

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

In the Matter of)	
)	
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
)	
International Comparison and Survey Requirements in the Broadband Data Improvement Act)	GN Docket No. 09-47
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

**JOINT REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
AND THE
NEW JERSEY DIVISION OF RATE COUNSEL**

I. INTRODUCTION

With these reply comments, the National Association of State Utility Consumer Advocates (“NASUCA”) and the New Jersey Division of Rate Counsel (“New Jersey Rate Counsel”) (collectively, “State Advocates”) reply to some of the positions set forth by regulators, consumer advocates, industry associations, and broadband providers in response to the Federal Communications Commission’s (“FCC’s” or “Commission’s”)

request for comment on how to interpret and implement Sections 106(h)(1) and 106(h)(2) of the Broadband Data Improvement Act (“BDIA”).¹

State Advocates reaffirm the recommendations contained in their initial comments for dissemination of a wide range of data to eligible entities, as defined in Sections 106(h) (1) and (2). Uniformly, however, the carriers’ comments would have the FCC ignore the clear mandates of the statute.² The clear intent of the BDIA is that eligible entities may use that data consistent with the need to promote broadband for unserved and underserved areas under the American Recovery and Reinvestment Act (“ARRA”),³ to make recommendations on a national broadband plan, and to otherwise fulfill the statutory charge that the FCC and State Commissions promote advanced services.⁴ Furthermore, under the statute, eligible entities are specifically authorized to withhold any data that is a trade secret, commercial or financial information, or

¹ In addition to State Advocates, the following submitted initial comments: AT&T, Inc. (“AT&T”), Benton Foundation, California Public Utility Commission (“CPUC”), District of Columbia Public Service Commission and New Jersey Board of Public Utilities (“DCPSC/NJBPU”), Free Press, Independent Telephone & Telecommunications Alliance and the Organization for the Promotion and Advancement of Small Telecommunications Companies (“ITTA/OPASTCO”), National Association of Regulatory Utility Commissioners (“NARUC”), National Cable & Telecommunications Association (“NCTA”), National Telecommunications Cooperative Association (“NTCA”), Nebraska Public Service Commission (“NPSC”), Public Knowledge, Media Access Project, and the New America Foundation (“Public Knowledge, et al.”), Public Service Commission of the State of Missouri (“MoPSC”), Qwest Communications International, Inc. (“Qwest”), Texas Statewide Telephone Cooperative, Inc. (“TSTCI”), Time Warner Cable (“TWC”), tw telecom inc. (“tw telecom”), United States Telecom Association (“USTelecom”), Verizon and Verizon Wireless (“Verizon”), and XO Communications, LLC (“XO”). These reply comments are limited, of course, by the unreasonable time period – only five days – that the Commission has allowed.

² See e.g., AT&T, Verizon, Qwest, NCTA, NTCA, ITTA/OPASTCO, TSTCI, tw telecom.

³ Pub. L. No. 111-5, 123 Stat. 115 (2009).

⁴ See CPUC, at 5, citing Sections 706 and 254 of the Telecommunications Act of 1996.

privileged or confidential, and to exempt that data from disclosure to the public absent an agreement by and between the eligible entity and the broadband service provider.⁵

II. ISSUE FROM THE PUBLIC NOTICE: INTERPRETATION OF THE TERM “AGGREGATE” IN SECTION 106(H)(1):

Section 106(h)(1) of the BDIA requires the Commission to “provide eligible entities access ... to aggregate data collected by the Commission based on the Form 477 submissions of broadband service providers.” Verizon argues that aggregate data should not include the identity of each broadband provider in a Census Tract,⁶ and that service tiers should be consolidated in order to protect confidential/sensitive data.⁷ These arguments are inconsistent with Section 106(h)(1), which does not limit how the FCC aggregates data. The so-called sensitive data is already protected from disclosure under Section 106(h)(2), and thus the “protections” advocated by Verizon are unnecessary. The aggregation methodology proposed by Verizon would also hinder access necessary for eligible entities to fulfill their responsibilities.⁸ Eligible entities require Form 477 data, at all levels of aggregation, to fulfill their broadband mapping and deployment goals.⁹ And

⁵ Verizon asserts that data should be disclosed to “non-governmental entities” only upon the signing of a non-disclosure agreement that is mutually agreeable to the mapping entity and to each broadband provider.” Verizon, at 9. This ignores the fact that the statute requires such agreements only as a condition for disclosure by an eligible entity, not disclosure **to** an eligible entity.

⁶ Other broadband providers make similar recommendations. See e.g., NCTA, at 2; XO, at 3.

⁷ Verizon, at 2; see also AT&T, at 3, ITTA/OPASTCO, at 6-7.

⁸ TSTCI support limits on how Form 477 data should be aggregated so that competitors cannot use the data, and TSTCI also wants additional safeguards (such as requiring all eligible entities to execute non-disclosure agreements, imposed before information is released). See TSTCI, at 2-5. TSTCI also ignores the fact that Section 106(h)(2) provides protection such that public disclosure requires the consent of the service provider.

⁹ Public Knowledge, et al., at 2-3; MoPSC, at 3-5; CPUC, at 6.

that aggregation does not require or involve stripping off important data, as the FCC currently does with its Form 477 summaries.

Verizon argues that the FCC must continue to protect sensitive and confidential data reported by broadband service providers.¹⁰ And AT&T cites to the long-standing practice of concealing the identity of specific providers in the Form 477 reports.¹¹ But these arguments again ignores the fact that the BDIA already protects such data, and disclosure of the data by the FCC is limited to eligible entities. If AT&T's theory were valid, Congress would not have needed to add the protections included in the BDIA.¹² The release of full and complete data obtained from individual Form 477 reports does not alter the protections in place to protect sensitive and confidential data. In fact, this is the very reason that State Advocates asked that the FCC clearly identify those portions of the data provided to eligible entities that are sensitive and confidential.

Limitations such as those proposed by Verizon and others are facially inconsistent with the express Congressional directive to make information available to eligible entities.¹³ The information sought to be restricted is the type of information necessary to carry out the objectives for which the data is collected. The NARUC resolution (quoted in State Advocates' initial comments¹⁴ and also included in NARUC's initial

¹⁰ Verizon, at 3-5.

¹¹ AT&T, at 3-4.

¹² See DC PSC/NJ BPU, at 3; NARUC, at 6-7.

¹³ For example, TSTCI states, "[D]epending upon the need for particular data by an eligible entity, it may be necessary to combine the data for two or more census tracts or as an alternative, provide data on only those census tracts where there are no broadband connections." TSTCI, at 3; see also USTelecom, at 4. This would clearly allow the carriers' desire for confidentiality to override eligible entities' requirement to make reasoned public policy decisions.

¹⁴ State Advocates, at 8.

comments¹⁵) clearly shows why such information is necessary.¹⁶ Furthermore, contrary to XO's recommendation that the FCC "prohibit any state from imposing mandatory broadband reporting requirements during any year in which the Commission is providing data to an eligible entity in that state pursuant to the BDIA,"¹⁷ State Advocates concur with the NPSC's recommendation that the Commission confirm that it "has not preempted states from collecting broadband data as long as states' confidentiality provisions governing protection of the data are consistent with federal law."¹⁸

Verizon, in apparent sympathy with state mapping efforts, asserts that aggregating speed tiers could "avoid overwhelming or slowing down state-level mapping initiatives with voluminous unnecessary data."¹⁹ But the state entities that are responsible for undertaking broadband mapping, *not the industry*, should determine how best to handle volumes of data. Indeed, it is presumptuous of Verizon to impose its views on the best way in which such entities may seek to gather and analyze the relevant data.

State Advocates urge the Commission to reject resoundingly industry's arguments for excessive aggregation. If such aggregation were required, eligible entities, including state regulators, would be faced with the untenable choice of either being left in the dark about critically important broadband information or having to duplicate data-gathering efforts at great expense.

¹⁵ NARUC, at 2.

¹⁶ See also NPSC, at 1.

¹⁷ XO, at 4, fn 4.

¹⁸ NPSC, at 1.

¹⁹ Verizon, at 7.

III. ISSUE FROM THE PUBLIC NOTICE: PROVISION OF DISAGGREGATED DATA TO ELIGIBLE ENTITIES FROM SECTION 106(H)(2)

The Commission sought “comment on whether the confidentiality provisions of section 106(h)(2) indicate that the Commission should provide access to data that is more disaggregated than the Form 477 filing-based data that it makes available to the public in various periodic statistical reports released by the Bureau.”²⁰ Commenters suggest that the various established procedures used under the Freedom of Information Act (“FOIA”) be applied to the data that is provided to eligible entities.²¹ However, this recommendation ignores the express directive that data be provided to eligible entities subject to the protections afforded under Section 106(h)(2).²² There has been no showing that additional protections are necessary. Disclosure to eligible entities is not disclosure to the public and is outside of the FOIA regime.²³ The FCC should reject calls for imposing the FIOA regime on eligible entities. The provisions of BDIA do not change how the Commission should handle requests from the public with respect to Form 477

²⁰ Public Notice, DA 09-1550 (rel. July 17, 2009) at 2.

²¹ See, e.g., USTelecom, at 3-4; ITTA/OPASTCO, at 8.

²² See AT&T, at 5-6.

²³ See, e.g., tw telecom, at 4-9; Qwest, at 2. Furthermore, State Advocates urge the Commission, as part of its pending investigation of broadband data collection and mapping in Docket No. 07-38, to consider thoroughly the purported competitively sensitive characteristic of data. Just as information about our roads and highways (e.g., their capacity, their speed limits, their locations) are readily available to policy makers and consumers, so too should information about the nation’s broadband infrastructure be readily available. Rather than having to laboriously replicate the data captured in Form 477 with time-consuming consumer surveys and field research, broadband information should be readily available to yield informed purchasing decisions by consumers and informed investment decisions by private and public entities. State Advocates recognize that until the Commission determines otherwise that Form 477 data, at certain levels of granularity, will continue to receive confidential treatment, but urges the Commission to re-visit this issue in more detail in the coming months. As a July 29, 2009 ex parte filed by New America Foundation shows, the concealment of information on the broadband network has severely limited empirical research to inform policy-making.

data and its release. How the FCC handles raw Form 477 data is irrelevant to making such data available to eligible entities.

Verizon requests that the FCC require eligible entities to abide by safeguards as robust as those set forth in 47 C.F.R. § 0.459 and require non-disclosure agreements from non-governmental eligible entities (which require mutual agreement with each service provider).²⁴ These requests should be rejected, because they are unnecessary in light of the protections afforded by Section 106(h)(2).²⁵ Any public disclosure will require voluntary agreement by and between the eligible entity and the service provider.²⁶

DCPSC/NJBPU's comments refer to access solely by state commissions.²⁷ All eligible entities, as defined in the statute, are entitled to get the information subject to Section 106(h)(2). The fact that information could also be shared with state commissions using a different approach, i.e., the "Data Sharing Agreement" that DCPSC/NJBPU describes,²⁸ does not limit or change the express Congressional intent for access to Form 477 data by eligible entities.

AT&T asserts that the Commission must require certification from eligible entities that they will comply with the BDIA.²⁹ If Congress had wanted such certifications, surely they would have been specified in the legislation.

²⁴ Verizon, at 8; see also TSTCI, at 4-5.

²⁵ See, CPUC, at 8.

²⁶ Indeed, CPUC proposes that the Commission require broadband providers to file their Form 477 reports "*simultaneously ... with both the FCC and the respective state utility commissions and state mapping authorities.*" *Id.*, at 7 (emphasis in original); see also MPSC, at 2. This makes much practical sense.

²⁷ DCPSC/NJBPU, at 6-8. The CPUC says that data is to be provided to "the states." CPUC at 2-3. Section 106(i)(2) defines "eligible entities" somewhat more broadly.

²⁸ *Id.*, at 7-8.

²⁹ AT&T, at 7; see also ITTA/OPASTCO, at 9-10; TWC, at 4.

USTelecom understands that “Congress required that all Form 477 data be treated by eligible entities as a non-public records, unless the eligible entity obtains specific agreement from the service provider to release the information.”³⁰ But that is precisely why the concern over disclosure of aggregate data when such data could be disaggregated by a competitor” raised by USTelecom³¹ should not be a concern here.

State Advocates again recommend that (1) the FCC clarify that when one eligible entity provides Form 477 data to another eligible entity, such provision does not itself constitute public disclosure of the information, (2) the FCC provide a mechanism to determine which alleged proprietary claims are valid, if disagreements arise, and (3) the aggregated data provided to eligible entities should clearly distinguish information that is protected from that information which is not subject to 106(h)(2) restrictions. These immediate steps would address the concerns raised by the commenters who want to impose roadblocks on the process.

IV. THE FCC SHOULD COMPLETE ITS INVESTIGATION IN THE STILL-PENDING “MAPPING” AND “DATA COLLECTION” NPRM IN WC DOCKET NO. 07-38.

Approximately a year ago, when the FCC issued its order revising Form 477 to include more granular and comprehensive broadband data, the FCC also included a further notice of proposed rulemaking (“FNPRM”) in which it sought comment on data

³⁰ USTelecom, at 6.

³¹ Id., at 5.

collection issues and separately on mapping issues.³² This FNRPM is still pending FCC review. State Advocates concur with initial comments submitted in this proceeding that seek further revisions to the Form 477 data collection methodology, including those comments that demonstrate the need for more granularity in the Form 477 to support more accurate mapping and broadband analysis.³³

V. CONCLUSION

Timely access to detailed data is critically important to assist the United States in efficiently and effectively pursuing its National Broadband Plan. Access to broadband data is also essential to assist state and federal policy makers in completing maps,³⁴ and in identifying and addressing imperfections in the broadband market. The FCC should move promptly and implement the recommendations of the State Advocates so that eligible entities will have access to all data without undue delay. The Commission should reject calls to impose additional restrictions and so called safeguards based merely on speculation and conjecture about possible competitive harm.

³² *In the Matter of Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Deployment of Advanced Services to All Americans, Improvement of Wireless Broadband Subscriber Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriber Data*, WC Docket No. 07-38, Report And Order And Further Notice Of Proposed Rulemaking, 23 FCC Rcd 9691 (2008) (“*Form 477 Order and FNPRM*”).

³³ See, e.g., CPUC, at 9-14 (explaining that the use of the census tract will overestimate areas where broadband is available, and that, therefore, the Form 477 should be revised to collect availability and subscribership data, and other broadband data, at the street address level, pursuant to the BDIA, and pointing out that some census tracts in California are as big as 8007 square miles). See also Free Press, at 9-20. In its “mapping” reply comments submitted a year ago in response to the pending FNPRM in WC Docket 07-38, New Jersey Rate Counsel stated that because census tracts “can cover large geographic areas, particularly in the nation’s more remote regions where broadband is more likely to be lacking,” “broadband availability should be reported at the more granular level of Census Block, or even better, at the address level.” WC Docket No. 07-38, New Jersey Division of Rate Counsel Reply Comments (August 1, 2008), at 9-10.

³⁴ See, e.g., NPSC, at 4, stating that “[t]ime is of the essence for states working to collect broadband data for mapping its availability within their borders.” See also, CPUC, at 7-8 (describing states’ need for timely access to the Form 477 data).

Respectfully submitted,

David C. Bergmann
Assistant Consumers' Counsel
Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
614.466.8574
Chair, NASUCA Telecommunications
Committee

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
301.589.6313

Ronald K. Chen
Public Advocate
Stefanie A. Brand, Esq.
Director
Christopher J. White
Deputy Public Advocate
Department of the Public Advocate
Division of Rate Counsel
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07101
Phone (973) 648-2690
Fax (973) 624-1047
www.rpa.state.nj.us
njratepayer@rpa.state.nj.us

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