

**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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**REPLY COMMENTS OF VERIZON AND VERIZON WIRELESS¹ ON FRESS
PRESS’ REQUEST TO REVIEW FORM 477 DATA AND REQUEST FOR
PROTECTIVE ORDER**

The comments filed in this proceeding overwhelmingly oppose Free Press’ Request for access to individual providers’ Form 477 Data.² As the comments filed by numerous broadband providers and industry trade associations explain, denying Free Press’ Request is the right answer in light of the longstanding Commission and court precedent concluding that reporting providers’ Form 477 data should be protected because it is confidential and commercially sensitive.³ Moreover, safeguarding this data is critical to ensuring that the Commission receives reliable broadband data.⁴ The Commission’s recent order implementing the Broadband Data

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

² 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, & 10-75 (Feb. 22, 2010) (“Free Press’ Request”).

³ See Comments of Verizon at 3-7 (Apr. 19, 2010), Comments of CTIA—the Wireless Association at 2-3 (Apr. 19, 2010); Comments of The National Cable & Telecommunications Association at 4-6 (Apr. 19, 2010); Comments of AT&T at 3-4 (Apr. 19, 2010); Opposition of COMPTTEL at 1-2 (Apr. 19, 2010); Joint Comments of the American Cable Association (ACA) et al. at 5-6 (Apr. 19, 2010).

⁴ See Comments of Verizon at 8 [citing *Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717, ¶ 91 (2000) (“2000 Data Gathering Order”)].

Improvement Act of 2008 (BDIA) confirms that there is no basis for departing from the Commission's prior conclusions that Form 477 data should be protected and also confirms that Form 477 data should not be released broadly because of the strong potential for competitive harm.

The comments of New America Foundation, the sole set of comments supporting Free Press' Request, do not offer any legitimate basis for departing from the longstanding Commission and court precedent concluding that Form 477 data should be protected.⁵ Instead, New America Foundation's comments make clear that Free Press' Request is, at bottom, an effort to release providers' Form 477 data to the public without any real protections.⁶ Like Free Press' proposal, New America Foundation claims that the Commission should make Form 477 data available on a broader basis than is permitted under the BDIA and the Commission's rules. Specifically, New America Foundation argues that Form 477 data should be made available to "qualified parties with a demonstrated stake in the decision outcome" at "highly controlled" data centers.⁷ Although New America Foundation claims that the Commission could impose "limitations in terms of how the data are used" and researchers would only be "able to leave with the aggregate statistical analyses," these measures would not eliminate the potential for competitive harm.⁸ Thus, as is the case with Free Press' Request, releasing Form 477 data under the circumstances outlined in New America Foundation's comments would fly in the face of the Commission's recent decision that additional safeguards were necessary to minimize the potential for competitive harm when Form 477 data is released under the BDIA.

⁵ See Joint Comments of the New America Foundation *et al.* (Apr. 19, 2010) ("New America Foundation Comments").

⁶ *Id.*

⁷ *Id.* at 6.

⁸ *Id.*

In adopting rules implementing the BDIA, the Commission acknowledged that there is a risk of competitive harm even when Form 477 data is released on a limited basis, as is permitted under the BDIA.⁹ This concern led the Commission to adopt several mechanisms to safeguard data released under the BDIA. The Commission found that these additional safeguards were necessary despite the BDIA's requirement that "eligible entities" treat "any matter that is a trade secret, commercial or financial information, or privileged or confidential, as a record not subject to public disclosure."¹⁰ These additional measures include requiring a representative from each "eligible entity" to sign a declaration certifying, inter alia, that the declarant read, understands and agrees to be bound by the terms of the Commission's order implementing the BDIA.¹¹ In addition, eligible entities are prohibited from "sharing or otherwise disseminating Form 477 aggregate data or further aggregation of these aggregate data, including maps designating broadband subscription based on Form 477 aggregate data, as well as penetration or other indicators derived from subscription."¹² In adopting these additional safeguards, the Commission expressly concluded that a protective order, which is part of Free Press' Request but missing entirely from New America Foundation's proposal, would not provide sufficient protection for Form 477 data. Specifically, the Commission explained that "a traditional protective order, such as those issued in recent merger and adjudicatory proceedings, including the National Broadband Plan, would not be appropriately tailored" to the limited release of Form

⁹ *Providing Eligible Entities Access to Aggregate Form 477 Data; Implementation of the Broadband Data Improvement Act of 2008; A National Broadband Plan for Our Future*, Order, WC Docket No. 07-38, GN Docket 09-47, GN Docket 09-51, ¶ 31 (Apr. 26, 2010) ("*BDIA Implementation Order*") (noting that "[e]ven in aggregated form, however, the data [released under the BDIA] will contain provider-specific information, which the Commission has historically protected and which may give rise to competitive sensitivities even in limited release.")

¹⁰ Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-04), Section 106 (h)(2).

¹¹ See *BDIA Implementation Order* ¶ 36 and Appendix B.

477 data to eligible entities under the BDIA because “unlike those proceedings, the Form 477 data collection is mandatory for thousands of broadband providers, the list of entities eligible to gain access is enumerated by statute, and interested third parties have no right to review the data and use that information to participate in any Commission proceeding.”¹³ The minimal protections outlined in New America Foundation’s comments and Free Press’ Request do not even approach the level of protection the Commission deemed necessary in adopting these additional mechanisms. However, even if these protections were added to Free Press’ Request and New America’s proposal, that would not alleviate the potential for competitive harm because under both proposals the universe of parties that would have access to Form 477 data and the potential uses for that data are too broad. The Commission should, therefore, deny Free Press’ Request and reject New America Foundation’s proposed process for releasing Form 477 data more broadly.

Next, New America Foundation argues that the Commission’s decision not to release providers’ Form 477 more broadly would undermine the public’s confidence in the Commission’s policy making.¹⁴ This argument fails. Under the BDIA, “eligible entities” are already permitted to review Form 477 data for purposes of carrying out activities under section 106(e) provided that those entities follow the designated processes and procedures for protecting that data. This approach carefully balances the need to protect providers’ confidential, commercially sensitive data and any interest the public has in Form 477 data.¹⁵ Outside of the BDIA context, the Commission achieves the same balance by releasing Form 477 data to the public on an aggregated basis in a number of Commission reports including the High Speed

¹² *Id.* ¶ 40; *see also* 47 C.F.R. § 43.11(c).

¹³ *BDIA Implementation Order* ¶ 34.

¹⁴ *See* New America Foundation Comments at 2.

¹⁵ *See BDIA Implementation Order* ¶ 16.

Services Report, 706 Report and the Statistics of Communications Common Carriers Report.

The Commission's rules also allow for state Commissions to review state-specific Form 477 data for individual providers provided that the state has established the appropriate protections to safeguard the data.¹⁶ In addition, interested parties have opportunities to submit recommendations on how the Commission should analyze Form 477 data and are also able to comment on the types of data that the Commission should collect on Form 477. Thus, there is no danger that denying Free Press' Request would undermine the public's confidence in any of the Commission's policy decisions based on Form 477 data.

Finally, New America Foundation misguidedly argues that the Commission is violating its confidentiality rules by allowing providers to "check a box" on the cover page of their Form 477 submissions to indicate that the submitted data is confidential, rather than requiring providers to make a detailed showing of why the data is confidential.¹⁷ However, the Commission adopted this process as a means of simplifying the process for requesting confidential treatment of Form 477 data, which it hoped would encourage greater compliance with the Commission's Form 477 reporting requirements.¹⁸ Despite New America Foundation's claims, this process does not permit providers to game the Commission's confidentiality rules. Indeed, as the Commission's orders explain "if the Commission receives a request for, or proposes the disclosure of, information reported on that particular Form 477, the filer will be notified and afforded the opportunity to make the necessary showing that the data should not be

¹⁶ See 47 C.F.R. § 43.11(c).

¹⁷ See New America Foundation Comments at 5.

¹⁸ 2000 *Data Gathering Order* ¶ 90 ("We also take an additional step to reduce provider concerns about the release of information identified as competitively sensitive by making it easier for providers to request confidential treatment of their data. . . where parties seek confidential treatment, they need only check the well-marked box on the first page of the form . . . We expect that this will lead to a greater level of compliance with this information collection

disclosed.”¹⁹ And, based upon such showings the Commission has in fact repeatedly denied FOIA requests for Form 477 data on the grounds that this data is confidential and commercially sensitive and, therefore, covered under FOIA exemption 4.²⁰

In affirming the Commission’s conclusion that providers’ Form 477 data should be protected from disclosure, the D.C. Circuit took no issue with the Commission’s processes for designating Form 477 data as confidential.²¹ This streamlined process is the most efficient use of the Commission’s resources because it only requires the Commission to review explanations demonstrating that Form 477 data should not be disclosed *after* the data has been requested and not before. Accordingly, the Commission should not change its existing process.

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and will give providers confidence that protectible data will not be published in our regular reports.”)

¹⁹ *Local Telephone Competition and Broadband Reporting*, Report and Order, 19 22340, ¶ 38 (2004). *See also 2000 Data Gathering Order* ¶ 90 (explaining that “[i]f the Commission receives a request for, or proposes disclosure of, the information contained in the Form 477, the provider will be notified and required to make the full showing under our rules”).

²⁰ 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)(denying Center for Public Integrity’s FOIA request for access to Form 477 data).

²¹ *Center for Public Integrity v. Federal Communications Commission*, 505 F. Supp. 2d 106, 112 (D. D.C. 2007)(affirming the Commission’s conclusion that providers’ Form 477 data is confidential and competitively sensitive and should, therefore, be protected).

CONCLUSION

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

Respectfully submitted,



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