PUBLIC NOTICE

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NOTICE OF REQUEST FOR ACCESS TO FORM 477 BROADBAND DATA
PLEADING CYCLE ESTABLISHED

WC Docket No. 09-214

Comment Date: December 7, 2009

The National Telecommunications and Information Administration (NTIA) is evaluating applications and comments to the applications that it has received from broadband service providers in its administration of the Broadband Technology Opportunities Program (BTOP).[1] NTIA requested access to the Form 477 data that the Commission collects from broadband service providers for the purpose of facilitating that evaluation.[2]

The Commission collects information about broadband connections to end user locations, wired and wireless local telephone services, and interconnected Voice over Internet Protocol (VoIP) services in individual states on FCC Form 477.[3] The Commission allows filers to request confidential treatment for competitively sensitive information in a particular Form 477 submission by making the appropriate selection on the cover page of Form 477.[4] If the Commission receives a request for release of information pursuant to the Freedom of Information Act (FOIA),[5] the filer is notified and afforded an opportunity to show why the data should not be released.[6] The Commission's current policies and procedures regarding

[1] *See* Letter to Sharon Gillett, Chief, WCB, from Anthony G. Wilhelm, Director, Broadband Technology Opportunities Program, and Deputy Associate Administrator, Office of Telecommunications and Information Applications, NTIA, WC Docket No. 09-214 (dated November 23, 2009) (*NTIA Request Letter*).

[2] *NTIA Request Letter* at 2.

[3] Instructions for Local Telephone Competition and Broadband Reporting Form (FCC Form 477), http://www.fcc.gov/Forms/Form477/477inst.pdf, at 1 (2009) (*Form 477 Instructions*).

[4] *See Local Competition and Broadband Reporting,* CC Docket No. 99-301, Report and Order, 15 FCC Rcd 7717, 7759, at para. 90 (2000) (*2000 Data Gathering Order*); *Local Telephone Competition and Broadband Reporting*, Report and Order, WC Docket No. 04-141, 19 FCC Rcd 22340, 22352, at para. 24 n.56 (2004); *Form 477 Instructions* at 19.

[5] 47 U.S.C. § 552.

[6] *2000 Data Gathering Order*, 15 FCC Rcd at 7759, para. 90; *2004 Data Gathering Order*, 19 FCC Rcd at 22352, para. 24 n.56. In implementing the streamlined procedure, the Commission explained that it expected that this mechanism would "lead to a greater level of compliance . . . and will give providers confidence that protectible data will not be published in our regular reports." *2000 Data Gathering Order*, 15 FCC Rcd at 7759, para. 90.

the confidential treatment of broadband data submitted using Form 477 include the exclusive use of aggregated data in our published reports.[7]

In general, the Commission may share information it has collected with another government agency.[8] Although the Commission's regulations provide that proprietary and commercially sensitive information will be withheld from public disclosure, subject to the public's right to seek disclosure under the FOIA and implementing regulations,[9] the Commission may disclose to other federal agencies records that have been submitted to the Commission in confidence upon another agency's request.[10]

NTIA explains in its request that, pursuant to the direction of the American Recovery and Reinvestment Act of 2009,[11] it and the U.S. Department of Agriculture's Rural Utilities Service (RUS) jointly issued a Notice of Funds Availability (NOFA)[12] to make grants to provide broadband access to unserved and underserved areas of the country.[13] The NOFA directs BTOP infrastructure applicants to identify in their applications the proposed service areas for funding that meet certain criteria for determining "unserved" or "underserved" areas.[14] NTIA requests access to the Form 477 data that the Commission collects from broadband service providers because it "intends to use this data to help validate the unserved or underserved classifications of the BTOP applicants' proposed funded service areas."[15]

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[7] *See 2004 Data Gathering Order*, 19 FCC Rcd at 22352, para. 24.

[8] 44 U.S.C. § 3510.

[9] 5 U.S.C. § 552; 47 C.F.R. § 0.457(d), 0.459(d).

[10] 47 C.F.R. § 0.442(a) ("The acceptance [by the Commission] of materials in confidence under § 0.457 or § 0.459 does not provide assurance against their disclosure to other agencies."); *see also* 47 C.F.R. § 0.442(d).

[11] American Recovery and Reinvestment Act of 2009 (Recovery Act), § 6001, Pub. L. No. 111-5, 123 Stat. 115 (2009).

[12] Notice of Funds Availability and Solicitation of Applications (NOFA), 74 Fed. Reg. 33104 (rel. Jul. 9, 2009).

[13] *NTIA Request Letter* at 1 (citing Recovery Act, § 6001(b), 123 Stat. at 512-513).

[14] The NOFA defines an area to be "unserved" where at least 90 percent of the households in the proposed funded service area lack access to facilities-based, terrestrial broadband service at the minimum transmission speed. NOFA, 74 Fed. Reg. at 33109. An "underserved" area for last-mile projects means a proposed funded service area where at least one of the following criteria is met: (1) no more than 50% of the households have access to facilities-based, terrestrial broadband service at greater than the minimum broadband transmission speed; (2) no fixed or mobile broadband service provider advertises broadband transmission speeds of at least 3 mbps downstream; or (3) the rate of broadband subscribership is 40% of households or less. For middle-mile projects, a proposed funded service area is underserved if at least one interconnection point terminates in an area that qualifies as unserved or underserved for last-mile projects. *Id*.

[15] *NTIA Request Letter* at 2. As NTIA points out, the Commission recently began to require wired, fixed wireless, and satellite-based broadband providers to report their subscriber counts at the Census-Tract level, and to report broadband collections at an increased number of upload and download transmission tiers. *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*, WC Docket No. 07-38, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 9691 (2008); *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, Order on Reconsideration, 23 FCC Rcd 9800 (2008).

In the *NTIA Request Letter*, NTIA commits, as provided in the NOFA, to "protect confidential and proprietary information from public disclosure to the fullest extent authorized by applicable law, including the [FOIA], the Trade Secrets Act, as amended (18 U.S.C. § 1905), and the Economic Espionage Act of 1996 (18 U.S.C. § 1831 *et seq*.)."[16] NTIA further maintains that, in the event of a request by a third party for disclosure under the FOIA of the Form 477 data that NTIA has received from the Commission, NTIA "will act in accordance with its FOIA regulations and will consult with or refer the matter to the FCC as appropriate."[17]

Pursuant to the Commission's regulations, affected parties have until December 7, 2009 to oppose disclosure to NTIA of the Form 477 data that the Commission collects from broadband service providers.[18] If the Commission receives no opposition from affected parties by that date, the Commission will disclose the information requested above to NTIA. If disclosure is opposed, the procedures set forth in 47 C.F.R. § 0.442 shall apply. All pleadings should refer to WC Docket No. 09-214. Comments may be filed using (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies.[19]

Comments filed through the ECFS can be sent as an electronic file via the Internet to http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov.[20] Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002.

-The filing hours at this location are 8:00 a.m. to 7:00 p.m.

-All hand deliveries must be held together with rubber bands or fasteners.

-Any envelopes must be disposed of before entering the building.

-Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

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[16] *NTIA Request Letter* at 2 (citing NOFA, 74 Fed. Reg. at 33126).

[17] *NTIA Request Letter* at 2.

[18] *See* 47 C.F.R. §§ 0.442(d)(1), 1.4(e) and 1.4(j). Because the 10th day from release of this Public Notice falls on a weekend, the deadline for submitting an opposition is extended to Monday, December 7, 2009 pursuant to Commission rule 1.4(j).

[19] *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

[20] Filers should follow the instructions provided on the Federal eRulemaking Portal website for submitting comments.

-U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554.

-All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer and Governmental Affairs Bureau at (202) 418-0530, (202) 418-0432 (TTY).

Parties must also send a courtesy copy of their filing to Jeremy Miller, Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 5-B145, Washington, D.C. 20554. His email address is jeremy.miller@fcc.gov; his telephone number is (202) 418-1507.

Pursuant to section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, this proceeding will be conducted as a permit-but-disclose proceeding in which ex parte communications are permitted subject to disclosure. For further information, please contact Jeremy Miller at the contact information listed above.

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