Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Protecting and Promoting the Open Internet	)	GN Docket No. 14-28
Notice of Information Collection Being Reviewed by the Federal Communications Commission	)	OMB Control No. 3060-1158

COMMENTS OF MOBILE FUTURE

I. Introduction

Mobile Future submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") request for comments, pursuant to the Paperwork Reduction Act of 1995 ("PRA")[1], regarding the utility and estimated burden on broadband Internet access service ("BIAS") providers to comply with the *Open Internet Order's* enhanced transparency requirements.[2] Due to the general vagueness and overall lack of guidance given to providers, combined with potentially massive penalties companies face for failure to comply with the rules, companies will undoubtedly err on the side of disclosing massive amounts information, taking considerable time and resources. It will also not provide any additional benefits to consumers, who will be overwhelmed with information they may not understand. The result will lead to less informed consumers and broadband companies facing substantially higher compliance costs than the estimates suggested by the Commission. This is particularly troublesome for mobile broadband service providers, given the dynamic nature of their networks.

[1] 44 U.S.C. §§ 3501-3520.

[2] *Information Collection Being Reviewed by the Federal Communications Commission*, 80 Fed. Reg. 29000 (May 20, 2015).

The gross underestimation of the impact on providers is a reflection of the Commission's apparent belief that any rules adopted for the purported benefit of consumers is justified, regardless of the cost imposed on carriers and regardless of whether any cost-benefit analysis has been undertaken.

President Obama directed executive agencies in Executive Order 13563 to "propose or adopt a regulation only upon a reasoned determination that its benefits justify its cost" and stated that agencies must "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible."[3] The President also called upon independent agencies like the FCC to follow the same principles, which then Chairman Genachowski publicly endorsed.[4] The additional disclosures required by the Commission's rules have made broad enhancements on a number of topics, but provide carriers with little insight as to how they can ensure compliance. As a result, the costs of compliance on providers will be substantial, particularly for larger wireless providers who, in a highly competitive wireless marketplace, are more inclined to experiment with different types of consumer-friendly service offerings and will regularly need to consider whether and how to update disclosures. For example, requiring disclosures to be geographically specific is extremely difficult in the mobile context and will be burdensome on providers with broad service areas.

While a focus on consumer disclosures may be the Commission's goal, the end result is vastly different. The time burdens and costs of compliance will far surpass the estimates provided in the PRA submission, and these costs will not benefit consumers who will largely be unable to utilize the information required for disclosure. While large amounts of information

[3] Executive Order 13563, 76 Fed. Reg. 3821 (Jan. 21, 2011).

[4] FCC News Release, *Statement From FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies* (July 11, 2011).

might be seen as a positive, many experts agree, "disclosure is powerful, but that does not mean that more disclosure is always better than less. … Information overload, therefore, presents an ironic twist for a mandatory disclosure regime. At some point, more disclosure can result in worse decisions."[5] Because of these reasons, the enhanced transparency requirements should not be approved.

II. The Burden Estimates Significantly Underestimate the Time and Cost Necessary for Compliance

A. The PRA burden estimates are wildly low and unsupported.

The PRA submission provides no details as to how it arrived at the total estimated costs and hours required for compliance with the rules, making it difficult to assess. Under the PRA, in order for the Office of Management and Budget ("OMB") to approve, and therefore make effective, the new enhanced transparency requirements, the Commission must demonstrate that the new rules minimize the burdens placed on BIAS providers and that any burdens are justified by the benefits of the rule. The Commission grossly underestimates the compliance burden and fails to explain how the burden is overcome by specific consumer benefits of each of the enhanced transparency requirements.

Based on the information provided in the Commission's PRA estimate, the average cost of compliance per entity subject to the enhanced transparency disclosures is $200.75. When taking into account the detailed information required to be disclosed and updated on a regular basis for any "material" changes[6], this figure is shockingly low. The Commission estimates that

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[5] Troy Paredes, *Information Overload and Mandatory Securities Regulation Disclosure*, REG BLOG, June 16, 2015 at http://www.regblog.org/2015/06/16/paredes-mandatory-securities-disclosure. *See also* Omri Ben-Shahar, and Carl Schneider, *The Failed Reign of Mandated Disclosure*, REG BLOG, June 15, 2015 at http://www.regblog.org/2015/06/15/ben-shahar-schneider-failed-disclosure (finding that it is often recognized that mandated disclosure fails because of the "overload problem").

[6] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5671 ¶ 161 (2015) ("*Open Internet Order*") (citation omitted). "[W]henever

3,188 responses will be due annually from 3,188 respondents. This suggests a one-time annual effort which is highly unrealistic for most companies that will be required to constantly monitor whether any new business practices represent a material change that requires an update to consumer disclosures.[7] The Commission believes that most broadband providers already disclose most of the required information in some manner, and that the incremental enhancements of the 2015 transparency rule will not be a significant extra burden. The Commission estimates that the average number of hours to comply with the enhanced transparency rule will be 28.9 hours per entity, for a total industry-wide annual burden of 92,133 hours (28.9 hours x 3,188 responses = 92,133 total hours). At a predicted total annual compliance cost of $640,000, the average cost of compliance per entity would be $200.75 ($640,000 / 3,188 responses = $200.75). However, the numerous hours company employees, along with outside counsel and consultants, will spend (and have already spent) on compliance will at best more closely resemble – but still likely underestimate – a per-*entity*, rather than industry-wide, compliance cost of $640,000.

B. The PRA burden estimate does not take into account the particularly high cost of compliance for wireless carriers.

The burden estimates are particularly absurd given the many and detailed transparency requirements uniquely imposed on wireless carriers without any meaningful discussion of their

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there is a material change in a provider's disclosure of commercial terms, network practices, or performance characteristics, the provider has a duty to update the disclosure in a manner that is 'timely and prominently disclosed in plain language accessible to current and prospective end users and edge providers, the Commission, and third parties who wish to monitor network management practices for potential violations of open Internet principles.' For these purposes, a 'material' change is any change that a reasonable consumer or edge provider would consider important to their decisions on their choice of provider, service, or application."

[7] Not only does the requirement to update disclosures for material changes suggest that more than one annual disclosure will be necessary, it also has a potentially chilling effect on innovative new service offerings as companies will think twice about whether a potential violation of open Internet disclosure requirements is worth the risk.

relative costs and benefits. In addition to enhancements to disclosure requirements concerning the terms of prices, other fees and data caps and allowances, wireless providers are also subject to detailed and onerous disclosure requirements concerning network performance. For example, carriers must disclose, at a minimum, the following network "performance characteristics" and "network practices" to comply with the transparency requirements:

- Packet loss;
- Actual network performance data that is "reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing the service";
- Network performance that is "measured in terms of average performance" over a "reasonable period of time and during peak usage";
- Wireless carriers must provide separate disclosures on the network performance for each technology it offers (*e.g.*, 3G and 4G), which can rely on their own or third party testing data to provide actual data on the performance of their networks;
- Disclosure of the impact on non-BIAS data services (specialized services) by identifying "whether the service relies on particular network practices and whether similar functionality is available to applications and services offered over [BIAS]"; and
- Disclosures of user-based or application-based practices which should include the "purpose of the practice, which users or data plans may be affected, the triggers that activate the use of the practice, the types of traffic that are subject to the practice, and the practice's likely effects on end users' experiences."[8]

Describing the benefits of permitting measurement methodologies to evolve and improve over time with further guidance from Bureaus and Offices, the Commission declines to codify specific methodologies for measuring the actual performance. The Commission also does not provide a specific means of effectuating the required disclosure, but does clarify that BIAS providers are required to establish "a mechanism for directly notifying end users if their individual use of a network will trigger a network practice, based on their demand prior to a

[8] *Open Internet Order*, 30 FCC Rcd at 5673-5677 ¶¶ 166-69.

period of congestion, that is likely to have a significant impact on the end user's use of the service."[9]

Far from being "clear and bright light" and given the inherent ambiguity and vagueness of the new rules, it is difficult to see how wireless carriers will be able to reasonably know in advance if they have fulfilled their obligations with many of the enhanced transparency requirements, despite consuming vast company resources while attempting to do so. As a general matter, mobile operators employ much more dynamic network management policies than wired networks, making it far more challenging for wireless carriers to provide all of the potential details that the new rules require, particularly in a form that would be understandable, let alone meaningful, to consumers. It will be especially difficult for wireless carriers to comply with a requirement to provide actual performance data "in the geographic area in which the consumer is purchasing the service" when the Commission has provided no guidance as to how granular such measurements must be. Similarly, the Commission provides no details as to how disclosures concerning packet loss should be reported, and this will be particularly difficult for wireless carriers whose network performance is literally being managed by the second as the number and types of uses of the network change.

Wireline providers are given the opportunity to rely on their participation in the Measuring Broadband for America ("MBA") program as a safe harbor in meeting the requirement to disclose actual network performance.[10] While Commission staff are continuing to refine the mobile MBA program, at this time it may not be relied upon by wireless carriers as

[9] *Id*. at 5677 ¶ 171. Notably, the Commission failed to identify paragraph 171 in the PRA submission as one of the paragraphs for which it is seeking OMB approval. Until such approval is sought and approved, the requirements in paragraph 171 cannot be in effect and BIAS providers cannot be penalized for alleged failure to comply with any requirements in that paragraph.

[10] *Id.* at 5674-75 ¶ 166, n. 411.

a safe harbor. Thus, in addition to the more dynamic nature of managing wireless networks, the lack of a safe harbor places an extra burden on wireless carriers compared to their wireline counterparts. The Commission is planning at a later date to establish a voluntary safe harbor for the format and nature of the required disclosure to consumers and has tasked the FCC's Consumer Advisory Committee with developing a proposed disclosure format for making consumer-facing disclosures, to be approved later by multiple Bureaus.[11] But at this time, there are no safe harbors for wireless providers and the Commission has taken no public steps since the release of the *Open Internet Order* to develop one.

III. Conclusion

The low estimate of time and cost necessary for compliance with the enhanced transparency requirements makes clear that the Commission continues to fail to take seriously its responsibility to conduct a thorough cost-benefit analysis when adopting major rules. The Commission provides virtually no analysis of the costs of compliance and whether or not the assumed benefits can be justified by the potential costs. What little information is provided is an egregiously low estimate of the actual compliance costs that carriers will face, particularly for wireless carriers. At a minimum, the Commission should extend the time necessary for providers to come into compliance with the new enhanced requirements for at least 12 months.

[11] *Id.* at 5681 ¶ 181. "Providers that choose instead to maintain their own format—for example, a unitary disclosure intended both for consumers and edge providers—will bear the burden, if challenged, of explaining how a single disclosure statement meets the needs of both consumers and edge providers."

Respectfully Submitted,

By: ___/s/ Jonathan Spalter_____

Jonathan Spalter, Chairman
Allison Remsen, Executive Director
Rachael Bender, Senior Policy Director
MOBILE FUTURE
1325 Pennsylvania Avenue, N.W.
Suite 600
Washington, DC 20004
(202) 756-4154
www.mobilefuture.org

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