

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
)
Empowering Broadband Consumers Through) CG Docket No. 22-2
Transparency)

COMMENTS OF INCOMPAS

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INCOMPAS, by its undersigned counsel, hereby submits these comments in response to the Consumer and Governmental Affairs Bureau’s Notice of Proposed Rulemaking (“NPRM”),¹ which seeks comment on the requirement from the Infrastructure Investment and Jobs Act that broadband internet access service providers (“ISPs”) display, at the point of sale, labels to disclose to consumers certain information about their internet access services.²

I. INTRODUCTION AND SUMMARY

INCOMPAS is the preeminent national industry association for providers of internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace. We represent fixed broadband companies, including small local fiber and fixed wireless providers that provide residential broadband internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. We also represent companies that are providing 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

¹ *Empowering Broadband Consumers Through Transparency*, Notice of Proposed Rulemaking, CG Docket No. 22-2 (rel. Jan. 27, 2022) (“NPRM”).

² See NPRM, at ¶¶ 2-3.

internet traffic; online video distributors, which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

On November 15, 2021, the President signed into law the Infrastructure Investment and Jobs Act. The law directs the Commission “to promulgate regulations to require the display of broadband consumer labels, as described in the Public Notice of the Commission issued on April 4, 2016, to disclose to consumers information regarding broadband Internet access service plans.”³ The NPRM defines BIAS as “a mass-market retail service[.]”⁴ and would require broadband providers to display, at the point of sale, labels that show prices, including introductory rates, as well as speeds, data allowances, network management practices, and other critical broadband service information.

It is clear from the language of the NPRM that the purpose of the label is to provide residential and small business consumers who are purchasing off-the-shelf BIAS from providers with helpful information in easy-to-understand language in order to make an informed decision when choosing the BIAS provider and service to which they would like to subscribe. As the NPRM explains, when the FCC implemented the voluntary broadband labels in 2016, the FCC relied on the Consumer Advisory Committee to help advise what would be displayed. The FCC found that the Committee’s proposal labels “displayed terms in plain language that was easy to

³ NPRM, at ¶ 2.

⁴ NPRM, at n.1 (defining BIAS as “a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence or that is used to evade the protections set forth in this part.”).

understand without overwhelming consumers with too much information.”⁵ The FCC also relied on the Committee’s recommendation that the Commission use design expertise to make the labels “consumer-friendly.”⁶ INCOMPAS and its members support the broadband label and agree with the Commission that access to accurate, simple-to-understand information about BIAS from different providers helps consumers make informed choices and is central to a well-functioning marketplace that encourages competition, innovation, low prices, and high-quality service.

Consumers have the right to know that competitors are offering faster, better, and more affordable service. A broadband label will assist consumers in better understanding and comparing the different BIAS services in the marketplace, which we believe will help them choose competitors’ superior service offerings. When consumers have an easier method to compare BIAS service offerings, consumers will know that competitive providers are offering better, faster, affordable, and more reliable services, which also will benefit consumers and the competitive marketplace overall. Consumers will save money and obtain the service that best meets their needs and competitors will be able to grow their revenue and build new networks to more areas.

In our comments, INCOMPAS encourages the Commission to clarify the purpose of the broadband label, as well as critical terms in its NPRM, in order to combat confusion regarding which companies are required to produce broadband labels. In the NPRM, the FCC refers to BIAS providers as “ISPs.” First, it would be very helpful for the FCC to clarify the term “ISPs” so that providers understand when they are required to provide a broadband label. The FCC

⁵ NPRM, at ¶ 7.

⁶ *Id.*

should clarify that the ISPs required to have a broadband label are those that sell mass-market services to residential and small business customers standardized, retail offerings, and more specifically that it does not include providers or resellers whose customers are larger businesses or governments. As discussed further below, large business and government customers typically negotiate the terms of their service contracts. As a result, requiring providers to include a label for every service negotiated would be costly, time-consuming, and would not achieve the purpose intended by Congress and the FCC of helping consumers understand and compare their options in the BIAS marketplace. Moreover, the FCC should exclude E-rate and Rural Healthcare (“RHC”) providers from the requirement of providing broadband labels because it would be redundant to the competitive bidding process where those customers define the services that they need and providers put forward their bids to be compared and ultimately chosen by the E-rate or RHC customer.

Second, the FCC should allow providers the option of adding two elements of their service to their broadband label: speed symmetry and reliability. The FCC should allow for providers to distinguish themselves and their services from their competitors in a way that consumers can easily understand. INCOMPAS has members who offer symmetrical speeds, and they would like the opportunity to represent that on the labels so that customers understand where such service is available and how it may better meet their particular needs. Moreover, as we explain further below, some competitors are offering service level agreements, which provides more reliability than best-efforts BIAS, and they would like the opportunity to denote that on their labels. Permitting competitors to communicate their distinctives through the labels is consistent with the goals of the label to best educate consumers about their options.

II. THE FCC SHOULD CLARIFY THAT THE PURPOSE OF THE BROADBAND LABELS IS TO HELP RESIDENTIAL AND SMALL BUSINESS CONSUMERS, AND THAT THE BROADBAND LABEL REQUIREMENT DOES NOT APPLY TO PROVIDERS OR RESELLERS PROVIDING SERVICES TO LARGE BUSINESS OR GOVERNMENT CUSTOMERS.

INCOMPAS and its members fully support the requirement that ISPs provide a broadband transparency label to share helpful information to consumers. A label is a very helpful way for consumers to understand the BIAS market and to compare different services. However, in order to mitigate confusion among broadband providers, it is critical for the FCC to clarify which providers fall under the requirement. The FCC can do so by clarifying two elements of its NPRM. First, the FCC should clarify that the purpose of the broadband labels is to help residential and small business consumers understand and compare BIAS services and subscriptions rather than to help larger business or government customers who negotiate their services. Second, and relatedly, the FCC should clarify which providers fall under the category of “ISP” and which providers do not. Specifically, the FCC should clarify that the ISPs required to provide broadband labels are those that provide broadband internet access service or a “mass-market retail service” to residential and small business consumers, and that providers and resellers that provide a broadband service to large business or government consumers are not required to provide broadband labels.

The first footnote in the NPRM defines BIAS as a “mass-market retail service.”⁷ In the past, the FCC has explicitly explained that a “mass-market” service means services sold to residential and small business customers. As such, it appears that providers whose customers include large business or government entities are not required to provide broadband labels

⁷ NPRM, at n.1.

because they are not selling a residential mass-market service, but the NPRM does not clarify as such. The FCC has previously been clear about which types of providers and services fall under this category and should do the same in this proceeding. For example, in the 2010 *Open Internet Order*, the FCC defined “mass-market” as:

“a service marketed and sold on a standardized basis *to residential customers, small businesses, and other end-user customers such as schools and libraries*. For purposes of this definition, ‘mass market’ also includes broadband Internet access services purchased with the support of the E-rate program that may be customized or individually negotiated. The term does not include enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements.”⁸

Following its definition of what is considered a mass-market service, the FCC then went further to explain what is not considered a mass-market service, which is a tremendously helpful clarification.⁹ Similarly, in the *Restoring Internet Freedom Order*, the FCC gave specific guidance on what is and what is not considered a mass-market service.¹⁰ Furthermore, in President Biden’s Executive Order on Competition, the Administration called for this proceeding in order to “give consumers clear, concise, and accurate information regarding provider prices

⁸ *Preserving the Open Internet*, Report and Order, GN Docket No. 09-191, at ¶ 45 (emphasis added).

⁹ *See id.* at ¶ 47.

¹⁰ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, Order, WC Docket No. 17-108, at n.58 (explaining that “[b]y mass market, we mean services marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as schools and libraries. ‘Schools’ would include institutions of higher education to the extent that they purchase these standardized retail services. For purposes of this definition, ‘mass market’ also includes broadband Internet access service purchased with the support of the E-rate and Rural Healthcare programs, as well as any broadband Internet access service offered using networks supported by the Connect America Fund (CAF), but does not include enterprise service offerings or special access services, which are typically offered to larger organizations through customized or individually negotiated arrangements.”).

and fees, performance, and network practices[.]”¹¹ It is clear that these labels are meant to help residential and small businesses who are buying off-the-shelf products rather than customers that negotiate their contracts or put bids out for their services and know exactly the service they will receive.

It is critical for the FCC to clarify which providers do and do not fall into this category in order to mitigate any confusion among providers and save companies time and resources in trying to confirm whether they are required to provide a broadband label. Clarifying the requirement in its Order would be advisable to avoid any confusion about the scope of the rules. Doing so would be consistent with other FCC Orders so that providers know when they must comply. Large business and government entities typically are not purchasing mass-market BIAS services and do not need the same type of protection that residential and small business customers may need who are purchasing an ISP's standardized offering. Unlike residential and small business consumers, large business and government entities are sophisticated customers that negotiate their contracts. As a result, it would be unnecessary to require providers to provide broadband labels to these customers. Furthermore, many providers that serve the large business and government markets offer so many types of broadband products that it would be highly burdensome, costly, and impracticable to require that they provide a specific broadband label for each service they have negotiated with businesses, including government agencies. Moreover, such a label would not help these types of customers since they negotiate the specifics of their service within a contract.

¹¹ The White House, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021).

Similarly, the FCC should clarify that the term “ISP” does not include resellers that do not provide a standardized BIAS service to residential and small businesses consumers. In the business marketplace, INCOMPAS members will purchase broadband internet access from facilities-based ISPs across the country to offer service to multi-location customers. These contracts are commercially negotiated from the wholesaler ISP, as well as to the business customer. Labels are not necessary to protect either the reseller or the reseller’s business customer. For example, one INCOMPAS member company resells 35 different broadband providers’ BIAS services. Each of these underlying providers offer different plans that have different speeds, pricing, usage rates, etc. It would be extremely difficult, confusing, and unnecessary for the wholesaler or the reseller to create a label for hundreds of different plans if they are not providing a standardized, mass-market service to residential and business customers. To avoid confusion as to who must comply with the broadband label requirement, INCOMPAS encourages the FCC to clarify that wholesalers and resellers in the business and government marketplace are excluded from the requirement.

III. THE FCC SHOULD EXCLUDE E-RATE AND RURAL HEALTHCARE PROVIDERS FROM THE BROADBAND LABEL REQUIREMENT.

The goal of the broadband label is to inform purchasers of mass-market BIAS services, namely residential and small business customers, in a standardized format to create a more informative and competitive BIAS market. The Commission previously has included in the definition of mass-market schools and libraries in the E-rate program and customers in the RHC program. Without clarification, providers offering service to E-rate and RHC customers potentially would also be required to provide a broadband label. However, E-rate and RHC customers are different from residential and small business consumers in how they purchase BIAS services because they engage in a competitive bidding process where they specify the

service(s) that they need from providers. The method by which E-rate and RHC providers obtain bids for their services makes it nearly impossible for a school or library not to know the specific details about the service they are requesting and how it compares to the other providers. Unlike the Commission's Orders in the context of net neutrality wherein the FCC wanted to ensure that ISPs also would treat E-rate and RHC customers the same as mass-market customers by offering the same protections, in this context E-rate and RHC customers are obtaining the information that they need to compare service offerings through the competitive bidding process so they are receiving the information that they need to assess options and with this information they choose the provider that best meets their needs. Applying broadband labels in this context would be duplicative and is not necessary, and it would be burdensome for providers to comply with as they potentially would need a label for every E-rate and RHC customer.

For example, on USAC's website, there is a six-step process for an E-rate customer to purchase a service.¹² Step One, "Competitive Bidding," is achieved by the applicant school or library completing the FCC's Form 470. The form is hard-coded and requires the applicant to contemplate and understand industry terms and nuances. The applicant must also be knowledgeable of technical compositions of the service's medium, such as whether it is copper, fiber, cable, or microwave. Step Two, "Selecting a Service Provider," is achieved by the applicant school or library completing the FCC's Form 471, which is even more detailed than the Form 470. The form details the elements of the service including service type, bandwidth upload and download speeds, type of connection (e.g. cable modem, ethernet, fiber, microwave), as well as monthly and one-time costs. As such, it seems redundant for the FCC to also require that these

¹² See Universal Service Administrative Co., *E-Rate*, <https://www.usac.org/e-rate/>.

providers provide a broadband label with the same information already mandated by the FCC's form in the competitive bidding process and that is thereby captured on the school or library's filing. It is not necessary to extend the broadband label requirement to E-rate and RHC providers because they already possess the information that is necessary for them to compare offerings through the competitive bidding process.

IV. THE FCC SHOULD ALLOW ISPS TO ADD TWO OPTIONAL ELEMENTS TO THE BROADBAND LABEL IN ORDER TO DISTINGUISH THEIR SERVICES: SYMMETRICAL SPEEDS AND RELIABILITY.

The last time the FCC had a proceeding on the broadband label was before the COVID-19 pandemic and therefore before most people fully felt and understood how important internet access is for them and their livelihood. Consumers now depend on internet service for jobs, education, healthcare, entertainment, and all other facets of life. They need to know whether their internet connection works because it matters so much more today than ever before. The broadband label will not only help residential and small business consumers better understand the BIAS market, but the transparency will also allow for providers to distinguish themselves and their services from their competitors in a way that consumers can easily understand. Being able to distinguish one's service is a key element of competition, which in turn incentivizes better products and services. As such, the FCC should allow providers the option of adding two elements of their service to their broadband label: speed symmetry and reliability. Speed symmetry and reliability have become important differentiators and providers should have to option to emphasize their superior network capabilities on their broadband labels.

First, providers should have the option to add a section to their broadband label on whether they provide symmetrical speeds and what this means for their service. In addition to having both download and upload prominently listed on the label, the ability to add whether

one's service includes symmetrical speeds would be critical for residential consumers and small businesses who need to upload significant amounts of content and would therefore benefit from a symmetrical service. Appendix B of the NPRM shows that in the 2016 proposed broadband labels there is a section under Performance for "Typical speed downstream" and "Typical speed upstream."¹³ INCOMPAS recommends keeping this speed criteria in the label, but also permitting providers to add language regarding symmetrical speeds. This will allow providers to better inform customers of the benefits of symmetrical speed offerings, potentially allowing them to grow their customer base which will allow them to grow their revenue, to pay for their networks, and potentially further grow their geographic presence and build additional high-speed network in other areas lacking such network capability.

Second, providers should have the option to add a section to their broadband label on the reliability of their services, which has become even more important today. Now that people are working, schooling, and engaging in other important activities at home and online, they may want or need a new level of certainty that their internet connection will be reliable and will not go out. As such, INCOMPAS suggests that the FCC add an optional criterion on the broadband label for reliability and specifically whether the service provided is guaranteed through a service level agreement ("SLA") or whether it is a best-efforts service. SLAs are valuable because they guarantee reliable service. INCOMPAS has members offering SLA guarantees for their residential and small business service that is their mass-market service, and it is important for the FCC to permit these providers to add language on their broadband labels to let consumers know whether they have a guaranteed connection. This idea of reliability is not fully reflected through

¹³ See NPRM, at Appendix B.

packet loss, which has been proposed on the label according to the label in Appendix B.¹⁴

Reliability is such an important aspect of a broadband internet access service and competitors who are building fast networks that can offer SLAs should be permitted to highlight that as another benefit for consumers who want or need such guarantees.

In addition, it may be beneficial to have a Glossary section on the FCC’s website that explains the various terms on the broadband label. On the 2016 proposed broadband label in Appendix B, there is a link on the label to a Glossary of Telecommunications Terms on the FCC’s website. While this type of glossary is helpful generally, it is a broad list of telecommunications words. Instead, the FCC should consider adding a Broadband Label Glossary on its website that is specific to the terms that will be used on the broadband label. Providers can then put this website on the broadband labels in order to ensure that consumers understand all the terms on the broadband label. For example, if a provider chooses to display that it provides guaranteed service, a consumer may not understand the term “SLA” or “Best-Efforts Service.” With a Broadband Label Glossary, the FCC can define these terms. In this instance, the FCC could seek industry input about the appropriate definitions. We note that in prior FCC Orders, the Commission has explained a “Best Efforts Internet Access Service” versus a dedicated business data service.¹⁵

¹⁴ *See id.*

¹⁵ *See Business Data Services in an Internet Protocol Environment et. al*, WC Docket No. 16-143 et. al (rel. April 28, 2017), at ¶ 30 (explaining “[b]est-efforts Internet access services describe basic Internet access as generally marketed to residential and small business subscribers. At the most-basic level, best-efforts and dedicated business data services appear to be interchangeable: end users can use both services to access the Internet or create virtual private networks. However, best-efforts Internet access is provided with asymmetrical speeds and without service performance guarantees. [Note: some of this language would need to be updated to reflect current realities where some providers now offer symmetrical offerings for their BIAS services.] Whereas dedicated packet-based business data services allow for packet prioritization and

V. CONCLUSION

For the reasons stated herein, INCOMPAS encourages the Commission to clarify which providers will be required to provide a broadband label and to allow these providers an opportunity to distinguish their services to consumers.

Respectfully submitted,

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quality of service priority tiers, best-efforts services do not. Also, while dedicated business data services commonly provide at least 99.9 percent network reliability, with higher guarantees being available for fiber services, and guarantees for latency and jitter, best-efforts services generally do not offer any reliability guarantees, although some cable providers offer some non-binding performance ‘assurances.’”).