

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

In the Matter of)	
)	WC Docket No. 07-38
Providing Eligible Entities Access to)	GN 09-47
Aggregate Form 477 Data As Required by the)	GN 09-51
Broadband Data Improvement Act)	DA 09-1550

**NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS**

The National Telecommunications Cooperative Association (NTCA)¹ files these initial comments in response to the Federal Communications Commission’s (Commission’s or FCC’s) July 17, 2009 Public Notice² seeking comment on how to interpret Sections 106(h)(1) and (h)(2) of the Broadband Data Improvement Act of 2008 (BDIA) regarding how to interpret the term “aggregate” for broadband data that are to be released to “eligible entities.”³ The FCC also seeks comment on whether additional safeguards are needed to protect confidential, competitively sensitive data collected on FCC Form 477 from public disclosure.⁴ NTCA cautions the Commission against releasing disaggregated raw data gleaned from previously-filed Form 477 submissions because the Commission did not provide adequate advance notice to Form 477 filers

¹ NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents over 580 rural rate-of-return regulated telecommunications providers. All NTCA members are full service rural local exchange carriers (RLECs), and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

² *Public Notice of Pleading Cycle Established for Comments on Providing Eligible Entities Access to Aggregate Form 477 Data As Required by the Broadband Data Improvement Act*, WC Docket No. 07-38, GN Docket Nos. 09-47, 09-51, DA 09-1550, Public Notice (rel. July 17, 2009) (Public Notice).

³ Public Notice, p. 2.

⁴ *Ibid.*

that the information they submitted would be released beyond the FCC. Release of disaggregated Form 477 data to state commissions and state-designated entities now, as NARUC and others suggest, is unwise because the necessary, additional assurances of confidentiality are not yet in place. NTCA maintains that any such release of disaggregated data should occur only after a properly-noticed, separate proceeding that results in new filing rules that apply prospectively, not retrospectively. Meanwhile, the FCC should focus its energies in analyzing and reporting, in aggregate fashion, the new broadband census tract data obtained in Form 477 submissions filed on and after March 1, 2009.

I. BACKGROUND.

The FCC Form 477 is filed twice a year – for periods ending June 30 and ending December 31 – by broadband service providers. The June 30 period report is due September 1, and the December 31 report is due March 1 of the following year. These reports are submitted electronically to the FCC.

The Broadband Data Improvement Act of 2008 (BDIA) requires the FCC to provide “eligible entities” with access to aggregate data collected based on the Form 477 filed by broadband service providers. The FCC, in its Public Notice, asks how to interpret Sections 106(h)(1) and 106(h)(2) of the BDIA, and seeks comment on how to define “aggregate” in the Form 477 context and how to interpret the confidentiality provisions of the BDIA.

Section 106(h)(1) states:

(1) In General. –Subject to paragraph (2), the Commission shall provide eligible entities access, in electronic form, to aggregate data collected by the Commission based on the Form 477 submissions of broadband service providers.

Section 106(h)(2) states:

(2) Limitation. –Notwithstanding any provision of Federal or State law to the contrary, an eligible entity shall treat any matter that is a trade secret, commercial or financial

information, or privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider and the eligible entity. This paragraph applies only to information submitted by the Commission or a broadband provider to carry out the provisions of this title and shall not otherwise limit or affect the rules governing public disclosure of information collected by any Federal or State entity under any other Federal or State law or regulation.

The aggregate broadband data is to be made available under the BDIA to “eligible entities” in the form of a web page on the U.S. Department of Commerce’s website, including links to maps. Section 106(i) defines “eligible entity” as the single state-designated contact point chosen to receive a grant under the BDIA and is either: 1) an agency or instrumentality of a State, or a municipality or other subdivision of a state; 2) a Section 501(c)(3) nonprofit organization that is tax-exempt under IRS Code Section 501(a); or 3) an independent agency which includes an official State officer.

Beginning with the March 1, 2009 filing of year-end connection data as of December 31, 2008, all facilities-based providers of wired, terrestrial fixed wireless, and satellite broadband connections must report the number of connections in service to households and businesses by census tract, separated by category and eight tiers of service speed.⁵ Terrestrial mobile wireless broadband providers must provide the census tract that best represents their service footprint.⁶ The new Form 477 will provide broadband information at the census tract level, instead of the former five-digit zip code level.

⁵ *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, WC Docket No. 07-38, Report and Order (rel. June 12, 2008), ¶ 19.

⁶*Id.* ¶ 23.

On July 22, 2009, the National Association of Regulatory Utility Commissioners (NARUC) adopted a resolution that calls on the FCC to provide states with copies of the current Form 477 submissions.⁷ Specifically, NARUC asks the Commission to:

- (1) Provide requesting states with disaggregated data from the relevant current Form 477 submissions by wireline and wireless broadband service providers;
- (2) Require broadband service providers to simultaneously file future Form 477 reports with both the FCC and requesting States;
- (3) Require state to commit to treat such Form 477 reports as privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider;
- (4) Immediately grant a petition for declaratory ruling to expand the scope of available broadband services data; and
- (5) Not preempt any State actions requiring broadband service providers to submit additional and more granular broadband information.

NARUC notes in its Resolution that disaggregated broadband information from FCC Form 477 would be useful for state public service commissions and their designated “eligible entities” to apply for funding under the Broadband Data and Development Grant Program of the National Telecommunications and Information Administration (NTIA), pursuant to the Broadband Data Improvement Act of 2008 (BDIA).⁸ NARUC also states that the disaggregated data will be useful for applying for grants and loans from NTIA (Broadband Technology Opportunities Program) (BTOP) and the Rural Utility Service’s Broadband Initiatives Program (BIP).

⁷ NARUC Summer 2009 Meeting, *TC-1 Resolution Supporting Access to Broadband Mapping Data* (adopted July 22, 2009) (NARUC Resolution), pp. 23-25.

⁸ NARUC Resolution, p. 24; Broadband Data Improvement Act, P.L. 110-385 (2008) (BDIA).

II. NEW FORM 477 DATA DISTRIBUTION RULES REQUIRE A NEW RULEMAKING PROCEEDING.

Currently, broadband service providers, including NTCA rural members, file their Form 477 data electronically twice a year with only the FCC.⁹ The FCC releases its analysis of these data in an aggregate format, and now questions whether disaggregated data should be released to states and state-designated entities under the BDIA.¹⁰ NARUC and others are encouraging the Commission to abandon the current Form 477 filing rules and adopt new broadband data collection and distribution rules.

NTCA maintains that any release of disaggregated Form 477 data, and any change in the types of broadband data collected, should occur only after a properly-noticed, separate proceeding that results in new filing rules that apply prospectively, not retrospectively. The Public Notice's statement that "the data-sharing issues raised by section 106(h) of the BDIA clearly fall within the scope of the more general data-sharing issues raised in the further notice"¹¹ does not clarify whether the instant comment proceeding is designed merely to solicit general views on broadband data collection, to "test the waters" on a potential sharing of that data and definitions of "aggregation" of data, or to hammer home new data distribution rules that will apply prospectively and/or retrospectively.

NARUC and other state commissions want to use data from previously-filed Form 477 submissions.¹² Carriers who filed these reports did not know prior to filing that the information could be released to state PUCs and other entities. Consequently, rural broadband service

⁹ See FCC Form 477 filing instructions, available at: <http://www.fcc.gov/Forms/Form477/477inst.pdf>.

¹⁰ Public Notice, p. 2.

¹¹ *Ibid.*

¹² NARUC Resolution; Missouri Public Service Commission Comments (filed July 29, 2009), p. 5.

providers may have inadvertently included confidential information that they would not have otherwise disclosed had they known about the possible data release. Fairness dictates, however, that those who provide confidential, competitively sensitive information should have reasonable advance notice that the information may be disseminated to non-FCC personnel. The instant Public Notice wording is not adequately framed or filed to give true notice of the Commission's intent. Furthermore, the Public Notice was not accompanied by any proposed rule change wording, upon which affected parties could comment. Due process requires adequate notice and a reasonable opportunity to comment on the effects of changing the distribution rules for Form 477 filers. A new proceeding would be necessary to change those distribution rules.

III. RELEASING RAW DATA WILL COMPROMISE CONFIDENTIAL INFORMATION.

In addition to not providing adequate advance notice of rule changes, release of disaggregated Form 477 data outside the FCC will compromise the confidential portions of the filings because the necessary, additional assurances of confidentiality are not yet in place. NTCA affirms its position that the FCC should protect broadband consumers' privacy interests and broadband providers' competitive interests by shielding proprietary information, especially carrier build-out plans and other sensitive materials, that may be provided on the FCC Form 477 and through statewide mapping efforts from public disclosure. Revealing these intentions and materials do not illuminate broadband availability but may cause carriers to retract broadband deployment plans and reduce broadband investments.

The Commission must recognize its obligation to protect proprietary and commercially sensitive information from public disclosure pursuant to 5 U.S.C. § 552, 47 C.F.R. § 0.457(d), 0.459(d) while subject to Freedom of Information Act (FOIA) disclosure rules. Broadband providers will be reluctant to submit private consumer information and confidential commercial

data unless the providers and consumers are assured their data will remain confidential. The Commission should keep these disclosure sensitivities in any distribution of aggregate or disaggregated data.

Immediate release of disaggregated data would permit non-profit entities, as well as state commissions, to gain access to competitively sensitive data. One measure that would aid in providing a modicum of protection to the broadband service provider when dealing with a non-profit or other state-designated entity is requiring the use of suitable non-disclosure agreements. Such agreements could address a host of issues such as the form in which data are stored, who has access to the data, for how long the data will be retained, training personnel on handling sensitive data, how the data are to be disposed, and the purposes for which the data can be used, as well as suitable penalties for inadvertent and intentional release of confidential data.

NTCA has consistently expressed reservations about releasing to anyone confidential, competitively sensitive data which may be contained on the Form 477.¹³ NTCA renews these concerns. Gathering and releasing disaggregated broadband data to states, non-FCC federal agencies and other entities, or releasing without additional safeguards such as non-disclosure agreements, will invite breaches of confidentiality and will burden NTCA's broadband provider members to search, detect and litigate over the breaches.

¹³ *In the Matter of Development 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, DA 08-1586, NTCA Reply Comments (Filed Aug. 1, 2008).

IV. THE FCC SHOULD EVALUATE THE NEW CENSUS TRACT DATA PROMPTLY.

The Commission just released aggregate Form 477 (zip code version) data as of June 30, 2008.¹⁴ The next Form 477 aggregate data report will reflect the new census tract data as of December 31, 2008, which was collected and filed online by March 1, 2009. This new collection of data required providers of wired broadband, fixed wireless broadband, and satellite-based broadband connections to report their subscriber counts at the census tract level, organized according to upload and download transmission speed tiers.

Rather than releasing the raw data, the FCC should focus its energies on analyzing the new broadband census tract data and prepare its report using aggregate information. The June 30, 2008 report on Form 477 data was the last report that will use zip code data. The next report will reflect census tract data. A wealth of information that is now available to the Commission. NARUC and several state commissions are clamoring for more detailed information about broadband availability and other broadband parameters. This information will be used to apply for BTOP and RUS grants under the ARRA and BDIA, and perhaps for other purposes. The Commission can assist the state PUCs greatly by focusing its efforts on analyzing promptly the Form 477 data and releasing its report on aggregate data using census tract information.

V. CONCLUSION.

For these reasons, the Commission should not release disaggregated raw data from previously-filed Form 477 submissions. The Commission did not provide adequate advance notice to Form 477 filers that the information they submitted would be released outside the FCC. Release of disaggregated Form 477 data to state commissions and state-designated entities now,

¹⁴ *High-Speed Services for Internet Access: Status as of June 30, 2008*, Report by FCC's Industry Analysis and Technology Division, Wireline Competition Bureau, July 2009.

as NARUC suggests, is unwise because the necessary, additional assurances of confidentiality are not yet in place. NTCA maintains that any such release of disaggregated data should occur only after a properly-noticed, separate rulemaking proceeding that results in new filing rules that apply prospectively, not retrospectively. Meanwhile, the FCC should focus its energies in analyzing the new broadband census tract data obtained in Form 477 submissions filed on and after March 1, 2009.

Respectfully submitted,



By: /s/ Daniel Mitchell
Daniel Mitchell

By: /s/ Karlen Reed
Karlen Reed

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203
(703) 351-2000

July 30, 2009

CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Initial Comments of the National Telecommunications Cooperative Association in WC Docket No. 07-38, GN Dockets 09-47 and 09-5, DA 09-1550, was served on this 30th day of July 2009 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

Julius Genachowski, Chairman
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554
Julius.Genachowski@fcc.gov

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554
Michael.Copps@fcc.gov

Commissioner Robert M. McDowell
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554
Robert.McDowell@fcc.gov

Best Copy and Printing, Inc.
Federal Communications Commission
445 12th Street, SW, Room CY-B402
Washington, D.C. 20554
fcc@bcpiweb.com

/s/ Adrienne L. Rolls
Adrienne L. Rolls