

**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

REPLY COMMENTS OF INCOMPAS

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INCOMPAS, by its undersigned counsel, hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Public Notice¹ and Order.² In responding to various comments submitted, these reply comments further 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* decision³ that remanded the *Restoring Internet Freedom Order*⁴ to the Commission.

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).

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 *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (“*Mozilla*”).

⁴ *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*”).

I. THERE ARE STILL STRONG INCENTIVES FOR LARGE INTERNET SERVICE PROVIDERS TO VIOLATE NET NEUTRALITY NORMS.

Various comments in this proceeding have based their claim that the Commission made the correct decision in repealing net neutrality protections on arguments that there has been increased investment in broadband, that we have yet to see the demise of the Internet due to net neutrality violations, and that network traffic is working robustly during the COVID-19 pandemic.⁵ INCOMPAS refrained from discussing these high-level issues in its initial comments because they are not directly connected to the three issues that the *Mozilla* court remanded⁶—namely how the *Restoring Internet Freedom Order* and reclassification of BIAS will impact the regulation of pole attachments, public safety, and the Lifeline program. However, due to the fact that there appears to have been a concerted effort to generate comments linking these remanded issues to the overall strength of the *Restoring Internet Freedom Order*, it is important to respond.

⁵ See, e.g. Comments of American Commitment, at 2 (“Of course nothing the angry net neutrality obsessives alleged would happen came to pass. Instead, we saw an incredible increase in network capacity, speed, and resilience as ISPs felt confident that their networks investment would not be divested from them[.]”); see also Comments of American Consumer Institute, at 5 (“[I]n times under stress, as during the COVID-19 pandemic, ISPs were able to handle the additional broadband load amid the increase in traffic . . . This happened partially thanks to a market-based regulatory framework that has promoted infrastructure investment and deployment.”); see also Comments of American Principles Project, at 1 (“The controversial order . . . reversed the Obama-era Title II framework . . . and prompted a tsunami of apocalyptic predictions that the Internet would be destroyed forever. Obviously that didn’t happen.”).

⁶ See Comments of INCOMPAS, at 1-2 (“*Comments of INCOMPAS*”) (“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* to the Commission to reconsider and sufficiently address how the reclassification of broadband Internet access service (“BIAS”) impacts the regulation of pole attachments, public safety, and the Lifeline program.”).

(a) *There Is Insufficient Competition In The Residential BIAS Marketplace To Claim That Large BIAS Providers Have No Incentive To Discriminate.*

Various commenters suggest that large BIAS providers have no incentive to discriminate because the competitiveness of the broadband marketplace restrains this behavior.⁷ In reality, however, there is inadequate competition in the residential, high-speed BIAS market, which continues to give large BIAS providers the incentive and ability to discriminate. As the Petitioners in *Mozilla* explained, almost 50% of Americans have either one or no choice for residential high-speed wireline broadband providers (download speeds of 25 Mbps and higher and upload speeds of 3 Mbps and higher).⁸ Another 45% have only two high-speed wireline options.⁹ INCOMPAS has also demonstrated in various proceedings that fixed broadband competition is insufficient.¹⁰ While some commenters have supposed that competition in the

⁷ See, e.g. Comments of Charter, WC Docket Nos. 17-108, 17-287, 11-42, at 2-3 (“And the Commission also determined, with substantial evidentiary support, that this competitive marketplace creates strong incentives for providers to adhere to open internet practices.”); see also Comments of Comcast, at 6 (“Comcast and other ISPs have strong incentives to provide high quality, reliable broadband service to all of their customers.”); see also Comments of Free State Foundation, at 4 ([B]roadband ISPs lack market power, and therefore do not have the ability and incentive to reduce services as a way of increasing returns.”); see also Comments of Innovation Economy Institute, at 4 (“With a broadband marketplace as robust and competitive as it is, service providers have great incentive to make sure they are meeting and exceeding consumer demand for openness.”); see also Comments of Institute for Policy Innovation, at 2 (“SPs have every incentive to ensure a high quality Internet experience[.]”); see also Comments of LGBT Technology Partnership, at 3 (“Internet access remains popular and extremely competitive.”).

⁸ *Mozilla*, at 88.

⁹ *Id.*

¹⁰ See Comments of INCOMPAS, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (filed July 17, 2017), at 26-27 (“There are virtually no competitive constraints on an incumbent broadband providers’ behavior due to consumers’ lack of choice in the local market for fixed high-speed broadband Internet access. Recent data show the extent of market domination.”); see also Comments of INCOMPAS, *In the Matter of Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, GN

BIAS market will hold BIAS providers accountable if they break net neutrality principles, this is not likely when just four companies—Comcast, AT&T, Charter (Spectrum), and Verizon—serve 76% of the national residential last mile BIAS marketplace, with even less local competition.¹¹ 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, which creates incentives to discriminate.

Moreover, we see even less competition in the marketplace when looking at higher broadband speeds. For example, the Commission's 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 lacked any provider
- Another 44% of developed census blocks had only one such provider
- Only 5% of census block had three or more providers advertising service somewhere in the block.¹²

Docket No. 20-60 (filed April 27, 2020), at 17-20.

¹¹ Leichtman Research Group Research Notes: Actionable Research on the Broadband, Media & Entertainment Industries, 1Q 2019, LEICHTMAN RESEARCH GROUP (2019), at 8, *available at* <https://www.leichtmanresearch.com/wp-content/uploads/2019/04/LRG-Research-Notes-1Q2019.pdf>. It should be noted that very little head-to-head competition between these four is occurring in the BIAS marketplace.

¹² FED. COMM'N COMM., *Internet Access Services: Status As Of December 31, 2017* (Aug. 2019), at 2, *available at* <https://docs.fcc.gov/public/attachments/DOC-359342A1.pdf>.

These numbers are far from competitive. And competitive choice and availability is weaker still at the desired, future-oriented broadband speeds of 1 Gigabit.

In the very recent past, the FCC, U.S. Department of Justice, and the U.S. Court of Appeals for the D.C. Circuit all 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.”¹³
- “[E]dge providers such as OVDs represent a common threat to . . . the entire cable industry.”¹⁴
- “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.”¹⁵
- “[T]he Commission fails to provide a fully satisfying analysis of the competitive constraints faced by broadband providers.”¹⁶

¹³ *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).

¹⁴ *Id.* at 6361 ¶ 71.

¹⁵ 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).

¹⁶ *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>.

In addition, over the last decade, the market has seen several large BIAS providers vertically integrate with video programming providers and other media and content companies.¹⁷ 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. This is not mere speculation, but rather there already are a number of practices that BIAS providers are *currently* engaged in that favor their own content to the disadvantage of online competitors. When coupled with a lack of last-mile competition, these practices will only continue.

(b) The Lack of Sufficient Competition Can Be Seen Through Interconnection Agreements And Terminating Monopolies.

Interconnection agreements are a critical piece to why net neutrality protections are so important for competition. The Commission’s prior targeted rules and interconnection policy under the 2015 net neutrality rules and related merger conditions were working to ensure that BIAS providers would not interfere with their consumers’ ability to access the content of their choice. In turn, content providers would be able to provide their content without disruption from the BIAS provider, allowing their content to compete against BIAS provider content.

In its comments, WISPA states: “According to the White House’s Council of Economic Advisors’ ‘Economic Report of the President,’ . . . returning to the ‘light touch’ regulatory

¹⁷ See Comments of INCOMPAS, *In the Matter of Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, GN Docket No. 20-60 (filed April 27, 2020), at 21-22.

framework benefited consumers because the Title II regulations ‘restricted the vertical pricing arrangements of ISPs’—that is, monetary transactions between ISPs and the providers of Internet content such as Netflix and Yahoo.’”¹⁸

However, these comments and the White House Report’s analysis completely disregard that vertical pricing is a reference to access charges on edge providers and transit providers, which the large BIAS providers have the market power to charge. Without net neutrality and interconnection oversight, large BIAS providers have used their positions to force access charges on OTT services and transit providers. In fact, the FCC itself has acknowledged that the large BIAS providers have been caught deliberately congesting interconnection points, preventing their own consumers from accessing Internet content over the BIAS service that they have paid for.¹⁹

The FCC is not alone in observing that BIAS providers’ interconnection practices have hindered the delivery of the BIAS services that consumers have purchased. The New York State Office of the Attorney General has confirmed this history of degradation of interconnection and traffic exchange. The New York Attorney General highlighted its investigations of major BIAS providers, stating that it has uncovered documentary evidence that: “[F]rom at least 2013 to 2015, major BIAS providers made the deliberate business decision to let their networks’ interconnection points become congested with Internet traffic and used that congestion as leverage to extract payments from backbone providers and edge providers . . . this practice was

¹⁸ Comments of The Wireless Internet Service Providers Association (“*Comments of WISPA*”), WC Docket Nos. 17-108, 17-287, 11-42, at 4 (citing Economic Report of the President, Council of Economic Advisors (Feb. 2020), at 122-23, *available at* <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-Economic-Report-of-the-President-WHCEA.pdf>).

¹⁹ See Ex Parte Letter of INCOMPAS, *Restoring Internet Freedom*, WC Docket No. 17-108 (filed Nov. 20, 2017), at n. 1-2 (“*Ex Parte Letter of INCOMPAS*”).

used for years by at least two of the country’s biggest BIAS providers who operate in New York and in many other states.”²⁰ Without effective oversight of interconnection, it is reasonable to expect that large BIAS providers will revert to exercising their incentive to engage in congestion practices at interconnection to force edge and transit providers to pay them, which will harm the investment in Internet content and services.

In addition to evidence in the record that large BIAS providers can and have caused congestion at interconnection points, the record is replete with evidence of broadband providers’ incentives and abilities to discriminate against unaffiliated OVD traffic, which they view as a competitive threat to their MVPD revenues.²¹ The Commission itself has recognized that broadband providers have the incentive to harm unaffiliated OVDs. For example, in the AT&T-DIRECTV merger proceeding, the Commission determined that the transaction would create an incentive and ability to harm competing OVDs and even imposed a reporting condition to allow the Commission to monitor all the merged entity’s interconnection agreements.²²

Often consumers do not even know that the interconnection congestion caused by the BIAS provider is the reason for the degraded quality of their BIAS service. And even *if* a customer can determine that it is the BIAS provider’s fault and wants to switch providers, due to

²⁰ Comments of The People of the State of New York by Attorney General Eric T. Schneiderman (NY Attorney General), WC Docket No. 17-108, at 2.

²¹ *See Ex Parte Letter of INCOMPAS*, at 5-6.

²² *AT&T-DIRECTV Order*, 30 FCC Rcd. at 9207–08, ¶ 205 (2015) (“We conclude that post-transaction AT&T has an increased incentive to discriminate against unaffiliated OVDs. As we have found in other proceedings, ‘broadband providers have incentives to interfere with and disadvantage the operation of third-party Internet-based services that compete with their own services.’”); *see also id.* at 9214 ¶ 217 (“Thus, as stated in the *2015 Open Internet Order*, we find that ‘broadband Internet access providers have the ability to use terms of interconnection to disadvantage edge providers and that consumers’ ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs.’”).

insufficient competition there is often no other broadband provider or one that offers the same high-speed connections. And *if* there is another provider, the customer will have to be able to afford the high switching costs and deal with the inconveniences of switching providers. To switch broadband providers, a consumer likely will need to pay equipment rental fees and an early termination fee, which can end up being several hundred dollars. Not to mention the inconvenience of returning equipment and waiting for a technician to connect the new service. Indeed, the evidence supports the fact that consumers rarely ever voluntarily switch residential BIAS providers.²³ So once consumers have picked their broadband provider, that will most likely remain their provider. In other words, consumers are too often locked in to a “terminating monopoly.” In sum, even where it is possible to figure out that a BIAS provider is engaging in net neutrality violations—which is extremely difficult, if not impossible, for the average consumer to know—the hurdles consumers must go through to switch providers in practice leave many consumers stuck with their current provider.

It is important to reiterate that mobile broadband is not an adequate substitute for residential BIAS for several reasons. For example, mobile broadband has data caps, often costs more, is not as good of a service for streaming content, and is not as conducive for consumers to use when working or for students to do their homework. Although millions of Americans use and rely on mobile broadband, these two services are still importantly different and should not be conflated when assessing the competitiveness of the market. The Commission itself recognizes this and has stated: “fixed and mobile services often continue to be used in distinct ways, and

²³ See, e.g., David S. Evans, Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers, at 11-12 (Aug. 29, 2017), <http://www.competitioninstitute.org/Portals/0/Evans%20White%20Paper%20on%20Economics%20of%20Wired%20Broadband%2029Aug2017%20Final%20for%20Publication%20%28002%29.pdf> (demonstrating the difficulty and costs associated with switching broadband providers).

that users tend to subscribe to both services concurrently and treat them as complements.”²⁴

(c) *Even If BIAS Providers Are Not Currently Discriminating, There Are Other Factors At Play That Affect Their Behavior Besides The Repeal Of Net Neutrality Protections.*

Various commenters in this proceeding have claimed that investment in broadband increased after the Commission repealed net neutrality protections, which therefore must show that the repeal led to an increased investment in broadband. However, this analysis is logically fraught for various reasons. When analyzing the effects of net neutrality, the Commission must remember that *correlation does not equal causation*. There have been other factors at play that are affecting BIAS providers’ investment behavior post-repeal. Furthermore, while various commenters making claims about increased investment rely on a report from USTelecom,²⁵ many other sources have actually found a *decrease* in broadband investment. For example, AT&T announced it will cut its capital investment by \$3 billion in 2020;²⁶ at least half the 5.6 million new fiber-connected homes in 2018 were included as a condition of AT&T’s merger with Time Warner;²⁷ and a recent study from George Washington University concludes that the

²⁴ 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); See also CTC Technology & Energy, *Mobile Broadband Service Is not An Adequate Substitute for Wireline* (Oct. 2017).

²⁵ See, e.g., Comments of Internet Innovation Alliance, at n 19; see also Comments of National Association of Manufacturers, at n. 1; see also Comments of R Street, at n. 17; see also Comments of The U.S. Chamber of Commerce, at n. 10.

²⁶ Jon Brodtkin, *AT&T will slash \$3 billion off its capital investments next year* (Oct. 30, 2019), available at <https://arstechnica.com/information-technology/2019/10/att-is-cutting-capital-investment-from-23-billion-to-20-billion/>.

²⁷ Karl Bode, *The White House is using fuzzy math to justify net neutrality veto* (Apr. 9, 2019), available at <https://www.theverge.com/2019/4/9/18302113/net-neutrality-veto-white-house-donald-trump-save-the-internet-act-broadband>.

passage and repeal of the net neutrality rules had no meaningful impact on broadband investment.²⁸

Some commenters argue that there have not been any major net neutrality violations since the repeal.²⁹ But, in addition to the fact that there is no longer a federal “cop on the beat,” as noted above there very well could be violations occurring that customers do not realize. In fact, researchers from Northeastern University and University of Massachusetts Amherst found that post-repeal, almost all wireless carriers have been slowing down Internet speed for selected video streaming services.³⁰ Furthermore, there has been a pending lawsuit in federal court, whose spotlight may be disciplining large BIAS providers from engaging in discriminatory behavior. While some commenters assert that there is no incentive to violate, BIAS providers have done so in the past and they will likely return to doing without net neutrality rules or effective oversight by the FCC (or the relevant state) once pending litigation is over. Moreover, as noted above, there are currently many interconnection agreements that were entered into when the FCC was overseeing it under the prior net neutrality Order as well as merger conditions that have not yet

²⁸ Karl Bode, *Study Proves The FCC’s Core Justification for Killing Net Neutrality Was False* (Sept. 27, 2019), available at https://www.vice.com/en_us/article/kz4g9x/study-proves-the-fccs-core-justification-for-killing-net-neutrality-was-false.

²⁹ See, e.g., Comments of Discovery Institute, at 6 ([T]hrottling hasn’t been necessary in the U.S. due to significantly higher levels of investment in the U.S. as compared to Europe.”); see also Comments of Free State Foundation (“[T]here is no record evidence of broadband ISPs engaging in such conduct[.]”); see also Comments of Information Technology & Innovation Foundation, at 4 (“These worst-case-scenario nightmares of outright blocking or throttling of Internet services as a shakedown for fees were never realistic, but today . . . they are less realistic than ever.”); see also Comments of Progressive Policy Institute, at 1 (“Broadband has flourished as an information service free from ill- fitting and stifling common carrier constraints.”).

³⁰ Khalida Sarwari, *Here’s Why It Took You So Long To Load The Trailer For The New Star Wars Movie On Youtube*, (Aug. 27, 2019), available at <https://news.northeastern.edu/2019/08/27/northeastern-university-researcher-finds-that-wireless-networks-are-throttling-video-streaming-24-7/>.

run their course. Therefore, it is incorrect to say that the broadband market is strong and fair due to the repeal of net neutrality.

Questionable practices still exist and now no agency will have oversight authority for many of them, evidenced by behavior such as Verizon's throttling of firefighters in Santa Clara County and AT&T's continued discriminatory behavior favoring its own programming over third party with respect to data caps for its mobile service.³¹

II. THE COMMISSION SHOULD CREATE POLICIES THAT PROMOTE ADDITIONAL FIXED BROADBAND COMPETITION, INCLUDING ACCESS TO POLES, CONDUIT, AND RIGHTS-OF-WAY.

The Commission should do everything it can to promote additional fixed broadband competition, and this includes allowing BIAS-only providers to qualify for protections under Section 224 of the Communications Act. No provider should be forced to offer a telecommunications service or cable service in order to qualify for the protections under Section 224. The Commission should take immediate steps to remedy this issue.

Various commenters have expressed their concerns regarding the impact on BIAS-only providers, and the negative effect it will have on competition. As Google Fiber explained in its comments in the Competition Marketplace Report proceeding, Section 224 expressly grants nondiscriminatory access to investor-owned utility poles only to telecommunications carriers and cable operators. As a result, "communications providers that are not telecommunications carriers or cable operators—like Google Fiber—cannot access investor-owned utility poles on the same

³¹ See Comments of INCOMPAS, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (filed July 17, 2017), at 20, 22-23.

rates, terms, and conditions as their traditionally regulated competitors.”³² Under the Commission’s reclassification of BIAS service, non-telecom/non-cable broadband providers, which includes most new entrants and small providers, are not protected from paying unreasonably high prices for access to privately-owned utility poles, and these innovative new providers are deprived of the right to use efficient and cost-saving deployment procedures like the Commission’s One-Touch Make-Ready policy.³³ Moreover, as Google Fiber expressed in its comments in this proceeding: “Google Fiber was able to negotiate commercial pole attachment agreements with numerous investor-owned utilities before broadband was classified as a telecommunications service. But those negotiations were difficult and time consuming, and Google Fiber had to be willing to pay higher pole rent than cable operators and telecommunications providers.”³⁴

Losing Section 224 rights is not only theoretically concerning, but there is evidence of it *currently* having a negative effect on small providers and competition. As WISPA expressed in its comments: “As WISPs and other small providers of broadband-only services increasingly seek to enter new markets and reach new customers – in many cases in rural areas that lack choice and vertical infrastructure – access to poles, conduits and rights-of-way are becoming more important deployment options.”³⁵ WISPA’s comments then list examples of companies

³² Comments of Google Fiber, *In the Matter of Office and Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, GN Docket No. 20-60 (Apr. 27, 2020), at 2-3.

³³ *Id.*

³⁴ Comments of Google Fiber, WC Docket Nos. 17-108, 17-287, 11-42, at 2.

³⁵ *Comments of WISPA*, at 8.

already encountering such barriers.³⁶ Moreover, others in the docket confirm the discrimination and higher rates that BIAS-only competitors face in accessing poles, ducts, or conduit owned by a utility. For example, according to Southern Company’s comments: “broadband-only providers are now without the benefit of pole attachment regulations purportedly designed to promote broadband deployment. Those regulations, for the most part, benefit only the incumbent providers (like cable television systems, telecommunications carriers, and ILECs).”³⁷

Given these troubling incidents to many small BIAS providers, WISPA asserts that the Commission could use its Title I ancillary authority and various statutory authority to grant BIAS-only providers Section 224 protections. According to WISPA’s comments: “WISPA asks that the Commission use its multiple grants of statutory authority to regulate communications, as well as its ancillary authority under Title I of the Act, to maintain equitable access to poles and other infrastructure for WISPs and other broadband-only providers that do not fall within the two defined categories of providers in Section 224.”³⁸ INCOMPAS would support action by the Commission to enable BIAS-only providers who need Section 224 access as it will further promote broadband availability and broadband competition.

³⁶ *Id.* at 9.

³⁷ Comments of Southern Company, at 3.

³⁸ *Comments of WISPA*, at 9; 11-14 (When stating “multiple grants of statutory authority,” WISPA refers to Sections 224, 157, 163, and 257 of the Communications Act, as well as Section 706 of the Telecommunications Act of 1996.

III. THE COMMISSION SHOULD TAKE ACTION TO ENSURE THAT THE LIFELINE PROGRAM CONTINUES TO ALLOW ACCESS TO BIAS SERVICES AND TO CORRECTLY DEFINE AND IDENTIFY THE ISSUES OF PUBLIC SAFETY.

As explained in INCOMPAS' comments, there are significant negative consequences on the Lifeline program from the Commission's decision to reclassify BIAS from a telecommunications service.³⁹ INCOMPAS would support the Commission using its available authority to ensure that low-income consumers in the Lifeline program can continue to access BIAS service through the Lifeline program as proposed by other commenters in the proceeding.⁴⁰

In addition, many commenters in the docket discuss the issue of public safety too narrowly. Public safety is broader than service to traditional public safety entities. As INCOMPAS explained in its comments,⁴¹ public safety also encompasses how consumers access public safety information online and how consumers communicate with each other during public safety events. For example, during the COVID-19 pandemic, there are constantly public safety updates on various platforms, such as streaming the news or late-night television shows as well as government officials sending out helpful information to the public and individuals sending messages to their loved ones over social media websites. As a result, the Commission must interpret "public safety" in a broader sense as it further understands and explains the reclassification's effect on public safety and the ability of the FCC to ensure that public safety is

³⁹ See *Comments of INCOMPAS*, at 12-14.

⁴⁰ See *Comments of The National Lifeline Association*, at 3 ("[T]he Commission has Title I ancillary authority to support Lifeline broadband."); see also *Comments of MMTC*, at 2 ("[T]he Commission can clarify that it has authority or rely on ancillary authority to provide Lifeline support to those providers as well.").

⁴¹ See *Comments of INCOMPAS*, at 9-10.

not harmed when there is no effective oversight of BIAS providers and their treatment of online content.

Moreover, many commenters have expressed concern that public safety is at risk without the reclassification of BIAS to an information service because public safety entities should always have their traffic prioritized over other types of content.⁴² However, these commenters incorrectly conflate the concept of prioritizing some special categories of traffic with paid prioritization for general Internet traffic. The net neutrality protections repealed by this Commission had exceptions for certain traffic that could be prioritized, such as public safety communications. Furthermore, specialized non-BIAS services could be offered for specific purposes. Thus, it is not the case that the paid prioritization prohibition was harmful to public safety.

IV. CONCLUSION

INCOMPAS strongly encourages the Commission to reconsider its *Restoring Internet Freedom Order*, including its repeal of net neutrality protections and its oversight of interconnection policy. Nonetheless, as the Commission considers its responses to the remanded issues, it should acknowledge and remedy the harmful impacts as much as possible. We support the FCC taking action to use its available authority to grant BIAS-only providers Section 224 rights and ensure the availability of BIAS service to low-income consumers in the Lifeline program. Unfortunately, the Commission's current view of public safety communications is too narrow and without effective oversight of BIAS and net neutrality rules in place that prohibit

⁴² See, e.g., Comments of Public Safety Broadband Technology Association, at 4 (“[T]he concept of prioritization that the *Order* permits is essential for public safety communications to the general public.”); see also Comments of Scott Wallsten, Technology Policy Institute, at 6 (“We broadly recognize the importance for first responders and other aspects of public safety to have priority over normal activities.”).

BIAS providers from blocking, throttling and discriminating, there are no guarantees that public safety communications and information will not be disrupted.

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