

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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

To: The Commission

**REPLY COMMENTS OF  
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association (“WISPA”) hereby provides its Reply Comments in response to the Commission’s Public Notice regarding certain of its disclosure obligations under the Broadband Data Improvement Act (“BDIA”).<sup>1</sup>

**Background**

Founded in 2004, WISPA is the trade association representing the interests of 300 Wireless Internet Service Providers (“WISPs”), vendors, system integrators and others interested in promoting the growth and delivery of wireless broadband service. Collectively, WISPs provide fixed wireless broadband access services to more than 2,000,000 consumers and businesses. Many of these subscribers live in rural areas of the country where wired broadband technologies, such as DSL and cable modem service, are not available and are unlikely to become available because of the high infrastructure deployment costs. Enabled by the Commission’s allocation of unlicensed spectrum in the early 1990s, many WISPs are eager to extend their networks further into more rural and remote areas where demand for broadband is great but where broadband currently is not available. Many WISPs operate in license-exempt

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<sup>1</sup> Public Notice, “Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by The Broadband Data Improvement Act,” DA 09-1550, rel. July 17, 2009 (“*Public Notice*”); Erratum, rel. July 23, 2009.

bands (e.g., 900 MHz, 2.4 GHz and 5.8 GHz) and in the 3650-3700 MHz “licensed-lite” band. The vast majority of WISPs are “small businesses,” as defined in the Small Business Act.

WISPA has emerged as the advocacy organization representing the interests of WISPs. In 2007, WISPA filed comments in the 700 MHz proceeding seeking to make spectrum more accessible to small entities.<sup>2</sup> More recently, WISPA filed extensive comments<sup>3</sup> and *ex parte* presentations<sup>4</sup> regarding use of the television white spaces, advocating rules that would promote affordable wide-area fixed wireless services under a “licensed-lite” approach. WISPA also filed a petition for reconsideration of the white space rules asking the Commission to eliminate costly and burdensome spectrum sensing rules and to amend other rules to make WISP deployment in rural and underserved areas more flexible and cost-effective. WISPA representatives have been active participants in the joint public meetings concerning the broadband stimulus provisions of the American Recovery and Reinvestment Act of 2009 (“Recovery Act”), again advocating grant eligibility and selection criteria that will best promote broadband service to rural, unserved and underserved areas.<sup>5</sup> In addition to filing extensive comments regarding the rules and criteria for NTIA and RUS funding, WISPA was one of the parties to the July 24, 2009 emergency request to NTIA and RUS to amend the NOFA requirements pertaining to the Professional Engineer certification.

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<sup>2</sup> See WISPA Comments filed May 23, 2007 *In the Matter of Service Rules for 698-746, 747-762 and 777-792 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 8064 (rel. Apr. 27, 2007).

<sup>3</sup> See WISPA Comments filed Feb. 20, 2007 in *Unlicensed Operation in the TV Broadcast Bands; Additional Spectrum for Unlicensed Devices Below 900 MHz and in the 3 GHz Band*, First Report and Order and Further Notice of Proposed Rulemaking, ET Docket Nos. 04-186, 02-380, 21 FCC Rcd 12266 (rel. Oct. 18, 2006); *see also* Petition for Reconsideration of the Wireless Internet Service Providers Association in ET Docket Nos. 04-186, 02-380 filed March 16, 2009.

<sup>4</sup> See, e.g., Notices of Ex Parte Presentations from Stephen E. Coran, Counsel to WISPA, to Marlene H. Dortch, FCC Secretary, ET Docket Nos. 04-186 and 02-380, dated August 1, 2008; Letter from Jack Unger, WISPA Secretary and FCC Committee Chair, to Marlene H. Dortch, FCC Secretary, ET Docket Nos. 04-186 and 02-380, dated October 22, 2008; Notices of Ex Parte Presentations and Letters from Stephen E. Coran, Counsel to WISPA, to Marlene H. Dortch, FCC Secretary, ET Docket Nos. 04-186 and 02-380, dated October 28, 2008.

<sup>5</sup> Publ. L. 111-5 (2009).

WISPA appreciates the opportunity to participate in this proceeding to address the significant concerns about preserving the confidentiality of information provided to the Commission under the BDIA.

## Discussion

### **I. Individual Form 477 Data Must Not Be Disclosed**

WISPA agrees with commenters such as AT&T, NTCA and the US Telecom Association<sup>6</sup> that the Commission should *not* provide “eligible entities” with company-specific Form 477 information. Rather, consistent with proposals submitted by commenters such as XO Communications and Verizon, and until such time as the Commission collects data on a more granular level,<sup>7</sup> the Commission should create a report for each census tract that aggregates information such as the number of broadband providers, speeds, etc. (*i.e.*, the information collected on Form 477). Eligible entities should be warned that using the information for anti-competitive purposes will subject those entities to unfair competition laws enforceable in civil courts.

The BDIA specifically states that eligible entities are entitled “to *aggregate* data collected by the Commission *based on* the Form 477 submissions of broadband services providers.”<sup>8</sup> Thus, as other commenters have stated, the BDIA itself clearly says that eligible entities are not entitled to data except in an aggregated form which preserves the confidentiality of the information submitted by individual Form 477 filers.<sup>9</sup>

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<sup>6</sup> Comments of AT&T, Inc at 4-5; Comments of National Telecommunications Cooperative Association at 6-7; Comment of the U.S. Telecom Association at 5-7.

<sup>7</sup> See Comments of XO Communications, LLC at 3; Comments of Verizon and Verizon Wireless at 5-7. Although Form 477 requirements have been improved to collect information at the census tract level, WISPA believes that the requirement should be made even more granular by collecting broadband data at the census block level, consistent with the funding areas that NTIA and RUS are using.

<sup>8</sup> 47 U.S.C. § 1304(h)(1) (emphases added).

<sup>9</sup> See Comments of Verizon and Verizon Wireless at 5-6; Comments of the United States Telecom Association at 2; Comments of AT&T at 4.

The *Public Notice* asks whether the above-quoted language from the BDIA “require[s] the Commission to provide to eligible entities data that is more aggregated than the raw data submitted by Form 477 filers.”<sup>10</sup> WISPA believes that the statutory requirement that the aggregate data must be “based on” the Form 477 data necessarily means that eligible entities are not entitled to data submitted by individual filers but are only entitled to aggregated data compiled from Form 477 filers. The Form 477 data are the “bases” from which aggregate data is “grossed up” for disclosure to eligible entities.

The Commission should clarify that any information submitted on an individual Form 477 constitutes information “submitted in connection with audits, investigations and examination of records pursuant to 47 U.S.C. 220” under Section 0.457(d)(iii) of the Commission’s Rules,<sup>11</sup> automatically exempt from disclosure, without the Form 477 filer having to file a request for confidentiality. This will give Form 477 filers greater comfort that their data submissions will be given confidential treatment and will save filers from enduring the time-consuming exercise of determining whether and to what extent the data would be exempt from disclosure under the Commission’s Freedom of Information Act rules. Likewise, the Commission would not have to process FOIA requests for the data under the provisions of Section 0.457(d)(iii). All told, the confidentiality of Form 477 will not be needlessly exposed to the time and trouble of defense from a FOIA request.

Moreover, WISPA disagrees with those commenters that seek overbroad disclosure of information provided in FCC Form 477.<sup>12</sup> These commenters appear to ignore that information

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<sup>10</sup> *Public Notice* at 2.

<sup>11</sup> 47 C.F.R. §0.457(d)(iii).

<sup>12</sup> For example, some commenters seek broad disclosure of Form 477 data for eligible entities and the public, seemingly in spite of the long-standing confidentiality rules in place for Form 477 and provided under the BDIA. See Comments of Public Knowledge, Media Access Project and the New America Foundation. at 2-4; Comments of the Benton Foundation at 3-4.

provided to date via Form 477 has been subject to confidentiality rules, and abrogating those rules *post hoc* will deter broadband providers from supplying competitively sensitive information that is critical in informing the FCC's policy objectives. Further, such approaches are inconsistent with the BDIA itself, which as noted above clearly states that providing the data in "aggregate" form preserves the confidentiality of individual filers. While these parties argue unconvincingly that an individual Form 477's data are already "aggregate" for BDIA purposes, such a ruling would by definition nullify the confidentiality concerns that BDIA so clearly – and wisely – addressed.

## **II. Additional Safeguards Are Needed**

Even if the Commission only provides aggregate data to eligible entities at the census tract level, and not at a more granular level, there will be instances where there are only one or a few broadband providers, and where, as a result, an eligible entity will be able to readily determine company-specific information regarding individual Form 477 filers. Therefore, Section 106(h)(2) of the BDIA is not "self-effectuating."

Like other commenters,<sup>13</sup> WISPA believes that the Bureau must establish additional safeguards to preclude misuse of the data by eligible entities. The Commission should declare that eligible entities are not permitted to use data received pursuant to the BDIA to enhance their own efforts to compete against Form 477 filers, and that any eligible entity that does so will be barred from having further access to BDIA data. To make this punishment real, the Commission should state that where evidence is presented by a Form 477 filer to the Commission, or where the Commission otherwise has reason to suspect a violation, the Commission will suspend the

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<sup>13</sup> While commenters recommend several methods of providing additional safeguards, they concur that the Commission should take new affirmative measures to protect confidential Form 477 data. *See, e.g.*, Comments of the United States Telecom Association at 7-8, Comments of AT&T at 5-8; Comments of Verizon and Verizon Wireless at 8-10.

involved eligible entity's right to access the BDIA data *pendente lite*, and the burden will be on the eligible entity to re-establish its right to receive such data.

### CONCLUSION

The Commission should prevent any access to the raw data contained in any individual Form 477 filing, and should ensure that data delivered to eligible entities are delivered only in an aggregated form which precludes the eligible entity from determining company-specific data of individual Form 477 filers. The Commission should also declare that all Form 477 data fall within the ambit of Section 0.457(d)(iii) of the Commission's Rules, and therefore is automatically deemed confidential and proprietary pursuant to Section 0.457.

Respectfully submitted,

### THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

August 4, 2009

By: */s/ Richard Harnish, President*  
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