

December 6, 2018

VIA ECFS

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte Notice, GN Docket No. 18-231, WC Docket No. 18-141, GN Docket No. 17-142*

Dear Ms. Dortch:

On December 3, 2018, I spoke with the following Wireline Competition Bureau staff via teleconference—Trent Harkrader, Steve Rosenberg, Adam Copeland, Pam Megna, Annick Banoun, and Celia Lewis. I also separately spoke with Arielle Roth of Commissioner O’Rielly’s office and Travis Litman of Commissioner Rosenworcel’s office. On December 4, 2018, I met with Preston Wise of Chairman’s Pai office, and on December 6, 2018, I met with Will Adams of Commissioner Carr’s office. I discussed the pending Communications Marketplace Report scheduled to be voted at the Commission’s December 12th open meeting.¹

The Commission’s current draft report is flawed with respect to its analysis of fixed broadband competition due to its current reliance on the Form 477 data without the appropriate caveats—caveats that the Commission uses in its reporting of that data in its Internet Access Services Report.² In the Internet Access Services Report, the Commission states clearly that its data “does not necessarily reflect the number of choices available to a particular household and

¹ There are a number of other improvements that INCOMPAS would recommend for future reports. For example, the Commission is solely focused on the availability of residential fixed broadband and voice services; however, given the reliance by businesses of all sizes on fixed broadband and voice services and their dependency on them for the well-being and growth of our nation’s economy, we believe that the Commission should expand its analysis in the next report to include fixed broadband and voice services for business. As such, I indicated that INCOMPAS would like the opportunity to discuss with staff additional changes to its approach for future Communications Marketplace Reports in the coming months.

² See Draft Communications Marketplace Report, FCC-CIRC1812-07, ¶ 183 (rel. Nov. 21, 2018).

does not purport to measure competition.”³ However, it is now using that same data to measure competition even though the data, as it is currently collected, is insufficient for measuring competitive choice. First, broadband providers may mark a census block as served even if it is not actually served as they are instructed by the FCC to do so if they *could* serve the census block without spending extraordinary resources. Second, the data does not indicate where there truly is competitive overlap in a census block. In other words, the data as currently collected does not lend itself to an analysis of the number of households that actually have choice of providers. In its comments in the proceeding, INCOMPAS specifically urged the Commission to complete its Form 477 proceeding and improve the collection of its data prior to using it to analyze fixed broadband competition, noting that the Commission itself has caveated that the data does not reflect the number of choices available to any particular household and does not measure competition.⁴ Given the decision to use the Form 477 data prior to completion of the Commission’s proceeding to improve its collection, it is important that the Commission make clear and be consistent in its description of the limitations of that data. As currently drafted, however, the report’s fixed broadband competition section’s caveats concerning the data are insufficient and do not comport with the Internet Access Services’ Report. Indeed, the claim that the data may *understate* competitive choice lends the reader to believe that an understatement of competition is just as likely as the very likely overstatement.

Accordingly, I requested that the Commission modify its draft and include the *same* caveat as the Internet Access Services Report that the data “does not necessarily reflect the number of choices available to any particular household and does not purport to measure competition.”⁵ In addition, I observed that in its 706 Broadband Deployment Report, the Commission also has made it clear in its presentation of the data that it represents the *estimated maximum number of options* that may be available based on the data.⁶ Accordingly, I urged the Commission to modify its presentation of the data in the report with respect to fixed broadband competition and describe it as the estimated maximum number of options.

I also discussed the necessity for a competition analysis to include observations about consumer behavior and evaluate whether consumers are switching service providers and whether providers are responding by improving service, lowering prices, and/or making more investment in their networks. In fact, the GAO has recommended to the Commission that it analyze in its

³ See, e.g., Internet Access Services: Status as of June 30, 2017, Industry Analysis and Technology Division, Wireline Competition Bureau, November 2018, at 6.

⁴ See INCOMPAS Comments, GN Docket No. 18-231, at 11-16 (filed Aug. 17, 2018).

⁵ *Id.* INCOMPAS also noted that the Commission’s Internet Access Service Report was released the same day as the draft Communications Marketplace Report, and a consistent approach would be prudent as to avoid unnecessary criticism.

⁶ See *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2016 Broadband Progress Report, GN Docket No. 15-191, FCC 16-6, Section IV.B.4, ¶¶ 85-86 (2016) (emphasis added).

reports how the varying levels of broadband deployment and competition affect broadband prices and service quality.⁷

It has been the experience of INCOMPAS' fiber providers that when they enter the market, incumbents respond by increasing broadband speeds, dropping their prices, and often investing in upgrades to their networks. 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. Dr. Zarakas shows that our competitive members are building more fiber than incumbents, offering faster speeds and lower pricing, and Dr. 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.⁸ Dr. Evans also confirms that incumbents respond when high-speed wired broadband is deployed.⁹ Consumers are best served when there are at least three or more fixed providers in a community with comparable service competing for their business. Consumers are not satisfied with a monopoly or duopoly,¹⁰ and I asked that the report be modified to reflect that.¹¹

The Commission has undertaken significant steps to address the barriers to broadband deployment, and INCOMPAS and its members have been supportive of those efforts. They are

⁷ GAO Sept. 2017 Report: Broadband Additional Stakeholder Input Could Inform FCC Actions to Promote Competition, at 26 (Recommendation 2).

⁸ See Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18-141, Attachment 2, Declaration of William P. Zarakas, at 3-4 & 9-11; Attachment 1, Declaration of David E.M. Sappington, at 14-17 ("INCOMPAS Opposition"). 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.

⁹ See 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).

¹⁰ Daniel B. Kline, "Consumer Satisfaction with Cable, ISPs Drops Again," USA Today (May 24, 2018), available at <https://www.usatoday.com/story/money/media/2018/05/24/consumer-satisfaction-cable-isps-drops/35298695/> (reporting that the American Customer Satisfaction Index (ACSI) found that Internet service providers (and cable) were the worst-ranked categories among the 46 industries it measures. Almost every ISP dropped 8%, noting that customers have few options. More than half of Americans only have one choice when it comes to an ISP according to the ACSI).

¹¹ Dr. Sappington discusses the limited competitive impact of a duopoly. He states that "it is generally inappropriate to rely on duopoly competition to protect consumers." With few suppliers in a market, tacit collusion may occur and prices may be higher. INCOMPAS Opposition, Attachment 1, Declaration of David E.M. Sappington, at 9-10.

making a difference. As the Communications Marketplace Report states, however, there is more work to be done. Our members agree and look forward to working with the Commission on additional efforts to address broadband deployment barriers, including in its MTE proceeding.¹² More than thirty percent of Americans live in multifamily buildings,¹³ and those residents often have fewer options for broadband service than those living in single-family homes in the same community due to the inability of new broadband entrants to gain access to consumers living in MTEs.¹⁴ Moreover, INCOMPAS has explained that competitive fiber builders use the Commission’s existing 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. In fact, many competitive providers rely on services that are subject to the USTelecom forbearance petition to enter and compete in the broadband marketplace. INCOMPAS opposes the petition; and if it is granted, it will erect new barriers for these providers to compete in the marketplace.

INCOMPAS appreciates the opportunity to review the draft report, and should you have any questions concerning the foregoing, please do not hesitate to contact me.

Respectfully submitted,

/s/ Angie Kronenberg

Angie Kronenberg
Chief Advocate & General Counsel

cc: Trent Harkrader
Steve Rosenberg
Adam Copeland

¹² Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket No. 17-142.

¹³ 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).

¹⁴ 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.”).

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