

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

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<b>In the Matter of Free Press Form 477 Data</b>	)	<b>WC Docket No. 10-75</b>
<b>Access Request</b>	)	
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**COMMENTS OF VERIZON<sup>1</sup> AND VERIZON WIRELESS ON FRESS PRESS’  
REQUEST TO REVIEW FORM 477 DATA AND REQUEST FOR PROTECTIVE  
ORDER**

Free Press’ Request for providers’ Form 477 broadband subscribership information is nothing more than an attempt to circumvent the Freedom of Information Act (FOIA) laws and the Commission’s confidentiality rules.<sup>2</sup> Rather than seeking the release of providers’ sensitive Form 477 information, in contravention of consistent Commission and court decisions that this information should be protected from disclosure, Free Press should raise its concerns about the way the Commission analyzes Form 477 data by submitting recommendations on how the Commission should conduct future analyses of that information.

As explained below, the Commission and the courts have long recognized that providers’ Form 477 information is highly confidential, sensitive information that should be protected. Accordingly, the Commission has routinely denied FOIA requests for this information. In addition, since the inception of its Form 477 reporting requirements, the Commission has assured

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<sup>1</sup> In addition to Verizon Wireless, the Verizon companies participating in this filing (“Verizon”) are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

<sup>2</sup> See Letter from Ben Scott et al., Free Press, to Marlene H. Dortch, FCC, GN Docket Nos. 09-137, 09-51, 09-191; WC Docket Nos. 07-52, 07-38, at 8-9 (Feb. 22, 2010) (“Free Press’ Request”).

providers that this information would be protected under the Commission's confidentiality rules and would only be published on an aggregated basis.

Fully aware of prior Commission and court decisions concluding that providers' Form 477 information should be protected from disclosure, Free Press attempts to circumvent the FOIA laws and the Commission's confidentiality rules by asking the Commission to release this data under a protective order and in reliance on Free Press' promises to aggregate that information in its public analyses of that information. Putting aside the inappropriateness of Free Press' attempt to interject itself into the Commission's role of analyzing providers' Form 477 data, a protective order and Free Press' promises to aggregate that information would not provide adequate protection in this context.

While the Commission often uses protective orders to provide access to confidential data in rulemaking proceedings, this situation is distinct from a rulemaking proceeding in several respects. Unlike a rulemaking proceeding, the information at issue was not submitted for a particular proceeding. In addition, Free Press intends to use this information in public analyses, which could then be used in any proceeding, including by parties that did not sign the proposed protective order. Free Press' promises to aggregate the individual provider information underlying its proposed analyses do not overcome these issues. Indeed, Free Press does not have experience with protecting, let alone aggregating, providers' sensitive Form 477 information, and in fact has repeatedly argued that this information is not entitled to protection. Given these facts, there is a significant risk that providers' sensitive information would be revealed publicly if the Commission grants Free Press' Request, which could result in the very competitive harms the Commission seeks to avoid by safeguarding this data against disclosure.

Releasing providers' sensitive Form 477 information under these circumstances could also undermine the Commission's future broadband data collection efforts. As the Commission has previously acknowledged, protecting individual providers' Form 477 information encourages compliance with the Commission's Form 477 requirements and provides assurance that the information the Commission receives is reliable. Reversing course here and releasing providers' sensitive information to Free Press would have the opposite effect. Accordingly, the Commission should deny Free Press' Request.

**I. The Commission Should Not Depart From Consistent Court and Commission Decisions That Providers' Form 477 Information Should Be Protected From Disclosure.**

There is no legitimate dispute that providers' Form 477 broadband subscribership information is highly confidential and competitively sensitive and should be protected from disclosure. In the context of FOIA requests for providers' Form 477 information, the Commission and the courts have consistently concluded that this information is highly confidential and competitively sensitive, and is therefore exempt from public disclosure under FOIA Exemption 4.<sup>3</sup> This is because this information provides a detailed picture of each provider's business, including information about where a particular provider's subscribers are located.

As the Commission has previously explained, competitors could use the information providers submit on Form 477 to "tailor market strategies to quash nascent competition, protect

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<sup>3</sup> See, e.g., *Center for Public Integrity v. Federal Communications Commission*, 505 F. Supp. 2d 106, 112 (D. D.C. 2007)(upholding Commission's decision to protect providers' Form 477 data from public disclosure on the grounds that this data is competitively sensitive); Letter to Drew Clark, Senior Fellow and Project Manager, The Center for Public Integrity, from Kirk S. Burgee, Associate Bureau Chief, Wireline Competition Bureau, re FOIA Control No. 2006-493 (September 26, 2006)("2006 FOIA Letter"). See also, FOIA Exemption 4, 5 U.S.C. § 552(b)(4)(protecting from public disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.")

areas that are being subjected to increased competition, or deploy facilities to defend strongholds.”<sup>4</sup> The Commission has further explained that reporting providers “customarily guard this data from their competitors and release would harm their competitive interests by revealing to competitors their market strategies, their customer identities and counts and where they have deployed services” and “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.”<sup>5</sup> The same arguments apply to Form 477 information that is several months old, as is the case here, because competitors could still use that information to track patterns over time and gauge where particular providers have or have not succeeded. Accordingly, the Commission has concluded that even “historical” Form 477 data should be protected under the Commission’s confidentiality rules and would be published only on an aggregated basis.<sup>6</sup>

In addition to denying FOIA requests for this information, the Commission has given providers repeated assurances that their Form 477 data would be protected. Specifically, the Commission has stated that it would not “publish in our publicly-available reports individual provider-filed data for the broadband (Part I) portion of the form.”<sup>7</sup> The Commission has also expressly extended to Form 477 filers the “procedural protections provided by our confidentiality rules,” allowing reporting providers to request confidential treatment of the data submitted on Form 477 and giving them an opportunity to object before any such data is provided to a third

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<sup>4</sup> *Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717, ¶ 88 (2000) (“*2000 Data Gathering Order*”).

<sup>5</sup> 2006 FOIA Letter at 3.

<sup>6</sup> *Local Competition and Broadband Reporting*, Report and Order, 19 FCC Rcd 22340 ¶ 24 (2004) (“*2004 Data Gathering Order*”) (deciding to maintain the Commission’s “current policies and procedures regarding the confidential treatment of submitted Form 477 data,” including using only aggregated data in Commission reports and expressly declining to “adopt a different approach with regard to historical data.”)

<sup>7</sup> *2000 Data Gathering Order*, ¶ 91.

party.<sup>8</sup> The Commission has consistently maintained these protections even as it continues to revise its Form 477 reporting requirements, and the courts have upheld the Commission's decisions to protect providers' data pursuant to these procedures.<sup>9</sup>

Nothing has changed that would warrant a departure from prior Commission and court decisions that this information should be protected from disclosure. If anything, the arguments in support of protecting providers' Form 477 data are even more compelling today in light of recent changes to Form 477 that increased both the scope and granularity of the information providers are required to provide.

Free Press' basis for reversing the Commission's settled treatment of Form 477 data is in any event singularly unpersuasive. Most of Free Press' Request consists of criticisms as to how the Commission has analyzed Form 477 data. Free Press asserts that the Commission's most recent High-Speed Internet Access Report made "questionable" analytical choices, contained "analytical gaps," conducted a study of fixed-line household penetration that "has little value," and completed other "incorrect" analyses.<sup>10</sup> Regardless of whether Free Press' criticisms are valid, they have nothing to do with Free Press' request for access to the underlying data, nor does Free Press' opinion of the Commission's analysis change the proprietary and sensitive nature of Form 477 data. Given Free Press' views that the Commission's analyses are deficient, Free Press should instead discuss its proposed revisions to those analyses with the Commission rather than seizing on those claimed deficiencies to gain access to confidential data. Put another way, nothing in Free Press' critique of the Commission's High-Speed Internet Access Report supplies

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<sup>8</sup> *Id.* ¶ 87. See also 47 C.F.R. §§ 0.457(d)(1)(iii), 0.459.

<sup>9</sup> See, e.g., *2004 Data Gathering Order*, ("We will retain our current policies and procedures regarding the confidential treatment of submitted Form 477 data, including the exclusive use of aggregated data in our published reports."); *Center for Public Integrity*, 505 F. Supp. 2d 112 (D. D.C. 2007).

<sup>10</sup> Free Press' Request at 3-6.

any grounds to reverse the Commission's settled policy to treat Form 477 data as confidential and exempt from disclosure under the FOIA laws.

**II. A Protective Order and Free Press' Promises to Aggregate Providers' Sensitive Information Would Not Provide Adequate Protection.**

Although the Commission often uses protective orders in rulemaking proceedings and itself aggregates providers' sensitive Form 477 data underlying its public reports, these measures would not provide adequate protection in this context. This situation is wholly distinct from a rulemaking proceeding in several respects. In rulemaking proceedings, participants submitting confidential data do so for the limited purpose of a specific proceeding. Here, however, providers' sensitive Form 477 information was not submitted for a particular proceeding, and if released, any analysis of that information could be used in any number of proceedings. Thus, if the Commission granted Free Press' Request, and it should not, reporting providers would have little control over where and how their sensitive information was used. In addition, Free Press intends to release its analyses of providers' sensitive Form 477 data to the public and simply asks providers and the Commission to trust it to shield competitively sensitive information underlying its proposed analyses, notwithstanding years of advocacy by Free Press denying that any of the requested data is competitively sensitive or entitled to protection.<sup>11</sup> In light of these facts, there is a significant risk, which is not present in typical rulemaking proceedings, that providers' sensitive information could be revealed to parties that are not bound by any protective order. Those parties could then use that information to inflict competitive harm on reporting providers and reporting providers would have no recourse against those parties.

Free Press' promises to aggregate the requested information in its analyses provide little comfort that each provider's confidential data will be safeguarded appropriately. As Verizon and

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<sup>11</sup> See Free Press' Request at 10-11.

Verizon Wireless explained in their comments in the Broadband Data Improvement Act proceeding, aggregating Form 477 information in a manner that makes it impossible to identify an individual provider's information is complex and requires a number of steps.<sup>12</sup> If this information is not aggregated in a way that effectively shields individual provider's data, those providers would likely suffer competitive harm. And it would be impossible to allow reporting providers to preview Free Press' analyses to ensure that their sensitive information was not inadvertently revealed without seeing potentially sensitive data from other parties.

### **III. Releasing the Requested Data to Free Press Could Undermine the Commission's Future Broadband Data Collection Efforts.**

In addition to the significant risk of competitive harm, granting Free Press' Request could impair the Commission's future broadband data collection efforts, which the Commission views as critical to carrying out its mandate under Section 706 to "determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion."<sup>13</sup> Where, as is the case here, parties are compelled to provide information to the government on an ongoing basis, the government has a strong interest in ensuring the reliability of the reported data. This interest is particularly strong for Form 477 broadband data because the Commission has taken the position that, to fulfill its mandate under Section 706, it needs reliable information about the state of the broadband market. Thus, the Commission has stressed that the information reported on Form 477 "will materially improve our ability to develop, evaluate, and

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<sup>12</sup> See Comments of Verizon and Verizon Wireless, *Providing Eligible Entities Access to Aggregate Form 477 Data As Required By the Broadband Data Improvement Act*, WC Docket No. 07-38, GN Docket No. 09-47, GN Docket Nos. 09-51, at 6-7 (July 30, 2009).

<sup>13</sup> 47 U.S.C. § 157 note. See also *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, Report Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, ¶ 1 (2008).

revise policy,” and “will make more effective our actions to implement the pro-competitive, deregulatory provisions of the Telecommunications Act of 1996.”<sup>14</sup>

To further the Commission’s interest in obtaining reliable broadband data in the future, the Commission should maintain the confidentiality of that data and deny Free Press’ Request. As the Commission explained in deciding to release industry reports of Form 477 data only on an aggregate, rather than a company-specific, basis:

While this is a mandatory collection, we wish to collect as much, and as accurate, information as possible about the status of broadband deployment in a short period of time . . . . Given the unique nature of this information collection, we believe that [publishing aggregate data, rather than company-specific analysis] will improve compliance, thus enhancing our understanding of the broadband market, without any material diminution in value of the information collection.<sup>15</sup>

The same rationale also applies in this context where Free Press intends to release publicly its analyses of providers’ sensitive information. As explained above, Free Press’ promises to aggregate this data provide little comfort that each provider’s sensitive information will be safeguarded.

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<sup>14</sup> 2000 Data Gathering Order ¶ 1.

<sup>15</sup> *Id.* ¶ 91.

**CONCLUSION**

For the foregoing reasons, the Commission should deny Free Press' Request.

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