Before the
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

In the Matter of	)	
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Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices, Report and Order, GN Docket No. 09-191 and WC Docket No. 07-52	)	76 Fed. Reg. 39873
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	)	OMB Control Number: 3060–XXXX
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COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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CTIA—The Wireless Association® ("CTIA")[1] respectfully requests that the Office of Management and Budget ("OMB") reject the proposed information collection associated with the "transparency" requirements adopted by the Federal Communications Commission ("Commission") in its *Open Internet Order*.[2] The Commission has not satisfied its obligations under the Paperwork Reduction Act ("PRA"), notwithstanding the guidance recently released by the Commission staff intended to clarify certain aspects of the transparency requirements.[3] Nor can the Commission reconcile its proposed information collection with the Obama

[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Report and Order, GN Docket No. 09-191; WC Docket No. 07-52, FCC 10-201 (Dec. 23, 2010) ("*Open Internet Order*").

[3] *Enforcement Bureau Issues Advisory Guidance Regarding Compliance With Open Internet Transparency Rule*, GN Docket No. 09-191, WC Docket No. 07-52 (rel. June 30, 2011) ("*Advisory Guidance*").

Administration's stated objective and explicit direction that administrative agencies reduce regulatory burdens. Accordingly, OMB should disapprove the proposed information collection.[4]

I. INTRODUCTION AND SUMMARY

The information collection in question stems from the FCC's "transparency" rule and the text of the *Open Internet Order*, which specifies over 30 topics that a broadband provider may be expected to disclose in order for its disclosures to be deemed "effective" under that rule.[5] Pursuant to the PRA,[6] the Commission published notice in the Federal Register on February 9, 2011 seeking comment on the PRA implications of the transparency rule and, in particular, on the Commission's estimate of the associated burdens.[7] Accepting the Commission's invitation, CTIA (as well as several other parties) identified significant burdens associated with the proposed information collection and questioned the Commission's estimates of the time and effort in complying.

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[4] CTIA is submitting these comments within the time frame set forth in the Federal Register notice inviting public comment. *See Information Collection Being Submitted for Review and Approval to the Office of Management and Budget*, 76 Fed. Reg. 39873 (July 7, 2011) ("*Information Collection Notice*"). The August 8, 2011 edition of *Communications Daily* references a statement by an unnamed "OMB spokesperson" suggesting that OMB had already "closed the comment period on the information collection piece" of the *Open Internet Order*. CTIA assumes that this was a mistake as the deadline for filing comments on the proposed information collection as set forth in the Federal Register is August 8, 2011.

[5] *Open Internet Order* ¶ 56.

[6] *See* Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (1995), *codified at* 44 U.S.C. § 3501 *et seq*.

[7] *See Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7207 (Feb. 9, 2011). The Commission also sought comment on the PRA implications of the proposed transparency rule in connection with its initial notice of proposed rulemaking. *See Preserving the Open Internet, Broadband Industry Practices,* Notice of Proposed Rulemaking, 74 Fed. Reg. 62638, 62639 (2009) ("*Open Internet NPRM*").

In response, the Commission's Enforcement Bureau and Office of General Counsel released the *Advisory Guidance*, which was intended to provide "initial guidance regarding specific methods of disclosure that will be considered to comply with the transparency rule…."[8] Based on the *Advisory Guidance*, the Commission subsequently adjusted its PRA analysis to increase modestly its estimates of the burdens associated with the proposed information collection.[9] These new estimates, however, are still significantly below the estimates the Commission provided when it originally proposed a transparency rule.

Unfortunately, and notwithstanding issuance of the *Advisory Guidance*, the Commission has failed to comply with the PRA in three respects. *First*, the information collection requirements imposed by the FCC's transparency rule significantly burden mobile broadband providers, and the Commission's latest estimates of these burdens – 32 hours and $319 of external costs per provider annually – are significantly understated.[10] These estimates are simply not realistic. Furthermore, they are at fundamental odds with the Commission's estimate of the burdens associated with its original proposed transparency rule – 327 hours and $2800 of external costs per provider annually – even though the proposed rule was considerably more circumscribed than the transparency requirements the Commission ultimately adopted. The original proposed rule was limited to disclosure of "network and congestion practices," where the rule ultimately adopted specified over 30 topics that disclosures were expected to address. Despite the increase in the scope of the transparency rule as proposed versus as adopted, the

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8 *See Advisory Guidance* at 1.

9 *Information Collection Notice*, 76 Fed. Reg. at 39874.

10 *See id*. at 39874; "Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices," Federal Communications Commission, New Collection Supporting Statement, filed with the Office of Management and Budget, 3060-XXX (July 2011) ("*July 2011 Supporting Statement*").

corresponding burden estimate actually decreased. Although CTIA believes these initial estimates also were understated, they underscore that the burdens of the proposed information collection are significantly greater than the Commission is now claiming. Without accurate burden estimates, it is impossible for OMB to satisfy its obligations under the PRA.

Second, the FCC has failed to demonstrate that the proposed information collection has "practical utility," as required by the PRA.[11] The Commission maintains that the transparency rule is necessary, at least in part, for the agency to perform its regulatory functions. But at the same time the Commission does not dispute that it has neither a plan nor the resources to use or review the information being collected. The Commission's attempt to satisfy the "practical utility" requirement of the PRA by insisting that the information collection primarily benefits "consumers and innovators" is unpersuasive.[12] The "regulatory lag" inherent in collecting, reporting, reviewing, and analyzing the information required by the *Open Internet Order* combined with the rapid innovation and dynamism that characterizes wireless broadband services, makes it self-evident that the information collection will have no practical utility to consumers and innovators.[13]

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11 5 C.F.R. § 1320.1.

12 *July 2011 Supporting Statement* at 5.

13 The FCC typically takes more than eighteen months simply to tally and publish the number of complaints and inquiries it receives from the public. *See* http://www.fcc.gov/encyclopedia/quarterly-reports-consumer-inquiries-and-complaints. Similarly, the annual CMRS Competition Report to Congress is published approximately eighteen months after the data has been collected. *See* http://www.fcc.gov/reports?filter_terms%5B%5D=0&topics%5B%5D=0&filter_terms%5B%5D=96&op=Apply+Filter; and http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0630/FCC-11-103A1.pdf ("In May 2010, the Commission released the *Fourteenth Report*, which provided an analysis of mobile wireless market conditions during 2008 and 2009. This year's fifteenth Mobile Wireless Competition Report updates the data and analysis presented in the *Fourteenth Report*, and

Footnote continues on next page . . .

Third, the Commission has not made any effort to reduce the burden of the proposed information collection on small business concerns, notwithstanding the agency's claims to the contrary. The transparency rule and its related disclosure requirements make no distinction based on the size of the mobile broadband service provider, and all providers – large and small – must engage in the same general exercise to ensure compliance. Likewise, the *Advisory Guidance* does nothing to make the requirements of the transparency rule less burdensome on small mobile broadband providers.

OMB should not and cannot approve the proposed information collection under these circumstances. The PRA is a fundamental check on agency action by protecting the public welfare while ensuring that businesses are not weighed down by the costs and impact of unnecessary and burdensome regulation. The Obama Administration has emphasized the importance of "getting rid of absurd and unnecessary paperwork requirements that waste time and money"[14] and "cutting down on the paperwork that saddles businesses with huge administrative costs."[15] Indeed, President Obama has issued two Executive Orders that direct

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analyzes mobile wireless service market conditions during 2009 and 2010…". Fifteenth Annual CMRS Report, FCC 11-103 at p.5 (rel. June 27, 2011).

[14] President Barack Obama, "Toward a 21st Century Regulatory System," Wall Street Journal, January 18, 2011, *available at* http://online.wsj.com/article/SB10001424052748703396604576088272112103698.html.

[15] Remarks by the President to the Chamber of Commerce, U.S. Chamber of Commerce Headquarters, Washington, D.C., February 7, 2011, *available at* http://www.whitehouse.gov/the-pressoffice/2011/02/07/remarks-president-chamber-commerce. Cass Sunstein, the Administrator for the Office of Information and Regulatory Affairs (the government body that implements the PRA) similarly emphasized in a memorandum to the Chief Information Officers of the federal agencies that "[p]aperwork and reporting requirements impose significant burdens on the American people, including those who run businesses, both large and small." "Minimizing Paperwork and Reporting Burdens; Data Call for the 2011 Information Collection Budget," Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, Memorandum for Chief Information Officers, at 1 (Feb. 23, 2011), http://www.whitehouse.gov/sites/default/files/omb/inforeg/icb/2011_ICB_Data_Call.pdf.

agencies – including independent agencies such as the FCC – to reduce regulatory burdens and costs.[16] If these directives are to have any meaning and if the PRA is going to be given effect, OMB must disapprove the Commission's proposed information collection. Doing so is the only way to satisfy the requirements of the PRA and help achieve the Obama Administration's objective of minimizing administrative burdens, including paperwork burdens, on businesses during these difficult economic times.

II. THE TRANSPARENCY INFORMATION COLLECTION REQUIREMENTS SIGNIFICANTLY BURDEN MOBILE BROADBAND PROVIDERS, AND THE FCC HAS SUBSTANTIALLY UNDERESTIMATED THOSE BURDENS.

Notwithstanding the Commission's assertions to the contrary, the information collection requirements under the *Open Internet Order* – as clarified in the *Advisory Guidance* – will significantly burden mobile broadband providers.[17] In determining the burden associated with the transparency rule, the Commission was required to consider the time, effort, and cost necessary to train personnel to be able to respond to the collection;[18] to acquire, install, and

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[16] In January 2011, President Obama released an Executive Order that called on all agencies to reexamine their significant rules, and to streamline, reduce, improve, or eliminate them on the basis of that examination. Executive Order, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order. Just last month, the President took this burden-reducing initiative a large step further by calling on independent regulatory agencies – including the FCC – to follow the same requirements that other agencies now follow. Executive Order, *Regulation and Independent Regulatory Agencies* (July 11, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/07/11/executive-order-regulation-and-independent-regulatory-agencies.

[17] The term "burden" is broadly defined to include all of the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency." 44 U.S.C. § 3502(2). The burden-hour estimate for an information collection is a function of (1) the frequency of the information collection, (2) the estimated number of respondents, and (3) the amount of time that the agency estimates it takes each respondent to complete the collection.

[18] 5 C.F.R. § 1320.3(b)(1)(vi).

develop systems and technology to collect, validate, and verify the requested information;[19] to process and maintain the required information;[20] and to provide the required information.[21] Unfortunately, the Commission's estimates of these burdens are significantly understated. They cannot be supported based on real-world experience or the Commission's own calculations.

Without accurate burden estimates, OMB is unable to "minimize" the burden of a proposed information collection and "maximize the practical utility of and public benefit from information collected" as required by the PRA.[22] Accordingly, the Commission should disapprove the proposed collection and mandate that the Commission revisit the proposed estimates.

A. Mobile Broadband Providers Will Need to Devote Substantial Resources to Satisfy the Proposed Information Collection.

According to the Commission, the objective of the *Open Internet Order* was to "preserv[e] and promot[e] a free and open Internet."[23] Consistent with this objective, the Commission adopted substantive rules for mobile broadband providers, including "a no blocking rule that guarantees end users' access to the web and protects against mobile broadband providers' blocking applications that compete with their other primary service offerings – voice and video telephony …."[24] The Commission also adopted its transparency rule, which requires that mobile and fixed broadband Internet access service providers "publicly disclose accurate

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19 5 C.F.R. § 1320.3(b)(1)(ii).

20 5 C.F.R. § 1320.3(b)(1)(iii).

21 5 C.F.R. § 1320.3(b)(1)(iv).

22 44 U.S.C. §§ 3501(1), (2) & 3504(c)(3), (4); *see also* 5 C.F.R. § 1320.1 (noting that OMB's rules aim to "to reduce, minimize and control burdens and maximize the practical utility and public benefit" of information collected by the Federal Government").

23 *Open Internet Order* ¶ 11.

24 *Id*. ¶ 99.

information regarding … [their] broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[25]

In the text of the *Open Internet Order*, the Commission identified approximately 30 discrete topics that it suggested a broadband provider should address, at least in some respect, in order for its disclosures to comply with the transparency rule.[26] The topics identified by the Commission include such disparate issues as "practices used to ensure end-user security or security of the network," "[a] general description of the service, including … expected and actual access speed and latency, and the suitability of the service for real-time applications," and "[p]ractices for resolving end-user and edge provider complaints and questions."[27]

As a threshold matter, the disclosures contemplated by the transparency rule (and the proposed information collection) are divorced from and unnecessary to preserving and promoting an open Internet, and they are hardly necessary to police compliance by mobile broadband providers with the Commission's no-blocking rule. In the absence of a nexus between mandated disclosures and the substantive requirements of the no-blocking rule, the Commission cannot demonstrate that its proposed information collection is consistent with the principles underlying the PRA and President Obama's recent Executive Orders, specifically that the benefits of regulatory requirements outweigh the corresponding costs and burdens. Indeed, the proposed information collection imposes significant burdens on mobile broadband providers

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25 *Id*. at Appendix A, Rule § 8.3.

26 *Id*. ¶ 56.

27 *Id*.

that extend beyond the mere collection of the data – burdens which necessitate the diversion of resources that otherwise could be devoted to broadband deployment and innovation.

In order to comply with the Commission's transparency rule, a mobile broadband provider must design and implement a protocol for the collection of the information subject to disclosure. For many of the suggested disclosures, it will be necessary for a mobile broadband provider to establish a process by which relevant information is identified, collected, reviewed, and ultimately disclosed.

At the outset, a mobile broadband provider must determine the specific information it is required to disclose. This process would require an assessment of the information currently available and an identification of the information that must be collected. Network, marketing, regulatory, and legal personnel would likely be involved in this process.

Once the mobile broadband provider settles on the information for disclosure, a process will have to be established to ensure that the information in question is collected at appropriate points in the provider's organization. For example, network personnel responsible for such matters as congestion management and network security will have to be trained to collect and report information regarding these practices and techniques. Similarly, product managers must be trained about the performance characteristics of a provider's broadband service that must be disclosed. And because the disclosure obligation is ongoing, a broadband provider may have to ensure that changes in the various matters subject to disclosure – such as congestion management techniques, network security practices, and performance characteristics – ultimately are disclosed as well.

Once the information that is subject to disclosure has been researched and collected, an initial draft of the proposed disclosure must be prepared. This draft will be have to be circulated,

reviewed, and finally approved by numerous parties within a company, including marketing, network, security, and legal groups. The draft disclosures will be revised and re-circulated for additional review and ultimate approval.

Once the required disclosures have been drafted and approved, they must be disseminated consistent with the requirements of the rule, as clarified by the *Advisory Guidance*, by which prospective customers must be directed "at the point of sale, orally and/or prominently in writing, to a web address at which the required disclosures are clearly posted and appropriately updated."[28] This effort also will involve a multitude of steps that will require input from marketing, legal, regulatory, network, and information technology ("IT") personnel.

First, providers may have to develop a website where the requisite disclosures are "clearly and readily accessible;" according to the *Advisory Guidance*, a link to the provider's general purpose home page would not suffice.[29] Thus, a mobile broadband provider must devote the resources to ensure that it either currently has or creates a website that meets applicable requirements.

Second, providers directing prospective customers orally to the special purpose website (which would occur when prospective customers call a provider's telephone and Internet sale centers) may have to develop training materials and conduct training sessions for their customer service personnel.[30] Depending upon the size of the broadband provider, training materials may be voluminous, and revising such materials may require considerable time and effort involving customer service and marketing personnel. Developing and conducting training sessions to

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28 *Advisory Guidance* at 4.

29 *Id*.

30 *Id*.

ensure that customer service representatives dealing with customers over the telephone direct those customers to the correct website site where the requisite disclosures can be found also would require the involvement of customer service and marketing personnel as well as potentially any third parties responsible for such training programs.

Third, providers directing prospective customers in writing to the special purpose website may need to modify their systems and written customer materials to include the website address.[31] This process would involve IT and marketing personnel.

Fourth, providers operating brick-and-mortar retail outlets that rely on a web page for point-of-sale disclosures are expected to: (i) arrange for "available equipment, such as a computer, tablet, or smartphone" to be placed in each retail outlet through which customers can access the disclosures; and (ii) develop training materials and conduct training sessions for in-store personnel regarding the use of such equipment.[32] Mobile broadband providers must make arrangements to acquire or place such equipment in all of their stores, which would involve customer service and marketing personnel. The same would be true for the training required for in-store personnel about the use of such equipment. As discussed below, each of these steps, involving a multitude of departments and employees, requires a significant and costly effort by the company.

B. The Commission Significantly Underestimated The Burden Of The Proposed Information Collection.

The Commission estimates that a mobile broadband provider could complete all of the tasks described above in 46 hours in the first year and an average of 32 hours over three years

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31 *Id*.

32 *Id*.

and that the total "external cost" to the entire industry would be $471,600.[33] These estimates simply are not realistic. In fact, based on input from its member companies, CTIA believes that it would take mobile broadband providers significantly more than 46 hours simply to determine the specific information that must be disclosed, not including the time it would take to establish a process to collect such information.[34]

That the Commission's burden estimates are not credible is underscored by comparing such estimates to the burdens the Commission estimated in connection with the information collection initially proposed in the *Open Internet NPRM*.[35] This comparison is set forth below:

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33 *July 2011 Supporting Statement* at 8-9, 11.

34 Notably, CTIA does not agree that the annual burden is likely to decrease dramatically after the first year. Because the disclosure obligations are ongoing and given the rapid changes in the mobile broadband industry, CTIA believes that subsequent disclosures will be as burdensome as the initial information collection.

35 "Part 8: Disclosure of Network Management Practices," Federal Communications Commission, New Collection Supporting Statement, filed with the Office of Management and Budget, at 2 (Nov. 2009) ("*2009 FCC Supporting Statement*").

Estimate	Nov. 2009 Supporting Statement	July 2011 Supporting Statement
Number of Respondents	1,674	1,477
Annual Hours (Per Respondent)	327	32
Annual Hours (Industry-wide)	546,840	47,264
"Annual Cost" (Per Respondent)	$2,800	$319
"Annual Cost" (Industry-wide)	$4,687,200	$471,600
"In-House Costs" (Per Respondent)	$19,533	$2,221
"In-House Costs" (Industry-wide)	$32,698,577	$3,280,919

In short, the Commission inexplicably *reduced* its estimates of the annual hours that it would take to comply with the proposed information collection by more than 300 hours and *reduced* its estimates of the annual industry-wide internal and external costs of compliance by more than $4 million and $29 million, respectively, at the same time that it *increased* the scope of the information collection.

Equally inexplicable are the changes the Commission made to its underlying assumptions regarding the time that would likely be expended by personnel involved in the proposed information collection, as the chart below vividly underscores.

Employee	Nov. 2009 Supporting Statement – Average Annual Hour Burden	July 2011 Supporting Statement – Average Annual Hour Burden
Engineer	227	12
Technical Writer	80	3
Staff Administrator	0	6
Web Administrator	0	3
Attorney	20	8
Total Hours	**327**	**32**

It is simply unreasonable to believe that a mobile broadband provider could identify, collect, review, and ultimately disclose the necessary information that must be disclosed in the time estimated for engineers, writers, administrators, and attorneys. It also is unreasonable to assume, as the Commission does, that a broadband provider could make the requisite disclosures without the involvement of customer service and marketing personnel whose input would be critical to the proposed information collection.

Importantly, the transparency requirements the Commission has adopted are significantly more burdensome than the transparency requirements it originally proposed, even though the Commission's burden estimates erroneously suggest otherwise. When the Commission initially proposed rules in 2009, the transparency requirements on which the Commission sought comment were limited to "network and congestion practices." Likewise, the Commission's

initial burden estimates assumed that "disclosures of network management practices will be done over the Internet" and would only be updated "quarterly."[36]

However, the transparency requirements the Commission eventually adopted require that broadband providers disclose "information regarding *the network management practices, performance, and commercial terms* of [their] broadband Internet access services …."[37] The Commission also identified 30 specific topics that disclosures should address, including security measures, pricing data, privacy policies, device attachment rules, specialized services, among others – none of which were mentioned in the *Open Internet NPRM* (or accounted for in the Commission's initial burden estimates). In addition, the Commission has mandated disclosures at the "point of sale" and imposed an ongoing obligation to update disclosures – requirements that were not mentioned in the *Open Internet NPRM* (or accounted for in the Commission's initial burden estimates).

Under the circumstances, one would reasonably expect that the burden estimates for the proposed information collection in the *Open Internet Order* (even as clarified by the *Advisory Guidance*) would be higher than the Commission's initial estimates in 2009. However, that is not the case. Instead, the Commission dramatically reduced its burden estimates, and those new estimates cannot be reconciled with the reality of the burdens associated with the proposed information collection.

C. Nothing in the *Advisory Guidance* Justifies the Commission's Burden Estimates of the Proposed Information Collection.

The Commission's initial burden estimates cannot be justified based on the *Advisory Guidance* issued by the FCC Enforcement Bureau and Office of General Counsel. The *Advisory*

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36 *2009 FCC Supporting Statement* at 2.

37 *Net Neutrality Order*, Appendix A, Rule § 8.3 (emphasis added).

Guidance correctly recognizes that the Commission's rule and the corresponding text of the *Open Internet Order* as written impose significant burdens on the industry. Further, the *Advisory Guidance* attempted to address industry concerns regarding certain components of the proposed information collection. To this end, broadband providers should be able to rely upon the staff-level guidance in their compliance efforts.

While helpful, however, the *Advisory Guidance* did not actually eliminate any disclosure obligations. And, even in those instances when the *Advisory Guidance* eased certain burdens of disclosure, these reduced burdens are not nearly significant enough to justify the dramatic reduction in the Commission's average burden estimates from 327 hours per broadband provider in 2009 to only 32 hours per broadband provider in 2011.

Take the security disclosures as an example. The *Advisory Guidance* clarifies that it is left up to the "sound judgment" of each broadband provider to decide "whether it is necessary and appropriate to disclose particular security measures."[38] In exercising this judgment, however, the broadband provider must: (i) identify each security measure employed in the network; (ii) determine whether each such measure is "likely to affect a consumer's ability to access the content, applications, services, and devices of his or her choice;" and (iii) decide whether disclosure of information regarding that security measure reasonably could be used to circumvent network security.[39] This could be a difficult and time-consuming task.

Furthermore, new security measures constantly are being adopted and new content, applications, services, and devices are introduced or modified all the time in the mobile ecosystem. Because the Commission requires that broadband providers provide relevant

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38 *Advisory Guidance* at 7.

39 *Id*. at 7-8.

disclosures on an ongoing basis,[40] these constant evolutions and changes could have additional significant impact.

The *Advisory Guidance* also clarifies the requirements regarding the obligation of mobile broadband providers to report actual broadband speeds and latency, allowing providers to disclose: (i) the results of their own or third-party testing; or (ii) Typical Speed Range ("TSR") representing the range of speeds and latency that can be expected by most of a provider's customers for each technology/service tier offered, along with required disclosures.[41] However, developing and reporting this data could be a difficult and time-consuming exercise, particularly for mobile broadband providers that have not done their own testing and lack access to third-party testing results. In addition, mobile broadband providers deploy new devices, offer new service tiers, and deploy network technologies often that could further increase the burden of compliance.[42]

It also is important for OMB to consider the legal effect of the *Advisory Guidance* for PRA purposes.[43] In particular, OMB must reconcile the staff-level guidance with the language

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40 *Net Neutrality Order* ¶ 56.

41 *Advisory Guidance* at 5.

42 Moreover, the Commission has demonstrated that it can obtain this information directly from third parties without burdening carriers. See http://www.fcc.gov/document/genachowski-unveils-measuring-broadband-america-report (rel. Aug. 2, 2011).

43 It is unclear why the Commission chose to have its staff issue guidance rather than release an order clarifying the scope of the transparency rule. *See*, *e.g.*, *In the Matter of DTV Consumer Education Initiative*, Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 08-199, MB Docket No. 07-148 (2008) (reconsidering, *sua sponte*, a decision regarding digital television transition consumer education and outreach requirements); *The Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17-7 GHz Frequency Band and at the 17.7-17.8 GHz Frequency Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting-Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band*, Order on Reconsideration, 22 FCC Rcd 17951 (2007)
Footnote continues on next page . . .

of the rule and corresponding text of the *Open Internet Order*, since different procedures apply depending upon whether the proposed collection of information is "contained in a proposed rule" or is "not contained in a proposed rule."[44] Furthermore, OMB should consider carefully the language in the *Advisory Guidance* that it offers only "initial" guidance based on information available "at this time" and intimates that such guidance is subject to change "in the future."[45] The Commission should not be permitted to rely upon the *Advisory Guidance* to demonstrate that its proposed information collection satisfies the PRA, only to subsequently impose new and more burdensome requirements under the guise of future "guidance." OMB should not permit the FCC, or any other agency, to evade meaningful PRA review of its collection requirements in this manner. To prevent the Commission from doing so, OMB should make clear that any future "guidance" would constitute a new information collection, thereby triggering PRA review.

III. THE "PRACTICAL UTILITY" OF THE PROPOSED INFORMATION COLLECTION IS SIGNIFICANTLY OUTWEIGHED BY THE ACTUAL BURDEN.

An information collection must have "practical utility" in order to pass muster under the PRA. To satisfy the "practical utility" requirement, an agency must have "the ability … to use information, particularly the capability to process such information in a timely and useful fashion."[46] OMB's rules clarify that "practical utility means the actual, not merely the

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(reconsidering, *sua sponte*, whether to provide space station operators additional flexibility for 17/24 GHz BSS space stations).

44 *Compare* 44 U.S.C. § 3507(c) (setting forth the OMB clearance process for a proposed collection of information not contained in a proposed rule), *with* 44 U.S.C. § 3507(d) (setting forth the OMB clearance process for a proposed collection of information contained in a proposed rule).

45 *Advisory Guidance* at 1, 3, 5.

46 44 U.S.C. § 3502(11).

theoretical or potential, usefulness of information."[47] Thus, an agency must have a "plan for the efficient and effective management and use of the information to be collected,"[48] not simply that the consumers and developers may benefit from the data

Here, the Commission has not indicated that it has an actual plan – let alone the resources – to use or review the information in a timely and effective fashion. In a previous context, OMB concluded that the Commission failed to "demonstrate[], given the minimal staff assigned to analyze and process this information, that the collection ha[d] been developed by an office that ha[d] planned and allocated resources for the efficient and effective management and use of the information collected."[49] This same deficiency underlies the information collection requirements in the *Open Internet Order* and, as detailed above, are not rectified by the clarification in the *Advisory Guidance*. The reported information will become stagnant quickly and the Commission has no plan and no resources to process the information. As noted above, the FCC is challenged by even simple data collections that take a year and a half or more to process and release.[50]

The Commission's attempt to justify the practical utility of its proposed information collection by claiming that its "transparency rule is primarily a requirement for the benefit of consumers and innovators" is unavailing.[51] The Commission seeks to justify the transparency rule as necessary for the agency "to collect information … to assess, report on, and enforce open

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47 5 C.F.R. § 1320.3(l).

48 5 C.F.R. § 1320.8(a)(7) (calling upon the agency to provide for a "plan for the efficient and effective management and use of the information to be collected.").

49 *Id*. (citing 44 U.S.C. § 3506(c)(3)(H)).

50 See n.12, *supra.*

51 *July 2011 Supporting Statement* at 5.

Internet rules."[52] The Commission cannot avail itself of this justification; if it is going to seek to justify the rule as necessary for the agency to perform its regulatory obligations, it must show that it has the staff and resources required to review the information being collected. Because it cannot make this showing, the Commission has failed to demonstrate the information collection has any practical utility.

Even as to "consumers and innovators," the proposed information collection has no practical utility. There is no evidence in the record or offered by the Commission that the most burdensome disclosures have any actual usefulness to consumers. Although the Commission claims the transparency rule is necessary to ensure that "consumers of broadband services can make informed choices regarding the purchase and use of the service," the Commission's own studies reflect that consumers are generally satisfied with their current broadband service,[53] and that accurate information about these services is being provided to consumers.[54]

Indeed, there is little reason to believe that disclosures regarding security measures and actual broadband speeds and latency factor into consumer purchasing decisions. And, by requiring that disclosures be geared to "technologically sophisticated Internet users," the *Advisory Guidance* effectively makes the disclosures unusable for the average broadband consumer.[55]

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52 *Id*. at 2.

53 *See, e.g.,* John Horrigan and Ellen Satterwhite, *Americans' Perspectives on Online Connection Speeds for Home and Mobile Devices*, 1 (FCC 2010), at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298516A1.doc (finding that 91% of home broadband users were *very satisfied* or *somewhat satisfied* with their home connection speed).

54 See n. 42, *supra.*

55 *Advisory Guidance* at 7.

IV. THE FCC DID NOT ADEQUATELY REDUCE THE BURDEN OF THE NEW REQUIREMENTS ON SMALL BUSINESS CONCERNS.

The Commission virtually ignored its mandate under the PRA to reduce the burdens of the new information collection requirements on small entities. The PRA requires that an agency certify to OMB that the proposed information collection reduces the paperwork burden to the extent practicable "with respect to small entities."[56] The PRA sets forth potential techniques to accomplish this goal, which include: (i) establishing different disclosure requirements for smaller entities; (ii) clarifying, consolidating, or simplifying compliance obligations of smaller entities; or (iii) exempting smaller entities from coverage of any parts of the information collection.[57] The PRA – as amended by the Small Business Paperwork Relief Act of 2002 – also directs agencies to make a special effort to "further reduce the information collection burden for small business concerns with fewer than 25 employees."[58] In this proceeding, it does not appear that any small business concerns were addressed.

Neither the *Open Internet Order* nor the *Advisory Guidance* adopts any of these PRA techniques, nor is there any indication that the Commission took into account the impact of its transparency rule on small businesses with fewer than 25 employees. Instead, the Commission simply concludes that "any burden on small businesses will be minimal" because the "the rule gives broadband Internet access service providers flexibility in how to implement the disclosure rule."[59]

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56 44 U.S.C. § 3506(c)(3)(C).

57 *Id*.

58 44 U.S.C. § 3506(c)(4).

59 *Open Internet Order* ¶ 166.

This argument is unpersuasive because the *Open Internet Order* provides the same "flexibility" to all broadband providers – large and small – to satisfy the disclosure requirements; no size distinction is made.[60] Furthermore, the "flexibility" afforded is of limited value because it will likely lead mobile broadband providers to disclose more information than would otherwise be required in an attempt to avoid enforcement actions, which can be brought by practically anyone under the Commission's rules.[61]

That all mobile broadband providers may have the option under the *Advisory Guidance* to disclose TSRs for each technology/service tier they offer does not lessen the burden on small providers.[62] Smaller providers still must develop TSRs, which can be challenging given the difficulties inherent in determining speed and latency for mobile broadband networks**.**

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60 *Id*. ¶ 56 ("We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models.").

61 The Commission also argues that small providers will be protected because "the rule gives providers adequate time to develop cost-effective methods of compliance." *Id*. ¶ 166. However, all broadband providers – large and small – are given the same time to come into compliance.

62 *Advisory Guidance* at 5-6.

V. CONCLUSION

For the foregoing reasons, OMB should disapprove the proposed information collection.

Respectfully submitted,

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