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February 13, 2017

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Enabling Competitive Broadband; WT Docket No. 16-138, WC Docket No. 16-132, IB Docket No. 16-131, PS Docket No. 16-128; WC Docket No. 05-25; WC Docket No. 16-143, RM-10593

Dear Ms. Dortch:

On February 9, the undersigned, along with Chip Pickering, CEO, and Karen Reidy, Vice President, Regulatory Affairs, met with Chairman Ajit Pai and his Acting Wireline Legal Advisor, Jay Schwarz. During that meeting, we delivered the attached letter and discussed the issues raised therein.

Sincerely,

/s/Angie Kronenberg

Angie Kronenberg
Chief Advocate & General Counsel

Attachment

cc: Chairman Pai
Jay Schwarz

February 9, 2017

The Honorable Ajit Pai, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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Chairman Pai:

Congratulations on being selected to lead the Federal Communications Commission. As the new Chairman, you have a remarkable opportunity to oversee the agency's efforts to enable further deployment of advanced telecommunications networks and services. Furthermore, the Digital Empowerment Agenda that you released as a Commissioner has significant potential to empower communities and their citizens around the nation. INCOMPAS, the Internet and competitive networks association, and its members look forward to working with you on the shared goal of removing barriers to broadband network deployment. In particular, we are encouraged by your commitment to gathering information and guidance for the Commission's efforts through the newly-announced Broadband Deployment Advisory Committee. We are hopeful that this Committee and the Commission will be successful in accelerating the deployment of high-speed broadband—both wired and wireless—nationwide, and INCOMPAS and its members will do everything it can to assist in these efforts.

As you know, our members have extensive experience deploying middle-mile infrastructure, residential and enterprise fiber, and wireless networks in order to reach their customers. Pro-competition policy is key to encouraging build-out of new broadband infrastructure that is both fast and affordable. Homes, office buildings, and government agencies, including schools and libraries, will benefit from the innovation and affordability only robust competition can produce.

The market for next-generation communications services like broadband will flourish when federal, state, and local agencies work in concert with industry to lower the barriers to deployment. Our members believe the provision of affordable, next generation communication services, to business and residential consumers—including broadband Internet access service ("BIAS") and dedicated broadband services—are critical to our growth and development as a

nation. Recently, a bi-partisan letter to President Trump from 48 U.S. Senators stated:

The internet has changed the way businesses reach their customers and workers do their jobs. From large companies that employ thousands to small businesses on Main Street, broadband access is not a luxury, it is a necessity. The internet expands opportunities for commerce and strengthens our economy. A broad agenda to promote broadband access will empower Americans living in every community—from urban city centers to rural towns—with economic opportunities that will jumpstart growth in jobs and wages. In fact, for every \$5 billion invested in broadband infrastructure, 250,000 jobs are created and with every percentage point increase in new broadband distribution, employment expands by 300,000.

These benefits can only be fully realized when connections are fast, reliable, and affordable. That is why improving broadband access must be a priority in the 115th Congress and broadband must be part of any discussions regarding infrastructure investments to meet the demands of the 21st century economy. In addition, policies that reduce barriers to investment in communications infrastructure and streamline the deployment process will play a key role in expanding economic growth.¹

As you have indicated, one way the Commission can remove regulatory barriers is by reforming its pole attachment rules.² It is critical that federal, state, and local regulatory agencies work to facilitate access to rights-of-way and infrastructure, such as conduit and poles. Reform of these rules is necessary because current make-ready processes do not allow affordable, timely, or efficient construction of competitive networks.³ Some carriers are taking more than 90 days

¹ See Letter to President Donald J. Trump from U.S. Senate (Jan. 31, 2017), *available at* <https://prodnet.www.neca.org/publicationsdocs/wwpdf/2217congress.pdf>. Similarly, 71 Members of the House of Representatives sent a letter to the President encouraging an infrastructure proposal that will ensure broadband availability and affordability for rural America. See Letter to President Donald J. Trump from Congress of the United States (Jan. 30, 2017), *available at* http://welch.house.gov/sites/welch.house.gov/files/Telecom%202017.01.30%20Letter%20to%20Pres%20Trump%20re.%20broadband_0.pdf.

² Ajit Pai, Commissioner, Fed. Commc'n Comm'n, Remarks at the Brandery: A Digital Empowerment Agenda (Sep. 12, 2016).

³ See White Paper, Fiber To The Home Council Americas: Roll of State and Local Governments in Simplifying the Make-Ready Process For Pole Attachments, 11, 14 (Nov. 2015), <http://toolkit.ftthcouncil.org/d/do/2209> (explaining that an “umbrella” make-ready policy “that adopts a single pole administrator as well as one touch make-ready would facilitate a smooth,

to complete their make-ready work and there are no “shot clocks” to ensure that “attachers” complete their work on a timely basis, leaving competitors in an untenable state of limbo as they seek to deploy their networks and begin service. INCOMPAS recommends that the Commission amend its pole attachment rules⁴ to authorize “one touch make-ready”—whereby a contractor approved by the pole owner could do all make-ready work at once. The Commission has called one touch make-ready laws “consonant with the goals of federal telecommunications policy” and noted that they encourage “timely deployment of advanced telecommunications services to all Americans.”⁵ Furthermore, make ready charges are not predictable or verifiable in many cases, making it difficult for competitors to plan their builds and accurately predict construction. INCOMPAS encourages the Commission to revisit its decision in its *2011 Pole Attachment Order* not to require utilities to provide schedules of common make-ready charges.⁶ By requiring pole owners to provide a statement of charges for make-ready work for poles, competitive providers will be able to more accurately plan for the costs to construct their competitive networks.

Competitive providers of fixed and mobile broadband services also continue to face challenges in expanding their service footprint and gaining access to many customers residing in multiple dwelling units (“MDUs”) who want their service. Incumbents have used a number of contractual methods to stymie deployment of BIAS and competitive video services to MDUs. For instance, incumbent providers and property owners have used marketing arrangements,⁷ with exclusive rights to advertise their services in building common areas, on MDU websites, and in new resident materials, and other contractual mechanisms to effectively deny (or create a perverse incentive to deny) competitive access. Additionally, property owners have demanded revenue sharing arrangements with competitive providers.⁸ Competitive broadband and video

efficient, and highly equitable process that would reduce disruption and increase public safety while also speeding the availability of new services to residents”).

⁴ See generally 47 C.F.R. Part 1, Subpart J.

⁵ Letter from Howard J. Symons, General Counsel, Fed. Comm’n Comm’n, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, U.S. Dep’t of Justice, 5-6 (Oct. 31, 2016), available at <https://assets.documentcloud.org/documents/3211861/Fcc-Att-Louisville.pdf> (requesting that the DOJ file a Statement of Interest in BellSouth’s litigation with the city and county explaining that there is no conflict between federal pole attachment regulations and Louisville’s one touch make-ready ordinance).

⁶ *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. Apr. 7, 2011) at 6 (“2011 Pole Attachment Order”).

⁷ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, ¶¶ 29-30 (2010).

⁸ Susan Crawford, *Dear Landlord: Don’t Rip Me Off When it Comes To Internet Access*, BACKCHANNEL (Jun. 27, 2016), <https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9#.gt2zhyfc4>.

providers that are unable or unwilling to participate in this kickback scheme are denied access to MDUs.

Moreover, wiring exclusivity arrangements have allowed incumbent MVPDs to prevent utilization of existing inside wiring even after a customer has ceased service. As you are aware, the incumbent provider is required by law to either make the wiring available to another MVPD or remove it.⁹ However, incumbents enter into agreements with MDUs to lease this fallow wiring on an exclusive basis, forcing competitive providers into the difficult position of having to choose between installing duplicative in-unit wiring or not serving the building at all. As explained recently by ITTA, this access “is required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider.”¹⁰ This exclusive leasing practice is now defeating that intent and deterring competitive providers from serving those MDUs.

The net impact of these practices is that deployment of competitive broadband and video services are discouraged, and in some instances, denied altogether. When deploying competitive networks, it is critical that competitive providers can reach as many potential customers as possible with their networks. When access to customers residing in MDUs is thwarted, the business case to build a competitive network is significantly impacted, further jeopardizing the competitive provider’s ability to offer its services to a community.¹¹ As INCOMPAS described in the Biennial Review proceeding, there is evidence that when a third competitive broadband provider enters the market to offer residential (wireline) BIAS, prices drop and the telco and cable incumbents respond by increasing speeds, upgrading their infrastructure, and lowering prices.¹² Thus, moving from two to three options in the marketplace is very beneficial for consumers. However, the barriers to entry often cannot be surmounted by competitors.

⁹ 47 C.F.R. § 76.802(a).

¹⁰ Comments of ITTA—The Voice of the Mid-Sized Communications Companies, MB Docket 16-247 (filed Sept. 21, 2016), at 9 (referencing 47 CFR § 76.2000).

¹¹ Comparable laws pertaining to cable providers have been passed in 18 different states and a number of municipalities. These laws have helped promote choice and level the playing field in the cable space and similar reforms will bring the same benefits to the broadband market. *See* White Paper, Fiber to the Home Council Americas: Residents’ Choice: Ensuring Consumers in Multiple-Dwelling Units Can Choose Their Communications Provider, 4-5 (Nov. 2016), *available at* <http://toolkit.ftthcouncil.org/d/do/2210>.

¹² *See* INCOMPAS Biennial Review Reply Comments, WC Docket No. 16-132 et al., at 9 (*citing* Google Gets Beaten to the Punch by AT&T on Super-Fast Broadband, Bloomberg Technology, April 25, 2016 *available at* <https://www.bloomberg.com/news/articles/2016-04-25/google-gets-beaten-to-the-punch-by-at-t-on-super-fast-broadband> (“Markets that Google enters enjoy a \$20-a-month drop in prices on average.”) Google’s fiber effect: Fuel for a broadband explosion, CNET, April 30, 2014 *available at* <https://www.cnet.com/news/googles-fiber-effect-fuel-for-a-broadband-explosion/>).

Accordingly, INCOMPAS urges you to re-examine the issues we have identified and address these artificial barriers to broadband and video competition.

Additionally, the inability of competitive network providers to procure the right to and deliver affordable video programming also stands as a barrier to robust wireline broadband competition and deployment. The Commission has long recognized that consumers prefer to purchase broadband and linear video services together in a bundled product¹³ and when offered together, broadband adoption increases by 24%.¹⁴ In an effort to compete in the residential broadband marketplace, competitive network providers must provide linear video services—not just broadband services—in order to achieve higher broadband adoption rates.¹⁵ Obtaining video programming rights at affordable rates and under reasonable terms is an essential prerequisite to offering linear video service. However, as reported by the Commission in its *Eighteenth Report*, video content costs continue to rise significantly.¹⁶ Providers are already feeling a squeeze as programming fees increase faster than retail charges, making the business case for rural expansion, new fiber deployments, and incumbent telco deployments even “less tenable.”¹⁷ Many INCOMPAS members are already offering linear video service at a loss, forfeiting providing a video service entirely, or outsourcing this service, all of which impedes broadband network expansion and upgrades. To enable broadband providers to compete head-to-head on linear video service to attract consumers to broadband service, the Commission should address the ease with which smaller MVPDs and new entrants can gain access to video programming.

¹³ See, e.g., FCC, *Connecting America: The National Broadband Plan*, 38 (2010), available at <http://transition.fcc.gov/national-broadband-plan.pdf>.

¹⁴ COMPTTEL, ITTA, NTCA Letter to Senator John Thune, Chairman, Senate Committee on Commerce, Science, and Transportation, June 22, 2015, available at <http://www.ntca.org/images/stories/Documents/videohearingletter.pdf> (explaining that “[a]ccess to video services drives broadband adoption, which in turn helps to justify the business case for broadband deployment”).

¹⁵ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶¶ 51, 62 (2006) (“The record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”).

¹⁶ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, MB Docket No. 16-247, ¶ 5 (Jan. 6, 2017) (reporting that programming costs rose 6.8 percent in 2014 and 8.1 percent in 2015, and have continued increasing at a similar pace in 2016 according to SNL Kagan).

¹⁷ Comments of the American Cable Association, MB Docket No. 15-158, *High and Increasing Video Programming Fees Threaten Broadband Deployment Research Paper*, at 9 (Aug. 21, 2015).

Importantly, the Commission needs to also recognize and address the footprint barrier to new last-mile deployment to certain business locations. A key feature of the enterprise broadband markets is the interdependency of demand, *i.e.*, the fact that many customers have multiple locations and seek a single provider to serve them all.¹⁸ There are a large number of business locations where there simply is no economically viable case for competitors to build out last-mile facilities.¹⁹ The large number of multi-location customers for dedicated services creates a substantial barrier to entry when competitors can serve some, but not all, locations on their own last-mile facilities. To compete, carriers must have an extensive network footprint to be able to offer services widely.²⁰ In fact, many competitors have made significant investment in

¹⁸ Hundreds of companies with multiple locations wrote the Commission as part of the *Technology Transitions* proceeding, urging the agency to preserve and promote competitive choices in telecommunications. See Reply Comments of Granite Telecommunications, LLC, WC Docket No. 16-132, at 2-3 (Jan. 3, 2017). Accordingly, preserving all of the protections afforded business customers through their competitive carriers in the *Technology Transitions* proceeding is critical. See also *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. §160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, FCC 10-113 at ¶ 74 (2010) (“[I]f a competitor seeks to serve a multi-location business customer, it must have access to facilities that reach all of the customer’s locations.”)

¹⁹ See Windstream Comments, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5, at 39 (dated Jan. 27, 2016) (The Cost Quest white paper “demonstrates that widespread CLEC last-mile build-outs to business customers remain economically infeasible today. . . . [T]he CostQuest model shows that CLEC self-deployment of fiber-served Ethernet last-mile facilities to serve a single customer in each building would not be economically viable unless the customer at each building purchases more than 1 Gbps of capacity.”) Likewise, the Commission recently asserted that these markets remain highly concentrated as “costs and conditions exist in the market with enough significance in any measure of a geographic market to deter rapid competitive entry or expansion, including high capital expenditures, large sunk costs, long lead times, scale economies, and cost disadvantages.” *Business Data services in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, Tariff Investigation Order and Further Notice of Proposed Rulemaking, FCC 16-54, at ¶ 224 (rel. May 2, 2016).

²⁰ “Because larger businesses and enterprise customers have locations spanning multiple areas and cable footprints, Comcast, TWC, and other cable companies have been unable to offer seamless business service options – or meaningful competition against incumbent providers – across these different locations.” Opposition to Petitions to Deny and Response to Comments, Comcast Corporation and Time Warner Cable Inc., MB Docket No. 14-57, at 70-71 (filed Sept. 23, 2014); “[A] provider typically must have a broad regional footprint without significant gaps in coverage areas to serve large enterprises with multiple sites across given geographic regions effectively. Customers typically prefer a single network, with a single set of technical standards and a single point of contact for customer support.” Public Interest Statement, Charter

their own networks. Nonetheless, given the bleak reality that last-mile facilities are uneconomic to duplicate in many instances, the footprint-barrier can only be overcome through reasonable wholesale access policies and pricing that enable providers (including incumbents attempting to compete outside their incumbent territories) to extend the geographic reach of their networks to off-net locations to create the multi-location service packages that this customer segment demands and encourage deployment where economically feasible.²¹

Moreover, wireless industry providers told the Commission that access to high-capacity dedicated broadband services at reasonable prices is essential for wireless providers to meet the current demand for wireless broadband services and to build next generation mobile broadband networks.²² A Telecom Advisory Services study found, among other things, that “high backhaul costs reduce competitive wireless carrier service quality, increase industry consolidation and exacerbate the digital divide” and that the current market conditions for dedicated broadband services impede future U.S. economic growth, particularly in rural areas of the country.²³ Accordingly, the Commission should address this significant barrier by ensuring that wholesale rates, terms and conditions are reasonable for last-mile access.

Communications Inc., Time Warner Cable Inc., & Advanced/Newhouse Partnership, MB Docket No. 15-149, at 35-36 (filed June 25, 2015).

²¹ See Robert D. Willig, appended as Attachment B to Reply Comments of Windstream Services, LLC, WC Docket Nos. 16-143, 15-247, & 05-25, RM-10593, ¶ 26 (filed Aug. 9, 2016).

²² Letter from Steven Berry, President and CEO, Competitive Carriers Assoc., Chip Pickering, CEO, INCOMPAS, Vonya McCann, Senior VP, Govt. Affairs, Sprint, Kathleen O’Brien Ham, Senior VP, Govt. Affairs, T-Mobile, and Grant Spellmeyer, VP, Fed. Affairs and Public Policy, U.S. Cellular to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25, RM-10593, at 1 (filed Apr. 21, 2016).

²³ “Assessment of the Impact of the Business Data Services Market Dynamics on Innovation and Competition in the U.S. Wireless Market” Telecom Advisory Services, LLC, July 2016 at 7-10.

INCOMPAS urges the Commission to consider the above-mentioned recommendations as it addresses the burgeoning challenges related to broadband deployment. This association and our members stand ready to assist the Commission in all its efforts to deliver next generation networks and services to consumers across the nation.

Sincerely,

A handwritten signature in black ink that reads "Chip Pickering". The signature is written in a cursive style with a large, looped "P" at the end.

Chip Pickering
CEO
INCOMPAS