

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
Guidance on Open Internet Transparency Rule Requirements)	DA 16-569
)	

To: The Commission

APPLICATION FOR REVIEW OF CTIA

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Pursuant to 47 C.F.R. § 1.115, CTIA¹ respectfully submits this Application for Review of the Public Notice regarding the Open Internet transparency rule issued on May 19, 2016 by the Chief Technologist, Office of General Counsel, and Enforcement Bureau (collectively the “Bureaus”).² The “guidance” includes new substantive rules issued without notice and comment, and this lack of public process has led to flawed and unworkable solutions. The Commission should rescind the *Public Notice* and create a new public comment process to address these issues.

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 *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, GN Docket No. 14-28, DA 16-569 (rel. May 19, 2016) (“*Public Notice*”).

I. INTRODUCTION AND SUMMARY.

CTIA members are committed to delivering an open Internet and ensuring transparency so consumers can learn about providers' product and service offerings and practices and make their market decisions accordingly. Indeed, providers are competing vigorously for consumers with new and differentiated services every day and are incented to provide increased transparency for wireless products and services to meet consumer demand in the mobile broadband market.

CTIA members also take the transparency rule obligations seriously. They must, as the Commission has shown its intent to impose enormous liability against providers it deems to have violated the transparency rule. It is precisely because of carriers' commitment that CTIA is compelled to file this Application for Review in response to the *Public Notice*.³

The *Public Notice* imposes new substantive transparency requirements on mobile broadband providers without notice and comment in violation of Section 553 of the Administrative Procedure Act ("APA").⁴ In particular, the *Public Notice*:

- Establishes a new point of sale disclosure obligation, creating a requirement that mobile broadband providers ensure that consumers "actually receive" disclosures;
- Requires mobile broadband providers to report actual network performance on a Cellular Market Area ("CMA") basis; and
- Compels mobile broadband providers to disclose their actual performance metrics using the mobile Measuring Broadband America ("MBA") data in order to obtain the protection of a safe harbor.

³ Given the importance of these issues, CTIA believes that it is critical for the full Commission to decide them in the first instance. To the extent the Commission wishes to treat this filing as a petition for reconsideration, however, CTIA requests that it be addressed by the full Commission. See 47 C.F.R. § 0.5(c).

⁴ 5 U.S.C. § 553.

The absence of requisite process has led to arbitrary and badly flawed requirements that might have been avoided if the Commission had sought comment from interested parties. Indeed, this process has resulted in new obligations that require more guidance and a safe harbor that is categorically unachievable today and in the foreseeable future. Such “guidance” is anything but, and CTIA requests that the Commission vacate these new rules.

II. THE BUREAUS’ GUIDANCE UNLAWFULLY IMPOSES NEW SUBSTANTIVE OBLIGATIONS ON MOBILE BROADBAND PROVIDERS AND SHOULD BE RESCINDED.

The *Public Notice* unlawfully changes the Commission’s transparency rule by establishing new disclosure obligations for mobile broadband providers. The Commission may promulgate new substantive rules – rules that “create new law, rights, or duties”⁵ – only after following the procedures set forth in Section 553 of the APA.⁶ No such process was followed here. Simply referring to agency action as “guidance,” or stating that providers “may implement alternative approaches” to disclose information to consumers,⁷ does not exempt the Commission from complying with the APA’s notice and comment obligations when its action establishes new substantive rules.⁸ The following aspects of the *Public Notice* effect substantive rule changes to which APA notice and comment requirements apply.

⁵ *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991).

⁶ *See* 5 U.S.C. § 553.

⁷ *Public Notice* at 3.

⁸ *See, e.g., Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) (finding that Department of Labor “Guidance Letters” were legislative rules and thus violated the APA because they were issued without providing public notice and opportunity for comment); *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (vacating EPA’s “Guidance” document addressing Clean Air Act implementation because it was a legislative rule that had not been adopted after notice and comment rulemaking and thus violated the APA); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding that a disclaimer that EPA routinely inserted at the end of guidance documents was “boilerplate”).

A. The *Public Notice* Unlawfully Adopts a New Point of Sale Disclosure Requirement.

The *Public Notice*'s "clarification" on point of sale disclosure requirements goes far beyond any previous Commission articulation of the rule by directing that providers "must ensure that consumers *actually receive* the information necessary to make informed decisions prior to making a final purchasing decision at all potential points of sale, including in a store, over the phone, and online."⁹

This new requirement contradicts the Commission's own statements regarding the transparency rule's flexibility. In 2010, the Commission emphasized that the rule "gives broadband providers some flexibility to determine what information to disclose and how to disclose it."¹⁰ The Commission reaffirmed the scope of the requirement in its 2011 Paperwork Reduction Act ("PRA") supporting statement to the Office of Management and Budget ("OMB"). There, the Commission stated: "[T]he *Open Internet Order* requires only that providers post disclosures on their websites, and direct consumers to such websites at the point of sale."¹¹ And here, the Bureaus state that the *2015 Open Internet Order* did not revise the requirements relating to the point of sale disclosures.¹²

The *Public Notice*'s "guidance," however, takes the point of sale disclosure obligations to a whole new level. Although the Bureaus assert that the *2015 Open Internet Order* made no

⁹ *Public Notice* at 8 (emphasis added).

¹⁰ *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17941 ¶ 60 (2010) ("*2010 Open Internet Order*").

¹¹ *Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices*, FCC Supporting Statement at 3, OMB 3060-1158 (Jul. 2011), http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201109-3060-014.

¹² See *Public Notice* at 9 ("While the Commission made some enhancements to the disclosures required under the [transparency] rule in the *2015 Open Internet Order*, the requirements relating to point of sale disclosures were not modified").

change to the point of sale disclosure requirements,¹³ the *Public Notice* does just that. It purports to reconcile the references cited above with a sentence in footnote 424 of the *2015 Open Internet Order*: “It is not sufficient for broadband providers simply to provide a link to their disclosures.”¹⁴ But the result is an *ultra vires* expansion of the Commission’s own conclusions. The announcement that providers “must” take steps to ensure that consumers “actually receive” the disclosures is a new obligation and a fundamental modification of the Commission’s rule. It effectively shifts the point of sale disclosure from constructive notice to an actual notice construct. The *Public Notice* therefore imposes a new, binding standard of conduct despite its claim that the *2015 Open Internet Order* did not revise the 2010 point of sale requirements. An agency cannot “promulgate mush and then give it concrete form only through subsequent less formal ‘interpretations.’”¹⁵

Further still, this requirement to ensure that consumers “actually receive” the disclosures is a “collection of information” covered by the PRA.¹⁶ Thus, in addition to infirmities under the APA, the Bureau’s action cannot become effective as the Commission has not solicited comment on the burdens this new obligation imposes pursuant to the PRA.

B. The *Public Notice* Unlawfully Adopts a New Geographic Standard for Network Performance Measurements.

The *2015 Open Internet Order* requires that disclosures of actual speed, latency, and packet loss “be reasonably related to the performance the consumer would likely experience in

¹³ *Id.*

¹⁴ *Protecting and Promoting the Open Internet*, Report and Order on Remand, 30 FCC Rcd 5601, 5677 ¶ 171 n.424 (2015) (“*2015 Open Internet Order*”).

¹⁵ *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 584 (D.C. Cir. 1997).

¹⁶ See 44 U.S.C. § 3502(3) (“[T]he term “collection of information” — (A) means the obtaining, causing to be obtained, soliciting, or requiring the transparency to third parties or the public, of facts or opinions by or for an agency, regardless of form or format. . . .”).

the geographic area in which the consumer is purchasing service.”¹⁷ The Commission did not delegate authority to the Bureaus to dictate the geographic area for the provision of actual network performance data, but that is just what the *Public Notice* does. The Bureaus established that mobile broadband providers “may meet this requirement by disclosing actual performance metrics for each Cellular Market Area (CMA) in which the service is offered....”¹⁸ As a practical matter, this language does not operate as “guidance.” The Bureaus are clear as to what they expect. The safe harbor requires data be reported at the CMA level and for providers not using the safe harbor, the *Public Notice* states:

Specifically, mobile BIAS providers that, instead of taking advantage of the MBA safe harbor, measure network performance by their own or third party testing may disclose performance metrics for each CMA in which the service is offered....¹⁹

In this context, “may” actually means “shall.” The *Public Notice* makes no suggestion that any other geographic area would be deemed an acceptable alternative – again, even though the Commission chose not to specify a particular geographic area. As such, the CMA reporting level purports to be binding.

In contrast, the Commission specifically delegated to the Chief Technologist the task of providing guidance to broadband providers on “acceptable methodologies” for measuring “actual performance” required under the rule²⁰ – a task the *Public Notice* disregards. In promulgating the actual performance rule, the Commission expressly declined to codify “specific methodologies” for measuring and disclosing actual performance metrics and instead

¹⁷ *2015 Open Internet Order* ¶ 166.

¹⁸ *Public Notice* at 5.

¹⁹ *Id.* at 7.

²⁰ *2015 Open Internet Order* ¶ 166.

“delegate[d] authority to our Chief Technologist” to provide “further guidance.”²¹ The Commission emphasized that these methodologies must be “grounded in commonly accepted principles of scientific research, good engineering practices, and transparency.”²²

The *Public Notice* does not provide any guidance on specific measurement methodologies. An obligation to disclose actual performance metrics on a CMA geographic basis is not a methodology for reporting actual network performance.²³ A CMA is simply a “standard geographic area used by the FCC for administrative convenience in the licensing of Cellular systems.”²⁴ Imposing a CMA requirement instructs mobile broadband providers to report data in a given geographic area, but it does not provide any guidance as to network performance measurement methodologies.²⁵ Contrary to the Commission’s directive to the Chief Technologist, there is nothing scientific or engineering-based about a CMA.

C. The *Public Notice* Compels Mobile Providers to Use the Measuring Broadband America Safe Harbor.

In the *Public Notice*, the FCC for the first time establishes a safe harbor for meeting the actual network performance requirement—specifically, “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,” provided there is sufficient data at the CMA

²¹ *Id.*

²² *Id.* n.412.

²³ *See Public Notice* at 5.

²⁴ 47 C.F.R. § 22.99.

²⁵ By contrast, one example of a measurement methodology is provided by RootMetrics: “Our methodology includes scenarios that can pose particular challenges for networks, such as indoor performance, high network loads (congestion), switching between network technologies, moving from cell tower to cell tower, and transitioning from data to call to text services. The end result is a scientifically based, spatiotemporal view of mobile network performance from the consumer point of view.” Root Metrics, “Consumer expectations are changing. So should your testing,” <http://www.rootmetrics.com/en-US/products> (last visited June 11, 2016).

level. In the *2015 Open Internet Order*, the Commission did not establish an actual network performance safe harbor, stating only that the mobile MBA program “*could* at the appropriate time be declared a safe harbor for mobile broadband providers.”²⁶ But the FCC has never solicited comment on a safe harbor that pertains to actual network performance metrics (nor has it sought PRA approval).

Nevertheless, the *Public Notice* adopts the mobile MBA program as the safe harbor for mobile broadband providers to disclose actual network performance metrics. While CTIA is not opposed to a safe harbor, the details matter and this “clarification” unlawfully modifies the Commission’s rules. Although agencies are entitled to deference, “they may not retroactively change the rules at will.”²⁷

By its very nature, a safe harbor is intended to influence parties’ actions because doing so can provide a higher degree of regulatory certainty (*i.e.*, mobile providers can be assured that if they comply with the safe harbor rule, their network performance disclosures will not later be subject to enforcement). In that regard, the D.C. Circuit has observed: “Voluntary or not, a safe harbor must achieve some useful purpose or an agency would not bother to create it, which suggests that *every* safe harbor has at least some substantive impact.”²⁸ The D.C. Circuit further explained that “[t]he extent of this substantive impact turns on the scope of the risk associated with *not* using the safe harbor; the higher the risk, the more likely the safe harbor will attract regulated entities into its calm (litigation free) waters.”²⁹

²⁶ *2015 Open Internet Order* ¶ 166 (emphasis added).

²⁷ *NetworkIP, LLC v. FCC*, 548 F.3d 116, 122 (D.C. Cir. 2008).

²⁸ *Renal Physicians Ass’n v. United States HHS*, 489 F.3d 1267, 1273 (D.C. Cir. 2007) (emphasis in original).

²⁹ *Id.* (emphasis in original).

Here, the Commission has already demonstrated that potential liabilities for alleged failures to comply with the Open Internet transparency requirements – even when the regulated party could have no way of knowing that it was failing to meet those requirements – are astronomical (as much as \$100,000,000 in a recent Notice of Apparent Liability).³⁰ Given the magnitude of the risks facing broadband providers, the incentive for providers to seek compliance through a safe harbor is so compelling that the provision constitutes a substantive regulation in that it effectively creates a new duty.³¹ As the *Renal Physicians* court stated, “[i]f an agency uses a safe harbor to coerce parties toward a substantive result the agency prefers, and the safe harbor is voluntary in name only, then the agency is making substantive law.”³²

III. NUMEROUS FLAWS IN THE BUREAUS’ GUIDANCE UNDERSCORE THE NEED TO RESCIND THE GUIDANCE AND PROCEED WITH NOTICE AND COMMENT RULEMAKING.

Had the Bureaus complied with the APA and sought public comment on these requirements before they were imposed, CTIA and other interested parties would have had a meaningful opportunity to inform the Commission that they are incomplete and unworkable. The following are issues that CTIA would have been able to raise had the Commission sought public comment on the binding requirements contained in the *Public Notice*.

A. Mobile Broadband Providers’ Obligations Under the New Point of Sale Disclosure Requirement are Uncertain.

As discussed above, the *Public Notice* commands that broadband providers “must” take steps to ensure that consumers “actually receive” the disclosures before a sale occurs at all

³⁰ See, e.g., *AT&T Mobility, LLC*, Notice of Apparent Liability for Forfeiture and Order, 30 FCC Rcd 6613 (2015) (“propos[ing] a forfeiture of \$100,000,000” for alleged violations of the transparency rule).

³¹ See *Fertilizer Institute*, *supra* n.5.

³² 489 F.3d at 1273.

potential points of sale.³³ As one would expect, *any* change to the point of sale disclosure requirements will require mobile broadband providers to modify their systems and processes at an enormous cost. But the *Public Notice* does not even attempt to provide guidance as to what it means to ensure that consumers “actually receive” Open Internet disclosures. For instance, does a mobile broadband provider now need to require a consumer to certify that she has reviewed the broadband “consumer label” by signing a physical document or clicking on a web page? How would (or could) mobile providers that use telemarketing to reach consumers comply with the “actually receive” requirement? Would they be required to physically read the full disclosures before completing a sale and require the consumer to confirm that they heard and understood – a practice that would confuse or antagonize customers? Absent corrective action by the Commission, the Bureaus’ failure to shed any light on these issues will inject uncertainty into the market, create confusion among customers, and deepen the hazard of potential liability for mobile broadband providers.

B. The CMA Disclosure Requirement is Arbitrary and Unreasonable.

As noted, the *Public Notice* requires mobile broadband providers to disclose actual performance metrics for each CMA in which the service is offered. This approach not only violates the APA, it is arbitrary and capricious because some providers do not have CMA-based licenses and/or do not track their networks on a CMA basis. Moreover, both the MBA safe harbor *and* the separate safe harbor for broadband “consumer labels”³⁴ appear to be premised upon mobile providers’ disclosure of actual performance metrics for each CMA in which their services are offered. A rule will be deemed arbitrary and capricious if the agency “entirely failed

³³ See *Public Notice* at 8.

³⁴ See *Public Notice* at 10; FCC, “Consumer Labels for Broadband Services,” <https://www.fcc.gov/consumers/guides/consumer-labels-broadband-services> (last visited June 11, 2016).

to consider an important aspect of the problem.”³⁵ Here, the *Public Notice* cites no reasonable explanation or justification for its CMA disclosure requirement where some providers do not have CMA licenses and have no reason to track their networks on a CMA basis.

Furthermore, while one goal of the transparency rule is to enable consumers “to make informed choices about broadband services,”³⁶ many consumers will have no idea what CMAs are, nor should they because they do not purchase service by CMA, yet they will be told what actual and expected speeds are in “their” CMA. Further, this requirement is also fundamentally unclear in the context of mobile services because consumers will utilize service across multiple geographic areas, and may not know what CMA they are in. By effectively forcing providers to disclose information using a metric that consumers have no reason and no basis to understand, the *Public Notice*’s mandate is not only unwarranted but would confuse consumers.

Finally, the *Public Notice*’s guidance that “*expected* network performance disclosed for a geographic area should not exceed *actual* network performance in that geographic area” is arbitrary and thus unlawful.³⁷ It ignores the reality that wireless speeds and network performance vary continuously over both space and time, and it thus masks the transparency that variables exist that affect network performance. There is in fact no fixed, “actual speed” that could be the “correct” speed that could then set the limit on “expected” speed, whether in a CMA or any other geographic area. Wireless network performance varies for many reasons. Expected network performance at times will exceed actual performance because actual performance

³⁵ *Motor Vehicle Mfrs’ Ass’n of U.S., Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Illinois Pub. Telecomm. Ass’n v. FCC*, 117 F.3d 555, 566 (D.C. Cir. 1997) (finding that the Commission’s failure to explain its decision not to provide interim compensation for certain carriers as required by statute, and its failure to cite a reasonable justification for the interim rate it chose, was arbitrary and capricious).

³⁶ *2015 Open Internet Order* ¶ 162.

³⁷ *Public Notice* at 5 (emphasis in original).

(which is measured at the device level) is affected by a number of variables that are distinct from and not under the control of the mobile broadband providers' network. As the Commission is aware, for example, some handsets (particularly the latest generation of devices) perform better on the same network than others do.³⁸ A user's device may also be running other applications using the broadband connection at the same time a speed test is being conducted. And the physical environment (e.g., topography and buildings) also influences network performance and a consumer's experience. As a result, handset performance "may change drastically from location to location (even with locations just a few meters apart)."³⁹ These and other factors inevitably impact actual performance results. It is thus wrong for the *Public Notice* to presume that actual speed must dictate "expected" speed. Such rigid, mandated disclosures will at best confuse and at worst mislead consumers, and should be removed.

C. The Framework for the Measuring Broadband America Safe Harbor is Unsound and Must be Revisited.

The MBA safe harbor is deeply flawed in a number of respects. As an initial matter, the safe harbor – which requires providers to use the mobile MBA program and report at the CMA level – *is not achievable*.⁴⁰ CTIA understands that the mobile MBA program does not have sufficient information to report at the CMA level and that reporting at the CMA level will not

³⁸ See Letter from Rajender Razdan, Electromagnetic Compatibility Division/OET, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-261, at 2 (May 5, 2016).

³⁹ *Id.*

⁴⁰ As noted above, the Commission indicated in the *2015 Open Internet Order* that the mobile MBA program "could" be included in a safe harbor "at the appropriate time." 30 FCC Rcd at 5675 ¶ 166. However, the Bureaus' abrupt announcement of the safe harbor does not explain why the mobile MBA program has evolved to the point that it is sufficient for this purpose. And there is no record to suggest now is the appropriate time for the safe harbor because the Bureaus did not seek comment to develop a record.

occur in 2016 and is aspirational for next year's report and for the foreseeable future. Thus, there is no way to meet the safe harbor the Bureaus have purported to establish.

Moreover, the protections of the safe harbor may *never* be available to non-nationwide carriers. For those providers that do not fall under the small business exemption, the mobile MBA program might never collect enough data at the CMA level. Indeed, the MBA program is not even expected to publish performance data in at least 200 rural CMAs.

The Bureaus' failure to seek public comment leads to a host of other unanswered problems with the selection of the mobile MBA as the exclusive mechanism for the safe harbor. The upcoming mobile MBA report will only utilize scheduled 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. Using data from only a subset of devices that consumers actually use drives home why the *Public Notice's* imposition of actual and expected speed disclosures is so flawed. Given that types of devices are one variable affecting network performance, restricting test results to Android devices will not provide an accurate picture of that performance that all consumers experience. This skewed, incomplete data underscores why the Commission should not dictate use of the mobile MBA framework.

Another problem is that the safe harbor is structured to drive mobile carriers to urge their customers to use mobile MBA – the FCC's crowdsourced Speed Test app. But consumers already have access to many robust speed test app tools with far greater participation than the MBA program. For example, Ookla, which the Commission has acknowledged as "one of the

most prominent providers of crowdsourced data,”⁴¹ offers a mobile app that is designed to accurately test the performance of mobile connections, including LTE, 4G, 3G, EDGE, and EVDO networks.⁴² OpenSignal also gathers crowdsourced data from millions of iPhones and Android devices through its app, which it notes is “the world’s most popular network measuring app.”⁴³ Other speed test tools and resources that are valuable to consumers include RootMetrics, Google M-Lab, and CalSPEED, among others. The Bureaus do not explain why MBA data is superior to other, commercially available data such that it qualifies as the only data source for the safe harbor.

Mobile providers also have access to and often pay for third-party data sets that are far more robust than the MBA program, such as OpenSignal, RootMetrics, Sensorly, Mosaik, Ookla Speedtest.net, and Nielsen. Nevertheless, mobile providers may not be able to take advantage of the safe harbor unless they pay a six-figure fee to obtain the mobile MBA data, from the FCC’s chosen vendor and assess its contents for accuracy prior to release, which raises troubling questions about the propriety of establishing a “pay for play” safe harbor rule. Yet the *Public Notice* supplies no facts as to why the mobile MBA data is more accurate. For the Commission to attempt to compete with the highly competitive market for wireless testing is questionable. But for it to dictate that carriers must use its chosen option to qualify for the safe harbor – absent any reasoning in support – is arbitrary and capricious. By failing to put forward any proposal for the mobile safe harbor in advance, the Commission has missed a critical opportunity to craft an

⁴¹ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Eighteenth Report, 30 FCC Rcd 14515 ¶ 128 (2015).

⁴² See Ookla Speedtest Mobile Apps, Ookla, <http://www.speedtest.net/mobile/> (last visited June 11, 2016).

⁴³ OpenSignal, “Millions of devices connecting billions of data points,” <https://opensignal.com/methodology/> (last visited June 11, 2016).

effective safe harbor that shelters mobile broadband providers from liability when they act in conformance with the transparency rule.

Many other questions remain. For instance, how often will MBA data be updated and would a provider's disclosure need to be updated at the same time? It is also difficult to comprehend fully what the Bureaus mean in describing how mobile broadband providers are expected to implement the safe harbor, given the disparities in data available on a CMA-by-CMA basis. To illustrate this 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.⁴⁴

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.

⁴⁴ *Public Notice* at 6 (footnotes omitted).

IV. CONCLUSION.

For the foregoing reasons, the Commission should grant the Application for Review, rescind those aspects of the Bureaus' guidance identified above, and seek public comment to ensure APA compliance *and* good, workable rules.

Respectfully submitted,

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