

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

OPPOSITION OF COMPTTEL

COMPTTEL, through counsel, hereby submits its opposition to the above-captioned Free Press Request that the Commission make publicly available access to confidential data submitted by broadband providers on Form 477 for the year ending December 31, 2008.¹ Free Press contends that public disclosure of the Form 477 raw data is warranted because the Commission could have done a better job of analyzing the broadband subscribership data collected on the form.² Rather than make the data that carriers submitted to the Commission on a confidential basis publicly available, however, the Commission should consider whether steps are necessary to ensure that the semi-annual High Speed Internet Access Reports appropriately reflect the status of actual broadband deployment and subscribership and the extent to which end users have a choice of providers.

Ten years ago when the Commission began collecting broadband data on Form 477, it assured providers that their information would not be publicly disclosed and would be published only once aggregated in a way that did not identify individual providers.³ Recognizing the

¹ Free Press Request at 1.

² *Id.* at 4-7.

³ *In the Matter of Local Competition and Broadband Reporting*, CC Docket No. 99-301, Report and Order, FCC 00-114 (rel. Mar. 30, 2000) at ¶ 91.

competitive sensitivity of the data broadband providers were being asked to submit, the Commission pledged to keep the provider-specific broadband information confidential even where providers did not formally request non-disclosure.⁴

Any request to inspect confidential materials on file with the Commission must make a “persuasive showing” as to the reasons for inspection.⁵ In determining whether a persuasive showing has been made, the Commission will weigh the policy considerations favoring non-disclosure against the reasons cited for permitting inspection.⁶ Because Free Press has failed to make a persuasive showing that broadband providers’ raw data should be made available to the public (even subject to protective order), its request for release of the data should be denied.

Free Press urges that the Form 477 raw data should be released to the public because the Commission’s most recent High-Speed Internet Access Report⁷ fails to make the best use of the data. According to Free Press, the High-Speed Internet Access Report for year end 2008 “contains relatively little meaningful analysis of the type enabled” by the more granular data collected on the revised Form 477. As a result, Free Press contends that the raw data should be made available “for independent analysis by a research community vastly larger than FCC staff.”⁸

⁴ *Id.*

⁵ See, Section 0.457(d)(2) of the Commission’s Rules, 47 C.F.R. §0.457(d)(2); *In the Matter of Examination of Policy Concerning The Treatment of Confidential Information Submitted To The Commission*, GC Docket No. 96-55, Report and Order (rel. Aug. 4, 1998) at ¶ 16.

⁶ Section 0.457 of the Commission’s Rules.

⁷ Industry Analysis and Technology Division, Wireline Competition Bureau, “High-Speed Services for Internet Access: Status as of December 31, 2008 (rel. Feb. 2010).

⁸ Free Press Request at 3, 4.

The Commission has acknowledged in the National Broadband Plan and elsewhere that there is a need for improvement in its broadband data collection and analysis and that better data and enhanced use of that data will present a more accurate picture of broadband availability, penetration and competition.⁹ The solution, however, is not to release providers' competitively sensitive information to the public in the hope and anticipation that "a research community vastly larger than the FCC staff" will independently analyze the data and produce a better product, but for the Commission to evaluate its own data collection and analytical processes and make any necessary changes. The Commission has never asserted that it does not have adequate staff or that the staff does not have adequate expertise to undertake and perform a more thorough and expedient review and analysis of the Form 477 data or to generate a more informative and utilitarian report. Ensuring that the Commission's resources are put to their best and highest use in analyzing the data will achieve the objective cited by Free Press for disclosing the data publicly while preserving the confidentiality of the broadband providers' competitively sensitive submissions.

To buttress its request for the confidential data, Free Press alleges that "[b]road disclosure of Form 477 analysis is unlikely to produce competitive harm" because the 2008 data that it seeks to analyze is old and much of the data "is publicly available through other sources, including corporate web sites that display availability of service, quarterly earnings calls, and other state and federal proceedings."¹⁰ These allegations undermine, rather than support, Free Press' request for disclosure. If the information is publicly available, Free Press can obtain

⁹ Connecting America: The National Broadband Plan at 43-44, 335; "Tracking Broadband Data," February 15, 2010 blog post by Sharon Gillett and Paul de Sa.

¹⁰ Free Press Request at 11.

whatever it needs from the public record. If the data is so dated that its release will not cause competitive harm, it is undoubtedly also too dated to have much utility in identifying exactly where broadband providers currently are providing broadband service and where customers currently are subscribing. As a result, release of the dated confidential data would not advance the public interest in tracking the availability of access to broadband.

Free Press' proposal to publicly release only "aggregated data, statistical analyses and econometric analyses based on raw data"¹¹ does not alleviate the potential for competitive harm to broadband providers that have submitted their data to the Commission. Free Press has requested that the raw data be made available to any member of the public that signs a Protective Order.¹² The proposed Protective Order submitted by Free Press does not restrict parties reviewing the data to publicly release only aggregated data and analysis, or even to use the raw data to analyze the extent of broadband deployment and subscribership throughout the nation or the number of providers offering service in any geographic area. Indeed, the only limitation on use of the data is found at paragraph 8 of the Protective Order which states that the "Reviewing Parties shall use the Form 477 Data, and any information derived there from, only for the purpose of participating in FCC proceedings."¹³

Finally, Free Press' criticisms of the procedures adopted by the Commission with respect to the confidential treatment of Form 477 data are overblown and unfounded.

¹¹ *Id.* at 10-11.

¹² *Id.* at 1, 15 and Exhibit A.

¹³ *Id.* at Exhibit A, ¶ 8. Allowing the data to be used in any Commission proceeding is contrary to the Commission's general rule that information subject to a protective order should be used only in the proceeding in which it was obtained. *In the Matter of Examination of Policy Concerning The Treatment of Confidential Information Submitted To The Commission*, GC Docket No. 96-55, Report and Order (rel. Aug. 4, 1998) at ¶31.

Most egregiously, Free Press alleges that the “Commission has effectively exempted providers from demonstrating that Form 477 data ought to be treated confidentially” by allowing them to simply check a box on the form to request non-disclosure of some or all of the information filed.¹⁴ While the Commission has streamlined the process for requesting non-disclosure for Form 477 filers, it has not exempted broadband providers from demonstrating that their Form 477 raw data is entitled to confidential treatment. As the Commission has made clear, when it receives a request for, or proposes to disclose the information contained in the Form 477, it will notify the filing broadband providers and require them to make the detailed confidentiality justification required by Section 0.459 of the Commission’s Rules.¹⁵ Thus, if the Commission proposes in response to Free Press’ request that Form 477 raw data should be released to the public, which it should not do, it must give each provider that submitted data the opportunity to demonstrate with particularity why disclosure of its information could result in substantial competitive harm. Contrary to Free Press’ suggestion, the Commission’s streamlined procedure

¹⁴ *Id.* at 13.

¹⁵ *In the Matter of Local Competition and Broadband Reporting, supra*, at ¶87 (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”); ¶¶ 90-91. *See also Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), where the Supreme Court quoted from the House of Representatives Report on the Freedom of Information Act stating that Exemption 4 is designed to protect information given to an agency in confidence (as is the Form 477 data) and that citizens should be able to trust the government when it has pledged not to disclose information it receives: “[Exemption 4] would assure the confidentiality of information obtained by the Government through questionnaires or through material submitted and disclosures made in procedures such as the mediation of labor-management controversies. It exempts such material if it would not customarily be made public by the person from whom it was obtained by the Government. . . . It would . . . include information which is given to an agency in confidence, since a citizen must be able to confide in his Government. Moreover, where the Government has obligated itself in good faith not to disclose documents or information which it receives, it should be able to honor such obligations.’” *Id.* at 291, n. 11 (emphasis in original).

does not go a “step above and beyond the protections required by the Commission’s confidentiality rules,”¹⁶ but merely delays somewhat the time when carriers requesting non-disclosure must make their detailed confidentiality showings.

For the foregoing reasons, the Commission should conclude that Free Press has failed to make a persuasive showing for disclosure of the confidential data submitted on Form 477 and deny its request to make the raw data available to the public.

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Respectfully submitted,

/s/

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¹⁶ Free Press Request at 13.