

**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. 18-1105  
(consolidated with Case No.  
18-1051 *et al.*)

**STATEMENT OF ISSUES TO BE RAISED**

Pursuant to the Court’s April 26, 2018 Order, petitioner INCOMPAS (No. 18-1105) respectfully submits this nonbinding statement of issues to be raised in this case.

This case concerns review of the final order of the Federal Communications Commission (“FCC”) captioned Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311 (2018) (“Order”).

In the Order, the FCC arbitrarily reversed course and eliminated the rules protecting an open Internet, which the FCC promulgated in 2015 and were upheld by this Court. *See* Protecting and Promoting the Open Internet, *Report and Order On Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015), *aff’d sub nom. United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). In that case, 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 five rules—no blocking; no throttling; no paid prioritization; no unreasonable interference; and enhanced transparency—to preserve and promote Internet openness. In the Order on review here, the FCC departs from its prior reasoning and precedent, and departed from findings made by this Court in related cases, reclassifying broadband Internet access service as an information service subject to Title I of the Communications Act and eliminating the five rules, among other things. For the first time since the beginning of the commercial Internet, the FCC has disavowed the authority and desire to protect the qualities that have made the Internet the open and innovative platform it is today.

The issues to be raised are:

1. Whether the Order’s declaratory ruling reclassifying broadband Internet access service as an “information service” violates the terms of the Communications Act of 1934, is based on an unlawful and unreasonable interpretation of the statute, is arbitrary and capricious and therefore violates the Administrative Procedure Act (“APA”), *see* 5 U.S.C. § 706, or is otherwise contrary to law.
2. Whether the FCC adopted the Order in violation of the APA’s procedural requirements, *see* 5 U.S.C. § 553, by failing to provide notice and an

opportunity to comment on critical features of the Order that the FCC ultimately adopted, including among others its cost-benefit analysis and the modifications to the transparency rule.

3. Whether the Order's abandonment of the FCC's oversight of interconnection disputes involving broadband Internet access service providers, which interconnection is crucial to the functioning of an open Internet and to allowing Internet content providers to reach consumers, is arbitrary and capricious in violation of the APA, or is otherwise contrary to law.

4. Whether the Order's failure to adequately consider Internet companies' and venture capitalists' reliance on open Internet protections and their investments based on such protections is in violation of the agency's mandate, is arbitrary and capricious in violation of the APA, or is otherwise contrary to law.

5. Whether the Order's abandonment of the bright line rules is in violation of the agency's mandate, is arbitrary and capricious in violation of the APA, or is otherwise contrary to law.

6. Whether the Order's abandonment of the general conduct standard is in violation of the agency's mandate, is arbitrary and capricious in violation of the APA, or is otherwise contrary to law.

7. Whether the Order's denial of INCOMPAS's motion, which requested that the FCC incorporate in the docket below highly probative documents,

analyses, and findings from previous merger investigations in which the Department of Justice and previous FCCs found—contrary to broadband Internet access service providers’ assertions and the opposite conclusions adopted in the current Order—that broadband Internet access providers had the incentive and ability to engage in behavior that threatened an open Internet, is arbitrary and capricious in violation of the APA or is otherwise contrary to law.

Respectfully submitted,

/s/ Markham C. Erickson

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Dated: May 29, 2018

**CERTIFICATE OF SERVICE**

I, Georgios Leris, hereby certify that on May 29, 2018, I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Georgios Leris

Georgios Leris