

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Protecting and Promoting the Open Internet)	GN Docket No. 14-28
)	
Guidance on Open Internet Transparency Rule Requirements)	DA 16-569
)	
Applications for Review of CTIA and Competitive Carriers Association)	

To: The Commission

REPLY OF CTIA

CTIA¹ replies to the comments submitted in response to the separate Applications for Review filed by CTIA² and CCA³ regarding the Open Internet transparency rule guidance issued by the Chief Technologist, Office of General Counsel, and Enforcement Bureau in the Public Notice of May 19, 2016.⁴ No one opposes CTIA’s specific challenges. RootMetrics, Nielsen, and Mosaik have all filed in the docket sharing concerns raised by CTIA and CCA, and call on

¹ CTIA® (www.ctia.org) represents the U.S. wireless communications industry. With members from wireless carriers and their suppliers to providers and manufacturers of wireless data services and products, the association brings together a dynamic group of companies that enable consumers to lead a 21st century connected life. CTIA members benefit from its vigorous advocacy at all levels of government for policies that foster the continued innovation, investment and economic impact of America’s competitive and world-leading mobile ecosystem. The association also coordinates the industry’s voluntary best practices and initiatives and convenes the industry’s leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

² CTIA Application for Review, GN Docket No. 14-28 *et al.*, (filed June 20, 2016) (“CTIA Application for Review”).

³ Competitive Carriers Association Application for Review, GN Docket No. 14-28 *et al.*, (filed June 20, 2016) (“CCA Application for Review”).

⁴ *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, DA 16-569 (rel. May 19, 2016) (“Public Notice”).

the Commission, at a minimum, to re-open the Public Notice and seek public comment to develop guidance that will result in meaningful, accurate disclosures for consumers.⁵

RootMetrics observes that “the Public Notice was adopted without any kind up public input.”⁶ CTIA agrees that the Commission should reverse course, “grant the Applications for Review so that the Commission can develop a proper record,” and issue guidance “that will produce the public disclosures of ‘accurate information’ that consumers deserve.”⁷

As CTIA and CCA both observed, the Public Notice’s guidance unlawfully imposed new substantive obligations, absent the Administrative Procedure Act notice and comment obligations, and as such should be rescinded. The lack of public process involved in the guidance led to flawed and unworkable solutions: the Public Notice unlawfully adopts a safe harbor relying on the Mobile Measuring Broadband America (“Mobile MBA”) program, resulting in an unachievable safe harbor (and with significant flaws in any event);⁸ the Public Notice unlawfully adopts Cellular Market Areas as a new geographic standard for reporting actual network performance;⁹ and the Public Notice unlawfully imposes a new point of sale

⁵ RootMetrics Comments, GN Docket No. 14-28 (filed June 27, 2016); Nielsen Comments, GN Docket No. 14-28 (filed July 5, 2016); Letter from Bryan Darr, Mosaik, to Marlene H. Dortch, FCC, GN Docket No. 14-28 (filed July 15, 2016) (“Mosaik Letter”). The American Cable Association also filed comments, see *infra* at 4, but “takes no position on the question whether the guidance provided to mobile BIAS providers with regard to the matters raised by CTIA and CCA constitutes appropriate guidance or legislative rules, the latter of which could not be done on delegated authority, but rather would require a notice-and-comment rulemaking proceeding.” American Cable Association Comments on Application for Review, GN Docket No. 14-28 *et al.*, at 6 (filed July 6, 2016).

⁶ RootMetrics Comments at 1.

⁷ *Id.* at 10.

⁸ CTIA Application for Review at 7-9; CCA Application for Review at 8-9.

⁹ CTIA Application for Review at 5-7; CCA Application for Review at 6-7.

disclosure that creates uncertainty, not guidance, as broadband service providers must now ensure that customers “actually receive” disclosures.¹⁰

RootMetrics, Nielsen, and Mosaik focus much of their comments on the mobile broadband safe harbor, which mandates that carriers rely on Mobile MBA data. RootMetrics explains that the Mobile MBA program “does not accurately reflect mobile providers’ actual performance,” identifying numerous shortcomings.¹¹ It adds that “there is no evidence that the FCC has made any attempt to adjust the MBA program to correct for these data quality problems.”¹²

Similarly, Nielsen highlights the CTIA and CCA concern about “whether the established safe harbor will inadvertently result in consumers not having the best available information.”¹³

Nielsen goes on to conclude:

Given the robustness of available data from professional third-parties and the questions raised in the record regarding the Measuring Mobile Broadband America program data, it seems a disservice to consumers to encourage providers to report based on an untested and questioned solution when other solutions are not only available but already in use.¹⁴

Mosaik adds that “[r]elying on a single source of data – especially when that data source suffers from serious flaws – introduces a high likelihood of misleading information that will not accurately represent actual network performance.”¹⁵

¹⁰ CTIA Application for Review at 4-5; CCA Application for Review at 10-12.

¹¹ RootMetrics Comments at 2.

¹² *Id.* at 5.

¹³ Nielsen Comments at 5.

¹⁴ *Id.* at 5.

¹⁵ Mosaik Letter at 3.

CTIA takes no position with respect to any particular third-party source of wireless service performance data, but notes there are several widely used and verifiable methodologies employed today that could provide the foundation for a safe harbor. Mosaik explains, however, that “[g]overnment identification of a single, seriously flawed method offered by a single preferred vendor as the sole safe harbor” would discourage continued investment and innovation in third-party, private sector network measurement solutions, undermining the Commission’s goal to provide consumers with reliable, accurate information.¹⁶ The Commission has never sought comment on a safe harbor for reporting actual network performance; public comment at this juncture would allow broad stakeholder input and consideration of these issues.

The safe harbor is just one of the issues of concern that CTIA and CCA raised, as the Public Notice improperly imposed the new point of sale obligation and the CMA-level reporting of actual network performance. All of these issues should be revisited, as a matter of law and policy. The Commission should re-open the guidance in the Public Notice, seek public comment, and develop guidance based on a sound record.

Finally, CTIA notes that the American Cable Association (“ACA”) takes no position regarding the issues raised in the Applications for Review involving mobile broadband guidance and does not object to the Commission seeking public comment on those portions of the guidance.¹⁷ Likewise, CTIA has no objection to ACA’s position with respect to the Public Notice’s guidance relevant to “methodologies fixed BIAS providers can use to comply with the enhanced performance characteristics disclosure requirements.”¹⁸

¹⁶ *Id.* at 5.

¹⁷ American Cable Association Comments at 6.

¹⁸ *Id.* at 6.

For the foregoing reasons, the Commission should grant the CTIA and CCA Applications for Review, rescind those aspects of the Bureaus' guidance identified above, and seek public comment to ensure APA compliance *and* good, workable rules.

Respectfully submitted,

/s/ Krista L. Witanowski

Krista L. Witanowski
Assistant Vice President, Regulatory Affairs

Thomas C. Power
Senior Vice President and General Counsel

Scott K. Bergmann
Vice President, Regulatory Affairs

Kara D. Romagnino
Director, Regulatory Affairs

CTIA
1400 Sixteenth Street, NW
Suite 600
Washington, DC 20036
(202) 785-0081

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