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
	)	

To: The Commission

JOINT MOTION FOR ADMINISTRATIVE STAY OF CTIA AND COMPETITIVE CARRIERS ASSOCIATION

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CTIA[1] and Competitive Carriers Association ("CCA")[2] respectfully move the Federal Communications Commission ("Commission") to stay its January 17, 2017 effective date for mobile broadband Internet access service providers ("mobile broadband providers") to comply with the Commission's enhanced Open Internet transparency rule, pending further review.[3] CTIA's and CCA's members take their transparency rule obligations seriously. Importantly, as

[1] CTIA® (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable America to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's largest tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] CCA is the nation's leading association for competitive wireless providers and stakeholders across the United States. CCA's membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to regional and national providers serving millions of customers. CCA also represents approximately 200 associate members including vendors and suppliers that provide products and services throughout the mobile communications supply chain.

[3] *See Notice of OMB Approval of the 2015 Enhancements to the Open Internet Transparency Requirements*, Public Notice, GN Docket No. 14-28, DA 16-1400 (rel. Dec. 16, 2016) ("OMB Approval Notice").

the Commission's review takes place, consumers and edge providers are—and will continue to be-- protected by the robust transparency rule adopted by the Commission in its *2010 Open Internet Order*. The enhanced transparency rule, however, should not go into effect because the Office of Management and Budget's ("OMB") approval of the information collections pursuant to the Paperwork Reduction Act ("PRA") is premised in no small part on the Commission staff's *2016 Guidance Public Notice*, and pending Applications for Review of that public notice show that the staff guidance is unreasonable and unlawful. In addition, OMB's unusual action requiring the Commission to take additional steps to evaluate numerous aspects of the enhanced transparency rule further call into question reliance on the staff guidance on this issue. Accordingly, the Commission should stay the effective date of the enhanced transparency rule until, at a minimum, it resolves the Applications for Review and responds to OMB's action.[4]

I. INTRODUCTION AND SUMMARY.

On December 15, 2016, OMB approved in part the information collections mandated under the enhanced transparency rule pursuant to OMB's authority under the PRA. In so doing, OMB issued separate approvals for disclosures associated with fixed broadband service and mobile broadband service. Although OMB did not make any changes to the fixed broadband

[4] In the alternative, CTIA and CCA request that the Commission suspend enforcement of the enhanced transparency rule pursuant to its authority under 47 C.F.R. §§ 1.3 and 1.103(a). *See, e.g., Telecommunications Relay Services, and the Americans with Disabilities Act of 1990*, Order, 8 FCC Rcd 8385 (CCB 1993) (suspending enforcement of the requirement that telecommunications relay service providers be capable of handling any type of call pursuant to section 1.3); *Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Order, 12 FCC Rcd 15739, 15746 (1997) (applying section 1.103(a) to stay the enforcement of a rule pending reconsideration, because parties "raised in the stay requests significant issues" that could require alteration of the rule).

service information collections, approving them for three years,[5] it made two substantive changes for the mobile broadband information collections, imposed a number of conditions, and limited the term for these provisions to only two years.[6] Specifically, OMB determined that packet loss will not be a required performance metric in mobile broadband disclosures. In addition, OMB took specific action with regard to several new dictates imposed by the staff guidance. Specifically, it rejected use of the mobile Measuring Broadband America ("MBA") program as a "safe harbor" for actual network performance due to the lack of public participation in program. And, although OMB approved the collections, it imposed several "terms of clearance" for any future OMB renewal of the information collections that only underscore the inherent flaws of the new enhanced transparency rule. In particular, OMB requires the FCC to: (1) refine its current mobile disclosure requirements, as necessary, in light of results published in the Commission's mobile MBA report; (2) report to OMB the results of its evaluation as to the usefulness to consumers and effectiveness of the mobile broadband disclosures; (3) assess whether Cellular Market Areas ("CMAs") are the appropriate geographic measurement unit for disclosing actual network performance, or whether other options (including voluntary consensus standards) are a viable alternative; (4) assess standards for reported peak usage data; and, (5) assess the "practical utility" of packet loss as it relates to mobile broadband disclosures.[7]

[5] *See* Notice of Management and Budget Action, OMB Control No. 3060-1158 (approved Dec. 15, 2016), https://www.reginfo.gov/public/do/DownloadNOA?requestID=276524.

[6] Notice of Management and Budget Action, OMB Control No. 3060-1220 (approved Dec. 15, 2016), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201612-3060-012#section0_anchor.

[7] *Id.*

On December 16, 2016, the Commission issued a Public Notice announcing an effective date of January 17, 2017 for the enhanced transparency requirements.[8]

OMB's approval of the enhanced transparency rule's information collections is premised in no small part on the Commission staff's *2016 Guidance Public Notice*.[9] That notice, issued in May 2016 by the Chief Technologist, Office of General Counsel, and Enforcement Bureau ("FCC staff" or "staff"), purported to provide "guidance" regarding compliance with the enhanced transparency rule. Staff's "guidance," however, constituted new substantive rules issued without any notice and comment, in violation of Section 553 of the Administrative Procedure Act ("APA").[10]

CTIA and CCA each filed Applications for Review[11] of the *2016 Guidance Public Notice*, asserting that FCC staff acted without any notice or opportunity for public comment to:

- require mobile broadband providers to report actual network performance on a CMA basis;
- impose a new point of sale obligation that mobile broadband consumers "actually receive" disclosures; and,
- compel mobile broadband providers to disclose their actual performance metrics using the mobile MBA data to obtain the protection of a safe harbor.

Notably, the lack of public process that led to the *2016 Guidance Public Notice* resulted in arbitrary and flawed requirements that, if implemented, cannot be implemented successfully without additional guidance from the Commission. CTIA's and CCA's concerns about the point

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[8] *See* OMB Approval Notice.

[9] *Guidance on Open Internet Transparency Rule Requirements*, Public Notice, 31 FCC Rcd 5330 (rel. May 19, 2016) ("*2016 Guidance Public Notice*").

[10] 5 U.S.C. § 553.

[11] *See* Application for Review of CTIA, GN Docket No. 14-28, DA 16-569 (filed June 20, 2016) ("*CTIA Application for Review*"); Application for Review of Competitive Carriers Association, GN Docket No. 14-28 (filed June 20, 2016).

of sale and CMA reporting requirements remain, even if OMB's action effectively prohibits the Commission from immediately adopting the mobile MBA safe harbor. Because the enhanced transparency rule should not go into effect until these issues are remedied, CTIA and CCA seek a stay of the January 17, 2017 effective date announced in the Public Notice.

An administrative stay is justified here. CTIA and CCA are likely to succeed on the merits of their Applications for Review that the *2016 Guidance Public Notice* created new, unlawful obligations for mobile broadband providers to comply with the enhanced transparency rule, and the arguments there present, at a minimum, "serious" legal issues warranting a stay. In addition, CTIA and CCA members will suffer serious and irreparable harm if they are forced to comply with the enhanced transparency rule, resulting in consumer confusion and corresponding loss of goodwill. Moreover, the balance of harms favors granting a stay given the nature of these injuries to mobile broadband providers and their consumers. Finally, maintaining the *status quo* in this instance will not result in any appreciable harm to the public interest, because the current transparency rule remains in effect. Mobile broadband providers should not be compelled to expend significant resources complying with the enhanced transparency rule, only to have it substantially modified or invalidated, as is likely given its legal and practical infirmities.

II. A STAY IS APPROPRIATE HERE BECAUSE THE FOUR FACTORS ASSESSED BY FEDERAL COURTS AND THE COMMISSION ARE SATISFIED.

In deciding whether to grant a stay, it is well established that the Commission looks to the same four factors as federal courts: (1) whether there is a likelihood of success on the merits; (2) the threat of irreparable injury absent a grant of stay; (3) the degree of injury to other parties if the relief is granted; and, (4) whether grant of a stay will further the public interest.[12] CTIA and

[12] *See Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958), *as revised by Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43

CCA offer compelling legal and practical objections to the enhanced transparency rule, but also observe that a stay is warranted when the movant demonstrates either a likelihood of success on the merits and a showing of "irreparable injury," or, alternatively, a "serious" question regarding the merits coupled with a more "substantial" showing regarding the balance of equities.[13] As demonstrated below, this motion satisfies each aspect of the Commission's requirements for a stay. As such, a stay is warranted.[14]

A. CTIA and CCA are Likely to Prevail on the Merits of their Arguments Regarding the *2016 Guidance Public Notice* and, at a Minimum, Raise Substantial Legal Issues.

OMB's approval of the information collections is premised upon "guidance" unlawfully issued by FCC staff in the *2016 Guidance Public Notice*. Accordingly, the Commission should stay the effective date of the enhanced transparency rule pending Commission action on the pending CTIA and CCA Applications for Review of the *2016 Guidance Public Notice*. CTIA and CCA are likely to prevail on the merits of their arguments and, at a minimum, have raised "serious" legal issues that warrant a stay pending further review. As CTIA and CCA both

(D.C. Cir. 1977); *see also Applications of Cumulus Licensing Corp.*, 16 FCC Rcd 1052, 1054 ¶ 5 (2001); *Applications of Shareholders of CBS Corp. and Viacom, Inc. for Transfer of Control of CBS Corp. and Certain Subs.*, 16 FCC Rcd 5831, 5832 ¶ 3 (2001).

[13] *Wash. Metro. Area Transit Comm'n*, 559 F.2d at 844; *see also Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("To justify the granting of a stay, a movant need not always establish a high probability of success on the merits…. A stay may be granted with either a high probability of success and some injury, or *vice versa*."); *TCI Cablevision of Dallas, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 7379, 7379 ¶ 2 (2000) ("[T]he degree to which a probability of success on the merits will be found will vary according to the Commission's assessment of the other factors."); *AT&T Corp. v. Ameritech Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 14508, 14515-16 ¶ 14 (1998) (granting interim relief where petitioner raised "serious questions going to the merits") (internal quotations and citations omitted).

[14] Alternatively, and for the reasons set forth below, CTIA and CCA submit that good cause exists for the Commission to suspend enforcement of the enhanced transparency rule pursuant to its authority under 47 C.F.R. §§ 1.3 and 1.103(a). *See* n.4, *supra.*

explained in their Applications for Review, the FCC's staff-level *2016 Guidance Public Notice* imposed new substantive transparency requirements on mobile broadband providers without notice and comment in violation of Section 553 of the APA.[15] The information collections approved by OMB for a two-year period are premised on that unlawful guidance.

New Point of Sale Disclosure Rule. The Commission adopted the transparency rule in the *2010 Open Internet Order*, requiring all broadband providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms" sufficient for consumers to make informed choices and for edge providers to develop, market, and maintain Internet offerings.[16] The Commission required mobile broadband providers to "post disclosures on their websites and provide disclosure at the point of sale," but it emphasized that the rule "gives broadband providers some flexibility to determine what information to disclose and how to disclose it."[17]

The Commission reaffirmed the scope of these obligations in its 2011 PRA supporting statement to OMB. There, the Commission stated: "[T]he *Open Internet Order* requires only that providers post disclosures on their websites, and direct consumers to such websites at the point of sale."[18]

As the *2016 Guidance Public Notice* acknowledges, the *2015 Open Internet Order* did not revise the requirements relating to the point of sale disclosures.[19] But the *2016 Guidance*

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[15] 5 U.S.C. § 553.

[16] 47 C.F.R. § 8.3.

[17] *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd 17905, 17941 ¶ 59 (2010).

[18] *Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices*, FCC Supporting Statement at 3, OMB 3060-1158 (July 2011).

[19] *2016 Guidance Public Notice* at 9.

Public Notice – without any authorization from the *2015 Open Internet Order* and without notice and comment – directs broadband providers to "ensure that consumers *actually receive* the information necessary to make informed decisions prior to making a final purchasing decision at all potential points of sale, including in a store, over the phone, and online."[20] The announcement that providers must take steps to ensure that consumers "actually receive" the disclosures is a new obligation and a fundamental modification of the Commission's rule. It effectively shifts the point of sale disclosure from constructive notice to an actual notice construct. The *2016 Guidance Public Notice* therefore imposes a new, binding standard of conduct absent notice and comment.

New Geographic Standard for Reporting Actual Network Performance. The Commission did not delegate authority to its staff to dictate the geographic area for the provision of actual network performance data, but that is just what the *2016 Guidance Public Notice* does. The *2015 Open Internet Order* expanded on the Commission's existing transparency rule, requiring, among other things, that disclosures of actual speed and latency "be reasonably related to the performance the consumer would likely experience in the geographic area in which the consumer is purchasing service."[21] The Commission specifically delegated to the Chief Technologist the task of providing guidance to broadband providers on "acceptable methodologies" for measuring "actual performance," but not geographic area.[22] The

[20] *Id*. (emphasis added).

[21] *See Protecting and Promoting the Open Internet*, Report and Order on Remand, 30 FCC Rcd 5601, 5674 ¶ 166 (2015) ("*2015 Open Internet Order*").

[22] *Id*.

Commission emphasized that the methodologies must be "grounded in commonly accepted principles of scientific research, good engineering practices, and transparency."[23]

The *2016 Guidance Public Notice*, however, did not provide any guidance on acceptable methodologies, as directed by the Commission. Instead, FCC staff established that mobile broadband providers "may meet this requirement by disclosing actual performance metrics for each Cellular Market Area (CMA) in which the service is offered. . . ."[24] As a practical matter, this language does not operate as "guidance": as written, CMA-based disclosures are the only described path to compliance for mobile broadband providers. By imposing a CMA-level measurement requirement for network performance metrics, despite clearly indicating more than one network measurement methodology would be acceptable, the staff has substantially changed its existing rules in violation of the APA.

The Commission's CMA reporting requirement not only violates the APA's notice and comment requirement, it is arbitrary and capricious because some providers do not have CMA-based licenses and/or do not track their networks on a CMA basis. A rule will be deemed arbitrary and capricious if the agency "entirely failed to consider an important aspect of the problem."[25] Here, the *2016 Guidance Public Notice* cites no reasonable explanation or justification for its CMA disclosure requirement where some providers do not have CMA licenses and have no reason to track their networks on a CMA basis.

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[23] *Id*. at 5675 n.412.

[24] *2016 Guidance Public Notice* at 5.

[25] *Motor Vehicle Mfrs' Ass'n of U.S., Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Illinois Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555, 566 (D.C. Cir. 1997) (finding that the Commission's failure to explain its decision not to provide interim compensation for certain carriers as required by statute, and its failure to cite a reasonable justification for the interim rate it chose, was arbitrary and capricious).

Indeed, OMB's "terms of clearance" for mobile broadband disclosures underscore these concerns about the Commission's CMA reporting requirement. OMB is requiring the Commission to determine whether CMAs are the "appropriate unit of measurement for disclosing 'actual network performance,'" or whether "other alternative geographic region measurement options" are superior, in the renewal process.[26] In other words, OMB is requiring the Commission to undertake the very process that the FCC staff eschewed in the *2016 Guidance Public Notice*.

* * *

The Commission may promulgate new substantive rules – rules that "create new law, rights, or duties"[27] – only after following the procedures set forth in Section 553 of the APA.[28] No such process was followed here. Simply referring to agency action as "guidance," or stating that providers "may implement alternative approaches" to disclose information to consumers,[29] does not exempt the Commission from complying with the APA's notice and comment obligations when its action establishes new substantive rules.[30] Given these serious defects,

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[26] Notice of Management and Budget Action, OMB Control No. 3060-1220 (approved Dec. 15, 2016), https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201612-3060-012#section0_anchor.

[27] *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1307-08 (D.C. Cir. 1991).

[28] *See* 5 U.S.C. § 553.

[29] *2016 Guidance Public Notice* at 3.

[30] *See, e.g.*, *Mendoza v. Perez*, 754 F.3d 1002 (D.C. Cir. 2014) (finding that Department of Labor "Guidance Letters" were legislative rules and thus violated the APA because they were issued without providing public notice and opportunity for comment); *Natural Resources Defense Council v. EPA*, 643 F.3d 311 (D.C. Cir. 2011) (vacating EPA's "Guidance" document addressing Clean Air Act implementation because it was a legislative rule that had not been adopted after notice and comment rulemaking and thus violated the APA); *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (finding that a disclaimer that EPA routinely inserted at the end of guidance documents was "boilerplate").

CTIA and CCA are likely to succeed on the merits of their argument that the Commission's guidance is unlawful.

B. A Stay Will Avoid Irreparable Injury to Mobile Broadband Providers and Consumers.

Although the Commission told OMB that it expected the compliance burdens associated with the enhanced transparency rule to be modest, this is not the case.

With specific regard to the new rules enunciated in the *2016 Guidance Public Notice*, compliance will likely inflict immediate irreparable harm upon mobile providers in the form of unrecoverable economic damages.[31] Providers face not only the certainty of new regulation, but also the corresponding uncertainty of trying to predict and anticipate precisely what the Commission or a court will require under the rules.

For instance, the notice's requirement that mobile broadband providers "ensure" that customers "actually receive" disclosures at the point of sale is a new obligation articulated for the very first time. However, the staff's "guidance" fails to shed any light on what steps mobile broadband providers must take to comply with the actual notice standard. As a result, mobile broadband providers must guess at staff's intent and modify their point of sale practices at enormous cost, or leave their existing practices in place subject to risk of enforcement action as a result of the staff's cryptic statement and the state of current uncertainty.

Further, according to the *2016 Guidance Public Notice*, network performance must be disclosed by providers at the level of geographic areas in which the consumer is purchasing

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[31] *See*, *e.g.*, *National Tank Truck Carriers, Inc. v. Burke*, 608 F.2d 819, 824 (1st Cir. 1979) (finding irreparable harm when plaintiff would incur substantial unrecoverable expenses to comply with regulations that may be invalid); *Brendsel v. Office of Federal Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004) (noting general rule that economic losses are not irreparable harm "is of no avail . . . where the plaintiff will be unable to sue to recover any monetary damages against [federal agencies]").

service, *i.e.*, the CMA level for mobile broadband providers. Now that OMB has rejected the Commission's mobile MBA safe harbor but left the network performance requirement in place, mobile broadband providers may need to seek out alternative network performance testing to gather data for the disclosures, either internally or by contracting with third parties. The cost to build these capabilities and gather data to provide disclosures with CMA geographic specificity will be significant, especially for those providers with FCC license areas that do not track CMA boundaries and small carriers who may not have the means to easily gather this granular data.

Making matters worse, the new enhancements could easily obscure other more useful information and will not assist consumers comparing the performance of competing networks. While one goal of the transparency rule is to enable consumers "to make informed choices about broadband services,"[32] the new enhancements are contrary to the rule's intent. For example, consumers have no idea what CMAs are, nor should they because they do not purchase service by CMA, yet they will be told what actual and expected speeds are in "their" CMA. Further, this requirement is unclear in the context of mobile services because consumers will utilize service across multiple geographic areas, and may not know what CMA they are in. By effectively forcing providers to disclose information using a metric that consumers have no reason and no basis to understand, the staff's mandate would immediately confuse consumers, leading to a loss of goodwill.

Perhaps most importantly, no after-the-fact administrative fix would be able to remedy the consumer confusion and the corresponding loss of goodwill that the Commission's "guidance" will engender. As noted above, the *2016 Guidance Public Notice* does not even attempt to articulate what it means to ensure that consumers "actually receive" Open Internet

[32] *2015 Open Internet Order* ¶ 162.

disclosures. Will providers be required to obtain confirmation from customers that they have received and understood the disclosures? Would they be required to physically read the full disclosures before completing a sale and require the customer to confirm that they heard and understood – a practice that would confuse or antagonize customers? Guessing will be especially harmful to small providers with limited resources, who expend capital and personnel only as needed.

The confusion resulting from the point of sale "guidance" is further compounded by the Commission's failure to consider the implications of OMB's action before the Commission's posthaste announcement of the rule's effective date. In the *2016 Guidance Public Notice*, the staff suggested that the Consumer Broadband Label, as approved on delegated authority by the Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus on April 4, 2016, could also be used as a safe harbor for disclosures made at the point of sale.[33] Among other disclosures, the Consumer Broadband Label requires mobile broadband providers to include information on packet loss.[34] As noted above, however, OMB has invalidated this requirement. Thus, it is unclear whether mobile broadband providers that wish to qualify for the safe harbor are obligated to comply with a disclosure requirement that no longer exists.

[33] *2016 Guidance Public Notice* at 10.

[34] *See Consumer and Governmental Affairs, Wireline Competition, and Wireless Telecommunications Bureaus Approve Open Internet Broadband Consumer Labels*, Public Notice, 31 FCC Rcd 3358, n.4 (2016) ("We emphasize that to benefit from the safe harbor providers must use the format and terms as they appear in the Attachment."); *id*. at 12 (requiring mobile broadband providers to "identify typical peak usage period packet loss for this network technology consistent with the Open Internet Orders and FCC guidance").

C. A Stay Will Not Harm Other Parties.

In evaluating the third prong of the stay standard, the determinative question is "whether injunctive relief would significantly harm other interested parties."[35] Even if any such harm is identified, however, it is necessary to "balance the competing claims of injury and ... consider the effect on each party of the granting or withholding of the requested relief."[36]

Significantly, a stay in this case will simply preserve the *status quo* – the 2010 transparency rule – while further review is conducted. The existing transparency rule effectively serves the interests of consumers and edge providers. Mobile broadband providers already disclose information regarding speeds (with appropriate disclaimers to account for the inherent variability of mobile services), prices, data caps (where applicable), and network management practices. Further, while the existing transparency rule has been in effect, mobile broadband providers voluntarily adopted a best practice of notifying wireless customers with data allowances when they approach and exceed their plans' allowance for data usage and will incur overage charges, without charge and without requiring sign-up to receive the notification. This best practice is now included in CTIA's Customer Code for Wireless Service ("Code"), to which most U.S. wireless providers are signatories. The Code also specifies that wireless providers should clearly and conspicuously disclose tools or services that enable consumers to track, monitor, and set limits on data usage. In sum, mobile broadband providers already disclose significant information regarding their services and there is no evidence that the existing transparency rule has failed to serve the interests of mobile broadband consumers or edge providers.

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[35] *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986).

[36] *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

Moreover, a stay would have no preclusive effect on the imposition of the enhanced transparency rule (or a modified version thereof) in the event the rule ultimately takes effect. A stay would merely preserve the *status quo* in the interim and would not result in any appreciable harm to any party.

D. The Public Interest Requires a Stay.

The public interest in this case compels a stay of the enhanced transparency rule. As CTIA and CCA explained in their Applications for Review, the lack of public process involved in the *2016 Guidance Public Notice* led to flawed and unworkable solutions, and OMB's action under the PRA is premised on that unlawful "guidance."[37] And OMB's terms of clearance for renewal only underscore these flaws. The procedures required under the APA exist to protect the public interest. Adherence to those procedures, therefore, will address the inherent problems in the *2016 Guidance Public Notice* and further the public interest by avoiding the expense, logistical problems, and customer confusion that the enhanced transparency rule will cause.

Broader public interest concerns also strongly favor a stay. CTIA and CCA note that, following the transition to the new Administration, it appears likely that the Commission or Congress may revisit the Commission's Open Internet policies.[38] A stay also is warranted in light of OMB's requirements for the Commission to evaluate numerous aspects of the enhanced transparency rule, including CMAs, in any renewal, and the problems associated with the safe harbor for Consumer Broadband Labels. As a practical matter, these actions can only occur once the new Administration is in place. Given these considerations, the public interest would be

[37] *See* CTIA Application for Review at 9-15.

[38] *See, e.g.*, Letter from Commissioners Ajit Pai and Michael O'Rielly to Meredith Atwell Baker (CTIA), Steven K. Berry (CCA), Alex Phillips (WISPA), Shirley Bloomfield (NTCA), and Matthew M. Polka (ACA) (December 19, 2016).

affirmatively served by maintaining the Commission's existing transparency rule and preserving the *status quo*.[39] If the enhanced transparency rule is substantially modified or invalidated, as is likely, it would be premature to proceed with enforcing this requirement, with its onerous legal problems and costs, while appropriate review is conducted.

III. CONCLUSION.

For the foregoing reasons, CTIA and CCA respectfully request a stay of the effective date of the Commission's Open Internet enhanced transparency rule. If these unlawful regulations are allowed to become effective, they will irreparably injure the mobile broadband industry and consumers. A stay of the rule, however, will not cause harm and will serve the public interest. CTIA and CCA urge the Commission to expeditiously grant their request.

[39] *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 427 (8th Cir. 1996) ("A stay would preserve the continuity and stability of [the existing] regulatory system.").

Respectfully submitted,

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