

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

In the Matter of)	
)	
)	
Office of Economics and Analytics Seeks)	GN Docket No. 22-203
Comment on the State of Competition in)	
the Communications Marketplace)	
)	

COMMENTS OF INCOMPAS

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

July 1, 2022

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION AND SUMMARY	1
II. THE FIXED BIAS MARKETPLACE IS HIGHLY CONCENTRATED. CONSUMERS AND SMALL BUSINESSES HAVE INSUFFICIENT CHOICE.....	5
III. THE FCC SHOULD CONTINUE TO VIEW FIXED AND MOBILE BIAS SERVICES AS SEPARATE, COMPLEMENTARY, NON- SUBSTITUTABLE SERVICES.....	8
IV. ANY CONCLUSIONS DRAWN ABOUT COMPETITION IN THE FIXED BIAS MARKETPLACE MUST BE BASED ON ACCURATE AND VERIFIABLE DATA.....	12
(a) Measuring Competition for Fixed BIAS Must be Carefully Evaluated and Based on Accurate and Verifiable Data.....	12
(i) The FCC Must Be Wary of Relying on Form 477 And Broadband Data Collection Information for Competition Analysis.....	12
(ii) The FCC Should Clarify Which Facilities-Based Providers Must Submit Data for the New Broadband Maps in Order to Have the Most Accurate Information of Competition in the Market.....	16
(iii) The FCC Should Publicly Report the Data Regarding All Speeds That Providers Report, Including up to 1 Gigabit and Beyond.....	18
(b) The FCC Should Separately Assess Competition in the Business Data Services Market.....	21
V. COMPETITIVE BROADBAND PROVIDERS CONTINUE TO FACE SIGNIFICANT BARRIERS TO DEPLOYING THEIR NETWORKS.....	24
(a) Examples of Barriers to Deployment for Competitive Providers.....	24
(b) Access to MTEs Enables Broadband Competition.....	30
VI. A NEW STREAMING ERA IS BRINGING RENEWED COMPETITION TO THE VIDEO MARKETPLACE.....	33
VII. CONCLUSION.....	39

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

In the Matter of)	
)	
)	
Office of Economics and Analytics Seeks)	GN Docket No. 22-203
Comment on the State of Competition in)	
the Communications Marketplace)	
)	

COMMENTS OF INCOMPAS

INCOMPAS, by its undersigned counsel, hereby submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Public Notice that seeks input on the state of the communications marketplace to inform the Commission’s required assessment of the state of competition in the communications marketplace in its upcoming *Communications Marketplace Report* (“2022 Report”) to Congress.¹

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

¹ See *Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, FCC Public Notice, GN Docket No. 22-302 (rel. May 16, 2022) (“*Public Notice*”).

sizes, including regional fiber providers; transit and backbone providers that carry broadband and Internet traffic; online video distributors (“OVDs”) which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

The Commission’s role in encouraging broadband deployment—both mobile and fixed—and protecting and promoting broadband competition is key to ensuring that residential and business customers will have a choice for their broadband provider as well as the online services and applications they may choose to take over those broadband connections.

INCOMPAS’ members are at the forefront of helping Americans get better, faster internet service and online content at prices they can afford. Competition in the marketplace is the leading driver for more affordability, innovation, speed and better customer service. Additional competition is key to tackling our nation’s internet challenges.

Last year, INCOMPAS launched its BroadLAND campaign, which calls for Internet for All²—a goal that has been wholeheartedly adopted by a bipartisan Congress and the Biden Administration.³ INCOMPAS has advocated that U.S. policymakers should continue to promote the competitive policies that work to enable competition and consumer benefits by prioritizing networks of the future rather than slower legacy networks of the past. This includes investing in fiber network deployment as a backbone for all network connectivity, including fixed broadband,

² See *Broadland*, an INCOMPAS project that advocates for Internet for All with competition as its guide, co-chaired by Former FCC Commissioner Clyburn and INCOMPAS CEO Chip Pickering, available at <https://broadlandusa.com/>.

³ See, e.g., FACT SHEET: Biden-Harris Administration’s “Internet for All” Initiative: Bringing affordable, reliable high-speed internet to everyone in America, available at <https://www.ntia.doc.gov/other-publication/2022/fact-sheet-biden-harris-administration-s-internet-all-initiative-bringing>.

cable, mobile, 5G, and satellite. With the billions of dollars allocated by Congress to deploy broadband networks through the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), American Rescue Plan Act (“ARPA”), and Investment Infrastructure and Jobs Act (“IIJA”), INCOMPAS has led the advocacy for investment in future-proof fiber wherever possible that will help support all broadband technologies in the marketplace. Treasury and NTIA have heeded our advice, and they both are encouraging states to invest federal dollars in this future-proof technology as much as possible. Moreover, INCOMPAS has asserted that through competitive grant processes and reasonable wholesale access policies that encourage more than one provider in the marketplace—government policy can ensure consumers and small businesses have more than one monopoly BIAS provider in the marketplace.⁴

Likewise, the investment made by Congress in the Emergency Connectivity Fund, the Emergency Broadband Benefit, and other Internet for All equity programs will help bridge the ongoing digital divide. A number of INCOMPAS’ members are participating in these programs to ensure that the choice they offer in the marketplace also are reflected in these programs so consumers can connect to high-speed broadband. Indeed, recently two of INCOMPAS’ members—Starry and IdeaTek⁵—were featured at a White House event for BIAS providers who

⁴ See INCOMPAS Press Release, *INCOMPAS to NTIA: Broadband Infrastructure Money Must Build Competition, Not Monopolies* (Feb. 4, 2022), available at <https://www.incompas.org/content.asp?admin=Y&contentid=689>; see also INCOMPAS NTIA Comments (Feb. 4, 2022), at 19-24, available at [https://www.incompas.org/Files/filings/2022/02-04-22%20INCOMPAS%20Comments-%20NTIA%20IIJA%20Broadband%20Programs%20\(Docket%20NTIA-2021-0002\).pdf](https://www.incompas.org/Files/filings/2022/02-04-22%20INCOMPAS%20Comments-%20NTIA%20IIJA%20Broadband%20Programs%20(Docket%20NTIA-2021-0002).pdf). NTIA has included reasonable wholesale access as one of the criteria for state consideration in the BEAD program. See NTIA BEAD Notice of Funding Opportunity, at 44-46, 69, available at <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>.

⁵ IdeaTek is transforming the lives of families and small businesses in rural Kansas with its fiber service, and Starry is offering low-cost, high-speed connectivity solutions to customers living in

are bringing high-speed service to low-income consumers through the Affordable Connectivity Program.⁶

For over two decades, the Communications Act has required that the Commission promote competition and customer choice and to protect consumers in the provision of communications services.⁷ As such, INCOMPAS supports the goal of the RAY BAUM'S Act that the Commission assess the state of broadband competition in its Communications Marketplace Report, and we appreciate the opportunity to weigh in on how the Commission can accomplish this goal. The fixed BIAS marketplace, as well as the business data services marketplace, remain highly concentrated in most geographic areas.⁸ INCOMPAS has urged the Commission to collect and assess the necessary data to determine where there is insufficient choice and then implement policies that will promote more choice, enabling more opportunities for competition to thrive, and in turn, for consumers to benefit with internet access that delivers faster speeds, better customer service, and affordable prices.

These comments aim to provide the FCC with information to enable and promote competition in the communications marketplace by providing data and insight on the following: (1) the importance of using accurate broadband data when analyzing competition in the fixed

apartment and public housing complexes in large metro areas across the nation with its fixed wireless service.

⁶ See INCOMPAS Press Release, *INCOMPAS Statement on White House Effort to Lower Internet Prices and Increase Speeds, with Praise for IdeaTek and Starry* (May 9, 2022), available at <https://www.incompas.org/content.asp?admin=Y&contentid=699>.

⁷ 47 U.S.C. § 1302(b).

⁸ Most Americans have only two BIAS options at home—typically from their cable operator or their incumbent telco. Some benefit from a third option—a fiber provider or in some limited cases a fixed wireless provider.

BIAS marketplace; (2) why the FCC should separately assess competition in the BDS market; (3) why the FCC should continue to treat fixed and mobile BIAS as separate, complementary services; (4) the barriers that many broadband providers still face when deploying their networks and the helpful FCC actions that have helped lift these barriers, including more access to MTEs; and (5) how certain policies and trends have led to increased competition and consumer choice in the video market and the rise of streaming (OVD) services and the potential new barriers they may face that could deter such competition and new broadband network deployment.

II. THE FIXED BIAS MARKETPLACE IS HIGHLY CONCENTRATED. CONSUMERS AND SMALL BUSINESSES HAVE INSUFFICIENT CHOICE.

In its 2022 Communications Marketplace Report, the Commission should find that the fixed BIAS marketplace is highly concentrated. As recently found by Leichtman Research Group, Inc., the top fixed BIAS providers—representing about 96% of the market—“account for about 109.3 million subscribers, with top cable companies having about 75.6 million broadband subscribers, top wireline phone [(telco)] companies having about 32.3 million subscribers, and top fixed wireless services having about 1.4 million subscribers.”⁹ Generally, the top cable and telco companies do not compete against each other in their respective categories, but cable and telco compete against each other—with cable able to offer higher speeds where telcos have not upgraded their networks from copper to fiber.

Comcast has almost 30% of fixed BIAS market share, followed by Charter with about 28% of market share, AT&T with approximately 14% of market share, then Verizon with almost

⁹ Leichtman Research Group, Inc. Press Release, *About 1,065,000 Added Broadband in 1Q 2022; Fixed Wireless Services Accounted for Half of the Net Adds in the Quarter* (May 18, 2022), available at <https://www.leichtmanresearch.com/about-1065000-added-broadband-in-1q-2022/>.

7% of market share.¹⁰ These four providers have almost 80% of the fixed BIAS market. Accordingly, most consumers only have two choices for their home BIAS provider—their incumbent cable or telco provider; some may have a third-party offering from a competitor, such as an INCOMPAS member—like Starry, IdeaTek, Sonic in the Bay Area of California, or Google Fiber in one of its markets. Leichtman Research Group notes that the fixed wireless offerings from Verizon and T-Mobile (their 5G home services) have garnered some subscribers—approximately 1.4 million.¹¹ (No other competitive fixed BIAS offering makes the list of top providers by Leichtman Research Group.)

The FCC’s data shows that for higher speed fixed BIAS, customers often face even less choice, with many having only one option. INCOMPAS has reviewed the most recent information the FCC has made available for multiple provider options for fixed terrestrial service—which happens to be in its *2020 Communications Marketplace Report*, and it confirms that the higher the speed offering the less competition there is.¹²

In its *2020 Communications Marketplace Report*, the Commission fails to fully engage with the reality that most Americans face—and that is the real lack of effective competition for their home broadband internet access service. Indeed, the Commission states that:

[O]ur data understate the benefits that come from competition because: (1) fixed Internet service providers have strong incentives, even when facing a single competitor, to capture

¹⁰ *Id.*

¹¹ *Id.*

¹² As we explain below, the FCC’s Form 477 was not designed to accurately assess competition, and we advise the Commission to begin using the appropriate caveats in the *Communications Marketplace Report* as it has done in its *Internet Access Service Reports* and on its website to explain this significant limitation. Moreover, we also believe it is important for the FCC to clarify if it is counting fixed wireless for purposes of assessing whether consumers have multiple options as it noted that it likely overstates fixed wireless availability due to the low subscriber numbers. See *2020 Communications Marketplace Report*, at ¶ 278.

customers or induce greater use of their networks; and (2) competitive pressures often have spillover effects across a given provider, meaning an Internet service provider facing competition broadly, if not universally, will tend to treat customers that do not have a competitive choice as if they do.¹³

But where there are only one to two options for higher speed BIAS—as so many Americans currently face at higher speeds—they are frustrated by the lack of options and higher prices. INCOMPAS urges the Commission to evaluate more closely and comprehensively the impact of competition where a third provider has entered the market with their own broadband infrastructure.

It is important that the FCC’s analysis take into account whether customers switch providers when offered better pricing or terms of service—not just whether service territories overlap. The FCC’s prior *Communications Marketplace Reports* did not consider the impact that competition has on pricing and service quality, leaving the evaluation of the market incomplete—despite the fact that the Government Accountability Office (“GAO”) has criticized the FCC for not doing so.¹⁴

While the Commission collects some pricing information for fixed BIAS, it may lack adequate information for analyzing the impact competition has on pricing and service quality. Thus, for purposes of its fixed broadband competition analysis, it could use the publicly available pricing information of BIAS providers and conduct a consumer survey on pricing, quality of service, and switching behavior in diverse geographic areas (urban, suburban, and rural areas) to be included in the 2022 Report. INCOMPAS believes the Commission should undertake

¹³ 2020 *Communications Marketplace Report*, at ¶ 105 (citing *FCC Restoring Internet Freedom Order*).

¹⁴ See U.S. Government Accountability Office, *Broadband: Additional Stakeholder Input Could Inform FCC Actions To Promote Competition*, GAO-17-742 (rel. Sep. 19, 2017), available at <https://www.gao.gov/products/GAO-17-742>.

consumer surveys in urban, suburban, and rural America to better understand whether and how the number of competitors impact switching of service providers, pricing, and service quality, including the availability of higher speeds.

III. THE FCC SHOULD CONTINUE TO VIEW FIXED AND MOBILE BIAS SERVICES AS SEPARATE, COMPLEMENTARY, NON-SUBSTITUTABLE SERVICES.

Consumers are using (1) fixed BIAS at home and (2) mobile BIAS on the go. Consumers prefer access to both fixed and mobile broadband service as each service plays a critical, yet distinct role, and the FCC has agreed that the availability of both types of service are necessary for finding that broadband service is available under Section 706 of the Communications Act. The experience of using these services is distinctly different and the Commission should continue to treat fixed and mobile as separate, complementary services rather than as substitutes.¹⁵

Fixed wireline (especially fiber) typically delivers faster, more robust BIAS connections. Consumers expect a high-speed fixed broadband service when they move to a new home. Indeed, where it is not available, it is more difficult to sell a house.¹⁶ When we are at our office or in our homes, our fixed connections are faster, we can stream and consume long-form video much more

¹⁵ See *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Fourteenth Broadband Deployment Report, GN Docket No. 20-269, at ¶¶ 10-11 (rel. Jan. 19, 2021). See also *Communications Marketplace Report, 2020 Communications Marketplace Report* (rel. Dec. 31, 2020), at ¶ 131.

¹⁶ See Ryan Knutson, *How Fast Internet Affects Home Prices*, Wall Street Journal (June 30, 2015, 6:35 PM), available at <https://www.wsj.com/articles/SB11064341213388534269604581077972897822358>. See also National Association of Realtors, *Impact of Broadband on Property Values* (July 17, 2019), available at <https://realtorparty.realtor/community-outreach/rural-outreach-initiative/news-resources/impact-of-broadband>.

easily, and most of us do not have to worry about hitting a data cap. Indeed, we turn on our Wi-Fi on our mobile handsets to help us manage our limited mobile data plans.

On the other hand, mobile connections provide the convenience of access, but typically at slower speeds and higher prices. When we are on the go, we use our mobile device to stay connected. We check email for work, talk on the phone, and use apps to manage our business and social lives. Sometimes our mobile connection is strong, and sometimes it is not. Americans typically are paying more for their mobile broadband connection, so many users limit how much they use to avoid going over their data caps and paying more. They use Wi-Fi wherever possible to save their data usage for when Wi-Fi is not available.

Notably, Americans are continuing to subscribe to both mobile and BIAS subscriptions, which shows that they are complementary rather than substitutable services. Last year, Pew found that smartphone ownership has increased among American adults from 81% to 85% since 2019 and that home broadband subscriptions have increased from 73% to 77%.¹⁷ Further, Leichtman Research Group found that 87% of U.S. households purchase home broadband¹⁸ and that 2.95 million homes added broadband subscriptions from top providers in 2021.¹⁹

¹⁷ Pew Research Center, *Mobile Technology and Home Broadband 2021* (June 3, 2021), available at <https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/>.

¹⁸ Leichtman Research Group, Press Release, *87% of U.S. Households Get an Internet Service at Home*, (Dec. 28, 2021), available at <https://www.leichtmanresearch.com/87-of-u-s-households-get-an-internet-service-at-home/>.

¹⁹ Leichtman Research Group, *About 2,950,000 Added Broadband From Top Providers In 2021* (March 7, 2022), available at <https://www.leichtmanresearch.com/wp-content/uploads/2022/03/LRG-Press-Release-3-7-2022.pdf>.

Simultaneously, only 15% of U.S. adults are “smartphone-only internet users,” meaning that they do not have a traditional high-speed internet connection at home.²⁰

Demand for connectivity at home and the need for robust capacity and higher speeds are increasing, especially as a result of the changes American society has experienced due to the COVID-19 pandemic. Consumers are using BIAS at home to work, access education, entertain themselves, shop, and stay connected to friends and family, among many other uses, and they need sufficient connectivity at home to do so. Even as our society has reopened, more employees are working from home at least some of the time and are reliant on their fixed BIAS to do their jobs. Moreover, multiple family members are using broadband simultaneously at homes across America through laptops, tablets, gaming devices, and smartphones, and the number of connected devices is growing.

Higher broadband speeds, where available, have allowed residential consumers to adopt new applications that compete with legacy services. For example, consumers can now stream video content online more affordably, rather than subscribing to a traditional cable or MVPD service. In fact, consumers are “cutting the cord” for video in record numbers.²¹ Most Americans and businesses continue to use a fixed BIAS because mobile BIAS is not a sufficient substitute. Accordingly, access to both fixed and mobile BIAS is necessary to meet the needs of

²⁰ *Id.*

²¹ *See infra* section vi.

consumers.²² FCC data also confirms this as both fixed and mobile BIAS subscriptions continue to rise.²³

Mobile BIAS is purchased locally and based on coverage needs for consumers and businesses. Consumers may have the choice of a regional provider, in addition to at least three nationwide providers from which to choose, with one of INCOMPAS' members—DISH—entering the market as a fourth option as a result of DOJ conditions to the merger of Sprint and T-Mobile. By empowering DISH as the fourth national provider, consumers have already and will continue to benefit from the retail competition, as well as the additional wholesale opportunity that smaller wireless builders will have through the DISH network. DISH is a disrupter with a long history of providing service to underserved rural Americans and is well positioned to bring more mobile 5G competition to more communities. In fact, as of June 15, 2022, DISH is offering 5G broadband service to more than 20% of the U.S. population, adhering to the FCC's deadline for this milestone.²⁴ Moreover, with the adoption of eSIM technology as a merger condition, consumers will obtain greater portability and flexibility to

²² While 5G networks may have the promise of competing directly against fixed wireline, the Commission, the FCC should be very cautious including 5G in its fixed BIAS competition analysis. A substantial number of Americans would need to have sufficient access, along with a robust demonstration that consumers view 5G networks as substitutable for fixed wireline networks.

²³ Federal Communications Commission, *Internet Access Services: Status As Of June 30, 2019* (March 2022) (“*FCC Internet Access Service Report 2022*”), at 2, available at <https://docs.fcc.gov/public/attachments/DOC-381125A1.pdf> (explaining “total Internet connections increased by about 4.7% between June 2018 and June 2019 to 449 million. Mobile Internet connections increased 5.1% year-over-year to 336 million in June 2019, while fixed connections grew to 113 million – up about 3.3% from June 2018.”).

²⁴ *Dish Network Now Offers 5G To More Than 20% Of US Population*, Nasdaq (June 15, 2022), available at <https://www.nasdaq.com/articles/dish-network-now-offers-5g-to-more-than-20-of-us-population>.

switch mobile providers, also driving more competition in the retail mobile market.

IV. ANY CONCLUSIONS DRAWN ABOUT COMPETITION IN THE FIXED BIAS MARKETPLACE MUST BE BASED ON ACCURATE AND VERIFIABLE DATA.

Accurate broadband maps are necessary as they assist policymakers and the public know where there is, and more importantly where there is not, sufficient fixed BIAS coverage in the nation. As a result, it is critical that the FCC does not overstate coverage as it potentially impacts where broadband funding support is provided and impacts its findings on competition.

(a) Measuring Competition for Fixed BIAS Must be Carefully Evaluated and Based on Accurate and Verifiable Data.

It is important for the FCC to base its conclusions about the state of fixed BIAS competition on accurate and verifiable data at the local market level, and that it do so for residential (mass market) BIAS and BDS service, which businesses of all sizes use, including schools, libraries, hospitals, public safety and local, state and federal government agencies, and mobile wireless companies for backhaul to towers. Unfortunately, the FCC's prior *Communications Marketplace Reports* fall woefully short of this objective, and the Commission should take the necessary steps to course correct.

(i) The FCC Must Be Wary of Relying on Form 477 and Broadband Data Collection Information for Competition Analysis.

Broadband connections and services should be currently physically available to consumers in order for the FCC to count them in its competition analysis. Because both residential and business users purchase their broadband services locally, geographic markets for fixed broadband, including BIAS and BDS, are based on where a person lives or where a business is located.

In its *Public Notice*, the FCC seeks comment on which data sources it should use to evaluate competition or deployment of fixed services. Specifically, the Commission seeks comment on whether it should continue to rely solely on the FCC Form 477 coverage data or whether there are alternative data sources it should consider, such as data from the Broadband Data Collection (“BDC”).²⁵ The BDC data must be submitted by providers to the Commission starting June 30, 2022 and is due on September 1, 2022.²⁶ Given the timeframe associated with this new data collection, the FCC seeks comment on whether it can include the fixed BDC data in the upcoming Communications Marketplace Report or whether it should continue to rely solely on FCC Form 477 coverage data for the upcoming Report.²⁷ Unfortunately, the FCC’s current Form 477 data is insufficient for purposes of evaluating competition for fixed BIAS.

Regarding the Form 477, there have been a number of concerns raised about the sufficiency of the information and assessments from the FCC’s current Form 477 data collections. Indeed, the Commission has recognized with increasing clarity the limitations of its Form 477 data, which led Congress to pass the Broadband DATA Act and create a new data collection process for the FCC.²⁸ The new BDC collection data will not be fully collected by the time the upcoming Report is published, and so the FCC proposes to continue relying on the Form 477 in the meantime in order to draw competition conclusions about the fixed BIAS marketplace. However, the Form 477 data does not lend itself to sound analysis of fixed BIAS

²⁵ *Public Notice*, at 5-6.

²⁶ *Id.* at 6.

²⁷ *Id.*

²⁸ See Broadband Deployment Accuracy and Technological Availability Act (or the Broadband DATA Act), 47 U.S.C. §§ 641—646 (2020).

availability or competition. This is because providers indicate where they “could” provide service in their Form 477 submissions—not where they *actually* provide service. To make matters worse, the Commission's existing approach, which treats any census block where a provider “could” provide service as entirely served even where the provider only indicates that it “could” offer service to a single location within the census block, overstates the amount of availability *and* competition. Even the FCC’s website states:

A provider that reports deployment of a particular technology and bandwidth in a particular census block may not necessarily offer that particular service everywhere in the census block. Accordingly, a list of providers deployed in a census block does not necessarily reflect the number of choices available to any particular household or business location in that block, and the number of such providers in the census block does not purport to measure competition.²⁹

As noted above, this caveat is necessary because the Form 477 information indicates a census block is served even where a broadband provider does not *actually* provide service, but *could* do so to *only one* location in a census block. The FCC qualifies its data as not measuring competition on its website and its Internet Access Service Report because it knows that doing so is very likely an overstatement of competitive choice of broadband providers.

Regrettably, the FCC failed to heed INCOMPAS’ warning and abandoned its previous practice of not using the Form 477 data for competitive analysis of fixed broadband in its Communications Marketplace Report released in December 2018 and again in 2020.³⁰ It should

²⁹ See FCC, *Explanation of Broadband Deployment Data, Block-Level Deployment and Competition*, available at <https://www.fcc.gov/general/explanation-broadband-deployment-data> (last visited June 30, 2022). See also *FCC Internet Access Service Report 2022*, at 6, (“A provider that reports offering service in a particular census block may not offer service, or service at that speed, to all locations in the census block. Accordingly, the number of providers shown in Figure 4 does not necessarily reflect the number of choices available to a particular household and does not purport to measure competition.”).

³⁰ See *Communications Marketplace Report, 2020 Communications Marketplace Report* (GN Docket No. 20-60) (rel. Dec. 30, 2020), at ¶ 69 (stating “[w]hile some consumers criticize as

not make the same mistake again. It is arbitrary and capricious for the FCC to properly caveat the severe limitations of its data in some of its reports specifically stating that the data cannot be used to measure competition and then in the Communications Marketplace Report use the same data to do just that—measure competition. If the Commission continues to rely on the Form 477 data, it should make clear that the data the FCC is relying upon does not accurately indicate the competitive options for consumers. The FCC can do so by adding the same caveat it uses in its Internet Access Service Report to its Communications Marketplace Report, which properly clarifies that the data the FCC relies upon does not measure actual competition.

Moreover, we also believe it is important for the FCC to clarify if it is counting fixed wireless for purposes of assessing whether consumers have multiple options. The Commission noted in the *2020 Communications Marketplace Report* that it likely overstates fixed wireless availability due to the low subscriber numbers for this technology.³¹ Thus, it is important that in its presentation of the fixed BIAS, access to multiple providers section, it should include this caveat as well in Figures II.B.23-31, if applicable.

Furthermore, INCOMPAS is concerned about the FCC relying on the BDC data in its upcoming report without first undergoing appropriate public review and comment of the data. INCOMPAS fully supports the FCC seeking this new data so that it has more accurate availability data for specific locations. However, the BDC collection process is due by

overly inclusive the use of census-block reporting for fixed providers, these data remain the best and most granular data available for our analysis at this point in time.”). We understand that this is the best information that the FCC may have, but its unwillingness to use the appropriate caveats consistently in all its reports is arbitrary and capricious and should be rectified in its 2022 Report that provides information about Access to Multiple Providers in its Fixed section. *Id.* ¶¶ 125-129.

³¹ *2020 Communications Marketplace Report*, at ¶ 278.

September 1, 2022 and then the FCC must still set up a challenge process for the public to challenge the data. It is unlikely that this timeline will provide the FCC with verifiable, accurate information by the time it makes its conclusions about competition in the marketplace for its upcoming Report. Moreover, INCOMPAS urges the Commission to consider making its tentative conclusions for fixed BIAS competition from the BDC data publicly available for review, and it should seek public comment before it makes any final determinations or conclusions on competition in the fixed BIAS marketplace.³²

(ii) The FCC Should Clarify Which Facilities-Based Providers Must Submit Data for the New Broadband Maps in Order to Have the Most Accurate Information of Competition in the Market.

INCOMPAS is concerned with how broadly the FCC has defined facilities-based competition in its mapping proceeding.³³ The Commission is relying on its current, outdated definition of the “facilities-based providers,” which includes providers who are relying on but have not built out their broadband network infrastructure. This definition is contrary to the Broadband DATA Act’s plain language that the new broadband coverage maps should rely on data filed by providers who have “actually built out the broadband network infrastructure of the provider such that the provider is able to provide that service.”³⁴ The FCC’s current definition

³² INCOMPAS also reiterates immediately below its comments made in the BDC process, that the Commission’s collection of information from UNE and BDS providers who rely on last-mile access from other providers are being treated as “facilities-based providers” and are required to submit to the broadband map. However, their presence in the market today could be a misleading indicator of competition because as UNEs are being transitioned out of the market, and as BDS prices rise, competitors relying on such access may discontinue their BIAS service in that area where they cannot make a business case to build their own last-mile facilities.

³³ See INCOMPAS Comments, *Establishing the Digital Opportunity Data Collection and Modernizing the FCC Form 477 Data Program*, WC Docket Nos. 19-195 & 11-10.

³⁴ 47 U.S.C. § 642(b)(2)(A)(i)(I).

of a facilities-based provider currently includes providers who do not meet the Broadband DATA Act's requirement that they "actually built out the broadband network infrastructure of the provider." Instead, the FCC's definition is broader than the statutory definition, which will lead to information that overstates the availability of broadband infrastructure.

Congress was so specific in its language to require providers who have built out the broadband network infrastructure to file their broadband mapping data because Congress wants the maps to be based on the broadband infrastructure built by those who have deployed that infrastructure in order to avoid the overstatement of broadband infrastructure availability.³⁵ The Commission's current information based on the Form 477 already poses significant challenges due to the overstatement of such availability. The Broadband DATA Act specifically was passed to solve these types of problems, and it is imperative that the Commission follow the Broadband DATA Act's plain directive here or risk the production of maps that continue to misstate the availability of broadband network infrastructure.

Most notably, the FCC's definition would mean that any provider using UNEs, business data services ("BDS" or "special access"), or leasing other facilities to offer broadband service will be obligated to file maps. However, UNEs, BDS, and other leased facilities have not actually been built out by the provider. Rather, they are leased from the company who deployed the infrastructure and therefore have a different role regarding competition in the market. The FCC should exclude or distinguish UNEs and BDS from the rest of the facilities-based providers' data so that it does not overstate the amount of facilities-based providers in the

³⁵ Broadband DATA Act Report, at 2 (Dec. 12, 2019) (describing how FCC maps are critical for determining where federal resources should go to build broadband infrastructure; "[h]owever, the use of Form 477 data by the FCC to develop broadband maps has come under scrutiny. A general criticism of using this data to build broadband maps is that the way the FCC directs providers to report broadband deployment data is unreliable.").

market. It is not real facilities-based competition if it is based on someone else’s network investment. Adding equipment onto a network does not mean that the provider is building out a new network and therefore it should not be considered to be a network for purposes of the broadband maps or competition analysis. Moreover, most UNEs are transitioning out of the market and the deregulation of BDS has led to price increased making it a less viable and competitive option.

(iii) The FCC Should Publicly Report the Data Regarding All Speeds That Providers Report, Including up to 1 Gigabit and Beyond.

The 2022 Communications Marketplace Report should include all speeds providers report, including up to 1 Gigabit and beyond. Reporting data at the higher broadband speed availability is consistent with the FCC's *Rural Digital Opportunity Fund Order*. In that proceeding, the FCC determined that its current 25/3 Mbps broadband definition is minimally adequate looking forward, in contrast to the Gigabit speeds (1000/500 Mbps) that the Commission preferred in its RDOF auction that supports advanced networks over the next ten years.³⁶ Additionally, as the *RDOF Order* recognizes with its baseline 50/5 Mbps tier, moving beyond 25/3 Mbps service is critical for “meeting the ‘immediate broadband needs’ of consumers today” and the deployment of future-proof networks such as fiber.³⁷ Indeed, INCOMPAS has urged the Commission to adopt 1 Gbps down as the metric for broadband service, to better promote fiber deployment deeper into the networks.³⁸ Meeting these higher-

³⁶ *Rural Digital Opportunity Fund*, Report and Order, FCC No. 20-5, WC Docket Nos. 19-126, 10-90, ¶¶ 4, 33, 38 (rel. Feb. 7, 2020) (“*RDOF Order*”).

³⁷ *RDOF Order*, at ¶¶ 31, 35.

³⁸ See, e.g., Comments of INCOMPAS, WC Docket Nos. 19-126, 10-90, at 6-7 n.3 (filed Sept. 20, 2019) (“*INCOMPAS RDOF Comments*”) (agreeing with NCTA—The Internet and Television Association’s statement that the United States “must transition from an era defined by

capacity needs require carriers to upgrade their facilities, a process that INCOMPAS members have jumpstarted.³⁹

Moreover, Congress has also prioritized future-proof broadband infrastructure investment which can offer higher broadband speeds in its recent COVID-relief funding and the Infrastructure Investment and Jobs Act. As a result, the Treasury Department’s final guidance on the American Rescue Plan encourage recipients to prioritize investments in fiber infrastructure wherever feasible and also require recipients “to design projects to, upon completion, reliably meet or exceed symmetrical 100 Mbps download and upload speeds” in the last mile.⁴⁰ NTIA’s Notice of Funding Opportunity for the BEAD program likewise encourages investment in fiber where possible because it allows for more affordable upgrades over time to accommodate future online growth demand. Today, we are seeing INCOMPAS members deploy up to 10 Gbps capabilities in the last mile. In urban and suburban areas, most consumers who are purchasing from a large incumbent cable ISPs are taking at least 100/20 Mbps service in their homes,⁴¹ and that is the level of service (or higher) most advertised by incumbents.⁴² In fact, Ookla finds that the average U.S. fixed internet download speed is now

megabits to one which gigabit connectivity is unleashed” to maintain its global leadership in fixed broadband and fiber deployment).

³⁹ See *INCOMPAS RDOF Comments*, at 6 (“Where our members have deployed competitive fiber, they are able to offer 1 Gigabit symmetrical service at reasonable prices.”).

⁴⁰ U.S. Department of Treasury, *Coronavirus State & Local Fiscal Recovery Funds: Overview of the Final Rule* (Jan. 2022), at 39, available at <https://home.treasury.gov/system/files/136/SLFRF-Final-Rule-Overview.pdf>.

⁴¹ FCC subscriber data collected before the pandemic shows that about 60% of fixed broadband was for 100 Mbps download or higher service. See FCC, *Fourteenth Broadband Deployment Report* (rel. Jan. 19, 2021), at Fig. 11, available at <https://docs.fcc.gov/public/attachments/FCC-21-18A1.pdf>.

⁴² Using the FCC’s Broadband Speed Guide, a household with two telecommuters and two to three remote learners today are estimated to need 100 Mbps download to work simultaneously.

211.41 Mbps and upload speed is 77.80 Mbps, and more consumers are moving to higher speeds and broadband services that offer symmetrical upload because of the shift to uses that are based on creation rather than consumption.⁴³

INCOMPAS' members are offering symmetrical speed to homes, and consumers are taking at least 100/100 Mbps and beginning to move to 1 Gigabit symmetrical and higher. With two-way video needs for work, education, and healthcare increasing significantly, and uploading data related to these endeavors, INCOMPAS' members are seeing the demand for higher symmetrical services. Symmetrical internet is critical for students, businesses, telecommuters, and content creators. This is because these types of Internet users often upload PDFs, large graphic files, and videos to the internet so that they can share them with clients, coworkers, teachers, and students. Uploading files that are 1 gigabyte in size can take significantly longer with only 10 Mbps upload—15 minutes as compared to 1.5 minutes at 100 Mbps.⁴⁴ And with more people working and schooling from home and the number of devices connected to the Internet increasing, upload speed is critical to meeting the economic needs of the nation. Moreover, the nation's leading ISPs and their trade associations recognize that 90% of Americans have access to networks providing downstream speeds of at least 100 Mbps.⁴⁵

See Federal Communications Commission, *Broadband Speed Guide*, available at <https://www.fcc.gov/consumers/guides/broadband-speed-guide>. It is not surprising that Americans are buying higher speeds, and ISPs are responding.

⁴³ See Ookla Speedtest, *United States's Mobile and Fixed Broadband Internet Speeds*, available at <https://www.speedtest.net/global-index/united-states> (as of December 2021).

⁴⁴ Catherine McNally, *What is Symmetrical Internet?*, Reviews.org (Feb. 22, 2022), available at <https://www.reviews.org/internet-service/what-is-symmetrical-internet/>.

⁴⁵ America's Broadband Future, News Release, *New National Coalition: It's Time To Ensure All Americans Can Connect To The Internet* (May 14, 2021), available at <https://americasbroadbandfuture.org/2021/05/press-release-5-14-2021-2/>.

We should be certain that all Americans have at least such access, but much more will be needed over time as more devices are connected and more content moves online.

Indeed, last year INCOMPAS released a new report highlighting the gigabit speed initiatives set by other nations, including China, the E.U. and the U.K.⁴⁶ The report illustrates the investment commitment made by other nations to fiber infrastructure, and how far behind the United States would fall without significant investment into deploying fiber-based networks as fast as possible. The *2020 Communications Marketplace Report* makes similar observations about other countries' commitments to upgrading their broadband infrastructure to meet future online demands.⁴⁷ Thus, it is appropriate for the Commission to expand its reporting and analysis beyond 250/25 Mbps.

(b) The FCC Should Separately Assess Competition in the Business Data Services Market.

The FCC should include a separate assessment of business data services (“BDS”) in its 2022 Report and reverse its prior practice of ignoring this market in its *Communications Marketplace Reports*. Many businesses still rely on BDS, including small, mid-sized and large businesses, schools, libraries, health care facilities, government entities, and wireless providers (for backhaul). The FCC defines BDS as “the dedicated point-to-point transmission of data at certain guaranteed speeds and service levels using high-capacity connections.”⁴⁸ Enterprise

⁴⁶ INCOMPAS/BroadLand Report, *Global Gigabit Goals - The Race to Faster Broadband Speeds*, available at [https://www.incompas.org/Files/filings/2021/FINAL%201%20Gigabit%20and%20Fiber%20Goals%20in%20Other%20Nations%204%20\(2\).pdf](https://www.incompas.org/Files/filings/2021/FINAL%201%20Gigabit%20and%20Fiber%20Goals%20in%20Other%20Nations%204%20(2).pdf).

⁴⁷ *2020 Communications Marketplace Report*, ¶¶ 307-308.

⁴⁸ *Business Data Services in an Internet Protocol Environment, Technology Transitions, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access*

customers use BDS “to enable secure and reliable transfer of data” and include services such as DS1 and DS3 interoffice facilities and channel terminations between incumbent local exchange carriers and interexchange carriers.⁴⁹

The assessment of competition for BDS should be limited to that product market. BDS is purchased by an enterprise customer at a specific business location. Data collected in the FCC’s most recent assessment of BDS competition demonstrated that 77% of locations with business data services demand had only a *single* full facilities-based provider (i.e. a provider with its own loop facilities to the customer’s premises) available at their location.⁵⁰ This figure jumped to 84% for locations with less than 100 Mbps of cumulative demand.⁵¹ In 2017, the FCC prematurely deregulated BDS pricing based on what have been so far unproven predictions of the potential of a single alternative facilities-based provider entering a market.⁵² In response, the incumbent telcos have raised prices.⁵³ For example, since the *BDS Order*,

Services, WC Docket No. 16-143, GN Docket No. 13-5, WC Docket No, 05-25, RM-10593, Report and Order, FCC 17-43, at 5 ¶ 6 (rel. Apr. 28, 2017) (“*BDS Report and Order*”).

⁴⁹ *Id.*

⁵⁰ *See id.* at 191.

⁵¹ *See* Letter from John T. Nakahata, Counsel to Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-143 et al., at 5 (filed Oct. 21, 2016).

⁵² *BDS Report and Order*, at ¶ 87.

⁵³ *Compare* CenturyLink, *Operating Companies Interstate Service Guide*, No. 11 Release 1, § 7.11.4.C.1.a (May 1, 2018) (Wyoming monthly per mile mileage rate of \$15.60), *available at* http://www.centurylink.com/tariffs/fcc_cloc_acc_isg_no_11_part1.pdf, *with* CenturyLink, *Operating Companies Interstate Service Guide*, No. 11 § Release 2, 7.11.4.C.1.a (May 1, 2019), *available at* http://www.centurylink.com/tariffs/pending_changes.pdf (Wyoming monthly per mile mileage rate of \$29.01 [86% increase]); *See also* Comments of Sprint, WC Docket Nos. 17-144, 16-143, 05-25 (filed Feb. 8, 2019), at 8 (“In 2018, a large price cap ILEC explicitly informed Sprint that it is marking up TDM BDS rates, for channel terminations and transport alike, across portions of its service territory newly deregulated by the 2017 BDS Order.”).

CenturyLink has increased the rates for special access DS1 channel terminations across the board in its price-cap and price-flexibility wire centers, whether urban or rural.⁵⁴ INCOMPAS' prior comments noted the significant price increases since the *BDS Order*,⁵⁵ and these price increases have not abated. For example, prior to the *BDS Order*, CenturyLink's rate for DS1 channel terminations was \$139.35/mo. However, these rates have now increased to \$510.59/mo, which is 3.7x the rate pre-*BDS Order*. This marks a 266% increase in price since before the *BDS Order* whereas in 2020 the highest price increase had been 150%. Furthermore, prior to the *BDS Order*, CenturyLink's rates for 8 miles of DS1 transport pre-BDS order was \$198.40/mo. However, these rates have now increased to \$501.02/mo, which is 2.5x the rate pre-*BDS order*. This marks a 153% increase in price since before the *BDS Order* whereas in 2020 the highest price increase had been 54%.

Another INCOMPAS member directed us to their experience in a rural area of Michigan served by an ILEC. In 2017—the year the *BDS Order* was released—a 23-mile DS3 circuit had monthly recurring rates totaling \$1,165. However, in 2018 the rates were increased to \$2,703 (a 132% increase over the 2017 rate); in 2019 the rates were increased to \$9,579 (a 722% increase over the 2017 rate); in 2020 the rates were increased to \$11,570 (a 893% increase over the 2017 rate); and in 2022 the rates were increased to \$18,706 (a 1,506% increase over the 2017 rate). INCOMPAS members have experienced similar price increases from the other ILECs as well, including AT&T. These BDS price increases demonstrate the

⁵⁴ Declaration of Douglas Denney, at ¶¶ 7-8, attached to Letter from Douglas Denney, Vice President, Costs & Policy, Allstream Business US, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 19-308 (filed Mar. 20, 2020).

⁵⁵ See Comments of INCOMPAS, GN Docket No. 20-60, at 14-16 (filed April 27, 2020).

lack of competition in the marketplace and are a basis for the Commission to conclude that its prediction that competition would increase in the BDS market was inaccurate and accordingly should be revisited.⁵⁶

V. COMPETITIVE BROADBAND PROVIDERS CONTINUE TO FACE SIGNIFICANT BARRIERS TO DEPLOYING THEIR NETWORKS.

Regardless of their business plans—whether fiber transport, fixed wireless, or mobile wireless—INCOMPAS members rely on the seamless and speedy deployment of fiber networks for their success. It is expensive and time-consuming for competitive fiber providers to build, and there are significant barriers that they face when they can make the business case to do so.⁵⁷ Such barriers and delays are particularly problematic for providers building with borrowed capital, which creates added pressure to deliver networks and revenues on a predictable, timely basis.

(a) Examples of Barriers to Deployment for Competitive Providers.

The FCC has taken a number of steps in recent years to address these barriers to entry. INCOMPAS commends the Commission for its focus on broadband deployment, and its actions to remove barriers to broadband deployment, including its adoption of a “one-touch, make-

⁵⁶ *BDS Report Order*, at ¶ 92 (“While competition may not be universal, it is sufficiently widespread for us to have confidence that a combination of these factors will broadly protect against the risk of supracompetitive rates *and* being charged by price cap LECs over the short- to medium-term [defined as over several years in paragraph 124].”).

⁵⁷ See Reply Comments of INCOMPAS, WC Docket No. 17-108 (Aug. 30, 2017), Exhibit B, David S. Evans, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, at 35-37 (Aug. 29, 2017), available at <https://www.incompas.org/files/INCOMPAS%20RIF%20Reply%20Comments-30Aug%20FINAL.pdf>.

ready” regime for pole attachments.⁵⁸ As a result, INCOMPAS members report that they have been able to deploy faster, benefitting more customers since these decisions. That the Ninth Circuit Court of Appeals has upheld the Commission’s efforts is further proof that the Commission is taking a reasoned and thoughtful approach to eliminating barriers to the deployment of the next generation of communications networks.⁵⁹

For wireless deployment, which is reliant on wireline fiber networks, the FCC also has streamlined processes to encourage builds, including 5G network rollout.⁶⁰ The need for dense fiber deployment across the country is more critical for the roll-out of 5G technology.⁶¹

With the introduction of 5G, the expectation is that more devices will be connected online. For example, the number of Internet of Things (“IoT”) devices is expected to grow worldwide to

⁵⁸ See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705, 7711-75, paras. 13-139 (2018) (“*Third Wireline Infrastructure Order*”).

⁵⁹ See *City of Portland v. United States, et al.*, No. 18-72689, *et al.* at 19-21 (9th Cir. Aug. 12, 2020).

⁶⁰ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 (rel. Sept. 27, 2018).

⁶¹ Unfortunately, the Commission’s reclassification of broadband Internet access service from a telecommunications service to an information service in its *Restoring Internet Freedom Order* has created another barrier to entry for BIAS providers. Section 224 of the Communications Act confers the rights to access poles, conduit, ducts, or rights-of-way at reasonable and non-discriminatory rates and in reasonable periods of time only on telecommunications service providers and cable operators. INCOMPAS is deeply concerned that competitive BIAS providers must now offer either a telecommunication service or cable service to qualify for Section 224 access. This puts BIAS-only providers at a significant competitive disadvantage as a pole owner can now refuse access, charge higher rates, and/or discriminate against them. See Comments of INCOMPAS, *In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 17-108, 17-287, 11-42 (filed Apr. 20, 2020), at 6-8.

14.4 billion active connections in 2022 and to approximately 27 billion by 2025.⁶² Given the data demands, there will be a significant need for more wired backhaul—*i.e.*, fiber, to carry wireless traffic. As such, continued efforts to streamline both wired and wireless deployments are important to enable faster and more cost-effective broadband networks to be built.

However, it is important to acknowledge that competitive providers face barriers when it comes to the lack of streamlined permitting processes and timelines for fiber.⁶³ INCOMPAS' members consistently face delays in permitting and gaining access to the public rights-of-way,⁶⁴ but we need new, fast networks, fast. Moreover, with new infrastructure funding being allocated to State and Local governments, it is necessary to have guidelines in place that enable faster processing that will allow the deployment of wired and wireless broadband infrastructure more quickly.

INCOMPAS supports increasing broadband providers' access to public rights-of-way, accelerating approval of permits, and asking state and local governments, utilities, and railroads to charge fees that are based only on their actual, objectively reasonable costs. We have encouraged federal, state, and local governments and others who control access to rights-of-way to provide as much transparency as possible of their fees, and to speed the approval process for

⁶² *State of IoT 2022: Number of connected IoT devices growing 18% to 14.4 billion globally*, IOT ANALYTICS (May 18, 2022), available at <https://iot-analytics.com/number-connected-iot-devices/>.

⁶³ Reply Comments of INCOMPAS at 7-10, WTB Docket No. 17-79 (filed July 17, 2017) (“Carriers must navigate multiple and frequently overlapping jurisdictions to obtain the needed franchises, permits, and zoning approvals.”).

⁶⁴ *See., e.g.*, Letter from Thomas Jones, Counsel for Zayo Group, LLC, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 17-79 & WC Docket No. 17-84 (filed Oct. 31, 2019) (“[M]any local and state governments condition [its] access to public rights of way for the purpose of deploying wireline facilities on the payment of above-cost and discriminatory access fees as well as on compliance with ambiguous in-kind contribution requirements.”).

permitting of new broadband networks. To that end, INCOMPAS has encouraged policymakers to encourage everyone involved to publicly disclose their fees, and ensure that they are competitively and technology neutral, nondiscriminatory and based on their actual, objectively reasonable costs for networks to access the ROW, poles, and conduit.

INCOMPAS and its members are actively engaged in outreach to develop constructive partnerships and to educate local and state policymakers that expanding fiber networks is a win-win for municipalities and carriers alike, as leveraging gigabit-level internet will allow these areas to attract new business and create jobs. INCOMPAS members make every effort to understand the concerns of municipalities and to negotiate mutually beneficial rights-of-way/franchise agreements whenever possible. Many cities, recognizing the value of fiber networks to economic development, welcome competitive fiber providers with reasonable rights-of-way agreements geared to recouping only the costs of managing the rights-of-way. INCOMPAS members routinely engage in negotiations with such cities to reach agreements, and collectively these companies pay substantial revenues to cities in the form of annual rights-of-way fees. The worst disputes that INCOMPAS members face stem from moratoria or other efforts to bar the timely deployment of fiber, or from rates that are entirely unrelated to the cost of managing the public rights-of-way.

INCOMPAS previously supported a petition filed at the FCC requesting preemption of above-cost duplicative rights-of-way fees for a fiber network in Missouri that is impeding further competitive fiber deployment.⁶⁵ In its comments, INCOMPAS demonstrates how that specific case is in conflict with Section 253, and we appreciate the Commission's decision to clarify that

⁶⁵ See generally Comments of INCOMPAS, WC Docket No. 20-46 (filed March 23, 2020).

situation and its preemption of the unreasonable double charging of fees for one network's presence in the rights-of-way.⁶⁶ In our comments in that proceeding, we also urge the Commission to adopt the principle of "one network pays" for access to rights-of-way such that government fees must be based on the costs of network deployment *by the network operator in the public rights-of-way* consistent with Section 253.⁶⁷ In other words, only the company that actually deploys, operates, and maintains the network in question pays the franchise/rights-of-way fees. Embracing this concept would deter state and local governments from pursuing the increasingly popular trend of looking to third party content providers, including OVDs and DBS providers that impose no deployment costs whatsoever on municipalities, for new revenue through state and local franchise/rights-of-way fee schemes that clearly violate the Communications Act.⁶⁸ As we discuss below in the next section on OVDs, such misplaced fees potentially impact the availability of those services, which are providing alternative competitive choices for consumers, as well as driving more demand for higher-speed broadband networks.

INCOMPAS members also face issues from pole owners concerning attachments that are required to deliver competitive broadband services—from outright prohibitions to attach to excessive fees charged, including requirements that poles be replaced at competitors' expense—there are myriad pole issues that INCOMPAS members cannot always work around and that deter competitive deployment. As we discussed above, INCOMPAS members work with their

⁶⁶ See *Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC*, Declaratory Ruling, WC Docket No. 20-46 (rel. Nov. 9, 2020).

⁶⁷ Comments of INCOMPAS, WC Docket No. 20-46, at 11-13. Similarly, only one cable company should pay franchise fees pursuant to Section 621 for the cable network that is deployed, operated, and maintained in the public rights-of-way.

⁶⁸ *Id.* at 11-13.

local and state officials and other invested stakeholders to deploy their competitive network infrastructure which leads to better, faster and more affordable broadband being available in wholesale and retail broadband markets. We appreciate that the Commission recognizes that pole attachment and replacement issues remain prevalent, and that the agency is now exploring how to ensure that new broadband network deployments are not deterred.⁶⁹

In our previous comments filed in this docket, INCOMPAS argued that in order to speed competitive broadband deployment in both rural and urban areas, there must be a more transparent, just, and reasonable process that ensures a fair allocation of replacement costs between pole owners and new attachers seeking to use the poles.⁷⁰ In our most recent comments filed in response to the FCC's Second Further Notice, we discussed how INCOMPAS members' efforts to attach facilities to poles is routinely stymied by pole owners unwilling to expand the capacity of their poles without recovering *unreasonable* pole replacement costs and timely consideration of pole attachment requests.⁷¹ This is a critical issue in urban and suburban America as it is impeding competitive providers' deployment of their competitive services which are sorely needed given the lack of alternative broadband options available in most markets throughout the U.S. Members have faced pole owners who refuse attachments because poles are overloaded, yet will lash fiber to their copper on those same poles. INCOMPAS continues to encourage that the Commission adopt a more comprehensive set of rules that close the gaps on the "inconsistent practices" of utilities which have resulted in new attachers bearing the primary

⁶⁹ See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Second Further Notice of Proposed Rulemaking, WC Docket No. 17-84 (rel. March 18, 2022).

⁷⁰ See Comments of INCOMPAS, WC Docket No. 17-84, 7 (filed Sep. 2, 2020).

⁷¹ See generally Comments of INCOMPAS, WC Docket No. 17-84 (filed June 27, 2022).

burden of pole replacement costs, even when utilities directly benefit from such replacement. Furthermore, the FCC should require utilities to share information with potential attachers concerning the condition and replacement status of their poles. Finally, the Commission should streamline the dispute process to expedite resolution and ensure rapid deployment of broadband facilities in both unserved and underserved communities.

INCOMPAS has long supported the FCC's focus on lowering barriers to broadband deployment. To further enable competitive fiber builds and fixed broadband competition, we encourage the FCC to complete its wireline and wireless deployment proceedings and adopt the remaining policies INCOMPAS supports, including (1) shot clocks applicable to wireline fiber deployment applications (as was done for wireless deployment), and (2) limiting rights-of-way use charges and siting application fees, consistent with Sections 253 and 332 of the Communications Act.⁷²

(b) Access to MTEs Enables Broadband Competition.

INCOMPAS has also sought to improve competitive broadband providers' access to multiple tenant environments ("MTEs"), which will improve fixed broadband competition. Introducing more broadband choice will unlock lower prices, faster speeds, and better customer service for tens of millions of Americans living in apartment buildings, condominium complexes, affordable housing and small businesses operating in shopping malls and other commercial properties. Ending broadband monopolies in MTEs and enabling greater competition will kickstart a deployment revolution for fiber and faster speed services and INCOMPAS congratulates the Commission for taking action earlier this year to reduce commercial barriers to entry in MTEs after evidence of a growing disparity between consumer demand for increased

⁷² Reply Comments of INCOMPAS, WTB Docket No. 17-79, at 7-10 (filed July 17, 2017).

internet speeds, lower prices, and competition and what MTE owners and landlords actually make available to their residents became apparent.⁷³

Specifically, the Commission adopted targeted prohibitions of certain commercial arrangements that have a particularly negative effect on competition. The Commission’s restrictions on exclusive and graduated revenue sharing⁷⁴ and exclusive marketing arrangements, as well as its declaratory ruling that sale-and-leaseback arrangements are prohibited under the Commission’s rules should reduce the ability of incumbent communications providers and landlords to circumvent the Commission’s rules on exclusive access and exclude competitive providers from serving MTEs. INCOMPAS urges the Commission to carefully monitor the MTE market to determine whether or not its recently adopted rules are having the intended effect on competition and further refine its rules if the agency finds that providers and landlords are using any potential gaps to exclude new entrants.⁷⁵

While the Commission has taken important and necessary steps to prohibit practices that stifle competition or are used as artificial barriers to deny competitors’ access to MTEs, the Commission’s recent Order indicated that these were “incremental steps” and did not address

⁷³ 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) (“*MTE Order*”).

⁷⁴ The effect of revenue sharing—if not the outright purpose—is to stifle competition. The use of revenue sharing arrangements has created an expectation on the part of landlords, such that competitive broadband and video providers that are unable or unwilling to participate in revenue sharing schemes are denied access.

⁷⁵ For example, the Commission should determine whether or not its new requirement that providers disclose the existence of an exclusive marketing arrangements that the provider has with an MTE owner is having the effect of making consumers aware that they have the option to choose their broadband provider. See *MTE Order* at para. 33. If not, the Commission should consider prohibiting exclusive marketing agreements.

other issues that were raised in the record, including exclusive wiring arrangements, bulk billing, and rooftop antenna and DAS facilities access.⁷⁶ Our members report that these issues can have a significant impact on their ability to gain access to MTEs and compete for enterprise and small business customers. In commercial MTEs, building owners have significant bargaining power and are often using that power to create local monopolies that force the largest retailers in the country to do business with one service provider, even though many of these companies seek service diversification and network redundancy for transactions and operations.⁷⁷ Furthermore, some commercial MTEs have exclusive wiring installation agreements that require competitive providers to use specific wiring vendors.⁷⁸ In these instances, the owner, who owns the rights to the wiring, becomes a monopoly, and while exclusive wiring agreements are not as pervasive as revenue sharing agreements, they can still amount to de facto exclusive access agreements, particularly where buildings have only one set of wires. INCOMPAS supports further action to prohibit these practices, which amount to an end-run around current FCC rules that are intended to promote competitive options, and INCOMPAS recommends that the Commission issue a Further Notice of Proposed Rulemaking to collect evidence on the harms of the remaining issues raised in the docket.

⁷⁶ See *MTE Order* at note 37.

⁷⁷ Despite many retail tenants having national agreements with specific broadband providers, including our members, shopping center owners are still interfering with those relationships and making it incredibly difficult and sometimes impossible, for competitive providers to serve customers. As INCOMPAS and others in the record have explained, even where competitive providers that are permitted to serve their customers, they are typically required to buy wholesale service from a pre-approved provider at exorbitant prices.

⁷⁸ See Comments of INCOMPAS, GN Docket No. 17-142 (filed Oct. 20, 2021), at 18 (“INCOMPAS MTE Comments”).

Finally, competitive providers have an improved business case where they can serve MTEs and are more likely to deploy next generation networks in surrounding communities where they have competitive entry into multifamily buildings. Therefore, INCOMPAS has urged the FCC to encourage local access laws that enable competitive entry.⁷⁹ An INCOMPAS member, located near San Francisco which passed a mandatory access law, is now able to provide fiber to thousands of new buildings, bringing a lower-cost, higher-speed 1 gigabit option to consumers in those buildings, as well as improving the business case for building fiber and 5G networks in the surrounding communities.⁸⁰ These laws put the choice of provider back in the hands of the consumer, allowing residents to decide when and if to switch services, and other cities and governments are following San Francisco's example.⁸¹ Given the current barriers to entry, INCOMPAS urges the FCC to encourage local access laws in order to improve broadband options in MTEs. The ability of competitors to gain access to these buildings will ensure the deployment of next-generation broadband networks (including the infrastructure for 5G), enable greater competition, and most importantly, lower prices for consumers.

VI. A NEW STREAMING ERA IS BRINGING RENEWED COMPETITION TO THE VIDEO MARKETPLACE.

The increasing availability of high-speed broadband has fundamentally changed the way consumers are watching video programming. As a result, we have seen competition in the video

⁷⁹ See INCOMPAS MTE Comments at 20-22 (highlighting that San Francisco's mandatory access law is a good example of a local regulation that lawfully eliminates a major barrier to entry for competitive providers and furthers the FCC's goals of accelerating deployment of high-speed Internet access).

⁸⁰ See Reply Comments of CALTEL, GN Docket No. 17-142, at 3 (Aug. 22, 2017).

⁸¹ See Reply Comments of the City of Boston, Massachusetts, MB Docket No. 17-91 (filed June 9, 2017), at 8.

marketplace rise due to video streaming services, which offer more choices and lower prices for consumers. Higher speed broadband at home now allows for numerous online video options for consumers, including a la carte, a skinny bundle, or an MVPD option online.

Online video distributors (“OVDs”), like Netflix and Amazon Prime Video, have led a revolution in the way consumers experience and access content.⁸² By making vast catalogs of movies, TV shows, and other content available to consumers at the touch of a button, streaming video on demand (“SVOD”) services are on the forefront of innovation and competition. These OVDs are now as important a part of the entertainment landscape and conversation about video competition as broadcasters and multi-channel video programming distributors (“MVPDs”). New services with both wide and specifically tailored appeal are constantly entering the marketplace and vying for consumers' attention.⁸³ Streaming video services have seen steady subscriber gains over the past several years. In fact, as the MPA reports, in 2021 online video

⁸² See Brooks Barnes, *The Streaming Era Has Finally Arrived. Everything Is About to Change.*, N.Y. TIMES (Nov. 18, 2019), available at <https://www.nytimes.com/2019/11/18/business/media/streaming-hollywood-revolution.html>.

⁸³ For example, at the end of 2019, Disney+ launched and quickly changed the marketplace. Within its first year, Disney+, had amassed over 50 million worldwide subscribers. Today, Disney+ has 87.6 million subscribers See Lisa Eadicicco, *Disney Plus already has 50 million subscribers around the world, even though it only launched 5 months ago*, BUSINESS INSIDER (Apr. 9, 2020, 9:45 AM), available at <https://www.businessinsider.com/disney-plus-streaming-subscriber-count-growth-50-million-2020-4>; see also David Pierce, *Disney Plus is now live in more than 50 new countries and territories* (June 14, 2022), available at <https://www.theverge.com/2022/6/14/23167230/disney-plus-new-countries-europe-africa-asia>.

More recently, HBO Max launched in May 2020 and ended March 2022 with 76.8 million global subscribers. Similarly, Paramount+ launched in March 2021 and as of May 2022 has increased to almost 40 million subscribers. See The Hollywood Reporter, *HBO Max and HBO Hit 76.8M Global Subs, and 48.6M in U.S., in Final AT&T Disclosure* (April 21, 2022), available at <https://www.hollywoodreporter.com/business/business-news/hbo-max-subscribers-grow-first-quarter-1235130203/>; see also The Verge, *Paramount Plus subscriber count has grown to nearly 40 million* (May 3, 2022), available at <https://www.theverge.com/2022/5/3/23055121/paramount-plus-subscriber-count-40-million>.

content viewing continued its upward trend reaching 352.9 billion views/transactions in the United States, which is a 6% increase from 2020, and there are now more than 135 online services providing movies and television shows to U.S. consumers.⁸⁴ Consumers have never had more access to or competition for the video content they want, whether through linear services, video applications, or online platforms.

For competitive broadband providers, the availability of OVD services has allowed them to focus on their core business. They no longer have to bundle a video product with their BIAS to attract subscribers. This is good for broadband investment as small competitive broadband providers faced high acquisition costs for video service, and it was not a profitable line of business. Now, consumers can obtain their own video service subscription separate from their BIAS, and they can pick and choose based on video offerings and/or price.

Of course, the shift to streaming is at least part of why traditional services have experienced declining subscribership over the last few years. In fact, the Leichtman Research Group found that, in direct contrast with the experience of OVDs, “the largest pay-TV providers in the U.S.—representing about 93% of the market—lost about 4,690,000 net video subscribers in 2021, compared to a pro forma net loss of about 4,870,000 subscribers in 2020.”⁸⁵ By the end of 2021, 71% of TV households nationwide have some form of pay-TV service, which is down

⁸⁴ Motion Picture Association, *Theme Report 2021* (2021), at 19, available at <https://www.motionpictures.org/wp-content/uploads/2022/03/MPA-2021-THEME-Report-FINAL.pdf>.

⁸⁵ Leichtman Research Group, Press Release, *Major Pay-TV Providers Lost About 4,700,000 Subscribers in 2021* (March 8, 2021), available at <https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-4700000-subscribers-in-2021/>.

from 82% in 2016, 87% in 2011, and 86% in 2006.⁸⁶ Consumers are actively seeking alternatives to cable and satellite as a result of a general dissatisfaction with increasing prices for these services and an increase in program carriage disputes between their service providers and broadcasters or cable channel operators.⁸⁷

As explained by the Congressional Research Service, video streaming services that use a subscription model “can compete by offering content at lower prices than their competitors.”⁸⁸ In turn, some MVPDs have responded by offering cheaper plans with fewer channels, and some streaming services that offer live TV advertise their services by promising no hidden fees, such as equipment rentals and cancellation fees, and no annual contracts.⁸⁹ In addition, cable and satellite companies have attempted to stem the tide of customers leaving their service by making changes to their pricing and service tiers through the introduction of “skinny bundles,” which feature fewer channels than traditional packages. Others have made the decision to launch new subscription-based digital products that will allow these companies to recover lost revenue.

In addition to OVDs, virtual MVPDs (“vMVPDs”), like YouTube TV and Sling TV have become an online alternative for linear cable and satellite offerings or traditional MVPDs. vMVPDs, which typically offer a “skinny bundle” of linear television channels via a broadband

⁸⁶ Leichtman Research Group, Press Release, *71% of TV Households Have a Live Pay-TV Service* (Oct. 26, 2021), available at <https://www.leichtmanresearch.com/71-of-tv-households-have-a-live-pay-tv-service/>.

⁸⁷ See Brad Adgate, *TV Station Blackouts Are Accelerating; Here’s Why*, FORBES (Nov. 12, 2019), available at <https://www.forbes.com/sites/bradadgate/2019/11/12/tv-station-blackouts-are-accelerating-heres-why/#583c2657f6c9> (reporting that there were 276 blackouts of broadcast TV station groups in 2019).

⁸⁸ Congressional Research Service, *Competition Among Video Streaming Services* (Sept. 2020), at 3, available at <https://sgp.fas.org/crs/misc/R46545.pdf>.

⁸⁹ *Id.*

connection, have made significant subscriber gains in the last few years and are viable and important players in the video marketplace.⁹⁰ Recent research indicates that up to 44% of customers that switch from a traditional pay-TV service are adopting a vMVPD to replace it.⁹¹ These trends show that consumers see vMVPD services as the next step in a new streaming era. In fact, Parks Associates predicts that the U.S. vMVPD subscriber base will increase to more than 23 million households by 2024 while traditional pay TV services will shrink to 53 million households during the same time period.⁹² Overall, streaming services have led to more competition in the video marketplace, which leads to more choice for consumers at a lower cost.

However, these companies also face significant challenges that have the potential to harm their ability to compete. One troubling trend that might deter competition is state and local efforts to single out certain online business models, like OVDs, to add a tax or fee to these services. These proposals have the potential to raise consumers' prices, deter new online entrants, and harm the competition and innovation that is driving online demand and new broadband network builds. To date, INCOMPAS has successfully fought against state legislative efforts,⁹³ and OVDs are defending against litigation brought by local franchising authorities who

⁹⁰ See Brad Adgate, *Virtual MVPD Subscriber Growth Is Slowing*, FORBES (Dec. 9, 2019), available at <https://www.forbes.com/sites/bradadgate/2019/12/09/virtual-mvdp-subscriber-growth-is-slowing/?sh=2f5dd5cb7016>.

⁹¹ Leichtman Research Group, Press Release, *44% with a vMVPD Switched From a Traditional Pay-TV Service* (Apr. 3, 2020), available at <https://www.leichtmanresearch.com/wp-content/uploads/2020/04/LRG-Press-Release-04-03-2020.pdf>.

⁹² Fierce Video, *U.S. vMVPD subscribers will total 23M by 2024: report* (July 8, 2021), available at <https://www.fiercevideo.com/video/u-s-vmvdp-subscribers-will-total-23m-by-2024-report>.

⁹³ See INCOMPAS Press Release, *INCOMPAS Praises Governor of Maine for Stopping Tax on Streaming Services and Broadband Providers* (June 30, 2021), available at <https://www.incompas.org/content.asp?admin=Y&contentid=644>.

are claiming that certain OVDs should pay local franchise fees. These legislative and litigation efforts are misguided and contrary to federal law as INCOMPAS discussed in its comments in 2020 as OVDs do not have networks that occupy the public rights-of-way.⁹⁴ Nonetheless, it is important that the Commission recognize that these types of state and local fees, if imposed, would have deleterious effects on OVDs and DBS providers and their consumers, potentially harming competitive options in the video marketplace.

Moreover, there is a lack of certainty for federal policies that ensure BIAS consumers will have access to the online content of their choice without unreasonable policies from their BIAS providers. INCOMPAS has long supported the FCC exercising its jurisdiction and authority to ensure that BIAS users have access to the online content and services of their choice without disruption and/or interference from their BIAS provider.⁹⁵ With the repeal of federal net neutrality protections, states have stepped in to fill the void. Nonetheless, these protections are not available in every state. Moreover, edge providers continue to face a highly concentrated BIAS marketplace with almost 80% of the residential last mile BIAS market being served by only four companies: Comcast, Charter (Spectrum), AT&T, and Verizon.⁹⁶ In our prior comments, INCOMPAS has discussed the discriminatory incentives of vertically integrated BIAS/MVPD providers, and the federal policies that helped address such incentives.⁹⁷ Those

⁹⁴ MO Legislation, Senate Bill SB No. 273, 100th Leg., 1st Sess. (Mo. 2019), *available at* <https://trackbill.com/bill/missouri-senate-bill-273-modifies-provisions-relating-to-video-service-providers/1636832/>. It is important to understand that local cable franchise authority is authorized and constrained under the Communications Act. *See* Comments of INCOMPAS, GN Docket No. 20-60, at 26-27 (filed April 27, 2020).

⁹⁵ *See, e.g., id.* at 17-22.

⁹⁶ *See supra* note 9.

⁹⁷ *See* Comments of INCOMPAS, GN Docket No. 20-60, at 17-22 (filed April 27, 2020).

policies are no longer in effect at the federal level. Thus, as the Commission considers the state of video competition in its Report, it must also consider that OVDs are subject to the practices of BIAS providers who are no longer obligated to abide by federal rules/policies that offered some protections from harmful practices. INCOMPAS has urged further review into the practices of large fixed BIAS providers who dominate the marketplace to ascertain any potential harm on OVDs, CDNs, and transit providers, and it would be appropriate in its upcoming Communications Marketplace Report for the Commission to identify those practices that should be further reviewed and modified to protect consumers and competition.

VII. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to consider and adopt the recommendations and data in its comments as it considers the best method by which to assess the state of competition in the various markets in its upcoming Communications Marketplace Report. Now, more than ever, Americans want access to faster, more robust and resilient broadband networks of the future. Competition is the driving force for network deployment and consumers' ability to access faster speeds, lower prices, and better customer service.

Respectfully submitted,

/s/ Angie Kronenberg

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

July 1, 2022