communications Bills*, U.S. House of Representatives, Subcommittee on Communications and Technology, Committee on Energy and Commerce (January 12, 2016) (online at energycommerce.house.gov/hearings-and-votes/hearings/legislative-hearing-four-communications-bills).

Again, the compromise struck in this specific instance helps to keep a fair balance between providing certainty for smaller ISPs while ensuring that consumers are not forgotten, as the FCC continues its process to collect the relevant data for Congress. We appreciate the opportunity to supplement the Committee Report to ensure our views are noted on this important discussion.

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