

**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

REPLY OF INCOMPAS

Pursuant to Section 1.429(g) of the rules of the Federal Communications Commission (“FCC” or “Commission”),¹ INCOMPAS replies to USTelecom’s Opposition² to INCOMPAS’ limited Petition for Reconsideration³ of the FCC’s Digital Opportunity Data Collection Order.⁴

USTelecom’s Reply concedes that the issues INCOMPAS’ Petition raises are “important” and that “the polygons will make available to providers competitively sensitive information that could be used in an anticompetitive manner.”⁵ It then attempts to limit its agreement of potential and serious harms to only enterprise business services, failing to address the actual facts as laid out by INCOMPAS that the Commission’s *Report and Order* requires competitors to submit polygons showing their current customer BDS and UNE locations. Such

¹ 47 C.F.R. 1.429(g).

² Opposition in Part of USTelecom-The Broadband Association, WC Docket Nos. 19-195 & 11-10 (filed Feb. 14, 2020) (“USTelecom Opposition”).

³ Petition for Reconsideration of INCOMPAS, WC Docket Nos. 19-195 & 11-10 (filed Feb. 14, 2020).

⁴ *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 (rel. Aug. 6, 2019) (“*Report and Order*”).

⁵ USTelecom Opposition at 6.

information can be used by third-parties in an anticompetitive manner if the customer is a residential customer, a small business customer, or an enterprise customer. USTelecom offers no basis by which the competition and anticompetitive concerns raised should be limited only to the enterprise market. Specific location and BDS/UNE access information combined with the information from the other polygons that competitors will be required to submit showing their ability to serve customers based on their own facilities will be a roadmap for other providers to engage in anticompetitive conduct—harming competition for broadband internet access service (hereinafter referred to as broadband service).

To provide some examples of potential harms that could occur—

INCOMPAS Member A that is currently using BDS/UNEs from USTelecom Member B to build its customer base and to build fiber in a town is required under the FCC Order (as it stands) to submit polygons where it has BDS/UNE customers and where it could provide service on its fiber network within ten days. Its polygons must be separately filed for the type of networks it uses and may not include any unserved areas. As a result, it would submit a thousand polygons identifying the thousand building locations where it currently has BDS or UNE customers—each identifiable by their location. In addition, it would submit a polygon that shows where it could turn up service within ten business days based on its fiber builds. The FCC *Report and Order* states that this information will be made public (while confidentiality may be sought, it is not guaranteed); thus, any competitor will be able to ascertain where (1) all of its BDS/UNE customers are located, and (2) where it has and has not built its own network.

USTelecom Member B who owns and manages all the utility poles in the town, supplies the underlying wholesale BDS/UNEs (assuming, of course, UNEs are even still in the marketplace given that USTelecom is still advocating for a nationwide finding that UNEs should be removed

from the marketplace),⁶ and competes against INCOMPAS Member A in the residential, small and mid-sized business market, and the enterprise market. Likewise, any other third-party provider also would have access to this information. USTelecom Member B or other third-party providers would be able to engage in a number of anticompetitive ways against INCOMPAS Member A with this information. For example, they could lower prices below their own costs in the areas where the INCOMPAS Member is serving. They also could use the information to target those areas and lock in customers to long-term contracts. Of course, they could also increase their wholesale access costs where such costs are not regulated (note BDS already is deregulated in areas with the most BDS demand), engaging in a price squeeze—actions that combined with other targeted acts—like underpricing their service and locking in customers to long contracts could be detrimental to a competitor’s business and also competition in the market, harming customers. (Where incumbents have larger footprints and a stable customer base, targeting specific areas with lower prices and engaging in lock-up tactics would not be irrational behavior as it could result in the INCOMPAS member failing.) It also could target certain actions to deter fiber builds to areas where it knows the INCOMPAS member has BDS/UNE customers. Indeed, it could deny access to its poles using a number of means, such as claiming that the poles are overloaded and no new attachments are permitted, in order to prevent further expansion of fiber facilities to areas where the INCOMPAS member is planning to move

⁶ Letter from Kristine Hackman Vice President, Policy & Advocacy, USTelecom, to Marlene H. Dortch, Secretary, FCC (Feb. 18, 2020). (“USTelecom continues to believe that the Commission would be justified in lifting unbundling mandates nationwide.”) Of course, INCOMPAS continues to oppose USTelecom in this matter and has filed comments in response to the pending NPRM in the proceeding. *See generally* Comments of INCOMPAS and NWT, WC Docket No. 19-308 (Feb. 5, 2020).

BDS/UNE customers to its fiber network—harming facilities-based, competitive broadband deployment.

Unfortunately, these are not far-fetched examples. INCOMPAS members have indicated that these are real threats that could occur with the detailed information they would be required to submit as BDS/UNE providers in addition to their own facilities-based network information. It is important to recognize that USTelecom does not dispute that companies using BDS/UNEs will be providing polygons based on their customer lists and locations. It also does not dispute that competitors will be submitting polygons of individual locations of their current customers where they do not serve every location in a census block. USTelecom is suggesting that INCOMPAS' concerns can be addressed through confidentiality requests—unfortunately, that is not an option that INCOMPAS members can rely on based on the current *Report and Order* which sets forth a strong presumption that all information will be made publicly available and that confidentiality requests will only be addressed on a case-by-case basis and are not guaranteed.⁷ Unfortunately, this does not provide INCOMPAS members any confidence that their competitively sensitive customer location information will be treated confidentially.

Moreover, USTelecom fails to address the fact that with the exception of DS0s, every other BDS/UNE will be captured on the incumbent telcos polygons, and there has been no rationale presented as to why the Commission needs two entities to report on the *same* infrastructure. Contrary to USTelecom's claim,⁸ this is not the same as cable reporting that they serve the same geographic areas as telcos—those are actually two different networks. Here, this is the identical network being used by multiple companies, and unlike incumbent telcos and

⁷ *Report and Order* ¶ 27.

⁸ USTelecom Opposition at 3.

cable, it will be competitors who will be put in the extremely damaging position of revealing their customer locations under the new mapping requirements.

Moreover, with respect to DS0s, INCOMPAS members have indicated a willingness to continue to report via census block so as to ensure that no provider can attain high-cost funds for those blocks—the main reason given for new broadband mapping. It is also a perfectly reasonable approach since the Commission is proposing to use census blocks for its RDOF auction procedures, and especially in light of the concerns we raise above and in our Petition. Accordingly, USTelecom’s stance that such reporting would be insufficient because the FCC would not “understand[] where broadband is available and where it is not”⁹ falls flat.

USTelecom’s position that INCOMPAS is “disingenuous at best, and legally defective at worst”¹⁰ because we have pointed out (as USTelecom has done) that the Form 477 information overstates broadband availability, while also wanting to ensure that new broadband mapping information is collected in a sound and prudent manner that is not duplicative of information the Commission is receiving from the underlying provider, and that INCOMPAS Members and the competition that they bring are not harmed, is completely consistent with our positions in all proceedings and is certainly *not* legally defective.

USTelecom’s arguments that the Commission fully justified its *Report and Order* with respect to the issues INCOMPAS has raised also is incorrect.¹¹ Nowhere in its *Report and Order* did the Commission address INCOMPAS’ concerns about the duplicative nature of mapping for

⁹ *Id.* at 3.

¹⁰ *Id.* at 5.

¹¹ *Id.* at 2-3.

BDS/UNE-provided broadband service or that the language in the *Report and Order* would require INCOMPAS Members to submit their information based on BDS/UNE customer locations. This is actually apparent from the first several pages of our Petition and note 3 in particular stating that there were “unknowable facts and/or circumstances, including the requirements in the then-circulated draft Order, which were modified in the final Order.”¹² Indeed, on page three of our Petition, we state that the FCC did not address the arguments we raised in the *Report and Order*. Without addressing the facts and arguments we raised, the Commission’s decision is at risk as it is contrary to previous findings in other proceedings where the Commission found such customer location information should be treated confidentially.¹³

Finally, INCOMPAS respectfully requests that the Commission consider the current broadband mapping legislation as it provides some guidance on this matter. While we recognize that the legislation has not been finalized, it is instructive and may be binding on the Commission by the time the FCC decides INCOMPAS’ limited Petition for Reconsideration. The Broadband Deployment Accuracy and Technological Availability Act (S. 1822)¹⁴ states that mapping by fixed providers apply to those who have “actually built out the broadband network infrastructure;”¹⁵ that fixed providers shall not be required to submit “a list of addresses or locations that they serve;”¹⁶ and that the Commission “should establish processes . . . to protect

¹² INCOMPAS Petition at n. 3 and 1-3.

¹³ *Id.* at 8.

¹⁴ The legislation is available at <https://www.congress.gov/bill/116th-congress/senate-bill/1822/text?q=%7B%22search%22%3A%5B%22broadband+map%22%5D%7D&r=5&s=1>.

¹⁵ Section 802(b)(2)(A)(i)(I).

¹⁶ Section 802(b)(2)(A)(iv)(II)(bb).

the security, privacy, and confidentiality of that non-public or competitively sensitive information.”¹⁷ As for the first provision cited above, INCOMPAS submits that Congress is rightfully focused on where providers have built out networks that offer broadband service. This warrants INCOMPAS members supplying polygons based on their own network builds versus areas where they served their customer via the incumbent telco network. As INCOMPAS has emphasized, we do not oppose filing based on our own broadband networks. As for the second provision, polygons that reflect BDS/UNE customer locations is inconsistent with the prohibition that addresses/locations should not be required to be submitted. Third, the legislation requires a process to protect confidential and competitively sensitive information. INCOMPAS contends that the FCC’s *Report and Order* failed to establish a process that provides confidence that competitors’ competitively sensitive information will be protected should the FCC deny our limited Petition for Reconsideration.

CONCLUSION

INCOMPAS supports Congress’ and the Commission’s goals of policymakers and the public understanding where broadband networks are available and can provide service to customers within ten business days, and INCOMPAS and its members do not oppose filing information based on our own broadband-capable facilities that we have built out as Congress is instructing. Nevertheless, the Commission should be focused on obtaining information from facilities-based providers and not requiring providers who are purchasing wholesale access via BDS/UNEs on incumbent networks to file polygons that disclose their customer locations. To the extent that the Commission requires such filings, it should rule that such information is

¹⁷ Section 802(a)(1)(B)(ii).

competitively sensitive, will remain confidential, and not be publicly released.

Respectfully submitted,

INCOMPAS

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CERTIFICATE OF SERVICE

I hereby certify that I am electronically mailing a copy of the foregoing Reply today to

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