

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

In the Matter of)	
Eliminating <i>Ex Ante</i> Pricing Regulation and)	WC Docket No. 20-71
Tariffing of Telephone Access Charges)	

COMMENTS OF INCOMPAS

Angie Kronenberg
Lindsay Stern
INCOMPAS
1100 G Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 872-5745

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I. INTRODUCTION AND SUMMARY

INCOMPAS, by its undersigned counsel, hereby submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking (“NPRM”) regarding eliminating *ex ante* pricing regulation and tariffing of telephone access charges (“TACs”)¹. INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace. We represent fixed broadband companies, including small local fiber and fixed wireless providers that provide residential BIAS, as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes, including regional fiber providers; transit and backbone providers that carry broadband and Internet traffic; online video distributors (“OVDs”) which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

¹ *Eliminating Ex Ante Pricing Regulation and Tariffing of Telephone Access Charges*, Notice of Proposed Rulemaking, WC Docket No. 20-71 (rel. Apr. 1, 2020) (“*NPRM*”).

The goals of this NPRM are laudable. INCOMPAS agrees with the Commission that it is important for customers to understand their telephone bills and be able to reasonably compare offerings from competitors in the marketplace. Better customer service is a key differentiator for small competitive providers, and the current well-established telephone access charges system provides transparency and truth in billing. However, with respect to the solutions that the Commission seeks comment on—to mandatorily de-tariff the federal telephone access charges (“TACs”) and to prohibit their inclusion on customer bills—INCOMPAS believes that the implementation would be very difficult for the industry. It will require significant time and resources during a pandemic that has stretched communications companies’ resources when many continue to face a decrease in revenue as a significant percentage of their customers have faced closure of their businesses and cannot pay their utility bills, and where many residential customers also are struggling to pay their bills due to job losses. Moreover, there is significant risk that the prohibition of TACs could result in both confusion and higher fees for customers and/or potentially further loss of revenue by communications providers.

As we discuss below, competitors set their pricing based on incumbent offerings. Where incumbents will face state regulatory barriers to including the federal TACs in their local rates, competitors are also at risk for including the TACs in their rates. Even where such barriers may not exist, there will be a significant amount of work needed to update state tariffs, billing systems, marketing and advertising materials, and customer contracts. Competitive local exchange carriers (“CLECs”) are concerned that explaining these changes to customers could also lead to more confusion. And where CLECs and customers are mid-contract, modifying them will be administratively burdensome, even where the contracts may allow for such changes. Furthermore, it is not apparent that customers are currently so confused by their telephone bills

that further FCC intervention is needed to ensure that customers can compare competitive offerings. Indeed, the Commission's own analysis suggests that competitive voice offerings in the retail market abound. Thus, INCOMPAS does not believe that any action is needed as there is not a problem here for the Commission to solve.

INCOMPAS urges the Commission to reconsider the need to move forward in this proceeding. However, should it choose to do so, INCOMPAS requests that the Commission focus on residential service only and exempt business and government customers from this proceeding. Business and government customers are more sophisticated than residential customers and are in a better position to negotiate with their provider. As such, they do not need the same types of protections as residential customers. INCOMPAS also requests that the Commission permit sufficient time for state processes and implementation of the changes. As the Commission is aware, state PUCs have limited resources, and it will be important that the Commission allow incumbents at least two full years and competitors an additional year after incumbents to implement the changes.

II. THE COMMISSION'S PROPOSAL WOULD HARM HOW COMPETITORS SET THEIR PRICES AND MAY ULTIMATELY HARM COST RECOVERY AS PROVIDERS DEAL WITH VARIOUS STATE REGULATIONS.

Although the NPRM discusses deregulating and detariffing TACs for incumbent local exchange carriers ("ILECs"), this decision will greatly impact CLECs as well. CLECs by nature compete with ILECs, and therefore it is very common for ILECs to set their prices and for CLECs to determine their prices accordingly. CLECs often follow any changes made by incumbents, allowing purchasers to better compare and understand competitive offerings. Based upon the Commission's proposal, incumbent carriers will have to figure out the various state regulatory requirements—which may or may not allow them to recover any costs lost through

removing TACs from consumer bills—and comply with those requirements. Competitors would then follow incumbents' lead on their implementation of the changes.

(a) *The Commission's proposal would impact how competitors set their prices.*

In the NPRM, when contemplating the transition period, the Commission suggests that perhaps CLECs should receive a shorter transition period than ILECs.² INCOMPAS' CLEC members are very concerned with this proposal. Competitive providers review incumbents' rates in setting their prices. This is one of the ways they can stay competitive. But if CLECs are required to transition to the new billing requirements before ILECs, it would be very difficult for CLECs as they rely on incumbents to go through any regulatory processes to set their rates and then CLECs benchmark their rates accordingly. If carriers are asked to transition at the same time, or if CLECs are required to transition first, it will be very harmful to CLEC business models, pricing strategies, and ultimately consumers.

(b) *Various state regulatory requirements will impact the ability to recover costs.*

The NPRM assumes and then relies on the misstated fact that because a growing number of states have adopted a deregulatory approach that this will allow for carriers to have flexibility upon setting new rates for their voice services. It therefore presumes that carriers will be able to move their TACs into the local rates so that the proposed federal deregulation and detariffing of TACs would not result in any material change in the total rates that customers pay for voice service.³ However, these assumptions are oversimplified and may have very negative consequences for carriers and their customers.

² NPRM, at ¶ 86.

³ NPRM, at ¶ 46.

The NPRM assumes that once TACs are removed as below-the-line fees, voice providers will be able to recover those charges elsewhere. However, INCOMPAS members are concerned that there continue to be state limitations on incumbents' cost recovery. Where there are such limitations, both incumbent and competitive carriers will be impacted. Incumbents' full cost recovery may be restricted, and competitors also would be limited as they benchmark their rates against incumbents', potentially leaving both incumbents and competitors from being able to fully recover their costs. Although the NPRM cites that several state commissions are completely deregulated and 41 states have "significantly reduced or eliminated oversight of wireline telecommunications," this standard is too vague and does not tell us how many or which states still implement price cap regulations.⁴ It is concerning for the Commission to move forward when many states potentially still have price caps on local rates—leaving carriers without the ability to recover the revenues lost upon removing their federal TACs. Accordingly, INCOMPAS recommends that the Commission survey all the states and territories to first determine how many still regulate local rates; whether there are any restrictions for carriers to put their federal charges into the local rate base; and to assess the time that will be needed for the states' processes prior to moving to an Order in this proceeding.

INCOMPAS members are also very concerned that the amount of work that will need to be completed is significant should the Commission adopt its proposals. The question of whether each state has price caps would require carriers to check each state's regulatory requirements before setting their prices. Whether or not a state has price cap regulations, removing TACs and adjusting base rates will require a significant amount of effort to change current rates and modify tariffs or pricing guides. Incumbent carriers will have to review each state's requirements, as

⁴ *NPRM*, at ¶ 47.

well as those of the utility user's fees in each city in which they operate, to determine whether any state process must be complied with. They will then have to go through any required state processes before adjusting any rates or bills. Competitors would then follow by going through each state process to adjust their rates and modify their tariffs or pricing guides accordingly.

In addition, carriers will need to review their customer contracts and modify them as necessary and as permitted by the contract. For business customers under multi-year agreements, carriers may not be able to adjust rates until contracts expire. This will cause great confusion and frustration for all parties involved. Furthermore, most state commissions have limited their telecommunications staff over the years, yet it is the state commissions that will need to review every new rate case and new tariff from every carrier in the state that is affected. In reality, the state commissions may not be equipped and able to process the needed changes in a timely manner.

(c) The Commission has not demonstrated why preemption of states' long-standing jurisdiction over customer billing practices is necessary to achieve the NPRM's goals.

In the *NPRM*, the Commission suggests that it might preempt state prohibitions against combining interstate and intrastate charges.⁵ However, it is not clear that such preemption would be lawful and, in all events, the Commission would be required to develop a robust record to substantiate any effort to preempt state billing laws.

For decades, the Commission has consistently found that state jurisdiction is coextensive with its federal truth-in-billing rules.⁶ Section 152(b) of the Communications Act grants states

⁵ See *NPRM*, at ¶ 66.

⁶ See 47 C.F.R. § 64.2400(c) (“The requirements contained in this subpart are not intended to preempt the adoption or enforcement of consistent truth-in-billing requirements by the states.”). *Truth-In-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 17090 ¶ 26 (1999) (establishing that “states will be free to continue to

jurisdiction to regulate the intrastate component of local exchange telephone service: “nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service.”⁷ The Commission may preempt state regulation of intrastate charges and practices where the state regulation would render a Commission policy for interstate services a nullity.⁸ However, in order to do so, the Commission must “demonstrate that it [would be] impossible . . . to comply with both federal and state requirements”⁹ and that the preempted laws “necessarily thwart achievement” of the Commission’s goals.¹⁰

The Commission does not make this showing in the *NPRM*. The Commission does not “show[] with some specificity” why such state laws “necessarily thwart achievement” of the Commission’s goal of preventing customer confusion about interstate charges that replace

enact and enforce additional regulation consistent with the general guidelines and principles set forth in this Order, including rules that are more specific than the general guidelines we adopt today”); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”); Consumer Information and Disclosure; Truth-in-Billing and Billing Format*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd. 4436, ¶ 112 (2012) (reiterating that the Commission’s latest amendment to its Truth-in-Billing rules does “not preempt[] any state cramming restrictions” and noting that the “Truth-in-Billing rules expressly do not pre-empt consistent state laws or rules”).

⁷ See also 47 U.S.C. § 253(b) (“Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”) (emphasis added).

⁸ See *NPRM*, at n.152 (citing *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986) and *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989)).

⁹ *Wyeth v. Levine*, 555 U.S. 555, 573 (2009) (overturning preemption of a state law involving a long-recognized, complementary state power).

¹⁰ *Nat’l Ass’n of Regulatory Util. Comm’rs*, 880 F.2d at 431 (emphasis added).

TACs.¹¹ On the contrary, the Commission could accomplish this same objective without preempting state regulation. It could do so, for example, by mandating that, going forward, TACs be replaced by a single line item that is described on customer bills using language that is clear and not confusing (perhaps using safe harbor language).

As the Supreme Court has made clear, “[t]he weight . . . accord[ed] the agency’s explanation of state law’s impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness,” particularly when an agency has “long maintained that state law offers an additional, and important, layer of consumer protection that complements [federal] regulation.”¹² The Commission has done exactly that with the truth-in-billing rules.¹³ Given the history of federal/state dual jurisdiction over customer billing, the lack of necessity demonstrated in the *NPRM*, and the obvious alternatives to preemption, it seems unlikely that the Commission can adequately justify preemption of state billing laws.

¹¹ *Id.*

¹² *Wyeth*, 555 U.S. at 577, 579; see also *National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling that No FCC Order or Rule Limits State Authority to Collect Broadband Data*, Memorandum Opinion and Order, 25 FCC Rcd. 5051, ¶¶ 8-9 (2010) (citing *Wyeth* for support that where Congress or the Commission has in the past recognized a state role in an otherwise interstate service, “such State efforts will not necessarily be incompatible with the federal efforts or inevitably stand as an obstacle to the implementation of valid federal polices”).

¹³ See *supra* note 6, at 6-7.

III. THE COMMISSION’S PROPOSAL COULD VIOLATE THE FIRST AMENDMENT.

In the *NPRM*, the Commission states that misleading speech is not protected under the First Amendment and may therefore be prohibited.¹⁴ But the Commission’s proposal to prohibit separate interstate line item charges would encompass speech that cannot fairly be described as misleading. It is therefore not clear that the proposed policy would be exempt from First Amendment review. Rather, it is more likely that the proposed prohibition would constitute government regulation of service providers’ commercial speech, which is subject to review under the four-part test established in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980) (“*Central Hudson*”).¹⁵

Under the *Central Hudson* test, a court must (1) assesses whether the speech at issue concerns lawful activity and is not misleading. If so, the government may restrict the speech only if it proves that (2) it has a substantial state interest in regulating the speech, (3) the regulation directly and materially advances that interest, and (4) the regulation is no more extensive than necessary to serve the interest.¹⁶ The Commission’s proposal “to prohibit carriers from billing customers for Telephone Access Charges through separate line items on their bills” likely violates this standard.¹⁷

¹⁴ See *NPRM*, at n.175.

¹⁵ See also *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 190–91 (1999) (applying *Central Hudson* to FCC prohibitions against broadcasting lottery information); *U.S. W. v. FCC*, 182 F.3d 1224 (10th Cir. 1999) (applying *Central Hudson* to FCC CPNI rules).

¹⁶ See *Central Hudson*, 447 U.S. at 564-65.

¹⁷ Because the Commission is proposing to prohibit a type of commercial speech, rather than impose affirmative disclosure obligations regarding such speech, *Central Hudson* – not the more deferential *Zauderer* standard – applies. See *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650, 651 n.14 (1999) (finding that there are “material differences between disclosure requirements and outright prohibitions on speech” and that “the

First, the Commission’s proposed line item prohibition would encompass lawful and non-misleading speech. For example, it would prohibit a service provider from separately listing interstate charges with an accompanying truthful explanation designed to limit customer confusion. The explanatory language could briefly note that the charges in question were previously subject to Commission tariffing requirements but are no longer subject to that regulation, and that the current charges are designed to recover the interstate costs of providing local telephone service.¹⁸ Accordingly, the target of the Commission’s proposal is protected commercial speech.

Second, although it may have an interest in “enabling consumers to easily compare voice service offerings by different providers,”¹⁹ the Commission likely cannot meet the next prong of *Central Hudson*, demonstrating that it has a substantial state interest in prohibiting non-misleading line items for charges replacing TACs. The Supreme Court has explained that

First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed”); *see also Spirit Airlines, Inc. v. U.S. Dep’t of Transp.*, 687 F.3d 403, 412-13 (D.C. Cir. 2012) (explaining that where a law “impose[s] a disclosure requirement rather than an affirmative limitation on speech, *Zauderer*, not *Central Hudson*, applies”) (internal citations omitted). In fact, the Commission’s proposed rule may be subjected to an even more exacting standard of review than the *Central Hudson* standard, since the Supreme Court appears to be moving toward applying strict scrutiny review to commercial speech restrictions. *See Sorrell v. IMS Health Inc.* 564 U.S. 552, 566–67 (2011) (applying “heightened judicial scrutiny” to a law targeting commercial speech where that “law imposes a burden based on the content of speech and the identity of the speaker”).

¹⁸ The Commission’s truth-in-billing requirements already mandate as much and ensure that any billing disclosures are not misleading. *See* 64 C.F.R. § 64.2401(b) (“Charges contained on telephone bills must be accompanied by a brief, clear, non-misleading, plain language description of the service or services rendered. The description must be sufficiently clear in presentation and specific enough in content so that customers can accurately assess that the services for which they are billed correspond to those that they have requested and received, and that the costs assessed for those services conform to their understanding of the price charged.”).

¹⁹ *NPRM*, at ¶ 4.

“bans that target truthful, nonmisleading commercial messages rarely protect consumers from such harms. Instead, such bans often serve only to obscure an underlying governmental policy that could be implemented without regulating speech.”²⁰ As such, the government bears the burden of showing that the prohibited speech “inflict specific and significant harm on individuals.”²¹ There is no evidence that telephone service providers’ line item charges inflict specific and significant harm on customers.

Third, even if the Commission were to demonstrate a significant interest in ensuring the transparency of customer bills and promoting competition, it likely cannot meet the next *Central Hudson* prong, which requires the Commission to show that the proposed prohibition “directly and materially” advances its interests. As is the case with the first prong of the *Central Hudson* test, the Commission bears the burden of demonstrating the direct and material effects of its action and cannot rely on “mere speculation or conjecture.”²²

The Commission points to no evidence, and there does not appear to be any, that prohibiting line-item charges that are accompanied by non-misleading descriptions would reduce customer confusion and promote competition. In fact, the opposite would appear to be the case, given that more accurate disclosure regarding the nature of end user charges would enable customers to make more informed choices, thereby yielding more efficient and competitive market outcomes. Moreover, the Commission asserts that, by reducing consumer confusion, eliminating line item charges will enable customers to compare rates with other telephone

²⁰ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502–03 (1996).

²¹ *U.S. W.*, 182 F.3d at 1235.

²² *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); *U.S. W.*, 182 F.3d at 1237.

service offerings, thereby enhancing competition.²³ But the Commission is not proposing to apply its policy to VoIP services, one of the primary sources of competition on which the Commission predicates its reform proposals in the *NPRM*.²⁴ This “exemption and inconsistency” diminishes the chances that customers will be able to compare the service providers’ bills more effectively after TACs are eliminated for telecommunications service.

For similar reasons, the Sixth Circuit in *BellSouth* struck down a state-level prohibition of line items regarding a particular state tax on communications customer bills. The court found that by “prohibit[ing] just one type of line-item statement . . . [while] allow[ing] the same separate statements on other” bills, the government failed to establish a “material and direct” connection between its prohibition and its stated goals of avoiding consumer confusion.²⁵ The same would be true in the Commission’s proposal.

Finally, the Commission likely cannot meet the fourth and final *Central Hudson* prong, showing that its proposed regulations are narrowly tailored to, or “not more extensive than necessary to serve,”²⁶ the substantial government interest. As explained, the proposed broad prohibition against any line item charges would encompass line items accompanied by non-misleading explanations designed to enable customers to make more informed buying decisions.

²³ *NPRM*, at ¶ 63.

²⁴ *See, e.g., NPRM*, at ¶¶ 2, 40.

²⁵ *BellSouth Telecomms., Inc. v. Farris*, 542 F.3d 499, 507–08 (6th Cir. 2008) 542 F.3d at 507–508; *see also Greater New Orleans Broad. Ass’n, Inc.*, 527 U.S. at 190–91 (“We need not resolve the question whether any lack of evidence in the record fails to satisfy the standard of proof under *Central Hudson*, however, because the flaw in the Government’s case is more fundamental: The operation of § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it.”).

²⁶ *Greater New Orleans Broad. Ass’n, Inc.*, 527 U.S. at 480.

The proposal therefore appears to reach far beyond remedying misleading and confusing information to advance the stated goal of the proposals in the *NPRM*. Significantly, a regulation will not be found to be narrowly tailored when the government could “rely on enforcement of federal regulations already on the books.”²⁷ For this reason, the Sixth Circuit in *BellSouth* struck down a state-level prohibition of line items on communications customer bills on the basis that, under 47 C.F.R. § 64.2401(b), the federal truth-in-billing laws already accomplish the goal of ensuring that “line items be ‘clear,’ ‘non-misleading’ and ‘plain.’”²⁸ The Commission should reach the same conclusion here. The most narrowly tailored course of action is not a prohibition on legal speech, but, rather, the Commission’s enforcement of the existing truth-in-billing laws, which already require line items to be “clear,” “non-misleading,” and “plain.”²⁹

IV. THE COMMISSION’S PROPOSAL WILL PLACE A SIGNIFICANT BURDEN ON SMALLER, COMPETITIVE CARRIERS, ESPECIALLY DURING THE COVID-19 PANDEMIC.

INCOMPAS agrees with the Commission’s goal to help end users better understand their telephone bills.³⁰ But there are other ways to achieve this goal in a manner that does not significantly burden carriers, especially smaller, competitive carriers. These carriers have fewer staff, including regulatory staff, and are doing their best to navigate through the various hurdles presented by the COVID-19 pandemic and the number of related customer demands, including keeping customers connected while also facing significant revenue loss related to the pandemic.

²⁷ *BellSouth*, 542 F.3d 499 at 508.

²⁸ *Id.* (quoting 47 C.F.R. § 64.2401(b)).

²⁹ *See* 47 C.F.R. § 64.2401(b).

³⁰ *See, e.g., NPRM*, at ¶ 25 (“The Commission has long sought to make telephone bills more understandable for consumers.”).

The Commission's proposal to remove TACs from consumer bills by July 1, 2022 would be extremely difficult for INCOMPAS members to comply with under normal circumstances, but the effects of the pandemic will make it especially difficult.

(a) The Commission's proposal would significantly burden carriers.

All the steps necessary for carriers to comply with the new regulations would require significant time and money, including heavy compliance costs and complexity in regulatory adjustments. While INCOMPAS is not opposed to streamlining fees generally (so long as customers are not confused by the changes), the work required by the NPRM would cause a tremendous amount of implementation problems. Overall, the Commission's proposal would place significant burdens on carriers that the costs would overwhelmingly outweigh any potential benefits to carriers or consumers. The Commission's proposal would especially burden smaller, competitive carriers that are already lacking many resources. Many of INCOMPAS' members have very small staffs compared to incumbent companies. The Commission's proposal would take the already minimal staff away from their daily jobs and ask them to dedicate more people and time to handle the implementation of the NPRM in order to change billing practices.

As a glimpse of what carriers will face to implement the NPRM—incumbent carriers will have to complete any necessary state processes, review their contracts, determine whether they can be modified, adjust their contracts and bills accordingly, train their employees, and notify their customers of the changes. Competitive carriers, who traditionally base their prices off of incumbents, will need to wait until the incumbents go through this entire process to then go through the same process themselves. This means they will also need to revise their billing systems, websites, marketing materials, and campaigns, and actively educate customers to make sure they understand all the changes. Mandatory detariffing and eliminating TACs from bills also

means carriers will have to remove surcharges from up to 50 tariffs and product guides and will likely have to raise rates after working through each state's regulatory process. One INCOMPAS member informed us that their company will have *thousands* of rates that will need to be changed if each rate needs to be increased in order to absorb what was previously billed as below-the-line charges. Our members are also very concerned with how they will manage contracts with terms that extend beyond July 2022 if they are required to increase their base rates. For example, some of our members are EIS providers for the federal government and have contracts with federal agencies that span for many years. Others have customers with three-year contracts terms. These members are very worried about how they will handle these multi-year contracts if the Commission's proposal moves forward. There will likely be other unforeseeable hurdles that come up as well.

All of these efforts require significant time, expenses, and resources. If the Commission's intent is to make it easier for customers to understand their telephone bills, providers can do so in other ways and are open to discussing alternatives with the Commission. Instead, carriers will have to maneuver a very difficult state-by-state regulatory process, which will take a long time, a lot of resources, and likely will end up being a very frustrating and confusing process for companies and their customers.

(b) The Commission's proposal would especially burden carriers as they deal with the COVID-19 pandemic.

Carriers have been spending significant amounts of time and money reacting to the COVID-19 pandemic and ensuring that their customers' connectivity needs are being met during this unprecedented time. Competitive carriers are at the forefront of providing connectivity for both voice and broadband services to customers around the nation. Like so many other

businesses, competitive carriers are working to ensure that their employees remain safe and that their networks remain fully operational. At the same time, competitive carriers are on the frontlines of experiencing revenue decline as they continue their businesses with much economic uncertainty.

Competitors are already being stretched thin at this time to meet the needs of their employees and their customers. Many carriers took the Keep Americans Connected Pledge—a voluntary pledge not to disconnect any residential or small business customers who cannot pay their bills due to the pandemic or to charge late fees to such customers. Many of INCOMPAS' members have gone far and beyond the Pledge. Among many actions, our members have continued to serve their communities by extending service, expanding bandwidth, and providing equipment to areas and those in need and often free of charge. Our members also continue not to disconnect mid-size and larger customer companies that have been impacted by the pandemic even when they cannot fully pay their network costs. There is not a compelling need to add an unnecessary burden to an already critical and busy industry.

V. IF THE COMMISSION MOVES FORWARD WITH ITS PROPOSAL, THERE WILL LIKELY BE AN UNWELCOMED PERCEPTION AND/OR REALITY OF PRICE HIKES FOR CONSUMERS.

If ILECS are required to detariff all below-the-line TACs from consumer bills, they will likely recover these charges by adding them to the base rate on consumer bills (assuming state regulations allow them to do so). Once incumbents make these adjustments to their bills, competitors will follow in order to obtain full cost recovery and to stay competitive. If companies have to make adjustments to their bills, contracts, and marketing materials, there is a major concern that these changes will appear to look like price increases rather than an adjustment to recover costs. In addition, requiring companies to remove TACs from their bills

may actually increase rates. For example, because state and local fees/taxes (e.g. E911, high-cost funds, city utility user fees) are based upon a percentage of the service charge, if access line charges are pushed up to the local base rate, this may result in an increase to the bottom-line costs for customers due to higher state and local taxes. Either way, the perception or reality of a price hike is not beneficial for the Commission, companies, or customers, especially during a global pandemic.

VI. IT IS UNCLEAR WHETHER THE COMMISSION’S PROPOSAL WOULD REDUCE BILLING CONFUSION FOR CONSUMERS.

The NPRM explains the Commission’s goal to simplify carriers’ advertised rates as well as customers’ bills.³¹ While this goal is commendable, it seems to be at odds with the Commission’s observations in the NPRM. The Commission reiterates throughout the NPRM that competition in today’s voice marketplace is “widespread”³² and therefore it no longer needs to regulate TACs, while also claiming that consumers experience significant confusion in reading and comparing their bills. However, it seems contradictory for the FCC to say that the voice market is sufficiently competitive, yet consumers need help in understanding their bills and switching providers.³³ If the voice market is truly competitive, then the billing practices and TACs, in particular, are not hindering that competition. Accordingly, consumers are not hindered

³¹ *NPRM*, at ¶ 37

³² *NPRM*, at ¶ 38.

³³ *See NPRM*, at ¶ 3 (“Telephone Access Charges are difficult to understand, and the opaque way they are sometimes described on telephone bills reduces consumers’ ability to compare the cost of different voice service offerings.”); *see also NPRM*, at ¶ 63 (“Prohibiting carriers from using separate, obscurely worded line items to bill for the interstate portion of local telephone services should make it easier for customers to understand their bills and to compare rates between different providers.”).

by TACs in comparing their options, and there appears to be no need for regulatory action by the Commission.

Moreover, it is likely that the Commission’s proposal will result in the exact opposite of what it intends—simplification, understanding, and transparency. While the goal is to simplify consumer bills by removing federal TACs as below-the-line charges, carriers will still need to recover these costs elsewhere in the bill. Therefore, any recovered fees will likely be moved to somewhere else in the bill (if allowed by the state). As a result, consumers will now see rates without any breakdown of where these costs come from. This can lead to *more* confusion as consumers no longer know what they are paying for. INCOMPAS agrees with the Commission that “greater transparency can improve the effectiveness of competition,”³⁴ and while transparency is very important, blending different charges above the line on a bill is not transparent. Overall, the costs required by the industry to execute the NPRM and the possibility of increased consumer confusion far outweigh the Commission’s goal for simpler, easier to understand bills.

VII. THE COMMISSION’S PROPOSAL HAS THE POTENTIAL TO NEGATIVELY IMPACT USF CONTRIBUTIONS.

As the NPRM explains, every telecommunications carrier that provides interstate telecommunications services has an obligation to contribute to the federal Universal Service Fund.³⁵ Traditionally, many ILECS and some CLECs have relied on the federal tariffing of TACs in order to determine their interstate and international revenues for contributions

³⁴ *NPRM*, at ¶ 63.

³⁵ *NPRM*, at ¶ 77.

purposes.³⁶ The NPRM contemplates two proposals/safe harbors for allocating interstate and intrastate revenues for voice services in order to help ensure continued stability of the USF and other federal programs.³⁷ It is helpful that the Commission acknowledges that its proposal would impact USF contributions; however, INCOMPAS members are concerned about potential harms.

TACs are assessable revenue for federal USF contribution purposes. As the Commission is aware, the USF contribution factor continues to rise with the latest number at 26.5% for the third quarter of 2020.³⁸ As a result, the Commission should not take actions that may risk decreasing the amount of money that companies contribute to USF at a time when the contribution base is decreasing and the contribution factor is increasing. Even though the NPRM proposes two safe harbor alternatives to continue the stability of USF and other federal programs, there is still concern that these will not be strong or reliable enough to combat the impact the Commission's proposal would have on USF contributions and the federal programs that rely on those contributions. Furthermore, the Commission should move forward with even greater caution regarding USF contributions now that the nation is still in the midst of a pandemic and there will likely be a further decrease in USF contributions as carriers continue to lose revenue, which also impacts the contributions factor. The Commission should not make any changes now that may negatively impact USF.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Proposed Third Quarter 2020 Universal Service Contribution Factor*, FCC Public Notice, available at: <https://docs.fcc.gov/public/attachments/DA-20-617A1.pdf>.

VIII. SHOULD THE COMMISSION DECIDE TO MOVE FORWARD WITH ITS PROPOSAL, IT SHOULD MITIGATE IMPACT ON CUSTOMERS AND PROVIDERS.

If the Commission proceeds, implementation should be limited to residential customers, and the FCC should exempt business or government customers. Moreover, the Commission should provide for a longer transition period of two *full* years for incumbents and three full years for CLECs.

(a) Business and government customers should be exempt.

The FCC should exempt business and government customers from its proposed TACs changes. Business and government customers are more sophisticated and are in a better position to negotiate with their providers and accordingly understand their bills. In prior proceedings, the Commission has even recognized that business and government customers are more sophisticated customers, and as a result there is much less of a need for the Commission to be concerned that these customers are confused by TACs or that their competitive options may be limited by TACs on bills. In fact, it seems that the Commission already is focused on residential customers as the NPRM uses the term “consumer” more than 50 times, “residential” more than 15 times, and even cited “households” as a meaningful statistic for voice subscriptions.³⁹ Moreover, while each year the FCC receives thousands of complaints about bills,⁴⁰ it is likely that the vast majority of these complaints are from residential customers and not business or government customers. While the Commission remains concerned that “telephone bills are too

³⁹ *NPRM*, at ¶ 40.

⁴⁰ *Consumer Guide: Understanding Your Bill*, FCC, available at: https://www.fcc.gov/sites/default/files/understanding_your_telephone_bill.pdf.

complicated and difficult to read and understand,”⁴¹ business and government customers are much more likely to understand billing and often even make it part of the negotiation process with their providers. Therefore, if the Commission does move forward with the NPRM, it should exempt business and government customers from the changes.

(b) A longer transition period is necessary, especially during COVID-19.

The NPRM currently contemplates a transition period that would be enough time “to allow affected carriers sufficient time to amend their tariffs and billing systems.”⁴² It proposes “a transition that would permit carriers to detariff Telephone Access Charges with a July 1 effective date, consistent with the effective date of the annual access charge tariff filing following the effective date of the Order in this proceeding, and would require carriers to detariff these charges no later than the second annual tariff filing date following the effective date of such order.”⁴³ However, this would not be enough of a transition period for ILECs or CLECs. Given the ongoing pandemic, the length of time providers expect to deal with its hardships, and all the work required to make the necessary adjustments, INCOMPAS urges for at least a full two-year process for incumbents with competitors complying the following year.

As discussed above, resources for competitive carriers are limited, especially due to COVID-19, but also because of limited staff for competitors, including regulatory staff. The Commission should allow more time for providers and their customers to get through the pandemic. This is also true for state agency staff that will need to be involved in the changes.

⁴¹ *NPRM*, at ¶ 62.

⁴² *NPRM*, at ¶ 85.

⁴³ *Id.*

INCOMPAS recommends a minimum of two full years for ILECs and an additional year for CLECs.⁴⁴ An even longer transition may be necessary for the smallest carriers that serve less than 250,000 subscribers.

In fact, Commission precedent shows that an extended transition period during COVID-19 should be granted. The FCC recently extended the deadline by six months of Section 1004 of the Television Viewer Protection Act of 2019 that required modifications to bills for certain MVPDs and BIAS providers that charge for equipment. In this decision, the Commission stated:

“As the nation tackles the COVID-19 pandemic, MVPDs and providers of fixed broadband internet access service are among the entities that are integral to the Commission’s ongoing, nationwide effort to keep Americans informed and connected during this national emergency. So that these service providers may focus their resources on this critical effort, we provide appropriate flexibility for MVPDs and providers of fixed broadband internet access service to fulfill their obligations under the TVPA.”⁴⁵

The Commission continued to explain that due to the “evolving and unpredictable nature of the pandemic” and the “additional demands” being placed on MVPDs and BIAS providers, extending the effective date was reasonable, justified, and would best serve the public interest.⁴⁶

Moreover, the Commission decided to extend to effective date because it found:

“Compliance with the new truth-in-billing requirements in section 642 may require that subject entities make changes to existing billing systems, provide employee training, or take other compliance measures, thereby requiring providers to divert resources away from other consumer demands brought on by the pandemic. Indeed, we note that these service providers are the entities principally responsible for operating and maintaining the

⁴⁴ INCOMPAS recommends a minimum transition period of *two full years* for ILECs in order to avoid a situation, for example, where an FCC Order is published in November 2020, leaving ILECs with only about 1.5 years to transition if the requirement is effective July 2022 as proposed by the NPRM. As such, the earliest ILECs should be required to transition is July 2023 and CLECs July 2024.

⁴⁵ 47 C.F.R. Part 76, *Implementation of the Truth-in-Billing Provisions of the Television Viewer Protection Act of 2019* (Apr. 23, 2020), at ¶ 1.

⁴⁶ *Id.* at ¶ 3.

infrastructure that Americans increasingly depend on for continued business and interpersonal communications during the national emergency.”⁴⁷

Just as the Commission rightly decided to extend the effective date for TVPA, so too should it extend the transition period here as carriers continue to connect and protect consumers during the pandemic. Unlike the situation above, here providers will need to undergo extensive regulatory processes at the state level, train their employees, update their billing systems, renegotiate contracts, modify their marketing materials, and likely undertake an educational campaign to avoid customer confusion. Thus, the request for incumbents to have two full years and competitors an additional year is justified.

(c) *CLECs should transition after ILECs.*

In its NPRM, the Commission considers a “different transition period for different classes of carriers” and suggests prescribing the proposed transition for ILECs and a shorter transition for CLECs.⁴⁸ INCOMPAS supports the idea of a different transition period for different carriers, but one where CLECs transition *after* ILECs. As discussed above, CLECs set their rates based upon ILECs’ rates, and requiring CLECs to transition first would be very hard, if not impossible, for CLECs to manage. Incumbents will need to complete the necessary steps to modify their rates and billing practices before CLECs can do so as well. Sufficient time to adjust to a new system is also supported by the fact that billing practices do not appear to be causing substantial confusion or restraining competitive choice in the voice marketplace. It is therefore imperative that CLECs have at least the same transition time period as ILECs, though a longer transition makes more sense for CLECs and their customers.

⁴⁷ *Id.*

⁴⁸ NPRM, at ¶ 86.

IX. CONCLUSION

INCOMPAS urges the Commission to reconsider moving forward with the Telephone Access Charges NPRM, as its perceived benefits do not outweigh the costs to consumers, businesses and government agencies as we have described above.⁴⁹ INCOMPAS and its members strongly believe the costs of ending a well-established system that provides transparency for customers and carriers outweigh any potential benefits. Nevertheless, should the Commission move forward, we have offered some recommendations for your consideration to limit negative impact of the proposals, including granting sufficient time for carriers to implement the changes and exempting business and government customers.

Respectfully submitted,

/s/ Angie Kronenberg

Angie Kronenberg
Lindsay Stern
INCOMPAS
1100 G Street, N.W.
Suite 800
Washington, D.C. 20005
(202) 872-5745

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⁴⁹ *NPRM*, at ¶ 37.