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December 16, 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 December 13, 2016, Joby Fortson of Nielsen Holdings plc ("Nielsen") and I met with Nick Degani of the Office of Commissioner Pai. We discussed the attached document and stated that the mobile Measuring Broadband America program should not be used as a safe harbor for reporting mobile network performance.

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: Nick Degani

PROPOSED CRITERIA TO QUALIFY TESTING COMPANIES AS SAFE HARBORS FOR MOBILE NETWORK PERFORMANCE REPORTING

Data Collection Parameters

For a carrier to rely on a testing company's data as a safe harbor, the testing company's data must be measured using adequate methodologies and test subjects to ensure accurate reflection of current mobile network performance conditions across the potential consumer base.

- *Method of Data Collection.* Data should be collected automatically (without user intervention) via active testing in the background or on a passive basis based on actual consumer usage, and should reflect network performance at all times of day on all days. Any data collected in response to a user-initiated request must be randomized or otherwise controlled in a statistically valid way to minimize bias in the data with regard to locations and times of day that are not reflective of typical performance. Atypical results may be reported at both ends of the spectrum, unusually poor coverage and performance, or unusually good coverage and performance. Both extremes must be controlled.

- *Minimum Period of Data Collection.* For a carrier to rely on a testing company's data as a safe harbor, the testing company's data must disclose performance based on results collected over a minimum period of thirty days.

- *Recency of Data Collection.* The population density of the relevant market should determine how recently a testing company's data must have been collected in order for a carrier to rely on it as a safe harbor. If the relevant market is defined at the level of the Cellular Market Area ("CMA"), a carrier should not be permitted to rely on any data more than 180 days after collection if the relevant CMA(s) have a population density at or above 250 people per square mile. If the relevant CMA(s) have a population density below 250 people per square mile, a carrier may be permitted to rely on data up to 240 days after collection. [Carriers with fewer than 100,000 subscribers, if not exempt from making disclosures, may be permitted to rely on data up to 365 days after collection.]

- *Selection of Test Subjects.* To qualify as a safe harbor, a testing company must manage the selection and recruitment of consumers from whose devices data will be collected. The pool of consumers selected must represent a cross-section of consumers in terms of age, gender, income level, and other factors.

Data Quality

A safe harbor testing program must ensure the disclosure of accurate, reliable data. To qualify as a safe harbor, a testing company should be required to meet certain criteria to ensure the quality of any disclosures based on that testing company's data.

- *Statistically Valid Sample Sizes.* For a carrier to rely on a testing company's data as a safe harbor, the testing company's data must reflect statistically valid sample sizes for the particular carrier in the relevant market (whether that relevant market is defined at the

level of the CMA, zip code, on a national or footprint basis, or another level of granularity).

- *Quality Control.* Testing companies must certify that they have and follow written quality control processes for collecting and analyzing data. Illustrative examples of issues that such quality control processes should address include: removing results that are outside technical possibilities (e.g., speeds above or below certain levels), removing results or devices that are severe outliers for the carrier in a CMA, and preventing a single device or single panelist's results having a disproportionate impact on results. As necessary, such quality control processes could be disclosed to the Commission under appropriate confidentiality protections.

- *Validation of Results by Device.* Testing companies must ensure that their tools and processes accurately gather and process the data generated by all makes and models of devices that are included in the testing process. This must be done by verifying each make and model included in a company's reports is tested for accuracy and completeness of results.

- *Completeness.* To qualify as a safe harbor, a testing company must be able to act as a single source for network performance data by gathering and reporting to the carrier all performance metrics required by the Commission. To rely on a testing company's data, a carrier must use only the data provided by the testing company for its disclosures in any single market.

- *Peak Usage.* To qualify as a safe harbor, a testing company must report peak usage based on actual consumer use of the network during the window of peak usage, which must be determined by the testing company and not by carriers, and should be a period of no less than one and no more than eight hours per day. The "Peak Usage" time definition should be determined by observing actual consumer usage over a continuous 24-hour period, for a minimum of thirty days, for a demographically representative sample nationally. Peak usage definitions should be updated annually.

Device Parameters

The Commission should require testing companies to meet certain device-related standards to qualify as a safe harbor. Doing so would protect consumers by ensuring that current, available devices are reflected in a carrier's disclosures. It would also protect carriers by ensuring that a testing company's data reflect performance on the most recent consumer technology.

- *Currency of Devices.* To qualify as a safe harbor, a testing company's data must disclose performance based on results reported only from devices that have been launched within the past eighteen months and that have 4G LTE (or better) capability. The testing company must be able to detect the type of network technology being used by the device (e.g., 3G, LTE) and analyze data on a per-technology basis.

- *Ordinary Consumer Devices.* To qualify as a safe harbor, a testing company must collect data from devices that the carrier provides to consumers in the ordinary course of business, as opposed to "beta version" devices, samples provided for purposes of evaluating the device, or devices that are distributed for the purpose of testing.

Neutrality

A safe harbor must be insulated from any carrier influence and must treat carriers with neutrality.

- *No Prioritization or Other Special Treatment.* For a carrier to rely on a testing company's data as a safe harbor, the carrier must certify to the testing company and the Commission that the carrier has taken no action to affect the testing, the testing panelists or their devices, or the testing company's measurement tools or processes, including but not limited to network prioritization affecting the testing.

- *Independence.* To qualify as a safe harbor, a testing company may neither be affiliated with a carrier nor be subject to undue influence by any carrier in any context.

- *Testing Company Certification*. To qualify as a safe harbor, a testing company must certify to the Commission—before any carrier relies on its data as a safe harbor and every twelve months thereafter—that it is not affiliated with a carrier or subject to any undue influence by any carrier (whether or not the carrier relies on the testing company's data as a safe harbor). After making such a certification, any testing company that becomes aware that its certification is no longer valid or that any carrier's certification to the testing company is not valid shall promptly notify the Commission.