



December 14, 2015

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

Via Electronic Filing

Re: Notice of Ex Parte Communications, GN Docket No. 14-28

Dear Ms. Dortch:

On December 10, 2015, Sarah Morris, Senior Policy Counsel, and Emily Hong, Policy Program Associate for New America’s Open Technology Institute (“OTI”), and Collin Anderson, Researcher with Measurement Lab (“M-Lab”), met with Scott Jordan, Chief Technology Officer, Kristine Fargotstein of the Wireline Competition Bureau, Jerusha Burnett of the Consumer and Governmental Affairs Bureau, Paroma Sanyal of the Wireless Telecommunication Bureau, and Alison Neplokh of the Media Bureau for the Federal Communications Commission (“FCC” or “Commission”).

In this meeting, OTI and M-Lab presented on a number of matters related to the transparency requirements set forth in the Commission’s 2015 Open Internet Order (“2015 Order”).¹ OTI reaffirmed its previous findings on broadband disclosures: consumers benefit from having more, rather than less, information about their broadband service. As part of the new transparency rules in the 2015 Order, ISPs will soon be required to make public-facing disclosures that for each service plan, include fees, metrics of network performance, general network management practices, and other general service descriptions. As suggested by the Consumer Advisory Committee disclosure label taskforce, OTI agreed that it would be valuable for the FCC to provide consumer-friendly definitions of performance metric terms that include: speed (both upload and download speeds), latency, and packet loss. Furthermore, it is also important that these disclosures accurately reflect service as measured on a network in operation from consumers, rather than advertised maximums.

OTI and M-Lab emphasized the value of having network performance measurements that (1) accurately reflect the experience of the end user, and (2) uphold standards of transparency and openness by providing methodological specifications that would allow for third-party oversight and verification.

¹ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report & Order, FCC 15-24 (rel. Mar. 12, 2015) at ¶¶165-167.

With regard to the first point, OTI noted that many factors can affect the speeds experienced by the consumer, and as such, a testing methodology should strive to capture not only the performance and capacity of an ISPs' network, or the fastest possible round trip time to the nearest measurement server, but also provide some indication for the degradation that occurs because of congestion or at interconnection points. Any methodology employed by an ISP or the FCC for the purposes of measuring broadband performance should be able to capture such disruptions.

Recognizing a diversity of existing methodologies for measuring broadband performance and disclosing metrics associated with that measurement, OTI and M-Lab noted that at end of the day, the merits and disadvantages of individual methodologies differ across different tools and use cases. No matter which way an ISP chooses to measure speed or latency, from the outset, providers must provide a clear justification for how they arrived at that measurement, and make the methodology open, replicable, and comparable.

To this end, broadband performance measurement disclosures should be accompanied with detailed methodological specifications to provide a way for external parties to validate and replicate how ISPs are collecting and compiling speed and other network performance metrics. The model specification would provide the information required for a third party to completely replicate the measurement methodology, along the same network perspectives – e.g. this would entail access to source code, an explanation of the analytic choices made when computing the data, server instrumentation and hardware details, a clear indication of the instrumented infrastructure paths, clients, server selection, etc.

While many ISPs in the fixed context currently fulfill transparency requirements through participation in the FCC's Measuring Broadband America (MBA) program (a safe-harbor that was constructed as part of the 2011 Open Internet Order Transparency Advisory Guidance), OTI believes that disclosure should seek to open up comparison in the data for non-MBA safe harbors and independent validation through alternative measurement systems. To the extent possible, disclosure should be based on an accessible standard that can be commonly adopted. Platforms such as Measurement Lab could provide a non-MBA safe harbor to providers that would fulfill the requirements of the Open Internet Order and meet the transparency qualities that would promote cross comparison of data. Moreover, M-Lab could do so in a cost effective manner that would not impose onerous operational costs to small and medium providers.

With regard to the definition of "peak hours," for fixed broadband services OTI believes that the current definition (7:00pm to 11:00 pm) continues to be appropriate for the trends that are evident in the M-Lab data. However, this period is defined based on Internet use behaviors that may change, or may shift with the introduction of new services. Therefore, this definition should be subject to data-driven reevaluation on a periodic basis in order to ensure that the definition continues to be appropriate. In the future it may be useful for FCC to reexamine the traditional understanding of "Internet peak hours," particularly when informed by real-time data from ISPs about more granular patterns of congestion and patterns in usage over time. Additionally,

patterns of device use on mobile broadband networks may differ substantially enough that wireless measurement regimes would require a different definition of peak hours.

Finally, OTI provided a brief discussion of how transparency disclosures might work in the mobile setting. As in the fixed broadband context, methodologies for mobile broadband performance should also be representative of the end user, and uphold a commitment to transparency through replicability. However, noting the ways that mobile performance differs from fixed broadband, OTI noted that simply extending the same transparency safe harbor for fixed broadband to mobile broadband may not necessarily be appropriate at this time. Rather, consumers, the FCC, and other interested groups might benefit from an alternative approach to mobile broadband transparency disclosure, which take in the design of challenges of defining appropriate geographic areas for reporting and the possibility for disclosing speed ranges rather than integer numbers.

Respectfully submitted,

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