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

In the Matter of

2016 Biennial Review of Telecommunications Regulation

WT Docket No. 16-138, WC Docket No. 16-132, IB Docket No. 16-131, PS Docket No. 16-128

REPLY COMMENTS OF INCOMPAS

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January 3, 2017
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INCOMPAS, the Internet and competitive networks association, hereby submits its reply comments in the Commission’s biennial review proceeding.1

I. Introduction and Summary

As demonstrated below, significant concentration and market power is prevalent in the communications industry. While some commenters have taken a targeted approach in suggesting that the Commission repeal specific rules they believe are no longer needed to further the public interest,2 others urge a wholesale repeal of rules and policies that are essential to enabling competitive options for small businesses and consumers.3 INCOMPAS supports efforts to reduce regulatory burdens where appropriate, but at the same time urges the Commission to

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2 See generally Sprint Comments.

3 See generally USTA Comments & CenturyLink Comments.
reject rolling back the regulatory protections that have enabled competitive retail solutions in the communications marketplace and that are still needed to ensure that consumers and businesses of all sizes have competitive options.

II. The Commission Must Examine Whether Businesses and Consumers Have Real Competitive Options When It Considers Whether a Regulation is No Longer in the Public Interest.

Several commenters have asserted that the telecommunications market is competitive by citing market trends. The Commission should reject these bald assertions. The Commission must scrutinize whether businesses and consumers have real competitive options in the marketplace, and if so, which regulations are necessary to ensure that such competition will continue. As the Commission observed in its 2002 Biennial Regulatory Review Report:

[T]he purpose of the 1996 Act as well as the legislative history of Section 11 confirms that competition is the touchstone of the Section 11 inquiry. The conferees, in explaining Section 11(a)(2), direct the Commission to determine whether its regulations are ‘no longer in the public interest because competition between providers renders the regulation no longer meaningful.’ Section 11 contemplates a thorough review and assessment of the state of competition among providers of telecommunications service and a determination of how the regulatory framework should be adjusted to account for those changes. We note, however, that the mere presence of meaningful economic competition will not always lead us to conclude that repeal or modification of a rule is in the public interest. Rather, our task is to determine whether the competitive environment has changed such that the rule is no longer meaningful, i.e., is not needed to further the public interest.

4 See USTA Comments at 2-4; CTIA Comments at 4-5; & CenturyLink Comments at 4-5.

As such, to determine whether competition is “meaningful,” the Commission must engage in a thorough analysis of the services that are purchased (the product market), the options that businesses and consumers have where they work and live (the geographic market), whether they regularly can and do switch providers, and whether there is sufficient actual discipline of the market as a result. Where regulation is needed for competition in the marketplace, then the Commission should refrain from disrupting such competition by removing those protections. For example, where retail competition relies on the market-opening provisions required by the 1996 Telecom Act, such as the availability of last-mile access to business customers via unbundled elements, the provision of business data services via tariffing provisions, and the reasonable access to poles, ducts, and conduits to build competitive networks, it would be antithetical to competition to roll back those regulatory protections.

Moreover, it is important to look at the state of competition from the perspective of the individual customer. Whether a residential or business customer, the presence or absence of services available to that customer at its location is critical. For wireline service, the presence of competitive options across the street or down the block does not mean a customer actually has competitive options. There are still high barriers to build, and where a provider may have a facility on the block, there must be sufficient demand to justify extension of its facilities across the street or down the block. In fact, in the Commission’s Business Data Services docket there has been extensive discussion of the economic business case to build. Multiple competitors stated, in declarations under penalty of perjury, that they usually lack a viable economic case to deploy a new fiber connection to serve a customer demanding only 100 Mbps of bandwidth or
This is consistent with the behavior that we generally see from large ILECs. They do not typically build out of market to serve customers; they usually purchase last-mile service from incumbents, except in situations where the customer has large capacity needs.

In addition, the Commission must keep in mind that mobile broadband is dependent on wired networks for backhaul and transit. Thus, it is crucial that the Commission’s competition analysis fully consider the dependency of mobile broadband on wireline networks and the need for diverse and competitive wireline networks and refrain from the broad-brush analysis that some commenters would like it to take. The Commission also should be mindful of limitations of mobile broadband and the limited substitutability of mobile networks for wired networks for numerous telecommunications services, including business data services and broadband Internet access services.

III. The Communications Marketplace Remains Highly Concentrated.

It is evident from ongoing FCC proceedings and recent analyses that many portions of the telecommunications marketplace remain highly concentrated. With respect to business data services in particular (formerly known as special access services), service provider options are severely limited and some large ILECs abuse their market power for these services. Business data services (“BDS”) are a critical input to the operations of countless businesses, including small businesses, educational and health care institutions, government entities, and wireless providers. BDS include the high-capacity dedicated services that sustain our wireless networks,

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6 See, e.g., Letter from Thomas Jones, Counsel to Level 3, WC Docket No. 16-143, Attached Declaration of John Merriman, at ¶ 6 (filed June 28, 2016); Windstream Comments, WC Docket No. 05-25, at 35-42 (Jan. 27, 2016).
facilitate commercial transactions, and underpin communications that American businesses rely on every day. While most consumers are not familiar with these services, they use them when they make a voice call or send a text on a mobile device, withdraw cash from an ATM, or search online reference materials on a computer at their public library. The rates, terms, and conditions on which these services are offered have a significant effect on consumer welfare. The Commission has estimated that BDS is a $45 billion annual market,7 and INCOMPAS believes that BDS revenues will continue to grow as the demand for Ethernet services increases with the expansion of mobile broadband networks and the introduction of 5G networks, in particular.

The Commission’s BDS proceeding shows that certain large ILECs still maintain and are exploiting their market power with respect to BDS. Indeed, the Commission’s own third-party expert, Dr. Rysman, concluded that more than 77 percent of locations with BDS demand are served by only one provider, about 22 percent have two providers, and only 0.1 percent are served by four or more providers.8 Further, Dr. Rysman found that “[t]he revenue data show that ILECs are an outsized presence in this industry. . . . [I]t appears from the revenue data that ILECs dominate the market for facilities-based service in their region.”9 Similarly, Drs. Besen


9 Id. at 25.
and Mitchell found that ILEC revenues account for about 82 percent of BDS revenues for 0-10 Mbps services and around 80 percent for 10-50 Mbps services.\(^\text{10}\) Moreover, there is significant evidence that ILECs are exploiting their market power to charge exorbitant supracompetitive rates and impose unreasonable and anticompetitive terms and conditions.\(^\text{11}\) We expect that the BDS market will remain highly concentrated and ILECs will maintain their competitive advantages, as the FCC has acknowledged that “costs and conditions exist in the [business data service] 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.”\(^\text{12}\)

With respect to residential broadband Internet access service, market concentration also is high, and the majority of residential broadband Internet access service customers still have very limited options for high-speed service. Fifty-one percent of Americans have only one fixed high-speed broadband option, and 10 percent have no option.\(^\text{13}\) Only 38 percent have a choice,

\(^{10}\) Besen/Mitchell April 11 Revised Declaration, WC Docket No. 16-143, ¶ 41 (filed April 11, 2016).

\(^{11}\) See Letter from Jennifer P. Bagg, Sprint’s Counsel, WC Docket No. 16-143 (filed Sept. 28, 2016), Attachment at 2-4.

\(^{12}\) BDS Further Notice, ¶ 224.

\(^{13}\) Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 2016 Broadband Progress Report, FCC 16-6, ¶ 86 & Table 6 (Jan. 29, 2016) (“2016 Broadband Progress Report”).
but the FCC has not provided us with additional detail of how many residential customers have three or more choices—most likely because it is a tiny fraction of American consumers. There is evidence that when a third provider enters the market, prices drop and the telco and cable incumbents respond, including increasing speeds, upgrading their infrastructure, and lowering prices.\textsuperscript{14} Thus, moving from two to three options in the marketplace is very beneficial for consumers. But the barriers to entry often cannot be surmounted. Moreover, mobile broadband is not a true substitute for most residential subscribers as the data limitations and costs are significant factors that limit the substitutability of mobile for fixed broadband Internet access service.\textsuperscript{15}


\textsuperscript{15} A limited number of Americans—only 13%—have cut the broadband cord and rely solely on mobile broadband. Home Broadband 2015, Pew Research Center, available at http://www.pewinternet.org/2015/12/21/home-broadband-2015/. The Commission has stated that “American consumers simply do not treat the two services as functional substitutes.” 2016 Broadband Progress Report, ¶ 40.
IV. The Commission Must Reject Requests to Roll Back Market-Opening Rules and Policies That Are Needed to Enable Retail Competition.

Certain commenters in the instant proceeding encourage the FCC to roll back tariffing requirements,\textsuperscript{16} technology transitions protections,\textsuperscript{17} UNE and resale obligations,\textsuperscript{18} interconnection regulations,\textsuperscript{19} Part 32 rules,\textsuperscript{20} and pole attachment and conduit access.\textsuperscript{21} The Commission must reject any actions that would further increase the ability of large ILECs to abuse their market positions to foreclose competition. Competitors rely upon all of these provisions to provide alternative options to business customers. If left to negotiate for wholesale access to the last mile or access to poles via private contract alone, large ILECs will charge even more unreasonable rates and impose unreasonable terms and conditions—should they even agree to provide service/access at all. Indeed, numerous INCOMPAS members have already experienced large ILECs refusing to interconnect for the exchange of VoIP traffic under the Act. We would expect to see the same results without regulations affording affordable access to wholesale bottleneck inputs, interconnection, and other competitive protections. In particular, tariffing of services purchased by competitors to serve their customers is an efficient and

\textsuperscript{16} See USTA Comments at 11-12; Verizon Comments at 9-10.

\textsuperscript{17} See USTA Comments at 13-16; Verizon Comments at 10-11.

\textsuperscript{18} See USTA Comments at 5 & 7; CenturyLink Comments at 10-11.

\textsuperscript{19} See USTA Comments, Appendix; CenturyLink Comments at 10-11.

\textsuperscript{20} See USTA Comments, Appendix; Verizon Comments at 11-12; CenturyLink Comments at 17.

\textsuperscript{21} CenturyLink Comments at 12-13.
important mechanism for incumbents and competitors alike. With the tariffing regime, parties can avoid lengthy negotiations. It also ensures that services are available to all competitors on a non-discriminatory basis. Tariffed services are an important complement to unbundled network elements, which serve an important role ensuring affordable competitive alternatives in the retail business solutions marketplace.

In addition, Part 32 accounting remains important, especially with respect to pole attachment rates competitors pay to ILECs. Modifications to Part 32 rules could impact the availability of sufficient information to ensure that ILEC pole attachment rates are reasonable. Likewise, the suggestion that competitors obtain access to poles, ducts, and conduits at below market rates is unsupported and should be rejected. The claim that ILECs have no special advantages with respect to poles, ducts, conduits, and rights-of-way is nonsensical given that ILECs have enjoyed first-mover advantage by government for a century. As the FCC stated in December of last year in denying ILECs forbearance of the obligation to provide pole attachments:

The Commission has recognized Congress’s insistence that, by virtue of their size and exclusive control over access to poles, incumbent LECs and public utilities are ‘unquestionably in a position to extract monopoly rents,’ and that Congress granted the Commission full authority to ensure that pole attachments are provided on just and reasonable rates, terms, and conditions.

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In deploying their own networks, competitors must often attach to the pre-existing infrastructure of incumbents. Indeed, as Commissioner Pai has suggested, the Commission should consider how lower pole attachment rates may further the competitive broadband deployment objectives of the nation:

If we want more affordable broadband and more competition, we need to take a fresh look at our pole attachment rates. We should reduce those rates by excluding capital expenses from the pole attachment formula (currently, ISPs have to pay for a pole owner’s capital expenses even when the pole owner has already recovered them separately). And we should commence a rulemaking to review the reasonableness of costs charged by pole owners for preparing poles, ducts, conduits, and rights-of-way for pole attachments.24

Reforms that streamline the make-ready process for Commission-regulated poles should be considered as well. To the extent there are barriers to incumbent deployment, then the Commission should consider how it can rectify that situation, but as the Commission has already found, the Telecom Act’s imposition of “different obligations on different classes of providers is not inherently unfair.”25 Because incumbents continue to benefit from their historical advantages, the Commission should be suspect of claims that regulations should be rolled back just because there are differences in application when they can be otherwise justified to enable competitive deployment and more options for consumers and businesses.


25 Forbearance Order ¶ 82.
It would be particularly arbitrary and capricious for the Commission to rescind recently adopted protections to ensure that competition is not adversely impacted by the ongoing technology transitions. In its August 2015 *Technology Transitions Report and Order*, the Commission found that it would serve the public interest for competitive providers to continue to provide broadband services that are vital inputs for small- and medium-sized business and enterprise users, including mobile carriers. There, the Commission stated:

> the organizations these carriers serve benefit from this competition in their purchase of communications services, which helps them serve their customers better and more efficiently.\(^\text{26}\)

Indeed, the Commission recognized that competitive local exchange carriers are the principal source of competition to ILECs in the enterprise market.\(^\text{27}\) In particular, the Commission recognized the critical role that access to certain wholesale input services play in enabling retail business solutions competition and emphasized that technology transitions should not be used as an excuse to limit existing competition.\(^\text{28}\) Accordingly, the Commission adopted a requirement that ILECs offer reasonably comparable wholesale IP last-mile access to competitors as a condition of discontinuance of its TDM services, pending the Commission’s determination that it


\(^{27}\) *Id.* ¶ 137.

\(^{28}\) *Id.* ¶ 6.
has implemented a policy regime that will ensure rates, terms, and conditions for business data
services are just and reasonable.

Many competitive carriers use ILEC-provided TDM wholesale inputs, such as DS1 and
DS3 business data services, to serve as the “last-mile” access to their customers. Hundreds of
thousands of such connections are in place today, actively connecting entities of all sizes to the
fiber networks and advanced services of their competitive providers. Accordingly, the
Commission concluded that an ILEC that seeks to discontinue a TDM-based business data
service used as a wholesale input by competitive carriers must, as a condition to obtaining
discontinuance authority, provide competitive carriers reasonably comparable wholesale access
on reasonably comparable rates, terms and conditions.29 Similarly, the Commission required that
ILECs provide a reasonably comparable replacement product for its wholesale voice platform
services when they transition their networks to IP. The Commission adopted these requirements
“to protect consumers, preserve the extent of existing competition, and facilitate technology
transition[s]” and, in particular, to ensure that small- and medium-sized businesses, schools,
government entities, healthcare facilities, libraries and other enterprise “end-users do not lose
service and continue to have choices for communications services.”30 Accordingly, these
requirements are still necessary and should not be eliminated.

29 *Id.* ¶ 132.

30 *Id.* ¶ 101 (emphasis added).
INCOMPAS also opposes attempts to roll back Section 251(c) interconnection obligations of incumbents that are critical to enabling competitive wired and wireless options. In particular, INCOMPAS has previously discussed at length its positions on voice interconnection, and we incorporate by reference those discussions. Without the 251(c) protections, competitors expect that incumbents will have no incentive to agree to reasonable interconnection arrangements; therefore, the Commission should reject those requests.

None of the commenters has set forth sufficient reasons for the Commission to consider rolling back any of the regulations and policies that are needed to enable competition. As stated by the Commission:

Section 11 reflects the legislative judgment that the development of meaningful economic competition in the telecommunications marketplace should yield a different regulatory framework from that designed for a non-competitive market characterized by few service providers or a monopoly. In other words, Section 11 obligates the Commission to reassess constantly the state of competition and directs the Commission to act when it determines that competition, and not regulation, can meet some or all of the objectives of a particular rule. As such, we believe that Congress intended the Commission to focus its Section 11 inquiry on whether meaningful competition exists. This qualitative assessment of competition would then undergird our determinations about the continued need for particular rules.


The lack of competitive alternatives for last mile, interconnection, and access to poles/conduit should not only give the Commission serious pause, it should halt any consideration of rolling back those regulatory protections that competitors rely upon to offer options in the retail marketplace.

V. The Open Internet Rules Enable Over-the-Top Competition to Flourish, and the Commission Must Not Repeal the Rules or Reclassify Broadband Internet Access Service.

Those calling for a reversal of the Open Internet rules and/or reclassification of broadband Internet access service have failed to provide sufficient justification for such action.\(^{33}\) Twice the U.S. Court of Appeals for the D.C. Circuit has agreed with the Commission that broadband Internet access service providers represent a threat to Internet openness and could act in ways that would ultimately inhibit its availability.\(^{34}\) None of the commenters has provided sufficient reasons for the Commission to reverse itself. Without rational and valid reasons for reversing its Open Internet rules and/or reclassification, a reviewing court would likely find such action to be arbitrary and capricious.

The Open Internet protections are important to ensure that consumers have access to the lawful content of their choosing without, for example, blocking, degradation, or discrimination

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\(^{33}\) USTA Comments at 10-11; CTIA Comments at 6-9; CenturyLink Comments at 20-22.

\(^{34}\) Verizon v. FCC, 740 F.3d 623, 645 (D.C. Cir. 2014); USTA v. FCC, 825 F.3d 674 (D.C. Cir. 2016).
by their provider—protections that many providers have endorsed.\textsuperscript{35} Moreover, they are critical for ensuring that consumers have access to competitive applications and services that compete directly against broadband Internet access service providers’ other services. The Commission’s carefully tailored rules need the strong legal foundation of Title II or the Commission risks its ability to enforce the rules. Accordingly, reversing reclassification of broadband Internet access service and/or Open Internet protections altogether must be rejected.

VI. Conclusion

As the Commission undertakes its biennial review, INCOMPAS urges the Commission to reject rolling back those regulatory protections that enable retail solutions competition in the communications marketplace and are needed to ensure that consumers and businesses of all sizes have competitive options. We also urge the Commission not to reverse course on its Open Internet rules or its reclassification decision.

Respectfully submitted,

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January 3, 2017

\textsuperscript{35} See Opposition of Intervenors to Petitioners’ Motion for Stay, Case No. 15-1063 (May 22, 2015) (attaching a number of declarations from broadband Internet access service providers supporting the FCC’s Open Internet rules and reclassification decision).