

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Disclosure of Network Management Practices)	GN Docket No. 09–191
)	
Preserving the Open Internet and Broadband Industry Practices)	WC Docket No. 07–52
)	

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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SUMMARY

CTIA—The Wireless Association® (“CTIA”) submits these comments regarding the Federal Communications Commission’s (“FCC” or “Commission”) compliance with the Paperwork Reduction Act (“PRA”) in adopting the information collection requirements in its Open Internet Order. CTIA wholly supports transparency and providing relevant information to consumers. Along these lines, CTIA specifically expected that network management transparency, as included in the Open Internet Notice of Proposed Rulemaking (“NPRM”), would be included in the final Order. CTIA did not expect, however, that the final rules would be expanded to include the very wide range of requirements that were adopted. This expansion beyond what was proposed in the NPRM to include issues involved in a number of open Commission proceedings causes CTIA concern.

In addition, the precedent of increasing the information collection burden from the NPRM to the final Order (as occurred in the Open Internet proceeding), while simultaneously reducing the estimate of time and money it would take, is of additional concern. CTIA believes that because of these changes, as well as other infirmities discussed below, the Commission has not fulfilled its obligation under the PRA to demonstrate that the benefits of its proposed information collection outweigh the costs and burdens.

Specifically, the proposed information collection violates four requirements of the PRA because:

- The Commission failed to provide the public the opportunity to comment on the expanded collection prior to its adoption.
- The Commission significantly underestimated the substantial burden that the information collection will impose on mobile broadband providers, particularly because the Commission’s Order suggests that the detailed list of requirements is not exhaustive.
- The information collection will have little, if any, “practical utility” for the FCC; and
- Contrary to the mandates of the PRA, the Commission did not adequately reduce the burden of the information collection on small business concerns.

Notably, the PRA deficiencies with the Open Internet Order are similar to those that led OMB to reject the information collection in the emergency backup power proceeding. In that case, OMB concluded that the FCC did not demonstrate the “practical utility” of the information collection because the information could “potential[ly] change before the FCC c[ould] process it.” The FCC also failed to “demonstrate[], given the minimal staff assigned to analyze and process this information, that the collection ha[d] been developed by an office that ha[d] planned and allocated resources for the efficient and effective management and use of the information collected.” And, finally, OMB explained that the “non-standardized format” of the information collection and “lack of sufficient clari[ty] on how respondents are to satisfy compliance” also limited the collection’s practical utility. As detailed in these comments, all of these problems are

equally applicable here: the reported information will become stagnant quickly; the Commission has no plan and minimal resources to process the information; and the lack of detailed reporting instructions ensures that the information provided by different broadband providers will differ in content, making ongoing monitoring exceedingly difficult.

Accordingly, the Commission should rescind or significantly revise the information collection requirements associated with the “transparency” rule in the Open Internet Order. Failure to do so will likely prompt OMB to disapprove the proposed information collection.

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CTIA—The Wireless Association® (“CTIA”)¹ submits these comments regarding the Federal Communications Commission’s (“FCC” or “Commission”) compliance with the Paperwork Reduction Act (“PRA”) in adopting the information collection requirements in its *Open Internet Order*.² CTIA wholly supports transparency and providing relevant information to consumers. Along these lines, CTIA specifically expected that network management transparency, as included in the Open Internet Notice of Proposed Rulemaking (“NPRM”), would be included in the final Order. CTIA did not expect, however, that the final rules would be expanded to include the very wide range of requirements that were adopted. This expansion beyond what was proposed in the NPRM to include issues involved in a number of open Commission proceedings causes CTIA concern. In addition, the precedent of increasing the information collection burden from the NPRM to the final Order (as occurred in the Open Internet proceeding), while simultaneously reducing the estimate of time and money it would

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² *In the Matter of Preserving the Open Internet; Broadband Industry Practices*, Report and Order, GN Docket No. 09-191; WC Docket No. 07-52, FCC 10-201 (Dec. 23, 2010) (“*Open Internet Order*”).

take, is of additional concern. CTIA believes that because of these changes, as well as other infirmities discussed below, the Commission has not fulfilled its obligation under the PRA to demonstrate that the benefits of its proposed information collection outweigh the costs and burdens.

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- The information collection will have little, if any, “practical utility” for the FCC; and
- Contrary to the mandates of the PRA, the Commission did not adequately reduce the burden of the information collection on small business concerns.

Accordingly, the Commission should rescind its proposed information collection or risk disapproval by the Office of Management and Budget (“OMB”).

I. INTRODUCTION

The information collection in question stems from the FCC’s “transparency” rule and the text of the *Open Internet Order*, which specifies numerous topics, “some or all” of which “likely” must be addressed in order for a broadband provider’s disclosures to be deemed “effective” under that rule.³ CTIA supports transparency, and the vigorous competition among wireless carriers has put the wireless industry at the forefront of ensuring the timely disclosure of relevant information to consumers. As an illustration of that belief, CTIA and multiple carriers recently launched an effort to inform consumers before the purchase of a service or device.

³ *Open Internet Order* ¶ 56.

CTIA’s “Wireless Consumer Checklist” Initiative is designed to empower wireless consumers to choose the right service plans and devices and provides two different guides that offer consumers standardized questions to ask customer representatives when choosing their wireless service and plans.⁴

The Commission nevertheless bears the responsibility of demonstrating that the benefits of its proposed information collection outweigh the costs and burdens,⁵ particularly in light of the PRA and President Obama’s recent Executive Order on improving regulation and the regulatory review process.⁶ As detailed below, the Commission cannot make this demonstration. Indeed, the Commission’s proposed information collection is antithetical to the PRA’s central purpose to “*minimize the paperwork burden*” for reporting entities⁷ as well as the mandate that agencies “reduce, minimize and control burdens and maximize the practical utility and public benefit of the information.”⁸

Specifically, the proposed information collection violates four requirements of the PRA. *First*, the Commission failed to provide the public the opportunity to comment on the collection

⁴ See <http://www.ctia.org/>. The CTIA Wireless Consumer Checklist Initiative consists of a one-page frequently asked questions (FAQ) guide about a provider’s general service and device offerings. This includes coverage area; contract terms and trial periods; usage management and monitoring tools; and parental control features. Once consumers have narrowed their choices, the “Checklist for Choosing Your Service and Device” helps individuals ask the right questions to get detailed information on available options. The one-page guide has specific questions on plans and devices; terms and charges for voice, text and data; and coverage area.

⁵ See, e.g., 44 U.S.C. § 3501(1).

⁶ Executive Order, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

⁷ 44 U.S.C. § 3501(1) (emphasis added).

⁸ 5 C.F.R. § 1320.1.

in “advance of [its] adoption.”⁹ In the *NPRM*, the FCC proposed disclosures limited to “information concerning *network management and other practices*.”¹⁰ But in the *Open Internet Order*, the Commission adopted a much broader information collection, requiring disclosure of “information regarding *the network management practices, performance, and commercial terms* of ... broadband Internet access services” and identifying approximately 30 topics that may have to be disclosed.¹¹ *Second*, the FCC significantly underestimated the tremendous burden that the information collection will impose on mobile broadband providers. The Commission’s estimate that broadband providers will only spend 10.3 hours each year in complying with the proposed information collection clearly is wrong. *Third*, contrary to the mandates of the PRA, the information collection will have little, if any, “practical utility” for the FCC. The FCC has not provided any indication that it has an actual plan—let alone the resources—to use or even review the disclosed information in a timely and effective fashion. *Fourth*, contrary to the mandates of the PRA, the FCC did not adequately reduce the burden of the information collection on small business concerns.

Moreover, much of the proposed information collection is unnecessary to ensure an open and vibrant Internet – the stated objective of the *Open Internet Order* – and the Commission cannot reconcile its approach with the goals of the Obama Administration to reduce regulatory burdens. Because the Commission failed to comply with the PRA, it should rescind or significantly revise its proposed information collection or risk disapproval by the Office of Management and Budget (“OMB”).

⁹ 44 U.S.C. § 3507(a).

¹⁰ *Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 74 Fed. Reg. 62638 (Nov. 30, 2009) (“*NPRM*”) (emphasis added).

¹¹ *Open Internet Order*, Appendix A, Rule § 8.3 (emphasis added).

II. THE FCC'S PROPOSED INFORMATION COLLECTION DOES NOT MEET A LEGITIMATE PUBLIC NEED AND THE COSTS AND BURDENS OF THE COLLECTION DO NOT OUTWEIGH THE BENEFITS.

On January 18, 2011, President Obama issued an Executive Order entitled “Improving Regulation and the Regulatory Review Process” directing federal agencies to review existing rules or consider whether new proposals create barriers that may unnecessarily burden businesses and the economy.¹² Specifically, the Executive Order, in relevant part, requires each agency to:

- “propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify);” and
- “tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.”¹³

Chairman Genachowski subsequently directed the Commission to “perform its responsibilities consistent with the principles in the executive order.”¹⁴ In those same remarks, Chairman

Genachowski stressed that:

One thing government at all levels can do is ensure efficient, effective regulation. We need rules that serve legitimate public needs without erecting costly or unnecessary barriers. The National Broadband Plan identified red tape as a significant obstacle to broadband deployment. Overly burdensome rules and regulations can slow down deployment and raise costs. It also can limit businesses ability to invest in new technologies and hire new workers.¹⁵

The Commission’s proposed information collection does not satisfy this standard.

¹² Executive Order, *Improving Regulation and Regulatory Review* (Jan. 18, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/01/18/improving-regulation-and-regulatory-review-executive-order>.

¹³ *Id.*

¹⁴ Prepared Remarks of Chairman Julius Genachowski, Federal Communications Commission, Broadband Acceleration Conference, Washington, D.C. (Feb. 9, 2011) at 4, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304571A1.pdf.

¹⁵ *Id.*

According to the Commission, the objective of the *Open Internet Order* was to “preserv[e] and promot[e] a free and open Internet.”¹⁶ Consistent with this objective, the Commission adopted substantive rules for mobile broadband providers, including “a no blocking rule that guarantees end users’ access to the web and protects against mobile broadband providers’ blocking applications that compete with their other primary service offerings – voice and video telephony”¹⁷ The Commission also adopted its transparency rule, which requires that mobile and fixed broadband Internet access service providers “publicly disclose accurate information regarding ... [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.”¹⁸

In the text of the *Open Internet Order*, the Commission identified approximately 30 discrete topics that it suggested a broadband provider should address, at least in some respect, in order for its disclosures to comply with the transparency rule.¹⁹ The topics identified by the Commission include such disparate issues as “practices used to ensure end-user security or security of the network,” “[a] general description of the service, including ... expected and actual access speed and latency, and the suitability of the service for real-time applications,” and “monthly prices, usage-based fees, and fees for early termination or additional network services.”²⁰ Disclosures regarding such topics share no nexus with and are wholly unnecessary

¹⁶ *Open Internet Order* ¶ 11.

¹⁷ *Id.* ¶ 99.

¹⁸ *Id.* at Appendix A, Rule § 8.3.

¹⁹ *Id.* ¶ 56.

²⁰ *Id.*

to preserving and promoting an open Internet, and they are hardly necessary to police compliance by mobile broadband providers with the Commission’s no blocking rule.

In the absence of a nexus between mandated disclosures and the substantive requirements of the no-blocking rule, the Commission cannot demonstrate that its proposed information collection is consistent with the principles of the Executive Order, especially the principle that the benefits of its proposals outweigh the costs and burdens. Indeed, as discussed below, the proposed information collection imposes significant burdens on mobile broadband providers that extend beyond the mere collection of the data – burdens which necessitate the diversion of resources that otherwise could be devoted to broadband deployment and innovation.

III. THE FCC VIOLATED THE PRA’S PROCEDURAL REQUIREMENTS IN ADOPTING THE PROPOSED INFORMATION COLLECTION.

Under the PRA, the FCC must obtain OMB approval before sponsoring an information collection.²¹ To receive approval, the FCC must: (1) conduct an internal clearance process; and (2) satisfy OMB’s clearance process.²² During both clearance processes, the public must be afforded the opportunity to comment on the proposed collection.²³ Importantly, the FCC was required to meet these requirements “*in advance* of the adoption or revision of the collection of

²¹ 44 U.S.C. § 3507(a). Failure to obtain OMB approval triggers the PRA’s public protection provision, under which no party can be penalized for failing to comply with the information collection. 44 U.S.C. § 3512.

²² During the clearance process, the FCC and OMB determine if the value of the collection outweighs the burden placed on respondents. 44 U.S.C. § 3506(c)(1); 44 U.S.C. § 3508.

²³ 44 U.S.C. § 3506(c)(2)(B) (requiring that agencies provide a 60-day comment period for PRA issues); *see also* “Memorandum for the Heads of Executive Departments and Agencies, and Independent Regulatory Agencies,” Office of Management and Budget, at 4 (April 7, 2010) (explaining that agencies must “publish[] a second Federal Register notice to announce the start of OMB review” and this “second notice informs the public about how to submit comments to OMB” and “informs the public that OMB may act on the agency’s request only after the 30-day comment period has closed”).

information.”²⁴ Here, the FCC did not seek comment on its extensive information collection prior to its adoption of the *Open Internet Order*.

That the FCC sought comment on a different information collection in the *NPRM* does not absolve the Commission from its responsibility to seek comment on the information collection actually adopted.²⁵ In the *NPRM*, the FCC proposed “to require providers of broadband Internet access service to disclose ... information concerning *network management and other practices*.”²⁶ But in the *Open Internet Order*, the Commission adopted a much broader information collection, requiring disclosure of “information regarding *the network management practices, performance, and commercial terms* of ... broadband Internet access services” and identifying approximately 30 topics that may have to be disclosed.²⁷ Specifically, the Commission detailed the following disclosures:

Network Practices

- *Congestion Management*: If applicable, descriptions of congestion management practices; types of traffic subject to practices; purposes served by practices; practices’ effects on end users’ experience; criteria used in practices, such as indicators of congestion that trigger a practice, and the typical frequency of congestion; usage limits and the consequences of exceeding them; and references to engineering standards, where appropriate.
- *Application-Specific Behavior*: If applicable, whether and why the provider blocks or rate-controls specific protocols or protocol ports, modifies protocol fields in ways not prescribed by the protocol standard, or otherwise inhibits or favors certain applications or classes of applications.
- *Device Attachment Rules*: If applicable, any restrictions on the types of devices and any approval procedures for devices to connect to the network....
- *Security*: If applicable, practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to

²⁴ 44 U.S.C. § 3507(a) (emphasis added).

²⁵ *Preserving the Open Internet, Broadband Industry Practices*, Notice of Proposed Rulemaking, 74 Fed. Reg. 62638 (Nov. 30, 2009).

²⁶ *Id.* (emphasis added).

²⁷ *Open Internet Order*, Appendix A, Rule § 8.3 (emphasis added).

be invoked (but excluding information that could reasonably be used to circumvent network security).

Performance Characteristics

- *Service Description*: A general description of the service, including the service technology, expected and actual access speed and latency, and the suitability of the service for real-time applications.
- *Impact of Specialized Services*: If applicable, what specialized services, if any, are offered to end users, and whether and how any specialized services may affect the last-mile capacity available for, and the performance of, broadband Internet access service.

Commercial Terms

- *Pricing*: For example, monthly prices, usage-based fees, and fees for early termination or additional network services.
- *Privacy Policies*: For example, whether network management practices entail inspection of network traffic, and whether traffic information is stored, provided to third parties, or used by the carrier for non-network management purposes.
- *Redress Options*: Practices for resolving end-user and edge provider complaints and questions.²⁸

Further, the *Open Internet Order* concluded that the list was not exhaustive, suggesting that companies may need to file even more information. Consistent with an agency's obligation under the PRA to provide notice about an information collection before its adoption, the FCC should have solicited public comment on its transparency requirements before they were actually adopted, not after the fact.

IV. THE PROPOSED INFORMATION COLLECTION WILL SIGNIFICANTLY BURDEN MOBILE BROADBAND PROVIDERS, AND THE FCC HAS SIGNIFICANTLY UNDERESTIMATED THESE BURDENS.

Notwithstanding the FCC's assertions to the contrary, the proposed information collection in the *Open Internet Order* will impose significant burdens on mobile broadband providers.²⁹ In determining the burden associated with a particular information collection, the

²⁸ *Id.* at ¶ 56 (internal citations omitted).

²⁹ The term "burden" is broadly defined to include all of the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency." 44 U.S.C. § 3502(2). The burden-hour estimate for an information collection is a

FCC must consider the time, effort, and cost required to train personnel to be able to respond to the collection;³⁰ to acquire, install, and develop systems and technology to collect, validate, and verify the requested information;³¹ to process and maintain the required information;³² and to provide the required information.³³ As detailed below, the burden necessary to comply with the Commission’s disclosure requirements will be enormous and will certainly exceed the Commission’s very minimal burden estimates. Further, the PRA requires that the FCC “minimize” the burden on respondents, something the Commission failed to do.³⁴

A. Mobile Broadband Providers Will Need to Devote Substantial Resources to Satisfy the Proposed Information Collection.

In order to comply with the Commission’s transparency rule, a mobile broadband provider must design and implement a protocol for the collection of the information subject to disclosure. For many of the suggested disclosures, mobile broadband providers will need to establish a process by which relevant information is identified, collected, reviewed, and ultimately disclosed, both “on a publicly available, easily accessible website” and at the “point of sale.”³⁵ This will be a very significant undertaking.

function of (1) the frequency of the information collection, (2) the estimated number of respondents, and (3) the amount of time that the agency estimates it takes each respondent to complete the collection.

³⁰ 5 C.F.R. § 1320.3(b)(1)(vi).

³¹ 5 C.F.R. § 1320.3(b)(1)(ii).

³² 5 C.F.R. § 1320.3(b)(1)(iii).

³³ 5 C.F.R. § 1320.3(b)(1)(iv).

³⁴ 44 U.S.C. § 3501(1).

³⁵ *Open Internet Order* ¶ 57. The Commission does not adequately define how to provide notice at a “point of sale,” and whether the notice must differ depending on whether the sale is in a store or over the Internet. Additionally, the Commission fails to address the problems that mobile broadband providers may have in managing the notice practices of third-party resellers.

At the outset, a mobile broadband provider must determine the specific information it is required to disclose – a process more complicated than otherwise may appear. As stated above, the approximately 30 topics that the FCC identified in the *Open Internet Order* are “not necessarily exhaustive.”³⁶ Thus, a broadband provider may be required to make additional disclosures not specifically identified by the FCC. Nor do these approximately 30 topics constitute “a safe harbor” because, according to the Commission, “there may be additional information ... that should be disclosed for a particular broadband service to comply with the rule in light of relevant circumstances.”³⁷ For a company to certify compliance with the Commission’s rules, simply attempting to understand what is meant by these vague terms will take them significantly beyond the Commission’s time estimates. Further, the disclosures must be adequate to allow “content, application, service, and device providers to develop, market, and maintain Internet offerings.”³⁸ Because a mobile broadband provider does not necessarily have a business relationship with these various entities, the level of detail necessary to satisfy this requirement is hardly self-evident. Moreover, mobile broadband service is still evolving, and as a nascent industry, the nature of these disclosures is more fluid than in a mature industry. Ultimately, mobile broadband providers will need to make a series of judgment calls about what information to disclose, which will require significant input from engineers, network managers, regulatory personnel, attorneys, and sales and marketing teams.

Once a mobile broadband provider settles on the information to be disclosed, the provider will need to establish a process to collect the information at appropriate points in the provider’s organization on an ongoing basis. For example, network operators will have to be trained to

³⁶ *Id.* ¶ 56.

³⁷ *Id.*

³⁸ *Id.* at Appendix A, Rule § 8.3.

collect and report information regarding network management, speed and latency, and security practices. Similarly, product managers must be trained about the performance characteristics of a provider's broadband service that must be disclosed. Once the information is collected, a team – likely with the involvement of regulatory personnel and inside and outside counsel – will need to draft, review, and approve the actual disclosures.

Next, the required disclosures must be posted on the mobile broadband provider's website and disseminated to all "points of sale" where the mobile provider's broadband service is sold. This is no small task. In fact, it could be a tremendous task due to the current sales model for mobile broadband. Mobile broadband providers offer service through a number of different outlets, including branded retail stores, websites, kiosks at the local mall and similar venues, and various unaffiliated retail chains, such as Best Buy and Radio Shack.³⁹ Information containing the required disclosures must be disseminated to all of these varying media and locations. While the information may be disseminated in different forms depending upon the point of sale involved – for example, a computer-generated acknowledgment in a branded retail store versus a pre-printed disclosure form in an unaffiliated retail store – there will be costs involved in "printing and distributing" the disclosures, notwithstanding the Commission's suggestion to the contrary.⁴⁰

And because the various matters subject to disclosure must be disclosed in a "timely" manner,⁴¹ a mobile broadband provider has to establish and implement a process to monitor and update its disclosure on an ongoing basis as changes are made. In addition, by virtue of the

³⁹ Moreover, the Order raises significant compliance questions for retailers that ultimately become "resellers" of broadband service, particularly given their limited knowledge of, or control over, these aspects of the broadband service.

⁴⁰ *Id.* ¶ 59.

⁴¹ *Id.* ¶ 56.

case-by-case adjudication approach articulated by the Commission, this process also must include a mechanism to monitor and incorporate the outcome of: (i) any complaint or enforcement proceedings initiated against a broadband provider regarding the adequacy of its disclosures; and (ii) any proceedings in which the Commission “may require adherence to a particular set of best practices in the future.”⁴²

To illustrate the challenges with and associated burdens of the Commission’s proposed information collection, CTIA highlights two topics that the Commission has suggested should be addressed in a mobile broadband provider’s disclosures in order to comply with its transparency rule—actual broadband speeds and security practices.

Actual Broadband Speeds. The significant challenges to reporting “actual access speeds” are well known. As CTIA recently explained in comments filed in response to the *Form 477 Data Collection NPRM*,⁴³ while providing remarkable utility to consumers, mobile wireless broadband is particularly susceptible to factors that may affect speed, which are not present in wireline networks, as the Commission itself has acknowledged.⁴⁴ These factors include, for example, air interface, distance from a base station, distance from a network hub, network congestion, cell congestion, weather conditions, foliage, topography, and geography.⁴⁵ Moreover, unlike wireline networks where speeds can be measured independently of end user

⁴² *Id.* ¶ 58.

⁴³ *Modernizing the FCC Form 477 Data Program*, Notice of Proposed Rulemaking, WC Docket No. 11-10, FCC 11-14, ¶ 59 (2011) (“*Form 477 NPRM*”).

⁴⁴ “The Broadband Availability Gap,” Omnibus Broadband Initiative Technical Paper 1, FCC, at 66, *available at* Appendix to *Connect America Fund, A National Broadband Plan for Our Future, High-Cost Universal Service Support*, WC Docket Nos. 10-90, 09-51, 05-337, Notice of Inquiry and Notice of Proposed Rulemaking, FCC 10-58 (rel. Apr. 21, 2010) (“[A] wireless network has several layers of complexity that are not found in wireline networks, each of which affect the user experience.”).

⁴⁵ *See id.*

equipment, wireless devices cannot be uncoupled from the network.⁴⁶ In the mobile wireless context, attempting to separate the network speed component from the processing component of the end user device (if even possible) would generate confusing and inaccurate data.

Consequently, the actual speed of a mobile broadband service that a customer uses can vary from location to location, from minute to minute, and from customer to customer in the same location.⁴⁷ Such drastic variability in mobile broadband speed cannot realistically be captured in a consumer disclosure. Indeed, because of these operating variations, there is no meaningful measurement of “actual” mobile broadband speed upon which mobile broadband providers could reasonably rely in satisfying its disclosure obligations. So, in this context, what would a wireless broadband provider report?

The Commission has acknowledged previously the difficulty in obtaining and reporting data on actual broadband speed. In the National Broadband Plan (“NBP”), the Commission tasked itself with crafting a methodology to measure broadband performance, which it has yet to do.⁴⁸ Indeed, while the Commission is in the midst of assessing the performance of fixed

⁴⁶ See Comments of CTIA – The Wireless Association®, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at 16-17 (July 8, 2010).

⁴⁷ CTIA conducted its own speed test across multiple wireless devices and carriers in 2010, which demonstrated that, in a single three minute period, there can be as much as a 97 percent drop in speed followed by a 1200 percent increase in speed, even without movement by the consumer. *See id.* at 2.

⁴⁸ See FCC, *Connecting America, The National Broadband Plan*, at 45 (rel. March 16, 2010) (“Plan”) (Recommendation 4.3); *see also Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing an Unified Intercarrier Compensation Regime, Federal-State Joint Board on Universal Service, Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13, ¶¶ 113 & 115 (rel. Feb. 9, 2011) (“*Connect America NPRM*”) (proposing to use universal service to support broadband based on “‘actual’ speed rather than the ‘advertised’ or ‘up to’ speed” and to require that fund recipients “test their broadband networks for compliance with whatever metrics ultimately are adopted and report the results to the Universal Service Administrative Company (USAC) on a quarterly basis ...”).

broadband services through the SamKnows project,⁴⁹ no similar formal project is underway for mobile broadband services. Rather, the Commission sought comment last year on “whether and how to pursue” a similar measurement program for mobile broadband.⁵⁰ Among the issues upon which the FCC requested public input concerned the “measurement metrics for mobile broadband services,” including “performance characteristics” (such as “typical data throughput” and “latency”), and the parts of the network that “should be measured.”⁵¹ The FCC has yet to take action on this public notice, and the absence of Commission guidance on the subject underscores the difficulty and corresponding burden of mobile broadband providers measuring and reporting actual speeds.

Security Information. According to the Commission, mobile broadband providers should disclose information about “practices used to ensure end-user security or security of the network, including ... triggering conditions that cause a mechanism to be invoked.”⁵² Mobile broadband providers employ a host of security practices to protect end users and the network, which are employed deep in the network or integrated into broadband services offered to end users.

At the outset, a mobile broadband provider must identify all of the various security measures that could possibly be the subject of disclosure. Because the *Open Internet Order*

⁴⁹ See Federal Communications Commission, *Request for Quotation for Residential Fixed Broadband Services Testing and Measurement Solution*, RFQ-10-000013 (Mar. 12, 2010) (<https://www.fbo.gov/files/archive/cb7/cb712eb3ef384ebe25bfbf6b0a5dfa16.pdf>) (awarding contract to SamKnows Limited “to provide a residential and small business fixed broadband services testing and measurement solution” in accordance with a specified statement of work); see also *Comment Sought on Residential Fixed Broadband Services Testing and Measurement Solution*, Public Notice, 25 FCC Rcd 3836 (2010).

⁵⁰ *Comment Sought on Measurement of Mobile Broadband Network Performance and Coverage*, Public Notice, 25 FCC Rcd 7069 (2010).

⁵¹ *Id.* at 2.

⁵² *Open Internet Order* ¶ 56.

exempts from disclosure any “information that could reasonably be used to circumvent network security,”⁵³ a mobile broadband provider also must make an assessment of each individual security measure to determine whether this exemption has been met. In the event a mobile broadband provider decides not to disclose information regarding a particular security technique, it would likely have to document the basis for its decision, since end users, edge providers, and “others” can file a complaint challenging a provider’s compliance with the Commission’s rules.⁵⁴ This documentation process only adds to the burdens associated with the Commission’s proposed information collection.

Significantly, the disclosures at issue do not entail an annual or even quarterly report; rather, the FCC requires that broadband service providers provide relevant disclosures on an ongoing basis. Thus, to remain in compliance with the FCC’s transparency requirements regarding its security practices, a mobile broadband provider presumably must decide whether to update its disclosures whenever its security practices change. As a result, every time a mobile broadband provider deploys a new technique to prevent, detect, mitigate, and respond to the latest malware, spam, or other network threat, a process would be triggered to determine whether this new technique must be disclosed. Given the increased security threats that mobile broadband networks face today, the FCC’s transparency requirements could necessitate weekly, if not daily, modifications to the information being disclosed, or at least a regular analysis of whether to report these changes.

⁵³ *Id.*

⁵⁴ *Id.* ¶ 153.

B. The FCC Failed to Mitigate the Burdens of the Information Collection, As Required by the PRA.

Contrary to the requirements of the PRA, the FCC did not make any serious effort to mitigate the potential burden of the proposed information collection.⁵⁵ Instead of providing the industry a list of mandatory disclosures and a potential safe harbor if those disclosures are made, the FCC outlined a non-exhaustive list of approximately 30 topics that broadband providers may or may not have to disclose and has indicated that additional but unspecified disclosures may be required. The proposed information collection here starkly contrasts with the approach the Commission has taken by providing more specific directions for complying with information collection requirements in other circumstances.⁵⁶ In short, the current approach is inconsistent with the Commission’s obligation to minimize the burden of the information collection, and the OMB has disapproved other proposed rules under such circumstances.⁵⁷

While the FCC’s approach purports to give broadband providers “flexibility” in meeting their disclosure obligations,⁵⁸ such flexibility does not necessarily reduce the burden on mobile broadband providers, notwithstanding the Commission’s claim to the contrary. In the absence of

⁵⁵ See 44 U.S.C. § 3501(1) (noting that one of the purposes of the PRA is to “minimize the paperwork burden for individuals, small businesses, and other persons resulting from the collection of information by or for the Federal Government”).

⁵⁶ See, e.g., 47 C.F.R. § 64.1200(d) (setting forth explicit rules relating to the maintenance of and adherence to “do-not-call” lists by telemarketers); 47 C.F.R. § 10.210 (detailing the Commission notification process for wireless service providers that elect to participate in the Commercial Mobile Alert System).

⁵⁷ See Notice of Office of Management and Budget Action, ICR Reference No. 200804-3060-012, OMB Control No. 3060-0568, at 2 (July 9, 2008); Notice of Office of Management and Budget Action, ICR Reference No. 199607-1880-002, at 1 (Sept. 23, 1996) (highlighting that the proposed “collection fails to take the least burdensome approach possible for the collection’s intended purpose”); Notice of Office of Management and Budget Action, ICR Reference No 199607-2060-001, at 1 (Aug. 30, 1996).

⁵⁸ *Open Internet Order* ¶ 166. The Commission also argues that small providers will be protected because the “the rule gives providers adequate time to develop cost-effective methods of compliance.” *Id.*

concrete guidance from the Commission regarding the information that must be disclosed and the level of detail required for such disclosures, mobile broadband providers are left to speculate about their compliance obligations, which may result in their disclosing more information than would otherwise be required in order to avoid a possible complaint or enforcement proceeding. The over-disclosure of information results in a greater burden on broadband providers – an issue the Commission did not appear to consider.

C. The Commission Significantly Underestimated The Burden Of The Proposed Information Collection.

As discussed above, a mobile broadband provider will be required to devote substantial time and effort to comply with the proposed information collection.⁵⁹ Yet, the FCC actually lowered the burden estimate at the same time that it was increasing the information collection requirements. The Commission erroneously estimated that broadband providers will only spend an average of approximately 10 hours annually in complying with the proposed collection and at no external cost for providers.⁶⁰ These estimates are not grounded in any facts. It would take considerably more than 10 hours and cost a significant amount of money just for a broadband provider to even decide which among the approximately 30 different topics identified by the Commission should even be disclosed.

⁵⁹ In addition to violating the PRA, the information collection associated with the “transparency” rule likely implicates the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), which requires an agency to advise the OMB as to whether the proposed rule constitutes a “major” rule. Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C., 15 U.S.C., and as a note to 5 U.S.C. 601). Under SBREFA, a rule is considered “major” where, if adopted, it results or is likely to result in an annual effect on the economy of \$100 million or more (either in the form of an increase or a decrease). Here, the transparency rule may have an effect on the economy that reaches \$100 million.

⁶⁰ *PRA Calculations for Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices Report and Order*, GN Docket No. 09-191, WC Docket No. 07-52, at 1 (2011) (“*Transparency Information Collection Burden Calculations*”).

That the burden estimates for the information collection in the *Open Internet Order* are seriously understated is clear from the burden estimates the Commission provided to OMB for the information collection initially proposed in the *NPRM*. The collection proposed in the *NPRM* was limited to “*network management and other practices*,”⁶¹ and yet the Commission estimated that the burden of this information amounted to 327 hours annually per broadband provider (or 546,840 hours industry-wide).⁶² The Commission’s estimate of the industry-wide costs totaled \$4,687,000.⁶³ Yet, after revising the transparency requirements to include significantly more data, both the cost and the time required were reduced. The FCC’s *Open Internet Order* PRA calculations claim that, for the approximately 10 hours per broadband provider, it will cost a mere \$734.97 per year in “in-house” costs, with no external costs whatsoever. These estimates cannot withstand serious scrutiny.

In the transparency rule adopted in the *Open Internet Order*, the FCC required broadband providers to disclose “information regarding *the network management practices, performance, and commercial terms* of its broadband Internet access services”⁶⁴ In addition, the 30 suggested topics of disclosure identified in the *Open Internet Order* were not mentioned in the *NPRM*, and the FCC’s initial burden estimates therefore did not account for the time and costs associated with disclosing such information, including device attachment policies, security measures, the impact of specialized services, and other disclosures. Based on this increase, one could reasonably assume that the estimates of the burden on providers would increase.

⁶¹ *Id.* (emphasis added).

⁶² *NPRM*, 74 Fed. Reg. at 62639.

⁶³ *Id.*

⁶⁴ *Open Internet Order*, Appendix A, Rule § 8.3 (emphasis added).

Even though the proposed information collection in the *Open Internet Order* is considerably more expansive than the collection proposed in the *NPRM*, the FCC inexplicably *reduced* its burden estimates. Specifically, the Commission reduced its burden estimates from 327 hours per broadband provider (or 546,840 hours industry-wide) to 10.3 hours (or 15,885 hours industry-wide),⁶⁵ and reduced its estimates of the cost of the collection from approximately \$4.7 million to zero dollars on an industry-wide basis.⁶⁶ The FCC did not explain why it reduced its burden estimates, but regardless none of the estimates can be reconciled with the reality of the burdens and costs being imposed on broadband providers.

The Commission attempts to justify its burden estimates by claiming that “most broadband providers already disclose most, and *in some cases all*, of the information required to comply with the rule.”⁶⁷ Even assuming this were true, the PRA prohibits the Commission from imposing information collections that are duplicative of information publicly available. Specifically, Section 1320.9 provides that as “part of the agency submission to OMB of a proposed collection of information, the agency ... shall certify ... that the proposed collection of information is not unnecessarily duplicative of information otherwise reasonably accessible to the agency.”⁶⁸ If, as the Commission believes, the information in question is already being

⁶⁵ *NPRM*, 76 Fed. Reg. at 62639; *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7206 (Feb. 9, 2011); *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7207 (Feb. 9, 2011).

⁶⁶ *Transparency Information Collection Burden Calculations* at 2.

⁶⁷ *Transparency Information Collection Burden Calculations* at 1.

⁶⁸ 5 C.F.R. § 1320.9.

disclosed, there is no justifiable reason for the Commission to mandate such disclosures, and it cannot do so consistent with the requirements of the PRA.⁶⁹

V. WHILE SIGNIFICANTLY BURDENING MOBILE BROADBAND PROVIDERS, THE INFORMATION COLLECTION REQUIREMENTS WOULD HAVE LITTLE, IF ANY, “PRACTICAL UTILITY” FOR THE FCC.

The “transparency” information collection does not have “practical utility,” as required by the PRA. In order to satisfy the “practical utility” requirement, an agency must have “the ability ... to use information, particularly the capability to process such information in a timely and useful fashion.”⁷⁰ OMB’s rules clarify that “practical utility means the actual, not merely the theoretical or potential, usefulness of information.”⁷¹ Thus, an agency must have a “plan for the efficient and effective management and use of the information to be collected.”⁷² Here, the FCC has not provided any indication that it has an actual plan—let alone the resources—to use or even review the disclosed information in a timely and effective fashion.⁷³

The information collection—which will be in myriad, carrier-specific formats and consist of voluminous technical data—will be very difficult for the agency to monitor. Moreover, the

⁶⁹ In assessing the burden of an information collection, OMB requires that an agency demonstrate a particular need for the information in question. *See* Notice of Office of Management and Budget Action, ICR Reference No: 199805-2040-001, at 1 (Sept. 11, 1998) (disapproving an Environmental Protection Agency (“EPA”) information collection aimed at minimizing environmental impacts caused by cooling water intake structures because the EPA failed to justify the substantial burden of the collection). Here, the FCC has not documented the need for the detailed disclosures that its information collection would require; for example, the *Open Internet Order* does not identify any harms – speculative or otherwise – that the disclosure of “security practices” or “actual access speed and latency” would purport to remedy.

⁷⁰ 44 U.S.C. § 3502(11).

⁷¹ 5 C.F.R. § 1320.3(l).

⁷² 5 C.F.R. § 1320.8(a)(7) (calling upon the agency to provide for a “plan for the efficient and effective management and use of the information to be collected.”).

⁷³ Indeed, the Order does not appear to include *any* estimate of the number of FCC staff hours required by the agency to process the information collected.

data will become stagnant quickly, as mobile broadband providers adapt their technology, practices, and offerings to the rapidly evolving demands of consumers.

Notably, the PRA deficiencies with the *Open Internet Order* are similar to those that led OMB to reject the information collection in the emergency backup power proceeding. In that case, OMB concluded that the FCC did not demonstrate the “practical utility” of the information collection because the information could “potential[ly] change before the FCC c[ould] process it.”⁷⁴ The FCC also failed to “demonstrate[, given the minimal staff assigned to analyze and process this information, that the collection ha[d] been developed by an office that ha[d] planned and allocated resources for the efficient and effective management and use of the information collected.”⁷⁵ And, finally, OMB explained that the “non-standardized format”⁷⁶ of the information collection and “lack of sufficient clari[ty] on how respondents are to satisfy compliance”⁷⁷ also limited the collection’s practical utility. As detailed above, all of these problems are equally applicable here: the reported information will become stagnant quickly; the Commission has no plan and minimal resources to process the information; and the lack of detailed reporting instructions ensures that the information provided by different broadband providers will differ in content, making ongoing monitoring exceedingly difficult.

⁷⁴ See Notice of Office of Management and Budget Action, ICR Reference Number 200802-3060-019, at 1 (Nov. 28, 2008).

⁷⁵ *Id.* (citing 44 U.S.C. § 3506(c)(3)(H)).

⁷⁶ *Id.* (citing 44 U.S.C. § 3506(c)(3)(A); 5 C.F.R. § 1320(5)(d)(1)).

⁷⁷ *Id.* (citing 44 U.S.C. § 3506(c)(3)(C)).

VI. THE FCC DID NOT ADEQUATELY REDUCE THE BURDEN OF THE NEW REQUIREMENTS ON SMALL BUSINESS CONCERNS.

The PRA requires that an agency certify to OMB that the proposed information collection reduces the paperwork burden to the extent practicable “with respect to small entities.”⁷⁸ The PRA sets forth potential techniques to accomplish this goal.⁷⁹ The PRA—as amended by the Small Business Paperwork Relief Act of 2002—also directs agencies to make a special effort to “further reduce the information collection burden for small business concerns with fewer than 25 employees.”⁸⁰

In the *Open Internet Order*, the FCC did nothing to accommodate small business concerns. The Commission did not: (i) establish different disclosure requirements for small broadband providers; (ii) clarify, consolidate, or simplify compliance obligations of small broadband providers; or (iii) exempt small broadband providers from coverage of any parts of the information collection. Instead, the FCC simply concluded that “any burden on small businesses will be minimal” because the “the rule gives broadband Internet access service providers flexibility in how to implement the disclosure rule.”⁸¹ But this argument overlooks that the *Open Internet Order* provides “flexibility” to all broadband providers—large and small—in satisfying the disclosure requirements.⁸² No distinction is made based on size. And, as discussed above, the “flexibility” afforded is of limited value to the extent it results in mobile

⁷⁸ 44 U.S.C. § 3506(c)(3)(C).

⁷⁹ *Id.*

⁸⁰ 44 U.S.C. § 3506(c)(4).

⁸¹ *Open Internet Order* ¶ 166. The Commission also argues that small providers will be protected because “the rule gives providers adequate time to develop cost-effective methods of compliance.” *Id.*

⁸² *Id.* ¶ 56 (“We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models.”).

broadband providers disclosing more information than would otherwise be required. Thus, the FCC cannot certify to OMB that the proposed information collection reduces the paperwork burden with respect to small entities, as required by the PRA.

VII. CONCLUSION

For the foregoing reasons, the Commission should rescind or significantly revise the information collection requirements associated with the “transparency” rule in the *Open Internet Order*. Failure to do so will likely prompt OMB to disapprove the proposed information collection.

Respectfully submitted,

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