

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

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| In the Matter of |) | |
| |) | |
| Development of Nationwide Broadband Data to |) | WC Docket No. 07-38 |
| Evaluate Reasonable and Timely Deployment of |) | |
| Advanced Services to All Americans, Improvement |) | |
| of Wireless Broadband Subscribership Data, and |) | |
| Development of Data on Interconnected Voice over |) | |
| Internet Protocol (VoIP) Subscribership |) | |
| |) | |
| Further Notice of Proposed Rulemaking on |) | |
| Voice Lines, Speed, Pricing, Confidentiality & Surveys |) | |

COMMENTS OF AT&T INC.

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I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliated companies (collectively, AT&T) respectfully submit the following comments in response to the sections of the Commission's further notice of proposed rulemaking on broadband data gathering (*2008 Broadband Data Notice*) that seek comment on "actual" broadband speeds, pricing information, voice line reporting, confidentiality, and broadband customer surveys.¹ Although AT&T has been generally supportive of the Commission's broadband data gathering efforts to date, we are concerned about its latest data collection proposals, which represent a significant departure from the Commission's long-standing pledge to collect only "essential" data and to do so in a minimally burdensome fashion. As discussed below, the data collections proposed in the *2008 Broadband Data Notice* – and particularly the speed and pricing data proposals – would impose significant burdens on broadband providers while producing inapt and potentially misleading data. Accordingly, AT&T strongly urges the Commission not to adopt either of these proposals.

II. DISCUSSION

A. **The Commission Should Reaffirm its Commitment to Collecting Sufficient Data About Broadband Deployment *Without Unduly Burdening Broadband Providers.***

As AT&T explained in its comments on the mapping section of the *2008 Broadband Data Notice*, the Commission has continuously attempted to balance two competing goals in its broadband data gathering program: (i) collecting sufficient information about broadband deployment to inform its policymaking activities, and (ii) minimizing data collection burdens on

¹ *Deployment of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, FCC 08-89 (released June 12, 2008). Pursuant to the bifurcated comment cycle established by the Commission, AT&T submitted comments on the mapping section of the *2008 Broadband Data Notice* on July 17, 2008.

broadband providers.² While the Commission needs “reliable and comprehensive data,” it has made a concerted effort to reduce the burdens of its data requests by “distill[ing] our [data gathering] down to that information which is most essential” to tracking broadband deployment and by focusing as much as possible on “easily-quantifiable and readily-available” data sources.³

Although the Commission has been successful, for the most part, in balancing the two competing goals of its broadband data gathering program thus far, the *2008 Broadband Data Notice* marks a disturbing departure from the Commission’s prior judicious approach to collecting data. As discussed below, not only is the Commission proposing to collect data of dubious utility, but it is planning to do so in a way that imposes substantial burdens on broadband providers. Such a course is simply not tenable because, as the Office of Management Budget recently made clear, information collections will be disallowed under the Paperwork Reduction Act when this Commission fails to properly minimize and justify burdens on the responding parties.⁴

Moreover, the burdens posed by the Commission’s latest proposals would be particularly onerous, as broadband providers have not yet had an opportunity to implement the latest reporting obligations from the *2008 Broadband Data Order*. For example, the Commission is

² AT&T comments, WC Docket No. 07-38, at 2-4 (July 17, 2008). See also *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, FCC 00-114, ¶ 65 (released March 30, 2000) (*2000 Broadband Data Order*).

³ *2000 Broadband Data Order* ¶ 6. See also *Local Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, FCC 04-266, ¶ 1 (released Nov. 12, 2004) (*2004 Broadband Data Order*); *Deployment of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Notice of Proposed Rulemaking, FCC 07-17, ¶ 2 (released April 16, 2007) (*2007 Broadband Data Notice*).

⁴ See Notice of Office of Management and Budget Action, OMB Control Number 3060-0568 (July 9, 2008) (rejecting FCC information collection under cable leased access rules due to numerous failures to justify the need for data and to minimize burdens on respondents).

proposing to synchronize the geographic scope of the reporting obligations of LECs, wireless carriers and VoIP providers for their voice-grade services (currently state level reporting) with the newly adopted geographic scope for broadband Internet access providers (Census Tract level). Doing so will unquestionably impose additional burdens on the providers of those voice-grade services, many of whom also provide broadband Internet access service and are already laboring to comply with the Commission’s more granular requirements for that service. Further, the concern animating the Commission’s switch to Census Tract level reporting for broadband – a desire to “identify more precisely those areas of the country where additional broadband deployment is needed”⁵ – does not appear relevant in the market for voice services, which is highly penetrated. Indeed, the Commission’s own data show that approximately 95% of households in the U.S. *already* subscribe to telephone service.⁶ Therefore, before it imposes additional data production obligations on the industry, the Commission must more carefully consider their cumulative costs and evaluate whether those proposals are truly consistent with its “twin goals of collecting the most useful information while subjecting respondents to the minimum burden.”⁷

B. The Commission Should Not Require Broadband Providers to Report “Actual Speeds.”

When categorizing their broadband connections into speed tiers under the Commission’s current reporting requirements, broadband providers are directed to report the “end user’s

⁵ Statement of Chairman Kevin J. Martin, *2007 Broadband Data Notice*.

⁶ See *Telephone Subscribership in the United States, Data through November 2007*, Wireline Competition Bureau, at Table 1 (released March 2008). See also *Local Telephone Competition: Status as of June 30, 2007*, Wireline Competition Bureau, at Tables 1, 14 (released March 2008) (showing 163 million end user switched access lines and 238 million mobile wireless telephone subscribers in the U.S.).

⁷ *2000 Broadband Data Order* ¶ 65.

authorized maximum information transfer rate ('speed') on that connection.”⁸ In 2004, the Commission sought comment on “whether we should modify our reporting instructions to require filers to categorize broadband connections according to the information transfer rates actually observed by end users.”⁹ After numerous commenters, including the California Commission, voiced a multitude of concerns with this proposal,¹⁰ this Commission quickly abandoned it because “the record of this proceeding does not identify a methodology or practice that currently could be applied, consistently and by all types of broadband filers, to measure the information transfer rates actually observed by end users.”¹¹

Three years later in the *2007 Broadband Data Notice*, the Commission again sought comment on whether it should collect data on the “download and upload speeds experienced by actual customers,”¹² and, again, numerous commenters highlighted the problems with such an approach.¹³ As AT&T explained in its comments,

Point in time measurements of individual users’ broadband experiences would not produce meaningful results because the “actual” information transfer speed that a particular customer experiences at any time is a function of myriad factors, many

⁸ FCC Form 477, Instructions for September 1, 2008 Filing, at 3. *See also 2000 Broadband Data Order* ¶ 66 n. 185 (“For purposes of this information collection, the information carrying capacity of a line or wireless circuit is the customer’s authorized maximum usage (‘speed’) on that line or wireless circuit.”).

⁹ *Local Competition and Broadband Reporting*, WC Docket No. 04-141, Notice of Proposed Rulemaking and Order on Reconsideration, FCC 04-81, ¶ 7 (released April 16, 2004) (*2004 Broadband Data Notice*).

¹⁰ *See 2004 Broadband Data Order* ¶ 27 n.62 (“Several commenting parties asserted that attempting to measure actual speeds experienced by end users is problematic, either due to high cost, the absence of a reliable methods [sic], or the absence of recognized measurement standards.”); California Commission comments, WC Docket No. 04-141 at 4-5 (June 28, 2004) (“It would be very difficult and costly for providers to obtain transfer rate information actually observed by each and every subscriber and there are many factors that could influence actual speeds delivered to end users.”).

¹¹ *2004 Broadband Data Order* ¶ 27.

¹² *2007 Broadband Data Notice* ¶ 21.

¹³ *See, e.g.*, AT&T comments, WC Docket No. 07-38, at 11-12 (June 15, 2007); OPASTCO comments, WC Docket No. 07-38, at 7-8 (June 15, 2007); Sprint/Nextel comments, WC Docket No. 07-38, at 6-7 (June 15, 2007); TWC comments, WC Docket No. 07-38, at 7 (June 15, 2007); Verizon comments, WC Docket No. 07-38, at 21 (June 15, 2007).

of which are beyond the broadband service provider's control and mask the true capabilities of the service, including the quality of the wiring at the consumer's premises, the computer and networking equipment used by the consumer, the software and applications currently being run by the consumer, general Internet congestion and the responsiveness of the particular servers and networks the customer seeks to access, as well as many technology-specific factors, including how many other subscribers are using the same shared facilities (e.g., cable modem), the consumer's distance from the provider's facilities (e.g., DSL), atmospheric conditions (e.g., satellite) and the capabilities of subscriber-purchased devices (e.g., wireless devices). Attempting to measure "actual" speeds would thus necessarily result in "apples to oranges" comparisons among different technologies and providers that would not produce consistent and comparable industry-wide measures of actual speed. Given the negligible benefits to be gained from such inapt comparisons, the Commission should once again decline to impose such additional reporting requirements on broadband providers.¹⁴

In fact, the Commission itself acknowledged in the *2008 Broadband Data Notice* that the "record indicates that factors beyond the control of service providers may compromise the ability of service providers to report actual speeds experienced by consumers."¹⁵ Nonetheless, in that same *Notice*, the Commission yet again sought comment on collecting data on "actual speeds of Internet access services experienced by customers."¹⁶ This time, however, the Commission did not simply seek comment on "whether" it should collect such information, which would have been troubling enough given the clear and unambiguous responses it received to the same question in 2004 and again in 2007. Instead, the Commission asked "how we might *require* service providers to report this information."¹⁷

¹⁴ AT&T comments, WC Docket No. 07-38, at 11-12 (June 15, 2007). *See also* AT&T comments WC Docket No. 07-38, at 8 (July 17, 2008) (explaining that numerous factors affect the coverage and speed available to end users, including, in the wireless context, terrain (e.g., hills and valleys), weather, foliage, buildings, signal strength, type and condition of handset or data card, and, in the wireline context, actual loop length, condition of the loop (e.g., presence of bridge taps), quality of inside wiring and many other factors).

¹⁵ *2008 Broadband Data Notice* ¶ 36.

¹⁶ *2008 Broadband Data Notice* ¶ 36.

¹⁷ *2008 Broadband Data Notice* ¶ 36 (emphasis added).

Notwithstanding the Commission’s repeated inquiries on the issue of “actual speeds,” the facts in the record have not changed – requiring broadband providers to report “actual speeds” would impose substantial burdens on broadband providers while producing data with minimal, if any, utility for the Commission. Thus, not only would such a requirement fail to meet either of the Commission’s data gathering goals (useful information and minimal burden), but it also would raise serious concerns under the Administrative Procedure Act.¹⁸ Accordingly, the Commission should not require broadband providers to report “actual speeds” experienced by end-user customers.

C. The Commission Should Not Require Broadband Providers to Report Pricing Information.

In the *2004 Broadband Data Order*, the Commission rejected a proposal “to require broadband providers to report information about the prices at which they offer broadband services to end users in particular Zip Codes” because the Commission was “not convinced” that the “potential benefits derived from collecting these additional data outweigh their associated costs.”¹⁹ When the Commission raised the issue of collecting broadband pricing data again in the *2007 Broadband Data Gathering Order*, numerous commenters described why doing so would not be in the public interest.²⁰ AT&T, for example, explained that broadband pricing “often turns on a host of customer-specific variables, including speeds, promotional rates, bundling discounts, and other service characteristics,” such as “free or discounted broadband

¹⁸ See *Clark County, Nevada v. FAA*, 522 F.3d 437, 441 (D.C. Cir. 2008) (under the APA “arbitrary and capricious” standard, agency decisionmaking must be “reasoned” and “adequately explained and supported by the record”); *Tesoro Alaska Petroleum Co. v. FERC*, 234 F. 3d 1286, 1294 (D.C. Cir. 2000) (agency’s “failure to respond meaningfully to the evidence renders its decisions arbitrary and capricious” and “[u]nless an agency answers objections that on their face appear legitimate, its decision can hardly be said to be reasoned.”).

¹⁹ *2004 Broadband Data Order* ¶ 29.

²⁰ See *2008 Broadband Data Notice* ¶ 37 n.130.

modems, service reliability, the number of email accounts or online storage capacity included with the broadband service, proprietary content available to the subscriber and myriad other factors.”²¹ We further pointed out that “it would be virtually impossible and often misleading to attempt to correct for these variables and construct apples-to-apples pricing comparisons for reporting purposes.”²²

Despite these concerns – and the lack of any serious response to them in the record – the Commission has proposed requiring broadband providers to report detailed pricing information for each broadband speed tier offered by the provider and in each state or Census Tract where the provider offers service. The Commission’s proposal is deeply flawed for at least four independent reasons.

First, the pricing data the Commission proposes to collect would not provide reliable or meaningful information to support the Commission’s policymaking activities and, thus, the Commission’s proposal fails to meet its first broadband data collection goal. As AT&T and others have previously explained, in today’s competitive marketplace where providers offer their services in triple-play (voice, video, Internet) or quadruple-play (triple-play plus wireless) packages, consumers often purchase broadband Internet access service as part of a bundle of services for which they receive discounted pricing. While this is clearly a pro-consumer marketplace development that policymakers should encourage, it makes comparing broadband Internet access service prices from different providers exceedingly difficult because those prices are dependent on the type and quantity of other *non-broadband* services purchased by the customer.

²¹ AT&T reply comments, WC Docket No. 07-38, at 20-21 (July 16, 2007).

²² AT&T reply comments, WC Docket No. 07-38, at 21 (July 16, 2007).

Moreover, even when providers offer broadband Internet access services on a “stand-alone” basis (i.e., not bundled with other non-broadband services), the broadband service offered to the customer is typically not an easily comparable, single-capability product that merely provides access to the Internet and nothing more. Quite the contrary, providers often charge a single price for Internet access capability offered together with a plethora of different features and functionalities that vary from provider to provider, including but not limited to multiple email addresses, web-based email access with email storage capacity, free or discounted email migration services, firewall software, anti-virus software, anti-spam software, pop-up blocking software, parental controls, online data storage capacity, a companion dial-up Internet access account, free or discounted modems and/or wireless routers, online or live technical support, free or discounted access to WiFi hotspots, access to proprietary content, and many other features. In addition, even when providing “stand-alone” broadband Internet access services, many providers offer customers a variety of pricing incentives, including but not limited to introductory promotional rates, rebates, gift cards, term discounts and other inducements. With so many bundles, features, and discounted pricing options available to consumers in the marketplace, it would be virtually impossible for the Commission to correct for all of these variables and make meaningful apples-to-apples comparisons between providers or to develop useful “price-per-bit” data as some commenters have proposed.²³

The Commission’s proposed solutions to these inherent comparability problems only make matters worse. To avoid having to parse through and correct all of the pricing variables mentioned above, the Commission suggests collecting only snippets of pricing data, such as the lowest and/or highest prices a provider charges for stand-alone and/or bundled broadband service

²³ 2008 *Broadband Data Notice* ¶ 37.

in a state or Census Tract to “identify the range of prices that a consumer may have to pay.”²⁴

The Commission also suggests collecting data on broadband providers’ average revenue per user (ARPU).²⁵ But limiting the data collection to only the lowest and/or highest prices charged by a provider and/or collecting ARPU data merely reduces the amount of *pricing* information the Commission would gather -- it does nothing to address the bundling and feature set variability among different providers and services, which prevent meaningful data comparisons for all of the reasons discussed above.

Second, the Commission’s proposal for collecting pricing data would impose significant and unnecessary burdens on broadband providers in violation of the Commission’s second broadband data collection goal and, more importantly, the Regulatory Flexibility Act (RFA) and the Paperwork Reduction Act (PRA). In addition to the Commission’s own self-created goal of minimizing broadband data collections burdens, the RFA and the PRA expressly require the Commission to take reasonable steps to minimize the burdens its rules place on the respondents to its data collections.²⁶ Here, the Commission is proposing to collect pricing data from broadband providers for each separate speed tier they offer and in each separate state or Census

²⁴ 2008 *Broadband Data Notice* ¶ 38.

²⁵ 2008 *Broadband Data Notice* ¶ 38.

²⁶ See 5 U.S.C. § 603(c) (requiring agencies to seek comment on alternatives that “accomplish the stated objectives of applicable statutes and which minimize any significant impact of the proposed rule on small entities”); 5 U.S.C. § 604(b) (requiring agencies to describe “the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.”); 5 U.S.C. § 3506(c)(3) (requiring agencies to certify that a data collection is “necessary for the proper performance of the functions of the agency, including that the information has practical utility,” “is not unnecessarily duplicative of information otherwise reasonably accessible to the agency” and reduces “the burden on persons who shall provide information to or for the agency”); 5 C.F.R. § 1320(5)(d) (requiring agencies to take “every reasonable step to ensure that the proposed collection of information . . . is the least burdensome necessary for the proper performance of the agency’s functions,” “is not duplicative of information otherwise accessible to the agency,” and “has practical utility”).

Tract they serve. AT&T offers a wide range of residential and business broadband Internet access services at a variety of broadband speeds using both wireline and wireless technologies, including asymmetric xDSL, symmetric xDSL, traditional wireline (e.g., T-1, T-3), optical carrier, fixed wireless and mobile wireless. We also offer broadband services in all 50 states and in tens of thousands of Census Tracts in the U.S. Compiling, validating and reporting this pricing data to the Commission would require substantial effort and expense. And combing through all of these products to determine which is the “lowest” and/or “highest” in any particular state or Census Tract, as the Commission proposes, would only increase those burdens.

Regardless of the precise cost of those burdens, moreover, imposing *any* such burdens on AT&T, or any of the more than 1300 other providers in the broadband industry, is entirely unnecessary.²⁷ As AT&T explained in its comments on the *2007 Broadband Data Notice*, broadband pricing data is available to the Commission from numerous market analysts and other firms that specialize in collecting such data, both at the macro level to track broad industry-wide pricing trends and at the micro level to capture company-specific, service-specific and speed-specific pricing information at the state and/or local level.²⁸ Indeed, in fulfilling its statutory responsibility to prepare an annual report to Congress evaluating the state of competition for

²⁷ High-Speed Services for Internet Access: Status as of June 30, 2007, Wireline Competition Bureau, FCC, at Tables 7 (March 2008).

²⁸ AT&T comments, WC Docket No. 07-38, at 28 n.70. *See, e.g.*, Telogical Systems at <http://www.telogical.com/services/>; Pike & Fischer at <http://www.pf.com/marketResearchPD.asp>; TeleGeography at <http://www.telegeography.com/services/index.php>; Current Analysis at <http://www.currentanalysis.com/solutions/index.asp>; Strategy Analytics at <http://www.strategyanalytics.com/default.aspx?mod=PrimaryResearchInformation>; Jupiter Research at <http://www.jupiterresearch.com/bin/item.pl/company:customresearch/>; BPI-Telcodata at <http://www.telcodata.net/>; TNS Telecoms at <http://www.tnstelecoms.com/products.html>. In addition, to the extent the Commission is proposing to “conduct and publish periodic surveys of broadband customers to obtain information about the price, technology, and speed of their connections and to obtain information about the applications and services that they use over the connections,” *2008 Broadband Data Notice* ¶ 39, it may wish to partner with the Census Bureau and/or the Pew Internet & American Life Project, both of which have experience with such survey projects.

commercial mobile services, the Commission has routinely and extensively relied on third-party analysts for information on the prices of such services.²⁹ Thus, rather than forcing more than 1300 broadband providers to each individually spend the time, money and resources to collect and submit their own pricing data to the Commission – time, money and resources that could be better invested in actually deploying broadband service – the Commission could simply obtain such data from one of the many firms that already have expertise in collecting such data and presenting it in the format(s) most useful to their customers. To be sure, the Commission would likely have to pay a fee for the use of such commercially supplied pricing data, but that fee would pale in comparison to the tremendous burdens the Commission would avoid imposing on the entire broadband industry through its unnecessary proposal to collect broadband pricing data from individual providers.

Despite the availability of such commercially available pricing data and the Commission’s prior experience with similar data in its wireless competition reports to Congress, the Commission appears inexplicably indifferent to even merely investigating the feasibility of using it here. Indeed, aside from casually observing that some commenters on the *2007 Broadband Data Notice* had previously raised the option of obtaining pricing data from market analysts, the Commission did not seek specific comment on this alternative in the *2008 Broadband Data Notice*.³⁰ The failure to explore, let alone adopt, an alternative that could cost-effectively produce the pricing data the Commission wants while saving the broadband industry

²⁹ See *Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 07-71, Twelfth Report, FCC 08-28, ¶¶ 111-123, 194-204 (released Feb. 4, 2008). In addition to relying on pricing data from third-party analysts, the Commission also touted the fact that it had entered into a “contract with American Roamer” to obtain maps showing “detailed boundaries of the network coverage areas of every operational mobile telephone carrier in the United States.” *Id.* ¶ 2.

³⁰ *2008 Broadband Data Notice* ¶ 37 n.132.

from enormous data collection obligations cannot be considered a reasonable step to minimize the burdens on respondents as required by the RFA and PRA.³¹

Third, assuming for the sake of argument the Commission could refine its pricing data proposals to collect meaningful data with minimal burden (which is not presently the case), the Commission has admitted that it does not know what, if anything, it would do with the data once it is collected. Specifically, after setting forth various proposals for collecting broadband pricing data in the *2008 Broadband Data Notice*, the Commission stated: “And finally, we seek comment on *whether* and in what form the Commission should use the reported service price information.”³² To impose those burdens on the broadband industry while simultaneously acknowledging that the Commission does not know what it should do with the data – and might not use the data at all – would be a clear violation of the APA, RFA and PRA.³³ To avoid such a violation, the Commission should refrain from adopting any broadband price reporting requirements. Indeed, absent an understanding of how the information would be used, the Commission is in no position to ensure that its data collection requirement is no more burdensome than necessary to fulfill its intended function, or to determine that the benefits of the data collection outweigh the burdens it imposes on the broadband industry.

Fourth, despite the fact that the Commission has declared various forms of broadband Internet access service to be information services, which are supposed to exist in a congressionally mandated deregulatory environment, the Commission is now proposing to apply legacy, common-carrier style price reporting obligations to providers of these services. As

³¹ See *supra* note 26.

³² *2008 Broadband Data Notice* ¶ 38 (emphasis added).

³³ See *supra* note 26; *Stereo Broadcasters, Inc. v. FCC*, 652 F.2d 1026, 1031 (D.C. Cir. 1981) (under APA, agencies must “exercise . . . informed discretion” and may not issue “dictate[s] of unbridled whim”).

Congress stated in section 230(b)(2) of the Act, it is “the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”³⁴ This congressional directive, moreover, codifies the Commission’s decades-old and highly successful policy of Internet “unregulation.”³⁵ As the Commission has explained,

The Internet has evolved at an unprecedented pace, in large part due to the absence of government regulation. Consistent with the tradition of promoting innovation in new communications services, regulatory agencies should refrain from taking actions that could stifle the growth of the Internet. During this time of rapid telecommunications liberalization and technology innovation, unnecessary regulation can inhibit the global development and expansion of Internet infrastructure and services. To ensure that the Internet is available to as many persons as possible, the FCC has adopted a “hands-off” Internet policy. We are in the early stages of global Internet development, and policymakers should avoid actions that may limit the tremendous potential of Internet delivery.³⁶

Yet, notwithstanding the well-established “hands-off” regulatory approach to the Internet pioneered by the Commission and codified by Congress, this Commission’s broadband pricing data collection proposal would subject broadband Internet access providers to the type of heavy-handed price reporting obligations that only apply to incumbent local exchange carriers for a limited number of legacy common carrier services. In particular, under section 203 of the Act, “Schedules of Charges,” incumbent local exchange carriers are required to “file with the Commission . . . schedules showing all charges for” their interstate communications services.³⁷ Given that the Commission has eliminated such price filing obligations for CLECs, IXC and

³⁴ 47 U.S.C. § 230(b)(2) (emphasis added).

³⁵ See *The FCC and the Unregulation of the Internet*, Jason Oxman, FCC Office of Plans and Policy Working Paper No. 31 at 24 (July 1999) (“Perhaps the most important contribution to the success of the Internet that the FCC has made has been its consistent treatment of IP-based services as unregulated information services.”).

³⁶ FCC, *Connecting the Globe: A Regulator’s Guide to Building a Global Information Community*, at Section IX (1999) available at <http://www.fcc.gov/connectglobe/sec9.html>.

³⁷ 47 U.S.C. § 203.

wireless carriers – all of whom are common carriers under the Act – it would be illogical to now impose an analogous price reporting obligation on broadband Internet access providers, who are *not* common carriers under the Act and who Congress forbade the Commission from treating as such.³⁸ Thus, to avoid running afoul of the Act and undermining its own well-established policy of Internet unregulation, the Commission should not impose price reporting requirements on broadband Internet access providers, particularly where it has less burdensome alternatives for acquiring such information, as discussed above.

D. The Commission Should Confirm that Data Reported to the Commission on Form 477 is Presumptively Protected from Disclosure.

In response to the *2007 Broadband Data Notice*, numerous parties raised substantial concerns about the confidentiality of the data the Commission proposed collecting.³⁹ That data is significantly more granular and detailed (e.g., line counts per Census Tract) than any data the Commission had previously collected, which itself was already highly confidential and proprietary. As AT&T explained at the time, disclosure of such data “would reveal the pace and pattern of each provider’s deployment and provide a detailed provider-specific roadmap for its competitors to follow.”⁴⁰ Thus, “public disclosure of such commercial secrets would force providers to constantly re-evaluate their strategic business decisions about where, when and how to deploy broadband services, thus significantly distorting competition and slowing the progress of broadband deployment.”⁴¹

³⁸ 47 U.S.C. § 151(44) (“A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services”).

³⁹ See *2008 Broadband Notice* ¶ 39.

⁴⁰ AT&T reply comments, WC Docket No. 07-38, at 8.

⁴¹ AT&T reply comments, WC Docket No. 07-38, at 8.

Despite these serious concerns, the Commission adopted its new broadband reporting requirements without taking any action on the issue of confidentiality. Instead, it deferred consideration of the matter to the *2008 Broadband Data Notice*, where it sought further comment. Although not discussed in the *Notice*, the Commission may have believed that timely action on the confidentiality issue was not critical in light of a recent decision from the United States District Court for the District of Columbia, which upheld the Commission’s determination that the Freedom of Information Act (FOIA) authorizes it to withhold sensitive data reported on Form 477 from public disclosure.⁴² Although the court’s decision certainly provides helpful precedent in protecting that data, it is but one ruling from one trial court in one jurisdiction. To remove any doubt about the confidential nature of Form 477 data and to prevent further disclosure challenges under FOIA in other jurisdictions in the future, the Commission should, at a minimum, formally amend its rules to provide a presumption of non-disclosure for Form 477 data,⁴³ while continuing to vigorously safeguard the confidentiality of that data.

In addition, to the extent the Commission is contemplating “sharing the information collected on Form 477 . . . with agencies such as the Department of Agriculture’s Rural Utilities Service and with public-private partnerships such as ConnectKentucky and similar ventures,”⁴⁴ the Commission should exercise *extreme* caution. Specifically, the Commission should share information from Form 477 with other entities only if: (i) the entity has a legitimate governmentally sanctioned interest in receiving such data, and (ii) the entity guarantees that it

⁴² See *Center for Public Integrity v. FCC*, 505 F. Supp.2d 106 (DC Aug. 27, 2007), *motion for reconsideration denied*, 505 F. Supp.2d 106 (DC Oct. 18, 2007).

⁴³ See 47 C.F.R. § 0.457(d)(1).

⁴⁴ *2008 Broadband Data Notice* ¶ 39

will provide at least as much protection from disclosure as this Commission provides under FOIA.⁴⁵

III. CONCLUSION

For all of the foregoing reasons, the Commission should re-commit itself to collecting only essential broadband data while minimizing collection burdens on respondents by disposing of the *2008 Broadband Data Notice* consistent with the positions stated above.

Respectfully Submitted,

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⁴⁵ See *2000 Broadband Data Order* ¶ 95 (discussing safeguards for sharing broadband data with state commissions).