

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

In the Matter of )  
 )  
Inquiry Concerning Deployment of Advanced ) GN Docket No. 20-269  
Telecommunications Capability to All Americans )  
in a Reasonable and Timely Fashion )

**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”) *Sixteenth Broadband Deployment Report Notice of Inquiry* to initiate the next annual assessment of the availability of advanced telecommunications capability to all Americans in a reasonable and timely fashion, and to solicit comment and information to help guide the Commission’s analysis.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

INCOMPAS is the preeminent national industry association for competitive providers of Internet and communications networks, including wireline, wireless, and satellite providers in the broadband marketplace. We represent companies 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 business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes; transit and backbone providers that carry broadband and Internet traffic; and online video distributors that offer video programming and other services over BIAS to

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<sup>1</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Fifteenth Broadband Deployment Report Notice of Inquiry, GN Docket No. 20-269, FCC 20-112 (rel. Aug. 19, 2019) (“*Sixteenth Broadband Deployment NOI*”).

consumers. Our members are providing and/or relying upon broadband capability, and the Commission's role in encouraging broadband deployment and protecting and promoting broadband competition is key to ensuring robust network deployment, and to guarantee residential and business customers will have choice for their broadband provider, as well as the services and applications they may choose to take over those broadband connections.

Despite the challenges presented by the global COVID-19 pandemic, INCOMPAS members are dedicated to helping the Commission achieve its goal of closing the digital divide through the deployment of the next generation of high-speed networks and services. Our members are eager to offer the competition that drives investment and innovation, deployment and faster speeds, affordability and better customer service. Consumers appreciate choice and are increasingly turning to competitive, online alternatives to traditional services, including streaming video, voice, and cloud services. These innovative offerings allow the association's members to compete, where possible, and ensure that consumers are able to engage in the digital economy and benefit from broadband availability and competition.

Supporting affordable, competitive BIAS and dedicated broadband services is critically important to the nation's development and with the COVID-19 crisis further exposing the digital divide across the country, broadband availability and connectivity remain more essential than ever before as many services continue to move online. As the Commission recently indicated, "[m]odern society is an increasingly digital one, and accessing advanced services is essential to ensuring that all Americans can participate and thrive."<sup>2</sup> Indeed, almost every business requires access to the internet (and other broadband services) today.

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<sup>2</sup> *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 18-238, 2019 Broadband Deployment

Unfortunately, due to the pandemic, it also is the case that households need greater access to broadband as well—whether it is for telework, distance learning, remote telehealth monitoring, or engaging in commerce—and most Americans agree that they need access to reliable, robust and affordable high-speed Internet at home. Our dependence on broadband services has only been amplified in recent months, and now high-speed broadband connectivity has become a necessity in American homes as social distancing guidelines and stay-at-home orders have required more Americans to work and learn from home, and to be able to connect with their communities, vital services, jobs, schools, and commerce through online resources. As INCOMPAS members can attest, when they enter the market to offer broadband services, speeds get faster, services improve, and prices typically drop—making services more affordable.

INCOMPAS has consistently advocated for policies that will reduce barriers to investment in communications infrastructure and will streamline the deployment process so that more consumers and businesses can adopt competitive broadband service. As our lives continue to adapt and rely more heavily on broadband services to meet the challenging circumstances of social distancing and the coronavirus pandemic, the commitment to reach all Americans and to deliver the broadband connectivity needed during and after this crisis must be embraced. Competition for broadband services also must remain a goal of the FCC—recognizing that it is competition that enables the market to meet the needs of American consumers and businesses. At the same time, INCOMPAS urges the Commission to recognize that the extraordinary circumstances of the last seven months require the agency to more closely examine and assess how the global pandemic is impacting consumers and their adoption of broadband. COVID-19

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Report, FCC 19-44, para. 1 (rel. May 29, 2019), *available at* <https://docs.fcc.gov/public/attachments/FCC-19-44A1.pdf>.

has fundamentally altered the landscape and future of broadband connectivity. Even in areas where competition for broadband is adequate, the needs of customers are changing due to this pandemic—job losses are at historic levels and families and businesses require greater capacity to meet broadband demands that now include virtual learning and constant video conferencing. As Congressman James Clyburn, the Majority Whip of the U.S. House of Representatives, stated in a recent keynote to INCOMPAS members on broadband connectivity:

To me today, the next greatest thing is to have the Internet in every home, that's what's going to get healthcare to rural communities, that's what will get online learning to those rural children who are not connected to the rest of the world. The kind of thing that's been revealed, maybe unveiled to us today because of COVID-19, . . . we cannot have telehealth without broadband, we cannot have online learning [without broadband] and kids are under threat of losing a second year of school.

. . .

COVID-19 has been an eye opener to everybody . . . how we get beyond this pandemic has to be a priority, [and we] cannot sustain it without broadband.<sup>3</sup>

Recognizing that the pandemic will be with us well beyond the publication of this report, the Commission's analysis should include data on not just deployment, but adoption, affordability, and how this health crisis may impact broadband over the next few years.

Additionally, in this comment, we focus on three critical issues that will drive more competitive deployment of broadband infrastructure and ensure that the Commission is accurately reflecting the status of broadband deployment in the country.

First, the FCC should adopt 1 Gbps as the fixed broadband benchmark for the nation. Gigabit connectivity is transforming communities and is the commercial product that is spurring

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<sup>3</sup> Representative James E. Clyburn, Keynote to ConnectIN INCOMPAS 2020 (Sep. 15, 2020) (transcript available with INCOMPAS).

deployment from incumbents and competitive broadband providers. Markets with gigabit connectivity not only have faster speeds, but also more affordable prices, as incumbents race to improve their networks and match the prices of competitive fiber providers that have entered the market with a broadband product that is attractive to consumers. The U.S. should be adopting benchmarks that reflect truly “advanced” telecommunications capability, not settling for baseline speeds that major BIAS providers have surpassed in their initial offerings to consumers. In turn, consumers are using much higher speeds today due to the growth in streaming and over-the-top services, as well as the number of users per subscription. With 5G well on the way, 1 Gbps represents a sensible standard and it is time for the Commission to adopt a future-proof definition of broadband for our nation.

Second, the Commission must continue to recognize the distinct differences between fixed and mobile broadband networks. With its inherent limitations, mobile is not yet a functional substitute for fixed service. American consumers and businesses rely on both fixed and mobile broadband networks, with each serving specific functions. Businesses and consumers alike continue to rely on dedicated fixed services for privacy and data protection as well as sensitive payment information. They continue to expect to have access to both types of networks, and full substitutability has not been achieved.

Third, INCOMPAS’ members support the Commission’s efforts to close the digital divide and lower barriers to broadband deployment. However, as the Commission itself has noted, barricades to new competitive deployment, especially at the local level, have been blocking competition for several decades. INCOMPAS highlights three current proceedings where the Commission can take action to speed broadband deployment, and INCOMPAS

encourages all levels of government to work with competitive broadband providers to streamline their broadband infrastructure deployment requirements.

## **II. THE COMMISSION SHOULD UPDATE THE FIXED BROADBAND PERFORMANCE BENCHMARK TO 1 GBPS.**

In the *Sixteenth Broadband Deployment NOI*, the Commission proposes to maintain the evaluative framework used in the 2020 Broadband Deployment Report, including the current speed benchmark of 25/3 Mbps for fixed services. While it is generally advisable to maintain consistent benchmarks, INCOMPAS submits that the fundamental changes to the marketplace over the last five years combined with the new reliance that consumers have on broadband networks as a result of the global pandemic should finally motivate the Commission to adopt a higher fixed broadband performance benchmark. Given that nearly half of all consumers are adopting fixed terrestrial services at 100 Mbps/10 Mbps<sup>4</sup> and with gigabit service now available to the majority of U.S. consumers,<sup>5</sup> INCOMPAS recommends that the Commission increase its performance benchmark for fixed broadband services to 1 Gbps.

INCOMPAS' members are bringing gigabit service to their customers,<sup>6</sup> and incumbents have responded by matching this investment in their networks in the areas they serve, including deploying their own fiber and/or upgrading their DOCSIS. In determining the appropriate

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<sup>4</sup> See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 19-285, 2020 Broadband Deployment Report, FCC 20-50, 31 Fig. 11 (rel. Apr. 24, 2020) (finding that 45.7 percent of U.S. consumers have adopted broadband service at 100 Mbps/10 Mbps).

<sup>5</sup> See Joan E. Solsman, *5G? We'll double it! Cable companies push '10G' at CES*, CNET (Jan. 7, 2019, 10:58 AM), <https://www.cnet.com/news/cable-companies-push-10g-at-ces/> (indicating that broadband providers offer gigabit service to nearly 80 percent of U.S. homes).

<sup>6</sup> See Comments of INCOMPAS, GN Docket No. 20-60 (filed Apr. 27, 2020) at 30.



performance measure for fixed broadband service, the Commission should consider speeds that “reflect current and near term use.”<sup>7</sup> Entry-level service options by major BIAS providers are typically at least 50 Mbps (and usually 100 Mbps) up to 2 Gbps.<sup>8</sup> The Fiber Broadband Association, in its comments on the *2020 Broadband Deployment Report*, indicated that the 100 Mbps downstream tier not only had the most fixed broadband connections in the country, but also increased by a factor of four from 2014 to 2017.<sup>9</sup> Indeed, Ookla now finds that the average U.S. internet download speed over six times faster than the Commission’s current benchmark at 156.61 Mbps (58.96 Mbps upload).<sup>10</sup> With gigabit service now widely available to the U.S. market and with plans being announced to bring even faster speeds to market,<sup>11</sup> the Commission should recognize that gigabit connectivity represents the advanced telecommunications capability that should be reflected in its Section 706 assessment as Congress envisioned.

Broadband demand has been steadily growing across the economy, but the global pandemic has increased our reliance on these networks. Consumers are now using broadband to

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<sup>7</sup> Comments of Fiber Broadband Association, GN Docket No. 19-285 (filed Nov. 22, 2019), at 4 (“FBA Comments”) (asserting that the Commission should increase the fixed broadband performance benchmark “to at least 100/10 Mbps, and preferably higher”).

<sup>8</sup> See Catherine McNally, *Best High Speed Internet Providers: Compare the Fastest ISPs*, REVIEWS.ORG (Sep. 10, 2019), <https://www.reviews.org/internet-service/fastest-internet-providers/>.

<sup>9</sup> FBA Comments at 4 (reporting that connections in every lower tier declined over the same time period, implying that consumers were shifting to higher speed tiers).

<sup>10</sup> Ookla SpeedTest, United States, August 2020, *available at* <https://www.speedtest.net/global-index/united-states#fixed>. According to the SpeedTest, 105 countries have a higher average broadband speed than 25/3 Mbps.

<sup>11</sup> Solsman, *supra* note 5 (reporting that a coalition of international cable industry groups were conducting lab trials on a 10 Gbps broadband service that it hoped to introduce “in the coming years”).

engage in virtual learning, video conferencing, and telehealth, in addition to using the Internet to entertain themselves, shop, and stay connected to friends and family. Multiple family members are using broadband simultaneously at homes across America, and the number of connected devices is growing. It is not surprising that broadband download speeds are increasing. Businesses also are using broadband connections more than ever before. Cloud services are growing, and entire industries are changing as they too are relying more on broadband connectivity. Broadband is impacting the healthcare industry, manufacturing, agriculture, and retail, among many others. Businesses large and small must be connected to compete. Consumer and business broadband demand is expected to continue to grow, and in turn, competitive providers are responding and deploying new capabilities.

The U.S. should be the global leader in fixed broadband and deployment of fiber—which is the backbone for 5G and winning the global race to the future. During a recent Congressional hearing, serious reservations were expressed about the Commission’s continued use of 25/3 Mbps as a performance benchmark for advanced telecommunications capability.<sup>12</sup> We need gigabit connectivity to win the global broadband race. The Commission recognizes this given its preference for gigabit service in proceedings like the *Rural Digital Opportunity Fund*. Because the current benchmark of 25/3 Mbps is minimally adequate for *RDOF*, it is time for the Commission to adopt a future-proof definition of broadband for our nation. Accordingly, the FCC should set the fixed broadband speed definition at 1 Gbps.

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<sup>12</sup> See *Oversight of the Federal Communications Commission: Hearing Before the Subcomm. on Comm’n and Tech. of the H. Comm. on Energy and Commerce*, 116th Cong. (Sep. 17, 2020) (statement of Rep. O’Halloran, Member, H. Comm. on Energy and Commerce).

### **III. FIXED AND MOBILE SERVICES ARE NOT YET FUNCTIONAL SUBSTITUTES AND SHOULD BE EVALUATED SEPARATELY.**

INCOMPAS supports the Commission's proposal to maintain its current evaluative framework with respect to collecting and measuring the availability of both fixed and mobile broadband networks.<sup>13</sup> These services continue to meet different consumer expectations and therefore should not yet be considered functional substitutes. Most Americans and businesses require access to a fixed broadband service because mobile is not a sufficient substitute. American consumers and businesses expect to have both types of networks available to them because the experience of using these services can be distinctly different.

For example, there is a difference between the speeds and connectivity available to consumers of mobile service (with average speeds of 44.06 Mbps) and fixed (with average download 152.60 Mbps).<sup>14</sup> Furthermore, Americans typically are paying more for their mobile broadband connection and have low data caps as compared to terrestrial fixed service, so many users limit how much data they consume in order to avoid going over data caps and paying more. Terrestrial fixed services, on the other hand, provide faster connections, allowing consumers to stream and consume content, like long-form video, in our homes and offices much easier and more reliably. Moreover, most consumers do not have to worry about hitting a typically higher data cap for their residential services. Even with 5G, there will still likely be applications and services that require a fixed connection—for example, telehealth and gaming—that will require the Commission to continue to evaluate these services separately given the inherent limitations

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<sup>13</sup> See *Sixteenth Broadband NOI* at para. 10.

<sup>14</sup> Ookla SpeedTest, United States, August 2020, available at <https://www.speedtest.net/global-index/united-states#fixed>.

of mobile networks caused by interference and environmental factors.<sup>15</sup> In fact, AT&T CEO's John Stankey recently said: "I personally do not believe that 5G is a replacement in the near term for suburban residential single family living units."<sup>16</sup>

Access to both fixed and mobile broadband are necessary to meet the needs of consumers; therefore, the Commission should continue to evaluate fixed and mobile broadband networks separately based on benchmarks that reflect advanced capability for these services.

#### **IV. THE COMMISSION SHOULD TAKE ACTION IN SEVERAL CURRENT PROCEEDINGS TO CLOSE THE DIGITAL DIVIDE.**

INCOMPAS appreciates the Commission's efforts to close the digital divide and take action to lower the barriers to broadband deployment. The Commission's promotion of both wired and wireless broadband deployment is a critical step to encouraging and enabling more fiber builds that are crucial to fixed broadband deployment, service availability, and competition. The Commission's 2018 adoption of a one-touch make-ready policy that allows fiber providers to attach their fiber to utility poles in a more efficient manner saves builders time and money and enables more fiber to be deployed. Furthermore, the Commission's efforts to limit shot clocks and establish fee guidelines at the state and local level for small cells has accelerated broadband

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<sup>15</sup> As former Google CEO Eric Schmidt noted during a recent appearance at the 2020 INCOMPAS Show, "It's obvious because of the pandemic that we're going to be wired and wireless forever, and . . . you never [have enough bandwidth], and especially not for the kind of interactive learning and so forth, especially across a broad swath of our population." Eric Schmidt, Former CEO and Chairman Google and Co-Founder, Schmidt Futures, Keynote to 2020 ConnectIN INCOMPAS 2020 (Sep. 16, 2020), *available at* [https://www.youtube.com/watch?v=kUh\\_doLiC2c](https://www.youtube.com/watch?v=kUh_doLiC2c).

<sup>16</sup> Mike Robuck, *Tale of the tape: Verizon's 5G Home vs. AT&T's fiber-fed broadband service*, FIERCE TELECOM (July 24, 2020), *available at* <https://www.fiercetelecom.com/telecom/taletapeverizon-s-5g-home-vs-at-t-s-fiber-fed-broadband-service>.

providers' plans for 5G.<sup>17</sup> That the Ninth Circuit Court of Appeals recently upheld these items<sup>18</sup> is further proof that the Commission is taking a reasoned and thoughtful approach to eliminating barriers to the deployment of the next generation of communications networks. To further enable competitive fiber builds and fixed broadband competition, we encourage the FCC to complete its wireline and wireless deployment proceedings and extend these policies to fiber infrastructure, including (1) requiring 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.<sup>19</sup>

Generally, INCOMPAS members have found that the Commission's work to establish expectations is helpful in educating communities and the association encourages the agency to do more in this area to ensure faster deployment and fiber builds. However, there are still significant issues that are "slow[ing] the deployment of 5G and wireline broadband services."<sup>20</sup> To help increase competitive choice and more broadband connectivity and availability,

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<sup>17</sup> See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (14) (rel. Sep. 27, 2018).

<sup>18</sup> See *City of Portland v. United States, et al.*, No. 18-72689, *et al.* at 19-21 (9th Cir. Aug. 12, 2020).

<sup>19</sup> Reply Comments of INCOMPAS, WTB Docket No. 17-79, at 7-10 (filed July 17, 2017). See also Letter of Craig J. Brown, Assistant General Counsel for CenturyLink, GN Docket No. 17-83 & WC Docket Nos. 17-84, 17-79, 19-126, 10-90, at 5 (filed Oct. 30, 2019) (asking the Commission to require municipal and cooperatives utilities entering the telecommunications market to offer just, reasonable, and nondiscriminatory access to poles as a condition of their participation in Commission auctions).

<sup>20</sup> See Letter from Thomas Jones, Counsel to Zayo, WT Docket No. 17-79 & WC Docket No. 17-84, at 1 (filed Oct. 31, 2019).

INCOMPAS urges the Commission to take additional action to remove barriers and streamline processes for fiber, fixed wireless, and mobile wireless providers, particularly in three open proceedings on duplicative fee assessment, pole replacement cost allocation, and anti-competitive commercial arrangements in multiple tenant environments (“MTEs”).

**a. The Commission Should Grant the Missouri Network Alliance’s Petition for Preemption and Declaratory Ruling on Duplicative Right of Way Fees.**

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. For this reason, INCOMPAS supports a 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.<sup>21</sup> In its comments, INCOMPAS demonstrated how that specific case is in conflict with Section 253 and should be preempted

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<sup>21</sup> See generally Comments of INCOMPAS, WC Docket No. 20-46 (filed March 23, 2020).

accordingly. The association also urged 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 the public rights-of-way consistent with Section 253.<sup>22</sup> 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.<sup>23</sup> 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.

**b. NCTA’s Petition on the Equitable Allocation of Pole Replacement Costs Should Be Applied to All Poles Under the Commission’s Jurisdiction.**

To further promote competitive fiber builds and enable broadband competition in more geographic areas, INCOMPAS urges the Commission to issue a declaratory ruling in response to NCTA’s petition seeking clarification that utility pole owners cannot require broadband facility attachers in unserved areas to bear the entire cost of pole replacement.<sup>24</sup> To speed broadband deployment in rural areas, NCTA has also asked the Commission to ensure a fair allocation process of replacement costs between pole owners and new entities seeking to use the poles, as

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<sup>22</sup> 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.

<sup>23</sup> *Id.* at 11-13.

<sup>24</sup> *See* Petition for Expedited Declaratory Ruling, NCTA—The Internet & Television Association, WC Docket No. 17-84 (filed July 16, 2020).

mandated by the just and reasonable requirements of section 224(b) of the Communications Act. INCOMPAS agrees with NCTA's position that, in accordance with section 224(b), pole replacement costs should be allocated equitably between pole owners and new attachers seeking to lease space on the poles in unserved areas. This is a finding, however, that should apply to all poles under the Commission's jurisdiction—not just in rural, unserved areas.

Requiring pole owners to share in the cost of pole replacement is consistent with the Commission's rules and will remove a significant barrier to broadband deployment. While the Commission has taken steps in the one-touch, make-ready provisions of the *Third Wireline Infrastructure Order* to meet the objectives Congress put forth as they relate to pole attachments, further clarification of the Commission's rules is necessary to provide more affordable, timely and efficient construction of competitive networks and to minimize inconvenience and safety concerns experienced by the public.

Pole owners are already able to sufficiently recover costs from attachers arising from the make-ready process, and the Commission has concluded that it is likely that the attacher is the “cost causer” for, at most, a *de minimis* portion of all remaining costs.<sup>25</sup> Pole owners' brazen attempts to require competitive network builders to cover the full replacement costs of utility poles is therefore unjust and unreasonable given that attachers are already covering the actual expenses for make-ready costs and have only incremental responsibility for advancing the retirement of the existing pole. INCOMPAS concurs with NCTA's assessment that requiring pole owners to share in the cost of pole replacement is consistent with section 224(b)(1) of the Act and section 1.1408(b) of the Commission rules and that proportionate sharing of the costs to

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<sup>25</sup> See *Implementation of Section 224 of the Act*, WC Docket No. 07-245, Order and Further Notice of Proposed Rulemaking, FCC 10-84, ¶ 135 (2010).



modify the facility will ensure that pole owners do not experience a windfall from requiring new attachers to replace and upgrade an existing pole.

**c. Enabling Access to Multiple Tenant Environments Will Increase 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 buildings<sup>26</sup> and those residents have fewer options for broadband service than those living in single-family homes in the same community.<sup>27</sup> 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 landlords actually make available to their residents should lead the FCC to adopt proposals included in a pending *Notice of Proposed Rulemaking* ("NRPM") on this issue.<sup>28</sup> Commission action in this proceeding not only has the support of competitive fiber providers, fixed wireless providers, mobile wireless carriers, wireless infrastructure providers, and telcos, but a recently

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<sup>26</sup> 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](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).

<sup>27</sup> 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](http://www.bbcmag.com/2016mags/Nov_Dec/BBC_Nov16_InternetChoice.pdf) ("[S]ome owners of multiple- dwelling-unit buildings . . . 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.").

<sup>28</sup> 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) ("NPRM" or "Declaratory Ruling").

filed letter in this proceeding from building owners and landlords urges the Commission to encourage greater facilities-based broadband competition in residential and commercial MTEs.<sup>29</sup>

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.<sup>30</sup> 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.<sup>31</sup> 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

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<sup>29</sup> See Letter from Neil Ovenden, *et al.*, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 (filed July 17, 2020).

<sup>30</sup> 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.

<sup>31</sup> 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.<sup>32</sup> 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 3,000 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.<sup>33</sup> Article 52 promotes competitive broadband deployment while specifically addressing the anticompetitive practice of wiring exclusivity.<sup>34</sup> 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.<sup>35</sup> Article 52 puts the choice of provider back in the hands of the consumer, allowing residents to decide when and if to switch services.<sup>36</sup> Other cities and governments are following San Francisco’s

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<sup>32</sup> 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).

<sup>33</sup> See Reply Comments of CALTEL, GN Docket No. 17-142, at 3 (Aug. 22, 2017).

<sup>34</sup> See Opening Comments of the City and County of San Francisco, MB Docket No. 17-91 (filed May 18, 2017), at 7-8.

<sup>35</sup> See *id.* at 6-7.

<sup>36</sup> 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).

example.<sup>37</sup> Given the current barriers to entry in multifamily buildings, INCOMPAS urges the 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.

## V. CONCLUSION

As the Commission determines whether broadband service is being deployed in a timely and reasonable manner, INCOMPAS urges the Commission to: (1) update the fixed broadband performance benchmark to 1 Gbps as this is truly representative of what constitutes “advanced” in today’s broadband marketplace; (2) maintain the current evaluative framework in which fixed and mobile broadband networks are not recognized as functional substitutes; and (3) take additional regulatory steps in current agency proceedings to promote increased broadband deployment and address barriers to entry.

Respectfully submitted,

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<sup>37</sup> See Reply Comments of the City of Boston, Massachusetts, MB Docket No. 17-91 (filed June 9, 2017), at 8.

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