



# PUBLIC NOTICE

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## FCC ENFORCEMENT BUREAU AND OFFICE OF GENERAL COUNSEL ISSUE ADVISORY GUIDANCE FOR COMPLIANCE WITH OPEN INTERNET TRANSPARENCY RULE

### GN Docket No. 09-191, WC Docket No. 07-52

In this Public Notice, the Enforcement Bureau and Office of General Counsel (together, the “Bureau”) offer initial guidance regarding specific methods of disclosure that will be considered to comply with the transparency rule adopted in the Commission’s *Open Internet Order*.<sup>1</sup> This guidance is intended for broadband providers seeking additional clarification about disclosure practices that will satisfy the rule when it becomes effective.<sup>2</sup> We emphasize that the alternatives described here are examples of approaches to disclosure that would satisfy the transparency rule; broadband providers may implement alternative approaches that disclose information sufficient to adequately inform consumers and relevant third parties.<sup>3</sup> And as noted in the *Open Internet Order*, the Commission or the Bureau may provide additional guidance in the future.<sup>4</sup>

In the *Open Internet Order*, the Commission concluded that effective disclosure of broadband providers’ network management practices increases “the likelihood that broadband providers will abide by open Internet principles,” enables the Internet community and the FCC to identify and address open Internet violations, and correspondingly increases “the chances that harmful practices will not occur.”<sup>5</sup> For example, information about performance metrics such as broadband speed and latency can help consumers and others identify situations in which access to a particular website or application may have been slowed if the speed or latency experienced in accessing that website or application is consistently and significantly worse than the disclosed speed or latency for the broadband service. The Commission

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<sup>1</sup> *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17936-41 (2010).

<sup>2</sup> The rules adopted in the *Open Internet Order* will become effective 60 days after the Federal Register notice announcing the decision of the Office of Management and Budget approving the information collection requirements contained in those rules. *See id.* at 17989, para. 161.

<sup>3</sup> *See id.* at 17938, 17941, paras. 56, 59.

<sup>4</sup> *Id.* at 17940, para. 58.

<sup>5</sup> *Id.* at 17936, para. 53.

also found that disclosure of network management practices and the performance and commercial terms of broadband services empowers consumers and promotes competition and investment, further reducing broadband providers' incentives and ability to engage in harmful conduct.<sup>6</sup>

To achieve these objectives, the Commission adopted the following transparency rule:

*A person engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its 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.*<sup>7</sup>

The Commission stated that "effective disclosures will likely include" information concerning "some or all" of the following topics: (1) network practices, including congestion management, application-specific behavior, device attachment rules, and security measures; (2) performance characteristics, including a general description of system performance and the effects of specialized services, if any, on available capacity; and (3) commercial terms, including pricing, privacy policies, and redress options.<sup>8</sup> Rather than providing an exhaustive list of topics that should be included in disclosures, the Commission concluded that "the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance concerning effective disclosure models."<sup>9</sup> "Broadband providers should examine their network management practices and current disclosures to determine what additional information, if any, should be disclosed to comply with the rule."<sup>10</sup>

The Commission indicated that it "may require adherence to a particular set of best practices in the future,"<sup>11</sup> and suggested that it might address this issue in the ongoing *Consumer Information and Disclosure* proceeding.<sup>12</sup> The Commission also noted that it had launched a broadband performance measurement project designed to measure some of the actual speed and performance characteristics of broadband service, which "will inform Commission efforts regarding disclosure."<sup>13</sup>

Pursuant to the Paperwork Reduction Act (PRA),<sup>14</sup> the Commission published a notice in the Federal Register on February 9, 2011 seeking comment on the PRA implications of the transparency rule,

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<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 17937, para. 54.

<sup>8</sup> *Id.* at 17938-39, para. 56.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 17940, para. 58.

<sup>12</sup> *Id.* at para. 58 n.188; *Consumer Information and Disclosure*, Notice of Inquiry, 24 FCC Rcd 11380 (2009).

<sup>13</sup> 25 FCC Rcd at 17940, para. 58 n.188; *see also Comment Sought on Residential Fixed Broadband Services Testing and Measurement Solution, Pleading Cycle Established*, Public Notice, 25 FCC Rcd 3836 (2010); *Comment Sought on Measurement of Mobile Broadband Network Performance and Coverage*, Public Notice, 25 FCC Rcd 7069 (2010).

<sup>14</sup> *See* Paperwork Reduction Act of 1995, Pub. L. 104-13, 109 Stat. 163 (1995), *codified at* 44 U.S.C. § 3501 *et seq.*

and in particular on the Commission's estimate of the burden of the transparency rule on broadband providers.<sup>15</sup> In response to the Federal Register notice, broadband providers and broadband provider industry associations expressed concerns arising from the flexibility provided to broadband providers in complying with the transparency rule. In the absence of greater clarity regarding expected disclosures, commenters stated, the transparency rule could be interpreted to require burdensome disclosures, particularly for small providers that may not have resources comparable to the largest providers.<sup>16</sup> Other commenters suggested that it would be appropriate for the Commission to provide early guidance to clarify disclosure obligations.<sup>17</sup>

To provide further clarity regarding the transparency rule, this Public Notice offers initial guidance for compliance with certain aspects of the rule based on the Bureau's understanding of the information available to broadband providers at this time.<sup>18</sup> While the suggestions below offer ways broadband providers can satisfy their disclosure obligations, these particular methods of compliance are not required or exclusive; broadband providers may comply with the transparency rule in other ways.

This Public Notice offers guidance in five specific areas:

**1. Point-of-Sale Disclosures.** The *Open Internet Order* requires broadband providers to disclose network management practices, performance characteristics, and commercial terms "at the point of sale."<sup>19</sup> Some commenters raised concerns that the *Order* could be interpreted to require distribution of physical materials at retail outlets and extensive training of sales employees at those locations and at telephone and Internet sales centers operated by broadband providers or third parties.<sup>20</sup> The Commission addressed those concerns in the *Order*, stating that "broadband providers must, at a minimum, prominently display or provide links to disclosures on a publicly available, easily accessible website that is available to current and prospective end users and edge providers."<sup>21</sup> The Commission further explained in the *Order* that it anticipated that "broadband providers may be able to satisfy the transparency rule through a single disclosure."<sup>22</sup> Accordingly, we clarify that the *Order* does not compel

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<sup>15</sup> See *Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7207 (Feb. 9, 2011). The Commission also sought comment on the PRA implications of the proposed transparency rule when it issued the *Open Internet NPRM*. See 74 Fed. Reg. 62638, 62639 (2009).

<sup>16</sup> See, e.g., Letter from Ross Lieberman, Vice President of Government Affairs, ACA, et al. to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 at 2 (filed June 8, 2011) (Lieberman Letter); CTIA Comments at 12-15; NCTA Comments at 5-6.

<sup>17</sup> See Letter from David Sohn, Center for Democracy & Technology, to Marlene Dortch, Secretary, FCC, GN Docket No. 09-191, WC Docket No. 07-52 at 1 (filed June 3, 2011).

<sup>18</sup> The guidance provided in no way alters broadband providers' obligation to comply with elements of the transparency rule not discussed herein, or with the *Open Internet Order's* other rules.

<sup>19</sup> 25 FCC Rcd at 17940, para. 57.

<sup>20</sup> See CTIA Comments at 12; MetroPCS Comments at 8-10; USTA Comments at 5, 10-11.

<sup>21</sup> 25 FCC Rcd at 17939-40, para. 57; see also *id.* at 17940, para. 58 n.186 ("[W]e expect that broadband providers will make disclosures in a manner accessible by people with disabilities.").

<sup>22</sup> *Id.* at 17940, para. 58.

the distribution of disclosure materials in hard copy or extensive training of sales employees to provide the disclosures themselves. Broadband providers can comply with the point-of-sale requirement by, for instance, directing prospective customers at the point of sale, orally and/or prominently in writing, to a web address at which the required disclosures are clearly posted and appropriately updated.<sup>23</sup> The address provided should enable consumers easily to find the disclosures, rather than, for example, leading to a broadband provider's general purpose home page from which the disclosures are not clearly and readily accessible. At brick-and-mortar retail outlets (*i.e.*, not telephone or Internet sales centers), broadband providers that rely on a web page for point-of-sale disclosure should make available equipment, such as a computer, tablet, or smartphone, through which customers can access the disclosures.

**2. Service Description.** The *Open Internet Order* requires broadband providers to disclose accurate information regarding network performance for each broadband service they offer.<sup>24</sup> As noted in the *Order*, the Commission has launched a broadband performance measurement project to accurately measure key performance metrics, including baseline connection speed and latency.<sup>25</sup> The Commission expects initial results of the project to be finalized and publicly released before the open Internet rules become effective. Both those initial results and the methodology developed through the project can facilitate broadband providers' measurement and disclosure of the actual performance of their services. Ultimately, we expect the Commission or the Bureau to provide additional guidance regarding disclosure of performance characteristics based on outputs from the broadband performance measurement project<sup>26</sup> and the *Consumer Information and Disclosure* proceeding.

A. *Fixed Broadband.* To satisfy their obligations under the transparency rule, the 13 fixed broadband providers that chose to participate in the broadband performance measurement project<sup>27</sup>— which together account for approximately 86% of all residential fixed broadband connections in the U.S.<sup>28</sup>— may disclose their results from the project as a sufficient representation of the actual performance their customers can expect to experience. For example, for a particular tier of service, a broadband provider could disclose data from the project showing the mean upload and download speeds in megabits per second during

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<sup>23</sup> See USTA Comments at 6; Lieberman Letter at 4. With regard to the form of website disclosures, we note that the Commission considered Comcast's disclosure concerning its congestion management practices likely to satisfy the network practices disclosure requirement, and that this disclosure provides a useful guide for other disclosures. See 25 FCC Rcd at 17938, para. 56 n.177; see also Comcast, Network Management Policy, <http://xfinity.comcast.net/terms/network/update/>; Comcast, Frequently Asked Questions About Network Management, <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Network-Management>.

<sup>24</sup> 25 FCC Rcd at 17937, 17939, paras. 54, 56.

<sup>25</sup> *Id.* at 17940, para. 58 n.188.

<sup>26</sup> See *supra* n.13.

<sup>27</sup> The participants in the project are AT&T, Cablevision, CenturyLink, Charter, Comcast, Cox, Frontier, Insight, Mediacom, Qwest, Time Warner Cable, Verizon, and Windstream. The project has also obtained some performance measurements for broadband provided by Clear (fixed wireless), HughesNet (satellite), and WildBlue (satellite) from customers that voluntarily submitted data.

<sup>28</sup> The 86% figure is a staff calculation based on June 30, 2010 Form 477 data. See Industry Analysis and Technology Division, Wireline Competition Bureau, *Internet Access Services: Status as of June 30, 2010* (March 2011), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0520/DOC-305296A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0520/DOC-305296A1.pdf).

the “busy hour” between 7:00 p.m. and 11:00 p.m. on weeknights. Similarly, broadband providers could report mean roundtrip latency<sup>29</sup> during this time period.

Providers that have not participated in the performance measurement project to date may use the methodology developed through the project—which will be released along with the project’s initial results—to measure the actual performance of their broadband offerings. Alternatively, a broadband provider may disclose actual performance based on internal testing; consumer speed test data;<sup>30</sup> or other data regarding network performance, including reliable, relevant data from third-party sources such as the broadband performance measurement project.

B. *Mobile Broadband.* The Commission has recognized that measuring performance can be more challenging for mobile broadband than for fixed,<sup>31</sup> and is in the process of obtaining data regarding mobile broadband performance that will help facilitate mobile broadband providers’ disclosure of actual performance, as the broadband performance measurement project data will do for fixed services. Once that data has been reviewed, we anticipate the Commission or the Bureau providing further guidance regarding specific methods of disclosing performance information. Until then, mobile broadband providers that have access to reliable information on network performance may disclose the results of their own or third-party testing; many mobile providers routinely receive such performance data.<sup>32</sup> This disclosure could include mean upload and download speeds in megabits per second and mean roundtrip latency. We recognize that some mobile broadband providers, particularly small providers, may not have or reasonably be able to obtain reliable information on their network performance metrics such as mean upload and download speeds. Such a provider that lacks reasonable access to this network performance information may disclose a Typical Speed Range (TSR) representing the range of speeds and latency that can be expected by most of their customers, for each technology/service tier offered, along with a statement that such information is the best approximation available to the broadband provider of

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<sup>29</sup> Generally, roundtrip latency is the length of time for a signal to be sent between two defined end points and the time it takes for an acknowledgement of the receipt of the signal to be received. *See, e.g.*, Institute for Telecommunication Sciences, *Telecommunications: Glossary of Telecommunication Terms*, Federal Standard 1037C, available at <http://www.its.bldrdoc.gov/fs-1037/> (definition of “round-trip delay time”).

<sup>30</sup> Various software-based broadband performance tests are available as potential tools for companies to estimate actual broadband performance. Ookla Inc., host for the speedtest.net broadband performance test, has information about obtaining test data at <http://www.netindex.com/source-data/>. Measurement Lab, the host for the NDT broadband performance test, has information about obtaining test data at <http://www.measurementlab.net/data>.

<sup>31</sup> *See Connect America Fund, A National Broadband Plan for Our Future, High Cost Universal Service Support*, Notice of Inquiry and Notice of Proposed Rulemaking, Appendix C (*The Broadband Availability Gap*, Omnibus Broadband Initiative Technical Paper 1), 25 FCC Rcd 6657, 6794 (2010).

<sup>32</sup> In 2010, the Commission issued a public notice seeking comment on measurement of mobile broadband performance. *See Comment Sought on Measurement of Mobile Broadband Network Performance and Coverage*, Public Notice, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, 25 FCC Rcd 7069 (2010). In response, several commenters acknowledged the existence of testing by mobile broadband providers and third parties. *See, e.g.*, AT&T Comments at 11 (“Mobile broadband network providers often perform their own testing, and hire independent third parties, like GWS and Nielsen, to perform testing.”); CTIA Comments at 12 (“In addition to this wealth of resources available from providers themselves, third-parties also study and report on wireless coverage and service.”); Nielsen Comments at 2 (“Nielsen Telecom’s annual testing program provides an independent view of wireless network performance and coverage across all major voice and data networks in more than 200 unique markets that are home to more than 220 million consumers.”).

the actual speeds and latency experienced by its subscribers. For example, they could disclose that their 3G offerings typically provide download speeds between X and Y kilobits per second.

We encourage fixed and mobile providers to disclose the source of their performance measurements and the underlying methodology used to evaluate performance.<sup>33</sup> We expect fixed and mobile broadband providers to reevaluate their performance disclosures whenever they know or have reason to believe that the actual performance of their services has come to differ materially from the performance reported in their disclosures.

**3. Extent of Required Disclosures.** Because the *Open Internet Order* states that its list of potential disclosure topics “is not necessarily exhaustive,”<sup>34</sup> some broadband providers have expressed concerns that they could be liable for failing to disclose additional types of information that they may not be aware are subject to disclosure.<sup>35</sup> We clarify that disclosure of the information specifically identified in paragraphs 56 and 98 of the *Open Internet Order* will suffice for compliance with the transparency rule at this time.<sup>36</sup> As noted in the *Open Internet Order*, the Commission may determine in the future that different disclosures by broadband providers are appropriate at that time, possibly in connection with the *Consumer Information and Disclosure* proceeding.<sup>37</sup>

**4. Content, Applications, Service, and Device Providers.** The transparency rule requires broadband providers to disclose accurate information sufficient for “content, application, service, and device providers to develop, market, and maintain Internet offerings.”<sup>38</sup> Commenters have voiced uncertainty about what broadband providers are required to disclose for the benefit of these edge providers.<sup>39</sup> We note that although the transparency rule requires disclosures for the benefit of edge providers as well as consumers, the Commission expected that “broadband providers may be able to

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<sup>33</sup> As noted in the *Open Internet Order*, the Commission will consider industry standards and best practices in enforcing open Internet rules. See 25 FCC Rcd at 17988, para. 159; see also *id.* at 17946, para. 74 (discussing the importance of conformity with industry best practices and technical standards).

<sup>34</sup> *Id.* at 17939, para. 56.

<sup>35</sup> See ACA Comments at 7; CTIA Comments at 10-11, 17-18; ITTA Comments at 4-5; MetroPCS Comments at 4; USTA Comments at 4, 9-10, 16-17.

<sup>36</sup> In paragraph 98 of the *Open Internet Order* the Commission explained that, in addition to the generally applicable requirements of the transparency rule, mobile broadband providers “should follow the guidance the Commission provided to licensees of the upper 700 MHz C Block spectrum regarding compliance with their disclosure obligations, particularly regarding disclosure to third-party application developers and device manufacturers of criteria and approval procedures (to the extent applicable). For example, these disclosures include, to the extent applicable, establishing a transparent and efficient approval process for third parties, as set forth in Rule 27.16(d).” 25 FCC Rcd at 17959, para. 98.

<sup>37</sup> See *id.* at 17940, para. 58 & n.188.

<sup>38</sup> *Id.* at 17937, para. 54.

<sup>39</sup> See ACA Comments at 9; CTIA Comments at 11; MetroPCS Comments at 5; NCTA Comments at 4-5; USTA Comments at 4, 8. As noted in the *Open Internet Order*, the term “edge provider” is used to describe content, application, service, and device providers because they generally operate at the edge rather than the core of the network. See 25 FCC Rcd at 17907 n.2.

satisfy the transparency rule through a single disclosure.”<sup>40</sup> Based on the record developed in the *Open Internet* proceeding, we anticipate that disclosures sufficient to enable “consumers to make informed choices regarding use of [broadband] services”<sup>41</sup> will also generally satisfy the portion of the transparency rule regarding disclosures to edge providers. We anticipate that broadband providers with consumer disclosures that include sufficiently detailed information regarding network management practices to enable a technologically sophisticated Internet user to understand how such network management practices work, and how they affect consumers’ access to and use of Internet offerings, will not need to make separate or additional disclosures for the specific benefit of edge providers.<sup>42</sup> This in no way alters the obligation of mobile broadband providers to disclose their certification and approval processes for devices and applications, if any.<sup>43</sup>

**5. Security Measures.** In response to the statement in the *Open Internet Order* that effective disclosures “will likely include” information concerning “practices used to ensure end-user security or security of the network,”<sup>44</sup> several commenters argued that because broadband providers employ a host of security measures and constantly update them, keeping disclosures up to date in this area will be unduly burdensome.<sup>45</sup> We expect broadband providers to use sound judgment in deciding whether it is necessary and appropriate to disclose particular security measures.<sup>46</sup> In making that determination, the touchstone is that providers must disclose information “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.”<sup>47</sup> As that standard suggests, the Commission is

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<sup>40</sup> *Id.* at 17940, para. 58.

<sup>41</sup> *Id.* at 17937, para. 54.

<sup>42</sup> *See id.* at 17941, para. 60 (“A key purpose of the transparency rule is to enable third-party experts such as independent engineers and consumer watchdogs to monitor and evaluate network management practices, in order to surface concerns regarding potential open Internet violations.”); 17938, para. 56 n.177 (discussing Comcast’s disclosure of congestion management practices); Comcast, Network Management Policy, <http://xfinity.comcast.net/terms/network/update/>; Comcast, Frequently Asked Questions About Network Management, <http://customer.comcast.com/Pages/FAQViewer.aspx?seoid=Frequently-Asked-Questions-about-Network-Management>; *see also* 25 FCC Rcd at 17992, Rule § 8.1 (“The purpose of this Part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission.”).

<sup>43</sup> *Id.* at 17938-39, 17959, paras. 56, 98.

<sup>44</sup> *Id.* at 17938-39, para. 56.

<sup>45</sup> *See* CTIA Comments at 15-16; MetroPCS Comments at 4-5; USTA Comments at 12-13; *see also* Lieberman Letter at 4. CTIA suggests, for example, that “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.” CTIA Comments at 16.

<sup>46</sup> *See* 25 FCC Rcd at 17941, para. 59 (“[T]he transparency rule we adopt today gives broadband providers some flexibility to determine what information to disclose and how to disclose it.”).

<sup>47</sup> *Id.* at 17937, para. 54; *see also id.* at 17992, Rule § 8.1 (“The purpose of this Part is to preserve the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission.”).

concerned with security measures likely to affect a consumer's ability to access the content, applications, services, and devices of his or her choice. Thus, for example, we would expect broadband providers to disclose if security measures intended to prevent the spread of viruses, malware, spam, or other threats to consumers also prevented end users from running a mail server or web server using their broadband connection. But we would not expect providers to disclose internal network security measures, such as routing security practices, that do not directly bear on a consumer's choices.

Issued by: Chief, Enforcement Bureau and General Counsel

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