Before the
OFFICE OF MANAGEMENT AND BUDGET
Washington, DC

Notice of Public Information Collection Requirement Submitted to OMB for Review and Approval	)))	OMB Control No. 3060-1158

COMMENTS OF CTIA
ON THE FCC'S PUBLIC INFORMATION COLLECTION SUBMISSION

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COMMENTS OF CTIA ON THE FCC'S PUBLIC INFORMATION COLLECTION SUBMISSION

CTIA[1] submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Paperwork Reduction Act ("PRA") Notice[2] regarding the information collections mandated by "enhancements" to the Open Internet transparency rule adopted in the FCC's *2015 Open Internet Order*.[3] The FCC has utterly failed to meet its obligations under the PRA,[4] and the Office of Management and Budget ("OMB") should disapprove the information collection.

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[1] CTIA® (www.ctia.org) represents the U.S. wireless communications industry. With members from wireless carriers and their suppliers to providers and manufacturers of wireless data services and products, the association brings together a dynamic group of companies that enable consumers to lead a 21st century connected life. CTIA members benefit from its vigorous advocacy at all levels of government for policies that foster the continued innovation, investment and economic impact of America's competitive and world-leading mobile ecosystem. The association also coordinates the industry's voluntary best practices and initiatives and convenes the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] Notice of Information Collection Being Submitted for Review and Approval to the Office of Management and Budget, 81 Fed. Reg. 53145 (Aug. 11, 2016).

[3] *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601 (2015) ("*2015 Open Internet Order*").

[4] 5 C.F.R. § 1320.8(a)(1), (4), and (5); *see also* 44 U.S.C. §§ 3501, *et seq*.

I. INTRODUCTION AND SUMMARY.

The FCC's *Supporting Statement* fails to provide an objective, supportable estimate of the burden of complying with the 2015 enhancements to the Open Internet transparency rule, and falls flat in its effort to show that the new rule is necessary, useful, clear, and understandable, as the PRA requires.[5] As presented, OMB cannot approve, and should promptly disapprove, the modified information collection.

The *2015 Open Internet Order* substantially expands upon the existing transparency rule, imposing new and onerous burdens on broadband Internet access service providers. As but one example, disclosure of performance data will now include "packet loss" in addition to speed and latency, and for mobile providers, packet loss can vary considerably from moment to moment based on spectrum congestion, fading, interference, propagation path loss, and other factors. This burden is further compounded by the requirement that network performance data be disclosed at the geographic area in which the consumer is purchasing service. The FCC, however, certifies that the burdens associated with these and other new requirements will be modest at most with:

- An increase in the currently approved Open Internet transparency rule collection of *just 6.8 hours* per year per respondent, from 24.4 hours per year to 31.2 hours per year;
- A total annual in-house cost per respondent of $1,701.72 to comply with the enhanced rule, relying exclusively on in-house personnel, rejecting showings of CTIA and others, and refusing to recognize *any* costs for outside counsel or consultants; and
- *Zero external costs* for wireless broadband Internet access service providers to identify performance measurement results (including the new packet loss requirement), even though the FCC estimates that the 25 largest wireline broadband providers will have up to $640,000 in costs.

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[5] *See* OMB, Office of Information and Regulatory Affairs, OMB Control No. 3060-1158, Supporting Statement (Aug. 10, 2016) ("*Supporting Statement*"), http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201608-3060-005.

These estimates defy reality generally, but particularly with respect to the new burdens imposed on mobile broadband providers.

The *Supporting Statement* relies heavily on the FCC's *2016 Guidance Public Notice*,[6] issued by Commission staff without any opportunity for public comment. But that notice makes matters worse. It actually increases obligations and imposes *additional* burdens, creates further ambiguity, and attempts to minimize the burdens by issuing a safe harbor for mobile broadband providers that is unworkable today and for the foreseeable future.

The Commission has already demonstrated that potential liabilities for a failure to comply with the Open Internet transparency requirements are astronomical (as much as $100,000,000 in a recent Notice of Apparent Liability).[7] Given the magnitude of the risks facing broadband providers, it is absurd for the Commission to suggest that these providers will spend just 6.8 hours more *per year* to ensure compliance with the "enhanced" transparency requirements. Nor is it credible to expect that providers will try to devise programs and procedures to comply with the enhanced transparency requirements without substantial guidance from outside counsel or consultants.

Finally, even after issuance of the *2016 Guidance Public Notice*, the new information collection is not unambiguous and understandable, as the PRA requires. Nor is the information collection necessary for the proper performance of the FCC's functions. Mobile broadband providers already disclose significant information regarding their services and there is no

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6 *Guidance on Open Internet Transparency Rule Requirements*, 31 FCC Rcd 5330 (2016) ("*2016 Guidance Public Notice*").

7 *See, e.g.*, *AT&T Mobility, LLC*, 30 FCC Rcd 6613 (2015) (proposing a forfeiture of $100,000,000 for alleged violations of the open internet transparency rules).

evidence that the existing transparency rule has failed to serve the interests of mobile broadband consumers or edge providers.

In short, the Commission has failed to provide the "specific, objectively supported estimate of burden" required by the PRA and implementing rules.[8] Moreover, the new rules will have little practical utility and customers already have access to many robust tools for measuring network performance. Finally, the rules are ambiguous and lack the clarity required by the PRA. In other words, the burden on the public has not been completely accounted for and minimized as required by the PRA. Indeed, the Commission's efforts to comply with the PRA to date are so lacking that OMB should disapprove this information collection.

II. THE FCC'S BURDEN ESTIMATE IS INDEFENSIBLY INACCURATE.

The PRA requires the Commission to certify that any new information collections, among other things, are "necessary for the proper performance of the functions of the agency, including that the information has practical utility," "reduce[] to the extent practicable and appropriate the burden," and are not "unnecessarily duplicative of information otherwise reasonably accessible to the agency."[9] Where an information collection does not meet these standards, OMB will "instruct the agency to make a substantive or material change to" or disapprove such information collection within 60 days of receiving the agency's submission.[10]

To that end, OMB has counseled agencies that an information collection will not be approved unless it is clearly justified and "[t]he burden on the public [is] completely accounted

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8 44 U.S.C. §§ 3501, *et seq.*; 5 C.F.R. § 1320.8(a)(1), (4), and (5).

9 44 U.S.C. §§ 3506(c)(3)(A), (B), (C).

10 5 C.F.R. § 1320.12(d).

for and minimized to the extent practicable. . . ."[11] Prior to submitting an information collection for OMB approval, therefore, federal agencies are required to assess all proposed information collections carefully by evaluating the need for the information collection, providing a "specific, objectively supported estimate of burden," and considering whether the burden can be reduced.[12] The FCC's submission utterly fails to satisfy these rigorous standards.

A. The Burden Estimate Is Facially Inadequate.

The FCC estimate of the burdens for complying with the enhanced transparency rule, on its face, fails to meet these rigorous statutory standards and the new information collection should not be approved. Indeed, the *existing* transparency rule is already extremely burdensome, well beyond the 24.4 burden hours previously approved by OMB.[13] Under the current rules, broadband providers must "publicly disclose accurate information regarding the network management practices, performance, and commercial terms" of their broadband service sufficient for consumers to make informed choices and for edge providers to develop, market, and maintain Internet offerings.[14] As but one example, mobile broadband providers must evaluate each new network management policy to determine whether any such changes trigger revised disclosures. This review requires input from management-level decision-makers, engineers, product specialists, marketing teams, website designers, legal counsel, and policy

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11 *See* OMB, Office of Information and Regulatory Affairs, *Guidance on Agency Survey and Statistical Information Collections*, at 9 (Jan. 2006), http://www.whitehouse.gov/omb/inforeg/pmc_survey_guidance_2006.pdf.

12 5 C.F.R. § 1320.8(a)(1), (4), and (5).

13 *See* OMB, Office of Information and Regulatory Affairs, OMB Control No. 3060-1158, View ICR – OIRA Conclusion, http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201407-3060-003 (last visited Sept. 9, 2016).

14 47 C.F.R. § 8.3.

training personnel. Failing to take these steps creates the risk that a provider may be deemed to have inaccurate, incomplete, or insufficient information in its network disclosures, and, as noted above, the enforcement risk of such a failing is extraordinary. Thus, the market for mobile broadband is continuously evolving with new technologies and updated services and offers, leading to a constantly changing environment for transparency rule compliance.

It is clear that the Commission has underestimated the burdens of complying with the current transparency rule, and has now compounded that error by drastically underestimating the compliance burdens related to its "enhancements" to the transparency rule. To be clear, the new and significantly expanded "enhanced" disclosure requirements go well beyond the existing requirements. The following summarizes the enhanced requirements:

- Pricing disclosures must now identify: (1) the full monthly service charge, with any promotional rates clearly noted and explained; (2) all additional one-time fees, recurring fees, and/or surcharges the consumer may incur either to initiate, maintain, or discontinue service; and (3) any data caps or allowances, as well as the consequences of exceeding the cap or allowance.[15]

- As part of the network management practice disclosures, providers must now disclose packet loss data in addition to information regarding speed and latency.[16]

- Network disclosures must now include practices that are applied to traffic associated with a particular user or user group, including any application-agnostic degradation of service to a particular end user. Disclosures of user-based or application-based practices 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.[17]

- Providers must have a mechanism for directly notifying an end user if his or her individual use of a network will trigger a network practice, based on their demand prior

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15 *2015 Open Internet Order*, 30 FCC Rcd at 5672-77 ¶¶ 164-171.

16 *Id*. at 5673-74 ¶ 166.

17 *Id*. at 5676-77 ¶ 169.

to a period of congestion that is likely to have a significant impact on the end user's use of the service.[18]

- And, providers must prominently display all relevant disclosures at the point of sale and, as a result of the *2016 Guidance Public Notice*, must now ensure that consumers "actually receive" these disclosures prior to any sale.[19]

Since July 2015, the Commission has had a substantial record before it demonstrating the myriad failings of the Commission's original efforts to estimate the compliance burdens with regard to these new obligations.[20] Indeed, commenters previously demonstrated that, given the enhanced rule's new burdens, the FCC's original burden estimate of 4.5 hours over the previously approved 24.4 hours drastically understated the actual burden. But instead of revising its burden estimate in any material way, the Commission chose instead to make minimal revisions to its estimate while discounting or obfuscating the myriad faults underlying its burden estimate.[21] The Commission finds that broadband providers can readily meet the burdens imposed by these "enhancements" with only "modest" adjustments and assumes:

- That compliance with the enhanced transparency rule will require on average *just 6.8 hours per year* per provider on top of the currently approved 24.4 hours for compliance with the existing rules, for a total of 31.2 hours per provider per year;

- At an in-house cost of $1,702.72 per year per provider on average, which is slightly *less than* the average in-house cost for the existing transparency rule ($1,721.66);

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18 *Id*. at 5674 ¶ 166.

19 *Supporting Statement* at 10 ("However, the Commission is actually seeking approval for the requirement contained in paragraph 171 and is refraining from enforcing it until OMB approval is obtained."); *2016 Guidance Public Notice*, 31 FCC Rcd at 5337.

20 *See Protecting and Promoting the Open Internet,* GN Docket No. 14-28, PRA Comments of CTIA (filed July 20, 2015); PRA Comments of AT&T (filed July 20, 2015); PRA Comments of United States Telecom Association (filed Aug. 25, 2015); PRA Comments of the Wireless Internet Service Providers Association (filed July 20, 2015); PRA Comments of American Cable Association (filed July 20, 2015).

21 *Supporting Statement* at 7-12.

- With *zero* costs for outside counsel and consultants; and
- *No external costs* for mobile broadband providers, despite allowing for $640,000.00 per year for capital, operation, and maintenance costs for the largest wireline broadband providers.[22]

What follows shows just how absurd the Commission's assumptions are.

1. The Commission cavalierly assumes that network performance disclosure requirements should not be unduly burdensome for mobile providers because mobile providers can rely on the Measuring Mobile Broadband America ("MMBA") program as a safe harbor.[23] This assumption is flat wrong, however, as the burdens are significant. Access to timely data from the MMBA program would carry significant annual costs – but more importantly, the MMBA program is completely unworkable as a safe harbor and will force mobile providers to expend significant resources to find ways to comply.

The network performance disclosure requirements are substantial. In connection with "packet loss" and other network performance disclosures, all of these data must be measured in terms of average performance over a reasonable period of time and during times of peak usage, must be identified with respect to each technology (*e.g.*, 3G and 4G), and must be disclosed by providers at the level of geographic areas in which the consumer is purchasing service – the cellular market area ("CMA") level for mobile broadband providers.[24]

The Commission claims that mobile broadband providers can readily comply with the disclosure requirement by relying on the MMBA data. But gaining access to timely data from the MMBA program is costly: providers will have to buy subscriptions to secure access to

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22 *Id*. at 13-17.

23 *Id*. at 6.

24 *2015 Open Internet Order*, 30 FCC Rcd at 5673-74 ¶ 166; *2016 Guidance Public Notice*, 31 FCC Rcd at 5334.

timely data, and those subscriptions have been made available at $180,000 per year per provider. The Commission ignores this cost in its burden estimate.

Further, as discussed below, the MMBA safe harbor's CMA geographic area-based approach is unworkable today, and thus MMBA data will not be available in the foreseeable future. The Commission does not dispute this fact, but the *Supporting Statement* ignores it. Absent a workable safe harbor, mobile broadband providers will have to seek out alternative network performance testing to gather data for the disclosures, either internally or by contracting with third parties. For mobile broadband providers, service qualities such as packet loss vary considerably from moment to moment based on spectrum congestion, fading, interference, propagation path loss, and a variety of other factors.[25] Gathering such data is further complicated by the fact that such disclosures must be made at the CMA level.[26] The costs to build capabilities and gather data to provide disclosures with such geographic specificity would dwarf the provided cost estimates. Indeed, in certain cases, "the monitoring and test equipment necessary to measure and report on a frequent or constant basis the effective download speeds, upload speeds, latency, packet loss, packet corruption, and/or jitter can cost as much at the underlying data transmission deployed to provide the broadband service."[27]

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[25] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of CTIA at 36 (filed July 18, 2014) ("CTIA Comments"); *see also* Comments of AT&T at 88 (citation omitted) (filed July 18, 2014) ("AT&T Comments") ("[F]ormal regulation requiring . . . 'information regarding the source, location, timing, speed, packet loss, and duration of network congestion,' would be impossible for [BIAS providers] to comply with given the broad array of external conditions that might affect broadband speed for an end user."); Comments of Bright House at 11-12 (filed July 18, 2014); Reply Comments of Verizon and Verizon Wireless at 16 (filed Sept. 15, 2014) ("Verizon Reply Comments").

[26] *2015 Open Internet Order*, 30 FCC Rcd at 5674 ¶ 166.

[27] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of WTA – Advocates for Rural Broadband at 8 (filed July 17, 2014); *see also* Reply Comments of the Wireless Internet Service Providers Association at 9 (filed Sept. 15, 2014).

Without any basis, the *2016 Guidance Public Notice* rejected mobile broadband providers' concerns regarding the new packet loss disclosure requirement. It concluded that "the Commission understands that current drive testing equipment for mobile broadband providers is already capable of measuring packet loss. The Commission therefore does not believe that mobile providers will need to purchase equipment to measure packet loss."[28] The closest the Commission comes to recognizing this burden is to provide slightly higher estimates for annual in-house cost per respondent in years one and two – *a two-year total of $134.03 above the average cost per year* – because providers "might incur implementation costs to establish procedures for translating packet loss data into disclosures."[29] Elsewhere, it acknowledges that providers may rely on third-party testing instead of taking advantage of the MMBA safe harbor to measure network performance, but does not account for any mobile provider external costs at all.

Based on CTIA member feedback, there is broad rejection of this "minimal burden" approach. Member input reflects that conducting drive tests with added enhancements to measure packet loss at the CMA level during residential peak hours from 9-11 p.m. would impose *millions of dollars of additional burden per provider per year*. Further, maintaining and updating data on a provider's disclosures website will cost tens of thousands of dollars each year. The *Supporting Statement* makes no effort to account for the MMBA data costs or the costs of any alternative data gathering means.

2. The disclosure of network practices that are applied to traffic associated with a particular user or user group, including any application-agnostic degradation of service to a

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28 *Supporting Statement* at 11-12.

29 *Id.* at 12.

particular end user, will likewise be extremely onerous for mobile broadband providers.[30] As CTIA demonstrated, keeping disclosures up to date will be a significant challenge for mobile broadband providers because their network management practices evolve rapidly on a real-time basis to address changing threats and challenges to the network.[31] Indeed, given the vast differences among network technologies (*e.g.*, LTE and LTE-Advanced), network management must be even more agile than previously.[32] Further, there is the very real risk that detailed reporting of network management practices could significantly undermine providers' efforts to avert hacking, malware, and other threats.[33] Again, however, the Commission's burden estimate of an additional 6.8 hours *in toto* does not in any way adequately account for the unique burdens the network disclosure requirements place on mobile broadband providers.

3. The requirement that broadband providers ensure that customers "actually receive" disclosures at the point of sale is an entirely new burden articulated for the first time in the staff-level *2016 Guidance Public Notice*.[34] As one would expect, *any* change to the point of sale disclosure requirements could well require mobile broadband providers to modify their systems and processes at an enormous cost. For instance, a mobile broadband provider could determine that compliance might require that a customer certify that she has reviewed the disclosures by signing a physical document or clicking on a web page. Compliance in the telemarketing context could require providers to direct their agents to read aloud the full disclosures and require the

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30 *2015 Open Internet Order*, 30 FCC Rcd at 5676-77 ¶ 169.

31 *See* CTIA Comments at 36.

32 *Id*. at n.92.

33 *Id*. At 36; *see also* Verizon Reply Comments at 15; Comments of AT&T at 80-81; *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Comments of CenturyLink at 30 (filed July 17, 2014); Comments of AdTran at 43 (filed July 15, 2014).

34 *Supporting Statement* at 10; *2016 Guidance Public Notice*, 31 FCC Rcd at 5337.

consumer to confirm affirmatively that they heard and understood the disclosures before a sale – a practice that no doubt would make the sales process much more burdensome, time consuming, and frustrating for customers.

It will cost hundreds of thousands of dollars on average to develop and display the Broadband Labels for all active services/plans for broadband services, with on-going maintenance costs in the tens of thousands of dollars. The costs of developing the labels could double if labels need to be developed for old or grandfathered service plans.

4. The requirement 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 period of congestion that is likely to have a significant impact on the end user's use of the service"[35] is also an entirely new requirement. This requirement could well require mobile broadband providers to develop new computer systems, which could very well cost more than the industry-wide burden estimate announced in the *Supporting Statement*.

5. Finally, although the *Supporting Statement* assigns zero costs for outside counsel and consultants, CTIA members have confirmed that they have historically relied heavily on outside counsel and consultants and will continue to do so to ensure they are in compliance with the existing transparency rule. One member estimated that going forward, it expects to spend $20,000 on outside legal fees once its new disclosure format is set up and in place just to ensure ongoing compliance as new services and offers are introduced. This does not reflect any other vendor or system changes needed for compliance. There is no question that the enhanced rules will require further reliance on outside counsel and consultants.

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35 *2015 Open Internet Order*, 30 FCC Rcd at 5677 ¶ 171.

B. The Reliance on the Measuring Mobile Broadband America and Broadband Label "Safe Harbors" Is Misplaced.

The FCC's rosy assumption that there will only be modest compliance burdens associated with the enhanced transparency rules rests in large measure on the MMBA and Broadband Label[36] so-called safe harbors. But Commission reliance on these safe harbors is misplaced; the costs associated with them do not support the agency's inaccurate and unsupportable estimate of the burdens of complying with the enhanced Open Internet transparency rule.

The *Supporting Statement* uses the MMBA safe harbor to brush off concerns raised by CTIA and others regarding the burden estimate. But, as CTIA demonstrated to the Commission earlier this summer, the MMBA safe harbor is deeply flawed in a number of respects, and it *is not achievable* at this time.[37] The MMBA program is supposed to report data at the CMA geographic area level, but CTIA understands that the MMBA program has not collected sufficient information to report at the CMA level. Reporting data at the CMA level as the MMBA safe harbor requires will not occur in 2016, and it is aspirational for the foreseeable future.[38] Thus, there is no way to meet the safe harbor the *2016 Guidance* has purported to establish.

Moreover, the protections of the MMBA safe harbor may *never* be available to non-nationwide carriers. For those providers that do not fall under the small business exemption, the

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[36] FCC, Consumer Labels for Broadband Services, https://www.fcc.gov/consumers/guides/-consumer-labels-broadband-services (last visited Sept. 9, 2016).

[37] *See* Application for Review of CTIA, GN Docket NO. 14-28, at 12-15 (filed June 20, 2016).

[38] *Id*. at 12-13.

MMBA program might never collect enough data at the CMA level.[39] Indeed, the MMBA program is not even expected to publish performance data in at least 200 rural CMAs.[40]

Further, the MMBA program is so lacking in other ways that carriers may be compelled to pursue other approaches to gather network performance measurements.[41] The upcoming MMBA report will only use test results from Android devices and will exclude data collected from iPhone users. This will skew results and provide consumers with a very imperfect picture of network performance by carriers with a large base of non-Android customers.[42] Carriers with a high percentage of iPhone customers, for example, may find that data from the MMBA program misrepresents their customers' overall experience and so will choose to use other, more accurate services to assess network performance.[43]

Indeed, there are already many robust tools that have far greater participation and reliability than the MMBA program. For example, Ookla, which the Commission has acknowledged as "one of the most prominent providers of crowdsourced data,"[44] offers a mobile app that is designed to accurately test the performance of mobile connections, including LTE, 4G, 3G, EDGE, and EVDO networks.[45] OpenSignal also gathers crowdsourced data from millions of iPhones and Android

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39 *Id*. at 13.

40 *Id*.

41 *Id*. at 13-14.

42 *Id*.

43 *Id*.

44 *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 30 FCC Rcd 14515, 14595 ¶ 128 (2015).

45 *See* Ookla, Ookla Speedtest Mobile Apps, http://www.speedtest.net/mobile/ (last visited Sept. 9, 2016).

devices through its app, which it notes is "the world's most popular network measuring app."[46] Other speed test tools and resources that are valuable to consumers include RootMetrics, Google M-Lab, and CalSPEED, among others. The Commission has never explained why its own MMBA data is superior to other, commercially available data such that it qualifies as the only data source for the safe harbor.

Also problematic is the fact that both the MMBA and Broadband Label "safe harbors" are premised on mobile providers' disclosure of actual performance metrics for *each individual CMA* in which their services are offered. As discussed above, this reliance on granular, CMA-level disclosures increases, rather than eases, the burdens of complying with the enhanced transparency rules. Further, some providers do not have CMA-based licenses and/or do not track their networks on a CMA basis.

The Broadband Label is also problematic on its own. As drafted, the Broadband Label does not appear to comply with the requirements of the enhanced disclosure requirements. For instance, the Broadband Label appears to allow providers to disclose "Typical speed," "Typical latency," and "Typical packet loss."[47] But, providers are required to disclose actual, not typical disclosure data. Likewise, the Broadband Label assumes that providers can place links to other disclosures in the label itself, but this does not release providers from the obligation to ensure that customers "actually receive" the linked disclosures. Further, to make the Broadband Label compliant with the enhanced transparency requirements, providers would have to create a different label for virtually each potential customer, showing that the customer's specific service plan (including promotions) and the actual performance data for the CMA in which the customer

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46 OpenSignal, *Millions of devices connecting billions of data points*, https://opensignal.com/methodology/ (last visited Sept. 9, 2016).

47 *See* Consumer Labels for Broadband Service, *supra* note 36.

will be using the service before the customer actually purchases service. It simply lacks credibility for the Commission to suggest that this Broadband Label will ease the burden on providers in any meaningful way.

III. THE PROPOSED COLLECTION DOES NOT SATISFY THE REMAINING PAPERWORK REDUCTION ACT STANDARDS.

The PRA requires that the Commission certify to OMB that the enhanced transparency rule meets certain standards, including that the collection "reduces to the extent practicable and appropriate the burden," "is necessary for the proper performance of the functions of the agency, including that the information has practical utility," and "is written using plain, coherent, and unambiguous terminology and is understandable to those who are to respond."[48] The above discussion shows that the Commission has not minimized the burdens "to the extent practicable" and, indeed, has significantly underestimated the compliance burdens associated with the enhanced transparency rules. In addition, however, the enhanced transparency requirements are not written in "coherent[ ] and unambiguous" language and will have little practical utility. OMB therefore should disallow the collection.

A. The Proposed Collection Is Ambiguous and Not Understandable.

In the *Supporting Statement*, the FCC asserts repeatedly that the *2016 Guidance* clarifies how providers can conform to the new burdens. The FCC's reassurances notwithstanding, there is much that remains confusing regarding the enhanced transparency rules. Indeed, the enhanced requirements are anything but unambiguous and understandable.

For example, the *2016 Guidance* declaration that providers "must" take steps to ensure that consumers "actually receive" the disclosures effectively shifts the point of sale disclosure

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48 44 U.S.C. § 3506(c)(3)(A), (C), (D).

from constructive notice to an actual notice construct. As discussed above, *any* such change to the point of sale disclosure requirements may require mobile broadband providers to modify their systems and processes at an enormous cost. But the *2016 Guidance* does not even attempt to provide guidance as to what it means to ensure that consumers "actually receive" Open Internet disclosures. If providers can still rely on providing a link to the disclosures online, how are they to ensure that customers "actually receive" the disclosures? Will providers be required to obtain confirmation from customers that they have received and understood the disclosures? Will this have to be done in writing? Will providers have to retain documentation of the customers' confirmation? If so, for how long? How are customers to actually receive disclosures on the telephone? Will agents have to read the full disclosures and require the consumer to confirm that they heard and understood the disclosures before a sale? The failure to shed any light on these issues necessarily injects uncertainty into the market, creates confusion among customers and providers, and deepens the hazard of potential liability for mobile broadband providers.

Another example involves how mobile broadband providers are expected to implement the safe harbor, given the disparities in data available on a CMA-by-CMA basis. The following quote from the *2016 Guidance* illustrates the confusion:

> The [Mobile MBA] program will provide, at a minimum, network performance metrics for each such service for each CMA in which the program has a sufficient CMA sample size, and additional sets of these network performance metrics aggregated among sets of other CMAs. Today, we establish that mobile [broadband] providers may disclose their results from the mobile MBA program as a sufficient disclosure of actual download and upload speeds, actual latency, and actual packet loss of a service if the results satisfy the above sample size criteria and if the MBA program has provided CMA-specific network performance metrics of the service in CMAs with an aggregate population of at least

> one half of the aggregate population of the CMAs in which the service is offered.[49]

The plain meaning of this statement is elusive at best.

Vague and ambiguous statements such as these are virtually certain to engender confusion among providers and consumers alike. OMB must find that the burden is anything but unambiguous and understandable.

B. The Enhanced Disclosures Will Have Little Practical Utility for Consumers and Edge Providers.

The existing transparency rule effectively serves the interests of consumers and edge providers in the competitive mobile broadband market and will continue to do so in the absence of the Commission's so-called "enhancements." Absent substantial evidence that those rules do not adequately enable the Commission to protect consumers and edge providers, there is no basis to conclude that new, enhanced disclosures are warranted or will offer any practical utility.

Mobile broadband providers already disclose information regarding speeds (with appropriate disclaimers to account for the inherent variability of mobile service), prices, data caps (where applicable), and network management practices. Further, while the existing transparency rule has been in effect, mobile broadband providers voluntarily adopted a best practice of notifying wireless customers with data allowances when they approach and exceed their plans' allowance for data usage and will incur overage charges, without charge and without requiring sign-up to receive the notification. This best practice is now included in CTIA's Consumer Code for Wireless Service, to which all major U.S. wireless providers are

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[49] *2016 Guidance Public Notice,* 31 FCC Rcd at 5335.

signatories.[50] The Code also specifies that wireless providers should clearly and conspicuously disclose tools or services that enable consumers to track, monitor, and set limits on data usage.[51]

In light of mobile broadband providers' strong disclosure practices, there is no reason to believe that detailed disclosures containing additional complicated technical information about packet loss and corruption, latency, jitter, and upstream and downstream speeds, etc. will result in any material benefit to consumers. To the contrary, additional, detailed technical disclosures could easily obscure other more useful information and will not assist consumers comparing the performance of a competing network. Taking the packet loss disclosures as an example, low packet loss does not necessarily correlate to better network performance for delay intolerant applications. Consequently, packet loss is not a reliable measure for evaluating the performance of a given network or for comparing the performance of difference networks.

The FCC's suggestion that it has already concluded that packet loss is a useful measure of network performance is unsustainable.[52] In fact, the Commission has never offered a good reason to include packet loss data in the transparency disclosures. The *2015 Open Internet Order* merely includes a footnote in which it cites comments from AARP and others arguing that "packet loss could be useful to consumers,"[53] without explaining exactly how packet loss disclosures would be useful to consumers. Indeed, the comments cited in that footnote merely

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50 *See* CTIA, Policy & Initiatives, *Consumer Code for Wireless Service* (2014) ("Consumer Codes"), http://www.ctia.org/docs/default-source/default-document-library/ctia-consumer-code-for-wireless-service.pdf?sfvrsn=2.

51 *Id*. at 5.

52 *Supporting Statement* at 8.

53 *2015 Open Internet Order*, 30 FCC Rcd at 5674 ¶ 166 n.407.

suggest, without support, that packet loss data might be useful for assessing "delay intolerant applications."[54]

Enhanced disclosures likewise will not have practical utility to edge providers. Mobile broadband providers have every reason to work with edge providers and others in the Internet ecosystem to ensure that their customers will have access to the best offerings available. It is what their customers demand, and a mobile broadband provider whose network does not offer suitable access to particular content or a popular application will be less able to compete with providers that do offer such access. In the context of this competitive reality, the Commission's efforts to mandate specific, granular disclosures will not provide any significant additional utility for edge providers.

While there may be a superficial appeal to requiring broadband providers to display all or a portion of the text of their network disclosures at the point for sale, such a requirement would not significantly benefit consumers and likely may degrade the experience. Providing customers a bulky, multi-page disclosure document for review prior to sale or printing detailed disclosures on the packaging for pre-paid devices would impair the customer experience and make the purchase process unwieldy. Further, these are customers purchasing mobile broadband Internet access service so they will each presumably have access to the complete disclosures through the company's website. And CTIA's Consumer Code for Wireless Service mandates that consumers have a minimum of 14 days in which to cancel service and return their device with no penalty.[55] This gives consumers more than enough time to review a provider's disclosures and decide whether to retain the service.

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54 *Id*.

55 Consumer Codes at 4.

All of this calls into question whether the Commission's enhanced transparency requirements will have any material utility for mobile broadband customers or edge providers. Indeed, the *2015 Open Internet Order* offers little guidance regarding the perceived utility of the enhanced disclosures other than general observations that more information would be useful to consumers and edge providers. That alone is insufficient to satisfy the PRA.

IV. CONCLUSION.

The Commission's *Supporting Statement* makes clear that the Commission has not yet developed a "specific, objectively supported estimate of burden" associated with the enhanced transparency rule, as required by the PRA and OMB.[56] The Commission's current burden estimate is dramatically understated, especially in light of the information presented with these comments. OMB should therefore disallow the information collection.

Respectfully submitted,

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[56] 5 C.F.R. § 1320.8(a)(4) and (6).