

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

In the Matter of)	
)	
Establishing the Digital Opportunity Data Collection)	WC Docket No. 19-195
)	
Modernizing the FCC Form 477 Data Program)	WC Docket No. 11-10

PETITION FOR RECONSIDERATION OF INCOMPAS

Pursuant to Section 1.429 of the rules of the Federal Communications Commission (“FCC” or “Commission”), INCOMPAS respectfully petitions the Commission to reconsider limited aspects of its recent Digital Opportunity Data Collection Order¹ establishing a new filing process for fixed broadband providers that requires the submission of geospatial maps of the areas where they have broadband-capable networks and make service available.² While INCOMPAS supports the Commission’s efforts to improve its broadband mapping, the FCC wrongly decided to reject INCOMPAS’ request that only broadband providers using their own last-mile facilities to provide broadband service be required to file polygons of their service areas. The Commission should reconsider its decision and grant INCOMPAS’ petition.³ In

¹ *In re Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, WC Docket Nos. 19-195 & 11-10, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-79, at n. 23 (rel. Aug. 6, 2019) (“*Report and Order*”).

² 47 C.F.R. § 1.429.

³ This petition is proper under 47 C.F.R. § 1.429(b)(1-3). The facts and the arguments relied on herein relate to unknowable facts and/or circumstances, including the requirements in the then-circulated draft Order, which were modified in the final Order. Moreover, the final Order was not made available for comment, and staff conveyed facts and/or circumstances about potential interpretation of the final Order after it was adopted and released that were not conveyed during ex parte meetings leading up to the Commission vote, such as providers would be expected to submit polygons based on their customer locations, even where such submission would be a polygon of each building served. Accordingly, some of the facts and arguments relied on herein

doing so, the Commission's goals to collect accurate broadband information to determine where broadband service is available and where it is not, will not be disrupted, and the Commission's broadband maps will more accurately reflect where there is true facilities-based offerings by broadband providers.

In our ex parte letters during the draft Order's consideration by the Commission, we stated:⁴

INCOMPAS is pleased that the Commission is moving forward in its effort to ensure that it has the data in hand to identify those areas that are lacking broadband service and must be included in the Commission's next steps to offer universal service support through the Rural Deployment Opportunity Fund. Through its proposed Order (once adopted), the Commission will require fixed broadband providers to submit polygons of their service areas based on technology type and speed offerings. INCOMPAS understands that the FCC intends for this new data collection methodology (as compared to the current Form 477) to improve upon the FCC's, the public's, and other stakeholders' understanding of (1) the geographic areas without broadband availability; and (2) the specific locations within those geographic areas without broadband availability.

We discussed the requirement for fixed broadband providers to submit polygons. We noted that the Commission states in its draft Order that "we require all fixed providers to submit broadband coverage polygons depicting the areas where they actually have broadband-capable networks and provide broadband service to end-user locations."⁵ It then defines those providers as facilities-based in note 22, including competitive local exchange carriers offering internet access service to end-users at 200 kbps or higher. With respect to this requirement, INCOMPAS explained that "facilities-based" should be defined so that it includes only those providers relying upon their own facilities, not through the purchase or lease of last-mile facilities from others. INCOMPAS noted that should competitors submit polygons that reflect the areas they serve end-users based upon the purchase of last-mile service or facilities from other providers (such as through

were unknown to petitioner until after our last opportunity to present our arguments to the Commission had passed, and we could not, through the exercise of ordinary diligence, have learned of the facts or arguments in question prior to reviewing the final Order. Finally, the Commission should determine that consideration of the facts and arguments relied on herein is in the public interest.

⁴ See INCOMPAS Ex Parte Letters, WC Docket No. 19-195 & 11-10 (July 24 & 26, 2019) (citations and explanations therein included).

⁵ See *Draft Digital Opportunity Data Collection Order and FNPRM*, ¶ 12.

special access service or unbundled network elements), it will not provide the Commission any additional information necessary for its assessment of broadband availability. Moreover, it potentially overstates the availability of broadband and broadband-capable networks because a polygon based on non-facilities based retail service does not reliably indicate whether the underlying broadband facilities are available throughout the area depicted on the polygon. Thus, INCOMPAS requested that the Commission clarify in its Order that the fixed providers that are required to submit polygons be defined as facilities-based providers that offer the defined broadband service to end-user locations over their own last-mile facilities.⁶

Unfortunately, the FCC did not address the arguments we raised in our ex parte filings in its final *Report and Order*. Rather, the FCC determined that because broadband providers that use UNEs and BDS file Forms 477, they must comply with the new requirements. Specifically, the Commission stated in note 23 of its final *Report and Order* (citations excluded):

We decline INCOMPAS' request to exclude from the definition of "facilities-based" those providers that supply service through the purchase or lease of capacity on the last-mile facilities of others. We currently require fixed providers that provide broadband service using leased or purchased capacity on third-party facilities to file broadband deployment data, and we see no reason to change that practice for Digital Opportunity Data Collection filers.⁷

As we discuss below, our concerns with requiring non-facilities-based providers to file polygons remain and have now been amplified by the final *Report and Order's* language that these providers must file and they may not include any geographic areas they do not serve.

Pursuant to the final *Report and Order*, competitive providers using last-mile services and facilities of other providers will file their polygons showing *only* those areas where they have service available:

⁶ For clarity, INCOMPAS is not requesting an exemption for all competitors and fully expects that its members that offer a competitive broadband service to end-users over their own last-mile facilities will file polygons and will have the incentive to do so to ensure that the Commission's USF efforts are appropriately targeted, efficient, and effective.

⁷ *Report and Order* at n. 23.

We require all fixed providers to submit broadband coverage polygons depicting the areas where they actually have broadband-capable networks and make fixed broadband service available to end-user locations.⁸

The *Report and Order* further states:

For purposes of the Digital Opportunity Data Collection, service is actually available in an area if the reporting fixed provider has a current broadband connection or it could provide such a connection within ten business days of a customer request, without an extraordinary commitment of resources, and without construction charges or fees exceeding an ordinary service activation fee.⁹

Given that providers using the last-mile facilities of third-party, wholesale providers (typically, incumbents), can only determine whether they can provide service upon a customer request through the wholesale provider's process, competitors will only be filing polygons that show their current customer connections for those facilities that they use that are owned by wholesale provider(s).¹⁰

Indeed, the language in the *Report and Order* can be read to prohibit providers from including in any polygon any area that it does *not* currently serve, as it does not have the relevant information as to whether or not they could serve a customer within ten days until they receive a customer request and can query the wholesale provider's network availability. Accordingly, based on the *Report and Order*, competitors that rely on last-mile facilities and services of wholesalers are required to file their polygons based on where they have customers installed using the last-mile facilities/services of other providers.

⁸ *Report and Order* ¶ 12.

⁹ *Id.* ¶ 13.

¹⁰ Where a competitor has its own facilities and broadband service availability, it must file separate polygon(s) noting the speed(s) and technology type(s).

Pursuant to the *Report and Order*, providers using the last-mile facilities and services of wholesalers will be submitting polygons of only those locations where they have a current broadband customer in service. As the Commission is aware, competitors using last-mile services/facilities of wholesalers may have customers in one building in a census block but not all buildings in a census block. In those situations, competitors would be expected to file polygons for each building location it has a customer. There are a number of issues with this approach.

First, it is not clear why the Commission needs this information to determine where there is broadband network availability from purchasers of last-mile facilities and services when the underlying network provider will be denoting on its own polygon where it could provision the broadband service itself.¹¹ In most instances, wholesale providers will have availability of broadband service that could be used to serve the customers in that location. This is certainly true where wholesale providers provision DS1s and DS3s (which meet the speed definition of required reporting).

The Commission has stated that the intent of the polygon process is to have more granular information so that it and the public can know where there is broadband availability in order for the agency to direct its limited USF resources to those geographic areas where broadband network(s) are not available.¹² Given that the underlying providers will be filing their

¹¹ While some competitors use DS0s to deliver a higher-speed broadband connections due to their investment in electronics, incumbents that own the facility would still have the same loop availability and could provide a broadband service if it invested in the necessary equipment.

¹² *Report and Order* ¶ 10 (“We conclude that in order to continue to advance our statutory universal service obligations, it is necessary to create a new data collection, calculated to produce broadband deployment maps that will allow the Commission to precisely target scarce universal service dollars to where broadband service is lacking.”).

own polygons that show their broadband network capability that largely captures the capability of competitors using their last-mile facilities, it is not necessary for competitive providers that use the last-mile facilities and services of wholesalers to file their own polygons in order for the Commission to meet its goal. To the extent that the Commission needs this information for other purposes, then it could continue to rely on the Form 477 submissions wherein competitive providers denote which census blocks are being served via last-mile services/facilities from wholesalers (through UNEs or BDS, for example).

Second, this information is more granular than the current Form 477 as it potentially pinpoints the buildings where broadband providers using the last-mile facilities of wholesalers currently have customers in service. INCOMPAS anticipates that tens of thousands of polygons, each representing a single location, will be filed for customer-based broadband access from providers who are using last-mile facilities of wholesalers—an unwieldy and potentially burdensome process for both the providers and the agency—that will lend the Commission very little additional information than the current Form 477 offers or that the wholesale providers' polygons will provide. Given that competitors would be identifying customer locations—this indicates more about adoption, than broadband availability, as where a competitor has a UNE or BDS-based customer, it provides very little information about what it means for the potential customer next door—even in a multi-tenant building where the incumbent must have facilities available for the competitor to provision additional services. There is not ample justification for requiring non-facilities-based service providers to submit polygons, especially when their current Form 477 submission should be sufficient for the Commission's need to understand where UNEs and BDS are being used by purchasers who then provision broadband to their own customers.

Third, the Commission has held that the polygons will be made public and while requests for confidential treatment may be requested, they may not be granted.¹³ INCOMPAS members are concerned that the polygons they will be submitting will afford its competitors competitively sensitive information that could be used in an anticompetitive manner if this information is not treated confidentially. The polygons that will be submitted through this new filing process will show where a competitive carrier has its own facilities-based, last-mile network capable of providing services, in addition to its customer locations for service that is provided via last-mile facilities/services of wholesale providers. The extent of a competitor's network versus where it is purchasing/leasing last-mile access provides insights into its ability to bid for particular customer locations, its likely reliance on incumbent or other wholesale facilities, its likely costs of providing service to particular locations, the likely timing of its entry into a given service in a geographic market or adjacent areas, and consequentially its competitive threat to other providers in the area.

Moreover, where a customer occupies the entire location, providers will be identifying its customers, revealing specific, competitive information not previously required—including the technology type by which the provider is serving the customer and the speeds offered to that customer—allowing its competitors access to highly, sensitive competitive information. Thus, combined with its polygons for its own facilities-based network offerings, third-party competitors will have the opportunity to piece together a significant amount of competitively-

¹³ *Report and Order*, ¶ 27 (“[A]ll service provider information filed as part of the Digital Opportunity Data Collection will be presumed to be nonconfidential unless the Commission specifically directs that it be withheld. Filers seeking confidential treatment of data submitted as part of the new collection must submit a request that the data be treated as confidential, along with the reasons for withholding the information from the public. The Commission will make decisions regarding non-disclosure of confidential information.”) (citations omitted).

sensitive information not previously afforded through the Form 477. This type of information has been consistently treated as confidential information within the competitive industry. Further, the Commission itself has routinely treated similar information as confidential—even highly confidential—in other contexts, such as its data collections in the BDS proceeding and in merger-related dockets.¹⁴ Under a settled principle of administrative law, the agency has an obligation to explain why it now believes that competitive information about locations actually served, and how they are served, should no longer be treated confidentially.¹⁵ It failed to do so in the *Report and Order*, and in particular, with respect to competitors using the last-mile facilities/services of other providers. The FCC must revisit its decision for legal reasons, in addition to the factual reasons discussed above.

Fourth, the Commission’s need for better broadband maps has been largely focused on how to direct universal service funds to mass market BIAS consumers that require support for broadband network deployment. Given that both UNEs and BDS are mostly used in the business

¹⁴ See, e.g., *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order on Reconsideration, DA 14-1327 at ¶ 15 & App. B at 5 (rel. Sept. 15, 2014) (showing that information on ability to serve particular areas and locations is “not routinely made available to the public” and warrants confidential or highly confidential treatment).

¹⁵ The FCC cannot depart from its own prior precedent “without explicitly recognizing that it is doing so and explaining why.” *Shaw’s Supermarkets, Inc. v. NLRB*, 884 F.2d 34, 36 (1st Cir. 1989). The FCC has a “duty to explain its departure from prior norms Whatever the grounds for departure from prior norms, however, it must be clearly set forth so that [a] reviewing court may understand the basis of the agency’s action and may so judge the consistency of that action with the agency’s mandate.” *Atchison, T. & S. F. Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808-09 (1973). See also *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) (“An agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”)

market,¹⁶ and the Commission has the census block information from the Form 477s, competitive polygons from competitors that are based on last-mile service or facilities from wholesale providers is not needed to achieve the Commission's need for better broadband maps to direct USF funding for mass market BIAS service.¹⁷

Accordingly, the FCC should grant INCOMPAS' petition for reconsideration and exclude competitors that use the last-mile facilities of wholesale providers from providing polygons. Rather, the Commission should continue to rely upon competitors' Forms 477 wherein they identify the census blocks where they provide broadband via UNEs or BDS. Moreover, the Commission also will be able to rely upon the facility-based provider polygons for where they provide broadband service and where they could provide broadband service within ten days for purposes of new broadband mapping to determine where universal service funds are needed to invest in broadband-capable networks.

¹⁶ While some competitors are using UNEs (typically, DS0s) to serve mass market consumers, the Commission could rely on the Form 477 information for purposes of its analysis needs.

¹⁷ Should the Commission determine not to continue to collect network deployment information through the Forms 477, it could retain the obligation for UNEs/BDS to the extent that it deems that information necessary for the Commission's work.

For the reasons stated herein, INCOMPAS urges the Commission to reconsider its *Report and Order* and exempt competitors that use last-mile facilities or services from wholesale providers from filing polygons.

Respectfully submitted,

INCOMPAS

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