

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Wireline Competition Bureau Seeks Comment On) GN Docket No. 18-231
The State of Fixed Broadband Competition)

COMMENTS OF INCOMPAS

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INCOMPAS, by its undersigned counsel, hereby submits these comments in response to the Wireline Competition Bureau’s *Public Notice*¹ requesting information for the Federal Communications Commission’s (“Commission” or “FCC”) assessment of competition in the fixed broadband market, as required by RAY BAUM’S Act of 2018.²

I. INTRODUCTION & SUMMARY

INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace. We represent companies that provide residential broadband Internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes; transit and backbone providers that carry broadband and Internet traffic, and online video distributors which offer video programming over BIAS to consumers. Each of

¹*Wireline Competition Bureau Seeks Comment on the State of Fixed Broadband Competition*, GN Docket No. 18-231, Public Notice, DA 18-784 (rel. July 27, 2018).

² Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. P-Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018, §§ 401-404, 132 Stat. 348, 1087-90 (2018) (“RAY BAUM’S Act of 2018”).

these members are providing and/or relying upon broadband capability, and the Commission's role in encouraging broadband deployment and protecting and promoting fixed broadband competition is key to ensuring that residential and business customers will have choice for their broadband provider, as well as the services and applications they may choose to take over those broadband connections.

For over two decades, the Communications Act has required that the Commission promote competition and consumer choice, and to protect consumers in the provision of communications services.³ As such, INCOMPAS supports the goal of RAY BAUM'S Act—that the Commission assess the state of fixed broadband competition—and we appreciate the opportunity to weigh in on how the Commission can accomplish this goal. In a number of proceedings, INCOMPAS has raised the fact that the high-speed broadband internet access services marketplace, as well as the business data services marketplace remain highly concentrated in most geographic areas.⁴ As such, INCOMPAS has urged the Commission to collect and assess the necessary data to determine where there is insufficient choice, and then implement policies that will promote more choice, providing more opportunities for competition to thrive, and in turn, for consumers to benefit.

Below we discuss how the Commission's current policies promote broadband competition. In particular, we support the Commission's recent adoption of one-touch make-ready ("OTMR") in August and its small cell deployment agenda adopted earlier this year—both are critical policies that will further spur competitive build for both fixed and mobile broadband networks. To further enable fiber builds, we continue to encourage the Commission to complete

³ 47 U.S.C. § 1302(b).

⁴ *See, e.g.*, Comments of INCOMPAS, WC Docket No. 17-199, at 16 (filed Sept. 21, 2017).

its wired and wireless deployment proceedings, consistent with INCOMPAS' filings in those dockets.

We also describe how fiber builders use unbundled network elements (“UNEs”) to build more and faster broadband to consumers, small and medium-sized businesses, as well as schools, libraries, public safety and other local and state government agencies, and we incorporate into the record our economic filings that demonstrate competitors using UNEs (1) build more fiber than incumbents; (2) deliver faster broadband speeds over traditional broadband lines than the incumbents; and (3) offer lower prices and better service to customers. We also discuss that the current policy incents competitors and incumbents alike to build more broadband and that in markets where a smaller broadband provider has deployed new fiber, offering gigabit speeds at a fraction of the cost, the incumbent providers are forced to respond with network upgrades and price matches. However, USTelecom seeks to cut off the bridge to broadband competition with its request that the Commission forbear from its UNE/resale policies which will harm fixed broadband competition, lead to price increases, and deter fiber buildout from both incumbents and competitors. Accordingly, INCOMPAS urges the Commission to grant the Motion for Summary Denial we filed in that proceeding.

We also encourage the Commission to complete its evaluation of its Notice of Inquiry concerning the deployment of broadband in multi-tenant environments and their surrounding communities, and it should adopt an NPRM (and after comment/replies, an Order) that prohibits the use of exclusive service agreements by all video, telecommunications, and broadband providers, as well as use of graduated revenue sharing and exclusive wiring agreements in MTEs.

We urge the Commission to respond to GAO’s criticism of the lack of Commission analysis demonstrating the impact of competition on price and service quality by assigning its new Office of Economics and Analytics to undertake such a study to assess that impact.

We explain that the Commission’s current data is insufficient to conclude that the fixed broadband marketplace is competitive. We urge the Commission to reform its collection of broadband data via its Form 477 proceeding. We reference and incorporate herein our filing in that proceeding, and we further address the need for the Commission to gather location-specific information from each fixed broadband provider for their residential offerings of BIAS, as well as for their dedicated broadband offerings of BDS. For purposes of assessing competition, the Commission’s analysis should *only* include where those services are currently available. Any finding of competition (or effective competition) in a local geographic market for BIAS and BDS, respectively, should be when *at least* three providers serve the local area and provide such service over their own last mile facilities—neither a monopoly nor a duopoly should be considered sufficient competition. The Commission should only include and evaluate those services that compete with one another. Thus, for purposes of BIAS—the Commission should only include fixed services that are delivering 25/3 Mbps, and not mobile broadband service—consistent with its Section 706 report finding that mobile is not substitutable; and the Commission should separately evaluate BDS competition.

II. THE COMMISSION’S DEPLOYMENT AGENDA AND UNE POLICIES PROMOTE BROADBAND COMPETITION

INCOMPAS appreciates the Commission’s focus to lower the barriers to broadband deployment and believes the Commission’s recent actions to promote both wired and wireless broadband deployment are critical steps to encouraging and enabling more fiber builds that are crucial to competitive fixed broadband deployment. INCOMPAS advocated for and supports the

Commission’s recent adoption of its one-touch make-ready (“OTMR”) policy in August⁵ and its small cell deployment agenda adopted in March⁶ which will help address some of the significant delays that our competitive fiber (and wireless) providers have experienced.⁷ To further promote competitive fiber builds and fixed broadband competition, we encourage the Commission to complete its wireline and wireless deployment proceedings and adopt the remaining policies INCOMPAS supports, including (1) strengthening shot clocks applicable to wireless siting applications, and (2) limiting rights-of-way use charges and siting application fees, consistent with Sections 253 and 332.⁸

Competitive fiber builders use the Commission’s existing unbundled network elements (“UNE”) and resale policy to build more and faster fixed broadband to residential consumers, small and medium-sized businesses, as well as schools, libraries, healthcare, public safety and other local and state government agencies.⁹ In fact, many competitive providers rely on services that are subject to USTelecom’s UNE forbearance petition—services such as UNE dark fiber,

⁵ See *In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment and Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order and Declaratory Ruling, WC Docket No. 17-84 and WT Docket No. 17-79 (rel. Aug. 3, 2018) (“*Third Report and Order*”).

⁶ See *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket No. 17-79 (rel. March 30, 2018).

⁷ However, twenty states have reverse preempted the FCC’s pole attachment policies, so the impact will be uneven across the nation. See *Third Report and Order* ¶ 5. As such, INCOMPAS urges the Commission to encourage states to follow suit and adopt the OTMR policy.

⁸ Reply Comments of INCOMPAS, WTB Docket No. 17-79, at 7-10 (filed July 17, 2017).

⁹ See Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141, at 37-55 (filed Aug. 6, 2018) (“*Opposition*”).

DSOs, etc.—to enter and compete in the broadband marketplace.¹⁰ We incorporate into the record our opposition to the USTelecom Forbearance petition and our economic filings in that proceeding that demonstrate competitors using UNEs (1) build more fiber than incumbents; (2) deliver faster broadband speeds than the incumbents; and (3) offer lower prices and better service to customers.¹¹ Indeed, the current UNE policy incents competitors and incumbents alike to build more broadband; and in markets where a smaller, competitive broadband provider has deployed new fiber, they offer gigabit speeds at a fraction of the cost, and incumbent providers are forced to respond with network upgrades and lower prices.¹²

If the Commission grants USTelecom’s petition for forbearance from UNEs/resale as proposed, however, competitive fiber providers’ ability to continue to build fiber will be significantly impacted—potentially leaving consumers with no broadband choice or only a monopoly, or at best a duopoly. In turn, USTelecom’s members, notably AT&T, Verizon, CenturyLink, and Frontier, will be able to charge substantially higher rates for broadband services, allowing them to earn substantially more on their existing copper network through rate increases. Where customers are captive and paying monopoly rates for slower services, AT&T and the other USTelecom members would not have an economic incentive to deploy fiber. Service quality is also likely to degrade, as it does in all monopoly markets—if there is no

¹⁰ *See generally* USTelecom Forbearance Petition, WC Docket No. 18-141 (filed May 4, 2018).

¹¹ *See* Opposition, Attachment 2, Declaration of William P. Zarakas, at 3-4 & 9-11.

¹² *See id.*, Attachment 1, Declaration of David E.M. Sappington, at 14-17. Dr. Sappington also discusses how the UNE policy benefits consumers so that they are not limited to a monopoly or duopoly choice which both fail to produce the types of benefits that consumers enjoy in a competitive market. *Id.* 9-13. *See also* Comments of INCOMPAS, WC Docket No. 17-199, Exhibit A, David S. Evans, Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers, at 35-37 (filed Sept. 21, 2017).

competitive threat, there is less incentive for rapid repair or service innovation. USTelecom's forbearance petition is clearly detrimental to fixed broadband competition, and the FCC should deny the petition so that fixed broadband competition is preserved and promoted.¹³

III. GIVEN THE CHALLENGES FACING COMPETITIVE PROVIDERS SERVING MULTI-TENANT ENVIRONMENTS AND THEIR SURROUNDING COMMUNITIES, THE COMMISSION MUST COMPLETE ITS REVIEW AND ADOPT AN NPRM AND ORDER IN THE PROCEEDING

INCOMPAS also has sought to improve competitive broadband providers' access to multiple tenant environments ("MTEs") which will improve fixed broadband competition. More than thirty percent of Americans live in multifamily buildings¹⁴ and those residents have fewer options for broadband service than those living in single-family homes in the same community.¹⁵ Despite the Commission's best efforts to reduce commercial barriers to entry in MTEs, evidence of a growing disparity between consumer demand for increased Internet speeds, lowers prices

¹³ As we set forth in the Motion for Summary Denial, USTelecom failed to make a *prima facie* demonstration that its Petition should be considered. Accordingly, INCOMPAS et al. submits it should be summarily denied. *See* of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association's Motion for Summary Denial, WC Docket No. 18-141 (filed Aug. 6, 2018).

¹⁴ *See* table from the U.S. Census Bureau's 2010-2014 American Community Survey 5-Year Estimates, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5_YR_B25024&prodType=table ("American Community Survey") (showing that thirty percent of American homes are in multifamily buildings).

¹⁵ *See* Carl Kandutsch, *Internet Choice in Apartment Buildings*, Broadband Communities, at 1 (Dec. 2016), http://www.bbcmag.com/2016mags/Nov_Dec/BBC_Nov16_InternetChoice.pdf ("It is undeniable that some owners of multiple- dwelling-unit buildings ("MDUs"), for the primary purpose of lining their pockets, have historically made—and still make—access deals with cable and broadband service providers that restrict or foreclose the entry of competing service providers. The result is that residents have fewer cable and broadband service provider options than their neighbors who live in single- family homes.").

and competition and what MTE owners and landlords actually make available to their residents should lead the FCC to revisit its previous findings. We incorporate into the record our filings in the MTE docket that (1) explain how incumbent communications providers and landlords use graduated revenue sharing, as well as wiring and rooftop exclusivity arrangements, to circumvent the agency's rules and exclude competitive providers from multiple tenant environments; and (2) encourage the Commission to revisit other practices, such as bulk billing and marketing exclusivity agreements that have been used as artificial barriers to deny competitors access to MTEs.¹⁶

INCOMPAS supports the Commission moving to a Notice of Proposed Rulemaking to further consider prohibiting these practices, which amount to an end-run around current rules that are intended to promote competitive options.¹⁰ Competitive providers have an improved business case where they can serve MTEs and are more likely to deploy next generation networks in surrounding communities where they have competitive entry into multifamily buildings. Consequently, the Commission should encourage, rather than consider preemption of, local access laws that enable competitive entry.¹⁷ In San Francisco, where the city implemented such a law, one INCOMPAS member is now able to provide fiber to 300 buildings it previously was excluded from, bringing a lower-cost, higher-speed 1 Gig option to consumers in those

¹⁶ See Comments of INCOMPAS, GN Docket No. 17-142, at 9-20 (filed July 24, 2017); see also Reply Comments of INCOMPAS, GN Docket No. 17-142 (filed Aug. 22, 2017).

¹⁷ See Reply Comments of INCOMPAS, MB Docket No. 17-91 (filed June 9, 2017) (arguing that a recently passed access law in San Francisco should not face federal preemption because it increases MTE residents' access to competitive communications services, lawfully eliminates a major barrier to entry for competitive providers, and furthers the Commission's goals of accelerating deployment of high-speed Internet access).

buildings, as well as improving the business case for building fiber in the surrounding communities.¹⁸ Given the current barriers to entry in multifamily buildings, INCOMPAS encourages the Commission to consider the impact on competition in these buildings and surrounding communities and take the next step of issuing an NPRM, and after comments/replies, an Order, in the proceeding to improve the broadband options for consumers who are living in MTEs and their surrounding communities.

IV. TO COMPORT WITH THE GAO REPORT'S RECOMMENDATIONS, THE COMMISSION MUST CONDUCT AN UNPRECEDENTED REVIEW OF THE FIXED BROADBAND MARKETPLACE AND STUDY THE COMPETITIVE IMPACT ON PRICING AND SERVICE QUALITY

To date, INCOMPAS has provided a number of economic reports that show lower pricing, faster speeds, and better service to customers when our members are providing an alternative broadband product, and we urge the Commission to review and rely upon those economic reports. As discussed above, Zarakas shows that our competitive members are building more fiber than incumbents, offering faster speeds and lower pricing, and Sappington demonstrates how the Commission's current UNE policies incentivizes competitors to build and in turn, incumbents to respond to the better offerings and pricing.¹⁹ Evans also confirms that incumbents respond when high-speed wired broadband is deployed.²⁰

INCOMPAS believes the GAO Report was critical of the Commission because it has not analyzed where competition is and what it means for consumers when competition is effective. It is time for the FCC to rectify that. Once the FCC has reformed its Form 477 collection as

¹⁸ See Reply Comments of CALTEL, GN Docket No. 17-142, at 3 (Aug. 22, 2017).

¹⁹ See Section II and accompanying notes 11-12 *supra*.

²⁰ *Id.*

discussed by INCOMPAS below, the Commission’s new Office of Economics and Analytics should undertake a review of the number of providers in local markets, as well as their pricing and service quality. As we discuss below, it is important that the Commission distinguish between market segments—residential (BIAS) service versus BDS that businesses often rely on.

V. ANY CONCLUSIONS THAT THE FCC DRAWS MUST BE BASED ON ACCURATE AND VERIFIABLE DATA FOLLOWING LOCAL MARKET ANALYSES BASED ON VARIOUS BROADBAND SUBSCRIBERS’ NEEDS

It is important for the FCC to base its conclusions about the state of fixed broadband competition on accurate and verifiable data at the local market level; and that it do so for residential (mass market) BIAS and for BDS service that businesses of all sizes use, including schools, libraries, hospitals, public safety and local, state and federal government agencies, and mobile wireless companies for backhaul to towers.

INCOMPAS posits that broadband connections and services must be actually physically available to consumers in order for the Commission to count them in its competition analysis. Unfortunately, the Commission’s current Form 477 data is insufficient for purposes of evaluating competition, generally overstating the level of competition. There have been a number of concerns raised about the sufficiency of the information and assessments from the FCC’s current Form 477 data collections. Indeed, even the Commission states:

A provider that reports deployment of a particular technology and bandwidth in a particular census block may not necessarily offer that particular service everywhere in the census block. Accordingly, a list of providers deployed in a census block does not necessarily reflect the number of choices available to any particular household or business location in that block, and the number of such providers in the census block does not purport to measure competition.²¹

²¹ See FCC Website, Explanation of Broadband Deployment Data, Block-Level Deployment and Competition, available at <https://www.fcc.gov/general/explanation-broadband-deployment-data>. See also FCC Internet Access Services Report at 6 (“A provider that reports offering service in a particular census block may not offer service, or service at that speed, to all locations in the census block. Accordingly, the number of providers shown in Figure 4 does not necessarily

This caveat is necessary because the Form 477 information indicates a census block is served even where a broadband provider does not actually provide service, but could do so. Moreover, the Commission treats the entire population of a census block served even where the broadband provider only offers service to one customer in a census block that potentially exaggerates the amount of *any* competitive overlap. Accordingly, an overstatement of competitive choice of broadband providers is very likely should the Commission rely upon the current Form 477 information in its analysis.

As the Commission is aware, it has a Further Notice of Proposed Rulemaking pending to modify its collection of Form 477 data to improve its collection and analysis.²² INCOMPAS participated in that proceeding and incorporates by reference its comments in that proceeding.²³ For purposes of using the Form 477 data to evaluate fixed broadband competition for BIAS and BDS services, INCOMPAS supports the following changes to the collection of information:

- BIAS providers should report the locations where they currently sell broadband service of at least 25/3 Mbps and higher to consumers.²⁴ We understand from our

reflect the number of choices available to a particular household and does not purport to measure competition.”)

²² *Modernizing the FCC Form 477 Data Program*, Further Notice of Proposed Rulemaking, FCC 17-103 (rel. Aug. 4, 2017).

²³ Comments of INCOMPAS, WC Docket No. 11-10 (filed Oct. 10, 2017).

²⁴ Under the current Form 477 instructions, a census block is considered to have fixed broadband when a carrier “could, within a service interval that is typical for that type of connection,” deploy service to a requesting customer “without extraordinary commitment of resources.” See FCC Form 477 Instructions. This shortcoming leads to a potentially systematic overstatement of where broadband is actually available to customers. See Microsoft Ex Parte Letter, WC Docket No. 11-10, at 2-3 (filed Aug. 2, 2018). We agree that the Commission should modify its collection so that it can assess where broadband is actually available and how many competitors are selling it to a location. To the extent that the Commission values understanding where broadband service *could* be provided without the need for an extraordinary commitment of

broadband provider members that they have this information, as it is how they provision their service to customers.

- The Commission should continue to collect and assess the information based upon technology, including wired, fixed wireless, and satellite so that it can assess improvements in offerings by technology over time. The Commission should also continue to collect the physical wire type (twisted pair, coaxial cable or fiber), as well as the technology deployed (ADSL1, ADSL2+, VDSL2, e.SHDSL, DOCSIS 3.0, DOCSIS 3.1, GPON, XGS-PON, etc.), and the speed of service offered, at each location.
 - Providers who are using UNEs or lease last mile facilities to reach their customers should include that information by noting the number of locations per census block.
- For fixed wireless, the Commission should collect technology used, spectrum frequency used, access point capacity and number of homes served in a census block per access point.

As INCOMPAS discussed in the Form 477 proceeding, the Commission should continue to collect information concerning BDS—specifically, the Commission should obtain location availability in each census block where providers sell BDS at 10 Mbps and below, 50 Mbps and below, 100 Mbps and below, below 1 Gig and above 1 Gig. Such collection should also include information indicating whether the BDS is being provided over the provider’s last-mile facilities it owns. Based on our members’ input, this is information that each BDS provider has readily available.

For BIAS, the Commission should assess competition from those providers who provide service at 25/3 Mbps and higher, and distinguish between those using their own facilities and

resources, INCOMPAS agrees with Microsoft that the Commission could separately request filers to identify census blocks where they could provision broadband service upon a reasonable request. *See id.* at 3.

The FCC currently defines broadband as 25/3 Mbps, but INCOMPAS has urged the Commission to revise its definition to reflect the FTTH speeds of 1 Gig. Comments of INCOMPAS, WC Docket No. 17-199, at 16-20 (filed Sept. 21, 2017).

those using leased facilities. Similarly, the Commission should assess competition for BDS distinguishing services of 10 Mbps and below, 50 Mbps and below, 100 Mbps and below, below 1 Gig and above 1 Gig, and distinguishing between those using their own facilities and those using leased facilities. Given that last mile facilities are the most time-consuming and expensive to build and that wholesale providers may be in the position of removing those facilities from availability to a competitor, the Commission should only count those facilities once (from the facilities-based provider) so that the level of competition is not overstated or misused by incumbents to support the FCC forbearing from competitive access requirements.

Any assessment of competition must take into account only those services that compete with one another. Where services are not treated as substitutes by purchasers, the FCC should be mindful to treat them separately. For example, many businesses still rely on BDS, including small, mid-sized and large businesses, schools, libraries, health care facilities, government entities, and wireless providers (for backhaul). The Commission's assessment of competition for BDS should be limited to that product market. Likewise, mobile services should not be included in this assessment. As INCOMPAS has asserted and the Commission has agreed,²⁵ fixed and mobile broadband are distinct offerings, and consumers do not view them as substitutes.

It also is important that the Commission's assessment take into account whether customers switch providers in its analysis when offered better pricing or terms of service. While the Commission does not collect pricing information, it has used publicly available data for its international comparisons in its Section 706 Report.²⁶ Thus, for purposes of its fixed broadband

²⁵ See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, FCC 18-10, at ¶ 18 (rel. Feb. 2, 2018).

²⁶ See *id.* ¶ 66.

competition analysis, it could use the publicly available pricing information of BIAS providers and conduct a consumer survey on quality and switching behavior in diverse geographic areas. For purposes of its BDS analysis, the Commission could likewise conduct a survey of BDS customers in diverse geographic areas. Where pricing is not publicly available, the Commission should survey BDS providers to obtain it.

The Commission also should assess the availability of reasonable wholesale rates in its Form 477 collection. It could do so by asking whether there is availability of wholesale rates to competitive providers that are less than retail rates in every census block for both BIAS and BDS service.

Finally, any finding of competition (or effective competition) in a local geographic market for BIAS and BDS, respectively, should be when *at least* three providers serve the local area and provide such service over their own last mile facilities—neither a monopoly nor a duopoly should be considered sufficient competition. Of course, it is obvious that a monopoly does not best serve consumers—the entire premise of the 1996 Telecom Act was based on this well-founded notion. Moreover, as Sappington discusses, “it is generally inappropriate to rely on duopoly competition to protect consumers.”²⁷ He outlines the concerns of economists that with few suppliers in a market, tacit collusion may occur, and he also discusses the empirical evidence that prices are higher in concentrated markets. As such, the Commission should not find competition or effective competition unless *at least* three providers serve the local area offering BIAS at 25/3 Mbps and BDS services *over their own last mile facilities*, respectively.

²⁷ See Opposition, Attachment 1, Declaration of David E.M. Sappington, at 9-10.

VI. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to consider and adopt the recommendations and data in its comments as it considers the best method by which to assess the state of competition in the fixed broadband market.

Respectfully submitted,

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