

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

In the Matter of)	
)	WC Docket No. 07-38
)	
Local Competition and Broadband Reporting)	GN Docket Nos. 09-47, 09-51

COMMENTS OF AT&T, INC.

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AT&T Inc., on behalf of itself and its affiliates (AT&T) respectfully submits these comments in response to the Wireline Competition Bureau’s July 17, 2009 *Public Notice* seeking comment on how to interpret the “aggregate data” and “confidentiality” provisions of the Broadband Data Improvement Act (BDIA).¹

I. BACKGROUND

The Commission has been collecting broadband data, semi-annually through its Form 477 data gathering program from hundreds of service providers for almost ten years.² From the beginning,³ the Commission’s disclosure and presentation of the data – particularly the

¹ *Comment Sought 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 (rel. July 17, 2009) (*Public Notice*).

² See *Public Notice* at 1. See also *Local Competition and Broadband Reporting*, Report and Order, CC Docket No. 99-301, 15 FCC Rcd 7717 (2000) (*2000 Data Gathering Order*).

³ See *2000 Data Gathering Order*, 15 FCC Rcd at 7759-60 (“ . . . we state our intention not to publish in our publicly-available reports individual provider-filed data for the broadband (Part I) portion of the form, even where providers do not seek non-disclosure of this data. . . . [And] we do agree to aggregate this information in a way that does not identify the individual provider data in our reports because commenters have made at least an initial showing that all or most of the data filed in these sections is typically held confidential by providers of these services. Our decision not to publish individual provider submissions from the Part I Broadband section reflects the particular and limited purposes of this data collection and our desire to maximize the level of voluntary compliance with the information collection.”). See, e.g., Federal

broadband data -- have always been guided by the Commission's recognition that the material reported by filers is commercially sensitive, competitive information that should not be disclosed without appropriate precautions to safeguard that information. Accordingly, the Commission has always (1) presented the data in "aggregate" form in its reports so as to avoid identifying individual, company-specific information,⁴ and (2) treated the data in its possession as confidential and protected from disclosure under the Freedom of Information Act.⁵ At the same time, in order to "maximize the value of this information collection for states," the Commission has granted state commissions access to provider-specific data collected on Form 477, subject to a state commission's adherence to confidentiality protections at least as strong as those provided under federal law.⁶

Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of June 30, 2007* (rel. Mar. 19, 2008), available at <http://www.fcc.gov/wcb/iatd/comp.html> (Table 5, "High Speed Lines by Information Transfer Rates," reflects practice of placing asterisks (*) in portions of the broadband report instead of numerical data to preserve confidentiality of individual providers).

⁴ See Letter from K. Burgee, Associate Bureau Chief, Wireline Competition Bureau, to Drew Clark, Center for Public Integrity, September 26, 2006 at 2-3. See also *2000 Data Gathering Order*, 15 FCC Rcd at 7760 ("Moreover, particularly with respect to the Part I broadband data, we conclude that we can achieve substantially the same public benefits by releasing this information in an aggregated fashion without any potential risk of competitive harm on the part of [filers]. . . . Thus, we agree to publish in our regular reports data from Part I of the form only once it has been aggregated, for example by provider class, regardless of whether parties request confidential treatment on the broadband portion of the form.")

⁵ See Letter from K. Burgee to Drew Clark, *supra*, at 3 ("We find that the requested database and associated documentation constitute commercially sensitive, competitive information. . . . For these reasons, we conclude that the requested data is protected against disclosure pursuant to FOIA exemption 4."). The lawfulness of the Commission's practice of treating individual filer's Form 477 data as confidential and protected against FOIA disclosure was confirmed by the U.S. District Court for the District of Columbia in 2007. See *Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007).

⁶ See *2000 Data Gathering Order* at 7761, ¶ 95.

Against that backdrop, Congress enacted the BDIA in October 2008.⁷ In the BDIA, Congress, *inter alia*, instructed the Commission to provide a narrow class of persons (“eligible entities”) access to “aggregate data collected by the Commission based on the Form 477 submissions of broadband service providers.”⁸ Congress did not define “aggregate data” in the BDIA. The Bureau, accordingly, seeks comment in the Public Notice on how it should interpret that term. The Bureau has also asked for comment on whether the confidential treatment provisions governing eligible entities’ receipt of aggregate data are “self-effectuating or whether the Commission should take any measures to ensure eligible entities’ compliance with section 106 (h) (2).”⁹ Each of these issues is addressed, briefly, below.

II. DISCUSSION

A. The Commission Should Interpret “Aggregate Data” Consistent With Its Longstanding Treatment of Form 477 Broadband Data.

As used in the Form 477 context, the production of “aggregate data” is well-established and understood by regulators and broadband providers to mean the accumulation and organization of data from multiple providers such that no provider-specific information is disclosed. As the Bureau noted three years ago in response to the Center for Public Integrity’s FOIA requests for company-specific data:

In the *2000 Data Gathering Order*, the Commission adopted several procedures to protect confidentiality of data submitted to it on Form 477. The Commission noted commenters’ concerns that new entrants could be harmed if competitors learned of the number of lines and customers that they had in a particular market. The Commission thus agreed to aggregate filed data in its published reports in a way that does not identify company-specific data. While the Commission recognized that the data collection was mandatory, the Commission also

⁷ Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-04).

⁸ See BDIA, § 106 (h), 47 U.S.C. § 1304 (h). See *Public Notice* at 1-2.

⁹ *Public Notice* at 2.

recognized that additional confidentiality protections would encourage voluntary compliance.¹⁰

When it enacted the BDIA, Congress was well aware of the Commission’s practices regarding the aggregation of broadband data and the publication of that aggregate data in its broadband data reports.¹¹ It was also aware that the Commission shared provider-specific data with state commissions, subject to confidentiality requirements.¹² Thus, the fact that Congress directed the Commission to make “aggregate data” (rather than provider-specific data) available to eligible entities clearly demonstrates that Congress intended for the Commission to continue to use the same practices and methodologies that the Commission has developed and utilized for broadband data collection and reporting for nearly a decade with the Form 477 program in providing access to “aggregate data” under the BDIA.¹³ Accordingly, the Commission should

¹⁰ Letter from K. Burgee, *supra*, at 2 (citing *2000 Data Gathering Order*, 15 FCC Rcd at ¶¶ 87-88, 91). *See 2000 Data Gathering Order*, 15 FCC Rcd at 7759-60 (“Moreover, in such cases [where providers request confidential treatment of submitted data], we agree with those commenters who suggest that we can aggregate much of the data – for example, by carrier class and to the state level – so that it does not identify the individual provider in our regularly published reports. . . . [And], particularly with respect to the Part I broadband data, we conclude that we can achieve substantially the same public benefits by releasing this information in an *aggregated fashion without any potential risk of competitive harm* on the part of respondents.”) (emphasis added).

¹¹ *See, e.g.*, the Commission’s High-Speed Services for Internet Access reports, available at <http://www.fcc.gov/wcb/iatd/comp.html>.

¹² *See 2000 Data Collection Order, supra*, at ¶ 95.

¹³ The Commission has organized and presented aggregate data in its broadband data reports in a series of tables and charts that it has deemed most relevant to meeting its statutory mandates and regulatory objectives. In the BDIA, Congress has now given “eligible entities” the right to access the raw aggregate data without any particular Commission organization and presentation, which will enable those entities to manipulate the aggregate data as they see fit to meet their objectives, subject to the overriding requirement that they do not disclose confidential data. *See* BDIA § 106 (h) (2), 47 U.S.C. § 1304 (h) (2).

apply its aggregation techniques in such fashion as to facilitate the purposes of the BDIA,¹⁴ while simultaneously safeguarding provider-specific data from improvident disclosure.

B. The Commission Should Take Appropriate Steps to Safeguard the Confidentiality of Any Data Provided to Eligible Entities Under the BDIA.

The Commission asks whether the BDIA’s confidentiality requirements governing the receipt of Form 477 data by eligible entities are “self-effectuating” or whether there are steps for the Commission to take prior to disclosure. Affirmative steps to protect confidentiality of sensitive, commercial information should be taken, and would also be fully consistent with long-standing Commission practices.

Section 106 (h) (2) states that “[n]otwithstanding 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,” unless providers expressly agree to such disclosure.¹⁵ This language establishes two core Congressional directives: (1) that the confidentiality protections of the BDIA take precedence over any otherwise applicable Federal or State public disclosure laws (*e.g.*, freedom of information, sunshine, or other similar laws or regulations) insofar as access to Form 477 data under Section 106 is concerned;¹⁶ and (2) those protections require eligible entities to safeguard any confidential information contained in the Form 477 data they receive.

¹⁴ See generally BDIA, § 102 (4) (federal government should encourage “complementary State efforts to improve the quality and usefulness of broadband data and should encourage and support the partnership of the public and private sectors in the continued growth of broadband services . . .”).

¹⁵ BDIA, § 106 (h) (2), 47 U.S.C. § 1304 (h) (2).

¹⁶ While the BDIA takes precedence over other laws and requirements with respect to data submitted by the Commission or a broadband provider for purposes of satisfying the BDIA, it does not “otherwise limit or affect” data submitted for other purposes. See BDIA § 106 (h) (2); 47 U.S.C. § 1304 (h) (2).

The first directive is straight-forward. If Congress intended for public disclosure laws to govern the data that “eligible entities” receive pursuant to the BDIA, it would not have included language to the opposite effect. Thus, Congress has foreclosed any argument that eligible entities can be obligated to publicly disclose data received under the BDIA pursuant to FOIA or other similar federal or state disclosure requirements.

The intent of the second directive is also readily apparent: preserve confidentiality. The language chosen by Congress compares closely to the Commission’s decade-long practice, as articulated in the *2000 Data Gathering Order*, regarding the preservation of confidentiality with respect to broadband data shared with state commissions.¹⁷ Just as the Commission’s broadband data aggregation practices are long-standing and should be presumed to have been in Congress’ thinking when enacting the BDIA, it should also be presumed that Congress was aware of, and did not intend to scale back (unless clearly indicated otherwise), the Commission’s established mechanisms for protecting filers’ commercially sensitive competitive information in the disclosure of broadband data to third party requestors.¹⁸ To the contrary, whereas the Commission, to date, may have deemed it sufficient to protect data and provider confidentiality by imposing federal FOIA safeguards over any less protective state laws applicable to state

¹⁷ Compare *2000 Data Gathering Order, supra*, at ¶ 95 (State commissions may view data, as specified, “provided that the state has appropriate protections in place (which may include confidentiality agreements or designation of information as proprietary under state law) that would *preclude disclosure* of any confidential information.”) (emphasis added), BDIA § 106 (h) (2) (“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*”) (emphasis added).

¹⁸ For example, in the past, the Commission has conferred with service providers to determine whether there is any objection to producing filers’ Form 477 data to state commission requestors and determining, based on that response, the appropriate next steps (*e.g.*, disclose, disclose in part, facilitate arrangements between providers and requestors for confidential treatment, *etc.*). See, *e.g.*, *2000 Data Collection Order, supra*, at ¶ 90 (“If the Commission receives a request for,

commission data recipients,¹⁹ the BDIA takes that *protection a step further* by expressly precluding applicability of public disclosure laws – *state or Federal* – in favor of requiring mutual agreement between broadband service providers and eligible entities before any disclosure of confidential data by eligible entities.²⁰

Taking the two core directives together, then, it seems clear that the Commission’s role under the BDIA is not that of a passive distributor of sensitive commercial data to eligible entities. Rather, when providing aggregate data to requesting eligible entities, the Commission should ensure (*i.e.*, through an appropriately worded certification from the requesting entity) that: (1) the recipient acknowledges that the confidentiality provisions of the BDIA take precedence over any contrary provisions in Federal and/or state public disclosure laws that would otherwise require disclosure of the broadband data at issue here; and, (2) in all events, the recipient will treat the data as confidential as mandated by section 106 (h) (2). By doing so, the Commission

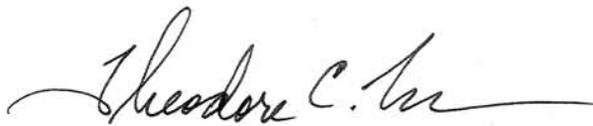
or proposes disclosure of, the information contained in the Form 477, the provider will be notified and required to make the full showing under our rules.”) (citing 47 C.F.R. § 0.459 (b)).

¹⁹ *See id.* (“However, where state laws afford less protection than federal FOIA laws, the higher federal standard will prevail.”)

²⁰ BDIA, § 106 (h) (2), 47 U.S.C. § 1304 (h) (2).

can satisfy its duty to preserve the confidentiality of the broadband data in a manner consistent with the BDIA's access requirements.²¹

Respectfully submitted,



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²¹ Confidentiality concerns with respect to the data are particularly acute now that there are likely to be more data recipients than before the BDIA was enacted and some of these recipients may lack the experience of state commissions in handling confidential information. *See 2000 Data Gathering Order, supra*, at ¶ 90 (Commission acknowledges that preserving confidentiality will “give providers confidence that protectable data will not be published” and, thus, will encourage the “greater level of compliance with [the Commission’s broadband] information collection” efforts that the Commission has sought in this area).