

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

In the Matter of)	
)	
)	
Implementing the Infrastructure Investment)	GN Docket No. 22-69
and Jobs Act: Prevention and Elimination)	
of Digital Discrimination)	

REPLY COMMENTS OF INCOMPAS

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April 20, 2023

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INCOMPAS, by its undersigned counsel, hereby submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking that seeks input on how the Commission should implement Section 60506 of the Infrastructure Investment and Jobs Act, which requires the Commission to adopt rules not later than two years after enactment “to facilitate equal access to broadband internet access service.”¹ In satisfying that obligation, Section 60506 requires the Commission to consider “the issues of technical and economic feasibility presented by that objective” and directs its rules be aimed at “(1) preventing digital discrimination of access based on income level, race, ethnicity, color, religion or national origin; and (2) identifying necessary steps for the Commission[] to take to eliminate discrimination described in paragraph (1).”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

¹ *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Notice of Proposed Rulemaking, GN Docket No. 22-69 (rel. Dec. 22, 2022), at 2 (hereafter “*NPRM*”) (citing 47 U.S.C. § 1754).

² *Id.*

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 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.

Competition is key to increasing digital access. Under Section 60506 of the Infrastructure Investment and Jobs Act, the FCC must create rules aimed at preventing digital discrimination based on certain characteristics as well as identifying necessary steps for the Commission to take to eliminate such discrimination.³ One of the most effective ways for the Commission to prevent digital discrimination and increase digital access is by lowering barriers to deployment so that new and competitive providers can more quickly enter and deploy in the market. By considering barriers to deployment in this proceeding, the FCC can take a more prospective approach, rather than an after-the-fact defensive approach to ensuring that everyone is connected. Easing the barriers to entry for competitive providers leads to more options for consumers as well as better services. Economics and real-life examples show that incumbent providers respond to more competition. This results in more buildouts, upgraded networks, lower prices, and better customer service. INCOMPAS and our members applaud all the FCC’s continued work in lowering barriers to deployment and emphasizing the importance of competition, yet there is still

³ 47 U.S.C. § 1754.

much more that can be done to streamline deployment including pole attachment reform, continued MTE reform, and upholding the *2018 Declaratory Ruling*.⁴

II. LOWERING BARRIERS TO DEPLOYMENT AND INCREASING COMPETITION IS KEY TO HELP PREVENT DIGITAL DISCRIMINATION.

As INCOMPAS-member Starry explains, “robust market competition is a key ingredient to driving broadband affordability and rectifying other long-standing systemic barriers to ubiquitous broadband access,” including high costs and punitive anticompetitive practices.⁵ Further, competition policy and digital discrimination practices are “closely intertwined and directly affect consumers’ ability to appropriately choose a service that best meets their needs.”⁶ As such, one of the most effective ways for the Commission to abide by Section 60506 of the Infrastructure Investment and Jobs Act, prevent digital discrimination, and increase digital access is to lower barriers to deployment for new and competitive providers. This also means that anticompetitive practices taken by incumbent providers that purposefully create barriers to deployment for competitive providers should be included in the FCC’s list of actions that may qualify as digital discrimination as they ultimately harm digital access.

(a) While There Has Been Much Progress, The Current Broadband Market Is Not Sufficiently Competitive.

Competition is key to increasing digital access, yet we know there is currently not enough competition in the market. While there has been much progress—through providers like INCOMPAS members that continue to deploy competitive networks as well as through helpful

⁴ See *Accelerating Wireless/Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84 (rel. Sept. 27, 2018) (hereafter “*2018 Declaratory Ruling*”).

⁵ Starry Comments, GN Docket No. 22-69, at 2 (Feb. 21, 2023).

⁶ *Id.* at 3.

FCC pro-competitive policies—the lack of residential broadband service means consumers will continue to miss out on better broadband speeds, service, and prices or even the option to connect at all. In its recent Communications Marketplace Report, the FCC found that there is insufficient choice for home fixed broadband by stating that “[c]urrently available data demonstrates that millions of Americans lack access to high-speed broadband or can only access high-speed broadband through a single provider.”⁷ The Report also confirmed the lack of choice in the home broadband market by showing that most consumers only have one or two options of home internet providers, and they often have zero or only one option at higher speeds.⁸ As a result of these findings, the FCC should continue to do what it can to ensure that competitors can more easily enter the market resulting in more investment and buildouts, upgraded networks, more consumer choice, higher speeds, better prices, and increased broadband adoption.

(b) INCOMPAS Members’ Presence In A Broadband Market Improves Digital Access.

Given the benefits that we know come with increased competition, the FCC should continue enabling and promoting competition where it can, including by lowering barriers to deployment. When new and competitive entrants are more easily able to enter the market, pro-competitive market effects are bound to follow. Not only do competitive providers offer better,

⁷ 2022 Communications Marketplace Report, GN Docket No. 22-203 (rel. Dec. 30, 2022) at para. 4; see Angie Kronenberg, *The FCC Communications Marketplace Report: More Must Be Done to Enable Broadband Competition and Choice*, Medium (Jan. 18, 2022), available at <https://medium.com/@akronenberg/the-fcc-communications-marketplace-report-more-must-be-done-to-enable-broadband-competition-and-1fd0ff58e1d0>.

⁸ 2022 Communications Marketplace Report, at 50, Fig. II.A.33, last column (finding that when taking into account providers who have 5% penetration in an area, at 100/20 Mbps, about 45% of households have two options, while 42% have only one option. Only approximately 6% of households have three options, and about 7% have zero options. The next tier of speed reported 940/500 Mbps is bleak — only two percent of households have two options. About 61% have no option, and 37% have one option).

faster services, but also incumbent providers respond when competitors show up, including by deploying more networks, upgrading to modern networks (e.g. DSL/copper to fiber), and lowering prices.

On increased deployment, for example, within a week after the announcement that Google Fiber would bring 1 Gbps and 2 Gbps service to parts of Concord, North Carolina, Windstream announced that it would double the number of locations in the city where it has Kinetic fiber internet available.⁹ On pricing, for example, the FCC recently found that the median cost of high-speed internet service for the top 11 home broadband providers is \$74.99 per month;¹⁰ however, INCOMPAS-member Sonic in the Bay Area of California offers a 10 Gig broadband service with free installation, no contract, and unlimited data for \$49.99 per month.¹¹ On increased speeds, for example, one economic analysis found that the entry of two fiber providers increases internet speed by almost 90 Mbps for cable and DSL services.¹² Given that we know more competition means more people are connected to a better, faster, more affordable service, the FCC must continue to make competition a priority.

⁹ Joan Engebretson, *Windstream Kinetic Responds to Google Fiber in Concord, N.C.*, Telecompetitor (Aug. 25, 2021), available at <https://www.telecompetitor.com/windstream-kinetic-responds-to-google-fiber-in-concord-n-c/>.

¹⁰ See 2022 Communications Marketplace Report, at para. 38.

¹¹ See Sonic's Website, available at <https://www.sonic.com/>.

¹² Dr. Pablo I. Varas, *Competition in the Broadband Internet Market*, Economists Ink, at 9, available at <https://ei.com/wp-content/uploads/2022/04/Secretariat-Economists-Ink-Q12022.pdf>.

III. THE FCC SHOULD CONTINUE ITS EFFORTS TO LOWER BARRIERS AND STREAMLINE DEPLOYMENT IN ORDER TO INCREASE COMPETITION AND DIGITAL ACCESS.

We urge the FCC to continue its efforts of promoting and increasing competition through various proceedings at the Commission, including pole attachment reform, MTE access, upholding its *2018 Declaratory Ruling*, and overall streamlining deployment.

Pole Attachments: One significant barrier to deployment that INCOMPAS members face is pole attachments. INCOMPAS' fiber providers are struggling to deploy their future-proof networks quickly and affordably because they too often are unable to attain timely access to investor-owned utility poles at reasonable costs.¹³ Large utilities that own poles—some of which compete with INCOMPAS members' service offerings—foist the high cost of replacing poles onto competitive attachers by refusing to bear financial responsibility for poles that are failing or have pre-existing conditions and by requiring new attachers to pay for taller or upgraded poles that are not necessary to accommodate the new attachment. These additional barriers to deployment delay the make ready process, increase costs, and often prevent providers from reaching underserved and unserved communities and offering customers faster, more affordable options. Addressing these challenges through targeted reforms to the FCC's pole attachment and replacement rules, particularly on the cusp of a once-in-a-generation federal investment of tens

¹³ See, e.g., INCOMPAS Ex Parte Letter, *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84 (Dec. 1, 2022), available at <https://www.fcc.gov/ecfs/document/1201771809073/1>; see Angie Kronenberg, *Poles and Railroads: Breaking Down Barriers to Broadband Deployment*, Medium (Mar. 1, 2023), available at <https://medium.com/@akronenberg/poles-and-railroads-breaking-down-barriers-to-broadband-deployment-d5eafda2c1ac>; see Panel at the 2023 INCOMPAS Policy Summit, *Investing in the Networks and Reducing Deployment Barriers to Secure Our Digital Future* (Mar. 7, 2023), available at https://www.youtube.com/watch?v=lrceMM_xSvA.

of billions of dollars, is critical to ensuring that we can finally bring the power of high-speed broadband and competition to everyone.

Another significant challenge is railroads. Railroad permitting approvals and costs also remain acute challenges for our members. The railroads are steadfast in charging excessive rates for access to rights-of-way that they manage or control and our members are experiencing significant delays in securing permitting approvals. Thankfully, some states are recognizing this problem and are capping permitting fees and setting timeframes for permit approvals.¹⁴

Solving the poles and railroads issues are key to successfully achieving our goal of Internet for All. We urge the FCC to reform its pole attachment rules, and INCOMPAS will continue to work with Congress and the Biden Administration to develop new policy in the 118th Congress to address the delays and eliminate unreasonable costs imposed by railroads.

MTEs: One area where the Commission has and should continue to scrutinize the impact of competition on broadband availability is with respect to competitive and smaller providers' ability to gain access to residential and commercial multiple tenant environments ("MTEs"). INCOMPAS concurs with stakeholders like WISPA that argue that the Commission must continue to address provisions and practices that have erected market entry barriers in MTEs "that prohibit competition and create an environment that can foster digital discrimination."¹⁵

The Commission's interest in exploring digital discrimination of access in MTEs is critical as

¹⁴ For example, Iowa, Illinois, Minnesota, and Nebraska have each passed laws that ensure timely and affordable access to railroads' rights-of-way. Generally, the laws (1) set a timeline for access requests to be considered to 30 or 35 days; and (2) set or cap the fee for crossings (\$750-1500). Minnesota provides that no crossing fee is permitted where the crossing is located within a public right-of-way. See [Iowa S.F. No. 515](#) (2001); [Illinois HB2626](#) (2009); [Minnesota Statute-S.F. No. 877](#) (2014); [Nebraska Legislative Bill 1144](#) (2022).

¹⁵ Comments of the WISPA—Broadband Without Boundaries, GN Docket No. 22-69, 25 (filed Feb. 21, 2023).

“many consumers in the Infrastructure Act’s protected classes are renters in private and public MTEs.”¹⁶ Despite the Commission’s efforts to improve competitive broadband access to MTEs, including a 2022 *Order* that prohibited exclusive and graduated revenue sharing and required disclosure of exclusive marketing arrangements to residents,¹⁷ competitive and smaller providers have historically struggled to gain entry to MTEs due in part to exclusive commercial arrangements between service providers and buildings owners.

As we have noted in the MTE proceeding, competitive providers enter the market to fill a need in unserved and underserved communities for faster and more affordable communications services. The provision of competitive and innovative broadband services in unserved and underserved areas is critical to creating more digital equity and connectivity, and INCOMPAS members are engaged across the country in meeting the needs of communities without reliable or affordable broadband service. INCOMPAS members regularly serve public housing where they can gain access to the building, have made free service¹⁸ and digital literacy training available in low-income housing,¹⁹ and almost three-quarters of our members who offer residential service

¹⁶ *Id.*

¹⁷ *See Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Report and Order and Declaratory Ruling, FCC 22-12 (rel. Feb. 15, 2022).

¹⁸ *See, e.g.*, Letter of Stephen Bradley, Director of Consumer Sales & Marketing, Sonic Communications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 (filed Nov. 22, 2020), at 3 (reporting on the additional MTEs designated as low income housing that Sonic has been able to serve by expanding its footprint in San Francisco and Oakland); Notice of Ex Parte from Virginia Lam Abrams, SVP, Gov. Affairs & Strategic Advancement, Starry, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, MB Docket No. 17-91 (filed Oct. 30, 2020), at 2 (describing Starry’s commitment to providing free Starry Connect service to residents of public housing in the City of Los Angeles).

¹⁹ *See Reply Comments of INCOMPAS*, GN Docket 17-42 (filed Aug. 22, 2017), at 12. An INCOMPAS member recently attempted to serve a public housing property with a heavily discounted high-speed broadband product as part of a community impact program. The property

are participating in the Affordable Connectivity Program (“ACP”) to assist low-income consumers.

While INCOMPAS is encouraged by the steps the Commission has taken to improve competitive broadband access in MTEs, the record contains evidence of additional practices that discourage competitive entry in residential and commercial MTEs that will require further examination in the future. WISPA submits that anti-competitive exclusive rooftop access and state and local laws that do not foster technology-neutral deployment are remaining issues that the Commission should address to encourage competitive deployment of broadband to MTEs. Similarly, INCOMPAS has proposed that the Commission examine unreasonable door fees, inside wiring disputes in commercial MTEs, and the benefits of neutral host provisions for MTE rooftops. As such, INCOMPAS urges the Commission to reject calls to close the MTE proceeding and end support for mandatory access laws. Despite assertions to the contrary in this proceeding, mandatory access laws, such as the ordinance adopted in San Francisco, have had a positive impact on competitive providers’ ability to reach new customers. As noted by INCOMPAS-member Sonic, “[t]his ordinance has proven to be essential for competitive access and has allowed Sonic to make inroads with building owners and property management companies that it might not have been able to otherwise.”²⁰

2018 Declaratory Ruling: The Commission’s *2018 Declaratory Ruling* is one example of how the FCC successfully lowered a barrier to deployment. INCOMPAS’ members work with

was party to a revenue share arrangement coupled with a marketing exclusivity. While the housing authority eventually allowed our member to provide its discounted internet service to the residents, the member was unable to engage in any on-site internet education, STEM awareness, or digital literacy training due to the property’s marketing exclusivity.

²⁰ See Reply Comments of INCOMPAS, GN Docket No. 17-142, at 17 (filed Sept. 30, 2019) (Declaration of Dane Jasper, Sonic Telecom, LLC).

cities to deliver better service and better coverage, and the *2018 Declaratory Ruling* has been tremendously helpful in these efforts. While some in the record call for the Commission to revisit the Order,²¹ the Commission should continue to uphold it.

In their comments, the Local Governments complain that Section 253 constrains their ability to favor certain providers over others, purportedly in furtherance of broadband deployment.²² However, the Local Governments' argument claims to be seeking to promote universal service. Although INCOMPAS generally supports the widespread deployment of broadband and ensuring the availability of broadband everywhere, Congress correctly removed local government authority to pick and choose winners and losers in the marketplace, including restricting their ability to deny access to competitors.

For example, Section 253(a) “prohibits State or local legal requirements that may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”²³ Moreover, the Act further restricts localities from imposing requirements to advance universal service: under Section 253(b), such authority is retained to the States and may only be exercised by a local authority if it is expressly delegated by the State, and even that authority must be exercised “on a competitively neutral basis.”²⁴ What the Local

²¹ See Comments of Local Governments (City of Philadelphia, Oklahoma City, Oklahoma, et al.), GN Docket No. 22-69 (Feb. 21, 2023), at 13; see also Comments of Local Governments (The Texas Coalition, Boston, and Portland), GN Docket No. 22-69 (Feb. 21, 2023), at 4.

²² See Comments of Local Governments (City of Philadelphia, et al.), at 10-13.

²³ 47 U.S.C. § 253(a).

²⁴ See, e.g., *Classic Telephone Inc. Petition for Preemption, Declaratory Ruling, and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd 13082, at para. 34 (explaining that “section 253(b) may be read to preserve certain regulatory powers of the States, and if there is a specific delegation by the State, local governments as well”); 47 U.S.C. § 253(b).

Governments seek is to manipulate the market by favoring certain providers—including, sometimes, municipal providers—over others. But the language of Section 253(b) expressly prohibits any regulation for the purpose of promoting universal service if it is not “competitively neutral.”²⁵ Likewise, Section 253(c) prohibits local governments from managing the public rights of way in a discriminatory, competitively biased manner.²⁶ As a result, even if a municipality has the authority to impose some regulation to promote universal service, it is never empowered to favor one provider over another. Congress and the Commission have correctly determined that local authorities may not tip the scales in favor of one entity over others under Section 253, and that policy has successfully promoted the deployment of competitive broadband. The Commission should reject calls to diverge from its plain language reading of the statute.

The Local Governments’ argument that the Commission “expressly limited its reasoning in the [2018 Declaratory Ruling] to small wireless facilities” is also inaccurate.²⁷ There is nothing in the language or structure of the Act suggesting that the legal standard governing local authority under Sections 253 can or should differ based on the technology involved, and there is nothing in the *2018 Declaratory Ruling* limiting the Commission’s reasoning to small wireless facilities.²⁸ In fact, the *2018 Declaratory Ruling* relied on cases addressing fees for *wireline facilities*, and articulated that “*the Commission’s interpretation of Section 253(a)...*”²⁹ The *2018 Declaratory Ruling* discussion of the Section 253 standard is technology neutral and recognizes

²⁵ 47 U.S.C. § 253(b).

²⁶ 47 U.S.C. § 253(c).

²⁷ Comments of Local Governments (City of Philadelphia, et al.), at 13.

²⁸ See 47 U.S.C. § 253.

²⁹ *2018 Declaratory Ruling*, at para. 46 (emphasis added).

that there is a long history of applying this statute to preempt unreasonable local requirements that pre-dates small wireless facilities.³⁰ Only after the Commission establishes the proper standard does it apply “the interpretations above” to the factual context of small wireless facilities.³¹ This view has been upheld in court, with the United States District Court for the Western District of New York finding that “there is no reason to conclude that the FCC’s interpretation of [Section 253] is limited to small wireless facilities.”³² The Local Governments’ assertion that the *2018 Declaratory Ruling* is limited to small cells is incorrect and contradicts the plain language of the *2018 Declaratory Ruling*.

Through its *2018 Declaratory Ruling*, the Commission streamlined processes and lowered fees for small cell deployment, which promotes the rapid deployment of broadband. Cities that had once held up deployment are now finding an abundance of new services as a result. If the FCC were to repeal or revise the Declaratory Ruling, it would erect new barriers to deployment, which would conflict with the Commission’s goal of increasing digital access.

IV. CONCLUSION

For the reasons stated herein, INCOMPAS encourages the Commission to continue lowering barriers for deployment in order to increase competition in the broadband market thereby increasing digital access and preventing digital discrimination. To achieve our nation’s goals of bringing high-speed internet to everyone—what the Biden Administration calls “Internet for All”—we must embrace streamlined processing and reasonable access at low-cost to public

³⁰ *See id.* at para. 56.

³¹ *See id.* at para. 69.

³² *Cellco P’ship v. City of Rochester*, __ F.Supp.3d __, U.S. Dist. LEXIS 150124, at *25 (W.D.N.Y. Aug. 22, 2022).

rights-of-way. Speeding access to poles, ducts, conduits, and MTEs so that networks can be built is hard work, but this effort also will enable competitors who are bringing fiber, fixed wireless, satellite, and mobile options to more communities to offer choice where so many customers still need it. Real choice for fast networks will enable greater economic growth for our cities and towns and will help secure our nation's economic future.

Respectfully submitted,

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