

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

I. INTRODUCTION

Pursuant to the schedule set forth by the Federal Communications Commission (“FCC” or “Commission”),¹ the National Association of State Utility Consumer

¹ Public Notice, DA 09-1598 (rel. July 24, 2009).

Advocates (“NASUCA”)² and the New Jersey Division of Rate Counsel³ (collectively, “State Advocates”)⁴ hereby submit these comments in response to the 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).”⁵

II. THE REVISED FORM 477 DATA REPORTING REQUIREMENTS

As a result of the *Form 477 Order*, the FCC is now collecting broadband data that is more granular than the data that had been previously collected. The Commission requires broadband service providers (wireline, terrestrial fixed wireless, and satellite) to

² NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Ch. 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

³ Rate Counsel, a member of NASUCA, is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The Rate Counsel is a Division within the Department of the Public Advocate, which is authorized by statute to “represent the public interest in such administrative and court proceedings... as the Public Advocate deems shall best serve the public interest,” N.J.S.A. § 52:27EE-57, i.e., an “interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.” .

⁴ State Advocates have individually and collectively submitted numerous comments previously in WC Docket No. 07-38 and GN Docket No. 09-51, and in those comments have addressed, among other things, Form 477 matters, broadband data collection, broadband mapping, and the treatment of confidential data. In its *Form 477 Order and FNPRM*, the FCC revised the Form 477 (adopting recommendations of NASUCA, Rate Counsel, and others to require the collection of more detailed, granular broadband data); in the *FNPRM*, the FCC sought further comment on broadband data collection and mapping. *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 Subscriberhip Data, and Development of Data on Interconnected Voice over Internet Protocol (VoIP) Subscriberhip*, WC Docket No. 07-38, Report And Order And Further Notice Of Proposed Rulemaking, FCC 08-89 (rel. June 12, 2008) (“*Form 477 Order and FNPRM*”). While the comments on the *FNPRM* were being reviewed, the BDIA became law (on October 10, 2008).

⁵ Public Notice, DA 09-1550 (rel. July 17, 2009), citing BDIA, Pub. L. No. 110-385, 122 Stat. 4097 (codified as 47 U.S.C. §§ 1301-04).

submit subscriber counts by Census Tract.⁶ Also, broadband service providers must report residential customers separately from business customers and must group customers by the upload and download speeds of service provided.⁷ These reporting changes took effect with the March 2009 reporting of 2008 year-end data.

Mobile wireless broadband service providers are not required to report subscribership at the Census Tract level, but instead must continue to provide statewide subscribership totals. Mobile wireless providers are, however, required to list the Census Tracts that best correspond to their broadband service areas.⁸

The Commission now requires mobile wireless broadband providers to report the number of subscribers purchasing a data plan that allows them to access “the lawful Internet content of their choice” at speeds of 200 kbps or higher.⁹ The Commission specifically excludes from this count those data subscribers whose access is limited to that “customized-for-mobile content.”¹⁰ Mobile broadband service providers must also

⁶ *Form 477 Order*, at ¶ 14. Previously, broadband service providers provided subscribership data at the state level, and listed all ZIP codes with at least one customer. As stated in the *Form 477 Order* (at footnote 36), “The Census bureau defines a Census Tract as a ‘small, relatively permanent statistical subdivision of a county delineated by a local committee of census data users for the purpose of presenting data. Census tract boundaries normally follow visible features, but may follow governmental unit boundaries and other non-visible features in some instances; they always nest within counties. Designed to be relatively homogeneous units with respect to population characteristics, economic status, and living conditions at the time of establishment, census tracts average about 4,000 inhabitants. They may be split by any sub-county geographic entity.’ U.S. Census Bureau, http://factfinder.census.gov/home/en/epss/glossary_c.html (viewed March 12, 2008).”

⁷ Separate reporting for residential and business customers was not required by the *Form 477 Order*. However, citing the comments of the New Jersey Division of Rate Counsel, the Commission, in an Order on Reconsideration also released June 12, 2008, required the separate reporting of business and residential broadband customers. See Order on Reconsideration, FCC 08-148 (rel. June 12, 2008), at ¶ 7 and n. 16.

⁸ *Form 477 Order*, at ¶ 16.

⁹ *Id.*, at ¶ 23.

¹⁰*Id.* The Commission clarified that “customized-for-mobile content includes, for example, text and multimedia messaging, as well as the capacity to download ringtones and games” and further stated that it “also includes content which encapsulates and packages a limited set of websites optimized solely for wireless device usage.” *Id.*, at footnote 86.

report as residential subscriptions those subscriptions that are not billed to a business, government, or institutional account.¹¹

In the *Form 477 Order*, the Commission updated the reporting categories for broadband service. More specifically, the Commission moved from five tiers describing the maximum connection speed (200 kbps to 2.5 mbps, 2.5 mbps to 10 mbps, 10 mbps to 25 mbps, 25 mbps to 100 mbps, and greater than 100 mbps) to eight speed tiers. The new speed tiers are: (1) greater than 200 kbps but less than 768 kbps; (2) equal to or greater than 768 kbps but less than 1.5 mbps; (3) equal to or greater than 1.5 mbps but less than 3.0 mbps; (4) equal to or greater than 3.0 mbps but less than 6.0 mbps, (5) equal to or greater than 6.0 mbps but less than 10.0 mbps; (6) equal to or greater than 10.0 mbps but less than 25.0 mbps; (7) equal to or greater than 25.0 mbps but less than 100.0 mbps; and (8) equal to or greater than 100 mbps.¹² Additionally, in recognition of the growing importance of upload speeds as well as download speeds, the Commission required service providers to categorize subscribers based on both download and upload speeds.¹³

III. 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

¹¹*Id.*, at ¶ 24.

¹²*Id.*, at ¶ 20.

¹³The Commission declined to create a system that would automatically adjust the speed tiers to reflect improving technology but instead stated that it would review the speed tiers every two years and make any adjustments necessary. *Id.*, at ¶¶ 21-22.

submissions of broadband service providers.”¹⁴ The FCC seeks comment on how to interpret the term “aggregate” in Section 106(h)(1).¹⁵ State Advocates recommend that the FCC, in its implementation of the BDIA, interpret the term “aggregate” to connote all levels of aggregation that the FCC compiles, ranging from the “raw” data as filed in the Form 477 up to and including all levels of aggregation that the FCC undertakes in its analysis and reporting of broadband data.

The FCC has not yet issued a high speed report that reflects the revised Form 477 data,¹⁶ but, in its preparation of such a report, and in its development of a National Broadband Plan, likely will aggregate data according to different categories. The FCC seeks comment on the extent to which the “adjective ‘aggregate’ require[s] the Commission to provide to eligible entities data that is more aggregated than the raw data submitted by Form 477 filers.” State Advocates anticipate that the FCC, in fulfilling its own broadband goals, and in preparation for its release of its statistical high speed report, likely will be “aggregating” raw Form 477 data, and, therefore, State Advocates recommend that the FCC provide eligible entities not only with the raw Form 477 data, but also with the various levels of aggregation that the FCC undertakes, which could include aggregation by, among others, the following categories:

- Upload speed;

¹⁴ Section 106(i)(2) of the BDIA defines “eligible entity” as: (A) an entity that is either (i) an agency or instrumentality of a State, or a municipality or other subdivision (or agency or instrumentality of a municipality or other subdivision) of a State; (ii) a nonprofit organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and that is exempt from taxation under section 501(a) of such Code; or (iii) an independent agency or commission in which an office of a State is a member on behalf of the State; and (B) is the single eligible entity in the State that has been designated by the State to receive a grant under this section. BDIA § 106(i)(2); 47 U.S.C. § 1304(i)(2).

¹⁵ Public Notice, DA 09-1550 (rel. July 17, 2009) at 2.

¹⁶ The FCC issued its most recent report earlier this month, which was based on the old Form 477. Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *High-Speed Services for Internet Access: Status as of June 30, 2008*, (rel. July 23, 2009).

- Download speed;
- Residential customers;
- Business customers;
- Census Tract;
- Technology (e.g., DSL, FiOS, cable modem); and
- Mobile.

The FCC seeks comment on “how much the Commission should aggregate the data that it provides to eligible entities, and what factors it should consider in determining the appropriate level of aggregation.”¹⁷ In its course of compiling and analyzing broadband data, the FCC likely will aggregate data in different ways for different purposes. All levels of aggregation, including the most disaggregated possible (i.e., the “raw” Form 477 data), should be provided to eligible entities to facilitate and support any broadband mapping projects such entities may undertake with stimulus monies¹⁸ as well as to support any broadband planning projects they may undertake on their own.

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

The Commission also seeks “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

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

¹⁸ See National Telecommunications and Information Administration Notice of Funds Availability, Federal Register, Vol. 74, No. 129, at 32545 (July 8, 2009).

public in various periodic statistical reports released by the Bureau.”¹⁹ As explained above, eligible entities require access to the granular Form 477 data. The disaggregated data is particularly valuable to support the broadband mapping and deployment efforts of eligible entities that, using NTIA funds, or other public monies, seek to ensure that unserved and underserved areas of the country obtain broadband access.

The FCC also seeks “comment on section 106(h)(2) of the BDIA, which requires eligible entities to treat ‘any matter that is a trade secret, commercial or financial information, or privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider and the eligible entity.’”²⁰ The FCC specifically seeks “comment on whether that section is self-effectuating or whether the Commission should take any measures to ensure eligible entities’ compliance with section 106(h)(2).”²¹

Although State Advocates believe that eligible entities should not disclose disaggregated data to non-eligible entities without the consent of the filers of the Form 477 data, eligible entities should be allowed to disclose data to other eligible entities. Furthermore, the FCC, as it aggregates data, should require providers to demonstrate that particular levels of aggregation merit confidential treatment. To the greatest extent possible, data should be public, to enable sound, open, and informed policy making at all levels of government.

In consequence, the FCC needs a mechanism to determine which alleged proprietary claims are valid. The FCC should itself, in its provision of information,

¹⁹ Public Notice, DA 09-1550 (rel. July 17, 2009) at 2.

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

²¹ Id.

distinguish clearly that information which is protected from that information which is not subject to 106(h)(2) restrictions. Finally, the FCC should 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.

We note that at its mid-year meeting, the National Association of Regulatory Utility Commissioners (“NARUC”) adopted a resolution that the

FCC, in accord with the requirements of the BDIA ... immediately: (1) provide States that so request with disaggregated data from the relevant current Form 477 submissions by wireline and wireless broadband service providers; (2) require broadband service providers to simultaneously file future Form 477 reports with both the FCC and the requesting States; and (3) condition the aforementioned on a State’s commitment to treat such Form 477 reports as privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider.²²

State Advocates agree with the NARUC resolution.

V. CONCLUSION

State Advocates welcome the opportunity to participate in this dialogue about broadband data collection and reporting, and urge the Commission to adopt the recommendations set forth in these initial comments.

Respectfully submitted,

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²² See <http://www.naruc.org/Resolutions/Resolution%20on%20Broadband%20Mapping%20Data1.pdf>.

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