

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Development of Nationwide Broadband Data) WC Docket No. 07-38
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)
)
A National Broadband Plan for Our Future) GN Docket No. 09-51
)
Providing Eligible Entities Access to) GN Docket No. 09-47
Aggregate Form 477 Data as Required by the)
Broadband Data Improvement Act)

To: The Commission

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – The Wireless Association® (“CTIA”) submits the following reply comments in response to the Public Notice¹ seeking input on how to implement the provisions of the Broadband Data Improvement Act (“BDIA”) mandating the release of “aggregate” FCC Form 477 data to the “eligible entities” designated under the BDIA within each state, and on the confidentiality provisions of that Section.² As discussed in more detail below, CTIA urges the Commission to interpret the term “aggregate” consistent with the well-established practice for

¹ *Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act; Pleading Cycle Established*, WC Docket No. 07-38; GN Docket Nos. 09-47, 09-51, Public Notice, DA 09-1550 (rel. July 17, 2009) (“Public Notice”).

² Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097, codified at 47 U.S.C. §§ 1301-1304. *See particularly* 47 U.S.C. § 1304(h).

the Form 477 and other confidential, competitively sensitive data the Commission collects – the data should be amalgamated in such a way that individual, provider-specific data are not revealed. CTIA further urges the Commission to adopt specific safeguards to protect the confidentiality of the aggregate Form 477 data released to the state eligible entities, consistent with the statute.

As the Public Notice rightly recognizes, the BDIA provides the Commission with specific direction regarding the release of Form 477 data to the eligible entity selected in each state to collect broadband data: The Commission may release *aggregate* data, to the designated *eligible entity*, and it must do so subject to strict *confidentiality* protections, unless otherwise agreed between the service provider submitting the data and the state eligible entity.³ Thus, the Commission cannot, consistent with the statute, (1) release raw, un-aggregated Form 477 data, (2) release Form 477 data without the confidentiality protections required under the statute, or (3) release confidential Form 477 data to anyone other than the eligible entity selected for each state pursuant to the BDIA.

³ 47 U.S.C. § 1304(h) provides as follows:

(h) Access to aggregate data.

(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.

(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.

I. THE TERM “AGGREGATE” IN THE BDIA REFERS TO WELL-ESTABLISHED PRECEDENT OF PROTECTING PROVIDER-SPECIFIC, COMPETITIVELY SENSITIVE INFORMATION SUBMITTED ON FCC FORM 477.

As many commenters note, the term “aggregate” as used in the BDIA refers to the well-established Commission practice of collecting and amassing confidential data so that no provider-specific information can be discerned.⁴ In adopting the Form 477 reporting requirements, the Commission noted broadband providers’ concerns about the confidentiality of the data requested and adopted measures to address those concerns.⁵ Specifically, the Commission decided “not to publish individual provider submissions from the Part I Broadband section” of the Form 477, and instead to “aggregate this information in a way that does not identify the individual provider data in our reports.”⁶

The Commission’s approach to aggregating confidential data in Form 477 reports is consistent with its approach to aggregating data in other contexts, such as the Form 502 Numbering Resource Utilization and Forecast data,⁷ the broadband data collected pursuant to the Commission’s obligations under Section 706 of the Act,⁸ and other regulatory provisions.⁹ In all

⁴ See, e.g., AT&T comments at 3; ITTA/OPASTCO comments at 7; NCTA comments at 2; Texas Statewide comments at 3; tw telecom comments at 3; USTelecom comments at 2-3; XO comments at 3. Unless otherwise noted, references in this reply to parties’ “comments” refer to initial comments in this proceeding filed on or about July 30, 2009.

⁵ *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd 7717, 7760-62 ¶¶ 91-96 (2000) (“2000 Order”); *Local Telephone Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, 19 FCC Rcd 22340, 22352 ¶ 24 & n.56 (2004) (“2004 Order”).

⁶ *2000 Order*, 15 FCC Rcd at 7760 ¶ 91; *2004 Order*, 19 FCC Rcd at 22352 n.56.

⁷ See *Numbering Resource Optimization*, CC Docket No. 99-200, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574, 7604 ¶ 78 (2000) (“disaggregated, carrier-specific [numbering] forecast and utilization data should be treated as confidential”).

⁸ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*
(continued on next page)

these contexts, data are combined so that no company-specific information can be discerned. This Commission precedent for “aggregating” confidential data, including Form 477 data, was well established when the BDIA was enacted last year and the legislation must be understood in this context.¹⁰ There is no indication that the BDIA’s confidentiality provision refers to any different kind of aggregation than the kind of aggregation that the Commission has long utilized to protect confidential Form 477 data.

Thus, the Commission should interpret “aggregate” in Section 1304(h) as prohibiting the release of any identifiable, provider-specific information. Information that is broken down geographically or by speed tier therefore must be presented at a level of aggregation that does not reveal provider-specific details.¹¹

Some commenters argue that the Form 477 data, because it is reported at the Census Tract level, is already “aggregated” and thus should be reported to eligible entities in raw form.¹² This is not, however, what the statute permits. Had Congress intended for the Commission to release individual Form 477 data submissions to eligible entities, it easily could have said so.

Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, GN Docket No. 07-45, Fifth Report, 23 FCC Rcd 9615 (2008) at Tables 5, 6, 9, 10-14, *passim* (redacting data to protect firm confidentiality).

⁹ See, e.g., NCTA comments at 2-3 & n.5 (citing CPNI rules and cable price survey data).

¹⁰ See *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of “settled judicial and administrative interpretation[s]” of terms when it enacts a statute); *The Commercial Mobile Alert System*, PS Docket No. 07-287, Third Report and Order, 23 FCC Rcd 12561, ¶ 45 (2008) (in interpreting statutory term, Commission “note[s] that Congress is well aware of” agency’s existing regulations).

¹¹ See, e.g., *supra* note 8 (citing data elements in the Section 706 Report that are listed as “N/A” in order to protect provider confidentiality).

¹² See, e.g., Benton Foundation comments at 4; California PUC comments at 4-6; DC PSC/NJ BPU comments at 6; NARUC comments at 6; Public Knowledge *et al.* comments at 3-4.

Instead, however, Congress specified that the Commission was to release “*aggregate* data collected by the Commission *based on* the Form 477 submissions of broadband service providers.”¹³ It therefore would be inconsistent with the statute to release the raw Form 477 data to eligible entities. Similarly, as discussed below,¹⁴ the existence of the confidentiality provisions in the statute in no way eliminates the need for aggregation of the data, as argued by some commenters.¹⁵ Congress clearly required *both* aggregation *and* confidential treatment, and it would violate elementary principles of statutory construction to read either provision out of the statute.¹⁶

In sum, the Commission should interpret the term “aggregate” in Section 1304(h)(1) to require the combining of data such that no identifiable, provider-specific information can be discerned.

II. THE BDIA MANDATES CONFIDENTIAL TREATMENT FOR AGGREGATE DATA

Section 1304(h)(2) imposes an independent statutory obligation of confidentiality on eligible entities, which extends to all data that state eligible entities collect (not just Form 477 data received from the Commission).¹⁷ Accordingly, the Commission should codify this

¹³ 47 U.S.C. § 1304(h)(1).

¹⁴ *See infra* Section II.

¹⁵ *See, e.g.*, California PUC comments at 6; NARUC comments at 6.

¹⁶ *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.”); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

¹⁷ The confidentiality provisions of Section 1304(h)(2) apply to “information submitted by the Commission *or a broadband provider* to carry out the provisions of this title,” and require that state eligible entities protect from public disclosure “*any matter* that is a trade secret, commercial or financial information, or privileged or confidential.” 47 U.S.C. § 1304(h)(2) (emphasis added).

requirement in its rules as it pertains to Form 477 data that the Commission provides to eligible entities. The record reflects broad support for requiring eligible entities to sign suitable non-disclosure or confidentiality agreements.¹⁸ Such documents should require eligible entities to certify to their compliance with the statutory requirement, to implement reasonable internal data protection practices (such as employee training and security of storage), and to notify the Commission in the event of any breach of confidentiality. Further, the Commission's rules should establish procedural safeguards to govern Commission personnel's handling of the transmission of Form 477 data to eligible entities to protect against inadvertent disclosure in transit.

The Commission has recognized that:

[F]ilers customarily guard [Form 477 broadband] data from their competitors, and release would harm [filers'] competitive interests by revealing to competitors their market strategies, their customer identities and counts, and where they have deployed their services. For example, competitors could use this data to decide where to target their service offerings, facilities construction, and marketing, all to the detriment of Form 477 filers."¹⁹

¹⁸ See, e.g., AT&T comments at 7; ITTA/OPASTCO comments at 9; Nebraska PSC comments at 4; NCTA comments at 3; NTCA comments at 7; tw telecom comments at 9; XO comments at 4.

¹⁹ Letter from Kirk S. Burgee, FCC, to Drew Clark, Center for Public Integrity, FOIA Control No. 2006-493 (Sept. 26, 2006) (available at <http://projects.publicintegrity.org/docs/telecom/telecomfoia/Response.pdf>) ("*Burgee Letter*"), *aff'd sub nom. Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007).

In addition, CTIA notes that antitrust agencies also restrict disclosure to protect consumers to ensure that the exchange of competitors' data is not used in aid of collusion. Accordingly, the DOJ has established the following guidelines for data collection and publication: The information should be historical only (*i.e.*, at least three months old), not current or projected data. There must be a least five providers reporting data on which each disseminated statistic is based, no individual provider's data can represent more than 25 percent on a weighted basis of that statistic, and any report based on the information should be sufficiently aggregated so that it would be impossible to attribute the information to specific members. See Statements of Antitrust Enforcement Policy in Health Care (August 1996), (continued on next page)

For this reason, the Commission has denied requests under the Freedom of Information Act (“FOIA”) for company-specific Form 477 data.²⁰ Commenters in this proceeding reiterate these concerns.²¹ The BDIA, moreover, recognizes that even aggregate data can be competitively sensitive and is entitled to confidentiality protection,²² and commenters observe that “even aggregate data, while it does not offer ‘individually identifiable information,’ may ‘nevertheless [be] valuable to competitors.’”²³

Thus, for the foregoing reasons, even aggregate Form 477 data may be competitively sensitive, and the Commission’s rules should ensure the data is not disclosed in the context of their release to eligible entities under the BDIA.

available at <http://www.usdoj.gov/atr/public/guidelines/0000.htm>. It would be strange, to say the least, that Congress and the FCC would seek to require carriers to share competitively significant data through the collection and release of Form 477 Data that the antitrust laws otherwise restricts.

²⁰ *Id.* The Commission established a procedure for state *regulatory* commission access to company-specific Form 477 data, subject to confidentiality protections. 47 C.F.R. § 43.11(c). There is, however, no requirement that the eligible entities selected under the BDIA will be state agencies in every (or any) case.

²¹ *See, e.g.*, ITTA/OPASTCO comments at 4; Verizon/Verizon Wireless comments at 3; XO comments at 2.

²² 47 U.S.C. § 1304(h)(2).

²³ *See, e.g.*, NCTA comments at 3, *quoting Implementation of the Telecommunications Act of 1996; Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, 17 FCC Rcd 14860 ¶ 9 (2002).

III. CONCLUSION

The Commission should interpret “aggregate” to preclude the release of any identifiable, carrier-specific data from FCC Form 477 submissions. Furthermore, even aggregate data is competitively sensitive and must be protected by reasonable confidentiality provisions as discussed herein.

Respectfully submitted,

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