Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Restoring Internet Freedom	)	WC Docket No. 17-108
	)	
Bridging the Digital Divide for Low-Income Consumers	)	WC Docket No. 17-287
	)	
Lifeline and Link Up Reform and Modernization	)	WC Docket No. 11-42

COMMENTS OF INCOMPAS

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TABLE OF CONTENTS

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INCOMPAS, by its undersigned counsel, hereby submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") Public Notice[1] and Order.[2] These comments seek to refresh the record in the *Restoring Internet Freedom* and *Lifeline* proceedings in light of the U.S. Court of Appeals for the D.C. Circuit's *Mozilla* decision that remanded the *Restoring Internet Freedom Order*[3] to the Commission to reconsider and sufficiently address how the reclassification of

[1] *See Wireline Competition Bureau Seeks To Refresh Record In Restoring Internet Freedom And Lifeline Proceedings In Light Of The D.C. Circuit's* Mozilla *Decision*, FCC Public Notice, WC Docket Nos. 17-108, 17-287, 11-42 (rel. Feb. 19, 2020) ("*Public Notice*").

[2] *In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, Order, WC Docket No. 17-108, 17-287, 11-42 (rel. March 25, 2020).

[3] *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (rel. Jan. 4, 2018) ("*Restoring Internet Freedom Order*").

broadband Internet access service ("BIAS") impacts the regulation of pole attachments, public safety, and the Lifeline program.[4]

I. INTRODUCTION AND 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 fixed broadband companies, including small local fiber and fixed wireless providers that provide residential 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, including regional fiber providers; transit and backbone providers that carry broadband and Internet traffic; online video distributors ("OVDs") which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

INCOMPAS has long supported the FCC exercising its jurisdiction and authority to ensure via net neutrality rules and policies that BIAS users have access to the content and services of their choice over the Internet without disruption or interference from their BIAS provider.[5] Before 2018, the Commission's targeted rules and interconnection

[4] *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) ("*Mozilla*").

[5] Net neutrality requirements are critical to ensuring a fair and competitive online market. Online content providers must access their customers through BIAS providers, and large BIAS providers have used their market power to extract non-cost based access fees from them and have engaged in other unreasonable discriminatory behavior against online content providers. Indeed, INCOMPAS is concerned that there already are a number of practices that large BIAS providers with significant market power are engaged in that favor their own online content and services to the disadvantage of their online competitors. The FCC, U.S. Department of Justice, and U.S. Court of Appeals for the

policy were working to ensure that no matter who a consumer chose for their BIAS provider, they could access the content of their choice without blocking, throttling, and other forms of unreasonable discrimination. In turn, content providers were able to provide their content without disruption from the BIAS provider. INCOMPAS therefore opposed the Commission's fundamental policy shift in its so-called *Restoring Internet Freedom Order*, and was a Petitioner in *Mozilla*. While the U.S. Court of Appeals for the D.C. Circuit in *Mozilla* upheld the FCC's reclassification of BIAS, it found arbitrary and capricious decision-making on three distinct issues, and remanded those issues for further consideration by the Commission.[6] The Commission must now reconsider and refresh the record on how its reclassification of BIAS and repeal of net neutrality in the *Restoring Internet Freedom Order* affect the regulation of pole attachments, public safety, and the Lifeline program.

Classifying broadband as an information service has significant implications for BIAS providers' statutory rights in Section 224 of the Act for access to poles and conduit required to deploy competitive service, public safety communications that consumers access online, and the ability of the Commission to ensure BIAS availability to low-income individuals through the Commission's Lifeline program.

D.C. Circuit have all agreed that large BIAS providers have the ability and incentive to harm online competition without net neutrality requirements. *See* Comments of INCOMPAS, *FTC Hearing #10 – Competition and Consumer Protection Issues in U.S. Broadband Market* (May 31, 2019), at 20-37.

[6] *Id.* at 18.

II. BIAS PROVIDERS' STATUTORY RIGHTS TO ACCESS POLES OR CONDUIT ARE CONTINGENT ON BEING A TELECOMMUNICATIONS CARRIER OR CABLE PROVIDER.

Petitioners in *Mozilla* argued, and the Court agreed, "the Commission, without reasoned consideration, took broadband outside the current statutory scheme governing pole attachments."[7] The Court explained that the Communications Act defines "pole attachment[s]" by reference to telecommunications service[s] under Title II,"[8] and that the Commission "did not adequately address how the reclassification of broadband would affect the regulation of pole attachments[.]"[9] The Court appropriately remanded this issue to the Commission for further reconsideration of this issue, and pointed to the fact that the Commission has previously recognized that infrastructure access such as pole attachments are "crucial to the efficient deployment of communications networks including, and perhaps especially, new entrants."[10] The Communications Act establishes a default rule that the Commission shall regulate pole attachments, but it also allows any state to displace the federal regulation if it certifies to the Commission that it instead is regulating the attachments.[11] The federal regulatory oversight of pole attachments only

[7] *Id.* at 104.

[8] 47 U.S.C. § 224(a)(4).

[9] *Mozilla*, at 104-105.

[10] *See In re Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 5618 (2015) ("*Open Internet Order*"), at ¶ 56.

[11] 47 U.S.C. § 224(b)(1). Approximately 20 states regulate pole attachments under this regime. *Moz*illa, at 105.

benefits providers of cable services and telecommunications service, which according to the FCC's *Restoring Internet Freedom Order* now excludes BIAS.

INCOMPAS agrees with the Governmental Petitioners in *Mozilla* who argued that reclassification of BIAS takes away BIAS providers' statutory right to nondiscriminatory, just and reasonable access to poles and conduit that only applies to cable providers and telecommunications carriers.[12] Not only is the Commission's new policy unfair for providers that provide standalone BIAS, but it will also serve as a significant barrier to new entrants that seek only to provide BIAS, which may negatively impact BIAS competition.

The FCC's recent pole attachments proceedings reflect the Commission's appreciation of how important it is for providers to obtain timely and affordable access to pole space.[13] Section 224 of the Communications Act, however, confers the right to access poles, conduit, ducts, or rights-of-way at reasonable and non-discriminatory rates and in reasonable periods of time only on telecommunication service providers and cable operators. Therefore, competitive BIAS providers who need such access must now offer either a telecommunication service or cable service to qualify for Section 224 access. For

[12] *Id.* at 106.

[13] For example, the Commission is currently defending its two Orders, which INCOMPAS supports, in the U.S. Court of Appeals for the Ninth Circuit. This includes the Commission's *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling (rel. Aug. 3, 2018) ("One-Touch, Make Ready Order") and the *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Declaratory Ruling and Third Report and Order (rel. Sept. 27, 2018) ("Small Cell Order"); see also *In the Matter of Implementation of Section 224 of the Act*, WC Docket No. 07-245, Report and Order and Order on Reconsideration (rel. April 7, 2011).

providers that only want to provide BIAS service, they are at a competitive disadvantage as a pole owner can refuse access, charge higher rates, and/or discriminate against them as compared to other providers who offer telecommunications service or cable service in addition to BIAS. INCOMPAS is deeply concerned that our BIAS provider members will now be forced to provide a telecommunications or cable service, rather than only a BIAS service, to make sure they do not potentially lose their Section 224 protections to access poles and conduit. With OTT voice and video availability, members may prefer to just offer the conduit for consumers to obtain these services over their BIAS rather than offer their own voice service that qualifies as a telecommunications service or a video service that qualifies as a cable service merely to obtain Section 224 rights.

There is already a serious need for competition in the residential BIAS market with most consumers only having a choice of two BIAS providers, and at higher speeds typically a choice of one,[14] and Section 224 rights are critical for new entrants deploying fixed networks (especially fiber, fixed wireless, and for new 5G home service). We know from our members that it is expensive and time-consuming to build a network. Without a clear path to exercise Section 224 rights for our members who just want to offer BIAS, there is a significant risk that competitive alternatives can be delayed or deterred altogether.

[14] *See, e.g.,* Comments of INCOMPAS and NWTA, WC Docket No. 19-308, at 17-18 (filed Feb. 5, 2020).

III. THE COMMISSION'S REPEAL OF NET NEUTRALITY RULES HAS DANGEROUS IMPLICATIONS FOR PUBLIC SAFETY COMMUNICATIONS.

In *Mozilla*, the Court agreed with the Governmental Petitioners' claim that the Commission's failure to consider the *Restoring Internet Freedom Order*'s implications for public safety was arbitrary and capricious.[15] The first provision of the Communications Act expressly states that Congress created the Commission for the purpose of, among other things, "promoting safety of life and property through the use of wire and radio communications."[16] In addition, as the Court explained, the Wireless Communication and Public Safety Act of 1999 requires the Commission to encourage, support, consult, and cooperate with states and local officials that are deploying emergency communications infrastructure and programs.[17] Petitioners pointed to various examples, and the Court agreed that "[a]ny blocking or throttling of these Internet communications during a public safety crisis could have dire, irreversible results."[18] INCOMPAS agrees.

It is apparent, especially during the current COVID-19 pandemic, that access to OTT information and services over BIAS is necessary to keep our nation's citizens informed and engaged. We have witnessed time and again that consumers use OTT services to stay connected in life or death situations. For example, in 2017, Twitter and Facebook were key in the wake of Hurricane Harvey—which caused a massive flood that

[15] *Mozilla,* at 93.

[16] 47 U.S.C. § 151.

[17] *Mozilla*, at 93.

[18] *Id.* at 96.

devastated the City of Houston and surrounding areas—as a way for ordinary citizens engaging in rescue efforts of their neighbors. Citizens took to social media and used hashtags to flag rescuers and to compile helpful databases.[19] Additionally, as more consumers rely on OTT voice services for critical communications, it is important that these and all other lawful applications and services be transmitted by BIAS providers without interference or preference. It is difficult to foresee how degrading access to a particular type of service or application could harm households and businesses during emergencies. Today, for example, governments, businesses, schools, and households are relying heavily on voice and conferencing apps that permit people to communicate remotely for work, pleasure, and education purposes. The Commission must address how the reliability of these services will be preserved in the absence of net neutrality protections, particularly during public emergencies when making immediate connections with first responders, government agencies, or family is critical.

Without ex ante net neutrality rules, there are no guarantees that any OTT service being used by citizens during a public safety emergency will not be blocked, throttled, or unreasonably discriminated against. Without net neutrality rules, no BIAS provider is under any obligation *not* to engage in such activity to block or slow down OTT services, even during times of critical safety. Thus, there is risk that BIAS providers can disrupt or undermine the competitive OTT services that citizens and first responders use to stay connected during emergency situations.

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[19] *'Please Send Help.' Hurricane Harvey Victims Turn to Twitter and Facebook*, TIME (Aug. 30, 2017), *available at* https://time.com/4921961/hurricane-harvey-twitter-facebook-social-media/.

As an example, the Governmental Petitioners pointed to the incident in June 2018, six months after the *Restoring Internet Freedom Order* was issued, when Verizon throttled the broadband Internet of Santa Clara firefighters while they were battling a California wildfire.[20] In its attempt to defend the *Order*, the Commission argued that this dangerous incident demonstrates that light-touch regulation *promotes* public safety because Verizon then introduced a new plan for public safety customers in response to the negative public reactions to the throttling incident.[21] But this "market gap" defense is misguided. When it comes to life or death situations, such as a hurricane or wildfire, people cannot wait for companies or rescuers first to await and then to interpret and adopt new public safety plans. People will expect, and deserve, to be connected to the Internet and each other as quickly as possible without network operators acting as gatekeepers to life-saving content and communications.

The Commission can also look to other institutions as an example of dealing with network connectivity during national or global crisis. For example, in the face of some operator proposals that contemplate application-specific throttling (incidentally, often targeted at U.S.-originated content and applications), the Body of European Regulators of Electronic Communications (BEREC) has been particularly strong in emphasizing the importance of maintaining net neutrality when network operators respond to heavier demand.[22] Unfortunately, the FCC's current position of allowing BIAS providers to

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[20] *Mozilla*, at 96.

[21] *Id.* at 97.

[22] *See* Press Release, BEREC, *Coping with the increased demand for network connectivity* (March 19, 2020), *available at* https://berec.europa.eu/eng/document_register/subject_matter/berec/press_releases/9237-

determine whether they will safeguard the open Internet—rather than the Commission being able to enforce neutrality where necessary—does not guarantee that consumers can access the content of their choice online at any time, much less during times of public safety import.

IV. LOW-INCOME INDIVIDUALS WHO QUALIFY FOR THE LIFELINE PROGRAM SHOULD HAVE ACCESS TO BIAS.

The Lifeline Program subsidizes low-income consumers' access to communications technologies, including BIAS.[23] In 1996, Congress codified the Lifeline Program in the Communications Act, and Congress added the financial support of BIAS to the Lifeline Program in 2016.[24] As the *Mozilla* Court points out, in the *Lifeline Order*, the Commission repeatedly referenced Congress' overriding command to provide *"telecommunication services* to consumers."[25] As a result, "broadband's eligibility for Lifeline subsidies turns on its common-carrier status" and the *Restoring Internet Freedom Order*'s reclassification of broadband disqualifies broadband from the Lifeline program.[26] This exclusion has negative consequences for low-income and vulnerable

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press-release-coping-with-the-increased-demand-for-network-connectivity (stating "Pursuant to the Open Internet Regulation. . . operators are authorised to apply exceptional traffic management measures, inter alia, to prevent impending network congestion and to mitigate the effects of exceptional or temporary network congestion, always under the condition that equivalent categories of traffic are treated equally. This could become relevant, following the confinement measures taken to address the COVID-19 crisis by the EU Member states.").

[23] 47 U.S.C. § 214, 254.

[24] *See In re Lifeline & Link UP Reform and Modernization*, 31 FCC Rcd. 3962, 3964 (2016) ("*Lifeline Order*").

[25] *Lifeline Order*, at 3964; *see also Mozilla*, at 110.

[26] *Mozilla*, at 111.

American consumers. INCOMPAS supports the availability of BIAS through Lifeline subsidies. It is important that the Commission continues to make BIAS available to qualified Lifeline consumers and that such availability be a requirement by *all* Lifeline providers rather than just a voluntary commitment.

The value of broadband networks and the OTT services that flow over them is connecting consumers. Excluding BIAS from the Lifeline program would negatively affect low-income individuals who need the Internet and the content offered over it for everyday services—from education to applying to jobs, connecting with loved ones, and, as we currently see, getting information and guidance about matters as critical as a global pandemic. On a bigger scale, excluding BIAS from the Lifeline program negatively affects the purpose of the Internet—a network of networks. As more consumers and devices are connected to the Internet, the significance of Internet connectivity is increasingly consequential for consumers nationally and around the world. People need access to the Internet to see what other people are doing, writing, and saying locally and globally. Making it harder, or in some instances impossible, for low-income individuals to access the Internet is unfair to low-income individuals, not sound policy to foster the use, growth, and value of the Internet and the content that flows over it, and goes against the Commission's purpose to "make available, so far as possible . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]".[27]

Yet, it is unclear how the Commission can require that all Lifeline providers offer BIAS under its current classification to ensure that BIAS is being made available to all

[27] 47 U.S.C. § 151.

consumers. Moreover, it is limiting that the current majority of the Commission chose to find its Section 706 authority as merely hortatory as prior Commission and D.C. Circuit decisions hold that Section 706 provides a means for the Commission to ensure broadband availability for all Americans.[28] It potentially could be used as a means of authority to require Lifeline providers to provide BIAS to their subscribers.

V. CONCLUSION

The Commission's *Restoring Internet Freedom Order*, wherein it reclassified BIAS as an information service and repealed net neutrality rules and its Internet interconnection policy, should be reconsidered. U.S. consumers are no longer guaranteed that they can access the content of their choice online without the undue interference of their BIAS provider, and the FCC is no longer exercising its jurisdiction to protect and promote consumers' net neutrality rights. As we discussed herein, the ability of the Commission to promote BIAS competition is negatively impacted by the facts that: BIAS-only providers cannot exercise Section 224 rights in building their networks; the Commission can no longer ensure that BIAS consumers can access public safety

[28] *See In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108 (rel. Jan. 4, 2018), at ¶ 267 (stating "We find that provisions in section 706 of the 1996 Act directing the Commission to encourage deployment of advanced telecommunications capability are better interpreted as hortatory rather than as independent grants of regulatory authority."); *contrast with Verizon v. FCC*, 740 F.3d 623, 637 (D.C. Cir. 2014) ("The question, then, is this: Does the Commission's current understanding of section 706(a) as a grant of regulatory authority represent a reasonable interpretation of an ambiguous statute? We believe it does."); *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28 (rel. March 12, 2015), at ¶ 276 (stating "Section 706 affords the Commission affirmative legal authority to adopt all of today's open Internet rules.); *United States Telecom Association, et. al v. Federal Communications Commission*, 825 F.3d 674, 734 (D.C. Circuit 2016) (stating "Consequently, as we held in *Verizon* and reaffirm today, the Commission's section 706 authority extends to rules "governing broadband providers' treatment of internet traffic").

information from the online provider of their choice whether it is a social media service or their local public safety agency; and it is unclear how the Commission can guarantee that low-income consumers who qualify for the Lifeline program can access BIAS.

Respectfully submitted,

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