

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
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)	
Office of Economics and Analytics Seeks)	GN Docket No. 20-60
Comment on the State of Competition in)	
the Communications Marketplace)	
)	

COMMENTS OF INCOMPAS

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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 that seeks input on the state of the communications marketplace to inform the Commission’s required assessment of the state of competition in the communications marketplace in its second Communications Marketplace Report (the 2020 Communications Marketplace Report) to Congress.¹

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 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

¹ See *Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, FCC Public Notice, GN Docket No. 20-60 (rel. Feb. 27, 2020) (“*Public Notice*”).

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. Many of INCOMPAS members are providing and/or relying upon broadband capability, speed and quality. The Commission’s role in encouraging broadband deployment—both mobile and fixed—and protecting and promoting broadband competition is key to ensuring that residential and business customers, will have a 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.² As such, INCOMPAS supports the goal of RAY BAUM’S Act—that the Commission assess the state of broadband competition—and we appreciate the opportunity to weigh in on how the Commission can accomplish this goal. The fixed BIAS marketplace, as well as the business data services marketplace, remain highly concentrated in most geographic areas.³ 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, enabling more opportunities for competition to thrive, and in turn, for consumers to

² 47 U.S.C. § 1302(b).

³ As we discuss below, the Commission’s reliance on Form 477 data to measure broadband availability and competition, in particular, is significantly problematic. Most Americans have only two BIAS options at home—typically from their cable operator or their incumbent telco. Some benefit from a third option—a fiber provider or in some limited cases a fixed wireless provider.

benefit with internet access that delivers faster speeds, better customer service and affordable prices.

We have also asserted that the Commission should not remove the competitive policies that work to enable competition and consumer benefits. This includes bipartisan competition laws that enable the Bridge 2 Broadband which unites communities, urban and rural, by promoting fiber network deployment through unbundling and resale requirements. The streaming, business software and cloud revolution have thrived due to interconnection policy and net neutrality requirements, and we continue to implore the Commission to streamline broadband deployment for fixed and mobile broadband service as broadband providers continue to face significant barriers to deployment of stronger, faster speed networks and 5G, which we discuss further below.

II. ANY CONCLUSIONS DRAWN ABOUT THE BROADBAND MARKETPLACE MUST BE BASED ON ACCURATE AND VERIFIABLE DATA AND INCLUDE A STUDY OF THE COMPETITIVE IMPACT ON PRICING AND SERVICE QUALITY.

When evaluating the various markets for this report, the FCC should be mindful of how broadband is being used by consumers and businesses. INCOMPAS urges the FCC to define the product markets and geographic markets by using what is made available today and how consumers and businesses are purchasing and using those services.

For residential or mass market service—consumers are using (1) fixed BIAS at home and (2) mobile BIAS on the go. Consumers prefer access to both fixed and mobile broadband service, and the FCC has agreed that the availability of both types of service are necessary for

finding that broadband service is available under Section 706 of the Communications Act.⁴

INCOMPAS supports the FCC collecting and assessing accurate and verifiable data that measures the availability of both fixed and mobile broadband networks.⁵

Of course, the experience of using these services are distinctly different, and the Commission should continue to treat fixed and mobile as separate services rather than as substitutes. Fixed wireline (especially fiber) typically delivers faster, more robust BIAS connections. Consumers expect a high-speed fixed broadband service when they move to a new home. Indeed, where it is not available, it is more difficult to sell a house.⁶ When we are at our office or in our homes, our connections are faster, we can stream and consume long-form video much more easily, and most of us do not have to worry about hitting a data cap. On the other hand, mobile provides the convenience of access, but typically at slower speeds and higher prices. When we are on the go, we use our mobile device to stay connected. We check email for work, talk on the phone, and use apps to manage our business and social life. Sometimes our mobile connection is strong, and sometimes it is not. Americans typically are paying more for their mobile broadband connection, so many users limit how much they use to avoid going over their data caps and paying more.

⁴ See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2020 Broadband Deployment Report, GN Docket No. 19-285, at ¶¶ 10-11 (rel. Apr. 24, 2020).

⁵ Comments of INCOMPAS, GN Docket No. 17-199, at 7-11 (Sept. 21, 2017).

⁶ See Ryan Knutson, *How Fast Internet Affects Home Prices*, WALL ST. J. (June 30, 2015, 6:35 PM), available at <https://www.wsj.com/articles/SB11064341213388534269604581077972897822358>.

Last year, Pew found that 37% of U.S. adults are using their mobile devices at home to access the Internet, which has increased from its finding of 19% in 2013.⁷ However, only 17% of U.S. adults are “smartphone-only internet users,” meaning that they do not have a traditional high-speed internet connection at home.⁸ This share has roughly doubled since 2013, when 8% of adults fell into this category. Pew also notes that a majority of U.S. adults continue to purchase residential broadband service.⁹ However, Leichtman Research Group found that 85% of U.S. households purchase home broadband,¹⁰ and that 2.5 million additional home broadband subscriptions were added in 2019.¹¹

Demand for connectivity at home and the need for robust capacity and higher speeds are increasing, especially as a result of the ongoing COVID-19 pandemic. Consumers are using broadband at home to work, do their homework, entertain themselves, shop, and stay connected to friends and family, among many other uses. Multiple family members are using broadband simultaneously at homes across America through laptops, tablets, gaming devices, and smartphones, and the number of connected devices is growing. More consumers are following stay-at-home directives and they need sufficient connectivity for distance learning and remote

⁷ Pew Research Center, *Mobile Technology and Home Broadband 2019* (June 13, 2019), available at <https://www.pewresearch.org/internet/2019/06/13/mobile-technology-and-home-broadband-2019/>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Leichtman Research Group, *85% of U.S. Households Get an Internet Service at Home; Three-Quarters of Households get Internet Service Both at Home and on a Mobile Phone*, Press Release (Dec. 23, 2019), available at <https://www.leichtmanresearch.com/85-of-u-s-households-get-an-internet-service-at-home/>.

¹¹ Leichtman Research Group, *2.5 Million Added Broadband in 2019; Over 101 Million now get Broadband From top Providers*, Press Release (March 5, 2020), available at <https://www.leichtmanresearch.com/2-5-million-added-broadband-in-2019/>.

working, among other uses. Since the COVID-19 pandemic began, our local fiber members serving residential consumers are seeing a daytime increase of 25% bandwidth usage.¹²

Higher broadband speeds, where available, have allowed residential consumers to adopt new applications that compete with legacy services. For example, consumers can now stream video content online and can do so rather than subscribing to a traditional cable or MVPD *service*. In fact, consumers are “cutting the cord” for video in record numbers which INCOMPAS will discuss further below. Most Americans and businesses continue to use a fixed broadband service because mobile is not a sufficient substitute. Accordingly, access to both fixed and mobile broadband is necessary to meet the needs of consumers.¹³ FCC data also confirms this as both fixed and mobile broadband subscriptions continue to rise.¹⁴ Unfortunately, in the current environment, consumers and businesses have limited choice for fixed terrestrial broadband services, and for particular types of broadband services—such as business data services (“BDS”)—choices are even more limited.

a. Measuring Competition for Broadband Must be Carefully Evaluated and be Based on Accurate and Verifiable data.

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 BDS service, which businesses of all sizes use, including

¹² See INCOMPAS Network Performance, Competition We’re BUILT for This; *Broadband and Voice Network Performance During COVID-19 Crisis*, available at <https://www.incompas.org/networkperformance>.

¹³ While 5G may have the promise of competing directly against fixed wireline, that has not been proven, and the FCC should not include 5G in its fixed broadband analysis.

¹⁴ FED. COMM’N COMM., *Internet Access Services: Status As Of December 31, 2017* (“FCC Internet Access Service Report 2019”) (Aug. 2019), at 2, available at <https://docs.fcc.gov/public/attachments/DOC-359342A1.pdf>.

schools, libraries, hospitals, public safety and local, state and federal government agencies, and mobile wireless companies for backhaul to towers. Unfortunately, the FCC’s prior and inaugural Communications Marketplace Report falls woefully short of this objective. It should take the necessary steps to course correct for the 2020 Report.

i. Residential Fixed BIAS

Broadband connections and services should be currently physically available to consumers in order for the FCC to count them in its competition analysis. Because both residential and business users purchase their broadband services locally, geographic markets for fixed broadband, including BIAS and BDS, are based on where a person lives or where a business is located.

In its *Public Notice*, the FCC proposes to use the current Form 477 data for its analysis of fixed broadband service.¹⁵ Unfortunately, the FCC’s current Form 477 data is insufficient for purposes of evaluating competition for fixed BIAS. 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, the Commission has recognized with increasing clarity the limitations of its Form 477 data and, even now, is in the process of overhauling the collection of broadband availability information through its Digital Opportunity Data Collection proceeding.¹⁶

The Form 477 data does not lend itself to sound analysis of broadband availability or broadband competition. This is because providers indicate where they “could” provide service in

¹⁵ *Public Notice*, at n. 6.

¹⁶ See *Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Red. 7505, ¶ 5 (2019). In fact, Congress has passed the Broadband DATA Act, which requires the FCC to produce broadband availability maps and reform its Form 477, among other things, Broadband Deployment Accuracy and Technological Availability Act, 47 U.S.C. §§ 641—646 (2020).

their Form 477 submissions—not where they *actually* provide service. To make matters worse, the Commission’s existing approach, which treats any census block where a provider “could” provide service as entirely served even where the provider only indicates that it “could” offer service to a single location within the census block, overstates the amount of availability *and* competition. Even the FCC’s website 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.¹⁷

As noted above, 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 to *only one* location in a census block. The FCC qualifies its data as not measuring competition on its website and its Internet Access Service Report because it knows that doing so is very likely an overstatement of competitive choice of broadband providers.

Regrettably, the FCC failed to heed INCOMPAS’ warning and abandoned its previous practice of not using the Form 477 data for competitive analysis of fixed broadband in its Communications Marketplace Report released in December 2018.¹⁸ It should not make the same

¹⁷ See *Explanation of Broadband Deployment Data, Block-Level Deployment and Competition*, FED. COMM’N COMM., available at <https://www.fcc.gov/general/explanation-broadband-deployment-data> (last visited May 28, 2019). See also FED. COMM’N COMM., *Internet Access Services Report: Status as of June 30, 2017* (Nov. 2018) (“*FCC Internet Access Service Report 2018*”), at 6, available at <https://docs.fcc.gov/public/attachments/DOC-355166A1.pdf> (“2018 Internet Access Services Report”) (“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 reflect the number of choices available to a particular household and does not purport to measure competition.”).

¹⁸ See *Communications Marketplace Report, et al.*, GN Docket No. 18-231, at Section II.D.2 (rel. Dec. 26, 2018) (“*Communications Marketplace Report*”). Cf. 2018 Internet Access Services

mistake again. Indeed, all five Commissioners recently agreed in an oversight hearing before the House Subcommittee on Communications and Technology that the Commission should not be relying upon the inaccurate information produced by the current Form 477 data.¹⁹ The Commissioners concurred that the existing broadband deployment data are “significantly lacking and deeply flawed” and when the FCC has bad data, “[it] can’t make good decisions.”²⁰ It is arbitrary and capricious for the FCC to properly caveat the severe limitations of its data in some of its reports specifically stating that the data cannot be used to measure competition, and then in the Communications Marketplace Report use the same data to do just that—measure competition.¹⁹

INCOMPAS is not aware of any sufficient information that is accurate and verifiable for the FCC to conduct a thorough competition analysis for fixed BIAS. Until new maps are available as required by the Broadband DATA Act, this information is not readily available. As we state above, the Commission should not continue to provide misleading data and related graphics on the availability of competitive fixed options; but if it chooses to do so, it should make clear that the data the FCC is relying upon does not actually indicate the competitive options consumers have by adding the language to its 2020 Report that the data the FCC relies upon “does not measure actual competition.”

Report, at 6 – Number of Providers by Census Block, Fig. 4. (“This information is taken from the block-level Form 477 fixed broadband deployment data that the Commission began collecting in 2014. 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 reflect the number of choices available to a particular household and does not purport to measure competition.**”) (*emphasis added*).

¹⁹ Likewise, the Commission’s qualified language in the Communications Marketplace Report about the inadequacy of its data completely ignores the fact that it cannot be used to measure competition. *See Communications Marketplace Report*, at ¶ 184 and accompanying notes.

Moreover, if it proceeds to use Form 477 data, the 2020 Report should include all speeds providers report, including up to 1 Gigabit. Reporting data at the higher broadband speed availability is consistent with the FCC’s recent *Rural Digital Opportunity Fund Order*. In that proceeding, the FCC determined that its current 25/3 Mbps broadband definition is minimally adequate looking forward, in contrast to the Gigabit speeds (1000/500 Mbps) that the Commission prefers in its upcoming RDOF auction that supports advanced networks over the next ten years.²⁰ Additionally, as the *RDOF Order* recognizes with its baseline 50/5 Mbps tier, moving beyond 25/3 Mbps service is critical for “meeting the ‘immediate broadband needs’ of consumers today” and the deployment of future-proof networks such as fiber.²¹ Indeed, INCOMPAS has urged the Commission to adopt 1 Gbps down as the metric for broadband service, to better promote fiber deployment deeper into the networks.²² Meeting these higher-capacity needs require carriers to upgrade their facilities, a process that INCOMPAS members have jumpstarted.²³ For example, competitors in the forbearance proceeding repeatedly stated how the availability of unbundled network elements supports their fiber builds.²⁴

²⁰ *Rural Digital Opportunity Fund*, Report and Order, FCC No. 20-5, WC Docket Nos. 19-126, 10-90, ¶¶ 4, 33, 38 (rel. Feb. 7, 2020) (“*RDOF Order*”).

²¹ *RDOF Order*, at ¶¶ 31, 35.

²² See, e.g., Comments of INCOMPAS, WC Docket Nos. 19-126, 10-90, at 6-7 n.3 (filed Sept. 20, 2019) (“*INCOMPAS RDOF Comments*”) (agreeing with NCTA—The Internet and Television Association’s statement that the United States “must transition from an era defined by megabits to one which gigabit connectivity is unleashed” to maintain its global leadership in fixed broadband and fiber deployment).

²³ See *INCOMPAS RDOF Comments*, at 6 (“Where our members have deployed competitive fiber, they are able to offer 1 Gigabit symmetrical service at reasonable prices.”).

²⁴ See, e.g., Ex Parte of Sonic (Oct. 2018), at 1 (“Sonic’s business model—and ability to deploy fiber—relies on the availability of UNEs.”).

Competitive choice and even availability is much weaker at the desired future-oriented broadband speeds of 1 Gigabit. The Form 477 data, as flawed as it is, shows a demonstrable lack of competition for services with advertised speeds at or above 100 Mbps download and 10 Mbps upload. Even using numbers inflated by counting as served any census block with one subscriber that could be served, as of the end of 2017:

- ▶ 31% of developed census blocks lack any provider
- ▶ Another 44% of developed census blocks have only one such provider
- ▶ Only 5% of census block had three or more providers advertising service somewhere in the block.²⁵

And the picture is even bleaker for services of at least 1 Gbps down and 500 Mbps up; in the census blocks having any such service, nearly all only have a single provider offering it.²⁶

It is also important that the FCC’s analysis also take into account whether customers switch providers when offered better pricing or terms of service—not just whether service territories overlap. The FCC’s Communications Marketplace Report in 2018 did not take into consideration the impact that competition has on pricing and service quality, leaving the evaluation of the market incomplete—despite the fact that in September 2017 the Government Accountability Office (“GAO”) criticized the FCC for not doing so.²⁷ While the Commission does not collect pricing information, it has used publicly available data for its international

²⁵ *FCC Internet Access Services Report 2019*, at 2.

²⁶ See Comments of INCOMPAS and NWTa, WC Docket No. 19-308, at 17-18 (filed Feb. 5, 2020).

²⁷ See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-17-742, ADDITIONAL STAKEHOLDER INPUT COULD INFORM FCC ACTIONS TO PROMOTE COMPETITION (rel. Sep. 19, 2017), *available at* <https://www.gao.gov/products/GAO-17-742>.

comparisons in its Section 706 Report. Thus, for purposes of its fixed broadband 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 (urban, suburban, and rural areas) to be included in the 2020 Report.

ii. Business Data Services

The FCC should include a separate assessment of business data services (“BDS”) in its 2020 Report. 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 FCC defines BDS as “the dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections.”²⁸ Enterprise customers use BDS “to enable secure and reliable transfer of data” and include services such as DS1 and DS3 interoffice facilities and channel terminations between incumbent local exchange carriers and interexchange carriers.²⁹

The assessment of competition for BDS should be limited to that product market. BDS is purchased by an enterprise customer at a specific business location. Data collected in the FCC’s most recent assessment of BDS competition demonstrated that 77% of locations with business data services demand had only a *single* full facilities-based provider (i.e. a provider with its own loop facilities to the customer’s premises) available at their location.³⁰ This figure

²⁸ *Business Data Services in an Internet Protocol Environment, Technology Transitions, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No. 05-25, RM-10593, Report and Order, FCC 17-43, at 5 ¶ 6 (rel. Apr. 28, 2017) (“*BDS Report and Order*”).

²⁹ *Id.*

³⁰ *See id.* at 191.

jumped to 84% for locations with less than 100 Mbps of cumulative demand.³¹ In 2017, the FCC prematurely deregulated BDS pricing based on what have been so far unproven predictions of the potential of a single alternative facilities-based provider entering a market.³² In response, the incumbent telcos have raised prices.³³ For example, since the *BDS Order*, CenturyLink has increased the rates for special access DS1 channel terminations across the board in its price-cap and price-flexibility wire centers, whether urban or rural.³⁴ The price increases range from 28% to 150%.³⁵ Allstream, an INCOMPAS member, experienced an even greater impact from these price increases because, prior to the *BDS Order*, CenturyLink offered a Regional Commitment Plan that allowed providers to purchase channel terminations and transport at a 22% discount off the monthly rate, with no term commitments on individual circuits.³⁶ CenturyLink discontinued the Regional Commitment Plan after the *BDS Order*,

³¹ See Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al., at 5 (filed Oct. 21, 2016).

³² *BDS Report and Order*, at ¶ 87.

³³ Compare CenturyLink, *Operating Companies Interstate Service Guide*, No. 11 Release 1, § 7.11.4.C.1.a (May 1, 2018) (Wyoming monthly per mile mileage rate of \$15.60), available at http://www.centurylink.com/tariffs/fcc_cloc_acc_isg_no_11_part1.pdf, with CenturyLink, *Operating Companies Interstate Service Guide*, No. 11 § Release 2, 7.11.4.C.1.a (May 1, 2019), available at http://www.centurylink.com/tariffs/pending_changes.pdf (Wyoming monthly per mile mileage rate of \$29.01 [86% increase]); See also Comments of Sprint, WC Docket Nos. 17-144, 16-143, 05-25 (filed Feb. 8, 2019), at 8 (“In 2018, a large price cap ILEC explicitly informed Sprint that it is marking up TDM BDS rates, for channel terminations and transport alike, across portions of its service territory newly deregulated by the 2017 BDS Order.”).

³⁴ Declaration of Douglas Denney, at ¶¶ 7-8, attached to Letter from Douglas Denney, Vice President, Costs & Policy, Allstream Business US, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 19-308 (filed Mar. 20, 2020).

³⁵ *Id.* at ¶ 8.

³⁶ *Id.* at ¶ 9.

causing Allstream to experience an 86% to 221% price increase for DS1 channel terminations.³⁷ CenturyLink also substantially increased prices for special access DS1 transport. For example, CenturyLink increased rates by 31% to 54%, depending on the term commitment, for an eight-mile DS1 transport route.³⁸ With the Regional Commitment Plan discount discontinued, Allstream faced a price increase of 91%.³⁹ As for special access DS3 special access transport, CenturyLink increased rates by 53% to 96% in price-flexibility areas for an 8-mile transport route, with Allstream and its customers experiencing increases between 74% and 96%.⁴⁰ Since the *BDS Order*, AT&T, Verizon, and Frontier each have implemented similar price increases across their geographic territories. These BDS price increases demonstrate the lack of competition in the marketplace and are a basis for the Commission to conclude that its prediction that competition would increase in the BDS market was inaccurate and accordingly should be revisited.⁴¹

iii. Mobile BIAS

The FCC should continue to assess mobile broadband service separately. As the FCC has asserted and INCOMPAS has agreed, fixed and mobile broadband are distinct offerings,

³⁷ *Id.*

³⁸ *Id.* at ¶¶ 12-13.

³⁹ *Id.* at ¶ 13.

⁴⁰ *Id.* at ¶¶ 17-18 (describing the rate increases experienced by Allstream for an eight-mile special access DS3 transport route under CenturyLink's 60-month rates).

⁴¹ *BDS Report and Order*, at ¶ 92 (“While competition may not be universal, it is sufficiently widespread for us to have confidence that a combination of these factors will broadly protect against the risk of supracompetitive rates being charged by price cap LECs over the short- to medium-term [defined as over several years in paragraph 124].”).

and consumers do not view them as substitutes.⁴² Mobile is also purchased locally and based on coverage needs for consumers and businesses. Consumers may have the choice of a regional provider, in addition to at least four nationwide providers from which to choose, with one of INCOMPAS' members—DISH—entering the market as a fourth option as a result of DOJ conditions to the merger of Sprint and T-Mobile. By empowering DISH as the fourth national provider, consumers will benefit from the retail competition, as well as the additional wholesale opportunity that smaller wireless builders will have. DISH is a disrupter with a long history of providing service to underserved rural Americans and is well positioned to bring more mobile 5G competition to more communities. Moreover, with the adoption of eSIM technology as a merger condition, consumers will obtain greater portability and flexibility to switch mobile providers, also driving more competition in the retail mobile market.

iv. Net Neutrality Policy Enables Online Competition, Including Video Competition.

INCOMPAS has long supported the FCC exercising its jurisdiction and authority to ensure that BIAS users have access to the content and services of their choice that are delivered over their Internet connection without disruption and/or interference from their BIAS provider via net neutrality rules and policies. The Commission's prior targeted rules and interconnection policy were working to ensure that no matter who a consumer chooses for their BIAS provider, they would be able to access the content of their choice without blocking, throttling, and unreasonable discrimination. And in turn, content providers would be able to provide their content without disruption from the BIAS provider. INCOMPAS has previously noted the ability and prior interference by large BIAS providers to exert their market power to charge non-

⁴² See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2020 Broadband Deployment Report, GN Docket No. 19-285, at ¶ 12 (rel. Apr. 24, 2020).

cost based access fees of online content and transit providers.⁴³ Indeed, only the largest BIAS providers receive payment for interconnection.⁴⁴ These payments resulted from some large BIAS providers refusing to upgrade their interconnection capacity into their last mile BIAS networks as their customers were demanding more online content unless they were paid.⁴⁵ They did so by intentionally allowing interconnection points into their networks to congest, preventing their own subscribers from accessing Internet content via the BIAS service for which they had paid. Paid interconnection arrangements with large BIAS providers are an exception and not the rule, and these arrangements are not the result of a functioning market. Indeed, the access charges directly reflect each BIAS provider's terminating access monopoly that stems from the number of subscribers that a particular provider controls.⁴⁶

⁴³ See Comments of INCOMPAS, *Re: FTC Hearing #10 – Competition and Consumer Protection Issues in U.S. Broadband Market* (filed May 31, 2019), at 20.

⁴⁴ In the *Charter/Time Warner Cable Merger Order*, the FCC stated that five BIAS providers were charging for interconnection: Comcast, AT&T, Time Warner Cable, Verizon, and CenturyLink. See *Charter/Time Warner Cable Merger Order* at 6377 ¶ 99. In fact, it is not the norm for transit providers, CDNs and edge providers to pay last-mile BIAS providers for interconnection. The overwhelming majority of BIAS providers either pay for transit service in order to connect with the other networks that make up the Internet, or they exchange traffic without compensation (also known as peering or settlement free interconnection).

⁴⁵ Traditionally, BIAS providers, transit providers, and CDNs would cooperate to upgrade the connections between their networks as the amount of Internet traffic flowing over the connection between their networks increased. Around 2013, some of the largest BIAS providers began to refuse to upgrade the connections between their networks on the one side, and transit providers, CDNs, and edge providers on the other side, unless the transit providers of the CDNs or edge providers they served agreed to pay a recurring toll.

⁴⁶ *Charter/Time Warner Cable Merger Order*, at 6384 ¶ 115 (“[T]he ability of a BIAS provider to charge for access to subscribers increases with the number of subscribers; the greater the number of subscribers, the more the BIAS provider can charge on a per-subscriber basis.”) See also Nicholas Hill, Nancy L. Rose, & Tor Winston, *Economics at the Antitrust Division 2014-2015*, 47 R. Indus. Org. 425, 427-29 (2015) (discussing the DOJ staff's empirical study of interconnection contracts between BIAS providers and online content providers). In regressions to determine the relationship between interconnection fees and size of BIAS providers, the DOJ found that “the relationship between size and fees was found to be positive, statistically

Seventy-six percent of the residential last mile BIAS marketplace is only served by four companies: Comcast, AT&T, Charter (Spectrum), and Verizon.⁴⁷ Thus, transit providers, CDNs, online content companies, and other edge providers face a highly concentrated marketplace in delivering Internet traffic to last mile BIAS providers. Given that each of the large BIAS providers is also an MVPD, these providers' video service businesses are threatened by the online video streaming content that consumers are adopting. In fact, as we note below these BIAS providers, especially cable, are losing MVPD subscribers, (although they also are gaining BIAS subscribers as we discussed above).

In the very recent past, the FCC, U.S. Department of Justice ("DOJ") and the U.S. Court of Appeals for the D.C. Circuit agreed that broadband providers have the ability and incentive to harm online competition:

- "The Commission has recognized the incentive of Internet access providers such as Charter to discriminate against unaffiliated OVDs."⁴⁸
- "[E]dge providers such as OVDs represent a common threat to . . . the entire cable industry."⁴⁹

significant, and economically meaningful." *Id.* at 428. In other words, larger BIAS providers obtained higher interconnection fees, a sign of greater bargaining power. *See also* Comments of Level 3, FCC WC Docket No. 17-108, at 10-11 (July 17, 2017).

⁴⁷ Leichtman Group Research Notes, at 8. It should be noted that very little head-to-head competition between these four is occurring in the BIAS marketplace.

⁴⁸ *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd. 6327, 6343 n.103 ("Charter/Time Warner Cable Merger Order") (citing the Commission's *Fourteenth Video Competition Report* (2012) and the Report and Order on *Preserving the Open Internet* (2010) as additional sources showing BIAS discrimination against edge providers).

⁴⁹ *Id.* at 6361 ¶ 71.

- “Some MVPDs have sought to restrain nascent OVD competition directly by exercising their leverage over video programmers to restrict the programmers’ ability to license content to OVDs.”⁵⁰
- “[T]he Commission fails to provide a fully satisfying analysis of the competitive constraints faced by broadband providers.”⁵¹

The record developed in formulating net neutrality protections was consistent with these findings and confirmed twice by the D.C. Circuit, first in *Verizon v. FCC* in 2014⁵² and then in *USTA v. FCC* in 2016.⁵³ In *Verizon*, the court found that the FCC had laid out a substantial and reasoned factual basis for the 2010 Open Internet rules: “[the Commission’s] justification for the specific rules at issue here—that they will preserve and facilitate the ‘virtuous circle’ of innovation that has driven the explosive growth of the Internet—is reasonable and supported by substantial evidence.”⁵⁴ In the subsequent *USTA* case, the court incorporated in full its earlier findings: “if there were any lingering uncertainty about the import of our decision in *Verizon*, we fully adopt here our findings and analysis in *Verizon* . . . including our conclusion that the Commission’s virtuous cycle theory provides reasonable grounds for the exercise of that

⁵⁰ Dep’t of Justice Complaint, at 3 ¶ 4, *U.S. v. Charter Communications, Inc., et al.* (D.C. Cir. 2016) (noting that some MVPDs have sought clauses in their programming contracts that prohibit programmers from distributing content online, or have placed significant restrictions on online distribution).

⁵¹ *Mozilla v. FCC*, D.C. Cir. (Oct. 1, 2019), at 89, available at <https://cdt.org/wp-content/uploads/2019/10/2019-10-01-FCC-NN-ruling.pdf>.

⁵² *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) (“*Verizon*”).

⁵³ *United States Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016) (“*USTA*”).

⁵⁴ *Verizon*, 740 F.3d at 628.

authority.”⁵⁵ And even in the recent *Mozilla* court decision, two of the three judges agreed that the current FCC’s views of broadband service and net neutrality were unhinged from the realities of broadband service: “*In a nutshell, a speedy pathway to content is what consumers value. It is what broadband providers advertise and compete over. And so, under any natural reading of the statute, the technological mechanism for accessing third-party content is what broadband providers ‘offer.’*”⁵⁶ Thus, as the Commission considers the state of video competition below, it must also consider that OVDs are subject to the practices of BIAS providers who are no longer obligated to abide by net neutrality rules/policies that offered some protections from discriminatory practices and FCC oversight.

v. Large, Vertically Integrated BIAS Providers’ Control Over Content Will Lead to Significant Challenges for Competitors and Edge Providers.

Over the last several years, the market has seen several large BIAS providers vertically integrate with video programming providers and other media and content companies. For example, Comcast owns NBC and Universal content. AT&T now owns Time Warner and its subsidiaries, including HBO and CNN. Verizon owns online content, such as Yahoo. With each of these companies having a significant share of BIAS subscribers, and in the case of AT&T and Verizon, a large number of mobile BIAS subscribers, they are in the unique position of being able to favor their own content and discriminate against third-party content over their BIAS networks. Without net neutrality protections and an agency to enforce those protections like the FCC did before 2017, it is especially critical that the antitrust authorities review their practices to ensure that they are just and reasonable and not in violation of antitrust law.

⁵⁵ *United States Telecom Ass’n*, 825 F.3d at 734.

⁵⁶ *Mozilla v. FCC*, Millett concurrence at 2.

INCOMPAS is concerned that there already are a number of practices that BIAS providers are engaged in that favor their own content to the disadvantage of online competitors. For example, AT&T zero-rates its own affiliated programming on its mobile network. With data caps in place, AT&T's zero rating encourages consumption of its own programming and discourages adoption of its competitors' programming.⁵⁷ AT&T is also withholding content from competitive distributors, such as DISH—its satellite competitor—and from Sling—its online video competitor. This is ironic given that AT&T claimed in the review of its transaction that it does not have the motive to withhold its programming from competitors; yet that is exactly what it is doing. Both DISH and Sling are competing in the marketplace to attract subscribers, and by withholding Time Warner content from them, AT&T is able to harm their ability to compete.

Federal antitrust authorities should be investigating these practices and how they can further skew the marketplace to favor the large, vertically integrated BIAS providers and disadvantage the online content (edge providers) and smaller BIAS providers that they may compete with, as well as competitive MVPDs. Given their market power in the BIAS marketplace, the vertical integration of BIAS with content is very different than other types of vertical integration that antitrust authorities may find as beneficial. As we discussed above, large BIAS providers are in the position and have charged non-cost based tolls of competitive online providers, raising their rivals' costs. Also, by withholding content altogether from competitive MVPDs and OVDs, they can harm their competitors' ability to attract and maintain subscribers.

⁵⁷ See Karl Bode, *How the new AT&T could bully its way to streaming domination*, THE VERGE (Dec. 18, 2018, 8:55 AM), available at <https://www.theverge.com/2018/12/18/18146186/att-time-warner-streaming-video-net-neutrality>.

vi. A New Streaming Era is Bringing Renewed Competition to the Video Marketplace.

The increasing availability of high-speed broadband has fundamentally changed the way consumers are watching video programming. There are numerous online video options for consumers—whether they want a la carte, a skinny bundle, or a traditional MVPD option online—higher speed broadband at home now allows for numerous choices.

Online video distributors (“OVDs”), like Netflix and Amazon Prime Video, have led a revolution in the way consumers experience and access content.⁵⁸ By making vast catalogs of movies, TV shows, and other content available to consumers at the touch of a button, streaming video on demand (“SVOD”) services are on the forefront of innovation and competition. These OVDs are now as important a part of the entertainment landscape and conversation about video competition as broadcasters and multi-channel video programming distributors (“MVPDs”). New services with both wide and specifically tailored appeal are constantly entering the marketplace and vying for consumers’ attention.⁵⁹ Streaming video services have seen steady subscriber gains over the past several years,⁶⁰ and significant gains in March of 2020 as citizens

⁵⁸ See Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change.*, N.Y. TIMES (Nov. 18, 2019), available at <https://www.nytimes.com/2019/11/18/business/media/streaming-hollywood-revolution.html>.

⁵⁹ Two new entrants that have already changed the marketplace are Disney+, which has amassed over 50 million worldwide subscribers, and Apple TV Plus, with 33.6 million customers, which both launched at the end of 2019. See Lisa Eadicicco, *Disney Plus already has 50 million subscribers around the world, even though it only launched 5 months ago*, BUSINESS INSIDER (Apr. 9, 2020, 9:45 AM), available at <https://www.businessinsider.com/disney-plus-streaming-subscriber-count-growth-50-million-2020-4>; Todd Spangler, *Apple TV Plus May Have More Than 33 Million Users But ‘Vast Majority’ Aren’t Paying for It, Researcher Says*, VARIETY (Jan. 24, 2020, 10:59 AM), available at <https://variety.com/2020/digital/news/apple-tv-plus-33-million-users-free-year-subscribers-1203478683/>.

⁶⁰ See Amy Watson, *Number of subscribers to selected subscription video on demand (SVOD) services in the United States from 2018 to 2024, by provider*, STATISTA (Oct. 17, 2019), available at <https://www.statista.com/statistics/706267/streaming-service-subscriber/>.

have sought out at-home entertainment while sheltering in place during the COVID-19 pandemic.⁶¹ Consumers have never had more access to or competition for the video content they want, whether through linear services, video applications, or online platforms.

The shift to streaming is at least part of why traditional services have experienced declining subscribership over the last few years. In direct contrast with the experience of OVDs, the Leichtman Research Group found that “the largest pay-TV providers in the U.S.—representing about 95% of the market—lost about 4,915,000 net video subscribers in 2019, compared to a pro forma loss of about 1,585,000 subscribers in 2018.”⁶² By the end of 2019, pay-TV penetration had fallen to 65.3 percent of U.S. households from its all-time high of 87.8 percent in 2009.⁶³ Consumers are actively seeking alternatives to cable and satellite as a result of a general dissatisfaction with increasing prices for these services and an increase in program carriage disputes between their service providers and broadcasters or cable channel operators.⁶⁴

⁶¹ See Tyler Hersko, *Streamers See Huge Subscriber Gains as Viewers Seek Out Indoor Entertainment*, INDIEWIRE (Mar. 27, 2020, 9:00 PM) (citing a Forbes report that Disney+ signups tripled from March 14-16, Netflix “enjoyed a 47 percent boost in subscribers” during that same time period, HBO Now and Showtime saw gains of 90 percent and 78 percent, respectively, and Apple TV+ had a 10 percent increase in subscribers), *available at* <https://www.indiewire.com/2020/03/streaming-services-subscriber-gains-indoor-entertainment-1202221087/>.

⁶² Leichtman Research Group, Press Release, *Major Pay-TV Providers Lost About 4,915,000 Subscribers in 2019: Top Pay-TV Providers had 3.3 Million More Net Losses Than in any Previous Year* (March 3, 2020), *available at* <https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-4915000-subscribers-in-2019/>.

⁶³ See Todd Spangler, *Traditional Pay-TV Operators Lost Record 6 Million Subscribers in 2019 as Cord-Cutting Picks Up Speed*, VARIETY (Feb. 19, 2020, 8:59 AM), <https://variety.com/2020/biz/news/cable-satellite-tv-2019-cord-cutting-6-million-1203507695/> (according to a Moffett Nathanson estimate).

⁶⁴ See Brad Adgate, *TV Station Blackouts Are Accelerating; Here’s Why*, FORBES (Nov. 12, 2019, 10:38 AM), <https://www.forbes.com/sites/bradadgate/2019/11/12/tv-station-blackouts-are-accelerating-heres-why/#583c2657f6c9> (reporting that there were 276 blackouts of broadcast TV station groups in 2019).

Cable and satellite companies have attempted to stem the tide of customers leaving their service by making changes to their pricing and service tiers through the introduction of “skinny bundles” which feature fewer channels than traditional packages. Others have made the decision to launch new subscription-based digital products that will allow these companies to recover lost revenue. On program carriage disputes, MVPDs and broadcasters must now conduct negotiations in accordance with the provisions of the recently enacted Television Viewer Protection Act, which made a “good faith” bargaining requirement between the negotiating parties permanent and incentivized DBS providers to deliver local TV stations in small markets; a development that will hopefully lead to fewer blackouts and service disruptions.⁶⁵

In addition to OVDs, virtual MVPDs (“vMVPDs”), like Sling TV and YouTube TV, are replacing and are marketed as an online alternative for linear cable and satellite systems. vMVPDs, which typically offer a “skinny bundle” of linear television channels via a broadband connection, have made significant subscriber gains in the last few years and are viable and important players in the video marketplace.⁶⁶ Recent research indicates that up to 44 percent of customers that switch from a traditional pay-TV service are adopting a vMVPD to replace it.⁶⁷ By the end of 2019, vMVPDs subscribers had increased to 9.96 million from 7.52 million at the

⁶⁵ See John Eggerton, *Source: Deal Struck on STELAR Successor Bills*, BROADCASTING + CABLE (Dec. 12, 2019), available at <https://www.broadcastingcable.com/news/source-deal-struck-on-stelar-successor-bills>.

⁶⁶ See Brad Adgate, *Virtual MVPD Subscriber Growth Is Slowing*, FORBES (Dec. 9, 2019, 1:57 PM) (reporting that despite slowing subscriber growth, VMVPDs added 584,000 subscribers in the third quarter of 2019 and that approximately 40% of consumers who give up cable or satellite subscriptions sign up for a VMVPD service).

⁶⁷ Leichtman Research Group, Press Release, *44% with a vMVPD Switched From a Traditional Pay-TV Service* (Apr. 3, 2020), available at <https://www.leichtmanresearch.com/44-with-a-vmvpd-switched-from-a-traditional-pay-tv-service/>.

end of 2018,⁶⁸ despite the fact that several providers were forced to raise prices to meet increased costs for channels and content. And while these increases may be more modest than SVODs, it is clear that, when taken together, consumers see online video services as the next step in a new streaming era.

One reason that OVDs have been successful in bringing greater competition to the video marketplace is that they have been able to deliver these innovative services via broadband connections. One troubling trend that might deter competition is state efforts to single out certain online business models, like OVDs, to add a tax or fee to fund broadband deployment. These legislative proposals have the potential to deter new online entrants and harm the competition and innovation that is driving online demand.

For example, one recent state legislative bill proposed to charge competitive video providers, including online video providers and DBS providers, franchise fees. This approach is misguided and contrary to federal law.⁶⁹ First, it is important to understand that local cable franchise authority is authorized and constrained under the Communications Act. Under Title VI of the Communications Act, franchise fees are restricted to cable operators (also defined by the Act), and cable operators pay the fee in exchange for the authorization of their networks to be deployed in and occupy public rights-of-way.⁷⁰ Internet content companies and other online

⁶⁸ See Todd Spangler, *Traditional Pay-TV Operators Lost Record 6 Million Subscribers in 2019 as Cord-Cutting Picks Up Speed*, VARIETY (Feb. 19, 2020, 8:59 AM), available at <https://variety.com/2020/biz/news/cable-satellite-tv-2019-cord-cutting-6-million-1203507695/>.

⁶⁹ MO Legislation, Senate Bill SB No. 273, 100th Leg., 1st Sess. (Mo. 2019), available at <https://trackbill.com/bill/missouri-senate-bill-273-modifies-provisions-relating-to-video-service-providers/1636832/>.

⁷⁰ Moreover, Section 621(a)(2) of the Communications Act makes clear that franchises must be construed to authorize a cable system over public rights-of-way and through easements; Section 622 limits the franchise fees that can be charged; and Section 624 limits the franchising authority as consistent with the Communications Act. The FCC has determined that franchise fees cannot

services and DBS providers are not cable operators, and they do not have network facilities that occupy public rights-of-way. As such, they need no franchise authorization, and applying a franchise fee would be inconsistent with the facts and law.⁷¹ Second, the imposition of such fees could deter the development of online content and additional competitive options for consumers. It is important that the Commission recognize that these types of state and local fees, if imposed, would have deleterious effects on OVDs and DBS providers and their consumers, potentially harming competitive options in the video marketplace.

b. Broadband Providers Face Significant Barriers to Deploying Their Networks.

Regardless of their business plans—whether fiber transport, fixed wireless, or mobile wireless—INCOMPAS members rely on the seamless and speedy deployment of fiber networks for their success. It is expensive and time-consuming for competitive fiber providers to build, and there are significant barriers that they face when they can make the business case to do so.⁷²

be charged on non-cable services. Moreover, Section 663(c), 47 U.S.C. § 556(c), preempts conflicting state law. Accordingly, states imposing franchise fees on online providers are in conflict with Section 621 that provides that franchises are only required for cable companies whose facilities will be occupying public rights-of-way and easements.

⁷¹ The National Conference of State Legislatures cautions jurisdictions from using its franchise authority and applying franchise fees inconsistent with its purpose, stating “[t]o the extent such fees are intended as payment for use of public rights-of-way, that fee should be limited to the actual, direct and identifiable cost of such use, and that portion of the fee should be applied only to those who use the rights-of-way.” National Conference of State Legislatures, Standing Committee: Communications, Financial Services and Interstate Commerce, *Policies for the Jurisdiction of the Communications, Financial Services & Interstate Commerce Committee* (last visited Feb. 28, 2020), available at <http://www.ncsl.org/ncsl-in-dc/task-forces/policies-communication.aspx>.

⁷² See Reply Comments of INCOMPAS, WC Docket No. 17-108 (Aug. 30, 2017), Exhibit B, David S. Evans, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, at 35-37 (Aug. 29, 2017), available at <https://www.incompas.org/files/INCOMPAS%20RIF%20Reply%20Comments->

Such barriers and delays are particularly problematic for providers building with borrowed capital, which creates added pressure to deliver networks and revenues on a predictable, timely basis.

The FCC has taken a number of steps in recent years to address these barriers to entry. For instance, it has adopted policies that encourage more predictable and more reasonable costs to build, including promulgating a one-touch make-ready (“OTMR”) policy for pole attachments that INCOMPAS and its members endorsed.⁷³ For wireless deployment, which is reliant on wireline fiber networks, the FCC also has streamlined processes to encourage builds, including 5G network rollout—which is the next generation of wireless networks that companies have begun to deploy.⁷⁴ The need for dense fiber deployment across the country is more critical for the roll-out of 5G technology.⁷⁵

30Aug%20FINAL.pdf (last visited March 23, 2020).

⁷³ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (rel. Aug. 3, 2018).

⁷⁴ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 (rel. Sept. 27, 2018).

⁷⁵ Unfortunately, the Commission’s reclassification of broadband Internet access service from a telecommunications service to an information service in its *Restoring Internet Freedom Order* has created another barrier to entry for BIAS providers. Section 224 of the Communications Act confers the rights to access poles, conduit, ducts, or rights-of-way at reasonable and non-discriminatory rates and in reasonable periods of time only on telecommunications service providers and cable operators. While the D.C. Circuit has remanded this issue back to the Commission for reconsideration, INCOMPAS is deeply concerned that competitive BIAS providers must now offer either a telecommunication service or cable service to qualify for Section 224 access. This puts BIAS-only providers at a significant competitive disadvantage as a pole owner can now refuse access, charge higher rates, and/or discriminate against them. See Comments of INCOMPAS, *In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 17-108, 17-287, 11-42 (filed Apr. 20, 2020), at 6-8.

With the introduction of 5G, the expectation is that more devices will be connected online. For example, the number of Internet of Things (“IoT”) devices is expected to grow worldwide to 10 billion by 2020 and 22 billion by 2025.⁷⁶ Given the data demands, there will be a significant need for more wired backhaul—*i.e.*, fiber, to carry wireless traffic. As such, continued efforts to streamline both wired and wireless deployments, and maintaining network unbundling policies (discussed further below)⁷⁷ are important to enable faster and more cost-effective broadband networks to be built.

However, it is important to acknowledge that competitive providers face barriers when it comes to the lack of streamlined permitting processes and timelines for fiber.⁷⁸ As a result, INCOMPAS members have experienced significant delays (in addition to unreasonable fees) on fiber deployment. Similarly, Zayo recently filed a letter with the FCC detailing the barriers to fiber deployment in numerous cities.⁷⁹ As summarized by Zayo, “many local and state governments condition [its] access to public rights of way for the purpose of deploying wireline facilities on the payment of above-cost and discriminatory access fees as well as on compliance with ambiguous in-kind contribution requirements.”⁸⁰

⁷⁶ *State of the IoT 2018: Number of IoT devices now at 7B – Market accelerating*, IOT ANALYTICS (Aug. 8, 2018), available at <https://iot-analytics.com/state-of-the-iot-update-q1-q2-2018-number-of-iot-devices-now-7b/> (last visited Mar. 23, 2020).

⁷⁷ See generally Comments of INCOMPAS and NWTa, WC Docket No. 19-308 (filed Feb. 5, 2020) (opposing FCC’s NPRM to repeal the 1996 Act’s unbundling and avoided-cost resale requirements).

⁷⁸ Reply Comments of INCOMPAS at 7-10, WTB Docket No. 17-79 (filed July 17, 2017) (“Carriers must navigate multiple and frequently overlapping jurisdictions to obtain the needed franchises, permits, and zoning approvals.”).

⁷⁹ Letter from Thomas Jones, Counsel for Zayo Group, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 & WC Docket No. 17-84 (filed Oct. 31, 2019).

INCOMPAS and its members are actively engaged in outreach to develop constructive partnerships and to build the case that expanding fiber networks is a win-win for municipalities and carriers alike, as leveraging gigabit-level Internet will allow these areas to attract new business and create jobs. INCOMPAS' members make every effort to understand the concerns of municipalities and to negotiate mutually beneficial rights-of-way/franchise agreements whenever possible. Many cities, recognizing the value of fiber networks to economic development, welcome competitive fiber providers with reasonable rights-of-way agreements geared to recouping only the costs of managing the rights-of-way. INCOMPAS members routinely engage in negotiations with such cities to reach agreements, and collectively these companies pay substantial revenues to cities in the form of annual rights-of-way fees. The worst disputes that INCOMPAS members face stem from moratoria or other efforts to bar the timely deployment of fiber, or from rates that are entirely unrelated to the cost of managing the public rights-of-way.

INCOMPAS supports a recent petition filed at the FCC requesting preemption of above-cost duplicative rights-of-way fees for a fiber network in Missouri that is impeding further competitive fiber deployment.⁸¹ In its comments, INCOMPAS demonstrates how that specific case is in conflict with Section 253 and should be preempted accordingly. We also urge the Commission to adopt the principle of “one network pays” for access to rights-of-way such that government fees must be based on the costs of network deployment by the network operator in

⁸⁰ *Id.* at 1.

⁸¹ *See generally* Comments of INCOMPAS, WC Docket No. 20-46 (filed March 23, 2020).

the public rights-of-way consistent with Section 253.⁸² In other words, only the company that actually deploys, operates, and maintains the network in question pays the franchise/rights-of-way fees. Embracing this concept would deter state and local governments from pursuing the increasingly popular trend of looking to third party content providers, including OVDs and DBS providers that impose no deployment costs whatsoever on municipalities, for new revenue through state and local franchise/rights-of-way fee schemes that clearly violate the Communications Act.⁸³ Such misplaced fees potentially impact the availability of those services, which are providing alternative competitive choices for consumers, as well as driving more demand for higher-speed broadband networks.

INCOMPAS members also face issues from pole owners concerning attachments that are required to deliver competitive broadband services—from outright prohibitions to attach to excessive fees charged—there are myriad pole issues that INCOMPAS members cannot always work around and that deter competitive deployment. For example, one of INCOMPAS' members, SmartCom, stated that the pole owner in its area has set the wind rating significantly higher than National Electric Safety Code requirements such that SmartCom cannot attach to the pole 75% of the time unless it replaces the entire pole—adding significant engineering costs, construction costs, and time.⁸⁴ Other members have faced pole owners who refuse attachments because poles are overloaded, yet will lash fiber to their copper on those same poles. Other companies that are not INCOMPAS members have filed their concerns about access to poles.

⁸² Similarly, only one cable company should pay franchise fees pursuant to Section 621 for the cable network that is deployed, operated, and maintained in the public rights-of-way.

⁸³ *Id.* at 11-13.

⁸⁴ Letter from Angie Kronenberg, Chief Advocate & General Counsel, INCOMPAS to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 19-308, at 2-3 (filed March 6, 2020).

For example, CenturyLink recently noted adverse impacts to its rural broadband deployment because the FCC’s pole attachment requirements are not universally applied.⁸⁵ Given the prevalence of these experiences across a range of providers, the FCC should conclude in its 2020 Report that deployment barriers for competitive fiber remain and are significant.

INCOMPAS has long supported the FCC’s focus on lowering barriers to broadband deployment. To further enable competitive fiber builds and fixed broadband competition, we encourage the FCC to complete its wireline and wireless deployment proceedings and adopt the remaining policies INCOMPAS supports, including (1) shot clocks applicable to wireline fiber deployment applications (as was done for wireless deployment), and (2) limiting rights-of-way use charges and siting application fees, consistent with Sections 253 and 332 of the Communications Act.⁸⁶

c. Removing Competitors’ Bridge 2 Broadband Will Harm Consumers and Impede Competition.

The FCC’s pending UNE/Resale proceeding that proposes to remove the market-opening provisions of the Telecommunications Act of 1996 poses a substantial risk to the build out of fiber networks in underserved urban, rural and suburban areas—areas that tend to be ignored by the bigger carriers’ buildout plans.⁸⁷ Small, competitive fiber builders use the FCC’s existing UNE and resale policy as a bridge to build more and faster fixed broadband networks, including

⁸⁵ Letter from Craig J. Brown, Assistant General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-83 & WC Docket Nos. 17-84, 19-126, 10-90, at 3-4 (filed Oct. 30, 2019) (describing the delays to deployment caused by the outdated exemption of municipal and cooperative utilities from Section 224).

⁸⁶ Reply Comments of INCOMPAS, WTB Docket No. 17-79, at 7-10 (filed July 17, 2017).

⁸⁷ See *Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, Notice of Proposed Rulemaking, FCC No. 19-119, WC Docket No. 19-308, (rel. Nov. 25, 2019).

fiber, 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 UNEs that are subject to the proceeding—services such as unbundled dark fiber and copper loops, etc.—to enter and compete in the broadband marketplace, including bringing fiber broadband to areas without it for the first time. These provisions of the Act allow competitors to build their customer base until they have a sufficient standing to support extending their own fiber either to the remote terminal or to the customer premises. This is the Bridge 2 Broadband and is consistent with the Commission’s goals in the Rural Digital Opportunity Fund to support 1 Gigabit service. As the Office of Advocacy at the U.S. Small Business Administration explained in its reply comments to the FCC, “the public comments submitted by small carriers in this proceeding show in greater detail that the FCC’s proposals will prevent small carriers from continuing to serve consumers with competitive services, and deploying next generation networks themselves. If the FCC proceeds as proposed, these carriers could face immediate harms. . . .”⁸⁸ INCOMPAS incorporates into the record our comments and reply comments in response to the FCC’s NPRM, which further demonstrate that the current policies incent the deployment of more broadband, and if the FCC proceeds as proposed, competitive fiber providers’ abilities to continue to build fiber will be significantly harmed.⁸⁹ 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 networks through rate increases. Where customers are captive and

⁸⁸ Comments of the Office of Advocacy, U.S. Small Business Administration, WC Docket No. 19-308, at 4 (filed March 20, 2020).

⁸⁹ Comments of INCOMPAS and NWT, WC Docket No. 19-308 (Feb. 5, 2020); Reply Comments of INCOMPAS and NWT, WC Docket No. 19-308 (filed March 20, 2020).

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 competitive threat, there is less incentive for rapid repair or service innovation. There is overwhelming opposition by a number of diverse stakeholders, including broadband providers, state and federal agencies, and consumer and public interest groups, and the Commission should reject the proposals so that broadband deployment and competition continues to be enabled.

d. Access to MTEs Enables Broadband Competition.

INCOMPAS has also sought to improve competitive broadband providers' access to MTEs, which will improve fixed broadband competition. More than thirty percent of Americans live in multifamily buildings⁹⁰ and those residents have fewer options for broadband service than those living in single-family homes in the same community.⁹¹ Despite the FCC's efforts to reduce commercial barriers to entry in MTEs, evidence of a growing disparity between consumer demand for increased Internet speeds, lower prices, and competition and what MTE owners and

⁹⁰ 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 30% of American homes are in multifamily buildings).

⁹¹ See Carl Kandutsch, *Internet Choice in Apartment Buildings*, Broadband Communities, at 1 (Dec. 2016), available at 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.").

landlords actually make available to their residents should lead the FCC to adopt proposals included in its pending *Notice of Proposed Rulemaking*.⁹²

INCOMPAS has urged the FCC to take a close look at certain commercial arrangements that have a particularly negative effect on competition. Graduated revenue sharing as well as wiring and rooftop exclusivity arrangements have been used by incumbent communications providers and landlords to circumvent the access rules and exclude competitive providers from serving MTEs. In short, revenue sharing is a kickback from the provider to the landlord.⁹³ The effect of revenue sharing—if not the outright purpose—is to stifle competition. The use of revenue sharing arrangements has created an expectation on the part of landlords, such that competitive broadband and video providers that are unable or unwilling to participate in revenue sharing schemes are denied access. Furthermore, other practices—particularly marketing exclusivity agreements—have been used as artificial barriers to deny competitors’ access to MTEs.⁹⁴ INCOMPAS supports further action to prohibit these practices, which amount to an end-run around current FCC rules that are intended to promote competitive options.

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. Therefore, INCOMPAS has urged the FCC to

⁹² See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 19-65 (rel. July 12, 2020) (“*Declaratory Ruling*”).

⁹³ Such kickback arrangements in other contexts—specifically, payola—are unlawful and prohibited under the FCC’s rules. See 47 C.F.R. §§ 73.1212, 76.1615.

⁹⁴ See Comments of INCOMPAS, GN Docket No. 17-142, at 17 (filed Aug. 30, 2019); see also Reply Comments of INCOMPAS, GN Docket No. 17-142, at 9 (filed Sep. 30, 2019).

encourage local access laws that enable competitive entry.⁹⁵ In San Francisco, where the city has implemented such a law, Article 52 of San Francisco’s Police Code, one INCOMPAS member is now able to provide fiber to over 1,000 buildings, bringing a lower-cost, higher-speed 1 gigabit option to consumers in those buildings, as well as improving the business case for building fiber and 5G networks in the surrounding communities.⁹⁶ Article 52 promotes competitive broadband deployment while specifically addressing the anticompetitive practice of wiring exclusivity.⁹⁷ Rather than codifying special treatment for one kind of provider—franchised cable operators—this law requires building owners to provide access to all communications providers who qualify under the law—that is, when a resident would like to purchase a competitor’s service.⁹⁸ Article 52 puts the choice of provider back in the hands of the consumer, allowing residents to decide when and if to switch services.⁹⁹ Other cities and governments are following San Francisco’s example.¹⁰⁰ Given the current barriers to entry in multifamily buildings, INCOMPAS urges the

⁹⁵ See Comments of INCOMPAS, at 20-22 (highlighting that San Francisco’s mandatory access law is a good example of a local regulation that lawfully eliminates a major barrier to entry for competitive providers and furthers the FCC’s goals of accelerating deployment of high-speed Internet access).

⁹⁶ See Reply Comments of CALTEL, GN Docket No. 17-142, at 3 (Aug. 22, 2017).

⁹⁷ See Opening Comments of the City and County of San Francisco, MB Docket No. 17-91 (filed May 18, 2017), at 7-8.

⁹⁸ See *id.* at 6-7.

⁹⁹ INCOMPAS acknowledges that the Commission elected to preempt provisions of the Police Code related to in-use wire sharing (which the association did not oppose), however, the Commission’s decision not to preempt other aspects of Article 52 ensures that the competitive service providers serving San Francisco are still able to avail themselves of the mandatory access provisions of the ordinance. See *Declaratory Ruling*, at ¶ 44 (denying the Multifamily Broadband Council’s Petition for Preemption to the extent it sought preemption of the sharing of unused wiring and other aspects of Article 52).

¹⁰⁰ See Reply Comments of the City of Boston, Massachusetts, MB Docket No. 17-91 (filed June 9, 2017), at 8.

FCC to encourage local access laws in order to improve broadband options in multiple tenant environments. The ability of competitors to gain access to these buildings will ensure the deployment of next-generation broadband networks (including the infrastructure for 5G), enable greater competition, and most importantly, lower prices for consumers.

III. 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 various markets in its upcoming Communications Marketplace Report. Now, more than ever, Americans want access to faster, more robust and resilient broadband networks of the future. Competition is the driving force for network deployment and consumers' ability to access faster speeds, lower prices, and better customer service.

Respectfully submitted,

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