

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

**In the Matter of**

<b>PROVIDING ELIGIBLE ENTITIES</b>	)	
<b>ACCESS TO AGGREGATE FORM 477</b>	)	<b>WC Docket No. 07-38</b>
<b>DATA AS REQUIRED BY THE</b>	)	<b>GN Docket No. 09-47</b>
<b>BROADBAND DATA IMPROVEMENT</b>	)	<b>GN Docket No. 09-51</b>
<b>ACT</b>	)	

**COMMENTS OF THE  
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE  
AND THE  
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF  
SMALL TELECOMMUNICATIONS COMPANIES**

To the Commission:

The Independent Telephone & Telecommunications Alliance (ITTA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) (collectively, the Associations) hereby submit comments in the above-captioned proceedings.<sup>1</sup> ITTA members are mid-size local exchange carriers that provide a broad range of high-quality wireline and wireless voice, data, Internet, and video services to 30 million access lines in 44 states. OPASTCO is a national trade association representing approximately 520 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3.5 million customers, and almost all of OPASTCO's members are rural telephone companies as defined in 47

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<sup>1</sup> See "Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act," Public Notice DA 09-1550 (Jul. 17, 2009) (Public Notice).

U.S.C. §153(37). The Associations urge the Commission to aggregate data and adopt confidentiality provisions in a manner that respects the sensitivity of data that broadband providers submit pursuant to the Form 477 process.

## 1. BACKGROUND

The Commission seeks comment on how to interpret and implement Sections 106(h)(1) and 106(h)(2) of the Broadband Data Improvement (BDIA).<sup>2</sup> Section 160(h)(1) of the BDIA requires the Commission to “provide eligible entities access . . . to aggregate data collected by the Commission based on the Form 477 submissions of broadband service providers.”<sup>3</sup> An “eligible entity” is defined by the BDIA as an entity that is “an agent or instrumentality of a State, or a municipality or other subdivision (or agency or instrumentality of a municipality or other subdivision) of a State,” or, “a nonprofit organization that is described in section 501(c)(3) of such Code,” or, an independent agency or commission in which an office of the State is a member on behalf of the State,” and, “is the single entity in the state that has been designated by the State to receive a grant under this section.”<sup>4</sup>

The Commission’s Form 477 collects information about broadband connections to end-user locations, wired and wireless local telephone connections, and interconnected Voice over Internet Protocol (VoIP) services. Broadband providers submit granular information about services, categorized on the basis of technology, geographic basis

<sup>2</sup> Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-04).

<sup>3</sup> 47 U.S.C. § 1304(h)(1).

<sup>4</sup> 47 U.S.C. § 1304(i)(2).

where services are provided, connections served, and other data that are competitively sensitive.

The Commission should ensure that its implementation of Section 106 accounts for the sensitivity and potentially broad distribution of Form 477 data. Information distributed to third parties should not include competitively sensitive data that could be used to undermine broadband provider efforts to deploy broadband by revealing those providers' proprietary strategies and plans. The potential distribution of competitively sensitive information to a wide swath of state, local, and public-private partnerships raises sobering questions as to the extent to which a broadband provider ultimately controls its information. At a minimum, data to be handed over to eligible entities should be secured through contractual provisions, with disincentives, including substantial penalties, to discourage and guard against disclosure. The confidentiality of competitively sensitive information must be maintained strictly. The Commission has already recognized the need to maintain confidentiality of information submitted via Form 477: the Form itself provides a built-in mechanism with which filers can request confidential treatment of their data.<sup>5</sup>

## **2. FORM 477 DATA ARE COMPETITIVELY SENSITIVE**

Broadband service providers face intense competition. Comments submitted in response to the Commission's notices in Docket No. 09-51, "A National Broadband Plan for Our Future," reveal a broad array of wireline, wireless, cable, and satellite broadband providers. This confirms the Commission's recent findings of strong intermodal

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<sup>5</sup> See, *i.e.*, Form 477 Tutorial, at 9 (<http://www.fcc.gov/Forms/Form477/477tutorial.pdf>) (last viewed Jul. 29, 2009, 13:57)).

availability of broadband services.<sup>6</sup> The growing National interest in and reliance upon applications that are supported by broadband encourages broadband providers to engage in creative marketing strategies and to deploy advancing technological capabilities bundled in packages and other consumer-oriented offerings.

The data culled from Form 477, were it to be made public or available without significant restrictions and disincentives against improper disclosure, could undermine broadband providers' network investments. Viewers of information, particularly when comparing that information against historic data, would be able to plot providers' progress and strategic attempts by comparing past deployments and offerings with current information. The trends revealed by this data could offer competitively damaging insight into broadband providers' internal strategies. Such disclosure would have a disproportionately negative impact on broadband providers that have already made significant investments in broadband deployment, as they have to produce more competitively sensitive data than would-be competitors who have failed to make similar investments in broadband deployment.

The Commission also has expressed its confidence that robust confidentiality protections will encourage broadband provider compliance with Form 477 reporting requirements. It stated that streamlined procedures for requesting confidential treatment "will lead to a greater level of compliance with this information collection and will give

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<sup>6</sup> See "High-Speed Services for Internet Access: Status as of June 30, 2008," Industry and Analysis Division, Wireline Competition Bureau, Federal Communications Commission, at 3, 4 (Jul. 2009).

providers confidence that protectible data will not be published.”<sup>7</sup> The Commission must continue to uphold that standard.

The Commission must ensure that unintended adverse consequences do not flow from the inappropriate release of proprietary information. For example, in an area where several providers offer service, even aggregated data might be easily “reversed engineered,” leading to a comprehensive view of any particular provider’s operations. The level of detail demanded by Form 477, particularly in its new format, raises significant implications were raw data, or even data that is not aggregated sufficiently, to be released. According to the Instructions for Form 477, providers are required to report: their total connections broken down to ten categories of service; the percentage of total connections that are provided over their own loops or facilities; the total number of connections that are billed to end-users; the total number of residential connections; and, data rates, including number of connections per data rate combination.<sup>8</sup> Similar types of data-intensive reporting obligations apply to both wired and wireless providers.

The data submitted by broadband providers is commercially sensitive. Service providers ordinarily do not make publicly available the types of data filed as part of Form 477; this fact can be discerned by the Commission’s streamlined method for requesting confidential treatment, which evinces the Commission’s recognition that many broadband providers would submit that request. Disclosing disaggregated data to eligible entities would betray the confidence of broadband providers that have submitted this information

<sup>7</sup> *Local Competition and Broadband Reporting: Report and Order*, CC Docket No. 99-301, FCC 00-114, at para. 90 (2000).

<sup>8</sup> Instructions for Local Telephone Competition and Broadband Reporting Form (FCC Form 477), OMB No. 3060-0816, at 7, 8, 9.

to the Commission in good faith and relying on the Commission’s assurances of confidential treatment. Such disclosure would enable competitors to assess critical competitive information “without incurring the time, labor, risk, or expense of developing them independently.”<sup>9</sup>

ITTA and OPASTCO members employ various means to determine deployment strategies that serve both the public interest and the interest of their shareholders. These include comprehensive analyses that address: costs and capabilities of various technologies; end-user considerations, such as consumer preferences and quality of service expectations; economic analyses to determine pricing; and market analyses that inform bundling and pricing. The cumulative results of these analyses are the deployment of networks and offering of particular services, in specific regions, at defined rates. ITTA and OPASTCO members employ and contract with economists, engineers, and other experts to create detailed strategies that lead to efficient deployment and service offerings. Form 477 data could offer a damaging and inappropriately intimate look at this internal determinative process.

### **3. DATA SHOULD BE AGGREGATED AT A HIGH LEVEL**

The Commission seeks comment on how much it should aggregate the data that it provides to eligible entities, and what factors it should consider in determining the appropriate level of aggregation. As a threshold matter, the data must be aggregated. In the Public Notice, the Commission asks, “to what extent does the adjective “aggregate” require the Commission to provide to eligible entities data that is more aggregated than

<sup>9</sup> See, *Webb v. HHS*, 696 F.2d 101, 103 (D.C. Cir. 1982) (upholding Food and Drug Administration denial of Freedom of Information Act request for New Drug Application (NDA), finding drug manufacturer’s competitive interest in ensuring that information in NDA is not released prematurely to the public).

the raw data submitted by Form 477 filers?” The BDIA itself provides the answer, specifically, that at minimum the data *must* be aggregated further than the raw Form 477 data. The BDIA is clear: the Commission shall “provide eligible entities access . . . to *aggregate* data collected by the Commission *based* on the Form 477 submissions of broadband service providers.”<sup>10</sup> The Commission’s question must not be interpreted to reflect an incorrect interpretation that the Commission is not required to aggregate the Form 477 data. Rather, the statute informs the Commission that it is to provide aggregate information that is based upon, or, stated differently, reflective of, Form 477 data, but which is not the Form 477 data itself.

ITTA and OPASTCO submit that the Commission should interpret “aggregate” to ensure that any Form 477 data disclosed does not identify, even by anonymous designation, the number or types of subscribers of various broadband providers in a particular area. The primary purpose of the mapping effort should be to determine where broadband is not offered. Therefore, for example, it is not material to provide data indicating that Company “A” has a specified number of subscribers in area “X,” and that Company “B” has a specified number of subscribers in neighboring or contiguous area “Y.” Rather, in that situation, the data should simply disclose that a broadband provider’s service is available in areas “X” and “Y.” Any disclosure of subscribership counts should only occur at the state level – so that subscribership data is aggregated at least to the point at which a broadband provider’s subscribership rates in a specific region can be neither discerned nor “reverse engineered.” Also, any disclosure of data regarding

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<sup>10</sup> 47 U.S.C. §§ 1304(h)(1) (emphasis added).

speeds should be limited to the speed thresholds used in the stimulus broadband programs' definitions of "unserved" and "underserved."

Freedom of Information Act (FOIA) exceptions to disclosure are consistent with the ITTA and OPASTCO position that Form 477 data should not be revealed to third parties. Case law involving FOIA requests speaks to the proposition of protecting information that by itself may be seemingly innocuous, but when combined with other data, could be used to create a picture of a provider's deployment strategy and customer response.<sup>11</sup> The Commission should avoid offering data that enables third-party determinations of a broadband provider's strategic plans.

In any event, if Form 477 data is released to eligible entities in a form that is less aggregated than reports currently released publicly by the Commission, stringent and enforceable contractual non-disclosure agreements must attend the transfer of the information. Such restrictions should extend to the release of information to third parties, such as subcontractors, by the eligible entities.

#### **4. THE COMMISSION SHOULD SPECIFY CONFIDENTIALITY SAFEGUARDS**

The Commission seeks comment on section 106(h)(2) of the BDIA, which requires eligible entities to 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." In particular, the Commission seeks comment on whether that section is self-effectuating or whether the Commission should take any measures to ensure eligible

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<sup>11</sup> *Timken Co. v. United States Customs Service*, 491 F Supp. 557, 599-560 (Dist. D.C. 1980) (finding that FOIA release of even three-year old price data could enable competitors to project manufacturer's future cost and price information, and could result in competitive injury).

entities' compliance with section 106(h)(2). Stated colloquially, the Commission's requirements in these regards must have teeth. Broadband providers expend significant resources on formulating business plans in highly competitive markets that have been characterized by many as the future of communications in the Nation. The risk that attends improper disclosure of confidential data could chill providers' confidence to invest if that risk is not mitigated sufficiently.

It cannot, and must not, be assumed that all eligible entities will possess either the experience or expertise to control confidential information appropriately. A single inadvertent error by an eligible entity, or an agent or employee of that entity, could have significant effects upon a broadband provider's investment and ability to serve an area. The institution and, if necessary, enforcement of rigorous standards will place eligible entities on notice of the seriousness with which the data must be safeguarded. It cannot be assumed that eligible entities will assure the proper treatment of proprietary information. The Commission must ensure that such provision is governed by appropriate standards.

## **5. ENFORCEMENT OF CONFIDENTIALITY SAFEGUARDS**

The Commission should adopt safeguards to ensure compliance with section 106(h)(2). These safeguards should include contractual obligations that bind the eligible entities to uphold and protect the confidentiality of the information. The contractual obligations should run between the eligible entity and the Commission, in order to avoid the foisting of any unnecessary costs on affected broadband providers. The agreements also should permit recovery by broadband providers against the eligible entities or their agents, contractors, or other third-parties should proprietary information be released.

Breach of the agreement by an eligible entity should result in stiff penalties levied by the

Commission, the fulfillment of which would not preclude separate action on behalf of the provider whose information was disclosed.

### **CONCLUSION**

WHEREFORE the reasons stated herein, the Associations urge the Commission to ensure the confidentiality of Form 477 data that is made available to eligible entities, and to ensure that the dissemination of such data is accompanied by rigorous and enforceable safeguards.

Respectfully submitted,

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