

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Comment Sought on Free Press Request to	)	WC Docket No. 10-75
Review Form 477 Data and Request for	)	
Protective Order	)	

**JOINT COMMENTS OF THE  
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**

**APRIL 19, 2010**

## TABLE OF CONTENTS

<b>SUMMARY</b> .....	<b>ii</b>
<b>I. INTRODUCTION</b> .....	<b>1</b>
<b>II. DISCUSSION</b> .....	<b>3</b>
<b>A. THE COMMISSION AND A U.S. DISTRICT COURT HAVE     RECOGNIZED THE COMPETITIVELY SENSITIVE NATURE     OF FORM 477 DATA</b> .....	<b>3</b>
<b>B. THE FREE PRESS REQUEST SEEKS TO BYPASS THE     FOIA LAWS AND PROCESSES AND THE COMMISSION'S     CONFIDENTIALITY RULES</b> .....	<b>7</b>
<b>C. THE PROTECTIVE ORDER PROPOSAL IS AN INADEQUATE     ALTERNATIVE TO FULL COMMISSION PROCESSES</b> .....	<b>12</b>
<b>D. THE COMMISSION IS THE BEST ENTITY TO REVIEW AND     EVALUATE FORM 477 DATA</b> .....	<b>15</b>
<b>III. CONCLUSION</b> .....	<b>17</b>

## SUMMARY

The 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 oppose the request of Free Press for access to proprietary data submitted to the Commission via Form 477 by broadband providers. The Commission has recognized that Form 477 data is competitively sensitive, and has accordingly implemented safeguards to protect that information. Public release of Form 477 data would damage the providers from which that data emanates. The competitively sensitive nature of Form 477 data has been affirmed not only by the Commission, but by the judiciary as well, which has upheld the Commission's refusal to release the information pursuant to the Freedom of Information Act.

By contrast, the Free Press Request attempts an end-run around the Commission's rules addressing treatment of confidential information. The Request would eliminate opportunities for providers to address the confidentiality of their data. Moreover, Free Press has a record of bias against maintaining the confidentiality of Form 477 data. For these reasons, as explained above, the Commission should reject the Free Press Request and continue to accord the full protections of FOIA and the Commission's rules to providers' Form 477 data.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of	)	
	)	
Comment Sought on Free Press Request to	)	WC Docket No. 10-75
Review Form 477 Data and Request for	)	
Protective Order	)	

**JOINT COMMENTS OF THE  
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**

To the Commission:

**I. INTRODUCTION**

The above-named associations, representing providers of broadband services throughout the United States (collectively, the Associations),<sup>1</sup> hereby submit these

---

<sup>1</sup> The American Cable Association (ACA) represents nearly 900 small and medium sized operators, including cable, phone and fiber-to-the-home companies, coops and municipalities, all of whom provide video, and many of which provide broadband and voice services to consumers and businesses in smaller markets and rural areas throughout the United States. The Independent Telephone & Telecommunications Alliance (ITTA) is an organization of midsized ILECs that collectively serve 24 million access lines in 44 states and offer a diversified range of services to their customers. The National Telecommunications Cooperative Association (NTCA) represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local

comments in response to the Request of Free Press to Review Form 477 Data and Request for Protective Order (Free Press Request).<sup>2</sup> Free Press requests the opportunity to review proprietary Form 477 data, subject to a protective order. For the reasons described herein, the Associations oppose the Free Press Request.<sup>3</sup>

---

exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a “rural telephone company” as defined in the Communications Act of 1934, as amended. The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) is a national trade association representing approximately 520 small ILECs serving rural areas of the United States. The United States Telecom Association (USTelecom) represents broadband service providers, manufacturers, and suppliers providing advanced applications and entertainment. USTelecom member companies provide broadband on a fixed and mobile basis, and offer a wide range of voice, data and video services. The Western Telecommunications Alliance (WTA) is a trade association that represents over 250 rural telecommunications companies operating in the 24 states west of the Mississippi River. Most members serve fewer than 3000 access lines overall and fewer than 500 access lines per exchange.

<sup>2</sup> *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* (GN Docket No. 09-137); *A National Broadband Plan for Our Future* (GN Docket No. 09-51); *Preserving the Open Internet* (GN Docket 09-191); *Broadband Industry Practices* (WC Docket No. 07-52); *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) Services* (WC Docket No. 07-38); *Request of Free Press to Review Form 477 Data and Request for Protective Order* (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))).

<sup>3</sup> The Associations filing in this proceeding do not waive the rights of their respective constituent members to contest the Free Press Request or implementation of it.

## II. DISCUSSION

### A. THE COMMISSION AND A U.S. DISTRICT COURT HAVE RECOGNIZED THE COMPETITIVELY SENSITIVE NATURE OF FORM 477 DATA.

Congress and the Commission, as reflected most recently in the National Broadband Plan, have recognized the vital role that broadband plays in the Nation's communications industry. Broadband providers have recognized this as well, deploying over the past decade ever-increasing facilities offering greater functionality. Form 477 data collection efforts guide the Commission's formulation of policies that are intended to facilitate achievement of National goals regarding advanced communications services. Form 477, specifically, is intended to enable the Commission to "develop and maintain appropriate broadband policies, in particular to carry out its obligation under section 706 of the Telecommunications Act of 1996 to 'determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion.'"<sup>4</sup>

Providers make Form 477 filings semi-annually. The Form requires the filer to provide detailed information about its broadband offerings. These data include, *inter alia*: the number of connections provided to end-users; the percentage of connections that are provided to residential end-users; the percentage of connections that are provided over the filer's own facilities; and, the percentage of connections provided to residential

---

<sup>4</sup> See, *Deployment 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: Report and Order and Further Notice of Proposed Rulemaking*, WC Docket No. 07-38, FCC 08-89, at para. 1 (2008) (2008 Data Order), *citing* 47 U.S.C. § 157 nt (incorporating section 706 of the Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56 (1996)).

end-user premises in discrete speed categories. Broadband providers must also provide information describing the type of broadband service they provide, *e.g.*, asymmetric xDSL, symmetric xDSL, cable modem, fiber, wireless, satellite, broadband over power lines, or other technologies. The detailed information imparted to the Commission via Form 477 is competitively sensitive information that broadband providers do not routinely release outside of their companies. It is maintained on a confidential basis, and substantial competitive harm would result were it released publicly.

Providers of broadband services, including those serving rural areas, face robust competition.<sup>5</sup> Form 477 responses provide insight into individual provider plans and strategies by revealing the areas providers serve, the technologies they use, and the number of customers served. The data also provide insight into which deployment strategies have been successful, and which have not. This data, were it to be made available on a company-specific basis, would provide competitors with competitively sensitive information that Form 477 filers have amassed through the incidence of intensive internal planning, and at substantial expense. Improper release of the data would occasion great detriment to the provider from which that information developed.

---

<sup>5</sup> In September 2009, OPASTCO conducted a survey of its members regarding the state of the marketplace for broadband Internet access services. Surveys were sent to 243 members, and it was completed by 50 respondents, or just over 20 percent of recipients. The survey results indicate that there is robust competition for broadband Internet access service in many rural service areas. Specifically, 90 percent of respondents indicated that they face competition from *at least* one other non-satellite broadband Internet access service provider, and 61 percent stated that they face competition from two or more. And, the Commission cited in the National Broadband Plan a study that revealed 89 percent of NTCA members surveyed face competition from at least one broadband provider in some portion of their service area, and 47 percent face competition broadband competitors serving customers throughout their service area (*Connecting America: The National Broadband Plan*, at ch.8, fn.94 (2010)).

The confidentiality of Form 477 data should therefore be maintained pursuant to the Commission's strictest applicable standards and rules, and should not be subject to disclosure pursuant to the Free Press Request.

When implementing Form 477 requirements, the Commission discussed "the potential for competitive harm,"<sup>6</sup> explaining "some providers release considerable data about the nature of their operations, while others more closely safeguard such data, including the type of data that we request in the reporting form."<sup>7</sup> Broadband providers employ and contract with economists, engineers, and other experts in order to develop comprehensive analyses of technologies, end-user preferences, and market conditions. The cumulative results of these analyses are the deployment of networks and offering of particular services, in specific regions, and at defined rates. Improper disclosure of Form 477 data, however, could offer a damaging and inappropriately intimate look at the results of those proprietary analyses. A single inadvertent disclosure could therefore give competitors an unfair advantage.

The Commission itself has articulated no fewer than six potential competitive harms that could accrue to both incumbent and new providers from the release of Form 477 information. In a 2007 filing with the United States District Court for the District of Columbia Circuit, the Commission stated that disclosure of Form 477 data

would, *inter alia*, (1) allow competitors to determine the particular areas where a service provider has or has not been successful in acquiring customers; (2) disadvantage new entrants in particular geographic areas by enabling existing providers to target "win back" efforts; (3) disadvantage

---

<sup>6</sup> *Local Competition and Broadband Reporting: Report and Order*, CC Docket No. 99-301, FCC 00-114, at para. 88 (2001) (2000 Data Order).

<sup>7</sup> 2000 Data Order at para. 89.

new entrants by drawing the interest of additional new competitors to a particular geographic area; (4) reveal data regarding the technologies that a service provider uses; (5) enable competitors to identify and target a service provider's largest or most lucrative customers; and (6) provide competitors with information about marketplace trends that would not be otherwise available through legitimate means.<sup>8</sup>

The Commission has vigorously defended the need to maintain the confidentiality of Form 477 information, stating,

disclosure could jeopardize the FCC's ability to (1) fulfill its statutory mandate under the Telecommunications Act of 1996 to take action to open all telecommunications markets to competition and promote innovation and investment in those markets by all participants, including new entrants; and (2) obtain timely and accurate information and data of uniform quality and reliability.<sup>9</sup>

And, the U.S. District Court for the District of Columbia has affirmed the confidential nature of Form 477 information. In a 2007 memorandum order addressing a request for public access to Form 477 data, the Court found that "disclosure of even redacted data from Part V [of Form 477] would be likely to cause substantial competitive harm to filers," and accordingly upheld a prior Commission determination to withhold the data from public disclosure, pursuant to exemptions within the Freedom of Information Act (FOIA).<sup>10</sup>

---

<sup>8</sup> *Center for Public Integrity v. Federal Communications Commission et al.: Defendant Federal Communications Commission's Opposition to Plaintiff's Cross-Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendant FCC's Motion for Summary Judgment*, United States District Court for the District of Columbia Circuit, Civil Action No. 06-1664 (ESH), at 2 (May 15, 2007) (*FCC CPI Opposition*).

<sup>9</sup> *FCC CPI Opposition* at 3.

<sup>10</sup> *Center for Public Integrity v. Federal Communications Commission, et al.* Civil Action 06-01644 (ESH) (2007) (*CPI*). The Court also denied access to data from other sections of Form 477 on other grounds.

Since that decision was issued, and as notably emphasized by Free Press, the Commission has actually “increased the burden on filers by requiring more detailed information . . . more granular data . . . .”<sup>11</sup> The greater specificity that is required under “new” Form 477 only increases the sensitivity of the information that providers submit, and amplifies the imperative to maintain its confidentiality. The Free Press Request, however, seeks an end-run around the Commission’s usual protection accorded to confidential information, and should accordingly be rejected.

**B. THE FREE PRESS REQUEST SEEKS TO BYPASS THE FOIA LAWS AND PROCESSES AND THE COMMISSION’S CONFIDENTIALITY RULES.**

Free Press initiates its discussion with a proposal that the Commission invoke its established FOIA-oriented standards to assess the confidential nature of the Form 477 data.<sup>12</sup> The Commission has already considered this issue, and concluded that the bulk of information reported on Form 477 is covered under FOIA Exemption 4 and therefore protected against public disclosure. The Commission’s treatment of this information has been upheld by judicial review. Under FOIA, agencies are required to make their records available to the public upon request, unless those records fall within one of nine statutory exemptions.<sup>13</sup> An agency bears the burden of proof to demonstrate that the information meets the standards for a FOIA exemption.<sup>14</sup> In the instant proceeding, the prevailing standard is Exemption 4, which permits agencies to withhold “trade secrets and

---

<sup>11</sup> Free Press Request at 3.

<sup>12</sup> Free Press Request at 11.

<sup>13</sup> 5 U.S.C. §§ 552(a)(2) and (a)(3)(A).

<sup>14</sup> 5 U.S.C. § 552(a)(4)(B).

commercial or financial information obtained from a person and [is] privileged or confidential.”<sup>15</sup>

Ordinarily, a party seeking confidential treatment of proprietary information from the Commission is required to submit with that request a “statement of the reasons for withholding the material from inspection,” which must contain several enumerated facts upon which the request is based.<sup>16</sup> Access to that information by third parties is then subject to the requirements of 47 C.F.R. § 0.461, which implements the Commission’s obligations under FOIA.<sup>17</sup> Section 0.461 requires a party seeking access to the confidential data to file a request addressing specific criteria. Records that fall within Exemption 4, *i.e.*, “trade secrets and commercial or financial information obtained from a person and [is] privileged or confidential,”<sup>18</sup> can be released only if the requesting entity makes a “persuasive showing” that the public interest implicated by its access to the information outweighs the imperatives to maintain the confidentiality of the data.<sup>19</sup> If the FOIA request is granted, then the party claiming confidential treatment may file an appeal for review of the FOIA decision.<sup>20</sup> By contrast, under the Free Press Request, the

---

<sup>15</sup> 5 U.S.C. § 552(b)(4).

<sup>16</sup> 47 C.F.R. § 0.459(b).

<sup>17</sup> See 47 C.F.R. 0.461, *et seq.*

<sup>18</sup> 5 U.S.C. § 552(b)(4).

<sup>19</sup> See *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission: Report and Order*, GC Docket No. 96-55, FCC 98-184, at paras. 19-20 (1998).

<sup>20</sup> 47 C.F.R. § 0.461(i)(1). The party filing the FOIA request has a subsequent opportunity to respond to the appeal for review.

Commission would make a determination to disclose confidential information without the direct involvement of the party whose proprietary information is at stake (as explained below, the protective order model proposed by Free Press is unavailing).

The Commission's approach to Form 477, in particular, applies a tailored approach that reflects the compulsory manner in which the Commission obtains proprietary data. Generally, the Commission's policy on "confidential treatment of information submitted pursuant to a survey or study is 'to allow survey and study respondents to request confidential treatment pursuant to Section 0.459 to the extent they can show by a preponderance of the evidence a case for non-disclosure consistent with the Freedom of Information Act (FOIA).'"<sup>21</sup> Although ordinarily a party requesting confidential treatment of data is required to make a showing at the time of the request, the Commission adopted a streamlined variation to that approach when implementing Form 477 requirements. The Commission provides a "check box" on the cover page of the Form 477 by which filers can request confidential treatment of their data.<sup>22</sup> The Commission explained,

We also take an additional step to reduce provider concerns about the release of information . . . by making it easier for providers to request confidential treatment of their data . . . a check-box on the first page of Form 477 . . . allows providers to request non-disclosure of all or portions of their submitted data without filing at this point in the process the detailed confidentiality justification required by our rules."<sup>23</sup>

---

<sup>21</sup> 2000 Data Order at para. 88.

<sup>22</sup> See, *i.e.*, Form 477 Tutorial, at 9 (<http://www.fcc.gov/Forms/Form477/477tutorial.pdf>) (last viewed Dec. 7, 2009, 19:19).

<sup>23</sup> 2000 Data Order at para. 90, *citing* 47 C.F.R. § 0.459(b).

The intent of the “check-box” is to “improve the ability of smaller providers and providers that are less familiar with the Commission’s rules to request confidential treatment of their data.”<sup>24</sup> The Commission explained that it “expect[ed] this will lead to a greater level of compliance with this information collection and will give providers confidence that protectable data will not be published in our regular reports.”<sup>25</sup>

Free Press characterizes the Commission’s use of a check-box as “egregious” and intimates that using the check-box does not warrant the presumption that the data are competitively sensitive and subject to confidential treatment. On this basis, Free Press then argues that the Commission is obligated to make the information public – without providing Form 477 filers the opportunity for demonstration or appeal as to why the information should be withheld from public review.<sup>26</sup> This request, however, ignores clear Commission precedent that stipulates that the Commission “will not release information that is the subject of non-disclosure requests until persons requesting confidential treatment are afforded *all of the procedural protections provided by our confidentiality rules.*”<sup>27</sup> Consistent with this Commission precedent, to the extent Free Press or any other party would seek access to that information, filers affected by the request would warrant (1) notification of the request and (2) opportunity to make an affirmative showing as to the confidentiality of the data, followed thereafter by (3) a right to appeal an adverse Commission decision pursuant to 47 C.F.R. § 0.461(b).

---

<sup>24</sup> 2000 Data Order at para. 90.

<sup>25</sup> 2000 Data Order at para. 90.

<sup>26</sup> Free Press Request at 13.

<sup>27</sup> 2000 Data Order at para. 87, *citing* 47 C.F.R. § 0.459(b).

Free Press notes that “the Commission’s established standard for treating information as confidential places the burden of proof on the provider of the information to ‘show by a preponderance of the evidence a case for non-disclosure consistent with the Freedom of Information Act (FOIA).’”<sup>28</sup> But as regards Form 477, the Commission relieved Form 477 filers from an obligation to make that showing concurrent with the filing of the Form. Rather, the Commission ruled that it would “allow[] providers to request non-disclosure of all or portions of their submitted data without filing *at this point* in the process the detailed confidentiality justification required by our rules.”<sup>29</sup> It is clear that the Commission intended that Form 477 data be subject to the same protections that apply to material submitted to the Commission pursuant to 47 C.F.R. § 0.459. While the Commission relieved broadband providers from submitting the complete statement “*at this [initial] point* in the process,” it emphasized clearly that filers can avail themselves of the full protections afforded by the Commission’s rules, stating that it “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.”<sup>30</sup> Those full protections cannot be considered fulfilled until the Form 477 filer whose information is the subject of a FOIA request has the opportunity to make an affirmative demonstration and,

---

<sup>28</sup> Free Press Request at 11.

<sup>29</sup> 2000 Data Order at para. 90, *citing* 47 C.F.R. § 0.459(b) (emphasis added).

<sup>30</sup> 2000 Data Order at para. 89. The Commission continued, “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.” 2000 Data Order at 90.

subsequently, potentially appeal an adverse Commission decision that follows a full-bodied request of the entity seeking access to the data. The Free Press Request seeks to bypass the protections the Commission found should apply to Form 477 data, and should accordingly be rejected.

**C. THE PROTECTIVE ORDER PROPOSAL IS AN INADEQUATE ALTERNATIVE TO FULL COMMISSION PROCESSES.**

Under the circumstances present here, the protective order model proposed by Free Press would not adequately safeguard individual providers' sensitive information. Although the Commission has previously utilized protective orders in rulemaking and other proceedings to enable limited access to sensitive information, those situations are distinguishable from the instant request. By way of example, in 1997, the Common Carrier Bureau issued a protective order to allow limited disclosure of cost support data filed by Southwestern Bell in connection with its virtual collocation tariff. Disclosure in that instance was warranted because cost support materials are "routinely available" for public inspection, in order to enable opportunity to assess the lawfulness of common carrier rates.<sup>31</sup> Moreover, the carrier in that proceeding submitted the information voluntarily. None of these circumstances are present here. The information submitted on Form 477, which is compelled by Commission order, is intended to enable the Commission "develop and maintain appropriate broadband policies,"<sup>32</sup> and is not collected for any specific proceeding. The proprietary Form 477 data does not directly

---

<sup>31</sup> See, generally, *Southwestern Bell Telephone Co. on Request for Inspection of Records: Memorandum Opinion and Order*, FOIA Control Nos. 94-310, 325, 328, FCC 97-184 (1997).

<sup>32</sup> 2008 Data Order at para. 1.

implicate the rates and charges or terms and conditions imposed upon users, or otherwise bear directly upon rights or obligations of other entities. Free Press's purported need for "independent analysis by a research company vastly larger than FCC staff"<sup>33</sup> does not warrant disclosure of providers' sensitive data in contravention of the FOIA laws and Commission rules.

Additionally, Free Press asserts that the information should not be deemed confidential because it is allegedly stale, claiming that information that is "14 months old . . . greatly ameliorates the competitive harm that could possibly be posed by public disclosure."<sup>34</sup> The Commission should reject that proposition. The information in Form 477, viewed over a period of years, can provide a comprehensive long-term image of a provider's strategic processes. For this reason, the Commission applies its confidentiality rules to "historical" Form 477 data, and has also declined calls to publish such data on a company-specific basis.<sup>35</sup> Further, the U.S. District Court for the District of Columbia noted that "analyzing zip-code data for a particular filer over a period of time could reveal whether customers had been acquired or lost," and "because some entities are assigned 'unique' zip codes, disclosure of zip code data would in some instances reveal

---

<sup>33</sup> Free Press Request at 4.

<sup>34</sup> Free Press Request at 11.

<sup>35</sup> *Local Competition and Broadband Reporting: Report and Order*, WC Docket No. 04-141, FCC 04-266, at para. 24 (2004) (deciding to maintain the Commission's "current policies and procedures regarding the confidential treatment of Form 477 data," including using only aggregated data in Commission reports and expressly declining to "adopt a different approach with regard to historical data.")

the presence of an actual business relationship between a filer and an entity.”<sup>36</sup> And, in other proceedings, the Commission has recognized the potential for ongoing sensitivity of confidential information. For example, in a proceeding involving vendor switch input data provided to Bell Operating Companies (BOCs) for their use in switch cost information system models, the Commission found that outdated pricing information was protected by Exemption 4: “the highly competitive nature of the switching equipment market magnifies the significance of pricing strategies . . . . Knowledge of a competitor’s pricing (*even its past pricing strategies*), assists a manufacturer in underbidding its competitors.”<sup>37</sup> The same concerns attend Form 477 and broadband providers’ ongoing efforts to deploy new innovative services to consumers in competitive markets.

Free Press’s other arguments are similarly unavailing. Its contention that “much of the data reported in Form 477 is publicly available through other sources”<sup>38</sup> does not justify release of the *balance* of information that is collected by the Commission and has already been recognized by the Commission as competitively sensitive. Likewise, Free Press’s assertion that similar data “may become available” via National Telecommunications and Information Administration (NTIA) proceedings is a supposition not supported by facts; to the contrary, NTIA has committed to protect the

---

<sup>36</sup> *CPI* at 16.

<sup>37</sup> *Allnet Communications Services, Inc., Freedom of Information Act Request: Memorandum Opinion and Order*, FOIA Control No. 92-266, FCC 92-356, at 13 (1992) (emphasis added).

<sup>38</sup> Free Press Request at 11.

confidential information of providers,<sup>39</sup> and Commission treatment of critical broadband provider information should not revolve around unwarranted predictions of what another agency may or may not do.

**D. THE COMMISSION IS THE BEST ENTITY TO REVIEW AND EVALUATE FORM 477 DATA.**

The Commission is the appropriate entity to review the Form 477 data. In addition to the considerations discussed in the preceding sections of these instant comments, the Associations submit that Free Press has failed to demonstrate why the Commission is not capable of reviewing and using the Form 477 data in order to meet the Commission's self-stated goal of "develop[ing] and maintain[ing] appropriate broadband policies."<sup>40</sup> The Commission is fully capable of marshalling its internal subject matter experts to test and analyze the collected data and, where necessary, to recruit additional objective specialists. To the extent Free Press has an interest in the various policies formulated by the Commission, it is eligible to participate in the Commission's open rulemaking proceedings, and to seek reconsideration or appeal of outcomes it disputes.

Free Press is not a neutral party seeking access to the Form 477 data for the purpose of reviewing the Commission's conclusions. Free Press has a history of bias against maintaining the confidentiality of Form 477 data. In the latest iteration of rulemaking regarding Form 477, Free Press and co-commenters urged the Commission to "dismiss any claims of potential competitive disadvantage that might be caused to private

---

<sup>39</sup> See, 75 Fed. Reg. 3801, "Broadband Technology Opportunities Program Notice of Funds Availability" (2010).

<sup>40</sup> 2008 Data Order at para. 1.

carriers through release of this information;”<sup>41</sup> Free Press clarified, “we have consistently requested that the Commission provide underlying datasets to the public.”<sup>42</sup> These comments fly in the face of the afore-mentioned findings by the Commission and the U.S. District Court for the District of Columbia that Form 477 data are proprietary, and that release would risk substantial competitive harms. Free Press argues, “there is absolutely no justification to redact data concerning the availability, price and actual speeds of broadband services,”<sup>43</sup> an approach that seemingly denies the possible competitive harm that could result if individual providers’ sensitive data were inadvertently revealed. The disclosure of sensitive data to entities that dispute the elemental confidentiality of it is a troubling prospect.

Finally, Free Press also requests that the “public” be able to view the forms.<sup>44</sup> Under this proposal, a competitor or consultant not subject to Commission regulation could try to review the data and use the information for improper means under the pretense of developing its own analysis; the Commission could be limited in its ability to pursue responsive action should such reviewers cause the improper release of proprietary data.

---

<sup>41</sup> *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: Further Comments of Consumers Union, Consumer Federation of America, Free Press, and Public Knowledge*, WC Docket No. 07-38, at 2 (Aug. 1, 2008) (Free Press, et al., Joint Comments).

<sup>42</sup> Free Press, et al. Joint Comments at 7.

<sup>43</sup> Free Press, et al. Joint Comments at 7.

<sup>44</sup> Free Press Request at 1, 4.  
Joint Comments of ACA,  
ITTA, NTCA, OPASTCO,  
USTelecom, and WTA

In brief, Free Press has a demonstrated bias against maintaining the confidentiality of the data, and has furthermore not demonstrated with any sufficiency any supposed inability of the Commission to analyze and test the data. The Commission is the appropriate party to review the data, and the Free Press Request should be rejected.

### **III. CONCLUSION**

Form 477 data is competitively sensitive, and public release of that data would damage the providers from which that data emanates. The Commission has recognized the competitively sensitive nature of Form 477 data, and the judiciary has upheld the Commission's refusal to release the information pursuant to FOIA Exemption 4. The Free Press Request attempts an end-run around the Commission's rules addressing treatment of confidential information by seeking to eliminate opportunities for providers to address the confidentiality of their data. Finally, Free Press has a record of bias against maintaining the confidentiality of Form 477 data. For these reasons, as explained above, the Commission should reject the Free Press Request and continue to accord the full protections of FOIA and the Commission's rules to providers' Form 477 data.

Respectfully submitted,

s/Ross J. Lieberman

Ross J. Lieberman  
Vice President of Government  
Affairs  
American Cable Association  
4103 W Street, N.W., Suite 202  
Washington, DC 20007  
(202) 494-5661

s/Joshua Seidemann

Joshua Seidemann  
Vice President, Regulatory Affairs  
Independent Telephone &  
Telecommunications Alliance  
1101 Vermont Avenue, NW, Suite  
501  
Washington, DC 20005  
(202) 898-1520

s/Daniel Mitchell

Daniel Mitchell  
Vice President, Legal and Industry

s/Jill Canfield

Jill Canfield  
Senior Regulatory Counsel  
National Telecommunications  
Cooperative Association  
4121 Wilson Boulevard, 10<sup>th</sup> Floor  
Arlington, VA 22203  
(703) 351-2000

s/Stuart Polikoff

Stuart Polikoff  
Vice President of Regulatory Policy  
and Business  
Organization for the Promotion and  
Advancement of Small  
Telecommunications Companies  
2020 K Street, NW, 7<sup>th</sup> Floor  
Washington, DC 20006  
(202) 659-5990

s/Glenn Reynolds

Glenn Reynolds  
Vice President for Policy  
United States Telecom Association  
607 14<sup>th</sup> Street, NW, Suite 400  
Washington, DC 20005  
(202) 326-7300

s/Derrick B. Owens

Derrick B. Owens  
Director of Government Affairs  
Western Telecommunications  
Alliance  
317 Massachusetts Ave., NE  
Suite 300  
Washington, DC 20002

DATED: April 19, 2010

**CERTIFICATE OF SERVICE**

I, Brian Ford, hereby certify that a copy of the comments by the Associations was sent via electronic mail, on this, the 19th day of April 2010, to those listed on the attached sheet.

By: /s/ Brian Ford  
Brian Ford

**SERVICE LIST**  
**WC Docket No. 10-75**  
**DA 10-466**

**VIA E-MAIL**

Jeremy Miller  
Industry Analysis and Technology Division  
Wireline Competition Bureau  
Federal Communications Commission  
Room 5-B145  
445 12<sup>th</sup> Street SW  
Washington, DC 20554  
Jeremy.miller@fcc.gov

Best Copy and Printing, Inc.  
fcc@bcpiweb.com