

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Restoring Internet Freedom)	WC Docket No. 17-108
)	
Bridging the Digital Divide for Low-Income Consumers)	WC Docket No. 17-287
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42

**REPLY OF INCOMPAS TO WISPA’S PARTIAL OPPOSITION TO PETITION FOR
RECONSIDERATION OF INCOMPAS**

INCOMPAS—the internet and competition networks association—hereby responds to WISPA – *Broadband Without Boundaries* (“WISPA”)’s Partial Opposition to INCOMPAS’ Petition for Reconsideration (“Opposition”) filed in the above-captioned proceedings.¹

I. INTRODUCTION AND SUMMARY

INCOMPAS’ Petition for Reconsideration explains that broadband internet access service (“BIAS” or “broadband”) must be classified as a Title II service in order for the FCC to regulate pole attachments for broadband-only providers. INCOMPAS disagrees with WISPA’s Opposition, which argues that the Commission can extend pole attachment benefits to broadband-only providers through its ancillary authority. Relying on the Commission’s ancillary authority for these protections is immensely speculative and unlikely to pass judicial review. Moreover, the FCC’s *Remand Order* addressed this issue under a non-Title II approach and, rather than using an alternative source of authority, the Commission declined to use its ancillary

¹ See *Restoring Internet Freedom et al.*, WISPA – *Broadband Without Boundaries* Partial Opposition to Petition for Reconsideration of INCOMPAS, WC Docket Nos. 17-108, 17-287, 11-42 (fil. Dec. 14, 2023).

authority to provide protections to broadband-only providers. WISPA's Opposition should be denied, and as INCOMPAS has demonstrated in our Petition for Reconsideration and in our comments responding to the most recent net neutrality NPRM, the Commission should grant our Petition and reclassify BIAS in the *RIFO* docket.²

II. RELYING SOLELY ON ANCILLARY AUTHORITY IS TOO SPECULATIVE OF AN APPROACH TO ENSURE SECTION 224 PROTECTIONS FOR BROADBAND-ONLY PROVIDERS.

As INCOMPAS explained in its Petition for Reconsideration, BIAS must be classified as a Title II service in order for the Commission to regulate pole attachments effectively and to ensure that BIAS-only providers have the same protections granted to cable operators and telecommunications providers under Section 224 of the Communications Act ("Section 224").³ WISPA agrees with INCOMPAS that broadband-only providers should have the same access to poles and other infrastructure as cable television systems and providers of telecommunications service, but it disagrees on the regulatory classification of BIAS to do so. While INCOMPAS supports the FCC classifying BIAS as a Title II service, WISPA relies on the argument that the FCC can implement Section 224 protections for broadband-only providers through its ancillary authority obtained through other provisions of the Communications Act. INCOMPAS disagrees for two main reasons: (1) relying on ancillary authority is too speculative, especially for such important protections; and (2) in the *Remand Order*, the FCC expressly declined to rely on other sources of authority to extend Section 224 protections to broadband-only providers.

² See *Restoring Internet Freedom et al.*, INCOMPAS Petition for Reconsideration, WC Docket Nos. 17-108, 17-287, 11-42, at 18-22 (fil. Feb. 4, 2021) ("*INCOMPAS Petition for Reconsideration*"); see also *Safeguarding and Securing the Open Internet*, INCOMPAS Comments, WC Docket No. 23-320, at 4-5 (fil. Dec. 14, 2023).

³ See *INCOMPAS Petition for Reconsideration*, at 18-22; see also 47 U.S.C. § 224.

(a) WISPA's Opposition Is Based On A Speculative And Highly Uncertain Approach And Is Insufficient To Ensure Pole Access For Broadband-Only Providers.

INCOMPAS and WISPA both agree that broadband-only providers should have Section 224 protections regarding pole access. INCOMPAS supports the FCC relying on its Title II authority, which has a clear legal and regulatory path forward. WISPA, on the other hand, argues that the FCC can still implement Section 224 protections for broadband-only providers through its ancillary authority obtained through other provisions of the Communications Act, including Sections 154, 163, 257, and 706. However, relying on the Commission's ancillary authority to ensure Section 224 protections is too speculative, especially at a time when broadband deployment has never been more important or encouraged, and with the Broadband Equity, Access, and Deployment ("BEAD") Program funding that likely will begin flowing in the next 12 to 18 months that broadband-only providers will be competing for to build out.

While WISPA points to several potential statutes that it argues the FCC could rely on for its ancillary authority, it is far from guaranteed that doing so would be upheld by a court. A clear regulatory framework, such as Title II, will always be more reliable than ancillary authority. For example, in *Comcast v. FCC*, the FCC acknowledged that it had no express statutory authority over the practices in question for broadband service and was relying on its ancillary authority through congressional policy statements as well as various provisions of the Communications Act, including Section 706 of the Telecommunications Act. However, the Court ruled against the FCC and found that the Commission "failed to tie its assertion of ancillary authority . . . to any 'statutorily mandated responsibility.'"⁴

⁴ *Comcast Corp. v. FCC and USA*, 600 F.3d 642, 661 (D.C. Cir. 2010).

INCOMPAS is concerned that the FCC likely will face the same scrutiny, and the agency's reliance on ancillary authority would lead to an uncertain legal battle and would not guarantee Section 224 protections for broadband-only providers. Broadband is the service that consumers want and need, and broadband-only providers should receive the same treatment and protections as their competitors as demonstrated in INCOMPAS' Petition for Reconsideration and our most recent comments in the FCC's net neutrality proceeding. The Commission should decline to follow the path that WISPA suggests.

(b) The FCC's *Remand Order* Shows That Title II Ensures Section 224 Protections For Broadband-Only Providers.

INCOMPAS filed its Petition for Reconsideration in direct response to the FCC's *Remand Order*. After the *Mozilla* Court remanded the issue of Section 224 under a Title I framework back to the FCC, the Commission clearly demonstrated why a Title I framework does not guarantee rights to broadband-only providers. In the *Remand Order*, the then-FCC specifically declined to address pole access rights for broadband-only providers.⁵ It stated, we “decline at this time to address requests in the record to reinterpret section 224 or rely on other sources of authority to extend the availability of access rights under section 224 to broadband-only providers.”⁶ Not only was this conclusion alarming for the various reasons discussed in INCOMPAS' Petition for Reconsideration, but it also provides no reason to assume that the FCC would act any differently if it continued to classify BIAS as a Title I service. When the FCC was given an opportunity in its *Remand Order* to explain how it could still guarantee Section 224 protections for broadband-only providers under a Title I framework, the FCC decided *not* to do

⁵ See *Restoring Internet Freedom et al.*, Order on Remand, WC Docket Nos. 17-108, 17-287, 11-42, at 18-22, at n.323 (rel. Oct. 29, 2020).

⁶ *Id.* at para. 81.

so. And since then, the Commission has not opened a proceeding to take further action for broadband-only providers to obtain pole access protections under a Title I ancillary framework.

Moreover, the issue of broadband-only providers having legal protections regarding access to poles is especially important today given the federal and state governments' focus and prioritization of broadband deployment. One of the reasons the then-FCC relied on in its *Remand Order* for dismissing the importance of Section 224 rights for broadband-only providers is that “there is only limited evidence in the record that a small number of broadband-only providers have experienced increased costs to obtain access to poles, and there is also evidence that such costs or other barriers have not increased.”⁷ INCOMPAS' Petition for Reconsideration lays out the substantive reasons why this conclusion was harmful.⁸ However, since then, the importance of broadband deployment has only increased. For example, since the FCC published its *Remand Order*, the Biden Administration launched its Internet for All campaign and Congress allocated \$42.5 billion for the BEAD Program in order to expand high-speed internet access by funding planning, infrastructure deployment, and adoption programs throughout the U.S. and its territories.⁹ As such, we can reasonably expect to see an increase in the number and importance of broadband-only providers that will participate, as well as serious harms if these providers cannot receive the same legal protections as telecommunication service providers and cable

⁷ *Id.* at para. 74.

⁸ See INCOMPAS Petition for Reconsideration, at 18-22.

⁹ See Internet for All, available at <https://www.internetforall.gov/> (last visited Jan. 17, 2024); see also NTIA, *Broadband Equity Access and Deployment Program* (last visited Jan. 17, 2024), available at <https://broadbandusa.ntia.doc.gov/funding-programs/broadband-equity-access-and-deployment-bead-program>.

operators under Section 224 so that they can obtain non-discriminatory and reasonable access to poles in deploying government-funded BEAD networks.

III. CONCLUSION

In light of legal and regulatory precedent that make WISPA's position highly speculative and uncertain, as well as the importance of broadband deployment, the FCC should grant INCOMPAS' Petition for Reconsideration and deny WISPA's Opposition. Accordingly, classifying BIAS as a Title II service will ensure that all providers offering a BIAS service have equal protections under Section 224.

Respectfully submitted,

/s/ Angie Kronenberg

Angie Kronenberg
Lindsay Stern
INCOMPAS
1100 G Street, NW
Suite 800
Washington, DC 20005
(202) 872-5745

January 17, 2024

CERTIFICATE OF SERVICE

I, Lindsay Stern, hereby certify that on this 17th day of January 2024, a true and correct copy of the foregoing Reply to WISPA's Partial Opposition to INCOMPAS' Petition for Reconsideration was sent by electronic mail to the following:

Louis Peraertz
Vice President of Policy
WISPA
lperaertz@wispa.org

/s/ Lindsay Stern
Lindsay Stern