

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Free Press Request To Review Form 477) WC Docket No. 10-75
Data and Request For Protective Order)
)

REPLY COMMENTS OF FREE PRESS

Free Press
501 Third Street, NW
Suite 875
Washington, DC 20001
202-265-1490

May 4, 2010

I. Introduction

The National Broadband Plan delivered to Congress in March was the result of an unprecedented examination of the broadband market and the Commission's policies. The Plan contains hundreds of recommendations; each carefully considered and designed to foster universal access, affordability and competition in our broadband market. The Commission has proposed an implementation schedule, and appears eager to take up recommendations as quickly as possible. This eagerness implies that the Commission will look for the low hanging fruit -- recommendations that are sensible and can be implemented immediately. The ask at the center of this proceeding is exactly the kind of action the Commission can take right now to begin to implement the data portions of the National Broadband Plan.

In Chapter 4 of the National Broadband Plan, when discussing recommendations to improve competition, the Plan states:¹

The FCC should have a general policy of making the data it collects available to the public, including via the Internet in a broadband data depository, except in certain circumstances such as when the data are competitively sensitive or protected by copyright. Further, the FCC should implement a process to make additional data that is not accessible by the public available to academic researchers and others, subject to appropriate restrictions to protect confidentiality of competitively sensitive materials.

Free Press' request is the embodiment of this recommendation. We are asking the Commission for a protective order to make Form 477 data currently deemed as confidential available for research purposes, as the Commission has already done in numerous other proceedings, including the National Broadband Plan itself. Free Press has

¹ Federal Communications Commission, Connecting America: The National Broadband Plan, Omnibus Broadband Initiative, March 16, 2010 ("National Broadband Plan").

signed numerous other protective orders, and has completely adhered to all terms for confidential treatment. Further, in prior proceedings, Free Press has provided detailed analysis of FCC data, correcting prior Commission reporting errors.² Free Press and other third parties have also provided further analysis of confidential data that enabled greater public participation in Commission proceedings.³

The data recommendations in the National Broadband Plan are central to improving the efficacy of Commission policymaking in this space. Acting on the Free

² See Further Comments of Consumers Union, Consumer Federation of America and Free Press, In the Matter of *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations In Local Markets*, MM Docket No. 01-317, *Definition of Radio Markets*, MM Docket No. 00-244, pp. 281-293 (Oct. 22, 2007). (Showing that Commission staff analysis of FCC Form 323 Ownership data missed 67 percent of the minority-owned TV stations and a whopping 75 percent of the stations owned by women).

³ See e.g. Yanich, Danilo. "Ownership Matters: Localism, Local Television News, and the FCC" Paper presented at the annual meeting of the International Communication Association, Marriott, Chicago, IL, May 20, 2009 (analysis based on access to confidential raw video data granted under protective cover); See also Ex Parte of Consumers Union, Consumer Federation of America and Free Press, In the Matter of *2006 Quadrennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 06-121, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 02-277, *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations In Local Markets*, MM Docket No. 01-317, *Definition of Radio Markets*, MM Docket No. 00-244 (Nov. 14, 2007). (A filing containing detailed econometric analysis of confidential data grated under protective cover).

Press request for Form 477 data access under protective order is an appropriate first step in this direction, and there is no justifiable reason why such access should be delayed.⁴

II. Data Provided Under Protective Order Will Be Used For Econometric Analysis and Will Greatly Inform Commission Policymaking, Consistent With the Recommendations in the National Broadband Plan

The new Census-Tract based Form 477 subscribership data proved to be a useful tool in the preparation of the National Broadband Plan. Chapter 4 contains numerous findings from a yet-unpublished econometric analysis of this data. It is worthy to note that this type of analysis provided far greater insight than the summary statistics released by the Industry Analysis and Technology Division of the Wireline Competition Bureau in their most recent “High-Speed” semi-annual report.⁵ This new analysis provides useful information about local market competition and the impacts on price and speed offerings.

This new insight could be highly influential in the policymaking process, but it is important to note that the specific referenced econometric model in the Chapter 4 of the Plan is just one among dozens of possible model specifications that could be used to ask

⁴ AT&T, Qwest and NCTA all argue that action on this request is premature, in light of the Commission opening a new proceeding on broadband data, scheduled for late this year. *See e.g.* Comments of AT&T at 2-3; Comments of NCTA at 1; Comments of Qwest at 5. We urge the Commission to reject this argument. The National Broadband Plan’s recommendations for outside researcher access stand separate from the future data proceeding, which will re-examine the *types* of data that should be collected. Whether the data is the old, current, or new Form 477 data, the question of granting access exists independent of deliberations about what data the Commission should collect. This instant proceeding on the Free Press request for protective order serves as an adequate space for interested parties to express their concerns on this matter, and there is no justifiable reason to delay the implementation of this specific narrow NBP recommendation.

⁵ *See Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd. 7717 (2000) (*2000 Data Order*) (establishing Form 477 process); *Local Telephone Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, 19 FCC Rcd. 22340 (2004); *see also* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2008*, 2010 WL 515415 (2010) (*High-Speed Internet Access Report*).

questions of the raw Form 477 data. While there is no doubt that the Commission itself can and should continue to explore this new treasure trove of data, the Commission's insight into the market would be greatly enhanced by allowing outside researchers access to this data, subject to protective order.⁶ If such access were granted to Free Press, we would likely conduct econometric analysis similar to that discussed in Chapter 4 of the National Broadband Plan.⁷ For example, the model in Chapter 4 seeks to examine the impact of facilities based competition on price and speed; we might also like to create and examine the impact of CLEC DSL on these outcome variables; or we might use Tract-based subscriber counts to construct a variable for market share (either HHI or a 2-firm concentration ratio) and then examine the relationship between market concentration and outcome variables of price and speed.

Under no circumstances would we produce any analysis or summary statistics that would be any more detailed than that already presented in the Commission's *High-Speed Report*. Our analysis, and the process for conducting it would resemble that which occurred in the context of the 2006 Quadrennial Review "10-Studies" proceeding. In that proceeding, the Commission granted interested outside researchers access to confidential

⁶ We believe, consistent with the recommendations in the National Broadband Plan, that is the Commission is committed do a data-driven process, it should welcome the prospect of additional analysis, and not hide from it as was suggested by several commenters. *See e.g.* Comments of WCAI at 7; Comments of AT&T at 6-7; Comments of COMPTTEL at 3; Comments of Verizon at 5; Comments of NCTA at 3; Comments of ACA at 15; Comments of CTIA at 7-8.

⁷ The econometric analysis referenced in Chapter 4 appears to combine Form 477 data with other commercial data on broadband prices. It would be appropriate for the Commission to make all such underlying data available to outside researchers, under protective order, in order to replicate and examine the robustness of the results reported in the National Broadband Plan, consistent with OMB Data Quality Act requirements. *See Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, Final Guidelines (corrected)*, 67 Fed. Reg. 8452 (Feb. 22. 2002).

information for the purposes of responding to empirical studies requested by the Commission as a part of the Quadrennial Review. Free Press along with Consumers Union and Consumer Federation of America used raw confidential data to replicate prior findings, and examine the sensitivities of those findings; we also constructed new econometric models based on the confidential data combined with other sources of data. This analysis was presented to the Commission, and also used in an academic setting.⁸

Our request for data access under a protective order is perfectly reasonable for an agency that is now publicly committed to transparent, data-driven policymaking. The central point of having open proceedings is so that parties can file analyses and facts in the record, and that's exactly what we propose to do with these data.⁹ What we ask for is identical to what the National Broadband Plan recommends, and our past experience with access to confidential information demonstrates our commitment to analytical rigor and our respect for the confidential treatment of proprietary information.

III. Contrary to Commenters' Misplaced Rhetoric, Access to Form 477 Data Subject to a Protective Order Provides Many Benefits, Without Risks, and is Consistent with Commission Precedent.

In our petition, we specifically stated that we are "willing to alleviate the Commission's confidentiality concerns by agreeing to abide by a protective order, which

⁸ See e.g. Cooper, Mark. "Junk Science And Administrative Abuse in the Effort of the FCC to Eliminate Limits on Media Concentration" Paper presented at the annual meeting of the International Communication Association, Montreal, Quebec, Canada, May 21, 2008.

⁹ And as the Commission knows quite well, allowing outside parties to fully participate in open proceedings through the granting of access to confidential information under protective order is in no way a delegation of authority by the Commission to those outside parties. Thus, the notion proffered by Quest and WCAI that allowing Free Press to analyze data would somehow result in impermissible delegation of authority is plainly absurd. See Comments of Qwest at 4; Comments of WCAI at 3.

will safeguard any potentially sensitive information.”¹⁰ Following custom, we offered a proposed protective order.¹¹ By offering to be subject to a protective order, even if the Commission continues to apply a policy of preemptive confidentiality, outside researchers can still gain access to the Form 477 data and perform original and independent analysis. In subsequent comment cycles, researchers seeking access to the data can engage in a productive dialogue with the broadband providers who are required to report such information, to illustrate the tradeoffs between ongoing confidentiality and the limits placed by compliance with protective orders.

But rather than enter into a dialogue on the scope of protective orders or a possible future of greater public access to data without such orders, filers seek to avoid the debate altogether with misleading arguments and assertions. Some broadband providers instead saw fit to attack the sincerity, expertise and general character of Free Press. For example, one commenter asserts that we have a “history of bias” against maintaining confidentiality of data, which implies that these providers believe we cannot be trusted even to follow the law, as we would be pledging to do through a protective

¹⁰ Request of Free Press to Review Form 477 Data and Request for Protective Order, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future; Preserving the Open Internet; Broadband Industry Practices; 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) Services*, GN Docket Nos. 09-137, 09-51, 09-191, WC Docket Nos. 07-52, 07-38, p. 14 (filed Feb. 22, 2010) (docketed by the Commission as *Free Press Request to Review Form 477 Data and Request for Protective Order*, WC Docket No. 10-75, see Public Notice DA 10-466 (Mar. 19, 2010)) (“*Free Press Request*”).

¹¹ *Ibid.* at Exhibit A.

order.¹² Some filers spend pages stridently defending the confidentiality of data, apparently seeking to preempt the Commission from even considering the question, or objecting on meaningless process grounds.¹³ Obviously, we strongly disagree with filers in these respects. However, in the interest of keeping this proceeding germane to the serious issue of third party analysis of Form 477 broadband data under protective order (as recommended in the National Broadband Plan), we will keep the bulk of these reply comments focused on this specific aspect of our *request*.

Access to Form 477 data subject to a protective order does not bring the risks asserted by providers. Furthermore, access to the data under a protective order falls well within Commission precedent for striking the right balance between transparency and confidentiality.

We remain committed to working constructively with the Commission to ensure that a protective order for Form 477 data would serve its intended purpose.

A. Alleged Risks of Access Under Protective Order are Unfounded.

i. Form 477 Filers Would Continue to Receive Vast Protections For Submitted Information

The purpose of a protective order is to ensure that confidential information being made available remains shielded from public disclosure. Nonetheless, many commenters contend that access under a protective order would lead to the public release of

¹² See e.g. Joint Comments of American Cable Association, Independent Telephone & Telecommunications Alliance, National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, United States Telecom Association and Western Telecommunications Alliance at 15-17. (“*Comments of ACA et al.*”) (Citations taking the form “Comments of...” refer to the initial comments in the instant proceeding.)

¹³ *Ibid.* at 7-12.

confidential data.¹⁴ For example, AT&T states that protective orders would “leav[e] Form 477 filers to simply hope that none of these many data recipients makes a mistake.”¹⁵

Yet these same service providers regularly place their trust in the protective order system. The Commission routinely relies on the use of protective orders to safeguard information deemed confidential. Industry commenters themselves have touted the rigidity of the Commission’s protective order process when it is to their benefit.¹⁶ In the National Broadband Plan proceeding, many providers received access to confidential data under a protective order, including Verizon,¹⁷ Time Warner Cable¹⁸ and Qwest.¹⁹ Small operators similarly participated in the Commission’s protective order process.²⁰ As AT&T recently noted, “when data is competitively sensitive, the Commission has a longstanding policy that such information should be submitted under a strict protective order, not withheld from the commenting parties altogether.”²¹ The protections that

¹⁴ See e.g. Comments of Verizon and Verizon Wireless at 6-7.

¹⁵ Comments of AT&T Inc at 6.

¹⁶ See e.g. AT&T Special Access Reply Comments at 35-40; Reply Comments of Qwest Communications, In the Matter of *Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, pp. 23-24 (Feb. 24, 2010).

¹⁷ Letter of Verizon et al, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (Dec. 7, 2009).

¹⁸ Ex Parte of Qwest, In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (Oct. 21, 2009).

¹⁹ Ex Parte of Time Warner Cable, Inc., In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (Dec. 14, 2009).

²⁰ See e.g. Letter of Cable One, Inc., In the Matter of *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (Nov. 12, 2009).

²¹ Reply Comments of AT&T Inc., In the Matter of *Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access*

service providers have relied on so frequently in other proceedings would be no different here.

Protective orders are effective in large part because of stiff potential penalties for violations, as the Commission has previously recognized:

The Commission has full authority to fashion appropriate sanctions for violations of its protective orders, including but not limited to suspension or disbarment of attorneys from practice before the Commission, forfeitures, cease and desist orders, and denial of further access to confidential information in Commission proceedings.²²

AT&T recently noted that the Commission has “repeatedly held that it ‘retain[s] ample authority to address a misuse of information obtained under a protective order.’”²³ Numerous and significant limitations would be in place to ensure the continued confidentiality of competitively sensitive information; the picture painted by commenters of a Form 477 wild west should be dismissed out of hand. A protective order process would continue to ensure that the detailed data submitted via Form 477 remains confidential, while allowing access by the larger research community.

Services, WC Docket No. 05-25, RM-10593, p. 36 (Feb. 24, 2010). (“*AT&T Special Access Reply Comments*”)

²² Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition, Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, 22 FCC Rcd. 17791, 17856, para. 103 (2007).

²³ AT&T incorrectly attributes this quotation. See AT&T Special Access Reply Comments at 37, n. 89-90. The correct citation is *General Communication, Inc., On Request for Inspection of Records*, FOIA Control No. 2003-208, Memorandum Opinion & Order, FCC 04-158, para. 14 (rel. July 8, 2004).

ii. Assertions That Acting On Free Press' Petition Would Undermine Future Collection Efforts are Misguided

Some commenters assert that their compliance with Form 477 data collection depends in part on the Commission preventing third-party access to the data under any circumstances. For example, Verizon entitles a section of their comments “Releasing the Requested Data to Free Press Could Undermine the Commission’s Future Broadband Data Collection Efforts.”²⁴ This thinly veiled threat stems from a line in the initial *Form 477 Order*, in which the Commission states it will grant confidentiality in part to “improve compliance.”²⁵ But this order was written in an earlier era of reporting thresholds, and the Commission thus relied on the voluntary participation of smaller operators and offered confidentiality as a trade-off for this participation. In 2004, the Commission applied mandatory filing to small operators as well.²⁶ The Commission’s Form 477 instructions explicitly state that entities failing to file Form 477 “may be subject to enforcement action under sections 502 and 503 of the Communications Act and any other applicable law.”²⁷ In other words, regardless of whether the Commission chooses to grant access to Form 477 data, service providers are legally obligated to provide that information, and “compliance” with binding Commission rules should not be allowed to serve as a political factor in a discussion of policy and law. But even with political and lobbying calculations factored in, access to Form 477 data *under a protective order* should trigger no red flags. These threats should be dismissed as empty theatrics.

²⁴ Comments of Verizon and Verizon Wireless at 7.

²⁵ See e.g. *ibid.* at 8.

²⁶ *Local Telephone Competition and Broadband Reporting*, WC Docket No. 04-141, Report and Order, 19 FCC Rcd. 22340, 22346 (2004).

²⁷ FCC Form 477, Instructions for March 1, 2010 Filing, OMB NO: 3060-0816, p. 20.

B. Benefits of Access Under Protective Order are Ignored By Commenters.

i. Availability to Outside Researchers Would Provide Policy Benefits Without Significant Risk.

A protective order would allow independent outside researchers to gain access to illustrative broadband subscribership data currently included in Form 477, enabling valuable public policy research and analysis without endangering confidentiality. There are numerous benefits to putting this data in the hands of researchers with a vast body of knowledge. Under a protective order, researchers would follow strict rules to ensure this underlying data was kept confidential. However, aggregated data and analysis that did not compromise confidentiality would be eligible for broad dissemination – and this data and analysis can vastly improve the quality of public participation in Commission proceedings, ensuring that future broadband policy reflects the public’s input, not just the input of the incumbent industries and their lobbyists.

Commenters in this proceeding appear to confuse the confidential information submitted through Form 477 with the subsequent, non-confidential insights that can be derived from that data. The Commission is well aware of the potential illustrative value of non-confidential analysis of confidential data, since the Commission releases a regular report that publishes select aggregated analyses of the data.²⁸ Transparent, data driven proceedings are best served by providing independent outside researchers with a similar opportunity to create and publish analyses of the data – particularly to perform any analysis that the Commission may omit. For instance, analysis determining the percentage of census tracts that have only two companies supplying 90 percent or more

²⁸ Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2008*, 2010 WL 515415 (2010).

of broadband subscribers in the tract – without specifying any tract names or company names – would result in no improper disclosure of Form 477 data, but would provide significant insight into the competitive landscape of the broadband marketplace. This analysis has never been performed by the Commission, and cannot be performed by third parties who lack access to the underlying data needed to perform such a calculation.

Further, the research community’s appetite for conducting analysis using Form 477 is high, but unfortunately, the only accessible granular data set to date has been the ZIP code provider count. This flawed variable has unfortunately found its way into outside papers, with researchers acknowledging the flaws appropriately and caveating their findings, but expressing their desire for more precise data.²⁹ The Commission, through the changes made in 2008, now has more useful raw information that could be put to great use by the telecommunications policy research community.

ii. The Use of Broadband Data Analysis in Numerous Proceedings Illustrates the Untapped Potential of Form 477 Data

Numerous broadband providers express concern about access to Form 477 data under a protective order because its use would not be limited to a single proceeding.³⁰ They are correct in noting that Form 477 data was not submitted for a particular proceeding. Nonetheless, the Commission originally stated that this data collection was done to “better satisfy our duty to encourage the deployment of advanced telecommunications capability.”³¹ In 2008, the Commission reaffirmed this purpose

²⁹ See e.g. Kolko, Jed, "Broadband for All? California's Broadband Adoption and Availability," Public Policy Institute of California, Volume 3:2, July 2007.

³⁰ See e.g. Comments of Verizon and Verizon Wireless at 6.

³¹ *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd. 7717, 7718 (2000) (“*2000 Form 477 Order*”).

behind the data collection.³² Thus, reporting entities should already expect this information to be used in any proceeding that relates to that Congressional directive, which includes a substantial number of Commission broadband proceedings.

The potential for analysis of this information to be used in numerous proceedings should argue *for* broader access, not against. This potential illustrates the value of the underlying data for broadband policy issues throughout the Commission's agenda, and increases the public policy value that access to the data under a protective order can provide for independent researchers seeking to take an active role in broadband policy. Furthermore, any protective order or filing with analysis relying on Form 477 information could be filed in individual proceedings, enabling providers to monitor any entity seeking access to the data, and to review the aggregate analysis that is ultimately made public. The Commission would continue to serve as the proper reviewing party to determine whether analysis contains information that would result in competitive harm.

C. Allowing Outside Entities Access to Form 477 Data Under Protective Order is Consistent with FCC Interpretations in Past Proceedings.

The Commission recently issued an order concerning the use of Form 477 data for implementation of the Broadband Data Improvement Act's broadband mapping program.³³ In interpreting the concept of "aggregate data" as that term is used in the Broadband Data Improvement Act, the Commission concluded that it had an obligation

³² *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*, Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd. 9691, 9692 (2008).

³³ *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*, WC Docket No. 07-38, GN Docket Nos. 09-47, 09-51, Order (April 26, 2010) (*BDIA Order*).

to further combine the data, beyond the level collected by Form 477, before sharing that data with eligible entities; however, the Commission declined to agree with industry commenters that all provider-specific information be removed, and emphasized that the “guiding policy” would be “maximum disclosure” to fulfill the goals of the statute, without “undue risk of misuse” of the data.³⁴

We expect the Commission to be sensitive to harms that could arise from misuse of confidential data and accommodating of reasonable service provider concerns, and yet to maintain a guiding policy of broad disclosure, to the extent feasible, of data that underlies fundamental policy decisions. However, outside entities creating additional analysis of the data, without making public the underlying confidential data, conforms with past Commission positions. In the *Report and Order* creating Form 477, the Commission declared:

[W]e continue to believe that the value of this data collection is significantly enhanced by making as much information as possible available to the public. At the same time, we conclude that we can achieve this goal in a manner that ensures the non-disclosure of confidential provider-filed data.³⁵

A protective order in this case would “balance access to Commission-collected data with important safeguards against improper disclosure,” as the Commission strove to achieve in the BDIA proceeding.³⁶

While certain highly aggregated data is made available to the general public through the Commission’s reports, an additional level of access can and should be made available for those willing to adhere to a protective order, consistent with past FCC

³⁴ *Ibid.* at paras 14-16.

³⁵ *2000 Form 477 Order* at para. 87.

³⁶ *BDIA Order* at para 1.

interpretations. As the Commission is well aware, a vast space exists between complete public disclosure and no public disclosure. Yet, in this proceeding, reporting entities have sought to masquerade *any* additional outside access to Form 477, even under a protective order, as *complete* public disclosure with no safeguards. Contrary to their assertions, additional access to data under a protective order would help realize the Commission's professed preference for disclosure without risk of disclosure of confidential data, fully consistent with the balance established in past proceedings.

IV. An Immediate Grant of Data Access via a Protective Order is Consistent with The Recommendations of the National Broadband Plan. However, the Commission Should Be Aware That Commenters Misstate the Law and the Facts Regarding Confidentiality of These Data.

Many false assertions are made regarding data confidentiality in this proceeding in an attempt to prevent any public access to data. Contrary to the Commission's well-established and balanced posture, commenters continue to misstate the law and the facts of confidentiality of Form 477 data. Contrary to many commenters,³⁷ as a legal matter, the burden of demonstrating confidentiality remains with the filer.³⁸ The Commission has established processes and procedures for Form 477 filers to indicate confidentiality of the submitted data;³⁹ these procedures belie commenters who mistakenly assert process

³⁷ Comments of Comptel at 2; Comments of WCAI at 5; Comments of CTIA at 2-3.

³⁸ *Free Press Petition* at 11.

³⁹ Specifically, Form 477 includes a "check box" for filers to indicate confidentiality of filed data. *Free Press Petition* at 14. The Commission has acknowledged that provider self-declaration of confidentiality is a short-cut to a detailed showing, and has set a higher standard for showing confidentiality when it is challenged. *See 2000 Form 477 Order* at paras. 89-90 ("[W]e will honor all parties' requests for confidential treatment of information that they identify as competitively sensitive until persons requesting confidential treatment are afforded all of the procedural protections provided by our confidentiality rules.... If 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.").

concerns.⁴⁰ As to substance, much of the data currently filed in Form 477 is public, and thus cannot logically be considered confidential.⁴¹ And there is a substantial delay between the data's collection date and the Commission's reports analyzing that data, and this delay limits the competitive sensitivity of the data;⁴² although we would certainly like to see this gap reduced in order to improve the value of the data for the Commission and the public, old data is better for public analysis than no data.⁴³

Respectfully submitted,

_____/s/_____

Adam Lynn
Policy Coordinator

Chris Riley
Policy Counsel

Derek Turner
Research Director

Free Press, Washington, D.C.
202-265-1490
dturner@freepress.net

May 4, 2010

⁴⁰ *See, e.g.*, Comments of ACA at ii, 8-9.

⁴¹ *See, e.g.*, Comments of Comptel at 3-4; Comments of CTIA at 5-6; Comments of NCTA at 4.

⁴² Commenters contending that the Commission has not previously acknowledged this distinction are thus, in a sense, missing the forest for the trees. *See, e.g.*, Comments of NCTA at 5; Comments of ACA at 13.

⁴³ *See, e.g.*, Comments of Comptel at 4.