

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

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

**COMMENTS**

INCOMPAS hereby files these comments in response to the Commission’s *Second Report and Order and Third Further Notice of Proposed Rulemaking*.<sup>1</sup> INCOMPAS supports the Commission’s efforts to improve its broadband mapping and to implement the Broadband DATA Act<sup>2</sup> in a manner that is consistent with its language and purpose. INCOMPAS’ comments focus on which fixed broadband providers are obligated under the Broadband DATA Act to file polygons (maps). The Commission’s proposal to rely on its old definition of a “facilities-based provider” that includes providers who have not built out the broadband network infrastructure is contrary to the Broadband DATA Act’s plain language that coverage maps should be filed by providers who have “actually built out the broadband network infrastructure of the provider such that the provider is able to provide that service.”<sup>3</sup> As such, we proffer a proposed modification that will ensure the Commission hews to the language of the Broadband

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<sup>1</sup> *In re Establishing the Digital Opportunity Data Collection; Modernizing the FCC Form 477 Data Program*, Second Report and Order and Third Further Notice of Proposed Rulemaking, WC Docket Nos. 19-195 & 11-10, FCC 20-94 (rel. July 17, 2020) (“*Third FNPRM*”).

<sup>2</sup> Broadband Deployment Accuracy and Technology Availability Act, Pub. L. No. 116-130, 134 Stat. 228 (2020) (codified at 47 U.S.C. §§ 641-646) (“Broadband DATA Act”).

<sup>3</sup> 47 U.S.C. § 642(b)(2)(A)(i)(I).

DATA Act and does not lead to information that would overstate the availability of broadband infrastructure which is a significant concern of Congress in its passage of the Broadband DATA Act.<sup>4</sup>

The Commission proposes to rely on its current definition in Section 1.7001(a)(2) of its rules for those facilities-based providers who will be subject to the mapping requirements, stating that it believes that “this definition is consistent with the Broadband DATA Act because the Act requires each provider to report where it ‘has actually build [sic] out the broadband network infrastructure.’”<sup>5</sup> It then goes on to describe how resellers are not in the position to report network infrastructure information accurately, how such information from resellers would overlap with facilities-based providers’ filings, and how relying on its old definition of a “facilities-based” provider is consistent with the Commission’s prior approach in the Digital Opportunity Data Collection and will allow the Commission to compare Form 477 information with the new maps required by the Broadband DATA Act.<sup>6</sup>

Section 1.7001(a)(2)’s definition of a facilities-based provider currently includes providers who do not meet the Broadband DATA Act’s requirement that they “actually built out the broadband network infrastructure of the provider such that the provider is able to provide that service.”<sup>7</sup> In particular, in subsection (iii) of the definition, any provider using UNEs, special

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<sup>4</sup> See Broadband Deployment Accuracy and Technological Availability Act, Report of the Committee on Commerce, Science, and Transportation on S. 1822, Report 116-174, at 2-3 (Dec. 12, 2019) (explaining the how FCC maps are critical for determining where federal resources should go to build broadband infrastructure, yet how the collection of information in the Form 477 leads to an overstatement of the availability of broadband) (“Broadband DATA Act Report”).

<sup>5</sup> *Third FNPRM*, ¶ 88, citing 47 U.S.C. § 642(b)(2)(A)(i)(I).

<sup>6</sup> *Id.*

<sup>7</sup> 47 U.S.C. § 642(b)(2)(A)(i)(I).

access (aka business data services or BDS), or leasing other facilities to offer broadband service will be obligated to file maps, yet UNEs, special access, and other leased facilities have not actually been built out by the provider. Rather, they are leased from the company who deployed the infrastructure.

The plain language of the Broadband DATA Act states that providers who have actually built out the network infrastructure for which the broadband service is provided over are the providers that should file.<sup>8</sup> The reason Congress was so specific is because Congress wants the maps to be based on the broadband infrastructure built by those who have deployed that infrastructure in order to avoid the overstatement of broadband infrastructure availability.<sup>9</sup> The Commission's broadband information based on the Form 477 already poses significant challenges due to the overstatement of such availability. The Broadband DATA Act specifically was passed to solve these types of problems, and it is imperative that the Commission follow the Broadband DATA Act's plain directive here, or it will risk the production of maps that continue to misstate the availability of broadband network infrastructure.

Moreover, as INCOMPAS previously has discussed in this docket, providers relying on UNEs or special access from an underlying broadband infrastructure provider—typically an incumbent telco—do not have general access to each UNE or special access line that may be

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<sup>8</sup> 47 U.S.C. § 642(b)(2)(A)(i)(I).

<sup>9</sup> Broadband DATA Act Report, at 2 (Dec. 12, 2019) (describing how FCC maps are critical for determining where federal resources should go to build broadband infrastructure; “[h]owever, the use of Form 477 data by the FCC to develop broadband maps has come under scrutiny. A general criticism of using this data to build broadband maps is that the way the FCC directs providers to report broadband deployment data is unreliable.”)

available and could be used to provide broadband service.<sup>10</sup> Rather, competitors can only determine which customers they can serve when they submit an inquiry to the underlying network provider, and that provider confirms availability—which they do during the customer on-boarding process. Thus, to fulfill the requirements of the Commission to submit polygons where it provides broadband service (or could provide broadband within 10 days), the competitive provider would only be able to submit polygons based on its current customer base.<sup>11</sup> Accordingly, where it is not providing service to a customer in every location in a census block via a UNE or special access, it will need to submit a polygon for every customer location it serves. This information is highly confidential information, and could be used by third parties to engage in anticompetitive actions to quash competition.<sup>12</sup> And as a result of the function of the Commission’s requirements, the Commission should anticipate that one competitive provider may be submitting thousands of polygons that depict its individual customer locations. INCOMPAS previously has discussed how the strong presumption against confidential treatment of mapping information and the requirement to request it for each submission is concerning especially given that the Commission has previously treated this type of information confidentially.<sup>13</sup> However, with the passage of the Broadband DATA Act, the Commission also must contend with the fact that the Act prohibits the FCC from requiring providers to submit

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<sup>10</sup> See Petition for Reconsideration of INCOMPAS, WC Docket Nos. 19-195 & 11-10, at 3-4 (filed Sept. 23, 2019) (“INCOMPAS Petition”).

<sup>11</sup> *Id.*

<sup>12</sup> See *id.* at 7-8. See also INCOMPAS Reply, at 1-4 (filed Feb. 20, 2020).

<sup>13</sup> See INCOMPAS Petition, at 7-8.

their customer addresses or locations.<sup>14</sup> Accordingly, it cannot require that providers using UNEs or special access submit their customer-location based polygons.

INCOMPAS also has discussed that information from UNE and special access purchasers does not provide the Commission with network infrastructure information that is valuable for assessing gaps in broadband availability and universal service or deployment funding.<sup>15</sup> Incumbents will be providing their maps based on their network capabilities. Competitors do not have access to the availability of every UNE or special access line without querying the incumbent's database for each and every potential customer location. As such, maps of competitive broadband based on UNEs/special access will be based on competitive service adoption and not accurately depict the full availability of the incumbents' networks. The Commission will be obtaining that information from the incumbents. Moreover, the Commission already collects broadband subscribership information. There is no reason for the Commission to implement a polygon filing obligation based on a provider's subscribership.

In addition, the Commission should consider that the points it made about resellers equally apply to purchasers of UNEs and special access.<sup>16</sup> Just like resellers, they would be providing overlapping information and are not in the position to provide accurate and complete information to the FCC, and requiring them to do so based on their customer lists or locations is unnecessary and contrary to the Broadband DATA Act's requirements.<sup>17</sup>

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<sup>14</sup> 47 U.S.C. § 802(b)(2)(A)(iv)(II)(bb).

<sup>15</sup> Petition for Reconsideration of INCOMPAS, at 8-9.

<sup>16</sup> *Third NPRM* ¶ 88.

<sup>17</sup> One of the reasons the Commission proposes in the *Third NPRM* for polygon filings to be made by those who meet its "facilities-based provider" definition is because doing so will enable "the comparison of data and maps" produced under Form 477 with those produced under the Broadband DATA Act, which the Act requires the Commission to do. *Third NPRM* ¶ 88 (*citing*

Moreover, the Commission’s current UNE policy is under review,<sup>18</sup> and INCOMPAS and USTelecom and a number of their respective members recently submitted a compromise proposal that, if adopted by the FCC, will impact competitive use of most UNE loops in a very short period of time (three to four years).<sup>19</sup> Requiring competitors to invest in mapping their use of UNEs when they are working to transition their customers off these UNEs does not make good policy sense. Thus, the Commission should reject its NPRM’s proposal to require providers who use UNEs or special access to deliver broadband to submit polygons. Fortunately, it is a very easy fix. When referring to its facilities-based definition for those providers who must file polygons, it should not refer to subsection (iii) of the definition in Section 1.7001(a)(2).

In its *Third NPRM*, the Commission discusses how the Digital Opportunity Data Collection Order and Further Notice required fixed providers to differentiate in their coverage polygons among service that was residential-only, business-only, or business-and-residential, but it also asks whether it should exclude business-only service and instead require only a distinction between “residential-only” and “business-and-residential” services by fixed providers.<sup>20</sup> It then

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47 U.S.C. § 642(b)(6)(A)(i)(II)(aa)). The exclusion of UNE and special access purchasers will not prevent or significantly impede the ability of the Commission to meet its statutory obligation to compare its prior Form 477 data with the new maps, and as we have explained above, the Broadband DATA Act provisions that those who actually have built out the networks should file polygons and that no fixed provider can be required to submit their customer address list or locations also must be followed.

<sup>18</sup> *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).

<sup>19</sup> See INCOMPAS and USTelecom Compromise Proposal Letter, WC Docket No. 19-308 (filed Aug. 5, 2020).

<sup>20</sup> *Third FNPRM*, ¶ 90.

states in footnote 263 that “[a]doption of this approach also would effectively render moot the Petition for Reconsideration filed by INCOMPAS in this proceeding wherein it argued that business data competitors using the last-mile facilities of wholesale providers should not file broadband coverage polygons.” Unfortunately, the Commission is incorrect that this would solve the issues INCOMPAS has raised in its Petition for Reconsideration. INCOMPAS’ members use UNEs to serve the residential and business markets. Indeed, in the FCC’s UNE proceeding referenced above, a significant number of competitors filed in that docket who use UNEs to serve mostly the residential market.<sup>21</sup> As such, the Commission’s proposal to deal with INCOMPAS’ Petition for Reconsideration would not be a satisfactory conclusion for competitors who use UNEs to serve the residential market.<sup>22</sup> For that reason and as we assert and discuss fully above, the more prudent course of action would be for the Commission to exclude UNE and special access purchasers from the filing requirements. This is consistent with the Broadband DATA Act’s requirements and its intent.

## **CONCLUSION**

Congress has now weighed in with its perspective on broadband mapping—it wants to know where providers have built out their infrastructure so that they can provide broadband service. As INCOMPAS has said in our filings in this docket, our members will submit the necessary polygons for the broadband networks they have built that deliver broadband service as required by the Broadband DATA Act and the Commission’s rules. However, they should not

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<sup>21</sup> For example, Sonic and SnowCrest mostly serve the residential market in California; IdeaTek in Kansas and Mammoth in Wyoming.

<sup>22</sup> With respect to special access service, INCOMPAS is not aware of it is being used in the residential market to deliver broadband internet access service as defined by the Broadband DATA Act.

be required to do so where they rely on UNEs or special access for the reasons stated herein. Accordingly, when referring to its facilities-based definition for those providers who must file polygons, the Commission should not refer to subsection (iii) of its definition in Section 1.7001(a)(2).

Respectfully submitted,

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