

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

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| In the Matter of |) | |
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| Free Press Form 477 Data Access Request |) | WC Docket No. 10-75 |
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COMMENTS OF AT&T INC.

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INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliated companies respectfully submit the following comments on the Letter from Free Press seeking access to the FCC's Form 477 broadband data.¹ Free Press alleges that the most recent broadband data report from the Commission (reporting on data as of December 31, 2008) contains certain anomalies that call into question the accuracy of some data points in the report. Free Press also asserts that certain data in the report could be presented in new formats that would improve the public's understanding of broadband deployment and adoption. According to Free Press, the Commission should give it all of the underlying, provider-specific data collected via Form 477 so that Free Press can investigate the anomalies, revise the presentation format and produce its own analysis of the data for "broad disclosure" to the public.

The Commission should deny Free Press's request or, at a minimum, defer any action on it for the following three reasons. *First*, Free Press's request is premature in light of the Commission's recently announced "Broadband Data NPRM" proceeding (scheduled for fourth quarter 2010), in which it will examine potential modifications to its Form 477 data collection program, including whether and how Form 477 data could be made available to "the public, academic researchers, and others" for further analysis. *Second*, the data requested by Free Press is highly confidential, as the Commission itself explained at length in successfully protecting prior, less detailed and less granular Form 477 data from disclosure during recent Freedom of Information Act (FOIA) litigation. Free Press's proposed protective order would not ameliorate these concerns because the "broad disclosure" envisioned by Free Press (and presumably anyone else who seeks the data) would severely jeopardize the confidentiality of the data. *Third*, to the

¹ Letter from Ben Scott, Free Press, to Marlene Dortch, FCC, GN Docket No. 09-137 (Feb. 22) (Free Press Letter).

extent that any of Free Press's suggestions have merit, the Commission is fully capable of evaluating and implementing them, without outsourcing the matter to Free Press. Thus, there is simply no compelling need to grant Free Press's request, particularly given the Commission's upcoming Broadband Data NPRM.

DISCUSSION

I. Free Press's Request is Premature and Should Be Denied, or at a Minimum Held in Abeyance Pending Completion of the Commission's Forthcoming Broadband Data NPRM

The Commission recently announced that it would be launching a notice of proposed rulemaking in the fourth quarter of 2010 to examine, among other things, whether and how Form 477 data could be made available to the "public, academic researchers, and others to enable more detailed market and competition analyses."² Notwithstanding its general desire to disseminate such data, the Commission recognized that any such disclosures would need to contain "appropriate restrictions to protect the confidentiality of competitively sensitive materials."³

Rather than addressing Free Press's request for access to the Form 477 data – and all of the significant confidentiality issues it raises⁴ – now in an *ad hoc* fashion, the Commission should deny Free Press's request or, at a minimum, hold it in abeyance pending completion of its Form 477 rulemaking proceeding. Doing so will enable the Commission to resolve Free Press's request with the benefit of a more comprehensive record that will be developed in response to forthcoming Broadband Data NPRM, which will promote consistent, well-informed policy analysis and decisionmaking by the Commission. It will also allow the Commission to make

² FCC Broadband Action Agenda, FCC Broadband.gov Website, Item 48 "Broadband Data NPRM," available at <http://www.broadband.gov/plan/broadband-action-agenda.html>. See also *Connecting America: The National Broadband Plan*, FCC, Recommendation 4.2 (2010) (*National Broadband Plan*).

³ *National Broadband Plan*, Recommendation 4.2.

⁴ See *infra* section III for a discussion of confidentiality issues.

efficient use of vital staff resources, which will be in heavy demand over the next year as the Commission seeks to produce more than sixty separate rulemakings, inquiries, workshops and other initiatives related to implementing the *National Broadband Plan*.⁵

II. The Form 477 Broadband Data Is Confidential

Ever since the Kennard Commission initiated the Form 477 broadband data collection program a decade ago, the Commission has kept provider-specific broadband data confidential and has refused to disseminate the data in a manner that would disclose individual company information.⁶ When the Commission's practice of safeguarding this data was challenged in court in 2007 under FOIA, the Commission vigorously defended the data from disclosure and won.⁷ As the Commission explained, "disclosure would, *inter alia*, (1) allow competitors to determine particular areas where a service provider has or has not been successful in acquiring customers; (2) disadvantage new entrants in particular geographic areas by enabling existing providers to target 'win back' efforts; (3) disadvantage new entrants by drawing the interest of additional new competitors to a particular geographic area; (4) reveal data regarding the technologies that a service provider uses; (5) enable competitors to identify and target a service provider's largest or most lucrative customers; and (6) provide competitors with information about market trends that would not be otherwise available through legitimate means."⁸

⁵ See *supra* note 2.

⁶ *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, FCC 00-114, ¶ 89 (2000) ("[W]e will honor all parties' requests for confidential treatment of information that they identify as competitively sensitive until persons requesting confidential treatment are afforded all of the procedural protections provided by our confidentiality rules. . . . [W]e 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.")

⁷ *Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007).

⁸ *Center for Public Integrity v. FCC*, Civil Action, No. 06-1644, FCC Reply, at 2 (D.D.C. filed May 15, 2007). The Form 477 data at issue here is even more detailed and granular – and thus more competitively sensitive – than the prior Form 477 data that was the subject of the FOIA litigation. See *High-Speed*

Indeed, a competitor “[a]rmed with [Form 477 data] . . . could . . . alter its facilities deployment plans and thereby defeat any advantage [another provider] hopes to gain by deploying particular technology in a given market.”⁹ Further, “a competitor could devise marketing strategies that seek to highlight perceived advantages it may claim to have over a particular technology [another provider] may be deploying in a particular market” and “a competitor could learn, on an aggregated basis, which technologies have found the most success in the market – information that [other providers] ha[ve] gained only through participating in the market and that is extremely valuable in making deployment and investment plans on a prospective basis.”¹⁰

Free Press acknowledges that the sensitive nature of the Form 477 data raises “confidentiality concerns,”¹¹ but contends that any such concerns could be alleviated if the Commission would simply issue a protective order governing Free Press’s access to and use of

Services for Internet Access: Status as of December 31, 2008, FCC Wireline Competition Bureau, at 2-3 (Feb. 2010) (describing changes to Form 477 data collection).

⁹ *Center for Public Integrity v. FCC*, Civil Action, No. 06-1644, Joint Declaration of Mark Keiffer, Robert W. Quinn Jr., and Rick Welday, Jr. on behalf of AT&T *et al.*, at 4 (D.D.C. filed Jan. 8, 2007).

¹⁰ *Id.* at 4. *See also Center for Public Integrity v. FCC*, Civil Action, No. 06-1644, Joint Declaration of John A. Wimsatt, Larry J. Zeppetela And Thomas Y. Ikegami on behalf of Verizon, at 4-5, (D.D.C. filed Jan. 8, 2007) (information regarding the “pace and pattern of Verizon’s roll-out of this new [fiber] network” would enable competitors “to anticipate Verizon’s moves and protect themselves against competition from Verizon in a targeted way, without engaging in the same business-wide price reductions and service improvements that they would have to make if they were competing without inside information” and “that, in turn, would cause Verizon substantial competitive harm in this vitally important area”); *Center for Public Integrity v. FCC*, Civil Action, No. 06-1644, Declaration of Kevin J. Albaugh on behalf of NPTC, at 2, (D.D.C. filed Jan. 8, 2007) (“[b]y utilizing the broadband data provided on Form 477, . . . competitors could identify areas where demand is highest, or where current service offerings would make NPTC most vulnerable to the introduction of new technology or aggressive marketing by a competitor” and such information could be “use[d] . . . to tailor their competitive strategies – including marketing and infrastructure investment – to compete unfairly against NPTC.”).

¹¹ Free Press Letter at 14. Although Free Press appears to acknowledge (at 11) that its request would be subject to FOIA requirements, it does not appear that Free Press has followed the Commission’s FOIA rules for requesting access to confidential data. *See* 47 C.F.R. § 0.461 (describing format and content of requests for access to confidential data under FOIA).

the Form 477 data, “which will safeguard any potentially sensitive information.”¹² But Free Press does not merely want access to the Form 477 data so it can submit a confidential filing of its analysis to the Commission, as is often the case when parties obtain data in connection with protective orders. Instead, it intends to conduct a series of statistical and econometric analyses which it plans to publish widely through “broad disclosure” of its work product.¹³ This should not raise any red flags, asserts Free Press, because it “proposes to release only aggregated data and analysis.”¹⁴

While we trust that Free Press is sincere in its desire to publish only aggregated data and analysis, even sincere parties can make mistakes – particularly those lacking the Commission staff’s decade of practical experience handling Form 477 data. Indeed, over the last ten years, Commission staff have spent considerable time and effort evaluating whether and how pieces of individual, company-specific data can (or cannot) be appropriately aggregated to prevent the disclosure of confidential information.¹⁵

Moreover, Free Press is not a neutral, disinterested observer of Commission proceedings, but rather a vocal advocate of pro-regulation policies. Thus, numerous other parties will naturally want to access and analyze the same data Free Press obtains so that they can “broadly disclose” their own studies responding to Free Press’s analysis. Indeed, Free Press fully expects

¹² Free Press Letter at 14.

¹³ Free Press Letter at 11.

¹⁴ Free Press Letter at 11. Free Press claims, without support, that it would be subject to “Commission sanctions” if it violated such a Protective Order. See Free Press Letter at 14, Exhibit A ¶ 11. However, Free Press does not claim to be a provider of communications services (or the representative of such a provider), nor does it identify what jurisdictional authority the Commission would have over it to enforce the Protective Order. See 47 U.S.C. § 151 (granting Commission jurisdiction over communications by wire or radio). Thus, the Commission should not grant Free Press’s request without first resolving this threshold question of its ability to enforce any such Protective Order.

¹⁵ See, e.g., *High-Speed Services for Internet Access: Status as of December 31, 2008*, FCC, Wireline Competition Bureau, *passim* (Feb. 2010) (replacing certain data points with an asterisk and explaining that the data was “withheld to maintain firm confidentiality”).

the data to be disseminated to a “community vastly larger than FCC staff.”¹⁶ Thus, contrary to the Commission’s commitment to protect confidential broadband data from disclosure, the end result of Free Press’s proposal would be the wide distribution of confidential Form 477 data to, and broad publication of analysis by, a host of third parties – leaving Form 477 filers to simply hope that none of these many data recipients makes a mistake. If ever there were a recipe for the improper disclosure of confidential information, this is it.¹⁷

III. To the Extent the Commission’s Broadband Data Contains Anomalies and/or Needs to Be Further Analyzed, Commission Staff (Rather than Free Press) Should Perform Those Functions

According to Free Press, the Commission’s most recent Form 477 broadband data contains certain anomalies that need to be investigated, such as unusually large numbers of providers in a handful of Census Tracts that have few households.¹⁸ Free Press also suggests that the Form 477 data could be categorized and presented in new ways that would enhance the public’s understanding of the state of broadband deployment.¹⁹ And, in Free Press’s view, it is particularly qualified to be entrusted with performing these tasks.

¹⁶ Free Press Letter at 4.

¹⁷ Free Press claims (at 15-16) that the Commission would run afoul of the Data Quality Act (DQA) if it does not disseminate the Form 477 broadband data in the manner Free Press suggests. Free Press conveniently neglects to mention, however, that the Office of Management and Budget guidelines implementing the DQA state that the DQA’s goal of improving data objectivity “does not override other compelling interests such as privacy, trade secret, and other confidentiality protections.” *See* OMB Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452, 8460 (2002). Similarly, the Commission’s own agency-specific guidelines implementing the DQA specifically exempt “trade secrets, intellectual property, confidential data or information” and a variety of other data from the scope of the guidelines. *See Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Pursuant to Section 515 of Public Law No. 105-554, Information Quality Guidelines*, FCC 02-277, Appendix A, Section III.2. (2002). Thus, Free Press’s invocation of the DQA is a red herring.

¹⁸ Free Press Letter at 5-6.

¹⁹ Free Press Letter at 4-5, 8-9.

Considering that the December 2008 Form 477 data at issue here is the first data set to include the vastly expanded data reporting requirements adopted by the Commission in 2008, it would hardly be surprising if there were some anomalies in some of the data or if there were new, more informative ways to present that data in the Commission's semi-annual broadband data reports. To the extent Free Press has raised any legitimate issues about the data, the Commission's highly skilled staff is fully capable of analyzing those issues and making any appropriate modifications to its Form 477 data report – without compromising the confidentiality of that data by handing it over to Free Press and anyone else who makes a similar request. Indeed, given that the *existing* presentation of Form 477 broadband data in its current format enabled Free Press to identify specific concerns with that data, the Commission should have little trouble zeroing in on those areas of concern and evaluating whether any of them have merit. To the extent that they have any merit (and it is far from certain that they do),²⁰ the Commission itself can address them without any need to outsource that task to Free Press.

²⁰ See, e.g., Free Press Letter at 8 (proposing to calculate Herfindahl-Hirschman Index (HHI) values on a Census Tract basis, but failing to explain why a Census Tract would be an appropriate geographic market for an HHI analysis).

CONCLUSION

For the reasons set forth above, the Commission should deny Free Press's request for access to the Commission's Form 477 broadband data or, at a minimum, hold the request in abeyance until the Commission completes its forthcoming rulemaking proceedings on modifying the Form 477 data collection process.

Respectfully submitted,

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