

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

INCOMPAS,

Petitioner,

v.

FEDERAL COMMUNICATIONS
COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

Case No. _____

PETITION FOR REVIEW

Pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342 and 2344 and Federal Rule of Appellate Procedure 15(a), COMPTEL d/b/a INCOMPAS (“INCOMPAS”), the internet and competitive networks association, hereby petitions this Court for review of the final order of the Federal Communications Commission (“FCC”) captioned in Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311 (2018) (“Order”). Petitioner is attaching an electronic copy of the Order with this petition. The new regulations in the Order were published in the Federal Register on February 22, 2018. *See* 83 Fed. Reg. 7852.

Venue is proper in this Court pursuant to 28 U.S.C. § 2343.

In 2015, the FCC promulgated network neutrality rules which, among other things, protected consumers, websites, apps, streaming services, internet

companies, and content creators against broadband internet access service providers’ “economic incentives and technical ability to engage in practices that pose a threat to Internet openness,” including their “ability to use terms of interconnection to disadvantage edge providers.” Protecting and Promoting the Open Internet, *Report and Order On Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601, 5628 ¶ 78, 5694 ¶ 205 (2015), *aff’d sub nom. United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). This Court held that the FCC had properly exercised its authority to reclassify broadband internet access service as a telecommunications service subject to Title II of the Communications Act of 1934 and to promulgate rules to promote and protect internet openness.

In the Order on review here, the FCC reversed course and reclassified broadband internet access service as an information service subject to Title I of the Communications Act. It also departed from every previous network neutrality order in addition to longstanding bipartisan FCC policy that the FCC has jurisdiction to ensure that American consumers have access to an open internet and by abandoning bright line rules protecting internet openness. These rules protected consumers and internet (edge) companies by prohibiting an ISP from blocking content, throttling content, or engaging in paid prioritization. The Commission also departed from its prior findings that broadband internet access service providers have the incentive and ability to block or degrade content and engage in

other behavior that harms an open internet. The Commission also, among other things, denied INCOMPAS's motion submitted in the proceeding below. Order, 33 FCC Rcd. at 496 ¶ 324.

Petitioner, which participated in the proceeding below filing detailed and substantive comments and reply comments, is the leading national trade association representing a wide array of competitive organizations in the internet ecosystem, including streaming services, internet companies, internet backbone providers and content delivery networks, wired ISPs, cloud and competitive communications service providers, and their supplier partners. Petitioner and its members would be aggrieved by the Order.

INCOMPAS's motion, which was improperly denied in the Order, requested that the FCC incorporate in the docket below highly probative documents, analyses, and findings from previous merger investigations, where the Department of Justice and the FCC found—contrary to ISP assertions—that broadband internet access providers representing nearly 70% of residential broadband internet access subscribers had the incentive and ability to engage in behavior that threatened an open internet. *See* INCOMPAS, Motion to Modify Protective Orders, WC Docket No. 17-108, at 1 (July 17, 2017) (“Motion”); *see also* Reply Comments of INCOMPAS, WC Docket No. 17-108, at 19 (Aug. 30, 2017). Among other things, INCOMPAS's motion cited several instances in those proceedings where the

Commission had recognized the incentives that broadband providers have to harm an open internet. Motion at 7-9.

Those determinations—resulting from lengthy investigative proceedings—stand in stark contrast with the Order’s newly found determination that ISPs lack such incentives and abilities. *Compare* Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 30 FCC Rcd. 9131, 9210 ¶ 210 (2015) (“We find that as the combined entity expands its online offerings, it will have an increased incentive to limit subscriber demand for competitors’ online video content Indeed, AT&T’s internal documents indicate that [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.]”) and Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd. 6327, 6344 ¶ 42 (2016) (“Many [internal] documents indicate that, despite some instances of [BEGIN HIGHLY CONF. INFO.] *** [END HIGHLY CONF. INFO.], New Charter would have an incentive to harm OVDs that could serve as substitutes for some or all of its video products.”), *with* Order, 33 FCC Rcd. at 382 ¶ 116 (“We do not believe hypothetical harms, unsupported by empirical data,

economic theory, or even recent anecdotes, provide a basis for public-utility regulation of ISPs.”).

Petitioner seeks review of the Order, including among other things the order specifically denying INCOMPAS’s motion, on the grounds that: it violates federal law, including, but not limited to, the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*, as amended, and the Telecommunications Act of 1996, and FCC regulations promulgated thereunder; it abdicates the FCC’s statutory mandate; it is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*; and is otherwise contrary to law.

Petitioner respectfully requests that this Court hold unlawful, vacate, enjoin, and set aside the Order, and that it provide additional relief as may be just and appropriate.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M.C. Erickson', with a horizontal line underneath.

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Dated: April 23, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and this Court's Rule 26.1, COMPTel d/b/a INCOMPAS ("INCOMPAS") states that it is a not-for-profit corporation and has not issued shares or debt securities to the public.

INCOMPAS does not have any parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public. INCOMPAS, the internet and competitive networks association, is the leading national trade association representing internet, streaming, fiber and competitive communications service providers large and small and their supplier partners. INCOMPAS's mission is to advocate for laws and policies that promote competition, innovation and economic development.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Georgios Leris, hereby certify that on April 23, 2018, I caused a copy of the foregoing Petition for Review and Corporate Disclosure Statements to be served on the following counsel by the manner indicated:

*By First Class Mail and
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