Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices	)	OMB Control No: 3060-xxxx

COMMENTS OF METROPCS COMMUNICATIONS, INC.

MetroPCS Communications, Inc. ("MetroPCS"),[1] by its attorneys, hereby respectfully submits these further comments on the information collection request and disclosure requirements related to the proposed transparency rules promulgated in the *Open Internet Order* (the "Transparency Rules") released by the Federal Communications Commission (the "FCC" or "Commission") on December 23, 2010.[2] These comments are submitted in response to the

[1] For purposes of these Comments, the term "MetroPCS" refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

[2] *Preserving the Open Internet and Broadband Industry Practices*, Report and Order, in GN Docket No. 09-191 and WC Docket No. 07-52 (rel. Dec. 23, 2010) (the "*Open Internet Order*"). *See also* 47 C.F.R. § 8.3 ("A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its 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.")

Second Federal Register Notice released July 7, 2011,[3] and supplement the comments filed by MetroPCS[4] in response to the *First Federal Register Notice*, released February 9, 2011.[5]

As a no long-term contract carrier, MetroPCS is a strong believer, and has a powerful economic incentive, to accurately describe its array of services to existing and prospective subscribers since its customers decide every thirty days whether or not to continue service. However, MetroPCS opposes Government mandates which either dictate how these disclosures are made or which drive up the costs of providing service. MetroPCS believes the Transparency Rules not only limit MetroPCS' flexibility to compete but also drive up its costs dramatically. And, while MetroPCS applauds the Commission's efforts to add further clarity regarding the Transparency Rules in the advisory guidance that it recently released ("*Advisory Guidance*").[6] MetroPCS continues to believe, even with the recent *Advisory Guidance*, that the Commission materially underestimates the burden of the collection requirements associated with the Transparency Rules and set forth in Section 8.3 of the Commission's rules. MetroPCS reiterates its view that the Office of Management and Budget ("OMB") should reject the Commission's estimate as insufficient and conclude that the Transparency Rules place too extreme a burden upon broadband Internet access providers in general, and upon smaller and mid tier wireless carriers in particular. The following is respectfully shown:

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[3] *See Information Collections Being Submitted for Review and Approval to the Office of Management and Budget*, 76 FR 39073, July 7, 2011 ("*Second Federal Register Notice*").

[4] *See* MetroPCS Comments in response to *First Federal Register Notice.*

[5] *See Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comment Requested*, 76 Fed. Reg. 7207 (Feb. 9, 2011) ("*First Federal Register Notice*").

[6] "FCC Enforcement Bureau and Office of General Counsel Issue Advisory Guidance for Compliance with Open Internet Transparency Rule," GN Docket No. 09-191, WC Docket No. 07-52, DA 11-1148 (rel. Jun. 30, 2011) ("*Advisory Guidance*").

I. BACKGROUND

The *Open Internet Order* adopted the Transparency Rules, which require broadband Internet providers to adopt transparency disclosures that are intended to allow consumers and third-parties additional information regarding the provider's broadband Internet access services. Paragraph 98 of the *Open Internet Order* made clear that these rules apply to mobile Internet broadband providers, and further obligates such providers to follow the guidance provided to licensees of the upper 700 MHz C Block spectrum regarding compliance with their disclosure obligations, particularly regarding disclosure to third-party application developers and device manufacturers of criteria and approval procedures for devices and applications to be used in conjunction with a mobile Internet broadband provider's services.[7] Because these transparency disclosures impose new information collection obligations on broadband Internet providers, the Commission must receive approval from OMB – in the form of a current valid OMB control number – under the Paperwork Reduction Act prior to allowing the regulations to take effect. In conjunction with obtaining such approval, the Commission must provide the OMB with an estimate of the amount of time necessary for a provider to comply with such regulations.

In the *First Federal Register Notice,* the Commission estimated that it would take on average 10.3 hours for carriers to comply with the Transparency Rules. Multiple carriers and other interested parties filed comments challenging the accuracy of this estimate.[8] Two events have transpired since then that are taken into consideration in these further comments. First, the Commission released on June 30, 2011 the *Advisory Guidance* in the form of a *Public Notice* designed to further explicate the Transparency Rules. In this *Advisory Guidance,* the Commission offered carriers guidance in five specific areas: (1) point-of-sale disclosures; (2)

[7] *Order* at ¶ 98.

[8] *See* Comments of MetroPCS and CTIA in response to *First Federal Register Notice*.

service description; (3) extent of required disclosures; (4) content, applications, service and device providers; and (5) security measures.[9] Second, the Commission revised its estimate of the time it would take to comply with the Transparency Rules in the *Second Federal Register Notice* upward from 10.3 hours to 32 hours. Once again, the *Second Federal Register Notice* and request for comments asks, among other things, about "the accuracy of the Commission's burden estimate" with respect to the proposed transparency disclosure requirements.[10]

Even though the Commission has issued the *Advisory Guidance* and increased its estimated annual response time for carriers from 10.3 to 32 hours, the Commission still has woefully underestimated the reporting burdens of the new disclosure and transparency requirements on mobile wireless broadband Internet access providers. This is particularly true for small, rural, and mid-tier mobile wireless carriers who already face significant multiple hurdles in providing broadband Internet access services. The larger national carriers may have staffs who can take on the additional reporting requirements caused by the Transparency Rules, and can spread the costs out over tens of millions of subscribers. However, small, rural, and mid-tier carriers, such as MetroPCS, do not have sufficient capacity in existing staffs to undertake these responsibilities.[11] These increased administrative burdens will distract carriers from focusing on deploying networks, serving customers, and providing new offerings at lower

[9] *Advisory Guidance* at 3-8.

[10] *See Second Federal Register Notice*.

[11] A fallacy surrounding these rules is that larger carriers may have to spend more time than smaller carriers in order to be in compliance. That is not true. These requirements will largely be the same for large and small carriers because the disclosure is driven off the number of networks and the number of rate plans. Since most carriers have a similar number of networks and a similar number of current rate plans, the amount of work required to comply with the actual disclosures would be the same for all carriers. However, the burden of being spread over a smaller number of customers will materially add to the cost to provide service. Thus, the Transparency Rules will have a disproportionately adverse impact on smaller carriers.

prices. These transparency and disclosure rules will damage competition in the mobile wireless market. And, the Commission's miscalculation is aggravated, not mitigated, by the *Advisory Guidance,* released June 30, 2011.

The Commission acknowledges providers' concerns that its disclosure rule will impose significant costs but "believe[s] that the costs of the disclosure rule…are outweighed by the benefits of empowering end users and edge providers to make informed choices and of facilitating the enforcement of the other open Internet rules."[12] This is not true, and does not represent the least intrusive means in which to ensure that customers are not deceived. Further, considering the FCC's extreme underestimation of the time commitment required by its new Rule 8.3, the OMB must review the Commission's cost-benefit analysis in light of the evidence presented – and reject the FCC's new reporting requirements.

II. THE OMB SHOULD DISAPPROVE THE PROCESS THE FCC HAS FOLLOWED

As is set forth in the sections below, the OMB should reject the proposed information collection on substantive grounds. The OMB also should disapprove of the manner in which the FCC has gone about seeking a control number for this particular collection. The source of the problem is the fact that the adopted Transparency Rules are broad and vague:

> A person engaged in the provision of broadband Internet access services shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its 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.[13]

The Commission stated in the *Open Internet Order* that "effective disclosure will *likely* include" information concerning "*some or all*" of the following topics: (1) network practices, including

[12] *Order* at ¶ 59.

[13] *Id*. at 17937, ¶ 54.

congestion management, application-specific behavior, device attachment rules, and security measures; (2) performance characteristics, including a general description of system performance and the effects of specialized services, if any, on available capacity; and (3) commercial terms, including pricing, privacy policies, and redress options.[14] However, rather than providing an exhaustive list of topics that should be included in disclosure, the Commission concluded that "the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance concerning effective disclosure models."[15] "Broadband providers should examine their network management practices and current disclosures to determine what additional information, if any, should be disclosed to comply with the rule."[16]

The Commission also indicated that it "may require adherence to a particular set of best practices *in the future*,"[17] and suggested that it might address this issue further in the ongoing *Consumer Information and Disclosure* proceeding.[18] The Commission also noted that it had launched a broadband performance measurement project designed to measure some of the actual speed and performance characteristics of broadband service, which "will inform Commission efforts regarding disclosure."[19]

Not surprisingly, the scope and indefiniteness of these transparency requirements were a source of broad concern throughout the industry, which gave rise to the uniformly negative

[14] *Id.* at 17938-39, ¶ 56 (emphasis added).

[15] *Id.*

[16] *Id.* (emphasis added).

[17] *Id.* at 17940, ¶ 58 (emphasis added).

[18] *Id.* at ¶ 58 n. 188; *Consumer Information and Disclosure*, Notice of Inquiry, 24 FCC Rcd. 11380 (2009).

[19] 25 FCC Rcd. at 17940, para. 58 n. 188; *see also Comment sought on Residential Fixed Broadband Services Testing and Measurement Solution, Pleading Cycle Established,* Public Notice, 25 FCC Rcd. 3836 (2010); *Comment Sought on Measurement of Mobile Broadband Network Performance and Coverage,* Public Notice, 25 FCC Rcd. 7069 (2010).

responses to the FCC's original estimate that carriers could comply with these mandates in 10.3 hours on average. Indeed, the Commission specifically acknowledged that its *Advisory Guidance* was intended to address the fact that "broadband providers and broadband provider industry associations expressed concerns . . . [that] . . . the transparency rule could be interpreted to require burdensome disclosures."

The problem is that the *Advisory Guidance* did not adequately address the expressed concerns, and in fact serves to exacerbate the concerns in major respects. For example, it appears in certain instances that the Commission is seeking to mitigate the burden of the adopted rule by relieving carriers of certain obligations, *but only temporarily*. Specifically, the *Open Internet Order* expressly states that its list of potential disclosure topics "is not necessarily exhaustive" which gave rise to serious concerns by broadband providers that they "could be liable for failing to disclose additional types of information that they may not be aware are subject to disclosure."[20] In an unsuccessful effort to address this concern, the *Advisory Guidance* indicated that "disclosure of information specifically identified in paragraphs 56 and 98 of the *Open Internet Order* will suffice for compliance with the transparency rule *at this time*."[21] Leaving aside the obvious question of whether the Chief of the Enforcement Bureau has the authority to alter an order of the full Commission in this fashion, the qualification that the relief is only temporary and applicable "at this time" makes it impossible for carriers or the OMB to accurately assess the real world burden of the collection requirement.[22]

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[20] *Advisory Guidance* at ¶ 3.

[21] *Id*. (emphasis added).

[22] There are serious questions concerning whether the *Advisory Guidance* can be considered binding by OMB in determining the amount of burden the proposed collection requirements will impose on carriers. The *Advisory Guidance* was adopted without notice and an opportunity to comment – thus it did not follow the procedures of the Administrative Practices Act. Further, to the extent the *Advisory Guidance* purports to modify the requirements of the Transparency

Similarly, there are other aspects of the collection requirement that are in flux and make it impossible for the OMB to make the necessary finding that they are properly articulated and not unduly burdensome. For example, the Commission has launched, but not yet completed, a fixed broadband performance measurement project that the Commission ultimately expects will be used by broadband providers to measure and disclose the performance of their services.[23] Similarly, the agency is in the process of obtaining data regarding mobile broadband performance measurement techniques that the Commission expects will be used by mobile broadband users to disclose actual performance. By proceeding in this manner, the Commission has put the cart before the horse by adopting broad Transparency Rules, and asking the OMB to approve the related information collection requirements, while continuing to reserve judgment on the nature and extent of the required information which is, of course, essential to meaningfully assess the practical utility of the requested information and the extent of the burden.

III. THE PROPOSED COLLECTION, AS APPLIED TO CARRIERS THAT DO NOT REQUIRE LONG TERM CONTRACTS, IS NOT NECESSARY

The *Second Federal Register Notice* invites commenters, *inter alia*, to indicate "[w]hether the proposed collection of information is necessary for the proper performance of the functions of the Commission."[24] In this case, the Commission's Transparency Rules are intended to inform consumers of, and protect them from, harmful practices. The reality is that wireless customers of carriers, such as MetroPCS, that do not require subscribers to sign long-term contracts do not need government mandated transparency requirements, and the burdens

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Rules, it is not clear that it was done in a way that satisfies the requirements of reasoned decisionmaking, the Commission's waiver standard, or the rules governing delegation of authority. Finally, to the extent that the *Advisory Guidance* is viewed as a modification of the *Order* – it was not done with the Commission's approval.

[23] *See Advisory Guidance* at ¶ 2.

[24] *See Second Federal Register Notice* at 39873.

imposed are outweighed by the benefits to be received, and do not represent the least intrusive way to ensure that customers are not deceived. Every month, MetroPCS customers make a decision whether to renew their service by paying for another month of services, or, to move to another carrier without paying any termination penalty. The effect of this is twofold. First, it creates powerful incentives for MetroPCS to make complete, accurate, understandable and well-tailored disclosures regarding issues of importance to the consumer to avoid customer dissatisfaction that will result in customer churn.[25] Second, it provides the customer with a near-term remedy if, in the customer's view, the wireless broadband disclosures were not considered to be adequate. As a consequence, the OMB should determine that the Transparency Rules are overbroad and unnecessary to the extent that they apply to carriers that do not obligate customers to sign long term contracts, because any burdens are clearly outweighed by any additional benefits a customer may enjoy as a result.

This is important because the Paperwork Reduction Act (the "PRA") is designed to minimize the burden of the collection of information on the respondents and to reduce the information collection burden on small businesses. Notably, many "month-to-month contract carriers" are non-nationwide carriers that do not have the resources of the larger carriers to devote to complying with the Transparency Rules. So, disapproving the FCC rule, at least insofar as it applies to month-to-month carriers like MetroPCS, is entirely consistent with the objectives of the PRA.

[25] A recent study shows that, although consumes may not know the exact speeds of their data services, they are generally happy with their services and the speeds are adequate for their use. This calls into question whether mandated disclosures regarding speed and other matters are even required in the public interest. In the case of pay-in-advance carriers, the market (through customer churn) provides the optimal determination of what is required to be disclosed rather than regulatory strictures.

IV. THE COMMISSION'S ESTIMATE WOEFULLY UNDERESTIMATES THE ACTUAL BURDEN ON MOBILE WIRELESS BROADBAND INTERNET ACCESS PROVIDERS

The Commission's initial estimate of the time it would take each Internet access provider to satisfy the disclosure requirements of the Transparency Rules was an average of 10.3 hours annually.[26] After receiving comments from numerous parties challenging the Commission's estimate as woefully underestimating the burden that would be placed on broadband Internet providers, and after releasing the *Advisory Guidance*, the Commission revised its estimate to an average of 32 hours annually for carriers.[27] This estimate still wildly underestimates the actual burden imposed on broadband Internet providers to comply with the disclosure requirements. In fact, the actual time in person-hours to comply with the Commission's proposed Transparency Rules, including the consistent updating of disclosures needed, will be exponentially higher. This, combined with the additional burden of complying with the Commission's net neutrality rules and fielding network-related questions and complaints, adds even more burden to carriers that are already fighting to compete with the ever-increasing dominance of the largest carriers. Finally, the burden may be higher if the Commission later decides to cease forbearing from the requirements it has said in the *Advisory Guidance* would not currently be enforced.

The Commission's rules remain extremely vague. Despite the *Advisory Guidance*, the Commission has still failed to place an accurate estimate on the time and effort that providers will need to expend to comply with the new rules. In addition, the extent and breadth of the necessary disclosures are still ill-defined, so carriers will need to go above and beyond to try to meet the Commission's nebulous standards. This will require extensive resources and vast efforts.

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[26] *See First Federal Register Notice*.

[27] *See Second Federal Register Notice.*

Taking the above into account, companies like MetroPCS that provide wireless broadband Internet access will have to consider taking a whole host of actions in order to comply with the proposed Transparency Rules. For instance, MetroPCS may need to conduct a bottom-up review and analysis of its network management policy, including how it will deal with congestion, applications, and device attachments. This could involve revising the company-wide strategy, including consultation with the engineering and marketing teams, coordination of the products team with third-party vendors, and advice and counsel from the legal staff. This could also include the formulation of new policies with respect to the attachment of devices and use of applications on the company's network – entirely new requirements that the Commission is now seeking to impose upon mobile wireless broadband Internet access providers. Such processes will be extremely time consuming and labor intensive, as well as involve extensive coordination and numerous layers of review between many levels of the organization.[28] Unfortunately, the driving force will not be to meet customer demands, but rather to meet regulatory mandates.

MetroPCS also will need to deploy and implement any changes in policy into various disclosures that would be made available to the public at the point-of-sale and by third-parties, including efforts to update marketing practices and collateral, adjustments to MetroPCS' website, all with advice from legal counsel. While the Commission did provide guidance regarding this point-of-sale requirement in the *Advisory Guidance*, MetroPCS will still be forced

[28] The rules still are ambiguous as to what level of disclosure is required. For example, MetroPCS offers a broadband access service that allows those customers who do not want streaming audio and video services and multimedia file downloads to forego such services and play a lower price. It is unclear what disclosures are necessary for services customers are or may be opting out of. It is also unclear whether MetroPCS can use "plain English" to disclose services in a manner customers can understand - for instance, as multimedia streaming – which customers can understand – or must use technical terms such as RTSP protocol services -- which customers do not understand. Unfortunately, the Commission's rules are unclear which audience the disclosure is meant to reach and there is serious ambiguity as to what disclosures are actually required.

to train marketing employees, network employees, network operators and retail store staff to become familiar with MetroPCS' policies on these matters. And, the fact that MetroPCS can meet these point-of-sale disclosure requirements via web access is of little comfort because, as MetroPCS indicated in an *ex parte* filing prior to the release of the *Advisory Guidance*, MetroPCS does not generally have compute terminals available for consumer use in many of its retail outlets.[29]

Finally, all of the above requires supervision, management, and directions from the highest levels of the company. And, the aforementioned efforts only account for the initial actions necessary to come into compliance once the *Order* becomes effective. Because the technologies involved in operating networks and the devices used to connect to broadband Internet access services are constantly evolving, providers will have to continuously review and revise their policies throughout the year as they add new devices and services to their offerings. Each one of these groups has some impact on the company's ability to comply with the rules. As the company experiences turnover in staff (which can be quite high in the call centers of retail staff), additional training will be required. Further, recurring training will also be required to make sure staff remember and follow the latest requirements and are able to provide the proper disclosures.[30] Thus, the above process will need to be repeated multiple times throughout any given year. Having considered all of these elements, MetroPCS believes that the Commission's revised estimate remains considerably inaccurate, and that the Commission's new rules still may

[29] *See* MetroPCS *Ex Parte* in GN Docket No. 09-191, filed June 14, 2011. While the *Advisory Guidance* states that companies can set up smartphones or tablets to reach such disclosures, this just further demonstrates the Commission's dedication to form, rather than substance.

[30] Further, even though MetroPCS does not operate its own call centers, it would be responsible for training its contractor call centers.

result in thousands of hours annually, even after initial compliance, and despite the *Advisory Guidance*.

V. THE INITIAL COMPONENT OF COMPLIANCE AND DISCLOSURES, CONSISTING OF POLICY DEVELOPMENT, DEPLOYMENT, AND MANAGEMENT, WILL REQUIRE SIGNIFICANT RESOURCES FROM WIRELESS INTERNET BROADBAND PROVIDERS

In order to establish an initial framework for compliance with the Commission's Transparency Rules, MetroPCS and other mobile broadband Internet access providers must develop and deploy new policies that correspond with the Commission's new rules. Even with the Commission's guidance that the required transparency disclosures will be the ones specifically identified in paragraphs 56 and 98 of the *Order*, such disclosures will involve vast company resources.[31] This will necessitate the involvement of high-level executives to develop the company's strategy, along with interaction between engineers, products specialists, marketing teams, legal counsel, web site designers, compliance personnel, and training teams.

A. Policy Development Will Take Place Across the Enterprise

First, multiple layers of review will be essential in the development of an overall policy related to network congestion, the use of third-party applications and devices, and the rules to be applied in order for third-parties to use such applications and devices on the MetroPCS network. The company's management will have to determine policy with regard to each of the

[31] Paragraph 56 of the *Order* details the disclosures required to be provided by broadband Internet providers, and include specific references to (1) network practices, including congestion management, application-specific behavior, device attachment rules and security; (2) performance characteristics, including service description and the impact of specialized services and (3) commercial terms, including pricing, privacy policies and redress options. Paragraph 98 of the *Order* applies these rules to mobile Internet broadband providers, and notes that such providers should follow the guidance provided to licensees of the upper 700 MHz C Block spectrum regarding compliance with their disclosure obligations, particularly regarding disclosure the third-party application developers and device manufacturers of criteria and approval procedures. *Order* at ¶¶ 56 and 98.

Commission's proposed Transparency Rules. Indeed, management must spend hours deciding, directing, and supervising these initiatives for compliance in order to implement the initial components for compliance. Network engineers must be consulted to ensure the technical details are accurately described in the language to be used in any disclosure. And, the Commission suggests the inclusion of a number of network management elements that would require extensive involvement by network operators and engineers. For example, the Commission suggests that providers detail all the types of traffic affected by management policies, the criteria for evaluating triggers, and the effect on end users' experiences.[32] However, the Commission neglects to mention that these decisions involve complicated issues and cannot be thoroughly dealt with in a brief exercise, as the Commission's time estimate seems to indicate. Additionally, engineers and network operators will be required to evaluate and describe "service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications."[33] Access speeds will vary greatly depending on network congestion, time, location, distances from cell sites, terrain, obstructions, atmosphere conditions, and backhaul availability, elements which cannot be easily described in a few sentences, and there are countless real-time application types for which the engineers and operators would need a great deal of time to consider and address.

And, while MetroPCS is pleased that the Commission has recognized the need to "exclude from the rule competitively sensitive information, information that would compromise network security, and information that would undermine the efficacy of reasonable network management practices,"[34] the Commission must also acknowledge this adds yet another vague

[32] *Order* at ¶ 56.

[33] *Id.*

[34] *Id.* at ¶ 59.

layer of complexity to the task confronting network operators, engineers and the providers' management. These actors will need considerable time to carefully comb through and parse their disclosures, especially those aimed at third-parties, to ensure that they are not disclosing any proprietary business information, confidential information, or information that could be used by those wishing to do harm to or through the provider's network.

In the *Advisory Guidance*, the Commission specifically stated that its guidance "in no way alters the obligation of mobile broadband providers to disclose their certification and approval processes for their devices and applications, if any."[35] Thus, providers remain obligated to should address "any restrictions on the types of devices and any approval procedures for devices to connect to the network."[36] Not only will this entail the consultation of engineers, but product specialists as well. And, because the *Order* suggests that providers will likely need to describe the specifics of pricing,[37] the marketing department will also need to review the policy language in any disclosure. The inclusion of details concerning privacy and "resolving end-user and edge provider complaints and questions"[38] will certainly necessitate extensive review by legal counsel. Legal counsel also will need to be involved in approving the language added to the website, reviewing all associated terms and conditions, and disclosures to third-parties wanting access to the MetroPCS network.

Notably, these third-party disclosures are not legally mandated today and would not otherwise be undertaken by the company. Accordingly, these third-party requirements do not get the benefit of merely being revised elements of existing procedures, but rather involve

[35] *Advisory Guidance* at 7.

[36] *Order* at ¶ 56.

[37] *Id*.

[38] *Id*.

completely new procedures and disclosures that the carriers today are not required to undertake and for which the burden outweighs any real benefit.

B. Deployment of Policies, Once Developed, Will Require Enormous Resources

Second, providers must deploy their new policies. Such deployment will necessitate the involvement of many sectors of the company, and will require vast resources throughout not only the company, but through the thousands of potential outlets where consumers will be able to obtain wireless service and may have questions about a provider's transparency disclosures with respect to a provider's broadband Internet access service.

For instance, the marketing department must integrate the policy into their marketing materials, including point-of-sale materials, and revise their marketing practices. More time will be required to redesign the provider's website in order to emphasize the new network management terms in a manner such that "[c]urrent end users [will] be able to easily identify which disclosures apply to their service offering."[39] The *Advisory Guidance* goes so far as to dictate that the transparency disclosures on the website must be "clearly and readibly accessible" so that they are easy to find, whatever that means. In conjunction with the disclosure requirements, the Commission advises mobile broadband providers to "follow the guidance the Commission provided to licensees of the upper 700MHz C Block spectrum regarding compliance with their disclosure obligations, particularly regarding disclosure to third-party application developers and device manufacturers of criteria and approval procedures (to the extent applicable)."[40] Even based on that advice, the OMB should realize that the Commission's

[39] *Id.* at ¶ 57.

[40] *Id.* at ¶ 98.

estimate is woefully low. Verizon's "Open Development" website is proof of this.[41] Verizon's website, created following its purchase of the 700 MHz C Block, details the specifications needed to attach devices on its network looks to have taken a significant amount of time and effort. The development of a website comparable to that of Verizon -- as complex, detailed, and thorough as it is -- would alone clearly take far more time than the Commission has designated for the entirety of providers' disclosure obligations. Of course, legal counsel would again need to spend extensive time advising each of these departments at every step of the process regarding deployment, including evaluating adjustments made to the marketing materials and language on the website, reviewing the materials, and finally assuring that no intellectual property of third-parties is infringed.

In addition, equating the new requirements with those imposed on 700 MHz C Block licensees suggests that the Commission's rules reach much further than originally contemplated in the *Order*. The 700 MHz C Block disclosure requirements include the requirement that a licensee allow attachment of any wireless device – something other mobile Internet access providers are not required to do. The *Advisory Guidance* reiterated the requirement that carriers should be guided by the disclosures applicable to the 700 MHz C Block licensees, thus adding to the confusion.[42]

Further, despite the Commission's new guidance on this issue, it will be extremely time consuming for broadband Internet service providers to train and retrain retailers, customer service representatives and call center employees to effectively inform customers of the new policy and answer customers' related questions, as the *Order requires* that provider's "must

[41] Open Development, Verizon Wireless, https://www22.verizon.com/opendev/index.aspx (last visited August 1, 2011).

[42] *Advisory Guidance* at n. 36.

disclose relevant information at the point of sale."[43] The *Advisory Guidance* does state the following with regards to point-of-sale disclosures:

> the *Order* does not compel the distribution of disclosure materials in hard copy or extensive training of sales employees to provide the disclosures themselves [and that] providers can comply with the point-of-sale requirement by, for instance, directing prospective customers 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.[44]

However, this represents an incredibly naïve view of the way companies operate. A provider would not be able to merely point consumers to a web-site address and not allow for questions to be answered about the information provided – thus, the training of employees and call centers would still undoubtedly be necessary, even if not explicitly required by the Commission's rule. Indeed, today mobile carriers undertake this training with respect to advertised products and services so it is inconceivable they would not move to do so if they had additional disclosures. In addition, the *Advisory Guidance states* that "[a]t brick-and-mortar retail outlets (*i.e.*, not telephone or Internet sales centers), broadband providers that rely on a web page for point-of-sale disclosure should make available equipment, such as a computer, tablet, or smartphone, through which customers can access the disclosures."[45]

Even with the revised guidance, the Commission clearly could not have taken into account any type of setup and training with regard to disclosures at the point-of-sale in its 32 hour estimate. For example, MetroPCS currently has 159 corporate-owned stores, each employing approximately five people. Corporate staff must develop a training program for these store employees to be able to answer customer inquiries about the point-of-sale disclosures.

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[43] *Order*. at ¶ 57.

[44] *Advisory Guidance* at 4.

[45] *Id.* at 4.

Then, staff must travel to each market to train those market employees to effectively convey to customers the details of MetroPCS' new terms and conditions, device capabilities, and network management practices. Even if training in each store lasts only five hours per store (a conservative estimate), that part of the Commission's disclosure requirement alone would increase the time commitment and burden on broadband Internet service providers by nearly 800 hours. Indeed, even setting up equipment to be specifically pointed to a web-site containing the necessary disclosures at MetroPCS' corporate-owned stores (which the Commission specifically references as being required in the *Advisory Guidance*) would take significantly more time than the 32 hours allotted by the Commission for providers to comply with the new rules in their entirety.

What's more, MetroPCS products are sold by more than 5,000 third-party retailers, each having multiple employees. The *Order* does not distinguish between the point of sale at a corporate-owned store and the point of sale at a third-party retailer's location. Thus, MetroPCS will need time to prepare a disclosure method for every one of these vendors, directly communicate with them to ensure they understand the terms and conditions, device capabilities, and network management practices of MetroPCS' broadband service that must be conveyed to customers at the point of sale, and ensure the continued availability of such materials. The time commitment will be staggering, and could extend into thousands of hours.

Further, the third-party call centers which handle MetroPCS' customer service calls run into the thousands. Again, companies would not be able to just leave consumers hanging if they have questions about the transparency disclosures, so employees must be trained to respond to consumer inquiries. Each one of these customer service representatives will need to be trained initially and then recurrently trained when changes to the relevant policies occur. Since many of

these employees may also be part-time and these call centers are staffed for twenty four hours seven days a week in two languages, the annual burden can easily run into the thousands of hours. Further, since turnover at call centers is traditionally robust (such as 5-10% per month), the new training required to just train turnover in employees would be substantial. Since third-parties (not customers) may also call customer service, such staff may also need to be trained on the third-party disclosures as well.

While the larger national carriers may be able to make slight adjustments to their armies of staff on hand to handle this large new task load, small, rural and mid-tier carriers will struggle to cope with this new burden while still being able to keep cost profiles down. The end result will be these non-national carriers losing opportunities to place their resources in the most needed places, namely network deployment and low-cost offerings. Though the Commission professes to work only for the best interest of competition and consumer welfare, it will wind up only bolstering the position of the larger national carriers.

VI. THE ON-GOING MAINTENANCE COMPONENT OF COMPLIANCE WILL REQUIRE A STAGGERING AMOUNT OF TIME AND PLACE A SIGNIFICANT BURDEN ON BROADBAND INTERNET PROVIDERS

Because the broadband Internet service market is continuously evolving as new technologies are developed and new devices and tools to utilize networks are made available, any network management policy adopted by a broadband provider will need to be updated on a continuous basis throughout the year. As new threats to broadband networks arise and new devices and network technologies advance, network engineers and operators must change their tactics in managing traffic. In addition, in order to react to the competitive marketplace, MetroPCS consistently changes and updates its service offerings. Under the Commission's proposed transparency rules, all such changes would need to be reflected and disclosed to the

public and to potential third-party users of MetroPCS' network, and thus force broadband Internet providers to engage in the above-described process numerous times each year.

For instance, simple adjustments to the policy following these reevaluations of network management practices made on a normal basis will require a significant amount of time each month. What's more, when providers roll out new products and offerings, additional time will be needed to update the disclosure statements. The provider must again go through the same layers of review detailed above. Management-level decision-makers, engineers, products specialists, marketing teams, website designers, legal counsel, and policy training personnel must be consulted each time a change is made to the policy. If any of these layers is skipped during the update process, then the carrier will risk inaccuracies in its policy, and incomplete or incorrect information will be disseminated to its customers. Further, all sales, customer service and call center staff will also need to be retrained as well.

Assuming that a carrier adds new products and services at least six times per year (which is a conservative estimate considering the constant changes in the wireless marketplace), the addition of new products and services would add substantial time annually to the time commitment necessary for compliance with the Commission's information collection request. And this on-going maintenance of the requisite network management policy would begin immediately upon completion of the initial policy implementation detailed in Section III. Clearly, the Commission has failed to account for all of the work necessary to maintain up-to-date transparency disclosures and has not even attempted to address the associated costs, even though such costs will be substantial and take away from MetroPCS' goal of broadened 4G broadband deployment.

VII. CONCLUSION

Compliance with the new Section 8.3 of the Commission's rules will represent a large cost and significant resource burden on MetroPCS and other broadband providers. No effort to comply with the Commission's proposed transparency disclosure requirements in the *Order* could take merely 32 hours, as estimated by the Commission. Indeed, in order to fully comply with the Commission's proposed disclosure requirements, a broadband Internet service provider may have to spend thousands, or maybe even tens of thousands, of hours. Compliance will require the involvement of multiple layers of review simply for initial development and deployment, including engineers, products specialists, marketing teams, website designers, policy training personnel, management, and legal counsel. Additionally, even after the initial development and deployment of the policy for disclosure to customers and to the Commission, broadband providers must spend time revising their policies on a continuing basis, due to the normal evolution of network management practices, and for each new product or service offering. For each of these updates, those multiple layers of review will need to be revisited. Accordingly, MetroPCS believes that OMB should reject the Commission's estimate for the amount of time necessary to comply with the transparency disclosure rules as woefully inadequate, and force the Commission to prepare an accurate assessment of the amount of time necessary for such disclosures.

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