
**Before the
Federal Communications Commission
Washington, DC 20554**

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

To: The Commission

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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SUMMARY

CTIA supports the Commission's national broadband goals and commitment to data-driven, transparent policymaking. Free Press's Request that the Commission release the raw Form 477 data to the public, however, disregards the proper process for requesting access to data from Commission reports, the commercial sensitivity of the data, and the Commission's court-affirmed stance that such data is not properly released to the public. The request should be denied.

The Commission's rules and precedent confirm what is readily apparent – that Form 477 data including specific geographic subscribership and broadband speeds is entitled to confidential treatment under FOIA exemption 4. The Commission's history of protecting carrier-specific Form 477 data is well-founded and consistent with a commitment to data-driven, transparent policymaking. The Commission has always safeguarded confidential information from disclosure. The fact that some data on Form 477 are available elsewhere *in part* or *in different formats*, or from a subset of providers, does not mean that all of the raw Form 477 data are not competitively sensitive. Given the capital-intensive nature of broadband deployment, the December 2008 data that Free Press requests will still be competitively sensitive in many geographic areas.

Free Press's ultimate concern is with the quality of the Commission's analysis of Form 477 broadband data. However, the appropriate remedy for any perceived shortcoming of Commission reports is to petition the Commission to improve the reports, not to take the radical step of releasing the raw Form 477 data to the public.

In recognition of the sensitivity of the data it requests, Free Press suggests that the Commission grant access to the data subject to a protective order. A protective order, however, would not be effective in this instance to alleviate the confidentiality concerns, and would be fundamentally different from the way protective orders have been used in prior cases. The universe of potential parties to whom the information would be available is too broad and the uses to which it could be put are too varied. As a result, Free Press's proposed protective order – and any protective order that could be used here – is so vague as to be meaningless. It would be grossly inappropriate for the Commission to make sensitive, confidential data available to anyone in the general public for virtually any purpose – particularly given the ease with which the Internet allows data to be disseminated – and expect a boilerplate protective order to guard against misuse.

Finally, Free Press's resort to the Data Quality Act is simply spurious. Like all good policymaking, the implementation of that section exempts confidential and competitively sensitive information from disclosure.

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CTIA – The Wireless Association® (“CTIA”)¹ submits the following comments in response to the Commission’s above-captioned public notice on the request by Free Press for the Commission to release raw, provider-specific FCC Form 477 data to the public.² CTIA shares the goal of ensuring that the Commission and other parties have access to the data that are necessary to shape and monitor the achievement of national broadband goals. Such access can be achieved, however, without disregarding broadband providers’ legitimate confidentiality and competitive concerns. As discussed in more detail below, Free Press’s request for access to providers’ FCC Form 477 filings is inappropriate as it seeks commercially sensitive data and would constitute a reversal of established Commission precedent that has been affirmed by the courts. Thus, the Commission should reject the request.

¹ CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, broadband PCS, ESMR and 700 MHz licensees, as well as providers and manufacturers of wireless data services and products.

² *Comment Sought on Free Press Request to Review Form 477 Data and Request for Protective Order*, WC Docket No. 10-75, DA 10-466 (rel. March 19, 2010) (the “Public Notice”). Free Press Request to Review Form Form 477 Data and for Protective Order, WC Docket No. 10-75 (filed Feb. 22, 2010) (the “Request”).

I. FREE PRESS'S REQUEST DISREGARDS RELEVANT PROCESS AND PRECEDENT UNDER FOIA

As an initial matter, Free Press's request for release of Form 477 data cannot be granted as submitted. Free Press's request should have been made under the Freedom of Information Act ("FOIA") and Section 0.461 of the Commission's rules.³ Instead, Free Press attempts to circumvent the FOIA process and standards by appealing to general principles of transparency – where the Commission has already concluded that provider-specific data are competitively sensitive and subject to protection.

Because the Form 477 data were submitted to the Commission pursuant to a validly adopted procedure for requesting confidentiality and a commitment to confidentiality made by the Commission, requests such as Free Press's for access to confidential information must be made pursuant to the Commission's FOIA processes.⁴

There is no question that, under FOIA, the raw Form 477 data should not be disclosed because they fall under FOIA Exemption 4.⁵ The information "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."⁶ Indeed, the Commission has already decided that Form 477 data are subject to confidential treatment under FOIA Exemption 4:

[F]ilers customarily guard [Form 477 broadband] data from their competitors, and release would harm [filers'] competitive interests by revealing to competitors their market strategies, their customer identities and counts, and where they have deployed their services. For example, competitors could use this data to decide where to target their service offerings, facilities construction, and marketing,

³ 47 C.F.R. § 0.461 ("Any person desiring to inspect Commission records that are not listed in §0.453 or §0.455 shall file a request for inspection meeting the requirements of this section.")

⁴ *Id.*

⁵ 5 U.S.C. § 552(b)(4).

⁶ *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

all to the detriment of Form 477 filers. For these reasons, we conclude that the requested data is protected against disclosure pursuant to FOIA exemption 4.”⁷

This decision was upheld by the U.S. District Court for the District of Columbia, and it is unquestionably correct. The geographically specific subscribership data reported in Form 477 would provide competitors with a roadmap to carrier deployment and crucial information about where providers have been successful in winning customers. Similarly, carrier- and geographically-specific speed data are invaluable to competitors seeking to plan their competitive offerings.⁸ This was the same conclusion reached by the D.C. District Court, finding that because “disclosure of even redacted [ZIP code] data from Part V [of FCC Form 477] would be likely to cause substantial competitive harm to filers, the FCC may withhold this data under Exemption 4.”⁹

Free Press’s attempt to avoid the FOIA standard is understandable given the group’s heavy resort to purported policy arguments for disclosure and nearly complete disregard for the competitive harms release of the data would cause.¹⁰ Under D.C. Circuit precedent, however, a party requesting access to confidential information under FOIA cannot “bolster the case for disclosure by claiming an additional public benefit.”¹¹ Free Press must demonstrate that release of the raw Form 477 data to the public will not cause competitive harm, and it must do so in the

⁷ Letter from Kirk S. Burgee, FCC, to Drew Clark, Center for Public Integrity, FOIA Control No. 2006-493 (Sept. 26, 2006) (available at <http://projects.publicintegrity.org/docs/telecom/telecomfoia/Response.pdf>) (“Burgess Letter”), *aff’d sub nom. Center for Public Integrity v. FCC*, 505 F. Supp. 2d 106 (D.D.C. 2007) (“Center for Public Integrity”).

⁸ See also *infra* Section II.

⁹ *Center for Public Integrity* at 16.

¹⁰ The Request includes 11 pages of purported policy arguments for disclosure (Request at 3-10, 12-14), but less than 2 pages addressing the potential harms to submitting providers (Request at 10-12).

¹¹ *Public Citizen Health Research Group v. FDA*, 185 F.3d , 898, 904 (D.C. Cir. 1999).

context of the well-established FOIA process. Its Request has done neither; thus, it must be denied.

II. THE COMMISSION RIGHTLY PROTECTS FORM 477 DATA

The Commission's treatment of Form 477 data is consistent with long-standing Commission precedent and with a commitment to data-driven, transparent policymaking. The Commission has rightly provided confidential treatment to Form 477 filings in recognition of legitimate provider concerns about the sensitivity of the data required on the form.¹² Going forward, the Commission should continue to protect this data.

In its filing, Free Press mischaracterizes FCC precedent on the protection of confidential data.¹³ While the Commission routinely provides public access to data that are not confidential or competitively sensitive (such as licensing information),¹⁴ it has a long history of protecting confidential and competitively sensitive information. For example, the confidential revenue data that providers report on Form 499 are never released to the public and are reported by the Commission only in highly aggregated form.¹⁵ Form 502 telephone number utilization data (a proxy for subscribership and market share) is released only in limited circumstances where necessary in the review of transactions, but such release is geographically limited and governed

¹² *Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, 15 FCC Rcd 7717, 7758-62 ¶¶ 88-96 (2000) (“2000 Data Order”); *Development of Nationwide Broadband Data to Evaluate Reasonable and Timely Development of Wireless Broadband Subscribership Data, and Development of Data on Interconnected Voice Over Internet Protocol (VoIP) Subscribership*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691, 9711-12 ¶ 39 (2008).

¹³ Request at 12-14.

¹⁴ See, e.g., Universal Licensing System, available at <http://wireless.fcc.gov/uls/index.htm?job=home>.

¹⁵ See, e.g., *Notice of Request for Data Filed in FCC Form 499-A*, WC Docket No. 09-15, Public Notice, 24 FCC Rcd 1502, 1502 (2009) (“the Commission recognizes that disaggregated, filer-specific [Form 499] data should be treated as confidential and should be exempt from public disclosure”).

by protective orders more restrictive than the one Free Press proposes.¹⁶ Moreover, disclosure in the context of a transfer of control is triggered by an action by the filer, not a request from the public.

Free Press is also incorrect that disclosure of the requested data is “unlikely to produce competitive harm.”¹⁷ First, it is inaccurate that the competitively sensitive data reported on Form 477 are “publicly available through other sources.”¹⁸ Significant data, including provider-specific geographic subscribership and speed levels, are not available from sources other than confidential provider records. And these data are highly competitively sensitive. As noted above, the D.C. District Court has found that geographically-specific subscribership data provides competitors with a roadmap to carrier deployment and crucial information about where providers have been successful in winning customers.¹⁹ Such data are analogous to Form 502 (NRUF) data, which the Commission also has acknowledged should be treated as confidential.²⁰ Similarly, carrier- and geographically-specific speed data are invaluable to competitors seeking to plan their competitive offerings. Other data, such as nationwide subscribership numbers, may be publicly available for some companies (*e.g.*, those that are publicly traded and subject to SEC disclosure requirements) but not for others (*e.g.*, smaller and/or privately held providers). The fact that *some* data filed on Form 477 are available elsewhere *in part* or *in different formats*, or

¹⁶ See, *e.g.*, *Applications of Atlantic Tele-Network, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 09-119, CC Docket No. 99-200, Protective Order, 25 FCC Rcd 50, 50-51 ¶ 3 (2010) (“The Commission has recognized that disaggregated, carrier-specific forecast and utilization data should be treated as confidential and should be exempt from general public disclosure.”). See *also infra* Section IV.

¹⁷ Request at 11.

¹⁸ *Id.*

¹⁹ See *supra* note 9 and associated text.

²⁰ See *supra* note 16 and associated text.

from some limited subset of providers, does not mean that the entirety of the raw Form 477 data are not competitively sensitive and is consistent with prior Commission and court precedent.

The age of the data – Free Press requests reports filed on March 1, 2009, reporting data from December 2008 – does not resolve the problem.²¹ It is simply untrue that a delay this brief “ameliorates the competitive harm that could possibly be posed by public disclosure.”²² While the broadband market is certainly “dynamic,”²³ it is sufficiently capital-intensive that significant changes will not occur in all areas every year. Stated another way, while providers are making significant advances every year in broadband deployment *nationwide*, there will always be many *specific areas* where one-year-old (or older) data are just as competitively sensitive as current data. And it is disaggregated geographic data that Free Press asks the Commission to release to the public.

Free Press also attempts to obfuscate the issue by arguing that *it* will release only aggregated data and analysis based on the raw data, which are unlikely to cause competitive harm.²⁴ But Free Press is requesting that the *Commission* release the raw Form 477 data to the *public*.²⁵ That is the basis upon which Free Press’s request must be judged.

Finally, Free Press argues that release of the raw Form 477 data to the public would be consistent with the Commission’s statement, in establishing the Form 477 reporting requirement, that “the value of the data collection is significantly enhanced by making as much information as

²¹ See Request at 11.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Request at 1 (“we request that the public be granted the opportunity to examine and analyze the data collected by the FCC on Form 477”).

possible available to the public.”²⁶ CTIA has no quarrel with this general policy, but it sheds little light on the central question raised by Free Press’s Request: How much information is it “possible” to release, consistent with well-established principles of protecting confidential and competitively sensitive data?²⁷ As the Commission has previously found, and as the courts have affirmed, it simply is not possible to release the raw Form 477 data to the public without causing competitive harm.

III. FREE PRESS’S REQUEST INAPPROPRIATELY ATTEMPTS TO BYPASS THE PROCESS FOR SEEKING CHANGES TO COMMISSION REPORTS

Free Press’s Request is clearly motivated by a belief that “the most recent High-Speed Internet Access Report contains relatively little meaningful analysis of the type enabled by the new data collection practices.”²⁸ Irrespective of whether the FCC’s broadband reports could be more effective, the radical step of releasing raw Form 477 to the public is not necessary to address any perceived shortcomings.

If Free Press believes that the FCC is not making the best use of the data it has collected, there is an appropriate avenue for requesting necessary changes: Free Press should petition the Commission to make changes to its reports – not request public release of the raw, confidential data so it can re-do the reports itself. This path – modifying Commission data reporting efforts – has been demonstrated by the Commission’s decision to revise the CMRS Competition Report,

²⁶ Request at 12, *citing 2000 Data Order*, 15 FC Rcd at 7758.

²⁷ As noted above, any other benefit to release is also irrelevant under the governing FOIA standard. *See supra* note 11 and associated text.

²⁸ Request at 3. *See also, e.g.*, Request at 5 (“many analyses leave the most interesting questions unanswered”).

which is currently being reformulated to consider new issues in the mobile wireless marketplace.²⁹

Moreover, there is every indication that the Commission is actively working on improvements to its broadband data reports. Free Press cites blog posts by Wireline Competition Bureau Chief Sharon Gillett indicating that the Commission is actively improving the reports.³⁰ At this point in the process, there is simply no reason for the Commission to throw up its hands and let the general public take over responsibility for analyzing highly confidential and competitively sensitive data.

Free Press's Request includes a wide range of recommendations for how broadband data reporting might be improved. The Commission should take these recommendations into consideration – consistent with well-established principles of protecting competitively sensitive information – as it contemplates any revisions to its broadband reporting process.³¹ But there is no basis for the radical step of releasing raw Form 477 data to the public.

IV. A PROTECTIVE ORDER WOULD NOT ADDRESS CONCERNS ABOUT RELEASE OF COMPETITIVELY SENSITIVE DATA

Free Press asserts that any concerns about release of the confidential Form 477 data could be addressed with a protective order.³² A protective order would be ineffective in this instance, however, because the universe of potential parties to whom the information would be available is too broad, the data differs from the type of confidential data typically made available under

²⁹ See generally *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless Including Commercial Mobile Services*, WT Docket No. 09-66, Notice of Inquiry, 24 FCC Rcd 11357 (2009).

³⁰ Request at 4 & n.9, 7 & n.28.

³¹ The process for revising Commission reports should be open and transparent, with full opportunity for participation by all affected stakeholders.

³² Request at 14-15.

protective order, and the expected uses of the data are too varied. As a result, the usual objectives of a protective order – putting boundaries around the use and dissemination of the confidential information – cannot be achieved. Consequently, the draft protective order that Free Press has offered – and indeed any protective order that could be considered in this context – is so vague as to be meaningless.

Notwithstanding the analysis above of the sensitivity of the data Free Press requests, the request provides little to no protection for the data through the proposed protective order. By contrast, other protective orders put clearer boundaries around the permissible uses of the confidential data. For example, in the *Media Ownership Quadrennial Review* proceeding cited by Free Press,³³ the protective order restricted parties to use of the confidential material within the context of that single proceeding.³⁴ Here, however, the request from Free Press apparently would permit parties access to the confidential raw Form 477 data for virtually any purpose, including to conduct additional analyses not included in the Commission’s own broadband report,³⁵ to study apparent differences between data reported by the Commission and that

³³ Request at 14-15 & n.55.

³⁴ *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, et al.*, MB Docket Nos. 06-121 *et al.*, Protective Order, 22 FCC Rcd 16593, 16595 ¶ 8 (2007) (access to the confidential studies could be requested “only for the purpose of participating in the Media Ownership Quadrennial Review proceeding, Docket Number 06-121”) (“*Media Ownership Protective Order*”). Similarly, in merger contexts also cited by Free Press (Request at 15 & n.57), use of confidential data accessed under protective order is restricted to the transaction at issue. *See, e.g., Applications filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, DA 10-221, Protective Order (rel. Feb. 2, 2010) (limiting use of confidential information “solely for the preparation and conduct of this license transfer proceeding before the Commission ... and any judicial proceeding arising directly from this proceeding”).

³⁵ Request at 3-6.

reported by NTIA,³⁶ to conduct Herfindal-Hirschman Index (“HHI”) studies,³⁷ to generate various maps and charts,³⁸ and to conduct additional demographic analysis.³⁹ Free Press asserts that the analyses performed by “the public” on the confidential data could “assist the Commission in making a variety of policymaking choices.”⁴⁰ Free Press provides a “non-exhaustive” list of at least four distinct ongoing Commission proceedings in which such analysis could be useful (National Broadband Plan, Universal Service, Section 706 Inquiry, and Open Internet).⁴¹ Consistent with this open-ended approach, Free Press’s proposed protective order would allow parties to seek access to the confidential Form 477 data “for the purpose of participating in FCC proceedings”⁴² – apparently, *any* proceedings.

Further, the data underlying the studies in the *Media Ownership Quadrennial Review* that Free Press cites also were not analogous to the confidential Form 477 data. The confidential data in the *Media Ownership Quadrennial Review* is described in the protective order as the “proprietary data sets created by the authors” of eight media ownership studies.⁴³ The data in that case were not confidential data supplied to the Commission by regulated entities on a compulsory form (as in the case of Form 477), but rather data compiled in a proprietary process by scholars commissioned by the FCC.⁴⁴

³⁶ Request at 6.

³⁷ *Id.* at 8.

³⁸ *Id.* at 9.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Request, Attachment at 4 ¶ 8.

⁴³ *Media Ownership Protective Order*, 22 FCC Rcd at 16594 ¶ 2.

⁴⁴ Although some authors of the studies were Commission staff, the findings and conclusions were those of the authors and did not represent the views of the FCC. As discussed above, even in the case of a merger proceeding, where the parties *voluntarily* provide information to the
(continued on next page)

Finally, in other contexts where the Commission has used protective orders, the universe of parties with potential access to the confidential information has been much more finite. Free Press’s Request appears to describe the reasons why *it* wishes to have access to the confidential data, but its request is that “*the public* be granted the opportunity to examine and analyze the data collected by the FCC on Form 477.”⁴⁵ In these respects, Free Press’s request is fundamentally different from prior cases in which the Commission has used protective orders to safeguard confidential information. In this case, there is no meaningful limit to the number of parties who would have access to the data or the uses to which the data could be put. It would be grossly irresponsible for the Commission to make sensitive, confidential data available to anyone in the general public for virtually any purpose – particularly given the ease with which the Internet allows information to be disseminated – and expect a broad boilerplate protective order to guard against misuse.

For these reasons, a protective order would not alleviate the potential harm from the release of the raw Form 477 data.

V. GUIDELINES FOR IMPLEMENTING THE DATA QUALITY ACT SPECIFICALLY EXEMPT CONFIDENTIAL DATA

As Free Press notes, the Data Quality Act mandated that OMB and federal agencies establish standards for the quality, objectivity, utility, and integrity of information that agencies disseminate.⁴⁶ Free Press fails to acknowledge, however, that both OMB’s and the FCC’s

Commission to seek approval of a proposed transaction, the Commission has limited the scope of the protective order.

⁴⁵ Request at 1 (emphasis added).

⁴⁶ *Id* at 15-16, citing Office of Management and Budget, *Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies; Republication*, 67 Fed. Reg. 8452 (2002) (“OMB Guidelines”); *Implementation of Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and* (continued on next page)

guidelines repeatedly recognize that the statutory goals must yield to confidential and competitive sensitivity concerns.

Specifically, the OMB Guidelines mandate that data and analysis be “transparent” and “reproducible,” and to this end urge “[m]aking data publicly available.”⁴⁷ “However,” the OMB Guidelines note, “the objectivity standard does not override other compelling interests such as privacy, trade secrets, intellectual property, and other confidentiality protections.”⁴⁸ Reflecting this well-grounded limitation, the FCC’s own Guidelines provide that “confidential information” and “trade secrets” are “exempt from these guidelines.”⁴⁹

The implementation of the Data Quality Act, like all good policymaking, recognizes the need to protect confidential and competitively sensitive information. Free Press’s attempts to use the Data Quality Act to bolster its unsupportable request are simply spurious.

Integrity of Information Pursuant to Section 515 of Public Law No. 105-544, Notice of Information Quality Guidelines, 17 FCC Rcd 19890 (2002) (“FCC Guidelines”).

⁴⁷ OMB Guidelines, 67 Fed. Reg. at 8460.

⁴⁸ *Id.*

⁴⁹ FCC Guidelines, 17 FCC Rcd at 19897.

CONCLUSION

Free Press's Request for confidential data submitted to the Commission on Form 477 was not properly brought or supported under FOIA, and is inconsistent with good policy. It must be denied.

Respectfully submitted,

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