HWG | HARRIS, WILTSHIRE & GRANNIS LLP

September 21, 2016

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Protecting and Promoting the Open Internet*, GN Docket No. 14-28

Dear Ms. Dortch:

On September 19, 2016, Joby Fortson and Tom Jenkins of Nielsen Holdings plc ("Nielsen"), and Elizabeth Uzelac and I from Harris, Wiltshire & Grannis met with Jon Wilkins, Chief of the Wireless Telecommunications Bureau, Joel Taubenblatt, Deputy Chief of the Bureau, and Paroma Sanyal, Chief Economist of the Bureau. Mr. Jenkins participated in the meeting by telephone.

We explained why the Commission should pause the implementation of the mobile safe harbor[1] to open a brief comment window on the standards that should govern the designation of safe harbors. While safe harbors provide certainty and clarity to providers, the mobile Measuring Broadband America ("MBA") program may not be capable of providing the robust disclosures that the *2015 Open Internet Order* requires and that consumers and edge providers deserve.[2] As we discussed in the attached presentation, Nielsen's program employs multiple techniques to measure mobile performance.[3] Nielsen's customers span the mobile ecosystem, including mobile broadband carriers, tower companies, equipment manufacturers, app providers and others—all of which use Nielsen because of their confidence in the quality of Nielsen's data. Notwithstanding the availability of robust measurement capabilities in the commercial marketplace, carriers may feel compelled to use the mobile MBA program as the basis of their

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1 *See Guidance on Open Internet Transparency Rule Requirements*, Public Notice, DA 15-569, 31 FCC Rcd. 5330 (Chief Tech., Off. of Gen. Couns., Enf't Bur. 2016) ("*2016 Guidance*"). CTIA and CCA have filed Applications for Review of the Guidance.

2 *See* Comments of Nielsen, GN Docket No. 14-28 (filed July 5, 2016); Attachment A to Letter from Scott Blake Harris, Counsel to Nielsen, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Sept. 14, 2016) ("Nielsen Sept. 14, 2016 Letter").

3 *See also* Attachment to Letter from Julie A. Veach, Counsel to Nielsen, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 14-28 (filed Aug. 5, 2016).

required disclosures—despite the flaws the record reflects—to avoid the risk of severe enforcement action.[4]

Nielsen recognizes in particular the challenges of smaller providers, which may be the providers that are least able to take advantage of the current safe harbor.[5] Nielsen already measures network performance outside of core urban areas and could further develop its program to ensure statistically sound measurement of the performance of smaller providers. A brief comment process would allow the Commission to develop standards that Nielsen and other qualified firms could meet that would reflect the network performance of a wider array of providers.

Should you have any questions, please communicate with me at (202) 730-1311 or jveach@hwglaw.com.

Sincerely,

Julie A. Veach
Counsel to Nielsen Holdings plc

cc: Jon Wilkins
Joel Taubenblatt
Paroma Sanyal

Attachments

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[4] *See* Application for Review of Competitive Carriers Association at 9, GN Docket No. 14-28 (filed June 20, 2016) ("CCA Application"); Application for Review of CTIA at 9, GN Docket No. 14-28 (filed June 20, 2016).

[5] *See* Nielsen Sept. 14, 2016 Letter at 2 (citing CCA Application at 14-16).

Attachment A

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September 12, 2016

VIA ELECTRONIC MAIL

Nicholas A. Fraser
The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503
via email: Nicholas_A._Fraser@omb.eop.gov

Cathy Williams
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
via email: PRA@fcc.gov, Cathy.Williams@fcc.gov

Re: OMB Control No. 3060-1158; FCC GN Docket No. 14-28

Nielsen Holdings plc ("Nielsen") hereby comments on the request submitted by the Federal Communications Commission ("FCC" or "Commission") for Office of Management and Budget ("OMB") approval, under the Paperwork Reduction Act ("PRA"),[1] of the regulations pending under the above control number.[2]

INTRODUCTION AND SUMMARY

The FCC seeks approval for the new, enhanced transparency rules adopted in the *2015 Open Internet Order*,[3] as expanded in its staff-level *2016 Guidance*.[4] The FCC adopted these disclosure requirements to "better enable end-user consumers to make informed choices about

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1 44 U.S.C. § 3501 *et seq.*

2 *See* Information Collection Being Submitted for Review and Approval to the Office of Management and Budget, Public Notice, 81 Fed. Reg. 53,145 (Aug. 11, 2016) ("August Request for Approval").

3 *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24, 30 FCC Rcd. 5601 (2015) ("*2015 Open Internet Order*"), *aff'd sub nom. U.S. Telecom. Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

4 *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, DA 16-569, 31 FCC Rcd. 5330 (Chief Technologist, Office of Gen. Counsel & Enf't Bur. 2016) ("*2016 Guidance*"), *applications for review pending*.

broadband services" and "provide edge providers with the information necessary to develop new content, applications, services, and devices that promote the virtuous cycle of investment and innovation."[5] Specifically, the enhanced transparency rules require mobile providers of broadband Internet access service to disclose their actual network performance in terms of speed, latency, and packet loss; per Cellular Market Area ("CMA"); reflecting average performance as well as performance during times of peak usage; and reported by network technology (e.g, 3G, 4G).[6]

As a leading national firm specializing in gathering and analyzing data in a variety of market sectors, Nielsen fully appreciates and supports the Commission's goals—accurate data, well presented, improves public and private decisions. Unfortunately, the Commission has misstepped in its implementation of its laudable goals. After becoming aware of the potential burdens of the required disclosures for mobile providers, the Commission designated its own mobile Measuring Broadband America ("MBA") program—an immature and one-dimensional mobile data collection program being developed by FCC vendor SamKnows—as the lone "safe harbor" for disclosure of actual mobile network performance.[7] While use of the safe harbor is technically voluntary, the mobile industry has stated on the record that providers have no practical option but to use the safe harbor if they qualify.[8]

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5 *2015 Open Internet Order*, 30 FCC Rcd. at 5672 ¶ 162.

6 *Id.* at 5673-74 ¶ 166; *2016 Guidance*, 31 FCC Rcd. at 5334, 5336. Mobile providers not using the safe harbor described below may aggregate performance across CMAs with population density of less than 250 persons per square mile.

7 *See 2016 Guidance*, 31 FCC Rcd. at 5335.

8 *See* Application for Review of CTIA at 2, 7-9, GN Docket No. 14-28 (filed June 20, 2016) ("CTIA Application") ("Given the magnitude of the risks facing broadband providers, the inventive 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."); *see also* Application for Review of Competitive Carriers Association at 9, GN Docket No. 14-28 (filed June 20, 2016) ("CCA Application") ("The potentially crippling nature of

By steering mobile broadband providers to its own project (without comment, discussion, or analysis), the FCC has failed to satisfy its obligations under the PRA. The FCC has failed to show that the data have "practical utility"; there is no evidence that the mobile MBA program meets the Commission's data quality standards or produces accurate, reliable data that can be used to help consumers make informed choices about broadband services and assist edge providers in developing new services and applications. Nor has the FCC shown how its sole safe harbor will reduce burdens on the industry. It is unclear which providers will ultimately meet the necessary thresholds to rely on the MBA as a safe harbor, and the record reflects concerns that mobile providers will have to pay for timely access to their data. Nor has the FCC demonstrated that it considered meaningful alternatives to designating a single, unready safe harbor. Because the imposition of the enhanced transparency rule in conjunction with this imprudent safe harbor designation violates the PRA, OMB should disapprove the proposed collection insofar as it designates SamKnows and the mobile MBA program as the sole safe harbor for compliance with mobile disclosures.

I. BACKGROUND

A. The FCC's Enhanced Transparency Rules and Safe Harbor

In 2010, the FCC adopted a transparency rule requiring broadband Internet access service providers accurately to disclose certain aspects of their network performance.[9] These disclosures were to be "sufficient for consumers to make informed choices regarding use of such services

enforcement actions has resulted in BIAS providers treating any safe harbor as, essentially, *de facto* compliance requirements.").

[9] *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, FCC 10-201, 25 FCC Rcd. 17,905, 17,937 ¶ 54 (2010) ("*2010 Open Internet Order*"), *vacated in part sub nom. Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[10] In the *2015 Open Internet Order*, the Commission expanded this transparency rule to require mobile broadband providers to disclose actual network performance metrics based on reliable data.[11] The disclosure must also be tied to a geographic area by being "reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing service."[12]

Commenters responded to the Commission's 2015 PRA notice[13] regarding the enhanced rule by criticizing the FCC for, among other things, prematurely imposing new requirements on mobile providers before establishing a safe harbor capable of alleviating the burdens of disclosure.[14] On May 19, 2016, with no opportunity for public comment, FCC staff issued a Public Notice further detailing the transparency rules and designating its own vendor's program as the sole safe harbor for disclosing actual mobile network performance.[15] Now, in seeking approval from OMB, the Commission points to this safe harbor as a panacea for the problems identified in the original PRA comments.[16]

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[10] *Id.*; 47 C.F.R. § 8.3.

[11] *2015 Open Internet Order*, 30 FCC Rcd. at 5673-74 ¶ 166.

[12] *Id.*

[13] *See* Information Collection Being Reviewed by the Federal Communications Commission, 80 Fed. Reg. 29,000 (May 20, 2015).

[14] *See* Comments of CTIA – The Wireless Association on Proposed Information Collection Requirements at 13, GN Docket No. 14-28, OMB Control No. 3060-1158 (filed July 20, 2015); Comments of Mobile Future at 6-7, GN Docket No. 14-28, OMB Control No. 3060-1158 (filed July 20, 2015); Paperwork Reduction Act Comments of AT&T at 5, 16, 29-30, GN Docket No. 14-28, OMB Control No. 3060-1158 (filed July 20, 2015).

[15] *2016 Guidance*, 31 FCC Rcd. at 5335.

[16] *See* Supporting Statement OMB 3060-1158 OI (2016) (final) at 6, 9-12 (filed Aug. 10, 2016) ("Supporting Statement"), http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201608-3060-005.

The FCC concedes that the SamKnows program will not be a viable safe harbor for all carriers subject to the enhanced transparency rule.[17] It is available as a safe harbor only if "the results satisfy [specified] sample size criteria" and the "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."[18] How many or which providers will ultimately be able to satisfy these requirements is unknown (as are the "policies regarding sufficient national and CMA sample sizes").[19] Even as the program is under development, carriers have reported having had trouble convincing the Commission to share useful information about it.[20]

B. The OMB and the Paperwork Reduction Act

The purpose of the PRA is to "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government."[21] As it is applies here, the PRA covers "requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format," imposing reporting requirements on ten or more persons.[22] Under the PRA, agencies must justify the need for an information collection and certify that the collection

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[17] *Id*. at 9 & n.38 (noting that the mobile MBA program may be used as a safe harbor only in certain circumstances); *id.* at 10, 12 ("[N]ot all mobile broadband providers will be able to take advantage of the mobile MBA safe harbor immediately.").

[18] *2016 Guidance*, 31 FCC Rcd. at 5335.

[19] *Id.* at n.45.

[20] *See* Letter from Krista Witanowski, CTIA, and Elizabeth Barket, CCA, to Marlene H. Dortch, Secretary, FCC, at 4, GN Docket Nos. 14-28 and 12-264, WT Docket No. 16-137 (filed Aug. 10, 2016) ("CTIA/CCA Ex Parte").

[21] 44 U.S.C. § 3501(2).

[22] 44 U.S.C. § 3502(3).

reduces to the extent practicable and appropriate the burden on persons who shall provide information.[23]

The Director of OMB must then independently assess and determine "whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility."[24] OMB regulations require that the practical utility of a collection be "actual," not "merely the theoretical or potential," "taking into account its accuracy, validity, adequacy, and reliability."[25] OMB must also take into account "a person's ability to receive and process that which is disclosed . . . in a useful and timely fashion."[26] In other words, an agency cannot impose the burdens of public disclosure for its own purposes without demonstrating a real need for doing so and showing that the proposed method of collection will actually have utility in serving that need.

II. ARGUMENT

The Commission has not complied with the PRA in designating the mobile MBA as the sole safe harbor for its mobile performance disclosures. The Commission's Supporting Statement makes no showing of practical utility when the enhanced transparency rule is adopted in conjunction with an untested, flawed safe harbor. The Commission also fails to adequately assess how its safe harbor designation affects the burden imposed by the information collection. Had the Commission sought comment before designating this or any safe harbor, it would have

[23] *See* 44 U.S.C. § 3506(c); 5 C.F.R. § 1320.9.

[24] 44 U.S.C. § 3508.

[25] 5 C.F.R. § 1320.3(l).

[26] *Id*.

been in a position to consider meaningful alternatives. Its incomplete "justification" is no justification at all—the Commission has not met its PRA burden.

A. Designating the SamKnows Program As the Sole Safe Harbor Undermines the Practical Utility of the Mobile Transparency Disclosures.

The commercial market for mobile network performance measurement products is increasingly robust, shaped by the forces of competition. In contrast, the FCC's SamKnows program is in its infancy. Its utility is unknown, and real questions exist as to whether it is an appropriate tool for meeting the FCC's own stated goals for its mobile performance disclosure requirements.

1. Unlike Existing Commercial Alternatives, the SamKnows Program May Not Be Useful.

The FCC has failed to show that the SamKnows mobile MBA program will have the utility that the PRA requires. Nor could it make such a showing: the program is too immature.

The first SamKnows mobile MBA program report has not been issued. The adequacy of the mobile program's eventual results—the timing of which is still a mystery—are unknown. With critical information about the program unavailable, it is premature for the FCC or anyone else to say that the program will produce information "sufficient for consumers to make informed choices" about mobile broadband services or for "content, application, service, and device providers to develop, market, and maintain Internet offerings" based on the information disclosed.[27]

In contrast, commercial mobile measurement products are available and have been fine-tuned by competitive forces. Nielsen is a market leader in measuring mobile network

[27] *2010 Open Internet Order*, 25 FCC Rcd. at 17,937 ¶ 54; 47 C.F.R. § 8.3.

performance. For more than fifteen years, Nielsen (and its predecessor) has measured mobile network performance through rigorous drive tests, engineered to scientifically assess network performance with an eye toward the consumer experience.[28] Nielsen complements its drive tests with testing data from more than 50,000 consumer devices, showing network performance based on the consumer's actual location and usage.[29] Nielsen is now rolling out a third testing modality to assess standardized tests from panelists' devices.[30] Nielsen is just one competitor in a crowded and active market.[31]

Given the robustness of the data available from more experienced third parties, it is a mystery why the Commission would—without analysis, comment, or discussion—designate its own vendor's program as the sole safe harbor.[32] Doing so does a disservice to consumer welfare by encouraging providers to report based on an untested solution with "merely . . . theoretical or potential" utility. Meanwhile, better solutions are not only available but are already in use.

2. The Commission Has Not Established That the SamKnows Program Will Enhance Data Quality or Utility.

Accurate, reliable data are critical to the utility of the enhanced transparency rule. Unfortunately, the SamKnows mobile MBA program is not up to the task. Limitations in the

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[28] *See* Attachment to Letter from Julie A. Veach, Counsel to Nielsen Holdings plc to Marlene H. Dortch, Secretary, FCC, at 4, GN Docket No. 14-28 (filed Aug. 5, 2016) ("Nielsen Aug. 5 Ex Parte").

[29] *Id*. at 7.

[30] *Id*. at 3.

[31] Other data sets are available from Mosaik, RootMetrics, and P3, with still more speed testing tools available from Google, M-Lab, and CalSPEED. *See* CTIA/CCA Ex Parte at 3-4.

[32] *Cf*. Comments of CTIA at 29-30, GN Docket No. 16-245 (filed Sep. 6, 2016) (noting that the FCC speed test app "pales in comparison to other more popular third-party applications" and has lower utilization by consumers).

program increase the risk that its results will be incomplete, biased, or unreliable—and thus not objective or accurate.

Numerous parties have articulated substantive and procedural flaws that will result in the SamKnows mobile MBA program producing reports that simply will not be useful.[33] CTIA and CCA described four primary problems affecting most aspects of the program: limited breadth and poor quality of data, redundancy with more robust third-party programs, lack of available information about the collection and filtering methods that will be used to prepare the data, and lack of a review process that would enable carriers to evaluate the data and ensure its accuracy.[34] Relying on the flawed SamKnows program could lead to the opposite result than the FCC intended when it promulgated the mobile performance disclosure rule—consumers could be presented with misleading or inaccurate information.[35]

Nielsen agrees that "the MBA data suffers from serious flaws that promise confusing, inaccurate and inconsistent information about wireless network performance."[36] For instance, the "all-volunteer pool of SamKnows app users" is troubling.[37] The program's reliance on self-selected volunteers undermines the quality of the data produced by the program.[38] These

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[33] *See* CTIA/CCA Ex Parte at 1-2.

[34] *Id.* at 1.

[35] *See* Comments of Nielsen at 5-6, GN Docket No. 14-28 (filed July 5, 2016) ("Nielsen Comments") (noting the concern about "whether the established safe harbor will inadvertently result in consumers not having the best available information"); Letter from Bryan Darr, President and CEO, Mosaik, to Marlene H. Dortch, Secretary, FCC, at 3, GN Docket No. 14-28 (filed July 15, 2016) ("Mosaik July 15 Ex Parte") ("Relying on a single source of data – especially when that data source suffers from serious flaws – introduces a high likelihood of misleading information that will not accurately represent actual network performance."); *id.* at 5 ("[T]he FCC's attempt at greater transparency could perversely lead to consumers having access to less current and less accurate information about wireless carriers' network performance than they enjoy today.").

[36] Mosaik July 15 Ex Parte at 2.

[37] *Id.* at 3 (noting that such a pool of users "is unlikely to be representative of the population").

[38] *See* Comments of Rootmetrics at 3, GN Docket No. 14-28 (filed June 27, 2016).

volunteers must all independently know about and be willing and able to download the FCC Speed Test App for themselves. This "self-selected panel" "is not and is not intended to be representative of the general population of wireless consumers."[39] In contrast, Nielsen's panelists are recruited with an eye toward representative demographics. Nielsen is uniquely positioned to leverage its considerable expertise in media markets in this endeavor.

Data generated by the SamKnows program is not likely to accurately reflect actual performance of the network because it does not use multiple, sound research methods.[40] First, the program does not "aggregat[e] the results from multiple collection methodologies and data sources," which would allow for each data source to "act[] as a check on the accuracy of the other sources" and "help[] identify inconsistencies and discrepancies."[41] Second, the program relies heavily on pre-scheduled, defined tests that transmit files of pre-defined sizes, rather than assessing how, when, and where consumers actually use their mobile devices. While these can have utility, they are also susceptible to influences by carriers and can be disabled by the MBA program's participants. To the extent the MBA program relies on user-initiated tests, the results can be skewed towards situations in which the user is experiencing a problem, such as deep within a building.[42] Passive testing, as Nielsen employs as one of its multiple testing modalities,

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[39] *Id.*

[40] *See Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554*, Notice of Information Quality Guidelines, FCC 02-277, 17 FCC Rcd. 19,890, App. A (2002) ("FCC Information Quality Guidelines") (requiring Commission-sponsored public information distribution to use data generated using sound statistical and research methods).

[41] Mosaik July 15 Ex Parte at 3; *see also* Comments of United States Cellular Corporation at 11-14, GN Docket No. 16-245 (filed Sep. 6, 2016) (noting the benefits of alternative data sources).

[42] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act,* Twelfth Broadband Progress Notice of Inquiry, FCC 16-100, 2016 WL 4158734 at *22 ¶ 70 n.158 (FCC 2016)

is a key component to reporting the network experience of real world consumer usage. Such passive measurement occurs at all times in all locations, measuring network performance with a variety of applications used, file sizes transferred, and network technologies in use.[43]

Adopted as it is now, the SamKnows mobile MBA program thus risks undermining the transparency rule. The Commission effectively asks OMB to approve a "government-endorsed benchmark" that is "defective and distorted."[44] Not only does this fail to meet the requirements of the PRA, it will also interfere with the Commission's responsibility to ensure that the quality of information that it disseminates meets the Commission's information quality standards.[45]

B. The Commission Has Not Shown That the Safe Harbor Will Reduce Burdens for Most Providers.

Safe harbors can be valuable tools to increase certainty and aid regulated entities in meeting their compliance obligations. Even so, considered execution of the selection and adoption of those safe harbors matters. The Commission's assertion that the current safe harbor will alleviate many burdens imposed by the enhanced transparency rule is not specific, objective, or complete. The Commission fails to account for many factors suggesting that this particular collection is needlessly burdensome. These factors include the effectively involuntary nature of the safe harbor, the lack of certainty surrounding the results of this particular program, and the suggestions that providers will make duplicate expenditures to obtain similar but more accurate information from other providers in addition to timely accessing SamKnows data.

(conceding that "manual testing can lead to biased results . . . and may provide a less accurate picture of overall broadband performance").

43 *See* Nielsen Aug. 5 Ex Parte.

44 Mosaik July 15 Ex Parte at 5.

45 *See* FCC Information Quality Guidelines, *supra* n.40.

The objections raised by so many demonstrate that participation in the SamKnows mobile MBA program is seen by providers as voluntary in name only. As CTIA has pointed out, "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."[46] "[E]very safe harbor has at least some substantive impact," the extent of which "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."[47] In the context of Open Internet transparency violations, that risk is quite high—recent enforcement actions have proposed record-breaking liability.[48] Thus, in order to obtain some protection, mobile providers will be compelled to participate in the mobile MBA program no matter that the safe harbor is technically voluntary.

Even if a mobile provider participates in the mobile MBA program, the illusory nature of the current program means that participation will provide no certainty. A provider must still eventually obtain results that exceed certain sampling thresholds and that are reported at the level of CMA in order to benefit from safe harbor protection.[49] As the Competitive Carriers Association has noted, it is "unclear if and when the Commission will, or can, improve the data set to include the coverage areas of all providers subject to the transparency disclosure

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[46] CTIA Application at 9; *see also* CCA Application at 9.

[47] *Renal Physicians Ass'n v. U.S. Dep't of Health & Human Servs.*, 489 F.3d 1267, 1273 (D.C. Cir. 2007); *see also* CTIA Application for Review at 8.

[48] *See AT&T Mobility, LLC*, Notice of Apparent Liability for Forfeiture and Order, FCC 15-63, 30 FCC Rcd. 6613 (2015) (proposing a forfeiture of $100,000,000 for alleged violations of the transparency rule).

[49] *See 2016 Guidance*, 31 FCC Rcd. 5335 (requiring, for a provider to rely on the mobile MBA program as a safe harbor, that "the results satisfy [specified] sample size criteria" and "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").

requirements."[50] CTIA observed that "the protections of the safe harbor may *never* be available to non-nationwide carriers."[51]

Even if the mobile MBA results are sufficient for a given provider, providers may still face duplicative expenditures to obtain contemporaneous data and a risk of inconsistent results. Many or most providers already use the services of a third party to monitor their own network performance. Given the significant questions that remain about the development, reach, and quality of the mobile MBA program, these trusted third-party measurement tools will not likely be displaced. The purchase of timely access to additional data from the mobile MBA program is thus wasteful at best.[52] It is also potentially harmful to consumers and the marketplace to the extent that the program produces different performance results than shown by more robust and statistically sound third-party services.

C. The Commission Failed to Consider Alternatives That Would Improve the Data Quality and Utility of the Enhanced Transparency Rule.

The Commission acknowledges that the mobile MBA program is not robust, while ignoring that alternative measurement products could more effectively fulfill the objectives of the transparency rule.[53] Nielsen and others have suggested that the Commission should seek comment before establishing its own program, developed by its chosen vendor, as the sole safe

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[50] CCA Application at 14; *see also* CTIA Application at 12 ("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 occur in 2016 and is aspirational for next year's report and for the foreseeable future.").

[51] CTIA Application at 13; *see also* CCA Application at 16 ("Essentially refusing to provide a safe harbor to all but the largest providers is an anticompetitive practice that should not be accepted by the Commission, especially at a time of increasing industry consolidation and diminishing spectrum resources.").

[52] *See* CTIA Application at 14.

[53] Supporting Statement at 9 (acknowledging the need to "transition to a more robust mobile MBA program" and explaining that some of its increased burden estimates account for the current lack of robustness in the mobile MBA program).

harbor, and that the Commission should consider the use of other qualified providers as safe harbors after an appropriate vetting process.[54] The Commission has not responded to these requests or suggested that it considered any alternatives whatsoever.

Instead, the Commission places its imprimatur on a single vendor, denying others the opportunity to fulfill the same functions while failing to justify its choice. As Mosaik has pointed out, this flies in the face of OMB policy favoring reliance on the private sector for commercial services and threatens private-sector investment.[55] The Commission appears to be using the safe harbor "to coerce parties toward a substantive result the agency prefers"—increased participation in its chosen vendor's program—and is thus "making substantive law" without the benefit of public comment or having considered alternatives.[56]

CONCLUSION

OMB should not give its stamp of approval to the FCC picking winners and losers in the marketplace for mobile measurement. The Commission's actions mean that providers will be compelled to use MBA data for their disclosures, given the dramatic risk of enforcement liability. Yet that product is neither sound nor useful. The Commission is distorting the private marketplace by endorsing its own single, inexperienced vendor without considering whether other qualified firms could better effectuate the rule. Because this violates the PRA, OMB should disallow the designation of the mobile MBA program as a safe harbor until the Commission has sought comment, evaluated alternatives, and met its obligations under the PRA.

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[54] *See* CTIA Application at 12-16; CCA Application at 8-9; Mosaik July 15 Ex Parte at 1; Nielsen Comments at 5-6.

[55] *See* Mosaik July 15 Ex Parte at 4-5 (citing Office of Management and Budget, Circular A-76, *Performance Activities* (May 29, 2003), https://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction).

[56] *Renal Physicians Ass'n*, 489 F.3d at 1273.

Respectfully submitted,

Joseph Fortson
Thomas Jenkins
NIELSEN HOLDINGS PLC
1250 23rd Street NW
Washington, DC 20037

Scott Blake Harris
Julie A. Veach
Elizabeth B. Uzelac*
HARRIS, WILTSHIRE & GRANNIS LLP
1919 M Street NW, 8th Floor
Washington, DC 20036

Counsel for Nielsen Holdings plc

**Admitted only in California; Supervision by Patrick O'Donnell, a member of the D.C. bar*

September 12, 2016

Attachment B

4 WAYS TO MEASURE MOBILE

3 USED BY NIELSEN TODAY

Active/Scripted Testing

User or Testing company actively tests the network. Performs predefined tasks.

Upload/Download/Voice Calls – Attempt to simulate consumer behavior and mobile experience. Fixed file sizes, types of files and test scripts.

Drive Test

Advantages:
Voice and data
Identical tests
Ultra-detailed metrics
Controlled/repeated area

Disadvantages:
2x to 3x per year
Limited scripts/tests
1 device per operator
Limited time of day
Limited locations
Limited operators

User Activated

CLICK: Begin Test Now

Advantages:
Anywhere user desires
Anytime desired
Multiple devices

Disadvantages
Large file sizes (data use)
No/limited app results
No voice results
Low quantity of results
Operators can identify

Background Activated

Automatically Test Periodically

Advantages:
Collects everywhere
Collects anytime
Controlled tests (same)
Multiple devices

Disadvantages
Med/large files (data use)
No/limited app results
No voice results
Operators can identify

Passive/Unscripted Testing

Results are based on what consumers do on their own for all calls, data uploads/downloads, wifi connections, and apps.

No scripts used. Only real results from actual consumers.

Consumer Uses Device Normally

Advantages:
Actual consumer experience
Collection 24x7 (billions of points)
All applications collected
Speed/throughput
Voice collection (inc. VoLTE)
Coverage
Collects everywhere/location
Multiple devices
Minimal extra data use
All operators
Operators can't identify

Disadvantages
No controlled tests
Tests not standardized
Less detailed metrics

OVERVIEW-NIELSEN DRIVE TEST

How does Nielsen measure mobile broadband performance and experience?
Drive Test

Drive Test – Active/Scripted Testing

- More than 15 years of Drive Test Expertise
- Viewed as the market leader and largest provider of Drive Test results to Mobile Operators
- 199 Markets (MSAs) – The largest program in the US
  - Top 125 Markets 3x per year
  - Covering 225M pops
  - 220,000 miles collected/reported per drive (over 1.5M miles driven)
- Collection/Results
  - Voice (Circuit and VoLTE)
  - Data (Uploads and Downloads, Speed, Reliability, 2G/3G/4G technology, Coverage)
  - Detailed metrics including Network Engineering level of detail

OVERVIEW-NIELSEN DRIVE TEST

Fleet of custom-outfitted drive test vehicles.

The latest devices used to test mobile voice and data networks across the US.

Large operations team supporting the program monitoring results and performing rigorous Quality Control throughout testing.