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

MAILED
APR 28 2010
FCC Mail Room

In the Matter of	)	
	)	
Providing Eligible Entities Access to Aggregate Form 477 Data	)	WC Docket No. 07-38
	)	
Implementation of the Broadband Data Improvement Act of 2008	)	GN Docket No. 09-47
	)	
A National Broadband Plan for our Future	)	GN Docket No. 09-51

ORDER

Adopted: April 23, 2010 **Released: April 26, 2010**

By the Commission:

I. INTRODUCTION

1. In this Order, we adopt rules interpreting and implementing sections 106(h)(1) and 106(h)(2) of the Broadband Data Improvement Act (BDIA).[1] Section 106(h)(1) of the BDIA requires the Commission to provide eligible entities, which are the sole designees of each state that are eligible to receive a BDIA State Broadband Data and Development grant, with access to the "aggregate" data that the Commission collects from broadband service providers on Form 477.[2] Section 106(h)(2) of the BDIA imposes certain confidentiality requirements on eligible entities that receive these data.[3] Our action today will facilitate the broadband mapping and other projects that eligible entities are undertaking under the BDIA to improve available data on broadband deployment and adoption. In doing so, we balance access to Commission-collected data with important safeguards against improper disclosure.

2. Specifically, to enable eligible entities to map broadband availability and undertake their other responsibilities as set forth in the BDIA, we find that the broadband data that we share with eligible entities should be aggregated to create the complementary sets of data that we describe below. We also find that the sensitivity of much of the data, and their potential to reveal provider-specific data even in aggregated form, warrant certain protective measures, including data-sharing firewalls, to minimize the

[1] Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4097 (codified at 47 U.S.C. §§ 1301-04).

[2] 47 U.S.C. §§ 1304(h)(1). Section 106(i)(2) of the BDIA defines "eligible entity" as: (A) an entity that is either (i) an agency or instrumentality of a State, or a municipality or other subdivision (or agency or instrumentality of a municipality or other subdivision) of a State; (ii) a nonprofit organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under section 501(a) of such Code; or (iii) an independent agency or commission in which an office of a State is a member on behalf of the State; and (B) is the single eligible entity in the State that has been designated by the State to receive a grant under this section. BDIA § 106(i)(2); 47 U.S.C. § 1304(i)(2).

[3] Specifically, section 106(h)(2) provides that 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." BDIA § 106(h)(2); 47 U.S.C. § 1304(h)(2).

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risk of inappropriate or inadvertent disclosure of the competitively sensitive information that the BDIA directs us to share with the state grantees.

II. BACKGROUND

A. Form 477 Data Collection

3. Since May 2000, the Commission has collected information from facilities-based providers of broadband connections on a semi-annual basis using Form 477.[4] The Commission revised the Form 477 data collection program in 2008,[5] and wireline and terrestrial-fixed wireless broadband service providers must now report, by Census Tract, the number of broadband subscribers, broken down by technology; more disaggregated speed tiers;[6] and percentage of subscribers that are residential.[7] Incumbent LECs must continue to report the percentage of their service areas to which DSL connections are available to residential end-user premises, and cable system operators must do the same with regard to cable modem service availability.[8] Providers of terrestrial mobile wireless (TMW) broadband services must continue to submit their broadband subscriber totals on a state-by-state basis, rather than at the Census-Tract level, and must report the Census Tracts that "best represent" their broadband service footprint for each speed tier in which they offer service.[9] The Commission also collects local telephone competition data from wireline and wireless providers.[10]

4. The Commission also sought comment in 2008 on further revising several aspects of its Form 477 collection, including whether and how to institute a nationwide broadband availability mapping program. Of relevance for the issues here, the Commission sought comment "on ways in which we can preserve confidentiality when sharing the information collected on Form 477, the voluntary registry, and other sources with agencies such as the Department of Agriculture's Rural Utilities Service and with

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[4] *Local Competition and Broadband Reporting,* CC Docket No. 99-301, Report and Order, 15 FCC Rcd 7717 (2000) (*2000 Data Gathering Order*).

[5] *Development of Nationwide Broadband Data 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,* WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008) (*2008 Broadband Data Gathering Order and Further Notice*); *Development of Nationwide Broadband Data 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*, WC Docket No. 07-38, Order on Reconsideration, 23 FCC Rcd 9800 (2008) (*2008 Broadband Data Gathering Reconsideration Order*).

[6] The Commission updated the broadband reporting tiers, which now consist of an upload speed tier of 200 kbps or less and upload and download speeds of: (1) greater than 200 kbps but less than 768 kbps; (2) equal to or greater than 768 kbps but less than 1.5 Mbps; (3) equal to or greater than 1.5 Mbps but less than 3.0 Mbps; (4) equal to or greater than 3.0 Mbps but less than 6.0 Mbps, (5) equal to or greater than 6.0 Mbps but less than 10.0 Mbps; (6) equal to or greater than 10.0 Mbps but less than 25.0 Mbps; (7) equal to or greater than 25.0 Mbps but less than 100.0 Mbps; and (8) equal to or greater than 100 Mbps—for a total of 72 speed-tier combinations. *2008 Broadband Data Gathering Order*, 23 FCC Rcd at 9700–01, para. 20.

[7] Previously, the Commission collected data by the Zip Codes where each provider had one or more customers, but collected subscriber counts only at the state level and in accordance with less granular speed tiers. *See, e.g., 2000 Broadband Data Gathering Order* 15 FCC Rcd at 7761, para. 94; 7772-73, Appendix B Cover Page, Part I.

[8] *See Local Telephone Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, 19 FCC Rcd. 22340 (2004) (*2004 Data Gathering Order*).

[9] *See 2008 Broadband Data Gathering Order and Further Notice*, 23 FCC Rcd at 9698–99, para. 16.

[10] *See 2008 Broadband Data Gathering Order and Further Notice*, 23 FCC Rcd at 9693, para.5.

public-private partnerships such as ConnectKentucky and similar ventures, for example by sharing the data in a less granular or aggregated form than the level at which it is collected."[11]

5. *Form 477 Confidentiality.* Due to the unique nature of this data collection, the Commission allows filers to request confidential treatment for competitively sensitive information by making a selection on the cover page of Form 477 without filing at that point the detailed confidentiality justification otherwise required by our rules.[12] In establishing this framework, the Commission announced its intention not to reveal individual-provider data in published reports.[13] At present, the Commission publishes aggregate Form 477 data in its High Speed Services report,[14] its Section 706 report,[15] and other reports, such as the Statistics of Communications Common Carriers report.[16] In making the Form 477 data publicly available, the Commission has had a longstanding policy of "releasing only aggregated information about broadband deployment . . . to protect against release of company-specific information directly or indirectly."[17] Both in the reports and the accompanying statistical summaries, the Commission has used "statistical methods, such as suppression and aggregation" to prevent the release of company-specific information.[18]

6. The Commission has not made any formal findings about which data elements constitute competitively sensitive information[19] and has never ruled on any requests for confidentiality. The Wireline Competition Bureau (WCB) has invoked FOIA Exemption 4 to protect against disclosure of filers' Zip-Code and other data in response to requests for that information under FOIA.[20] In the one case where the Bureau's denial of access to Form 477 data was appealed, the federal district court affirmed the Commission's decision not to release Zip-Code data.[21]

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[11] *2008 Broadband Data Gathering Order and Further Notice*, 23 FCC Rcd at 9711-12, para. 39.

[12] *See 2000 Data Gathering Order*, 15 FCC Rcd at 7759, para. 90; *2004 Data Gathering Order*, 19 FCC Rcd at 22352, para. 23 n.56. If the Commission receives a request for release of information pursuant to the Freedom of Information Act, the filer is notified and afforded an opportunity to show why the data should not be released. *2000 Data Gathering Order*, 15 FCC Rcd at 7759, para. 90; *2004 Data Gathering Order*, 19 FCC Rcd at 22352, para. 23 n.56. In implementing the streamlined procedure, the Commission explained that it expected that this mechanism would "lead to a greater level of compliance . . . and will give providers confidence that protectible data will not be published in our regular reports." *2000 Data Gathering Order*, 15 FCC Rcd at 7759, para. 90.

[13] *Id.* at 7761, para. 89, 91.

[14] *See, e.g.*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of* ,December 31, 2008 (rel. Feb. 12, 2010), *available at* http://www.fcc.gov/wcb/iatd/comp.html.

[15] 47 U.S.C. § 1302(a).

[16] *See, e.g.*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Statistics of Common Carriers: 2005/2006 Edition* (rel. Jun. 10, 2008), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-282813A1.pdf.

[17] *2004 Data Gathering Notice*, 19 FCC Rcd at 7377 n.25.

[18] *Third Section 706 Report*, 17 FCC Rcd at 2855 n.49. Although the Commission has never formally announced its protective mechanisms, it has explained in its releases that, "when an item of aggregated data combines information from only a few filers, an informed party could 'back out' a particular filer's specific data only by successfully bringing reliable information to bear." *Local Telephone Competition and Broadband Reporting*, Report and Order, WC Docket No. 04-141, 19 FCC Rcd 22340, 22347 at para. 12, n.27 (2004).

[19] *See 2000 Data Gathering Order*, 15 FCC Rcd at 7758, para. 87; 47 C.F.R. § 0.459.

[20] Under FOIA Exemption 4, an agency may withhold from release records containing trade secrets and commercial or financial information that is privileged or confidential. *See* 5 U.S.C. § 552(b)(4).

[21] *See Center for Public Integrity v. FCC*, Memorandum Opinion, 505 F.Supp.2d 106, 115-16 (D.D.C. 2007) (agreeing with the Commission's arguments that analyzing the Zip-Code data for a particular filer over time could (continued....)

7. *State Commission Access to Raw Form 477 Data.* In establishing the Form 477 data collection, the Commission created a limited exception to its general policy of releasing only aggregated and redacted Form 477 data. Specifically, it established a mechanism to allow state public utility commissions to view all disaggregated state-specific data, provided that the state commission has appropriate confidentiality protections in place (which may include confidentiality agreements or designation of information as proprietary under state law).[22] Where the relevant state law affords less protection than federal FOIA law, the state must agree to comply with the higher federal standard as a precondition to the data release.[23] The Commission has delegated to the Chief of the WCB authority to release the information where these conditions are satisfied.[24]

B. Broadband Data Improvement Act

8. *Section 106(h)(1) and Eligible Entities' Access to "Aggregate Data."* On October 10, 2008, Congress passed the BDIA, which provides for improved federal data on the deployment and adoption of broadband services. Section 106(h)(1) of the BDIA, entitled "Access to Aggregate Data," provides that, "[s]ubject 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."[25] The BDIA defines "eligible entity" to be an entity that is (i) an agency or instrumentality of a State, or a municipality or other subdivision; (ii) a nonprofit organization; or (iii) an independent agency or commission in which an office of a State is a member on behalf of the State; *and* is the single eligible entity in the State that has been designated by the State to receive a grant under BDIA section 106(i)(2).[26]

9. Section 106(h)(2) of the BDIA imposes certain confidentiality requirements on eligible entities that receive the FCC Form 477 "aggregate data." Specifically, section 106(h)(2) provides:

> (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.[27]

10. Section 106(b) of the BDIA sets forth the primary role for eligible entities through the establishment of a State Broadband Data and Development Grant Program (Program), which requires the Secretary of Commerce to award grants "to eligible entities for the development and implementation of statewide initiatives to identify and track the availability and adoption of broadband services within each

(Continued from previous page)
reveal where customers had been acquired or lost, or could allow competitors to free ride on the efforts of the first new entrants to identify areas where competition is more likely to be successful, and finding that disclosure of even redacted Zip-Code data would be likely to cause substantial competitive harm to others), *mot. for recon. denied*, Memorandum Opinion and Order, 515 F.Supp.2d 167 (D.D.C. 2007)

[22] *2000 Data Gathering Order*, 15 FCC Rcd at 7761-62, paras. 95-96.

[23] *Id.*

[24] *See 2000 Data* Gathering Order at 7761-62 & n.240 (delegating authority to the Chief of the then-Common Carrier Bureau).

[25] 47 U.S.C. § 1304(h)(1).

[26] 47 U.S.C. § 1304(i)(2) (emphasis supplied).

[27] 47 U.S.C. § 1304(h)(2).

State."[28] Section 106(e) identifies ten activities to be funded through the Program, which include the creation within each State of a geographic inventory map of broadband service availability.[29] On July 2, 2009, NTIA released a Notice of Funding Availability (NOFA) on funding this program, which defined several key terms for the purposes of the state broadband program.[30] The NOFA defines "broadband" to include data-transmission technology with advertised speeds of at least 768 kbps downstream and at least 200 kbps upstream to end users.[31] An "area," consisting of "one or more contiguous census blocks," is considered to be an "underserved area" if at least one of three factors is met: (1) 50% or fewer households in the area have access to facilities-based terrestrial broadband service, (2) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least three Mbps downstream in the area, or (3) the rate of household broadband subscribership in the area does not exceed 40%.[32] An area is "unserved" for purposes of the NOFA if 90% of households in the area lack access to facilities-based terrestrial broadband service.[33] NTIA later issued a clarification of the Technical Appendix to the *NTIA State Mapping NOFA*,[34] and later provided additional guidance to its implementation of the Program by posting responses to Frequently Asked Questions.[35]

11. On July 17, 2009, the Commission issued a Public Notice seeking comment on how to interpret and implement sections 106(h)(1) and 106(h)(2) of the BDIA.[36] On September 9, 2009, NTIA published a list of the eligible applicants that had filed applications under the Program, from all 50 states, five territories, and the District of Columbia.[37] NTIA announced on October 5, 2009, that it had awarded the first four grants under the Program.[38] As of March 5, 2010, NTIA had awarded a total of 54 grants totaling approximately $102 million under the Program.[39]

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[28] 47 U.S.C. § 106(b).

[29] 47 U.S.C. § 106(e).

[30] Department of Commerce, National Telecommunications and Information Administration, State Broadband Data and Development Grant Program, Docket No. 0660-ZA29, Notice of Funds Availability, 74 Fed. Reg. 32545, 32555 (July 8, 2009) (*NTIA State Mapping NOFA*).

[31] *NTIA State Mapping NOFA*, 74 Fed. Reg. at 32548.

[32] *NTIA State Mapping NOFA*, 74 Fed. Reg. at 32549.

[33] *Id.*

[34] Department of Commerce, National Telecommunications and Information Administration, State Broadband Data and Development Grant Program, Docket No. 0660-ZA29, Notice of Funds Availability; Clarification. 74 Fed. Reg. 40569 (Aug. 12, 2009) (*NTIA State Mapping NOFA Clarification*).

[35] NTIA, *State Broadband Data and Development Program (Broadband Mapping Program) Frequently Asked Questions*, http://www2.ntia.doc.gov/html/files/BTOP_BroadbandMappingFAQs.pdf (rel. Aug. 12, 2009) (*NTIA Aug. 12 FAQs*).

[36] *See Comment Sought on Providing Eligible Entities Access to Aggregate Form 477 Data as Required by the Broadband Data Improvement Act*, Public Notice, DA 09-1550, WC Docket No. 07-38, GN Docket Nos. 09-47, 09-51 (WCB rel. Jul. 17, 2009) (*Aggregate Data Notice*).

[37] *NTIA, NTIA's Broadband Mapping Imitative Off to Strong Start, All U.S. States, Territories, and D.C. Apply to Participate in Program*, http://www.ntia.doc.gov/press/2009/BTOP_mappingtotals_090909.html (rel. Sep. 9, 2009); *NTIA, Summary of State Broadband Data and Development Grant Program, Eligible Applications* http://www.ntia.doc.gov/press/2009/BTOP_applicantlist_090909.pdf (rel. Sep. 9, 2009) (*NTIA Eligible Applicants List*).

[38] *NTIA, Press Release: NTIA Announces First State Broadband Mapping Grants; Recovery Act Funding to Provide Policymakers and Consumers with Improved Data on Internet Service in California, Indiana, North Carolina, and Vermont*, http://www.ntia.doc.gov/press/2009/BTOP_MappingAwards_091005.html (rel. Oct. 5, 2009).

[39] *See NTIA, Press Release: NTIA Awards Grants for Broadband Mapping and Planning in Virginia and American Samoa*, http://www.ntia.doc.gov/press/2010/BBMapping_VA_AS_03052010.html (rel. Mar. 5, 2009).

III. DISCUSSION

12. In this part, we first interpret the term "aggregate" in section 106(h)(1), through examination of the statutory language, its context in the statute, and the purposes of the BDIA itself. We then apply our interpretation of "aggregate data" to the various categories of broadband data collected through Form 477. We next discuss the need for additional safeguards that apply to the eligible entities' access to that aggregated data, and impose certain requirements to protect the confidentiality of those data and the integrity of the data-sharing process.

A. Interpretation of "Aggregate Data" under section 106(h)(1)

13. While the BDIA does not include an explanation for the requirement that the Commission provide "aggregate" Form 477 data to eligible entities, the only mention of eligible entities in the statute is in connection with the State Broadband Data and Development Grant Program (Program) contemplated by section 106(b). Accordingly, we find the only reasonable interpretation of the requirement to be that Congress intended the Commission to provide aggregate Form 477 data to eligible entities in order to support the activities to be funded through the Program, as identified in section 106(e). This conclusion informs our interpretation of the requirement and the meaning of "aggregate." In this regard, we note that section 106(e) sets forth a range of activities that grants can support, and NTIA has made clear that "[w]ith respect to this Program, NTIA's highest priority is the development and maintenance of a national broadband map."[40]

14. We also conclude that, at a minimum, section 106(h)(1) requires the Commission to aggregate at least some of the Form 477 data that it collects, and that "aggregate data" necessarily includes some confidential information. Traditional canons of statutory interpretation compel us to read all of section 106(h) to have meaning.[41] We therefore conclude that the BDIA's use of the term "aggregate" in section 106(h)(1) directs us to collapse or combine some of the granular categories of information collected on Form 477. Several commenters assert that we should share fully disaggregated, raw Form-477 data with eligible entities, largely because Census-Tract data are already an aggregation of Census Block information or street address availability, and the NTIA has already directed the grantees to collect such availability data from providers.[42] We do not find these arguments persuasive; logically, "aggregate data" must mean something other than fully disaggregated data. Moreover, the statute directs us to aggregate the data we collect through Form 477, not to aggregate based on a broader set of more granular data that we do not collect. Similarly, we also conclude that Congress contemplated that "aggregate [Form 477] data" would include some confidential information, to avoid rendering section 106(h)(2) superfluous or irrelevant.[43]

15. We squarely reject the argument advanced by some commenters that, under the Commission's longstanding treatment of Form 477 broadband information, "aggregate data" must mean

[40] *NTIA State Mapping NOFA*, 74 Fed. Reg. at 32547.

[41] *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."); *Carter v. United States*, 530 U.S. 255, 256 (2000) ("These extra clauses in subsection (b) cannot be regarded as mere surplusage; they mean something.") (quoting *Potter v. United States*, 155 U.S. 438, 446 (1894)).

[42] *See, e.g.*, Public Knowledge, et al. Comments at 3-4 (arguing that the NOFAs' requirements of Census Block-level information supports the agreement that Census Tract-level data should be considered "aggregate"); California PUC Comments at 6; Benton Comments at 4-5; Free Press Comments at 3-4; NASUCA/NJDRC Comments at 5; Massachusetts DTC Reply Comments at 6-7.

[43] *See, e.g.*, CTIA Reply Comments at 5 ("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.") (emphasis in original).

that no provider-specific data are to be disclosed.[44] Such an interpretation misreads or overstates precedent in several ways. First and foremost, we find that previous statements regarding Commission policies of data disclosure *to the public* have little if any relevance in the context of disclosure to designees selected by states subject to the protective provisions of this order, and the existence of our past practices does not indicate congressional intent to extend Form 477 reporting methodologies to this context.[45] The issue of defining "aggregate data" to share with a state designee is a novel one for the Commission, and past references in a distinct context do not dispositively define this term here. Similarly, we find reliance on Bureau-level actions to establish longstanding Commission precedent to be inappropriate here.[46]

16. Accordingly, we interpret "aggregate data" to mean data that are combined in a manner that involves providing utility to eligible entities in carrying out activities under section 106(e), while protecting the confidentiality interests of providers submitting the data. In crafting a balance between sharing as much as possible to help eligible entities and preserving confidentiality, we rely heavily on the language and purpose of the BDIA, as well as on the lines drawn by the NTIA in its NOFA and subsequent guidance in implementing the statute. Specifically, our guiding policy in aggregating data is to maximize disclosure to eligible entities to allow them to carry out their activities under section 106(e) without unnecessarily disseminating, or creating an undue risk of misuse of, data the Commission has historically protected.

17. In making this determination, we acknowledge that competitively sensitive information will be shared with eligible entities, and that, especially where there are only one or two providers in an area, eligible entities may be able to reverse engineer additional granularity for some data.[47] In light of the confidentiality protections of section 106(h)(2), however, this will not make confidential data available to the general public. In combination with the additional safeguards we impose today, we find that our sharing of this information with eligible entities is consistent with, and indeed necessary to furthering, the overall purposes of the statute.

18. We emphasize that the decisions we reach in this order are limited to the issues raised in the *Public Notice*, and that we do not reach any of the issues regarding disclosure of Form 477 data to the

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[44] *See, e.g.*, AT&T Comments at 3 ("As used in the Form 477 context, the production of 'aggregate data' is well-established and understood by regulators and broadband providers to mean the accumulation and organization of data from multiple providers such that no provider-specific information is disclosed."); *id.* at 3-4 & n.10 (relying on *CFPI* and the *Sept. 26, 2006 Burgee Letter*); NCTA Comments at 2; CTIA Reply Comments at 3-4 (pointing to Commission protection of Numbering Resource Utilization and Forecast data and other regulatory provisions).

[45] *See* AT&T Comments at 4 (arguing that in enacting the BDIA, Congress was well aware of the Commission's publication of aggregated broadband data in its reports, and the statutory direction to make aggregate data available to eligible entities "clearly demonstrates" that Congress intended for the Commission to continue to use those same practices and methodologies).

[46] *See, e.g.*, AT&T Comments at 2, 4, nn. 4, 5, 10 (citing Letter from Kirk Burgee to Drew Clark (dated Sept. 26, 2006)).

[47] *See, e.g.*, USTelecom Comments at 5-6 (arguing that in particular, where the number of providers is fewer than three, the Commission should avoid any disclosure of customer counts at the Census Tract level); ITTA/OPASTCO Comments at 7 ("Any disclosure of subscribership counts should only occur at the state level – so that subscribership data is aggregated at least to the point at which a broadband provider's subscribership rates in a specific region can be neither discerned nor 'reverse engineered'."); TSTCI Comments at 3 (arguing that small rural incumbent LECs may be the only broadband provider to some Census Tracts, and it may be necessary to combine the data for two or more tracts or provide data on only those Census Tracts where there are no broadband connections); Sprint Reply Comments at 3 (agreeing with USTelecom that there should be at least three carriers in each category of aggregated data that is provided to eligible entities).

public that many commenters raise and which remain pending.[48] As we explain in more detail below, eligible entities are expressly prohibited from publishing directly or indirectly any of the aggregate data that they access.[49] We also recognize that several designated awardees are state commissions, which have rights to disaggregated data through the data-sharing mechanism set forth in the *2000 Form 477 Order*. We emphasize that nothing we do here today expands or diminishes the rights and obligations of state commissions as set forth in that order.

B. Aggregate Data Sets

19. As set forth below, we have developed a data-sharing framework intended to enable eligible entities to carry out the activities specified in section 106(e), particularly with regard to mapping. Several commenters, including Form 477 broadband filers, support such disclosure of comprehensive data to eligible entities to carry out their mapping activities.[50] Two associations of broadband providers expressly recognize that the disclosure should be tied to the speed thresholds used in the stimulus programs' definitions of "unserved" and "underserved."[51] We agree, but also recognize that the release of aggregate data should support the fuller set of responsibilities set forth in section 106(e), rather than just mapping.[52]

20. Rather than adopt a single form of aggregation, we find that the creation of the complementary data sets described below would be the most useful approach for eligible entities.[53] For each such data set, we identify below how we aggregate the data so as to help the eligible entities carry out their responsibilities without unduly risking exposure of confidential information. In adopting these data sets, we emphasize that nothing we do today modifies the Commission's definition of "broadband,"

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[48] *See, e.g.*, Free Press Comments at 20-23 (urging public disclosure of current Form 477 data). Accordingly, we also find no basis to support the argument that eligible entities should be allowed to disclose data to other eligible entities, *see*, NASUCA/NJDRC Comments at 7, especially since each eligible entity has no rights or obligations with regard to other states.

[49] *See, infra*, para. 40.

[50] *See, e.g.*, TW Telecom Comments at 2-3 (citing the *Broadband Technology Opportunity Program NOFA* in asserting that detailed and comprehensive maps are necessary for the government to target broadband programs where the necessary infrastructure is lacking, and arguing that the Commission should condition the use of the data solely for the purpose of developing broadband maps); Time Warner Cable Comments at 3 ("Indeed, particularly for states that have yet to begin their individual broadband mapping efforts . . . the currently available Form 477 raw data may be extremely timely and most beneficial."); XO Comments at 3 ("It is also critical that BDIA grantees produce reliable broadband mapping products. High-quality broadband maps will be a valuable ongoing resource for the public sector, public interest groups, and other industry participants as all parties work to expand broadband availability throughout the United States.").

[51] *See* ITTA/OPASTCO Comments at 7-8; *see also* Sprint Reply Comments at 3-4 ("Furthermore, the purpose of collecting broadband data is to identify underserved and unserved areas of the country."); NASUCA/NJDRC Joint Reply Comments at 2.

[52] *See NTIA Mapping NOFA FAQs* at 7 ("NTIA encourages states to consider what specific activities will best support broadband planning in their states based on the history, needs, population and other factors unique to each state's circumstance."); Time Warner Cable Comments at 4 ("[T]he Commission should emphasize that the Form 477 broadband data provided pursuant to the BDIA cannot be used for any purpose other than that contemplated by statute – *i.e.*, to improve the quality of federal and state data regarding the availability and quality of broadband services and to promote the deployment of affordable broadband services to all parts of the country."); CPUC Comments at 2 (arguing that "it is imperative that the FCC require Form 477 to be given to these eligible entities, and that the data be as detailed as possible to enable the necessary analysis for fulfilling the BDIA's requirements").

[53] *See* Free Press Comments at 22 ("Aggregation can take a number of forms, and most have limitations of one sort or another.").

and that we reach these conclusions exclusively for the more narrow concerns of implementing section 106(h).[54]

1. Subscriber-Count Data

21. *Data Set 1: Number of Total Wireline, Terrestrial-Fixed Wireless and Satellite Broadband Subscribers per Census Tract, with Disaggregated Technology and Residential/Business Classification Data.* With this data set, we will provide eligible entities with the total number of wireline, terrestrial-fixed wireless (TFW), and satellite "broadband" connections[55] for each Census Tract in their state, broken down by technology and residential/business classification. We will aggregate all speed tiers above 768 kbps downstream and 200 kbps upstream, and will not supply provider names as part of this data set for any specific provider.

22. Providing access to this data set advances the activities of eligible entities in multiple ways. First, by showing actual subscribership in a Census Tract, the data set will assist eligible entities in verifying the availability data they collect, confirming their findings or alerting them to areas that may warrant further investigation. Additionally, numbers of the wireline and TFW *residential* subscribers could also be used to inform eligible entities' identification of "underserved" and "unserved" areas, as defined in the NTIA NOFA. Where an eligible entity determines, for example, that a tract has a level of household fixed subscription penetration of less than 10 percent, it could investigate and verify, based on availability data collected from providers, that the tract, as a whole or some portion thereof, is "unserved."

23. In addition, the technology and residential/business breakdowns in this data set should help eligible entities carry out their non-mapping functions in sections 106(e)(1)-(9) of the BDIA, specifically with regard to identifying problems and barriers unique to certain technologies or to the residential market.[56] With regard to geographical granularity, due to the importance in both the statute and the NOFA of identifying those geographical areas that lack broadband availability, we decline to aggregate geographically any of the Census-Tract information that we collect on Form 477. We find that the Census Tract is the appropriate level of granularity to assist in identifying areas where broadband service is or is not available.

24. *Data Set 2: Total Number of Terrestrial Mobile Wireless Broadband Subscribers per State by Residential/Business Classification.* For each state, we will provide the total number of terrestrial mobile wireless (TMW) "broadband" subscribers, broken out by business/residential classification, and will aggregate all provider data and all speed tiers above 768 kbps downstream and 200 kbps upstream. We will not supply individual provider identities as part of this data set. This is the most geographically granular TMW subscribership data we collect. This information complements the information in *Data Set 1*, and will similarly assist eligible entities in carrying out non-mapping functions under sections 106(e)(1)-(9) of the BDIA.

2. Provider Data

25. *Data Set 3: List, by Census Tract, of Wireline, Satellite and Terrestrial-Fixed Wireless Providers, Reporting at Least One Broadband Subscriber, Disaggregated According to NTIA NOFA Speed Breakpoint for "Underserved" and by Residential/Business Classification.* The Commission will provide, for each Census Tract, a list of all wireline, TFW and satellite providers reporting at least one "broadband" subscriber in the Census Tract. We will also provide data indicating whether or not each

[54] *Compare Comment Sought on Defining "Broadband," NBP Public Notice #1*, GN docket Nos. 09-47, 09-51, 09-137, Public Notice, 24 FCC Rcd 10897 (2009).

[55] Unless otherwise noted in this Order, "broadband" refers to services with transmission speeds of at least 768 kbps downstream and at least 200 kbps upstream, consistent with the NTIA's definition of that term in the BDIA NOFA. *See NTIA State Mapping NOFA*, 74 Fed. Reg. at 32548.

[56] *See* §§ 106(e)(1)-(9).

provider reported at least one connection above 3 Mbps downstream as well as whether they reported at least one business connection, at least one residential connection or both.

26. Access to this data set will provide eligible entities with a tool useful in identifying broadband providers and broadband service availability in their respective states.[57] This data set will thus assist eligible entities in creating a geographic inventory map of broadband service, as contemplated by section 106(e)(10). In particular, this data set will allow eligible entities to identify providers for whom they do not have data and assess the availability of service in an area. This data set can also help providers carry out several other activities funded under section 106(e), including the identification and tracking of possible suppliers of broadband services to areas that have low levels of broadband service deployment.[58]

27. This data set can also inform eligible entities' identification of "underserved" Census Tracts, since an area is underserved if "ii) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least three megabits per second ('mbps') downstream in the area."[59] Specifically, where an eligible entity otherwise fails to find an advertised speed over 3 Mbps, the existence of a fixed subscriber at a tier above that speed would signal that further investigation is necessary, and the identity of the relevant provider would assist an eligible entity to locate any associated advertisement.

28. In determining whether and which speed tiers are appropriate to aggregate, we look to the NOFA's definition of "broadband" as being above 768 kpbs downstream, and its 3 Mpbs cutoff for downstream transmission speeds as part of its definition of "underserved area."[60] We conclude that aggregating the 72 tiers of combined upstream and downstream speeds[61] into two speed tiers -- between 768 kbps and 3 Mbps downstream, and above 3 Mbps downstream – comports with the statutory directive to aggregate, while preserving the distinctions that NTIA has deemed critical to carry out section 106(b) of the BDIA. While we agree with commenters that aggregation of speed tiers will shield particular provider's performance, we decline to adopt the differing proposed breakpoints that do not comport with these key NTIA definitions.[62]

29. *Data Set 4: List, by Census Tract, of Terrestrial-Mobile Wireless Broadband Providers Representing Service.* The Commission will provide, for each Census Tract, a list of the TMW providers identifying the Census Tract as a part of their "broadband" service territory, along with data indicating whether or not they provide service at speeds above 3 Mbps. Similar to *Data Set 3,* this data set will assist in identifying the universe of TMW providers from whom eligible entities are seeking to collect availability data. The data set could also assist in the identification of "underserved" areas by providing an indication that service is available or may be advertised in an area. While a TMW provider's identification of those Census Tracts best representing its footprint is not necessarily indicative of "access" as defined in NTIA's NOFA, such information provides useful guidance for the eligible entity to follow up.

[57] WCB's Industry Analysis and Technology currently posts lists of the Form 477 filers submitting broadband data, broken out by states for which data is filed. These lists can be accessed at: http://www.fcc.gov/wcb/iatd/comp.html.

[58] §§ 106(e)(2)(A),(C).

[59] *NTIA State Mapping NOFA*, 74 Fed. Reg. at 32549.

[60] *NTIA State Mapping NOFA*, 74 Fed. Reg. at 32548-49. ;

[61] *See 2008 Broadband Data Gathering Order and Further Notice*, 23 FCC Rcd at 2701, para. 20 Fig. 1.

[62] *See, e.g.*, Verizon Comments at 7 (suggesting breakpoints of 1.5 Mbps, 6 Mbps, 10 Mbps, and 25 Mpbs, on the basis that such distinctions separate entry-level broadband services, video services, and advanced applications and services).

3. DSL and Cable-Modem Service Availability

30. *Data Set 5: Percentages of Incumbent LEC DSL and Cable Modem Service Residential Availability*. The Commission will provide percentages, by state, of residential end-user premises in incumbent LEC and cable provider service territories that have access to high-speed DSL and cable-modem services, disaggregated by technology. This dataset is the same as the percentages that are published as part of the *High-Speed Services Report*,[63] although without any redaction. Again, these figures are based on providers' responses to questions about "availability" on Form 477 which may differ from NTIA's definition of "access," but these data can be helpful to eligible entities in tracking down availability.

C. Confidentiality of Form 477 Data

1. Need for Protection

31. We turn now to the question of whether the Commission should seek to prevent inappropriate release of sensitive data, or whether it is more appropriate under the statute to release data to eligible entities and leave them to determine how to comply. We identify two issues of commercial sensitivity posed by the release of confidential data to an eligible entity: (1) an eligible entity's inadvertent disclosure of confidential Form 477 data to third parties potentially could cause competitive harm to the broadband provider that submitted the data to the Commission; and (2) where the eligible entity is itself a provider of broadband service, it could unfairly use these aggregated data in marketing its own services or planning its investment strategy.[64] In this regard, we note the language of section 106(h)(2) requiring eligible entities to treat "any matter that is a trade secret, commercial or financial information, or privileged or confidential, as a record not subject to public disclosure," unless providers expressly agree to such disclosure. This provision establishes important protections for the aggregated data that the Commission will provide. Even in aggregated form, however, the data will contain provider-specific information, which the Commission has historically protected and which may give rise to competitive sensitivities even in limited release. Accordingly, we find it appropriate to condition our release of the aggregate data by instituting the procedural mechanism described below.

32. We make clear at the outset that the affirmative steps we impose to safeguard confidentiality do not constitute a non-disclosure agreement (NDA), as some parties suggest.[65] In contrast to an NDA that is a product of a contractual negotiation between two parties, we emphasize that we safeguard the limited release of our data through the issuance of a non-negotiated and non-negotiable order, and we require a certification from each eligible entity to several terms and conditions set forth below.

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[63] *See* Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of Dec. 31, 2008* at Table 19 (WCB IATD rel. **XXX**, 2009), *available at* http://www.fcc.gov/wcb/iatd/comp.html. The reported xDSL availability is weighted by incumbent LEC end-user switched access lines and VoIP lines, and the reported cable modem availability is weighted by cable television subscribers.

[64] Further, where an eligible entity is a broadband service provider itself, we are aware of the possibility that it may also apply for a BTOP grant. *See* Department of Agriculture, Rural Utilities Service, Broadband Initiatives Program, Docket No. 0572-ZA01, Department of Commerce, National Telecommunications and Information Administration, Broadband Technology Opportunities Program, Docket No. 0660-ZA28, Notice of Funds Availability, 74 Fed. Reg. 33104 (rel. Jul. 9, 2009) (*BTOP NOFA*). Providing one BTOP applicant with access to the subscribership or availability information of competing BTOP applicants that is unavailable to others would potentially create an unfair advantage in the application process and in the market generally.

[65] *See* ITTA/OPASTCO Comments at 9-10; NTCA Comments at 7; Time Warner Cable Comments at 3; TW Telecom Comments at 9; Verizon Comments at 9-10; USTelecom Comments at 6; TSTCI Comments at 4; Sprint Reply Comments at 2-3.

33. We decline to adopt the several alternative procedural vehicles that some commenters propose. For example, one provider suggests that the Commission require all eligible entities to abide by the safeguarding regimes that are at least as robust as the Commission's, and require all non-governmental eligible entities to sign an NDA that is mutually agreeable to the mapping entity and each broadband provider and afford providers rights to notice and objection to the publication or sharing of data.[66] For reasons of administrability, efficiency, and fairness, we find that a uniform mechanism featuring streamlined reviews of a standardized declaration form and avoiding assessments of state disclosure laws or non-standard commitments will promote the timely processing of access requests and most effectively advance the goals of the BDIA.

34. Although we look to our past precedent for guidance on the necessary safeguards, we find that the more minimal set of conditions for release of the raw Form 477 data to state commissions set forth in the *2000 Data Gathering Order and NPRM* are insufficient in this context for a variety of reasons, most notably the potential for misuse in a recipient's provision of its own broadband services.[67] We also find that imposing a traditional protective order, such as those issued in recent merger and other adjudicatory proceedings, including the National Broadband Plan, would not be appropriately tailored to the instant proceeding. In particular, 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. Nevertheless, we respect the concerns identified by those commenters seeking the imposition of a protective order,[68] and we find many of the terms and conditions of prior adjudicatory protective orders – particularly those adopted in the *National Broadband Plan Protective Order* – are instructive in crafting the safeguards we impose today.[69]

2. Specific Safeguards

35. We conclude that the Chief of the WCB may provide electronic access to state-specific aggregate data collected on Form 477 to the eligible entity for each state, subject to the conditions set out below.[70] We agree with commenters who identify the importance of protecting against inadvertent disclosure in transit,[71] and direct the WCB Chief to exercise its discretion in establishing the medium for such electronic access and appropriate security measures, such as encryption and passwords.[72] We therefore revise our delegation of authority to the WCB Chief consistent with the new regulation we adopt in Appendix C.

36. *Non-Disclosure of Aggregate Data.* Consistent with the terms of BDIA section 106(h)(2) and the Commission's historical practice with regard to Form 477 data, we will condition our release of

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[66] Verizon Comments at 9. Several other parties propose similar bifurcation or even trifurcation of safeguards, which may set forth different procedures depending on the protections afforded by a state's public record laws and the governmental status of the eligible entity. *See, e.g.*, DCPSC/NJBPU Comments at 5-9; MDTC Reply Comments at 8-9. The record also indicates concerns that confidentiality concerns are particularly acute now that there are more data recipients than there were prior to the BDIA's enactment, and that some of them may lack the state commissions' experience in handling confidential information. *See, e.g.*, AT&T Comments at 8 n.21.

[67] *See 2000 Data Gathering Order and NPRM*, at 7761-62, para. 95.

[68] *E.g.*, NCTA Comments at 3.

[69] *See, e.g.*, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Protective Order, DA 09-2187 (rel. Oct. 8, 2009) (*National Broadband Plan Protective Order*).

[70] 47 U.S.C. § 0.291; *2000 Data Gathering Order and NPRM*, at 7761-62, para. 95.

[71] *See, e.g.*, CTIA Reply Comments at 6.

[72] WCB has recently implemented a comprehensive electronic system to allow state commissions to gain access to state-specific disaggregated Form 477 data designed to maximize security of transmission of sensitive data. *See* http://www.fcc.gov/form477/datashareprocess.html.

the aggregate data upon a commitment from each eligible entity that they will abide by the protections of section 106(h)(2) and will not disclose the aggregate data to any third party except with the consent of the provider that submitted it.[73] Additionally, we will require each eligible entity to execute and submit a Declaration (in the format attached as Appendix B) containing an express commitment to protect the data in this fashion.[74]

37. *Procedures for Obtaining Access to Aggregate Data.* In order to initiate its request for electronic access to aggregate data, each eligible entity seeking access shall execute the Declaration and file it with the Bureau via the Commission's Electronic Comment Filing System (ECFS) for this docket, and must also submit an electronic copy to the WCB Chief and the Chief of the Industry Analysis and Technology Division (IATD).[75] We agree with the several commenters that emphasize the need for certifications from eligible entities as critical tools in keeping the aggregate data secure.[76] We also find that making these certifications public by requiring them to be filed in this docket will enhance the transparency and accountability of this process, and that the standardized Declaration and the request process for eligible entities will lead to a more efficient administration of the processing of requests for access. For these administrative and efficiency reasons, we reject the proposals that the Commission review protections of state-instrumentality eligible entities individually.[77]

38. Each prospective party seeking access must demonstrate that it qualifies as an eligible entity by submitting into ECFS documentation of the fact that it "is the single eligible entity in the State that has been designated by the State to receive a grant under" section 106(i)(2).[78] NTIA has already established a procedure for identifying the designation of an eligible entity,[79] and has published a list of eligible applicants for all 50 states, the five territories, and the District of Columbia.[80] Although the Commission will make its own determinations of which entities qualify under section 106(i)(2), we find NTIA's Letter of Designation standard to be appropriate and administrable, and we adopt this standard here.

39. *Use of Aggregate Data.* Each eligible entity obtaining access under this order must certify that it shall use the aggregate data only for the purposes of the section 106(b) State Broadband

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[73] *See, e.g.*, Verizon Reply at 5.

[74] *See National Broadband Plan Protective Order*, at 3, para. 6.

[75] As indicated in the attached Declaration, the eligible entity must specify contact person(s) to coordinate access, including contact e-mail addresses and direct dial telephone numbers. Any changes to contact person(s) must be made through an amended declaration and filed consistent with the terms of this order.

[76] *See, e.g.*, AT&T Comments at 7; NARUC Comments at 8; Time Warner Cable at 4.

[77] *See, e.g.*, DCPSC/NJBPU Comments at 5 ("If necessary, the Commission can review a State's FOIA to determine whether it is sufficiently protective of confidential information and, by agreement, impose federal requirements where not."); NARUC Comments at 8.

[78] 47 U.S.C. § 1304(i)(2)(B).

[79] For the purposes of designation of an eligible entity, the NTIA State Mapping NOFA requires a Letter of State Designation, which letter "signed by the Governor or equivalent chief executive of the State, or his duly authorized designee, affirms that the applicant is the single eligible entity in the State that has been designated by the State to receive a grant under this Program." *NTIA State Mapping NOFA*, 74 Fed. Reg. at 32553; *see also NTIA State Mapping NOFA* at 32549 (defining State to be "the Governor or in the absence of a designation by the Governor, the Legislature, officer, or executive agency within the State that the Governor or State Constitution authorizes to take binding action for the State"), 32550 (setting forth eligibility standards), 32551 (requiring a Letter of State Designation). The *NOFA* further explains that "[i]n the case State, the District of Columbia, or a territory or possession of the United States, the terms Governor, Legislature or State Constitution shall mean their respective functional equivalents." *NTIA State Mapping NOFA* at 32549.

[80] *NTIA Eligible Applicants List.*

Data and Development Grant Program and, except as provided herein, shall not use such documents or information for any other purpose, including without limitation, business, governmental, or commercial purposes, or in other administrative, regulatory or judicial proceedings. We agree with those filers that assert that eligible entities should not be permitted to use data received pursuant to the BDIA to enhance their own efforts to compete against Form 477 filers,[81] or to provide data to entities that are direct or even indirect competitors.[82] These restrictions are necessary to prevent an eligible entity's right to access aggregate data from becoming an unfair, anticompetitive tool in its own provision of broadband service.

40. Numerous commenters express concerns about grantee publication of confidential, provider-specific Form 477 data, and several propose different mechanisms for the Commission to deem confidential all or part of those data prior to sharing them with the grantee, including a review for confidential information by the Commission of grantee broadband maps and appropriate redaction.[83] We recognize the legitimacy of these concerns. Rather than undertaking any case-by-case review of maps or data, however, we specifically prohibit any eligible entity, contractor, or other party from publishing, 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. We view this approach as administratively efficient and as an effective safeguard, and consistent with the goal of the BDIA and the *NTIA NOFA* – to award grants for eligible entities to track *availability*, not to republish information supplied to them by the Commission.[84] We are aware of the utility that the Form 477 broadband subscribership data has to states, providers, and the public, and to the extent possible, we will publish those data in our *High-Speed Services Reports* and miscellaneous reports.

41. *Permissible Disclosure.* We limit access to aggregate data to certain personnel. NTIA expressly anticipates that awardees may use contractors and subcontractors,[85] including for-profit companies,[86] and we devise our disclosure rules to be consistent with that relationship. At least one commenter has recognized, however, that use restrictions should extend to third parties,[87] and we agree that avoiding potential conflicts of interest – as well the appearance of such conflicts – warrant certain measures. Accordingly, subject to the use description described above, we specifically limit access to aggregate data to (1) principals or employees of the eligible entity; (2) outside contractors, subcontractors, consultants or experts retained for the purpose of assisting eligible entities, *provided that* such outside consultants are not employees of or consultants or contractors to any broadband service provider in the relevant state, and do not otherwise participate directly in the business decisions of any broadband service provider in the state nor the analysis underlying the business decisions; and (3) outside counsel to eligible entities, provided that such persons are not involved in competitive decision-making, *i.e.*, outside counsel's activities, association, and relationship with any broadband service provider in the relevant state do not involve advice about or participation in the business decisions of that provider nor the analysis

[81] *See* WISPA Reply Comments at 5.

[82] *See* TW Telecom Comments at 2-3, 9; ITTA/OPASTCO Comments at 8 ("The Commission should avoid offering data that enables third-party determinations of a broadband provider's strategic plans."); TSTCI Comments at 3 ("Some eligible entities that can receive Form 477 data may in fact be competitors of broadband providers.").

[83] *See, e.g.*, TW Telecom Comments at 11-12.

[84] *See also* BDIA, 47 U.S.C. § 1303(e) ("Nothing in this chapter shall reduce or remove any obligation the Commission has to protect proprietary information, nor shall this chapter be construed to compel the Commission to make publicly availably any proprietary information.").

[85] *See Broadband Mapping NOFA* at 32554.

[86] *NTIA Aug. 12 FAQs* at 1-2.

[87] ITTA/OPASTCO Comments at 8 (arguing for restrictions to extend to third parties, such as subcontractors).

underlying the business decisions. We find this protective measure necessary to ensure against anticompetitive misuse.

42. *Protection of Aggregate Data.* Persons described in paragraphs 37 and 41 shall have the obligation to ensure that access to aggregate data is strictly limited as prescribed in this order. We agree with those commenters who seek strengthened safeguards to preserve confidentially, and agree with the proposal of some commenters that eligible entities should be required to implement reasonable internal data protection policies, such as employee training and security of storage.[88] Furthermore, each eligible entity must work with the encryption, password-protection, designation-of-confidentiality, or other security measures that the Commission may attach to the aggregate data or the electronic access to those data, and may not remove, alter, or otherwise adjust any such security feature. We adopt similar file protections as those adopted in the *National Broadband Plan Protective Order*,[89] as set forth below, although in this docket we expressly allow WCB to transmit information electronically, consistent with the BDIA's requirement to provide access in electronic form:

a. In order to receive a password to access directly the state-specific aggregate data, an eligible entity will submit, via the Commission's Electronic Comment Filing System, a Declaration, consistent with Appendix B, signed by a corporate officer, director, managing partner or equivalent official of the eligible entity. Upon receipt of a properly executed Declaration, the Wireline Competition Bureau will supply the Declarant with a password for access. Other individuals may then access the aggregate data consistent with the terms of this Order, although at all times the eligible entity and Declarant assume full responsibility for compliance with all terms and conditions of this order. The Declarant must maintain a list of the names and titles of all employees, contractors, and others who access these aggregate data, and must produce this list to the Commission upon request.

b. A person in receipt of aggregate data in electronic format shall load the information onto a computer solely for the purpose of analysis in connection with this proceeding and for no other purpose.

c. Once loaded onto a computer, the files containing aggregate data shall be password protected immediately. The aggregate data may not be stored on a computer after being analyzed. Consequently, aggregate data should not be stored in computer memory that is copied, such as to a network's back-up or archival storage. After the analysis is complete, the results of such analysis may be stored by saving the results (but not the underlying aggregate data) to a mobile data storage medium. All files containing aggregate data shall, as soon as practicable, be deleted from the computer.

43. *Subpoena by Courts, Departments or Agencies.* If a court, or a federal or state department or agency issues a subpoena or orders production of aggregate data that an eligible entity has obtained under terms of this *Order*, the eligible entity shall promptly notify the WCB Chief of the pendency of such subpoena or order. Consistent with the independent authority of any court, department or agency, such notification must be accomplished such that the Commission has a full opportunity to oppose such production prior to the production or disclosure of any aggregate data.

44. *Violations of Order.* Should a person that has properly obtained access to aggregate data under this *Protective Order* violate any of its terms, that person shall immediately convey that fact to the Commission, including the WCB Chief. Further, should such violation consist of improper disclosure of

[88] *See, e.g.*, NTCA Comments at 7 (seeking protections through NDAs that could address the form in which data are stored, who has access to the data, length of data retention, training on handling data, and other issues); CTIA Reply at 6.

[89] *National Broadband Plan Protective Order* at 5, para. 11.

aggregate data, the violating person shall take all necessary steps to remedy the improper disclosure. The Commission retains its full authority to fashion appropriate sanctions for violations of this *Order*, including but not limited to suspension or disbarment of Counsel from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to aggregate data.[90]

45. Several commenting parties urge the Commission to recognize a right to recovery by providers against eligible entities.[91] We decline at this time to address this issue, but we do make clear that nothing in this *Order* shall limit any other rights and remedies available to a provider that has submitted underlying Form 477 data at law or in equity against any person using aggregated data in a manner not authorized by this *Order*.[92]

D. Adequacy of Notice

46. We reject the argument raised by one commenter that the *Aggregate Data Notice* is inadequate to implement section 106(h), and that a new rulemaking proceeding is necessary in order to adopt new Form 477 data distribution rules.[93] That commenter contends that rural broadband service providers may have "inadvertently" submitted confidential information that they would not have otherwise disclosed, and therefore "fairness" and due process dictates that the Commission should not apply section 106(h) retrospectively to data that have already been collected.[94] We disagree for several reasons. First, the mandatory nature of Form 477 negates the argument that any broadband provider may somehow have not included certain information that is required from all facilities-based broadband providers. Second, the breadth of the current pending *2008 Broadband Data Gathering Further Notice* and the *Aggregate Data Public Notice* provide more than enough opportunity for filers to provide meaningful comment on the rule change that we make today. Third, the combination of aggregation and the confidentiality protections described above provide ample protection for the confidential data.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

47. Final Regulatory Flexibility Certification. The Regulatory Flexibility Act of 1980, as amended (RFA),[95] requires that a regulatory flexibility analysis be prepared for rulemaking proceedings, unless the agency certifies that "the rule will not have a significant economic impact on a substantial number of small entities."[96] The RFA generally defines "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[97] In addition, the

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[90] *See* Time Warner Cable Comments at 4 ("[T]he Commission should make clear that an eligible entity's entitlement to obtain such information is conditioned on its agreement, in advance and in writing, to comply with the BDIA's confidentiality provisions. Such an acknowledgement, which could be modeled on those that typically accompany protective orders in Commission proceedings, would provide the Commission with the ability to enforce this requirement.").

[91] *See, e.g.*, ITTA/OPASTCO Comments at 8-10.

[92] *See* USTelecom at 8 (arguing that any public penalties that the Commission imposes for violation of confidentiality provisions of an NDA should not preclude a right of action); ITTA/OPASTCO Comments at 9.

[93] NTCA Comments at 5-6.

[94] *Id.* Furthermore, NTCA argues that the Public Notice was not accompanied by any proposed rule change wording, upon which affected parties could comment.

[95] The RFA, *see* § 5 U.S.C. S 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[96] 5 U.S.C. § 605(b).

[97] 5 U.S.C. § 601(6).

term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[98] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[99]

48. This *Order* takes steps to provide for the sharing of Form 477 data with other entities. Our rule imposes no burden on Form 477 filers or on the eligible entities. Therefore, we certify that the requirements of this *Order* will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the *Order* including a copy of this final certification, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, *see* 5 U.S.C. § 801(a)(1)(A). In addition, the *Order* and this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration, and will be published in the Federal Register. *See* 5 U.S.C. § 605(b).

B. Paperwork Reduction Act Analysis

49. This document contains no new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13.

C. Accessible Formats

50. To request information in accessible formats (computer diskettes, large print, audio recording, and Braille), send an e-mail to fcc504@fcc.gov or call the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY). This document can also be downloaded in Word and Portable Document Format (PDF) at: http://www.fcc.gov.

V. ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that pursuant to sections 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 403, and sections 101-06 of the Broadband Data Improvement Act, 47 U.S.C. §§ 1301-04, this Order IS ADOPTED, effective upon its release.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[98] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in Small Business Act, 15 U.S.C. S § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[99] Small Business Act, § 15 U.S.C. S 632.

APPENDIX A

List of Commenters

Comments

Commenters	Abbreviation
AT&T Inc.	AT&T
California Public Utilities Commission	California PUC
Charles Benton	Benton
District of Columbia Public Service Commission; New Jersey Board of Public Utilities	DCPSC/NJBPU
Free Press	Free Press
Independent Telephone & Telecommunications Alliance and the Organization for the Promotion and Advancement of Small Telecommunications Companies	ITTA/OPASTCO
Massachusetts Department of Telecommunications and Cable	Massachusetts DTC
Missouri Public Service Commission	Missouri PSC
National Association of Regulatory Utility Commissioners	NARUC
National Association of State Utility Consumer Advocates and New Jersey Division of Rate Counsel	NASUCA/NJBPU
National Cable & Telecommunications Association	NCTA
National Telecommunications Cooperative Association	National Telecom Cooperative
Public Knowledge, Media Access Project, The New America Foundation	Public Knowledge, et al.
Qwest Communications International Inc.	Qwest
Texas Statewide Telephone Cooperative, Inc.	TSTCI
Time Warner Cable Inc.	Time Warner Cable
Time Warner Telecom	TW Telecom
United States Telecom Association	USTelecom
Verizon and Verizon Wireless	Verizon
XO Communications, LLC	XO

Reply Comments

Reply Commenters	Abbreviation
CTIA - The Wireless Association	CTIA
Colorado Public Utilities Commission	Colorado PUC
National Association of State Utility Consumer Advocates and New Jersey Division of Rate Counsel	NASUCA/NJBPU
Sprint Nextel Corporation	Sprint
The Wireless Internet Service Providers Association	WISPA
United States Telecom Association	USTelecom
Verizon	Verizon

APPENDIX B

Declaration

In the Matter of	)	
	)	
Providing Eligible Entities Access to Aggregate Form 477 Data	)	WC Docket No. 07-38
	)	
	)	
Implementation of the Broadband Data Improvement Act of 2008	)	GN Docket No. 09-47
	)	
	)	
A National Broadband Plan for our Future	)	GN Docket No. 09-51

I, _____, of the eligible entity _____ for the state of _____, hereby declare under penalty of perjury that I have read the Order that has been entered by the Commission in this proceeding, and I understand it.

I agree to be bound by its terms pertaining to the treatment of section 106(h) aggregate data, and I agree that I shall not disclose or use section 106(h) aggregate data except as allowed by the Order.

I certify that I have verified that there are in place procedures at my place of business where the data is accessed to prevent unauthorized disclosure of section 106(h) aggregate data.

I acknowledge that a violation of the Order is a violation of an order of the Federal Communications Commission.

Executed at _____ this ___ day of _____, ____.

[signed]_____

[Name] _____

[Position] _____

[Eligible Entity]_____ _____

[Address] _____

[Telephone] _____

[Email] _____

APPENDIX C

Rule Amended

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

PART 1 – PRACTICE AND PROCEDURE

Part 1of Title 47 of the Code of Federal Regulations (C.F.R.) is amended as follows:

1. Section 1.7001 of the Commission's rules is amended by revising paragraph (d) to read as follows:

§ 1.7001 Scope and Content of Filed Reports

(c) Respondents may make requests for Commission non-disclosure of provider-specific data contained in FCC Form 477 under § 0.459 of this chapter by so indicating on Form 477 at the time that the subject data are submitted. The Commission shall make all decisions regarding non-disclosure of provider-specific information, except that:

(1) The Chief of the Wireline Competition Bureau may release provider-specific information to a state commission provided that the state commission has protections in place that would preclude disclosure of any confidential information, and

(2) The Chief of the Wireline Competition Bureau may release provider-specific information to "eligible entities," as those entities are defined in the Broadband Data Improvement Act, in an aggregated format and pursuant to confidentiality conditions prescribed by the Commission.

* * * * *