

SUPPORTING STATEMENT

A. Justification

Background

1. In 2009, the Federal Communications Commission (“Commission”) released a Notice of Proposed Rulemaking (“NPRM”) to determine whether and what actions might be necessary to preserve an open Internet. . The NPRM specifically noted the proposed information collections and sought public comment thereon.¹ On December 21, 2010, the Commission adopted the *Preserving the Open Internet and Broadband Industry Practices Report and Order* (“*Open Internet Order*”).² In January 2014, the D.C. Circuit struck down certain of the rules adopted in the *Open Internet Order*.³ Following that ruling, the Commission issued a Notice of Proposed Rulemaking.⁴ On Feb. 26, 2015, the Commission adopted the *Protecting and Promoting the Open Internet Report and Order on Remand, Declaratory Ruling, and Order* (“*Title II Order*”).⁵

The statutory authority for the information collection requirements is contained in 47 U.S.C. 151, 152, 153, 154, 201, 218, 230, 251, 254, 256, 257, 301, 303, 304, 307, 309, 316, 332, 403, 503, 522, 536, 548, and 1302.

This information collection may affect individuals or households, and thus, there may be impacts under the Privacy Act. The Privacy Act requires federal agencies to take special measures to protect personal information about individuals when the agencies collect, maintain, and use such personal information. Federal agencies are required to make the public aware of what “systems of records” they maintain. The Privacy Act defines a system of records as a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual. The Commission has a system of records, FCC/EB-5, “Enforcement Bureau Activity Tracking System (EBATS),” that will cover the personally identifiable information (PII) that may be submitted to the Commission in open Internet formal complaint proceedings. FCC/EB-5 became effective on January 24, 2011. *See* 75 FR 77872 (Dec. 14, 2010). The Commission prepared a Privacy Threshold Analysis (PTA) for the information systems, including the information system that will track open Internet formal complaints, which are covered by EBATS.

¹ 74 Fed. Reg. 62638 (Nov. 30, 2009).

² *Preserving the Open Internet, Broadband Industry Practices, Report and Order*, 25 FCC Rcd 17905 (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).

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

⁴ *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561 (2014).

⁵ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) (*Title II Order*).

Information Collection Requirements:

47 C.F.R. Section 8.12 permits any person to file a formal complaint alleging a violation of the rules adopted in the *Open Internet Order* and the *Title II Order*.

47 C.F.R. Section 8.13 establishes requirements for all pleadings filed in formal complaint proceedings, including that pleadings must be clear, concise, and explicit; that all matters concerning a claim, defense, or requested remedy should be pleaded fully and with specificity; that pleadings must contain facts that, if true, are sufficient to warrant a grant of the relief requested; and that facts must be supported by relevant documentation or affidavit.⁶ Complainants must file an original copy of the complaint, accompanied by the correct fee, in accordance with part 1, subpart G (see 47 C.F.R. Section 1.1106) using the Commission’s Electronic Comment Filing System and serve the complaint by hand delivery on either the named defendant or one of the named defendant’s registered agents for service of process, if available, on the same date that the complaint is filed with the Commission.

Any person intending to file a complaint must first notify the potential defendant in writing that it intends to file a complaint with the Commission based on actions alleged to violate one or more of the provisions contained in part 8 of the Commission’s rules. The notice must be sufficiently detailed so that its recipient(s) can determine the specific nature of the potential complaint. The potential complainant must allow a minimum of ten (10) days for the potential defendant(s) to respond before filing a complaint with the Commission.

47 C.F.R. Section 8.14 establishes requirements for the filing of formal complaints, answers to formal complaints, replies, and additional procedures and filings.⁷

Complaints. Complaints shall be accompanied by a certificate of service on any defendant. The complaint shall state the relief requested. It shall state fully and precisely all pertinent facts and considerations relied on to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. The complaint shall set forth all steps taken by the parties to resolve the problem.

Answers. This rule requires that unless otherwise directed by the Commission, any party who is served with a complaint shall file an answer within 20 days of service of the complaint. The answer shall advise the parties and the Commission fully and completely of the nature of any and all defenses, and shall respond specifically to all material allegations of the complaint. Collateral or immaterial issues shall be avoided in answers and every effort should be made to narrow the issues. Any party against whom a complaint is filed failing to file and serve an answer within the time and in the manner prescribed by these rules may be deemed in default and an order may be entered against defendant in accordance with the allegations contained in the complaint. Facts must be supported by relevant documentation or affidavit. The answer shall admit or deny the averments on which the adverse party relies. If the defendant is without knowledge or information sufficient to form a belief as to the truth of an averment, the defendant shall so state and this has the effect of a denial. When a defendant intends in good faith to deny only part

⁶ See 47 CFR Section 8.13 for specific requirements pertaining to pleadings filed in a formal complaint proceeding.

⁷ See 47 CFR Section 8.14 for specific requirements pertaining to the filing of formal complaints, answers, and replies.

of an averment, the answer shall specify so much of it as is true and shall deny only the remainder, and state in detail the basis of that denial. Averments in a complaint are deemed to be admitted when not denied in the answer.

Replies. This rule permits a complainant to file a reply to a responsive pleading that shall be served on the defendant and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied on. Unless expressly permitted by the Commission, replies shall not contain new matters. Failure to reply will not be deemed an admission of any allegations contained in the responsive pleading, except with respect to any affirmative defense set forth therein. Unless otherwise directed by the Commission, replies must be filed within ten (10) days after submission of the responsive pleading.

Additional procedures and written submissions. The Commission may specify other procedures, such as oral argument or evidentiary hearing directed to particular aspects, as it deems appropriate. The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including copies of all contracts and documents reflecting arrangements and understandings alleged to violate the requirements set forth in the Communications Act and in this part, as well as affidavits and exhibits. The Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence. Reply briefs may be submitted at the discretion of the Commission. The Commission may, in its discretion, order discovery limited to the issues specified by the Commission. Such discovery may include answers to written interrogatories, depositions, document production, or requests for admissions. The Commission may, in its discretion, direct the parties to submit discovery proposals, together with a memorandum in support of the discovery requested.

47 C.F.R. Section 8.15 provides that, in any proceeding subject to the part 8 rules, the Commission may, in its discretion, direct the attorneys and/or the parties to appear for a status conference.

47 C.F.R. Section 8.16 provides that any materials filed in the course of a proceeding under this part may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act (FOIA), 5 U.S.C. 552(b).

47 C.F.R. Section 8.17 describes the circumstances under which parties to a part 8 proceeding may seek review of rulings.

2. Information filed is used to make determinations on complaints filed with the Commission.

3. This collection of information does not involve the use of forms or surveys that can be completed electronically. The collection of information comprises various pleadings that may be filed before the Commission. Due to the unique nature of these pleadings, it is not feasible to file them in standardized electronic form format. Parties may, however, voluntarily submit electronic copies of their pleadings to staff via e-mail in order to expedite review.

4. None of the information collected as a result of the *Open Internet Order* or the *Title II Order* is unnecessarily duplicative of other information. The formal complaint procedural rules that are the subject of this supporting statement are based on the cable access rules in Part 76 of the Commission’s rules.⁸
5. This information collection makes possible a formal complaint process to address open Internet disputes that cannot be resolved through other means, including the Commission’s informal complaint system. This process will permit anyone to file a claim alleging that another party has violated a rule, and asking the Commission to rule on the dispute. The formal complaint rules will facilitate enforcement of the rules adopted in the *Open Internet Order* and the *Title II Order*.
6. If this information were not to be collected, the Commission would lack a method of monitoring compliance with its rules. The absence of this information collection would also eliminate a means by which consumers and others may seek the Commission’s help with alleged violations of its rules.
7. No other special circumstances apply to these information collection requirements.
8. Pursuant to 5 C.F.R. § 1320.8(d), the Commission published a notice in the *Federal Register* to solicit public comment on this reporting requirement on May 16, 2017 (82 FR 22547). No comments were received.
9. The Commission does not anticipate providing any payment or gift to respondents.
10. Any information submitted by parties as part of their petition, complaint, answer, or reply may be submitted pursuant to a request for confidentiality under section 0.459 of the Commission’s rules. See 47 C.F.R. § 0.459.

As noted in Question 1 above, this information collection may affect individuals or households, and thus there may be impacts under the Privacy Act. The PII that individuals and others may include in their open Internet formal complaint submissions is covered by a system of records, FCC/EB-5, “Enforcement Bureau Activity Tracking System (EBATS),” which became effective on January 24, 2011. See 75 FR 77872 (Dec. 14, 2010). The Commission prepared a Privacy Threshold Analysis (PTA) for the information systems, including the information system that will track open Internet formal complaints, which are covered by the EBATS system of records notice (SORN).

11. As noted in Questions 1 and 10 above, a system of records, FCC/EB-5, “EBATS,” covers all PII that may be submitted in a formal complaint, and the Commission prepared a PTA for the information systems covered by the EBATS SORN.

12. This collection accounts for formal complaints filed pursuant to Sections 8.12 *et seq.* We anticipate that two filing parties will generally be involved (the complainant and the defendant/responding party).

We estimate that parties initiating their own formal filings will have an average burden of 40 hours and parties using outside counsel will have an average burden of 4.5 hours to assist their counsel, with some

⁸ *Open Internet Order*, 25 FCC Rcd at 17987, para. 155.

filings requiring considerably less time, and some requiring more time. We estimate that approximately 15 filings will be made annually in accordance with procedures in Sections 8.12 *et seq.*

Total Number of Annual Respondents: 10

Total Number of Annual Responses =	5 filings x 2 parties/filing =	10 responses/filings
	5 pre-complaint notices =	<u>5 notices</u>
		15 responses

ANNUAL BURDEN HOURS

Parties Initiating Their Own Filings: We estimate that 50% of parties initiating or responding to formal filings will do so on their own at an average of 40 hours per complaint filing. We assume that all parties that prepare their own complaints will also prepare their own pre-complaint notices, and will expend 4 hours per pre-complaint notice filing.

$$(3 \text{ complaints} + 2 \text{ responses}) \times 40 \text{ hours/filing} = 200 \text{ hours}$$

$$3 \text{ pre-complaint notices}^9 \times 4 \text{ hours/filings} = 12 \text{ hours}$$

Parties Using Outside Counsel: We estimate that 50% of parties initiating or responding to formal filings will use outside legal counsel. These parties will commit an average of 4.5 hours per complaint/response filing. We assume that parties that use outside counsel to prepare complaints will also use outside counsel to prepare pre-complaint notices, and will expend 2 hours per pre-complaint notice filing to coordinate with outside legal counsel.

$$(2 \text{ complaints} + 3 \text{ responses}) \times 4.5 \text{ hours/filing} = 22.5 \text{ hours}$$

$$2 \text{ pre-complaint notices}^{10} \times 2 \text{ hours/filing} = 4 \text{ hours}$$

Total Annual Burden Hours = 200 hours + 12 hours + 22.5 hours + 4 hours = 238.5 hours (239 hours rounded)

ANNUAL “IN-HOUSE” COST

We estimate that an in-house attorney and paralegal will initiate 50% of the formal filings without outside assistance and the remaining filings will be coordinated with outside legal counsel.

⁹ The Commission estimates that 3 parties will prepare and issue their complaints and pre-complaint notices to potential defendants without outside assistance.

¹⁰ The Commission estimates that 2 parties will rely on outside counsel to prepare and issue complaints and pre-complaint notices.

Filings Done In-House

For formal filings done without outside assistance, we estimate that parties will use paralegal staff whose pay is comparable to mid- to senior-level federal employees (GS 12/5, plus 30% overhead), about \$56.28 per hour. We estimate that parties will use an average of 5 hours of in-house paralegal time per complaint filing or response and 1 hour per pre-complaint notice filing. We estimate that parties will use legal staff whose pay is comparable to senior level federal employees (GS 15/5, plus 30% overhead), about \$93.03 per hour. We estimate that respondents will use an average of 35 hours of in-house legal staff time per complaint or response filing and 3 hours per pre-complaint notice filing.

Paralegal: 5 hours x (3 complaints + 2 responses) x \$56.28/hour = \$ 1,407.00
Attorney: 35 hours x (3 complaints + 2 responses) x \$93.03/hour = \$16,280.25
Total Annual “In-House” Cost for in-house complaint filings: \$17,687.25

Paralegal: 1 hour x 3 pre-complaint filings x \$56.28/hour = \$168.84
Attorney: 3 hours x 3 pre-complaint filings x \$93.03/hour = \$837.27
Total Annual “In-House” Cost for in-house pre-complaint filings: \$1,006.11

Filings Done by Outside Counsel (But Requiring In-House Staff to Spend Time Coordinating Information with Outside Counsel)

For the half of filings done by outside counsel, we estimate that parties will use 4.5 hours of in-house lawyer time for complaints and responses and 2 hours per pre-complaint notice filing to coordinate information with outside legal counsel.

Attorney: 4.5 hours x (2 complaints + 3 responses) x \$93.03/hour = \$2,093.16
Attorney: 2 hours x 2 pre-complaint filings x \$93.03/hour = \$ 372.12
\$2,465.28

Total In-House Cost for all Filings: \$17,687.25 + \$1,006.11 + \$2,465.28= **\$21,158.64**

These estimates are based on Commission’s staff knowledge and familiarity with the availability of the data required.

13. Annual Cost Burden:

a. Total capital and start-up costs: \$0

b. Half of the respondents are expected to receive assistance from consulting attorneys at costs of \$300/hour when initiating their filings (50% of 10 filings = 5 filings), and outside paralegals at the cost of \$52.86 per hour. We estimate that, on average, outside attorneys will spend 25 hours per complaint, and outside paralegals will spend 5 hours per complaint. We estimate that 2 of the 5 respondents will require outside counsel to prepare the pre-complaint

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notices. We estimate that, on average, outside attorneys will spend 2 hours per pre-complaint notice, and outside paralegals will spend 1 hour per complaint.

Therefore, the total operation and maintenance costs are

$$(2 \text{ complaints} + 3 \text{ responses}) \times 25 \text{ hours} \times \$300/\text{hr} + (2 \text{ complaints} + 3 \text{ responses}) \times 5 \text{ hours} \times \$52.86/\text{hour} = 37,500 + 1321.50 = \$38,821.50$$

$$2 \text{ pre-complaint filings} \times 2 \text{ hours} \times \$300 + 2 \text{ pre-complaint filings} \times 1 \text{ hour} \times \$52.86/\text{hour} = 1,200 + 105.72 = \$1,305.72$$

c. Total Annualized Cost: **\$40,127.22 (\$40,127 rounded)**

14. **Cost to the Government:** The Commission staff performing work that reviews these filings consists of attorneys at the GS-15, step 5 level (\$71.56/hour), paralegals at the GS-12, step 5 level (\$43.29/hour) and administrative personnel at the GS-5, step 5 level (\$19.70/hour).

Legal review: 10 filings x 11.3 hours/filing x \$71.56/hour	=	\$8,086.28
Paralegal review: 10 filings x 3.4 hours/filing x \$43.29/hour	=	\$1,471.86
Admin. review: 10 filings x 2 hours/filing x \$19.70/hour	=	<u>\$ 394.00</u>
Total Cost to the Federal Government:		\$9,952.14

15. There are no program changes or adjustments to this collection.

16. The data will not be published for statistical use.

17. The Commission does not seek approval to not display the expiration date for this collection of information.

18. There are no exceptions to the Certification Statement.

B. Collections of Information Employing Statistical Methods:

No statistical methods are employed.