

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Protecting and Promoting the Open Internet)

) GN Docket No. 14-28
) OMB Control No. 3060-1158
)

ACCEPTED/FILED

JUL 20 2015

DO NOT FILE COPY ORIGINAL.

Federal Communications Commission
Office of the Secretary

**PAPERWORK REDUCTION ACT
COMMENTS OF AT&T**

James P. Young
Christopher T. Shenk
Jacqueline G. Cooper
Rishi P. Chhatwal
Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Christi Shewman
Christopher M. Heimann
Gary L. Phillips
David L. Lawson
AT&T Services, Inc.
1120 20th Street, N.W.
Washington, D.C. 20036
(202) 457-2055

Attorneys for AT&T

July 20, 2015

No. of Copies rec'd _____
List ABCDE _____

0+4

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY1

I. THE COMMISSION’S *PRA NOTICE* IS DEFICIENT AND IN ALL EVENTS GROSSLY UNDERESTIMATES THE BURDENS ASSOCIATED WITH THE PROPOSED INFORMATION COLLECTIONS.....7

 A. The *PRA Notice* Is Deficient Because It Fails To Identify The Information Collections For Which The Commission Is Seeking OMB Approval.....8

 B. The *PRA Notice* Is Deficient Because Its Burden Estimate Is Vastly Understated.15

 C. The Commission Should Issue A New *PRA Notice* And Adopt Clarifications of the *2015 Open Internet Order* that Reduce Some of the Largest Unnecessary Burdens.29

II. THE COMMISSION HAS NOT SOUGHT OMB APPROVAL OF ANY INFORMATION COLLECTIONS CONCERNING IMPLEMENTATION OF NEW POINT-OF-SALE REQUIREMENTS AND, THEREFORE, CANNOT LAWFULLY ENFORCE ANY SUCH REQUIREMENTS.31

 A. The Commission Should Clarify That It Did Not Intend To Change the Point-of-Sale Requirements.33

 B. If The Commission Did Intend To Modify The Point-of-sale rule, Such A Change Would Impose Enormous Burdens On The Industry That Could Not Be Justified Under The *PRA*.....35

CONCLUSION.....42

Before the
Federal Communications Commission
Washington, D.C. 20554

ACCEPTED/FILED

JUL 20 2015

Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Protecting and Promoting the Open Internet)
)
_____)

GN Docket No. 14-28
OMB Control No. 3060-1158

**PAPERWORK REDUCTION ACT
COMMENTS OF AT&T**

AT&T Inc. (“AT&T”), on behalf of itself and its affiliates, respectfully submits these comments responding to the Commission’s *Notice*¹ under the Paperwork Reduction Act (“PRA”)² relating to the *2015 Open Internet Order*.³

INTRODUCTION AND SUMMARY

The *2015 Open Internet Order* is one of the most sweepingly broad orders in Commission history. In a major section of that *Order*, the Commission adopted a host of new information collections as part of its “transparency” rules, requiring broadband providers to collect and report a wide variety of new data and metrics and modifying prior rules to require the reporting of data in new forms, in new geographic areas, and/or with greater frequency. It should be obvious that the adoption of so many new collections will require broadband providers to devote substantial resources to the collection of the relevant data, engaging the time of engineers, technical analysts, IT professionals, and outside vendors (such as companies that

¹ Information Collection Being Reviewed by the Federal Communications Commission, 80 Fed. Reg. 29000 (rel. May 20, 2015) (“*PRA Notice*”).

² 44 U.S.C. §§ 3501-20.

³ Report and Order on Remand, Declaratory Ruling, and Order, *In the Matter of Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (“*2015 Open Internet Order*”).

perform drive testing). To facilitate Office of Management and Budget (“OMB”) review of this broad new set of collections, therefore, one would have expected the Commission to issue a robust public notice for this initial round of comment, which would have – as the PRA and OMB’s implementing rules require – identified the collections for which the Commission is seeking approval, explained the Commission’s estimate of the burden for each collection, and, consistent with President Obama’s Executive Order 13563, included some analysis weighing the “benefits and costs, both quantitative and qualitative.”⁴

The actual notice falls astonishingly short of what is required. The Commission’s entire analysis consists only of its bottom-line, aggregate answers: “*Number of Respondents and Responses*: 3,188 respondents; 3,188 responses. *Estimated Time per Response*: 28.9 hours (average). . . . *Total Annual Burden*: 92,133 hours. *Total Annual Cost*: \$640,000.”⁵ These estimates are absurd on their face. With a total cost of \$640,000 and 3,188 respondents, the Commission is estimating that it will cost each company an average of \$200 – that is not a misprint – to comply with *all* of the 2015 *Open Internet Order*’s new collections. Moreover, given that the Commission estimates the collections will take 28.9 hours per company to complete, the Commission is assuming that the mythical engineers and other employees performing these tasks are being paid about \$6.95 per hour – well below the federal minimum wage. These estimates are so far below any range of plausibility that they cannot even be taken seriously as a legitimate PRA analysis. No reasonable OMB would approve these collections

⁴ Executive Order 13563, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), available at <https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review> (“Executive Order 13563”) (agencies must “use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.”). See also 44 U.S.C. § 3512; *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 29-31 (D.C. Cir. 1998) (without OMB approval, an agency’s data collection requests need not be followed).

⁵ PRA Notice at 29001.

based on such facially absurd burden estimates.⁶

The *PRA Notice* here is so legally deficient that interested parties have effectively been denied any meaningful opportunity to comment.⁷ The PRA and OMB’s implementing rules require the Commission’s public notice in this round to (1) identify the collections for which it is seeking approval; (2) estimate the burden imposed by *each* collection; and (3) justify the practical utility of the data collected.⁸ The Commission has not come close to satisfying any of these requirements. It has not specifically identified the collections for which it is seeking approval. The Commission is presumably seeking approval for collections adopted in certain paragraphs of the *2015 Open Internet Order* listed in the Federal Register publication of that order;⁹ but even if that is the case, the Commission has never defined the key terms in those collections or explained how it expects broadband providers to report the information, and those ambiguities are important because the burdens could vary dramatically depending on exactly what the collection entails. The Commission has not broken out what it believes the burden will be for each collection at issue; indeed, it has not even explained how it calculated the aggregate burden for all of the collections. And the *PRA Notice* is silent on the expected benefits of any of

⁶ See, e.g., Disposal of National Forest Timber – Timber Export and Substitution Restrictions, ICR Ref. No. 199508-0596-001 (Sept. 29, 1995) available at <http://www.reginfo.gov/public/do/DownloadNOA?requestID=121756> (rejecting PRA submission because agency “appears to have grossly underestimated the burden hours”).

⁷ Collection of Economic and Regulatory Impact Support Data under RCRA, ICR Ref. No. 199709-2050-001 (May 5, 1998) available at <http://www.reginfo.gov/public/do/DownloadNOA?requestID=28005> (rejecting PRA submissions where “the generality of the Agency’s description of the proposed collection is such that it would be difficult for a member of the public to provide meaningful comments on it”).

⁸ See Section I.A, *infra*.

⁹ Final Rule, *Protecting and Promoting the Open Internet*, 80 Fed. Reg. 19737, ¶ 584 (rel. Apr. 13, 2015) (“*2015 Final Rule*”) (“the modified information collection requirements in paragraphs 164, 166, 167, 169, 173, 174, 179, 180, and 181 of this document are not applicable until approved by the Office of Management and Budget (OMB)”).

these collections. With a public notice this devoid of content, interested parties have almost nothing on which to comment, and the Commission will not receive any useful feedback as it prepares its submissions to OMB.

In all events, the Commission’s \$200-per-provider estimate is obviously too low by far. Although the Commission has not defined the scope of the new collections well enough for anyone to make a reasonably precise estimate, the true cost to implement all of the *2015 Open Internet Order*’s new transparency rule collections will likely be millions, if not tens of millions, of dollars for AT&T alone, depending on how the new requirements are ultimately interpreted, and many times more for the industry as a whole. The enormous gulf between the Commission’s low-ball estimate and the true cost can be seen by examining the likely impact of only three new collections in the Network Performance category of disclosures: (1) the requirement to report all network performance metrics (speed, latency, and packet loss) on a more geographically granular basis; (2) the new requirement to report packet loss metrics; and (3) the requirement to report these metrics “during times of peak usage.” Even if the Commission construes these requirements in a way that minimizes their burdens, each one could cost AT&T more to implement than the Commission’s estimate of the industry-wide total – even though none of these three requirements will have any significant “practical utility” for consumers or edge providers.

For example, as explained in more detail below and in the Declaration of Dr. Fahmy,¹⁰ depending on how granular the Commission expects providers to report performance metrics, the costs to gather such metrics would range from substantial to astronomical. These millions of dollars of expenses are unnecessary, however, as consumers can already obtain far more

¹⁰ See Declaration of Dr. Hany Fahmy (July 20, 2015), attached hereto as Attachment A (“Fahmy Decl.”).

localized and real-time data for these metrics from third party sources. Similarly, AT&T's drive testing does not currently gather packet loss data and thus it would have to incur substantial costs to upgrade its current drive testing programs and devote additional engineering resources to analyzing and reporting the results. Consumers will not find such metrics useful, however, because such metrics depend on the specific end-points of the test and the methodology used by the tester, which means that such metrics would provide little information about the packet loss any particular customer will likely experience, nor will they facilitate apples-to-apples comparisons. A requirement to report metrics at times of peak usage will also require AT&T to devote substantial resources both to determine when such times occur (for mobility, peak times vary from residential districts, to business districts, to arenas, to airports, and so on) and then to perform the engineering analyses (and possibly increase drive testing at substantial expense, depending on how the requirements are defined). It will not be practical to take such measurements at the small geographic levels for which variations in peak usage exist, and taking such measurements for larger areas (*e.g.*, at the Cellular Market Area ("CMA") level) would mask any meaningful differences, making such measurements of little or no use to consumers or edge providers.

To comply with the statute and OMB regulations, the Commission must start over and issue a new notice that meets the requirements of the PRA. In addition, the Commission should take this opportunity, as it did with the 2010 transparency rules, to issue clarifications that would reduce clearly unnecessary industry burdens. Specifically, as explained below, the Commission should: (1) postpone any enforcement of the new collections as they relate to mobile wireless services until the planned Measuring Broadband America ("MBA") program for mobile services is in place and available as a safe harbor, to avoid forcing mobile providers to incur substantial

expenses implementing measures that may become moot or unnecessary; (2) clarify that the Commission will not require providers to report performance metrics for geographic areas smaller than a CMA for wireless services or smaller than a state for wireline services; (3) clarify that the new disclosure requirements do not apply to Wi-Fi; (4) clarify that disclosures relating to “non-Broadband Internet Access Services (“BIAS”) data services” may be reported by aggregating similar services; and (5) clarify that broadband providers will be given at least a year from approval to implement the systems necessary to comply with these new collections.

Finally, the Commission should clarify that it did not intend to change its “point of sale” rule in the *2015 Open Internet Order*. In 2011, the Enforcement Bureau issued a guidance document making clear that broadband providers could comply with the rule by directing prospective customers to a website link to the company’s disclosures at the point of sale.¹¹ In footnote 424 of the *2015 Open Internet Order*, however, in a passage purportedly restating existing law, the Commission unexpectedly announced that “[i]t is *not* sufficient for broadband providers simply to provide a link to their disclosures.”¹² This footnote thus could be read as a modification of the point-of-sale rule in the *2010 Open Internet Order*. If that is the Commission’s intent, the Commission cannot pass this change off as a mere clarification of existing law. If the rule has been modified to require broadband providers to make some or all of the full disclosures at the point of sale (rather than via a link to the website), such a change would impose substantial new burdens on broadband providers, forcing them to incur millions of

¹¹ Indeed, the Commission’s submission to OMB in 2011 made clear that “the *Open Internet Order* requires only that providers post disclosures on their websites, and direct consumers to such websites at the point of sale” – which reinforces that OMB never considered or approved any broader requirement. FCC Supporting Statement OMB 3060-1158, at 5 (September 7, 2011), *available* *at* <http://www.reginfo.gov/public/do/DownloadDocument?documentID=275090&version=1>.

¹² *2015 Open Internet Order* ¶ 171 n.424 (emphasis added).

dollars of new compliance costs. And given the absence of any justification whatsoever for such a change, such a new requirement could not possibly survive review under the PRA or the Administrative Procedure Act. Under the circumstances, the Commission should clarify that it did not change its prior holding that broadband providers may satisfy the point-of-sale requirement by providing customers with the link to their broadband disclosures. If the Commission wishes to revisit that requirement, it should do so in a lawful manner and seek comment on whether the existing rule is fulfilling its intended purpose as well as on the costs and benefits of alternative approaches.

I. THE COMMISSION'S *PRA NOTICE* IS DEFICIENT AND IN ALL EVENTS GROSSLY UNDERESTIMATES THE BURDENS ASSOCIATED WITH THE PROPOSED INFORMATION COLLECTIONS.

The *PRA Notice* is deficient and grossly underestimates the burdens that these new collections will impose on the industry. As shown below: (1) the *PRA Notice* does not meet the basic legal standards requiring an explanation of how the Commission calculated its burden estimates or the expected “practical utility” of the data collected, and thus risks rejection by OMB on that ground alone; (2) the actual estimate of the burden is absurdly low, as can be shown simply by looking at the cost to implement merely a subset of the new Network Performance disclosure requirements; and (3) the Commission should take this opportunity to start over and issue clarifications, as it did for the 2010 transparency rules, that would eliminate some of the largest and most unnecessary burdens that these new collections could potentially impose.

A. The PRA Notice Is Deficient Because It Fails To Identify The Information Collections For Which The Commission Is Seeking OMB Approval.

The Commission's PRA Notice does not meet the most basic requirements of the PRA. The PRA was enacted to "minimize the paperwork burden" of federal data collection efforts,¹³ and thus Congress required agencies to obtain OMB approval before any submission of information can be enforced.¹⁴ OMB, in turn, must not approve any proposed information collection unless it determines that the collection is "necessary" for the "proper performance of the functions of the agency, including whether the information shall have practical utility."¹⁵ The PRA defines "practical utility" as "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion."¹⁶ OMB's regulations further provide that "[p]ractical utility means the actual, not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy, and reliability, and the agency's ability to process the information it collects . . . in a useful and timely fashion."¹⁷

To facilitate OMB review, the PRA requires each agency to "provide 60-day notice in the Federal Register, and otherwise consult with members of the public . . . concerning each

¹³ *Tozzi v. EPA*, 148 F. Supp. 2d 25, 38 (D.D.C. 2001); 44 U.S.C. § 3501(1).

¹⁴ See 44 U.S.C. § 3512; see also *Saco River Cellular*, 133 F.3d at 29-31 (without OMB approval, an agency's data collection requests need not be followed).

¹⁵ 44 U.S.C. § 3508; see also *Tozzi*, 148 F. Supp. 2d at 38 ("The OMB must determine whether the [information collection] request is necessary to enable the agency to function and of public utility.").

¹⁶ 44 U.S.C. § 3502(11).

¹⁷ 5 C.F.R. § 1320.3(l). See also *id.* ("In determining whether information will have 'practical utility,' OMB must 'take into account whether the agency demonstrates actual timely use for the information . . . to carry out its functions.'").

proposed collection of information, to solicit comment”¹⁸ before the agency submits the proposed collections to OMB. The PRA and its implementing rules require the Commission to develop “a functional description of the information to be collected,”¹⁹ and its Federal Register notice must set forth “a summary of the collection of information.”²⁰ The Federal Register notice also must contain “an estimate of the burden that shall result from the collection of information” so that interested parties can comment on this estimate.²¹ A burden estimate must be provided for *each* proposed information collection (not all collections in the aggregate) and must be “objectively supported.”²² The Federal Register notice must provide sufficient information to allow interested parties to “[e]valuate the accuracy of the agency’s estimate of the burden of the proposed collection of information, *including the validity of the methodology and assumptions used.*”²³

OMB has rejected agency PRA submissions on the grounds that “[t]he generality of the

¹⁸ 44 U.S.C. § 3506(c)(2)(A); 5 C.F.R. § 1320.8(d)(1).

¹⁹ 44 U.S.C. § 3506(c)(1)(A)(ii); 5 C.F.R. § 1320.8(a)(2).

²⁰ 44 U.S.C. § 3507(a)(1)(D)(ii)(II); 5 C.F.R. § 1320.5(a)(1)(iv)(B)(2).

²¹ 44 U.S.C. § 3507(a)(1)(D)(ii)(V); 5 C.F.R. § 1320.5(a)(1)(iv)(B)(5).

²² 5 C.F.R. § 1320.8(a)(4).

²³ *Id.* at § 1320.8(d)(1)(ii) (emphasis added). The rules define “burden” broadly (the “total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information”) and the burden estimate must account for:

- (i) [r]eviewing instructions; (ii) [d]eveloping, acquiring, installing, and utilizing technology and systems for the purpose of collecting, validating, and verifying information; (iii) [d]eveloping, acquiring, installing, and utilizing technology and systems for the purpose of processing and maintaining information; (iv) [d]eveloping, acquiring, installing, and utilizing technology and systems for the purpose of disclosing and providing information; (v) [a]djusting the existing ways to comply with any previously applicable instructions and requirements; (vi) [t]raining personnel to be able to respond to a collection of information; (vii) [s]earching data sources; (viii) [c]ompleting and reviewing the collection of information; and (ix) [t]ransmitting, or otherwise disclosing the information.

Id. at § 1320.3(b).

Agency’s description of the proposed collection is such that it would be difficult for a member of the public to provide meaningful comment on it.”²⁴ OMB has explained that “[t]he Agency is required by the PRA to solicit comment from the public prior to any collection of information in order to evaluate the practical utility and burden of the collection” and that an agency’s submission fails to comply with that requirement when it does “not describe its information collection plan sufficiently to allow evaluation of practical utility, burden, and necessity in the following ways: 1) [it] does not specify the information to be collected or the methods used for collecting information, 2) [it] does not clearly identify the respondent groups with specificity necessary to provide adequate notice and opportunity to comment.”²⁵

In short, the Commission’s public notice must meet at least three very simple requirements: it must (1) identify each information collection for which it seeks OMB approval; (2) provide an “objectively supported” burden estimate that includes sufficient information to allow interested parties to evaluate “the validity of the methodology and assumptions used”; and (3) demonstrate and justify the “practical utility” of each proposed information collection. The Commission’s bare-bones *PRA Notice* does not come close to meeting any of these requirements.

Identification of the Collections. The Commission is required to provide a “functional

²⁴ Collection of Impact Data on Technical Information: Request for Generic Clearance, Design for the Environment (DfE), ICR Ref. No. 199907-2070-002 (Feb. 2, 2000) *available at* <http://www.reginfo.gov/public/do/DownloadNOA?requestID=29362> (“DfE Clearance Submission”). *See also* Reporting Requirements under the Regulations Governing Inspection and Certification of Processed Fruits and Vegetables and Related Products, ICR Ref. No. 200110-0581-004 (Feb. 13, 2002) *available at* <http://www.reginfo.gov/public/do/DownloadNOA?requestID=3591> (OMB rejecting an agency’s PRA submissions for “fail[ing] to provide the public with a description of the proposed information collection that would allow for meaningful public comment in both their 60 day and 30 day federal register notice”).

²⁵ *See* DfE Clearance Submission.

description” of “each proposed collection.”²⁶ The *PRA Notice*, however, contains a single sentence that says only that the Commission is seeking approval for “[t]he rules adopted in” the *2015 Open Internet Order* that “require all providers of broadband Internet access service to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of their broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.”²⁷ This broad and imprecise description does not qualify as a “functional description” of “each collection” for which the Commission is seeking approval and commenters can only guess at which of the dozens of new collections in the lengthy *2015 Open Internet Order* are covered by the public notice.

For further clues, interested parties are apparently expected to consult the version of the *2015 Open Internet Order* published in the Federal Register.²⁸ In that “Final Rule” publication, the Commission included the same generic description of the collections, but also identified the paragraphs containing the new collections that it believes fall within that description: “the modified information collection requirements in paragraphs 164, 166, 167, 169, 173, 174, 179, 180, and 181 of this document are not applicable until approved by the Office of Management and Budget (OMB).”²⁹ Although the Commission still has never specifically identified which information collections in these paragraphs it thinks require OMB approval, these paragraphs must necessarily constitute the maximum possible universe of collections that the *PRA Notice*

²⁶ 44 U.S.C. §§ 3506(c)(1)(A)(ii) & 3506(c)(2)(A); 5 C.F.R. §§ 1320.8(a)(2) & 1320.8(d)(1).

²⁷ *PRA Notice* at 29001.

²⁸ *2015 Final Rule* ¶ 584. The transparency rules are discussed and set forth in paragraphs 154-85 of the *2015 Open Internet Order*.

²⁹ *2015 Final Rule* ¶ 584.

can reasonably be interpreted to cover, since the Commission has not identified any other collections that fall within the *PRA Notice*.

But even if the *PRA Notice* is intended to cover all of the collections in each of the paragraphs listed in the published version of the *2015 Open Internet Order*, the descriptions in those paragraphs are hopelessly vague and thus do not provide a “functional description” of “each” collection. The descriptions of the information collections in these paragraphs are open to a wide range of interpretations, and the burdens would vary dramatically depending upon how the collections are defined. To take just one example, paragraph 166 of the *2015 Open Internet Order* requires, among other things, that broadband Internet access service providers collect and disclose “actual data on performance of their networks representative of the geographic area in which the consumer is purchasing service.”³⁰ The Commission has never explained what it means by “geographic area,” but as shown below, the burdens associated with this new requirement could be massive depending upon the granularity with which the “geographic area” is defined. Interested parties cannot possibly provide meaningful comment on the Commission’s proposed new collections if those parties do not even know what those collections are.

Estimate of the Burden. The Commission is also required to provide sufficient information in the notice to allow interested parties to evaluate the Commission’s burden estimate, “including the validity of the methodology and assumptions used.”³¹ The Commission’s estimate must comprehensively account for the total time, money, and effort of responding to the information collection.

The *PRA Notice* does not remotely satisfy these requirements. The *PRA Notice* merely sets forth three aggregate numbers with no explanation as to how they were computed: (1) the

³⁰ *2015 Open Internet Order* ¶ 166.

³¹ 5 C.F.R. § 1320.8(d)(1)(ii).

Commission's estimate that there will be 3,188 responses; (2) the Commission's estimate that each response will take an average of 28.9 hours to complete (for a total of 92,133 hours, 28.9 x 3,188 responses); and (3) the Commission's estimate that the industry-wide total annual costs imposed by the collections will be \$640,000.³² The *PRA Notice* does not disclose the methodology or assumptions used to compute these numbers, nor does it break out the aggregate burden estimates as to each individual new data collection, as the statute requires.³³ The OMB has expressly rejected PRA submissions where "the generality of the Agency's description of the proposed collection is such that it would be difficult for a member of the public to provide meaningful comments on it," and has noted that "[t]his is of special concern [where] the data gathered under th[e] collection is likely to be used for regulatory development, in which there is inherent public interest."³⁴

It is essential that the Commission show its work. Without a description and explanation as to how the Commission derived its estimates, commenters cannot provide meaningful feedback on them. The required explanation is especially important here, because the aggregate estimates provided in the *PRA Notice* are facially absurd. The Commission may not want to try to explain how it arrived at these estimates, but that does not excuse it from complying with its statutory duty in this important round of public comment. As OMB has explained, PRA submissions will be rejected when the agency "appears to have grossly underestimated the

³² *PRA Notice* at 29001.

³³ See 44 U.S.C. § 3507(a)(1)(D)(ii)(V) (Federal Register notice must contain "an estimate of the burden that shall result from *the* collection of information") (emphasis added).

³⁴ Collection of Economic and Regulatory Impact Support Data under RCRA, ICR Ref. No. 199709-2050-001 (May 5, 1998) available at <http://www.reginfo.gov/public/do/DownloadNOA?requestID=28005>.

burden.”³⁵

Notably, the black-box estimates in the *PRA Notice* stand in stark contrast to the explanations the Commission provided during the PRA review of the information collections in the *2010 Open Internet Order*. There, the Commission made available to commenters a multiple page document that described how it calculated the burden estimate in its Federal Register notice and the assumptions it made in doing so.³⁶ This enabled commenters to focus their analyses on the Commission’s actual assumptions and methodologies, as contemplated by the rules. Here, however, the Commission has declined to provide such documentation to commenters, leaving them without any real basis to comment on the estimates.

Explanation of “Practical Utility.” Just as the statute requires the Commission to explain its estimates of the burdens, the Commission is also required to explain what “practical utility” these collections have that would justify the imposition of those burdens. Given that the *PRA Notice* does not even specify the collections for which the Commission is seeking approval, it

³⁵ Disposal of National Forest Timber – Timber Export and Substitution Restrictions, ICR Ref. No. 199508-0596-001 (Sept. 29, 1995) available at <http://www.reginfo.gov/public/do/DownloadNOA?requestID=121756> (“The Forest Service appears to have grossly underestimated the burden hours. For example, the justification mentions 16 hours of burden time for the preparation of sourcing area applications and 3 hours for the preparation of annual reports. These burden hours do not appear to have been added into the total burden hours.”); see also National Fire Incident Reporting System (NFIRS), ICR Ref. No. 199908-3067-002 (March 3, 2000) available at <http://www.reginfo.gov/public/do/DownloadNOA?requestID=38175> (“This collection is disapproved based on the following factors: ... No documentation is included to account for training, information technology, or State resources necessary to participate in this collection. A burden figure of \$1.6 is asserted, but not supported, and is not included in the total annual cost burden.”).

³⁶ See PRA Calculations for Disclosure of Network Management Practices, *Preserving the Open Internet and Broadband Industry Practices Report and Order*, GN Docket No. 09-191 and WC Docket No. 07-52 (Feb. 2011), attached as Exhibit B to Comments of the National Cable & Telecommunications Association, *Preserving the Open Internet, Broadband Industry Practices, Notices of Public Information Collection*, GN Docket No. 09-191, WC Docket No. 07-52 (Apr. 11, 2011).

should not be surprising that it fails to provide any explanation of the practical utility for any of the collections either. This failing is particularly egregious given the Commission’s determination to adhere to President Obama’s Executive Order, which places particular emphasis on imposing the smallest burdens necessary taking into account the expected benefits of the collection, both “quantitative and qualitative.”³⁷ Because the Commission has made no effort to calculate the actual burdens or benefits of any specific collection, the Commission is evading the whole point of the PRA, which is to force agencies to grapple with and demonstrate that the collections it seeks to impose have a real net social benefit.

B. The PRA Notice Is Deficient Because Its Burden Estimate Is Vastly Understated.

The Commission’s burden estimates are so low they have no credibility. Assuming the Commission is seeking comment on the information collections mentioned in the paragraphs identified in the Federal Register publication of the *2015 Open Internet Order*, those collections would require AT&T and other providers to, among other things, develop new systems and software; collect, analyze, and verify vast amounts of new data; train thousands of employees and contractors; install new equipment in dozens of vehicles used for drive testing AT&T’s network and potentially add thousands of miles to existing drive test routes; and numerous other costly initiatives.³⁸ The Commission contends that the total cost to the industry to implement these new requirements would be \$640,000. Since the Commission is assuming there are 3,188 broadband providers, the Commission is therefore estimating that the average *total* cost for a

³⁷ See Executive Order 13563.

³⁸ Fahmy Decl. ¶ 3.

single company to implement *all* of the new requirements would be \$200 per year.³⁹

These cost determinations are absurd on their face, and OMB could not reasonably approve these new collections based on such miniscule estimates of the burden. Indeed, as shown in the attached Declaration of Dr. Fahmy, just three of the new network performance disclosure requirements – those relating to (1) geographic reporting, (2) packet loss, and (3) average metrics for peak periods – would cost millions of dollars to implement and potentially tens of millions of dollars, depending on how they are ultimately defined.⁴⁰ The Commission cannot justify imposing these substantial burdens on the industry under the PRA, especially given that – as shown below – none of these requirements has any “practical utility” within the meaning of the PRA.

More Granular Geographic Reporting. The *2015 Open Internet Order* requires speed, latency, and packet loss to be collected and reported at geographic levels more granular than the current nationwide reporting: “We expect that disclosures to consumers of actual network performance data should be reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing service.”⁴¹ These new requirements will be very costly to implement, with no offsetting benefits.

First, the Commission has never explained what it means by “the geographic area in which the consumer is purchasing service.” That phrase could be defined a million ways, from individual locations to multi-state regions. Obviously, if the Commission were to define the requirement at significantly granular, sub-market levels such as census blocks or cell sites, the

³⁹ Given that the Commission proposes that these tasks will take no more than about 28 hours to complete, it is also necessarily assuming that these tasks will be performed by employees making less than \$7.00 per hour on average over three and a half work days.

⁴⁰ Fahmy Decl. ¶ 4.

⁴¹ *2015 Open Internet Order* ¶ 166.

resulting information collection would quickly become astronomically and prohibitively expensive.⁴² But even if the “geographic area” is defined as a larger area, the burden of computing each of the performance metrics for a large number of new areas would be many millions of dollars.⁴³

For its mobility network, AT&T obtains these data from drive testing. Today, AT&T conducts drive tests covering most of the U.S. population to obtain actual national average speed and latency metrics.⁴⁴ As explained by Dr. Fahmy, depending on the geographic granularity of the new collection requirements, AT&T would have to devote substantially greater resources for additional drive testing and engineering hours to develop performance metrics for each of the new geographic areas.⁴⁵

These additional burdens are likely to be very costly. If the Commission chooses any geographic area smaller than a CMA, AT&T’s engineers would have to perform new calculations for hundreds (and potentially thousands) of new, smaller areas of interest.⁴⁶ Each new geographic area carries with it a multiplier effect, because engineers must calculate, for each of these smaller areas, speed, latency *and* packet loss; uplink *and* downlink; average and peak; and they must do so for each technology (*e.g.*, LTE, HSPA+, HSPA) – resulting in thousands of additional calculations.⁴⁷ These burdens would be subject to further multiplier effects if the Commission is now requiring these new collections to be updated one or more times during the

⁴² *Cf.* Fahmy Decl. ¶ 31.

⁴³ Fahmy Decl. ¶¶ 30-40.

⁴⁴ *Id.* ¶ 32.

⁴⁵ *Id.* ¶¶ 33-39.

⁴⁶ *Id.* ¶¶ 34-36.

⁴⁷ *Id.* ¶ 33.

year.⁴⁸ In addition, AT&T would have to conduct substantial additional drive testing, for two reasons: (1) AT&T’s current drive tests may not produce enough data points to estimate statistically significant average performance metrics for the small geographic areas that may be required, and (2) the Commission’s new collections may require AT&T to expand drive testing to additional areas not currently covered.⁴⁹ The burdens associated with these more geographically granular reporting requirements alone, even if the geographic areas are relatively large, would run well into the millions of dollars annually – vastly greater than the Commission’s facially absurd estimate of \$200 *for everything*.⁵⁰ On the other hand, as the geographic areas become larger – as they will have to in order to avoid imposing extraordinary costs on providers – there will be significantly less variation in the performance metrics, undermining their usefulness.

Another facet of mobile services implicated by the disclosure requirements are Wi-Fi services. Providers are increasingly relying on Wi-Fi networks to support their traditional mobile service platforms, and even integrating Wi-Fi into their platforms. For example, the “Project Fi” joint initiative with Google, Sprint, and T-Mobile is expected to allow customers to seamlessly switch between Wi-Fi and mobile networks. To the extent the new transparency disclosures – especially those that require actual performance measures at granular levels – apply to Wi-Fi services, such requirements raise significant burden issues. As explained by Dr.

⁴⁸ See Fahmy Decl. ¶ 33. Moreover, as described further below, providers today use different equipment and methodologies for computing performance metrics. To enable apples-to-apples comparisons of these metrics, the Commission would have to require providers to use identical equipment and methodologies. But such micro-management would require most providers to completely change their current approaches, which would impose yet another large burden on providers. Fahmy Decl. ¶ 42.

⁴⁹ Fahmy Decl. ¶¶ 37-39.

⁵⁰ *Id.* ¶¶ 30-39.

Fahmy, drive testing is not feasible (indeed, many Wi-Fi routers are indoors).⁵¹ AT&T has investigated alternative methods to gather performance metrics for Wi-Fi services, but all are extremely expensive. For example, one approach AT&T has explored is placing a “test probe” at each Wi-Fi location that measures performance of the Wi-Fi network at these locations. But AT&T has tens of thousands of Wi-Fi locations, and initial estimates indicate that deploying and monitoring these probes would cost millions of dollars (not including the costs of analyzing the data collected by those probes to compute the required disclosures).

The millions of dollars of additional burdens associated with requiring more geographically granular data for mobile services would not result in any “practical utility” gains for anyone. First, these reporting requirements will not actually allow anyone to compare speed, latency, or packet loss among different providers at granular levels, because there is no standardized approach to the measurement of these metrics (different providers use different vendors or may do it themselves), and each provider will inevitably calculate these metrics for different geographic areas.⁵² The only way to eliminate these issues would be for the Commission to force all providers in the industry to use the same equipment, systems, and methods, but any such requirement would increase the industry-wide costs of these collections by an order of magnitude, by requiring many or most of them to change their current measurement practices.⁵³

Second, consumers and edge providers already have a variety of sources for this sort of geographically granular information in the marketplace. For example, Ookla, Root Metrics, Sensorly, Open Signal, and the Commission’s Mobile Broadband America application provide

⁵¹ *Id.* ¶ 40.

⁵² *Id.* ¶ 42.

⁵³ *Id.*

users with *current* metrics for speed, latency, and packet loss from any geographic location within AT&T’s network.⁵⁴ Indeed, the Commission itself has acknowledged that if users want more granular information, there are “[v]arious software-based broadband performance tests . . . available as potential tools for end users and companies to estimate actual broadband performance.”⁵⁵ These freely available data sources give users far more localized and real-time network performance measurements than they could ever obtain from Commission-mandated macro-reporting requirements. The burdensome geographic reporting proposed here would add no useful information that customers cannot already obtain elsewhere.

Geographically granular reporting requirements will also cost more than \$200 per year for wireline providers. Under the 2010 reporting requirements, AT&T engineers use MBA data to compute a single set of “national” performance metrics for the 21 states where AT&T offers wireline broadband Internet access services. Since the *2015 Open Internet Order* makes clear that “[p]articipation in the [MBA] program continues to be a safe harbor for fixed broadband providers in meeting the requirement to disclose actual network performance,”⁵⁶ and the most granular data available from the MBA program is state-level data, the new geographic reporting requirement presumably will not require data that is more granular than at the state level. Even so, AT&T would have to devote a substantial amount of additional engineering resources to compute this metric for each of its 21 states.⁵⁷

There is little to be gained from these efforts. As explained by Dr. Fahmy, AT&T has analyzed the data for each of the three performance metrics (speed, latency, and packet loss)

⁵⁴ *Id.* ¶ 43.

⁵⁵ *2015 Open Internet Order* ¶ 166 n.411. In addition, numerous publications also provide download speeds at highly disaggregated levels. See Fahmy Decl. ¶ 49.

⁵⁶ *2015 Open Internet Order* ¶ 166 n.411.

⁵⁷ Fahmy Decl. ¶¶ 45-49.

available for AT&T’s wireline network from the MBA program for the period from January 2015 through May 2015 (the most recent data available) for all AT&T speed tiers for which data are available from the MBA program. The results of this analysis show that there is little variation in wireline speed or latency within each speed tier offering from state-to-state.⁵⁸ In addition, packet loss is generally so low in every state that any variations among states would have no noticeable impact on customers’ or edge providers’ experience.⁵⁹ Accordingly, there is no “practical utility” to these enhanced disclosures, and even if there were, consumers and edge providers already have such metrics available to them from third party sources.⁶⁰

Packet Loss. The *2015 Open Internet Order* now requires broadband providers to include “packet loss” in their network performance disclosures.⁶¹ Adding packet loss measurements to these disclosures would impose very substantial burdens on broadband providers, while providing no useful benefits.

For its mobile broadband network, AT&T would collect packet loss information using drive testing, as it does for other mobile broadband performance metrics. As noted, AT&T currently uses drive testing to measure only speed and latency, not packet loss. Such drive testing entails a substantial cost, involving dozens of vehicles taking measurements in areas covering most of the U.S. population.⁶² Once collected, analysts must analyze and verify the data before IT professionals place the information on the AT&T website containing AT&T’s

⁵⁸ *Id.* ¶ 48.

⁵⁹ *Id.*

⁶⁰ *See id.* ¶¶ 45-59.

⁶¹ *2015 Open Internet Order* ¶ 166 (“The existing [2010] transparency rule requires disclosure of actual network performance. In adopting that requirement, the Commission mentioned speed and latency as two key measures. Today we include packet loss as a necessary part of the network performance disclosure.”).

⁶² *See id.* ¶ 10.

transparency disclosures.⁶³ To add packet loss data to this process, AT&T would either have to install new equipment in all of its vehicles, or install new software in its existing equipment (as explained by Dr. Fahmy, however, this latter approach would mean fewer measurements taken and thus would require additional drive test time to achieve the same sample size).⁶⁴ Either option would cost upwards of three quarters of a million dollars – not \$200.⁶⁵ Adding packet loss data would also necessitate a significant increase in the amount of time engineers and IT professionals must devote to verification and analysis of the drive test data, adding thousands more to the cost.⁶⁶ And, depending on how the Commission defines the new requirements relating to geographic granularity and peak period reporting, those costs could increase by many times over.⁶⁷

The addition of packet loss would also increase the cost of disclosures for wireline services. AT&T currently uses the data collected by the Commission’s MBA program to estimate the required national speed and latency metrics. Although the MBA program also includes packet loss data, AT&T engineers would be required to analyze the MBA packet loss data to estimate statistically significant national packet loss metrics, and the cost of this additional engineering time would depend on the total number of locations for which average packet loss must be computed; in any event, computing packet loss data would cost tens of

⁶³ See *id.* ¶ 11.

⁶⁴ See *id.* ¶¶ 12-14.

⁶⁵ See *id.* ¶¶ 13-14.

⁶⁶ See *id.* ¶ 16.

⁶⁷ Fahmy Decl. ¶¶ 15, 16-17.

thousands of dollars per year, and these costs would be incurred each time an update to the data must be completed.⁶⁸

The Commission has never offered a good reason to include packet loss data in the transparency disclosures (and the *PRA Notice* is certainly silent on the matter). 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,”⁶⁹ but none of those commenters explained how packet loss would actually be useful to consumers or edge providers. Those comments merely suggested that packet loss might be useful for assessing “delay intolerant applications.”⁷⁰ As the “expert” agency, the Commission was required to do more than simply accept their claims without any analysis of whether such data would be at all useful, let alone whether the burdens of collecting and disseminating such information outweighed any purported benefit.

The truth is that packet loss metrics have no real “practical utility” for either consumers or edge providers in evaluating service quality or comparing the performance of alternative networks, including for delay intolerant applications.⁷¹ The issue of packet loss implicates certain trade-offs in the way broadband networks are engineered.⁷² One of the principal means a provider has for reducing packet loss is to use larger buffers in its routers.⁷³ The larger the buffer, however, the longer the queue in which packets must wait for delivery to their next

⁶⁸ *See id.* ¶ 18.

⁶⁹ *2015 Open Internet Order* ¶ 166 n.407.

⁷⁰ *Id.*

⁷¹ *See Fahmy Decl.* ¶ 20.

⁷² *See id.* ¶¶ 19-27.

⁷³ *See id.* ¶ 21.