

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

In the Matter of)	
)	
Safeguarding and Securing the Open Internet)	WC Docket No. 23-320
)	

COMMENTS OF INCOMPAS

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SUMMARY

INCOMPAS supports a federal framework for net neutrality rules that the Federal Communications Commission (“FCC” or “Commission”) oversees by reclassifying broadband internet access service (“BIAS”) as a telecommunications service to ensure that residential and small business customers throughout the United States have access to an open internet so that they can access the lawful online content, applications, and services of their choice. We agree with the Commission’s Notice of Proposed Rulemaking (“*NPRM*”) that BIAS is an essential service that warrants Commission oversight due to consumer and small business reliance on BIAS. The fixed BIAS marketplace remains highly concentrated. Customers lack sufficient competitive options, which increases large, incumbent internet service providers’ (“ISPs”) gatekeeping power. While the mobile BIAS market is more competitive than the fixed market, there are still concerns about the ability of mobile providers to use their gatekeeper power. The lack of sufficient competition, the terminating gatekeeper power of BIAS providers, and their history of violating net neutrality policy warrants Commission oversight of both fixed and mobile BIAS providers.

In addition to reclassification of BIAS enabling the Commission to promulgate and enforce net neutrality rules pursuant to Title II (the only authority the court has upheld for the net neutrality rules), the FCC can enable broadband competition more effectively if BIAS is classified as a telecommunications service. BIAS-only providers will be able to exercise their rights to deploy broadband infrastructure and the protections afforded by Title II in the Act, including Sections 224 and 253 that will enable more competition in the BIAS marketplace—which is sorely needed. INCOMPAS specifically discusses the need for BIAS-only providers to

access poles, ducts, conduit, and multi-tenant environments (“MTEs”), as well as the ability to address local and state permitting and deployment access issues under Section 253.

INCOMPAS supports the reimposition of net neutrality rules and policies as proposed in the Commission’s *NPRM*, but we are concerned that the Commission may seek to impose many more regulations on BIAS providers than may be necessary or prudent. Indeed, we caution the Commission on some of the reasons it seeks to reclassify BIAS—including imposing Section 214, cybersecurity, and other requirements such as blocking robocalls and robotexts.

INCOMPAS fully explains its concerns for the imposition of ill-fitting regulation on BIAS providers without the full development of a record. The FCC has a history and appropriate role with respect to consumer protection and BIAS, but it must balance any new requirements against potential new burdens, especially for small BIAS providers. ISPs generally claim that they are following net neutrality policy; thus, reimposition of the FCC’s *2015 Open Internet Order* will not be a burden on them. INCOMPAS also cautions the agency on regulatory drift into areas of internet regulation, such as content delivery networks (“CDNs”), virtual private networks, and other areas in which the FCC has not traditionally had a role, lacks statutory authority, and/or there is no market failure, and we request that the Commission clarify that it is not regulating CDNs in this proceeding.

We agree with the Commission’s recommendation not to regulate BIAS retail rates, but we oppose forbearance of Section 254(d) that creates a legal barrier for the FCC to reform the Universal Service Fund (“Fund” or “USF”) contribution system, which is sorely needed to address the unreasonable high fee on telecommunications customers and to sustain the Fund for the long term, and we advocate for the Commission to forbear from Section 214.

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COMMENTS OF INCOMPAS

INCOMPAS, by the undersigned, respectfully submits these comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Notice of Proposed Rulemaking* (“NPRM”) to reestablish the agency’s authority over broadband internet access service (“BIAS”)¹ by classifying it as a telecommunications service under Title II of the Communications Act of 1934, as amended (“Communications Act”) and to reinstate net neutrality rules to ensure that customers throughout the United States have access to an open internet so that they can access the lawful online content, applications, and services of their choice.²

¹ At times, this pleading uses the terms “BIAS” and “broadband” interchangeably.

² *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-230, (rel. Oct. 20, 2023), available at <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>. (“NPRM”). INCOMPAS also is filing these comments in response to the Public Notice seeking comment on the Petitions for Reconsideration in WC Dockets Nos. 17-108, 17-287 & 11-42, and filing a motion in Appendix A to allow INCOMPAS’ comments to exceed the 25-page limit for our comments in response to those Petitions. FCC Public Notice, *Wireline Competition Bureau Seeks Comment on Petitions Seeking Reconsideration of the RIF Remand Order*, DA 23-996 (rel. Oct. 19, 2023), available at <https://docs.fcc.gov/public/attachments/DA-23-996A1.pdf>. INCOMPAS appreciates the opportunity to comment in these proceedings through one pleading. Because these issues are interrelated, INCOMPAS believes the agency and the interested parties will experience significant efficiencies by allowing the association to file one set of comments.

I. A FEDERAL NET NEUTRALITY FRAMEWORK ENSURES CUSTOMERS WILL HAVE ACCESS TO AN OPEN INTERNET THROUGHOUT THE UNITED STATES, AND INCOMPAS IS UNIQUELY POSITIONED TO PROVIDE THE AGENCY INPUT IN THE PROCEEDING.

INCOMPAS, the internet and competitive networks association, 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 offer 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 mobile and satellite entities offering BIAS and video services, as well as companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes, including regional fiber providers; transit and backbone providers that carry broadband and internet traffic; and 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 availability of BIAS connectivity and access to an open internet throughout the U.S. is critical for the nation’s economic development and global competitive edge, and INCOMPAS’ members are at the forefront of helping Americans get better, faster internet service and online content and services at prices they can afford.

The association has long supported a federal framework for open internet rules in the U.S. so that consumers can access the lawful online content and services of their choice.³ We

³ See, e.g., COMPTTEL Comments, GN Docket No. 14-28 (July 15, 2014), *available at* [https://www.incompas.org/Files/filings/2014/07-15-14 COMPTTEL Open Internet Comments.pdf](https://www.incompas.org/Files/filings/2014/07-15-14%20COMPTTEL%20Open%20Internet%20Comments.pdf); INCOMPAS Comments, WC Docket No. 17-108 (July 17, 2017), *available at* [https://www.incompas.org/files/INCOMPAS--RIF%20Comments%20WC%20Docket%20No %2017-108%20\(July%2017,%202017\).pdf](https://www.incompas.org/files/INCOMPAS--RIF%20Comments%20WC%20Docket%20No%2017-108%20(July%2017,%202017).pdf); Press Release, *INCOMPAS Files Petition in United States Court of Appeals to Stop FCC Net*

believe such a framework best ensures consumers and small businesses are protected in each state, and we have urged Congress to codify the protections of the *2015 Open Internet Order* in the Communications Act in a new Title.⁴ We continue to support a legislative solution that could end the political back and forth that this issue has become at the Commission (since 2010) based on the political party in control of the agency. This is because it is important to BIAS providers,⁵ edge providers, and internet users that there is certainty and predictability about the protections that apply—which has yet to be achieved. Without Congressional action, however, INCOMPAS believes the Commission can and should exercise its authority to classify BIAS as a telecommunications service and reinstate its net neutrality rules and maintain oversight of BIAS.

INCOMPAS believes that every customer deserves competitive options for their BIAS service and for the online content/services that are delivered over the internet.⁶ An appropriately-designed federal open internet framework expands competitive online options that enable more investment and innovation in the networks that make up the internet, including incumbent and

Neutrality Repeal (Apr. 24, 2018), available at <https://www.incompas.org/Files/filings/2018/04-24-18%20Net%20Neutrality%20Petition%20Release.pdf>.

⁴ See Press Release, *INCOMPAS Applauds Bold Action on Net Neutrality by Congressman Mike Coffman (R-CO): Praise for Rep. Coffman's '21st Century Internet Act' and Signing of CRA Discharge Petition*, (July 17, 2018) available at <https://www.incompas.org/Files/filings/2018/07-17-18%20Coffman%20Bill%20Release%20FINAL.pdf>.

⁵ This pleading sometimes refers to “BIAS providers” as “ISPs” (Internet Service Providers).

⁶ Separate fixed and mobile competitive options is key to meeting consumer expectations, and the FCC correctly treats these services as distinct product markets that are not substitutable. 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 (rel. Jan. 19, 2021), at para. 10 (“As in the 2020 Report, we continue the Commission’s practice of considering both fixed and mobile services as capable of independently meeting the definition of “advanced telecommunications capability” under section 706 . . . we find, consistent with the Commission’s findings in past reports, that fixed and mobile services are not full substitutes.”) (“2021 706 Inquiry”).

competitive BIAS networks and BIAS made available by resellers, which benefits consumers and businesses in every economic sector and supports the deployment of high-speed broadband networks. We explain further below the essential nature of BIAS in connecting customers to critical services and content and permitting them to work, school, and obtain medical care at home and on the go, among many other important uses.

INCOMPAS has long recognized that the D.C. Circuit's decisions related to the FCC's authority and net neutrality rules in *Comcast* and *Verizon* required the FCC to reclassify BIAS as a Title II telecommunications service to promulgate enforceable net neutrality rules (and not just an unenforceable policy), and we supported the FCC's *2015 Open Internet Order*.⁷ We also opposed the FCC's repeal of net neutrality rules during the last administration, and we filed a petition for reconsideration of the Commission's *Remand Order* in that proceeding, asserting that the *Remand Order* did not properly address the concerns of the U.S. Court of Appeals for the D.C. Circuit in *Mozilla* when considering how the reclassification of BIAS negatively impacts public safety and the ability of BIAS-only providers to access poles, ducts, and conduit via Section 224 of the federal Communications Act so that they can build out their competitive broadband networks.⁸ In our Petition, we asserted that "[u]nder the current case law, the Commission cannot ensure that the public interest is met in either of these areas but-for exercising its oversight authority pursuant to Title II with BIAS as a telecommunications

⁷ Press Release, *COMPTEL Comments on Chairman's Draft Order on Open Internet* (Feb. 4, 2015), available at https://www.incompas.org/Files/filings/2015/02-04-15_Open_Internet_NPRM_statement.pdf.

⁸ INCOMPAS Petition for Reconsideration, WC Dockets Nos. 17-108, 17-287 & 11-42 (Feb. 4, 2021), available at [https://www.incompas.org/Files/filings/2021/INCOMPAS'%20Petition%20for%20Reconsideration%20\(2.4.21\).pdf](https://www.incompas.org/Files/filings/2021/INCOMPAS'%20Petition%20for%20Reconsideration%20(2.4.21).pdf) (*"INCOMPAS Petition for Reconsideration"*).

service.”⁹ Other parties made similar arguments about the fact that BIAS must be a Title II service for the FCC to exercise its appropriate authority over broadband for public safety and universal service reasons.¹⁰ We urge the Commission to act on those petitions and reverse its findings in the *Remand Order* and reclassify BIAS as a Title II telecommunications service under the pending *2018 RIFO* docket. By doing so, the U.S. Court of Appeals for the D.C. Circuit can continue to review the issues in the pending proceeding with respect to the classification of BIAS as a telecommunications service. The Commission can simultaneously review the pending *NPRM* proceeding to determine the appropriate rules for net neutrality and what forbearance is appropriate from Title II provisions and associated regulations. Both actions can be included in one final Order from the agency that then could be reviewed by the court that has the extensive history and background on these issues.

INCOMPAS has a diverse membership that includes industry members that represent the entire internet value chain—from competitive BIAS providers (both those that own their own facilities and those that resell BIAS), to transit and edge providers¹¹—thus, we are uniquely positioned to weigh in on the proposed net neutrality rules, forbearance, and the Commission’s oversight of the BIAS marketplace. We caution the Commission on some of the areas it seeks to explore additional oversight of BIAS providers and the edge. As we explain further below, the

⁹ *Id.* at 1-2.

¹⁰ See, e.g., *Restoring Internet Freedom et al.*, Petition for Reconsideration of Common Cause, The Benton Institute For Broadband & Society, United Church Of Christ, OC Inc., National Hispanic Media Coalition, New America’s Open Technology Institute, and Free Press, WC Dockets Nos. 17-108, 17-287 & 11-42 (Feb. 8, 2021), *available at* <https://www.fcc.gov/ecfs/document/10208276724468/1>.

¹¹ A list of INCOMPAS members is available on our website: <https://www.incompas.org/memberlist.asp?contentid=2109>.

FCC has a history and appropriate role with respect to consumer protection and BIAS, but it must balance any new requirements against potential new burdens, especially for small BIAS providers. INCOMPAS also cautions the agency on regulatory drift into areas of internet regulation, such as CDNs, cybersecurity, robocall mitigation and other areas in which the FCC has not traditionally had a role, lacks statutory authority, and/or there is no market failure.

II. BROADBAND IS AN ESSENTIAL SERVICE THAT CONSUMERS AND SMALL BUSINESSES NEED.

We agree with the Commission's *NPRM* that BIAS is an essential service.¹² Consumers are using fixed BIAS at home to work, access education and health care services, 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 after COVID, more employees are working from home and are reliant on fixed BIAS to do their jobs.¹³ 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, like streaming video, that compete with legacy video and television services. Indeed, there's been a sizeable increase in streaming services that are available in the U.S. since the FCC's *2015 Open Internet Order*,¹⁴ and streaming services are

¹² *NPRM*, at paras. 17-19.

¹³ Jeffrey M. Jones, *Remote Work Stable at Higher Rate Post-Pandemic*, Gallup News (Sept. 15, 2023), available at <https://news.gallup.com/poll/510785/remote-work-stable-higher-rate-post-pandemic.aspx>.

¹⁴ The Commission has discussed the trend of new streaming entrants in its reports observing the increase of options to consumers. See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, MB Docket No. 14-16 (rel. Apr. 2, 2015), at paras. 268-270 ("Several OVDs launched during 2013 and the first half of

offering significantly more diverse content to consumers at more affordable prices.¹⁵ Consumers and businesses also are adopting cloud services that are supporting economic growth and opportunity throughout the economy.¹⁶ In addition, consumers and small businesses have adopted mobile BIAS to stay connected to apps and services while on the go. And some mobile BIAS providers offering 5G services are now marketing their network capacity to serve the fixed BIAS marketplace.

INCOMPAS has long advocated that customers need access to both fixed and mobile BIAS networks and should have competitive options for both types of service.¹⁷ We also agree

2014.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, MB Docket No. 15-158 (rel. May 6, 2016), at paras. 168-170 (“Since the last report, several OVDs have entered the crowded marketplace.”); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, MB Docket No. 16-247 (rel. Jan. 17, 2017), at paras. 153-155 (“Perhaps the most significant entry in the OVD space involved MVPDs offering online video streaming services that do not require a subscription to an MVPD service.”). One article discusses the over 200 streaming options that are now available in the U.S. See Sam Cook, *The Complete List of Streaming Services - 200+ Services*, Flixed (Sept. 6, 2023), available at <https://flixed.io/complete-list-streaming-services>.

¹⁵ Consumers are cutting the video cord at significant rates. See Statista, *Cord Cutting in the United States—Statistics & Facts* (Aug. 31, 2023), available at <https://www.statista.com/topics/4527/cord-cutting/#topicOverview> (“Since 2010, the pay TV penetration rate in the U.S. has dropped from 88 to 66 percent, and according to the latest data from the fourth quarter of 2022, 28.8 percent of Americans and Canadians were planning to cut the cord in the next six months.”).

¹⁶ *The Impact of Cloud Services in the United States*, Public First, available at <https://cloudimpactus.publicfirst.co/> (discussing the economic benefits in the U.S. of cloud migration).

¹⁷ See INCOMPAS Comments, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 18-238, at 4 (fil. Aug. 17, 2018), available at <https://www.incompas.org/Files/filings/2018/09-17-18%20FINAL%20INCOMPAS%20Section%20706%20Broadband%20Deployment%20Comments%209.17.2018.pdf>.

with the Commission’s most recent finding that these are two separate services that are not fully substitutable for one another at this time,¹⁸ and the Commission should take that into account in this proceeding concerning the incentives of BIAS providers (especially incumbent BIAS providers) as we discuss further below.

III. BROADBAND CUSTOMERS NEED COMPETITION, AND THE LAW REQUIRES IT. HOWEVER, THE LACK OF COMPETITIVE OPTIONS AT HOME AND THE CONCENTRATION OF THE FIXED BIAS MARKET SUPPORT FCC OVERSIGHT.

Competition in the marketplace is the leading driver for more affordability, innovation, speed, and better customer service. 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.¹⁹ The Commission’s role in encouraging broadband deployment—both mobile and fixed— and protecting and promoting competition is key to ensuring that residential and business customers will have a choice for their BIAS 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 customers get better, faster internet service and online content at prices they can afford. In some cases, our members achieve this by providing BIAS using their own facilities, and in other cases our members achieve this by reselling BIAS provided over other service providers’ facilities. Additional competition is key to tackling our nation’s internet challenges, and often INCOMPAS’ small, competitive BIAS providers that offer an alternative to large incumbent cable and telcos are marketing their service

¹⁸ 2021 706 Inquiry, at para. 10.

¹⁹ 47 U.S.C. § 1302(b).

as privacy and open-internet friendly, as well as offering faster speeds, better service, and more affordable pricing.

A. The Fixed BIAS Marketplace Remains Highly Concentrated, Which Increases Large, Incumbent ISPs' Gatekeeping Power and Warrants FCC Oversight.

Unfortunately, the fixed BIAS marketplace remains highly concentrated in most geographic areas.²⁰ According to the Leichtman Research Group, Inc., the “top broadband providers now account for over 113.9 million subscribers, with top cable companies having about 76.2 million broadband subscribers, top wireline phone companies having about 30.7 million subscribers, and top fixed wireless services having about 6.9 million subscribers.”²¹ Generally, the top cable and telco companies do not compete against each other in their respective categories, but cable and telco companies compete against each other in offering BIAS—with cable typically able to offer higher speeds in areas where telcos have not upgraded their networks from copper to fiber. In fact, Comcast has about 28% of the fixed BIAS market share, followed by Charter with about 27%, AT&T with approximately 14%, then Verizon with almost 7%. These four providers have almost 80% of the fixed BIAS market.²² Accordingly, most consumers only have two choices for their home BIAS provider—their incumbent cable or telco provider. Leichtman Research Group notes that the fixed wireless/5G home internet

²⁰ Indeed, the White House has recently observed the impact of the lack of competition stating that Americans “pay too much for broadband.” See The White House, *Executive Order on Promoting Competition in the American Economy* (July 9, 2021), available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

²¹ Leichtman Research Group, *About 950,000 Added Broadband in 3Q 2023* (Nov. 13, 2023) available at, <https://leichtmanresearch.com/about-950000-added-broadband-in-3q-2023/>.

²² *Id.*

services offerings from T-Mobile and Verizon have garnered some subscribers—almost 7 million.²³ However, no other competitive fixed wireless service made the list of top providers by the Leichtman Research Group. While T-Mobile and Verizon seem to be making some inroads in gaining subscribers with their respective fixed wireless services, they only have about 6% of the total fixed BIAS market, and INCOMPAS understands their services may be subscriber-limited based on network capacity.

We know from the FCC’s data that only *six percent* of households have three fixed BIAS options at 100/20 Mbps.²⁴ Thus, while some customers may have a third-party offering from a competitor, such as an INCOMPAS member like Starry, IdeaTek, Sonic, or Google Fiber in one of its markets—it is still quite a low percentage of households that have the third option from a competitive provider. The FCC’s data also shows that for higher-speed fixed BIAS, customers often face even less choice, with many having only one option. According to the FCC’s *2022 Communications Marketplace Report*, which provides the most recent information the FCC has made available for multiple provider options for fixed terrestrial service, the higher the speed offering for fixed terrestrial services correlates with fewer provider options and therefore less

²³ *Id.*

²⁴ See *Communications Marketplace Report*, 2022 Communications Marketplace Report, GN Docket No. 22-203, at 43-50 (rel. Dec. 30, 2022). In its analysis, the FCC for the first time considered penetration rates and found that the number of options at higher speeds was very low. At 100/20 Mbps (which is now the most common tier of service purchased), almost 50% of households had only one option (41.9%) or no option (7.5%), while only 44.5% had two options and 6% had three options. *Id.* at 50 (Fig. II.A.33).

competition.²⁵ And customers have even fewer provider options at higher speeds in rural areas and Tribal lands.²⁶

As INCOMPAS discussed in our comments opposing the repeal of net neutrality rules in 2017, the lack of home internet options for customers and the high switching costs they experience where they do have options allow for large, incumbent fixed BIAS providers to potentially abuse their gatekeeper power with respect to both their customers and edge providers.²⁷ Thus, INCOMPAS cautions that this market power could be exercised without any rules or oversight by the FCC. We understand that ISPs claim to support net neutrality policies; however, they have done so while (1) the FCC’s proceeding on the repeal of net neutrality rules has remained pending; and (2) several states have stepped in to enact net neutrality protections. INCOMPAS maintains that the oligopolistic nature of the fixed BIAS market—and the terminating access monopoly and gatekeeper role that they play—support the imposition of oversight by the Commission of the fixed BIAS market.

In the *NPRM*, the FCC tentatively concludes that “ISPs continue to have the incentive and ability to engage in practices that pose a threat to internet openness.”²⁸ Past and present

²⁵ *Id.*

²⁶ *Id.* at 58. See Pew, *How Can the United States Address Broadband Affordability?* (Apr. 29, 2022) (explaining that “many broadband markets are uncompetitive monopolies or duopolies, which leaves consumers with limited choice and higher prices.”), available at <https://www.pewtrusts.org/en/research-and-analysis/articles/2022/04/29/how-can-the-united-states-address-broadband-affordability>. See also Open Technology Institute, *The Cost of Connectivity 2020* (July 2020) (a study on the affordability of broadband prices found that the U.S. market suffers from a lack of competition, and that “this lack of choice directly affects the cost and quality of internet service.”), available at <https://www.newamerica.org/oti/reports/cost-connectivity-2020/>.

²⁷ INCOMPAS Comments, WC Docket No. 17-108, at 7-41 (fil. July 17, 2017).

²⁸ *NPRM*, at para. 126.

examples support this conclusion by showing that ISPs have the incentives to and will abuse their market power without proper oversight for net neutrality. In the *2010 Open Internet Order*, the FCC showed how ISPs have the incentive and ability to reduce the open internet.²⁹ In fact, the Commission discussed examples of ISPs' harmful conduct that had already come before the agency in enforcement proceedings and stated "[t]hese dangers to Internet openness are not speculative or merely theoretical."³⁰ In the *2015 Open Internet Order*, the FCC similarly explained that the record showed that ISPs "have a variety of strong incentives to limit Internet openness"—citing examples where BIAS providers used their technical ability to act on incentives to harm the open internet.³¹ And today, large BIAS providers are in the position to require payment from third party streamers, gamers, and cloud computing companies, and recent examples show how BIAS providers have disadvantaged online competitors and can do so based on their terminating monopoly for their BIAS customers.³²

²⁹ *Preserving the Open Internet, Broadband Industry Practices*, Report and Order, GN Docket No. 09-191 & WC Docket No. 07-52, at para. 20 (rel. Dec. 23, 2010) ("*2010 Open Internet Order*").

³⁰ *Id.* at n.60; paras. 35-37.

³¹ *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, at para. 79 & n.123 (rel. March 12, 2015) ("*2015 Open Internet Order*").

³² See, e.g., Local 12, *Citing 'censorship' concerns, Idaho internet provider blocks Facebook, Twitter* (Jan. 13, 2021), available at <https://local12.com/news/nation-world/citing-censorship-concerns-idaho-internet-provider-blocks-facebook-twitter>; Khalida Sarwari, *Here's Why It Took You So Long To Load The Trailer For The New Star Wars Movie On Youtube*, (Aug. 27, 2019) (where researchers from Northeastern University and University of Massachusetts Amherst found that after the net neutrality repeal in 2018, almost all wireless carriers had slowed down internet speed for selected video streaming services.), available at <https://khalidasarwari.com/heres-why-it-took-you-so-long-to-load-the-trailer-for-the-new-star-wars-movie-on-youtube/>.

Moreover, the Commission has addressed the potential for online harms by large BIAS providers through merger conditions. For example, in the merger of Comcast and NBC/Universal, the Commission understood the incentives and abilities of large companies to violate open internet principles by favoring their own content over others; accordingly, the agency adopted several open internet principles as conditions to approving the merger.³³ In the Charter/Time Warner Cable merger, the Commission addressed the company's increased incentives to harm online content through conditions.³⁴ Other large ISPs also own online content, and are in the unique position of being able to favor their own content and/or discriminate against third-party content over their BIAS networks. Moreover, all BIAS providers are in a position as the terminating monopoly to engage in behavior that undermines net neutrality policy. In the *Charter/Time Warner Cable Merger Order*, the FCC stated:

BIAS providers function as gatekeepers between their subscribers and the rest of the Internet; all traffic going to or from a subscriber must pass through the BIAS provider. Because of this gatekeeping role, BIAS providers with large numbers of subscribers have greater leverage to negotiate preferential terms and prices with edge providers seeking to reach those subscribers.³⁵

³³ See *Applications of Comcast Corp., General Electric Corp. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensee*, Memorandum Opinion and Order, MB Docket No. 10-56, at para. 94 (rel. Jan. 20, 2011) (“neither Comcast nor Comcast-NBCU shall prioritize affiliated Internet content over unaffiliated Internet content.”).

³⁴ See *Applications of Charter Communications, Inc., Time Warner Cable Inc., And Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 15-149, at paras. 8-12 (rel. May 10, 2016) (the conditions included a seven-year prohibition on imposing data caps or usage-based pricing for BIAS, a settlement-free interconnection commitment, and a prohibition on entering or enforcing contractual terms that prevent or penalize programmers from distributing content online.)

³⁵ *Id.* at para. 95.

That observation has not changed. When the past and present examples of violating an open internet are coupled with a lack of last-mile competition, it is justifiable for the FCC to reinstate its net neutrality rules and exercise oversight of BIAS providers.

B. The Current Mobile BIAS Market Warrants FCC Oversight.

While the mobile BIAS market is more competitive than the fixed market, there are still some concerns about the ability of mobile providers to use their gatekeeper power with respect to edge providers.³⁶ Moreover, oversight of mobile BIAS providers' practices to ensure that customers have access to an open internet will permit the FCC the opportunity to consider practices that may be a violation, such as throttling, which some providers have engaged in. Accordingly, INCOMPAS supports the FCC's proposal that mobile BIAS is reclassified as a commercial mobile service and that net neutrality rules apply. INCOMPAS' members that provide voice and messaging services are experiencing market power behavior from certain large, mobile providers. For example, INCOMPAS has expressed concerns regarding the competitive implications of the voluntary messaging framework in the mobile wireless industry that has taken root without any regulatory oversight. The Campaign Registry and 10DLC system carry significant operational and economic burdens, especially for smaller companies (including a myriad of registries and "compliance" obligations and related fees and penalties), as well as privacy concerns. Our members have also taken issue with certain aspects of wireless carriers' use of existing methods of blocking behaviors, which can degrade our members' products.

Moreover, certain consumers subscribe to a mobile service only—in fact, only 15% of U.S. adults are "smartphone-only internet users," meaning that they do not have a traditional

³⁶ With three nationwide providers (with a fourth entrant DISH continuing to build its 5G network), this market is still highly concentrated.

high-speed internet connection at home.³⁷ Indeed, low-income consumers rely on mobile BIAS when they cannot also afford a home (fixed) service. As such, ensuring that mobile customers have access to the open internet and Commission oversight is also important.

As a policy matter, it would be prudent to have the same rules apply—recognizing that the agency may need to adjust its implementation of such oversight to account for the technical differences between networks that deliver service over spectrum versus wired technologies, for example. The same is true for emerging satellite BIAS services and potentially some fixed wireless providers that deliver last mile BIAS service using spectrum.³⁸ The FCC should ensure that reasonable network management standards have sufficient flexibility for spectrum constraints that these providers may face.

C. Classifying BIAS as a Telecommunications Service Will Enable More Competition.

INCOMPAS believes that the FCC should be doing more to encourage BIAS network deployment. It is clear from the agency’s Section 706 mandate to the evolving level of service and Section 254’s universal service support requirements that the FCC’s mission is to ensure customers across the nation can access broadband networks at affordable rates. Promoting additional competition in the BIAS marketplace is key to this goal. The FCC can enable competition more effectively if BIAS is classified as a telecommunications service, as we will discuss further below with respect to pole, duct, and conduit access, and MTE access for BIAS-

³⁷ See 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/>.

³⁸ See FCC News, *FCC Rejects Applications of LTD Broadband and Starlink for Rural Digital Opportunity Fund Subsidies* (Aug. 10, 2022) (“Starlink’s technology has real promise,” [but its technology is] “still developing.”).

only providers, as well as the ability to address local and state permitting and deployment access issues under Section 253.

We need more competitive BIAS options for residential and small business customers, and the association has been advocating for deployment-friendly and resale-friendly policies so that our members can deliver more choice and affordability for broadband customers. For example, INCOMPAS has been the leading association advocating for pole access and MTE access at the Commission. And in the context of the Infrastructure Investment and Jobs Act (“IIJA”), INCOMPAS advocates for policies that enable additional competitive options through open access or wholesale policies so that government funding does not entrench monopolies, and instead, will result in new networks and new resale competitors that will enable competitive options, thereby driving more innovation, investment, and better and more affordable service for BIAS over time to communities and individual customers.

It is important that the actions of the FCC in this docket account for the need to promote resale competition in the many circumstances where consumers have no or only limited choices of broadband networks.³⁹ In those cases, resellers offer consumers choices, including better quality service and lower prices, that would otherwise be unavailable. In fact, the promotion of broadband resale has become an important component of federal broadband subsidy programs for exactly this reason. Both the US Agriculture Department and NTIA have prioritized BIAS resale in the rules they have adopted for, respectively, the ReConnect Program and the BEAD program, and many states have proposed to promote resale in their implementation of the BEAD

³⁹ In addition, as discussed in Section VII below, the Commission cannot ensure that the rules proposed in the NPRM protect consumers of resold BIAS unless the Commission exercises jurisdiction over BIAS sold on a wholesale basis.

program.⁴⁰ INCOMPAS believes the agency has a significant role to play in speeding competition through resale under these programs. It should do so by clarifying that BIAS providers that provide open access—for example, pursuant to commitments made under the BEAD program—provide a Title II telecommunications service when selling BIAS service on a wholesale basis. In addition, the Commission should recognize that BIAS providers (especially the large BIAS providers) have the incentive and opportunity to harm consumers by undermining resale competition for essentially the same reasons that BIAS providers have the incentive and opportunity to harm edge providers. The Commission should therefore explore ways to modify the regulatory framework proposed in the *NPRM* to protect existing and prospective purchasers of resold BIAS from anticompetitive harm caused by network owners, especially large BIAS providers. For example, the Commission could clarify, consistent with long-standing precedent, that it has the authority under Sections 201 and 202 to adjudicate disputes between wholesalers and resellers of BIAS.⁴¹ Alternatively, as discussed below, it could modify the definition of BIAS by deleting the word “retail.” Even if the Commission decides not to take any of these

⁴⁰ See U.S. Department of Agriculture: ReConnect Loan and Grant Program, *Evaluation Criteria*, available at <https://www.usda.gov/reconnect/evaluation-criteria>; NTIA, *Broadband Equity, Access, and Deployment Program: Notice of Funding Opportunity*, at 44, available at <https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf>. Moreover, some states are currently considering Open Access, Wholesale in their BEAD Program Initial Proposal, Volume II, including, Colorado, Washington, Florida, Illinois, Michigan, Kansas, Maine, Massachusetts, Pennsylvania, and New York.

⁴¹ See, e.g., *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services*, Report and Order, 83 FCC 2d 167, at para. 41 (1980) (establishing a blanket prohibition on tariff provisions restricting the resale of common carriers' domestic public switched network services); *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 FCC 2d 261, at para. 88 (1976) (prohibiting tariff restrictions on resale and shared use of private line service because permitting resale and shared used would result in, among other things, greater competition, prices closer to cost, more innovation and investment).

steps at this time, it should commit to closely monitoring the wholesale BIAS market to identify unreasonable and/or unreasonably discriminatory wholesaler conduct and to fashion appropriate regulatory responses in the future. In addition, it should refrain from forbearing Title II provisions where doing so would limit its ability to enable and promote more competitive BIAS options.

IV. RECLASSIFICATION IS NECESSARY FOR THE AGENCY TO HAVE PROPER OVERSIGHT OF THE AVAILABILITY OF AFFORDABLE BIAS.

Reclassification of BIAS as a Title II service will help ensure that BIAS-only providers can exercise their rights to deploy broadband infrastructure and the protections afforded by Title II in the Act to enable more competition in the BIAS marketplace—which is necessary given that consumers do not have sufficient choice of providers at home.

There are significant barriers to deploy broadband network infrastructure—among them access to poles, ducts, and conduit and commercial and residential multi-tenant environments. Providers also encounter significant permitting costs and delays from government—federal, state and local agencies—as well as from railroads. Many of INCOMPAS’ providers only offer BIAS service. As a result, they cannot exercise any rights afforded by Title II to speed their deployment. For example, our BIAS-only members must negotiate commercial agreements to access poles. They cannot exercise the rights afforded under Section 224 and the accompanying FCC rules. As a result, they face delays getting access and higher costs which impedes effective competition. In fact, this is one of the reasons that INCOMPAS filed its Petition for Reconsideration of the *Remand Order*, and we incorporate by reference the arguments we made

in the Petition that highlight the harms to bringing more competitive options in the BIAS marketplace when BIAS is not classified as a telecommunications service.⁴²

The Commission tentatively concludes in the *NPRM* that the Commission erred in its 2020 analysis and believes that reclassifying BIAS as a telecommunications service will help support the Commission’s goals to facilitate broadband deployment.⁴³ INCOMPAS agrees. Competitors should not be required to offer a telecommunications service (e.g., voice service) or a cable video service to obtain the protections of Section 224. By reclassifying BIAS as a telecommunications service, BIAS-only companies will be able to exercise the same rights as incumbent telephone and cable television systems that they compete with, and competitors rightly will receive the same protections the Communications Act affords. This is only fair and non-discriminatory and will enable more competition for customers—which is needed and is the goal of the 1996 Act.

Since 2015, INCOMPAS has witnessed that our members offering residential fixed BIAS have ceased offering voice and/or video options to their residential customers given that those customers can choose third-party over-the-top video or VoIP options for these services, and especially given that the providers were losing money for video offerings. As a result, more of our members are BIAS-only providers today as compared to 2015. (They also have been able to drop video because online streaming is available directly to consumers and the number of streaming options has improved consumer choice and outcomes.⁴⁴) And we expect that many

⁴² *INCOMPAS Petition for Reconsideration*, at 18-23 (Feb. 4, 2021).

⁴³ *NPRM*, at para. 47.

⁴⁴ The Commission observed the increasing number of streaming options in earlier reports. *See supra* note 14.

entities that will be competing for BEAD dollars will be BIAS-only. Thus, it will be beneficial for entities in the BEAD program to be afforded the protections that Title II offers telecommunications providers in Section 224. It will speed deployment and lower costs, both of which are important for the taxpayer and private sector funds being used for these deployments, further stretching the dollars and supporting more unserved and underserved locations being built. Thus, INCOMPAS agrees with the Commission’s observation in the *NPRM* that “ensuring the protections of section 224 are restored to all ISPs, including broadband-only providers, will pave the way for quicker and less expensive broadband deployment, thereby enabling that [federal program] funding to go as far as possible.”⁴⁵ Moreover, given that these programs require private investment as well—it will benefit both taxpayers and investors—in addition to end user customers that seek fast and affordable connectivity.

In addition, INCOMPAS supports FCC action in its pending pole proceedings that we and our members have been actively participating. We recently filed with the Commission our perspective on how the Commission should advance affordable pole access.⁴⁶ Our letter encourages the agency to continue considering changes to its policies that will ensure new

Streaming has led to increased competition in the video marketplace, and consumers are no longer held hostage to oligopolistic cable bundles that are not consumer friendly. That is why consumers are cutting the cord in increasing numbers. See Statista, *Cord Cutting in the United States—Statistics & Facts* (Aug. 31, 2023), available at <https://www.statista.com/topics/4527/cord-cutting/#topicOverview> (“Since 2010, the pay TV penetration rate in the U.S. has dropped from 88 to 66 percent, and according to the latest data from the fourth quarter of 2022, 28.8 percent of Americans and Canadians were planning to cut the cord in the next six months.”).

⁴⁵ *NPRM*, at para. 47.

⁴⁶ See Letter from Christopher L. Shipley, Executive Director of Public Policy, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (fil. Dec. 7, 2023), available at <https://www.fcc.gov/ecfs/document/1208067468256/1>.

attachers are not burdened with the full cost of pole replacements as our members are currently experiencing. This is unreasonably raising the cost of broadband deployment. INCOMPAS members also are raising with us that the federal and state funding programs are providing the opportunities to employ major construction projects for fiber deployment that require pole attachments to over 3,000 poles at a time, and utility companies are uncooperative and causing major delays of these projects. And INCOMPAS believes that FCC oversight of these issues cannot hinge on whether a builder is also offering a telecommunications or cable service. The FCC must also oversee broadband deployment and where broadband-only providers need access to rights-of-way, it should be able to gain that access through the statutory provisions of Title II. Broadband service is the service that customers now need. It is evident that we need FCC oversight of BIAS-only construction now so that the projects that are being funded by the federal government are as efficient and effective as possible.

There is a similar issue with access to multi-tenant environments (“MTEs”). Currently the FCC’s rules are limited to telecommunications service providers, cable operators, and multi-channel video providers.⁴⁷ BIAS-only providers are not protected. Our BIAS-only members need every tool available to help them overcome the massive barriers they face to deploy their networks. The Commission seeks comment on how reclassification may impact its authority to take action to promote tenant choice and competition in the provision of broadband services to the benefit of those who live and work in MTEs. While the Commission has long prohibited agreements between providers of telecommunications and cable/MVPD services and MTE owners that grant the provider exclusive access and rights to provide service to the MTE, these restrictions do not apply to BIAS-only providers. The Commission recently determined that it

⁴⁷ See 47 C.F.R. § 64.2500 et seq. & § 76.2000.

was appropriate to “proceed incrementally” on new rules for access to MTEs, but it did not address BIAS-only providers or agreements, and it is seeking comment on whether reclassification of BIAS would provide additional authority for the Commission to further promote competition and consumer choice in communications services in MTEs.⁴⁸ INCOMPAS agrees that reclassification of BIAS will afford the necessary protections to BIAS-only providers—in addition to ensuring that BIAS-only providers are restricted from engaging in anti-competitive and lock up behavior, particularly in commercial and residential properties, with MTE owners that severely limit competitive broadband options to customers.

With respect to the protections under Section 224 and MTE rules, INCOMPAS implores the FCC to clarify that the protections apply upon the effective date of its Order reclassifying BIAS service. As BIAS-only providers are deploying today and will be in response to the BEAD program in the very near future, these protections will help ensure faster and more affordable deployment immediately that will best meet the public interest. Thus, the FCC’s Order should clarify that upon the effective date of reclassification, these protections (and restrictions) apply to BIAS-only providers.

INCOMPAS also supports reclassification because BIAS-only providers cannot seek FCC protections under Section 253 when they encounter policies at the local and state level that restrict competitive deployment. Section 253 provides, in part, a mechanism for review of restrictions imposed by state or local officials that may prohibit or have the effect of prohibiting an entity from providing a telecommunications service.⁴⁹ Because BIAS is currently classified as

⁴⁸ *NPRM*, at para. 52.

⁴⁹ *See* 47 U.S.C. § 253(a). Pursuant to Section 253(d), the Commission may preempt such restrictions.

an information service, BIAS-only providers cannot invoke the protections afforded in this provision. Thus, a reclassification of BIAS service opens an avenue for additional protections for BIAS-only providers who may need Commission intervention to address state/local policies that restrict competitive deployment through its oversight for ensuring competitors can access new geographic markets.

The *NPRM* also seeks “comment on how reclassifying BIAS as a telecommunications service and classifying mobile BIAS as a commercial mobile service will impact the Commission’s authority over wireless infrastructure,” and “how reclassification of BIAS as a telecommunications service may affect the Commission’s application of the Act’s preemption frameworks in sections 253(d) and 332(c)(3) regarding infrastructure used to provide broadband-only services.”⁵⁰

The FCC has previously recognized that even under the current classification, many facilities can be used to provide both telecommunications services or personal wireless services and Title I services.⁵¹ Facilities that are capable of providing such commingled services are thus already subject to the provisions of Sections 332 and 253, which limit the ability of local jurisdictions to take actions that would prohibit or have the effect of prohibiting the construction of these facilities.⁵² As the Commission observed in 2018, “there is no basis” for state and local

⁵⁰ *NPRM*, at para. 48.

⁵¹ See *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment et al.*, WT Docket No. 17-79, WC Docket No. 17-84, at para. 36 n.84 (rel. Sept. 27, 2018).

⁵² In the case of Section 332, this also includes express procedural protections on decisions involving wireless facilities siting. See *id.*

jurisdictions to either conduct proceedings into the types of services offered, or to mandate the provision of particular types of services.⁵³

Title II reclassification of BIAS and reclassification of mobile broadband as a commercial mobile service is not necessary to trigger the protections of Sections 253 and 332 for commingled facilities. However, reclassification of these services would be beneficial for those providers that do not currently offer telecommunications services or commercial mobile services, under current regulatory classifications. As noted above, INCOMPAS includes members who are solely focused on providing broadband services. The current classification of BIAS and mobile broadband as Title I services makes it difficult for these providers to argue that they are building the kinds of facilities capable of commingled operation that are covered by Sections 332 and 253. That creates both a competitive imbalance and a drag on overall investment in broadband facilities. Reclassification of BIAS and mobile broadband service would eliminate this imbalance and open an avenue for additional protections when BIAS-only providers need court or Commission intervention to address state/local policies that restrict competitive deployment; the Commission can use its oversight to ensure competitors can access new geographic markets. Again, reclassification so that BIAS-only providers receive the same Title II protections as incumbent telecommunications providers is in the public interest as it will best ensure that the Communications Act's goal of the Commission enabling and promoting competition can be fulfilled and that consumers will benefit from additional choice in the marketplace.

Over the years, the FCC has taken robust action pursuant to its authority under the 1996 Act to ensure that state and local legal requirements do not pose a roadblock to the provision of

⁵³ *Id.*

the kinds of communications services upon which Americans increasingly rely.⁵⁴ In reclassifying BIAS as a telecommunications service and mobile broadband as a commercial mobile service, the Commission should reemphasize the need for these protections. The agency should commit where appropriate to vigorously exercising its preemptive authority under Sections 332(e)(7) and 253(d) to remove state and local barriers to the construction of broadband facilities and provision of broadband services.

V. OTHER REASONS FOR BIAS RECLASSIFICATION ARE NOT NECESSARY, AND THE FCC SHOULD CALIBRATE ITS ORDER SO AS NOT TO INCREASE BURDENS OR REGULATE AREAS OUTSIDE ITS JURISDICTION.

The Commission tentatively concludes that reclassification of BIAS is necessary and timely to address national security and public safety concerns.⁵⁵ In our Petition for Reconsideration, we address our concerns about the lack of open internet protections with respect to public safety—emphasizing the reliance of customers to obtain information about public safety online—especially during emergencies—from government officials and fellow citizens.⁵⁶ The *NPRM* also tentatively concludes that reclassification will enhance the agency’s role with respect to national security and national defense of the country’s broadband networks,

⁵⁴ See, e.g., *Public Utility Commission of Texas et al.*, CCB Pol 96-13 et al., Memorandum Opinion and Order (rel. Oct. 1, 1997); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, Declaratory Ruling, WT Docket No. 08-165, at paras. 56-57 (rel. Nov. 18, 2009), *aff’d*, *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 569 U.S. 290 (2013); *Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC, Petition for Preemption and Declaratory Ruling*, Declaratory Ruling, WC Docket No. 20-46 (rel. Nov. 9, 2020).

⁵⁵ *NPRM*, at paras. 25-29.

⁵⁶ *INCOMPAS Petition for Reconsideration*, at 8-14.

and it specifically discusses the Commission's oversight of foreign ownership through exercise of its Section 214 authority, its expansion of authority to restrict equipment and services that pose a national security threat (e.g., ZTE and Huawei equipment), including interconnecting with data centers and traffic exchange.⁵⁷ INCOMPAS maintains that there is no evidence that the FCC needs to address issues beyond net neutrality or expand its authority to do so. And, if the FCC determines that it is critical to address an issue beyond net neutrality, it should pursue a separate proceeding to address the issue given that these issues are complex and warrant a meaningful and robust record in order to develop effective policy solutions.

Section 214. Section 214 authority should not be a prerequisite for BIAS providers and should not be a justification for reclassification of BIAS. Indeed, a number of INCOMPAS members with foreign ownership already have undergone CFIUS review and have national security agreements in place that cover their network operations. INCOMPAS has expressed serious reservations with recent proposals by the agency to vastly expand its regulatory requirements for current international Section 214 holders.⁵⁸ Concerns we raised in that proceeding are applicable here. Requirements that all BIAS providers obtain domestic and international Section 214 authorizations and/or undergo CFIUS review will be costly and time consuming, without any evidence that the costs justify the benefits gained. INCOMPAS cautions

⁵⁷ *NPRM*, at paras. 25-29.

⁵⁸ See INCOMPAS Comments, *Review of International Section 214 Authorizations to Assess Evolving National Security, Law Enforcement, Foreign Policy, and Trade Policy Risks et al.*, IB Docket No. 23-119 & MD Docket No. 23-134 (fil. Aug. 31, 2023), available at <https://www.incompas.org/Files/filings/2023/08-31-23%20INCOMPAS%20Comments%20FCC%20International%20Section%20214%20Proceeding%20FINAL.pdf>; INCOMPAS Reply Comments, IB Docket No. 23-119 & MD Docket No. 23-134 (fil. Oct. 2, 2023), available at <https://www.incompas.org/Files/filings/2023/10-02-23%20INCOMPAS%20Reply%20Comments%20for%20FCC%20International%20Section%20214%20Proceeding%20FINAL.pdf>.

the agency on the significant impact this could have on numerous small BIAS providers, which could negatively affect their ongoing investment in their deployment and upgrades of their networks. Requiring all BIAS providers to meet the requirements under Section 214 and its requisite rules would be a significant burden. For those entities with foreign ownership to report and potentially undergoing the CFIUS/Team Telecom review process will lead them into an uncertain process with other government agencies, will require hiring outside counsel with expertise in this area, and will be a costly endeavor. The significant burden and undefined outcome for BIAS providers that do not have 214 authorizations and CFIUS/Team Telecom approvals outweigh the potential for harm. It certainly is not justified by the *NPRM* at this time. Accordingly, INCOMPAS supports forbearance on Section 214 obligations for BIAS providers and excluding this as a reason for reclassification.

Cybersecurity. The Commission also tentatively concludes that reclassification of BIAS as a telecommunications service would reinforce the agency's authority to support its efforts to enhance cybersecurity, and it seeks comments on its exercise of such authority.⁵⁹ Rather than focusing on new regulatory mandates in the internet cybersecurity space, we urge the Commission to continue investing in solving evolving challenges through partnerships with the Cybersecurity and Infrastructure Security Agency (CISA), other government stakeholders, and the private sector. Doing so will help to ensure that conflicting policy guidance does not emerge and is the most effective approach in this fast-moving, developing area. Where the FCC sees an opportunity to act, it is currently doing so; it has issued a proposal on funding cybersecurity

⁵⁹ *NPRM*, at para. 30.

solutions for schools⁶⁰ and has a proceeding underway on CyberTrust Mark labels and the Internet of Things.⁶¹ Therefore, there is no demonstrated need for the FCC to further engage in developing new cybersecurity regulations in this proceeding.

Resiliency and Reliability. The Commission also tentatively concludes that reclassifying BIAS as a telecommunications service would enhance the Commission’s ability to ensure the nation’s communications networks are resilient and reliable by potentially requiring outage reporting for BIAS and Wi-Fi calling and potentially blocking internet traffic to curb robocalls/texts. INCOMPAS believes that there has been no demonstrable need for the Commission to intervene in this area or that BIAS must be defined as a telecommunications service for the Commission to act. Outage reporting is already required of subsea cables that are not common carriers (e.g., not Title II), so Title II is not a prerequisite to outage reporting. Nevertheless, there is no indication that there has been a reliability problem of BIAS networks or for Wi-Fi calling, nor is there any indication that reporting to the FCC has improved reliability. Moreover, it is incongruous to try to impose reliability obligations on “best efforts” BIAS connectivity, and many rely on public Wi-Fi connections which arguably will not be covered by the FCC’s definition of BIAS. The Commission must be mindful not to unnecessarily increase regulatory burdens on BIAS providers. In this proceeding, it should focus on reinstatement of net neutrality rules—which INCOMPAS believes is not a burden for providers to comply with—as many claim to already abide by net neutrality.

⁶⁰ See *Schools and Libraries Cybersecurity Pilot Program*, Notice of Proposed Rulemaking, WC Docket No. 23-234 (rel. Nov. 13, 2023).

⁶¹ See *Cybersecurity Labeling for Internet of Things*, Notice of Proposed Rulemaking, PS Docket No. 23-239 (rel. Aug. 10, 2023).

Privacy and Data Security. With respect to privacy and data security, the Commission states that the classification of BIAS as a telecommunications service could support the FCC's efforts to address unlawful robocalls and robotexts.⁶² The FCC already has ample authority to address illegal robocalls and texts. Through the authority Congress provided under the TRACED Act to engage voice service providers on robocall mitigation and call authentication requirements, the Commission has launched dozens of proceedings intended to address issues associated with illegal robocalls, including VoIP and IP-based voice service providers. Now that all originating voice service providers are required to implement the STIR/SHAKEN call authentication framework, the Commission should turn its attention to issues under its jurisdiction having to do with call blocking, labeling, and call presentation. INCOMPAS has cautioned the FCC on blocking legal and wanted robocalls/robotexts and remains concerned that the lack of a universally adopted redress mechanism for blocked calls degrades the reliability of the public switched telephone network. Furthermore, INCOMPAS has consistently voiced concern over the possibility that, absent Commission oversight and formal redress processes, terminating providers and their analytics engines could utilize their place in the call path to mislabel or manipulate call presentation in a manner that discriminates against competitive providers. Several recent filings suggest that transparency into the labeling and presentation decisions of wireless carriers' analytics providers remains a significant, if not growing problem, and something that the Commission must address in the near term.⁶³

⁶² *NPRM*, at paras. 40-45.

⁶³ *See, e.g.*, Letter from Sarah Delphey, Vice President of Trust Solutions, Numeracle, to Marlene H. Dortch, Secretary, FCC, CG Docket No. 17-59, WC Docket No. 17-97, at 1-2 (fil. Oct. 31, 2023).

Additionally, the Commission must continue to address the efficacy of its chosen call authentication solution by ensuring that STIR/SHAKEN header information is delivered on a consistent basis. To that end, INCOMPAS and other associations have alerted the Commission to the need for increased IP interconnection in order for STIR/SHAKEN to effectively operate and eliminate illegal robocalls.⁶⁴ One of the ramifications of deficient IP interconnection is the compromised efficacy of the STIR/SHAKEN framework (industry's chosen IP-based call authentication solution), which industry members have invested millions in implementing. It has been observed that networks relying entirely on IP, and who sign 100% of their outbound calls, are receiving only a fraction of inbound calls with SHAKEN information, consequently limiting the potential impact of SHAKEN in curbing fraudulent activities within the ecosystem.⁶⁵

The *NPRM*'s suggested expansion of requiring blocking by BIAS providers is concerning, exceeds the FCC's statutory authority, and should not be adopted. Blocking access to a website is an extreme measure with significant consequences that could disrupt and severely harm legitimate organizations if adequate measures are not taken to minimize the risk of error. Identifying with precision which websites are illegitimate and controlled by persons with intent to defraud is a resource-intensive, complex, expensive, and difficult process that would be hard to manage properly on a wide-scale basis. Website addresses can be temporarily hijacked and blocking them may create harm to the legitimate website owner when other options are available

⁶⁴ See Letter from Diana Eisner, Vice President, USTelecom—The Broadband Association, et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-97 (fil. Nov. 16, 2022) (submitting the SIP Interconnection Working Group Report).

⁶⁵ See Letter from Glenn S. Richards, Counsel, Voice on the Net Coalition, CG Docket No. 17-59 & WC Docket No. 17-97, at 2 (fil. Oct. 24, 2023) (reporting that even though VON members are signing 100 percent of outbound calls from their networks, 50-75 percent of inbound calls are reaching members' networks unsigned).

and more suitable. Moreover, reversing an erroneous blocking order can be complicated and disruptive. In addition, if the FCC begins to decide which websites are or are not accessible by consumer-grade connections, there could be prior restraint First Amendment issues with doing so. Finally, it would be incomplete, as BIAS does not include enterprise connectivity, and the use of VPNs could deliberately or inadvertently circumvent website blocks placed by ISPs. For these reasons, reclassification to enable website blocking is simply ill-suited for combating robocalls and robotexts. The Commission already exercises its authority in this arena and should instead focus on restoring the reliability of the public switched telephone network by adequately policing blocking of legitimate voice calls and texts. To expand that approach to the internet would be unnecessary, and the FCC has no need to police the workings of closed messaging systems and, indeed, doing so falls outside the Commission's authority under the TRACED Act and Communications Act generally even if Title II is expanded here.

VI. FCC OVERSIGHT AND REGULATION OF BIAS HAS IMPLICATIONS FOR SMALL BIAS PROVIDERS AND THEREFORE THE FCC'S PROCEEDING SHOULD BE TARGETED AND AVOID UNDUE BURDENS.

While INCOMPAS agrees with the *NPRM's* statements of the importance of BIAS and the broadband networks,⁶⁶ it is also important for the agency's oversight and regulation of BIAS providers to account for the potential significant burdens on providers to comply with FCC regulation. The Commission should be mindful that an imposition of numerous new regulatory requirements on BIAS providers will impact their ability to focus on their deployments and service to customers, especially for small BIAS providers. As such, imposing new regulations is a fine line between appropriate and overly burdensome, but it is one we believe the agency can walk.

⁶⁶ See, e.g., *NPRM*, at para. 17.

BIAS providers already have numerous regulatory obligations to comply with at the FCC. Today, without reclassification, the Commission already has authority over BIAS providers with respect to digital discrimination (which was granted under the IIJA and is in process of being implemented),⁶⁷ with response to law enforcement via CALEA,⁶⁸ and with broadband mapping.⁶⁹ Moreover, BIAS providers that also offer telecommunications services, cable video services, or services supported by USF programs are regulated by the Commission. Also, USF-supported broadband providers must often meet specific broadband deployment requirements as a condition for the funding they receive.⁷⁰ The FCC also has authority to advance broadband deployment and affordability through Section 706 of the Telecommunications Act of 1996.⁷¹

BIAS providers already claim that they comply with net neutrality;⁷² thus, new compliance burdens would be non-existent to minimal for complying with the proposed net

⁶⁷ *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69 (rel. Nov. 20, 2023).

⁶⁸ FCC, *Communications Assistance for Law Enforcement Act*, available at <https://www.fcc.gov/calea>.

⁶⁹ BIAS providers must file information about their network availability via the Commission's Broadband Data Collection requirements. *See* FCC, *Information for Filers*, available at <https://www.fcc.gov/BroadbandData/filers>.

⁷⁰ *See, e.g.*, USAC, *ACAM II: Deployment Requirements*, available at <https://www.usac.org/high-cost/funds/acam-ii/>; USAC, *CAF Phase II Auction: Deployment Requirements*, available at <https://www.usac.org/high-cost/funds/caf-phase-ii-auction/>; USAC, *Rural Digital Opportunity Fund: Deployment Requirements*, available at <https://www.usac.org/high-cost/funds/rural-digital-opportunity-fund/>.

⁷¹ *See* 47 U.S.C. § 1302(b).

⁷² *See, e.g.*, USTelecom, *The Case for Modern Net Neutrality Legislation* (Nov. 13, 2023) ("Broadband companies have long practiced net neutrality and do not block, throttle or unfairly

neutrality rules—especially if there are no changes to the transparency requirement. However, the FCC proposes whole new expansions of regulation on BIAS providers under Title II authority with respect to privacy,⁷³ Section 214 authorizations,⁷⁴ cybersecurity,⁷⁵ and network outage reporting.⁷⁶ INCOMPAS cautions the agency against these proposals so as not to overburden BIAS providers, especially small BIAS providers, with a host of new obligations beyond the net neutrality rules. In fact, some of the Commission’s questions in these areas go beyond net neutrality into areas that are not sufficiently developed to produce rules. As such, they are simply ill-suited for a Notice of Proposed Rulemaking and would be more appropriate in a separate Notice of Inquiry. Any new obligations should only be implemented after much review and collaboration with the industry and other federal agencies who also play a significant role in advancing secure and safe networks. Accordingly, if the Commission continues to have an interest in these significant expansions of authority—which INCOMPAS considers to be precarious and overly burdensome—it should proceed into these new areas with caution and deliberation by issuing a new Notice of Inquiry with specific proposals for feedback.

prioritize content.”), available at https://www.ustelecom.org/wp-content/uploads/2022/12/USTelecom_NetNeutrality_IssueBrief.pdf; NCTA, *Internet for All at Stake* (“Internet service providers have always delivered open, unrestricted internet service.”), available at <https://www.ncta.com/netneutrality> (last visited Dec. 13, 2023); Comcast, *Open Internet* (“We do not block, slow down or discriminate against lawful content.”), available at <https://corporate.comcast.com/openinternet> (last visited Dec. 13, 2023); Charter, *Leave Title II In The 20th Century Where It Belongs* (Feb. 7, 2019) (“Charter is committed to deploying faster and better broadband across our 41-state footprint which includes preserving an open internet.”), available at <https://policy.charter.com/blog/leave-title-ii-20th-century-belongs>.

⁷³ *NPRM*, at paras. 40-44.

⁷⁴ *Id.* at paras. 27, 108.

⁷⁵ *Id.* at paras. 30-32.

⁷⁶ *Id.* at para. 39.

VII. THE DEFINITION OF BIAS SHOULD REFLECT RELEVANT PRECEDENT AND BE MODIFIED TO REFLECT MARKETPLACE REALITIES, INCLUDING PROMOTING MORE BROADBAND COMPETITION.

The FCC proposes to continue using the definition of “broadband internet access service” as a “mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service,” as well as “any service that the Commission finds to be providing a functional equivalent of the service described [in the definition] or that is used to evade the protections set forth” in part 8 of the Commission’s rules.⁷⁷ It also proposes to continue to define “mass market” as the Commission did in the *2015 Open Internet Order* and *RIF Order*—“a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-user customers such as school and libraries.”⁷⁸ In addition to including BIAS purchased with support from the E-Rate, Lifeline, and Rural Health Care programs, as well as any BIAS offered using networks supported by the Connect America Fund or the Rural Digital Opportunity Fund, it proposes that such “mass market” services would also include any BIAS purchased with support from the Affordable Connectivity Program and the Connected Care Pilot Program.⁷⁹ Importantly, it also would exclude enterprise service offerings, which are typically offered to larger organizations through customized or individually negotiated arrangements, and it would exclude special access services which have not been included in the BIAS definition.⁸⁰

⁷⁷ *Id.* at para. 59.

⁷⁸ *Id.* at para. 60.

⁷⁹ *Id.*

⁸⁰ *Id.*

The FCC also asks whether it should apply the modified definition of BIAS used for the broadband label requirement in this context to make clear that enterprise services are excluded even when they are supported by the Commission’s broadband access and affordability programs.

Except as discussed below with regard to wholesale service, INCOMPAS agrees with the *NPRM*’s proposed definition of BIAS and mass market. INCOMPAS also supports net neutrality rules applying to BIAS service supported by USF programs, such as the E-rate and RHC programs, as well as the ACP. INCOMPAS believes that net neutrality rules should not apply to broadband services purchased by enterprises that typically negotiate their services, including those enterprise services that may be supported by USF programs as determined by the *Broadband Labels Recon Order*.⁸¹ There is no reason to alter that approach because enterprise customers and broadband providers negotiate to deliver the service that those customers need, and those that seek service through the FCC’s affordability programs, like E-rate, set forth their requirements in requests for proposals that providers then respond to and meet to win the contract.

Moreover, INCOMPAS supports the Commission’s proposal to remain consistent with its conclusions in prior FCC Orders to include in the term “broadband internet access service” those services provided over any technology platform, including but not limited to wire, terrestrial wireless (including fixed and mobile wireless services using licensed or unlicensed spectrum), and satellite, and to use its prior definitions of fixed and mobile and that BIAS is covered

⁸¹ See *Empowering Broadband Consumers Through Transparency*, Order on Reconsideration, CG Docket No. 22-2, at paras. 24-26, Appendix A (rel. Aug. 29, 2023).

whether it is provided via leased capacity or facilities-based capacity.⁸² INCOMPAS also supports the exclusion of private or public Wi-Fi networks, such as in airports or coffee shops or in employers' offices.⁸³

The only caveat to INCOMPAS's support for the Commission's proposal is that the Commission should consider deleting the word "retail" from the definition of BIAS to clarify that it could, if necessary, resolve disputes between wholesalers and resellers of BIAS. As mentioned, this is not the only way in which the Commission could accomplish this objective (it is worth noting that NTIA defines BIAS in the BEAD NOFO in the same way as the Commission proposes to do so in the *NPRM* and yet the NOFO still strongly encourages states to regulate wholesale BIAS under that program), but it is the simplest way of doing so. In all events, Commission oversight of wholesale BIAS is a necessary consequence of classifying resold BIAS as a telecommunications service. This is because the underlying facilities owner (the wholesaler) controls many aspects of resold service. Exercising jurisdiction over only the retail resold service is insufficient to ensure that resold service complies with the Commission's regulatory regime for BIAS. Thus, the only way for the Commission to protect consumers of resold BIAS from violations of protections proposed in the *NPRM* would be to exercise jurisdiction over wholesalers of BIAS.⁸⁴

⁸² *NPRM*, at para. 61.

⁸³ *Id.* at para. 62.

⁸⁴ As the Commission explained in the *2015 Open Internet Order*, "consumers will expect the protections and benefits afforded by providers' compliance with the [net neutrality] rules, regardless of whether the consumer purchases service from a facilities-based provider or a reseller." See *2015 Open Internet Order*, at n.258. It stated further that "the extent of compliance by the underlying facilities-based provider will be a factor in assessing compliance by the

Non-BIAS Data Services. The Commission also seeks comment on whether to continue excluding non-BIAS data services (formerly “specialized services”) from the scope of broadband internet access service.⁸⁵ In the *2015 Open Internet Order*, the Commission explained that certain services offered by ISPs that share capacity with BIAS over ISPs’ last-mile facilities were not BIAS and provided examples and characteristics of services that likely fit within this category of non-BIAS data services.⁸⁶ The Commission defined characteristics of these services, explaining that they (1) are not used to reach large parts of the internet; (2) are not a generic platform, but rather a specific “application level” service; and (3) use some form of network management to isolate the capacity used by these services from that used by broadband internet access service. INCOMPAS submits that these characteristics still appropriately describe non-BIAS data services, and we also support the Commission’s tentative conclusion that it should maintain the *2015 Open Internet Order*’s approach and continue to closely monitor the development of non-BIAS data services,⁸⁷ especially so that they do not undermine consumers’

reseller,” thus implicitly recognizing the need for the Commission to exercise jurisdiction over wholesale providers of BIAS. *See id.*

⁸⁵ *NPRM*, at para. 64.

⁸⁶ The Commission identified some ISPs’ existing facilities-based VoIP and Internet Protocol-video offerings, connectivity bundled with e-readers, heart monitors, energy consumption sensors, limited-purpose devices such as automobile telematics, and services that provide schools with curriculum-approved applications and content as examples of non-BIAS data services. *See 2015 Open Internet Order*, at para. 208; *Restoring Internet Freedom*, Declaratory Ruling, Report & Order, and Order, WC Docket No. 17-108 (rel. Jan. 4, 2018), at para. 23 (“*2018 RIFO*”).

⁸⁷ In the *2015 Open Internet Order*, the Commission emphasized that non-BIAS data services might still be subject to enforcement action if the Commission determined that: (1) a particular service is providing the functional equivalent of BIAS; (2) an ISP claimed or attempted to claim that a service that is the equivalent of BIAS is a non-BIAS data service not subject to any rules that would otherwise apply; or (3) a non-BIAS data service offering is undermining investment, innovation, competition, and end-user benefits. *2015 Open Internet Order*, at para. 210.

use of and ability to access BIAS. Such monitoring should continue to consider whether online content services are impeded in their ability to compete with other services. INCOMPAS members are offering streaming, voice, and texting services that compete directly with BIAS providers' services. Thus, it is imperative that the Commission continue to monitor BIAS provider behavior so that it does not interfere with competitors' online offerings.

Internet Traffic Exchange. The Commission tentatively concludes that BIAS includes arrangements for the exchange of internet traffic by an edge provider or an intermediary with the ISP's network, to the extent they provide the "capability to transmit data to and receive data from all or substantially all internet endpoints . . . [and] enable the operation of the communications service."⁸⁸ As the Commission explained in 2015, "[t]he representation to retail customers that they will be able to reach 'all or substantially all Internet endpoints' necessarily includes the promise to make the interconnection arrangements necessary to allow that access" and "the promise to transmit traffic to and from those Internet end points back to the user."⁸⁹ INCOMPAS agrees with this approach, as we explain further below.

The Commission also tentatively concludes that the Commission's findings and rationale regarding internet traffic exchange in the *2015 Open Internet Order*—that such "edge service" is derivative of BIAS and constitutes the same traffic—remain valid. The *NPRM* also discusses how the *Verizon* court concludes that, in addition to the retail service provided to consumers, "broadband providers furnish a service to edge providers, thus undoubtedly functioning as edge providers' 'carriers.'"⁹⁰ And it seeks comment on the *Verizon* court's characterization of

⁸⁸ *NPRM*, at para. 65.

⁸⁹ *Id.*

⁹⁰ *NPRM*, at para. 66.

broadband internet access service in relation to service provided to both consumers and edge providers. INCOMPAS disagrees with this tentative conclusion. While ISPs are in the position to interfere with edge providers' traffic, this does not mean that ISPs are carriers for edge providers, and the Commission should clearly state the ISPs serve their BIAS customers, not edge providers, in the provision of BIAS.

The *NPRM* also asks about ISPs economic incentives and mechanisms to block or disadvantage a particular edge provider or class of edge providers, and it specifically seeks comment on vertically-integrated ISPs and whether these affiliate relationships that may be bundled with BIAS create additional incentives to favor affiliated OTT services.⁹¹ The *NPRM* also asks whether ISPs are incentivized to increase revenues by charging edge providers for access or prioritized access to the ISPs end users and whether there are justifications for charging such fees that were not present in 2015.⁹²

INCOMPAS agrees with the FCC's tentative conclusion that BIAS includes internet traffic exchange, and that it is important for the Commission to maintain oversight of a BIAS provider's interconnection arrangements that result in internet traffic exchange, so that it cannot evade net neutrality rules at interconnection points.⁹³ As the Commission explained in its *2015 Open Internet Order*, BIAS "involves the exchange of traffic between a last-mile broadband

⁹¹ *Id.* at para. 126.

⁹² *Id.*

⁹³ As we explain above, edge service is *not* derivative of BIAS. BIAS providers and edge providers may share the BIAS customer—the end user who pays for the BIAS—but that does not make the edge provider a customer of the BIAS provider. The Commission also should account for the fact that edge service may be provided to some customers via connections that are not reliant on BIAS.

provider and connecting networks,” and that “[t]he representation to retail customers that they will be able to reach ‘all or substantially all Internet endpoints’ necessarily includes the promise to make the interconnection arrangements necessary to allow that access.”⁹⁴ In the face of evidence that consumers were being harmed because of disputes between internet content companies and broadband providers about congestion with the BIAS providers’ ports that connect to the internet,⁹⁵ the *2015 Open Internet Order* found that BIAS providers had the ability to use “terms of interconnection to disadvantage edge providers and that consumers’ ability to respond to unjust or unreasonable broadband provider practices are limited by switching costs.”⁹⁶ The *2015 Open Internet Order* rightfully understood that such behavior would permit a broadband provider to do at the point of interconnection with the internet what it would be prohibited from doing once the content had entered the broadband provider’s network. Indeed, even the *2010 Open Internet Order* understood that the point at which a broadband provider’s network connects to the internet is capable of being used to circumvent the no-blocking rule. The Commission at the time clarified that the no-blocking rule encompasses “all traffic transmitted to or from end users of a broadband Internet access service,” including content, applications, or services.⁹⁷ The *2010 Open Internet Order* provided a mechanism to address abusive practices by broadband providers, including interconnection practices: “[s]ome concerns have been expressed that broadband providers may seek to charge edge providers simply for delivering traffic to or

⁹⁴ *2015 Open Internet Order*, at para. 204.

⁹⁵ *Id.* at para. 199 (“At the end of the day, consumers bear the harm when they experience degraded access to the applications and services of their choosing due to a dispute between a large broadband provider and an interconnecting party.”).

⁹⁶ *Id.* at para. 205.

⁹⁷ *2010 Open Internet Order*, at para. 64.

carrying traffic from the broadband provider's end-user customers. To the extent that a content, application, or service provider could avoid being blocked only by paying a fee, charging such a fee would not be permissible under these rules.”⁹⁸ As Level 3 (now Lumen) noted at the time, broadband providers should not be able to circumvent interconnection protections by characterizing the interconnection dispute as an existing peering arrangement outside the scope of the *2010 Open Internet Order*.⁹⁹

A broadband provider’s interconnection with the internet is an indispensable part of its BIAS, which means it is rightfully considered part of the Title II service.¹⁰⁰ Without interconnection and internet traffic exchange, there is no internet access. Interconnection is the

⁹⁸ *Id.* at paras. 67 & 64 n.200 (noting that the no-blocking rule applied to wherever “in the network blocking could occur”). The Commission noted that it would examine future, not existing, interconnection arrangements. *Id.* at para. 67 n.209.

⁹⁹ See Letter from John M. Ryan, Executive Vice President, Level 3 to Julius Genachowski, Chairman, FCC, GN Docket No. 09-191 (Feb. 17, 2011) (“interpreting the Open Internet Order to eliminate Commission review if a dispute is over any service, simply because it is arbitrarily labeled a ‘backbone service,’ creates a gaping hole in the Commission’s ability to preserve openness in the Internet. If an ISP is free to refuse to accept content requested by its subscribers in the metro area where the subscriber resides, but rather can insist that the same content will only be accepted at a point of interconnection 1 mile or 500 miles away where a fee will be charged for the ‘backbone service’ to carry it to the subscriber’s home town, then the prohibition on charging content providers for delivery of content requested by subscribers is eviscerated. The Commission can be assured that if this construct allows ISPs to evade scrutiny by regulators and policymakers, then anticompetitive interconnection schemes will proliferate and be justified simply by labeling the coerced payment a ‘backbone’ service charge. And this outcome will be a direct result of the incentives ISPs have to discriminate against online content that competes with the ISPs’ own content – the same incentives the Commission explicitly outlined and warned against in the Open Internet Order.”).

¹⁰⁰ M-Lab, *ISP Interconnection and Its Impact on Consumer Internet Performance, A Measurement Lab Consortium Technical Report*, at 4 (Oct. 28, 2014), available at https://www.measurementlab.net/publications/M-Lab_Interconnection_Study_US.pdf (reporting that customers of ISPs such as AT&T and Comcast experienced “sustained performance degradation” over Access/Transit ISP connection points, and noting that “business relationships between ISPs, and not major technical problems, are at the root of the [degradation] we observed”).

means by which broadband providers offer access to content and applications outside of their own network. Thus, Commission oversight of interconnection and internet exchange practices of BIAS providers is proper because it is an essential part of BIAS, which is within the ambit of the Commission's regulatory powers.

The Commission has recognized this: “BIAS involves the exchange of traffic between a broadband Internet access provider and connecting networks” and consumers rely upon interconnection because broadband providers tell their “customers that they will be able to reach ‘all or substantially all Internet endpoints.’”¹⁰¹ That includes the promise to make the interconnection arrangements necessary to allow that access. The D.C. Circuit upheld the Commission's judgment in the *2015 Open Internet Order*, holding that the reclassification of broadband services under Title II gave the Commission jurisdiction over “the interconnection arrangements necessary to provide” the broadband service.¹⁰² Before the *2015 Open Internet Order*, the increasing number of interconnection disputes mattered not only because it reflected an exercise of broadband providers' gatekeeper power, but also because the congestion and poor quality of internet service caused by such disputes directly impaired the internet access offered by the broadband providers.¹⁰³ It still holds true today that ISPs can use the interconnection points to demand payment in exchange for not blocking or throttling internet traffic, and they have the incentive to do so.

Commission oversight of BIAS providers' interconnection and interexchange traffic practices is proper because it is an essential part of BIAS, which is within the scope of the

¹⁰¹ *2015 Open Internet Order*, at para. 28.

¹⁰² *U.S. Telecom Ass'n*, 825 F.3d at 713.

¹⁰³ *2015 Open Internet Order*, at paras. 199-01.

Commission’s regulatory powers. Section 201(b) states: “[a]ll charges, practices, classifications, and regulations for and in connection with [a] communications service, shall be just and reasonable.”¹⁰⁴ For purposes of that section, it does not matter whether the practice, classification, or regulation itself involves a separate telecommunications service.

The Commission has evidence from its *2015 Open Internet* proceeding and large ISP mergers that broadband providers with significant market power can use interconnection to harm BIAS customers. Based on the *2015 Open Internet* record *alone*, the Commission cannot ignore the effect interconnection has on consumers’ use of broadband. Moreover, the Department of Justice and the Commission also have investigated interconnection issues extensively in several large ISP mergers, resulting in conditions being placed on those merged entities to ensure that they would not be able to use interconnection disputes to harm consumers or edge providers.¹⁰⁵ Charter was outright prohibited from imposing interconnection fees in particular situations, and AT&T was required to submit its interconnection agreements with the Commission for review. Interconnection oversight is necessary so that the FCC’s net neutrality rules of no-blocking, no-throttling, and no-interference that the FCC is proposing cannot be evaded at interconnection. Those conditions are no longer in force; thus, if the Commission does not reassert its authority

¹⁰⁴ 47 U.S.C. § 201(b). *See Computer & Comm’n Indus. Ass’n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982) (holding that FCC had jurisdiction over enhanced services and CPE ancillary to its regulation of interstate wire communications services); *Rural Telephone Coal. v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988).

¹⁰⁵ *See, e.g., Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-75 (rel. Nov. 17, 2005), at Appendix G; *Applications of AT&T and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 14-90 (rel. July 28, 2015), at para. 219; *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 15-149 (rel. May 10, 2016), at para. 131.

over BIAS interconnection and internet traffic exchange, it may not be able to address potential harms in the future.

With respect to BIAS providers' incentives to block or disadvantage certain OTT services, either because they compete with the providers' own services or to increase their own revenue, INCOMPAS believes that those concerns remain. In comments recently submitted to the EU on whether mandated payments from edge providers to ISPs should be instituted,¹⁰⁶ NTIA expressed concerns about the potential for ISPs to use their terminating monopoly position in ways that violate net neutrality, raise costs on customers, and is discriminatory. It also raised concerns about the potential impact on how ISPs and edge providers make efficient decisions regarding network investment and interconnection and also how it could potentially entrench ISPs' market position and harm ISP competition. NTIA asserted:

The U.S. shares the goal of promoting reliable, fast, and secure connectivity for all. Internet services depend on a diverse global infrastructure extending well beyond end-user access networks. CAPs/LTGs¹⁰⁷ [online content providers] build and operate networks, including large international fiber and submarine cable systems, that deliver popular services and applications. They develop or acquire content, operate data centers, and incur other obligations that contribute to the ecosystem's total costs.

Mandating direct payments to telecom operators in the EU absent assurances on spending could reinforce the dominant market position of the largest operators. It could give operators a new bottleneck over customers, raise costs for end users, and alter incentives for CAPs/LTGs to make efficient decisions regarding network investment and interconnection. It is difficult to understand how a system of mandatory payments

¹⁰⁶ *United States comments on European Consultation: "The future of the electronic communications sector and its infrastructure"* (May 25, 2023), available at <https://www.ntia.gov/other-publication/2023/united-states-comments-european-consultation-future-electronic> ("NTIA's EU Submission").

¹⁰⁷ The EU questionnaire set forth these definitions: CAPs are defined as Content and application providers, and LTGs are defined as large traffic generators. See *Exploratory Consultation: The future of the electronic communications sector and its infrastructure*, at 39 & 59, available at <https://ec.europa.eu/newsroom/dae/redirection/document/94019>.

imposed on only a subset of content providers could be enforced without undermining net neutrality.¹⁰⁸

NTIA also asserted:

There are substantial risks in a mandatory mechanism of direct payments from CAPs/LTGs to telecom networks, especially absent mandatory, enforceable obligations on how such payments are spent. Enforcing mandatory payments on a subset of traffic generators could be discriminatory and degrade equal access to the Internet, thereby endangering the principle of Internet openness/net neutrality. As BEREC has noted, such a model “would provide ISPs the ability to exploit the termination monopoly and it is conceivable that such a significant change could be of significant harm to the internet ecosystem.” (BEREC preliminary assessment of the underlying assumptions of payments from large CAPs to ISPs, October 2022.) Studies suggest that similar policies in Korea “create unnecessary costs and bottlenecks in South Korea’s digital ecosystem.” (Internet Society, “Internet Impact Brief: South Korea’s Interconnection Rules,” May 2022.)¹⁰⁹

These concerns are present in the U.S. where large BIAS providers can demand payment from online content providers or their traffic will be blocked or throttled.

Moreover, the largest incumbent home BIAS providers are cable operators who are losing revenues as they are losing their traditional video subscribers. While they have been gaining broadband subscribers (especially since COVID), those providers have economic incentives to find new revenue opportunities. Given their history of charging interconnection fees from OTT video, they have the ability to do so. Incumbent telcos that are ISPs also have a history of charging certain online content companies fees for interconnection and traffic exchange. Their counterparts in other parts of the globe have been seeking regulatory changes so that large ISPs can charge OTT services, and the U.S. Government has expressed its concerns about these proposals, as discussed above. Moreover, ISP customers already pay ISPs for access to the internet. Charging OTT services as well means that they get to double charge for the same

¹⁰⁸ *NTIA’s EU Submission*, at Response to Question 54.

¹⁰⁹ *Id.* at Response to Question 58.

service. A recent Analysys Mason study demonstrates the harms that could result if regulators permit ISPs to charge OTT providers.¹¹⁰ The interconnection/traffic exchange oversight will allow for the Commission to review on a case-by-case basis whether any of the BIAS provider practices are harmful based on complaints. Thus, interconnection would still be commercially negotiated, but the agency would have the ability to intervene as may be necessary through a complaint proceeding to ensure that the BIAS providers' terms are just and reasonable.

The FCC also seeks comment on whether it should exclude any particular services or functions from the definition of BIAS. For example, it asks whether it should exclude virtual private network (VPN) services, web hosting services, and/or data storage services from the scope of the BIAS definition.¹¹¹ The Commission has previously excluded CDNs and internet backbone services, including transit arrangements, from the definition of BIAS.¹¹² And the Commission observes that these services directly or indirectly provide data on behalf of their clients. INCOMPAS maintains that it is appropriate for the FCC to exclude these services from the definition of BIAS. Furthermore, the Commission should not regulate them under Title II.¹¹³ Unlike BIAS, they do not offer service to all endpoints of the internet. Additionally, these

¹¹⁰ See Analysys Mason, *The Impact of Tech Companies' Network Investment on the Economics of Broadband ISPs* (Oct. 2022), at 10 (stating that allowing ISPs to charge OTT providers usage fees could have “detrimental effects on multiple stakeholder types”—including OTTs, ISPs, and end users—by imposing high interconnection costs and disrupting incentives, investment, and competition), available at <https://www.incompas.org/Files/2022%20Tech%20Investment/FINAL%20Analysys%20Mason%20Report%20-%20Impact%20of%20tech%20companies'%20network%20investment%20on%20the%20economics%20of%20broadband%20ISPs.pdf>.

¹¹¹ *NPRM*, at para. 67.

¹¹² *Id.*

¹¹³ See *id.*

markets are highly competitive, and customers using these services can negotiate the protections they may need, and relatively easily switch providers for these competitive services. The FCC does not currently have jurisdiction over these services, even under Title II. Continuing to keep these services outside of the scope of BIAS is consistent with the FCC’s prior decisions.

Moreover, the Commission should confirm that CDN providers are not subject to the Commission’s proposed open internet regulations as the services they offer are neither BIAS, as the Commission proposes to define that term,¹¹⁴ nor “telecommunications services,” as defined by the Communications Act.¹¹⁵ CDNs store content at the network edge, closer to end users, to expedite access to that content and improve online performance; they do not operate or enable a telecommunications system. The Commission should also confirm that ISPs that permit CDN providers to store content near end users are not engaging in “paid prioritization.” CDNs do not prioritize or otherwise impact the treatment of traffic within an internet pathway; all traffic continues to be treated equally and routed with the same priority to its destination. Excluding CDNs from Title II regulation would be consistent with over a decade of Commission precedent,¹¹⁶ and global consensus.¹¹⁷ The imposition of open internet regulatory obligations on CDNs would adversely impact the security and overall functioning of the internet and therefore

¹¹⁴ See *id.* at paras. 59–60.

¹¹⁵ See 47 U.S.C. § 153(53).

¹¹⁶ See, e.g., *2010 Open Internet Order*, at para. 47; *2015 Open Internet Order*, at para. 190; *2018 RIFO*, at para. 24.

¹¹⁷ See, e.g., Body of European Regulators for Electronic Communications, *About BEREC’s Net Neutrality Guidelines* (stating that it “does not consider interconnection services [provided by, for example, CDNs] to be within the scope of [network-neutrality] Regulation”), available at https://www.berec.europa.eu/sites/default/files/document_register_store/2016/8/NN%20Facsheet.pdf.

must be avoided. While the Commission’s reasoning could support finding that a CDN that is integrated into an ISPs BIAS network is itself BIAS, this is not the case for a CDN operated by a company that does not provide BIAS or operate such a network.

VIII. THE FCC HAS THE LEGAL AUTHORITY TO RECLASSIFY BIAS.

There is a long history and clear legal precedent to show that the FCC has the authority to reclassify BIAS. As the *2015 Open Internet Order* explained, “the Commission has steadily and consistently worked to protect the open Internet for the last decade, starting with the adoption of the *Internet Policy Statement* up through its recent *2014 Open Internet NPRM* following the D.C. Circuit’s *Verizon* decision.”¹¹⁸ In fact, as the NPRM explains, the *2010 Open Internet Order* was based in part on a revised understanding of the Commission’s Title I authority—as well other statutory provisions, including Section 706 of the Telecom Act, and was challenged before the D.C. Circuit in *Verizon v. FCC*.¹¹⁹ Following the *Verizon* decision, the Commission adopted the *2015 Open Internet Order*. In 2016, the D.C. Circuit upheld the Commission’s *2015 Open Internet Order* in full.¹²⁰

Despite the D.C. Circuit’s decision upholding the Commission’s *2015 Open Internet Order*, in 2018 the Commission reclassified BIAS as an information service. However, as the NPRM explains, “in *Brand X*, the Supreme Court confirmed not only that an administrative agency can change its interpretation of an ambiguous statute, but that it ‘must consider varying interpretations and the wisdom of its policy on a continuing basis, for example in response to . . .

¹¹⁸ *2015 Open Internet Order*, at para. 328.

¹¹⁹ *NPRM*, at para. 8 (citing *Verizon v. FCC*, 740 F.3d 623, 635-42 (D.C. Cir. 2014)).

¹²⁰ *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016).

a change in administrations.”¹²¹ As such, the *NPRM* explains that not only does the Commission have the authority to classify BIAS, but also that it must reevaluate the Commission’s 2018 decision to reclassify BIAS as an information service and to return to the telecommunications service classification.¹²² In fact, the *RIF Order* acknowledged the FCC’s authority to do so. Relying on Supreme Court precedent from *Brand X*, the Commission in 2018 explained that “[a]n agency of course may decide to change course, and such a decision is not . . . inherently suspect.”¹²³ The Commission explained that “[r]elevant precedent holds that we need only ‘examine the relevant data and articulate a satisfactory explanation for [our] action,’” and that the “possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence.”¹²⁴ As such, history and legal precedent show that the FCC has the authority, ability, and responsibility to reclassify BIAS to a Title II telecommunications service to ensure that consumers and small businesses can access an open internet.

IX. COMPLIANCE WITH THE NET NEUTRALITY RULES AS PROPOSED IS NOT A BURDEN ON ISPs.

INCOMPAS supports the net neutrality rules as proposed, subject to the limited caveats discussed above. As we have described, BIAS is essential for customers for education, jobs, and health care, among other important uses. Complying with no blocking, no throttling, no paid

¹²¹ *NPRM*, at para. 68 (citing *Nat’l Cable & Telecomms. Ass’n v. Brand X*, 545 U.S. 981).

¹²² *Id.* at para. 68.

¹²³ *2018 RIFO*, at para. 156.

¹²⁴ *Id.* at para. 156 (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 513 (2009) and *Domestic Sec. Inc. v. SEC*, 333 F.3d 239, 249 (D.C. Cir. 2003)).

prioritization, and the general conduct standard is not burdensome for ISPs. Indeed, they claim to support net neutrality policy and abide by it.¹²⁵ The ISPs' real objection seems to be that they do not want FCC oversight, but as we discuss above, FCC already has oversight vis-a-vis digital discrimination, broadband data collection, and its Section 706 authority. A federal agency with network expertise—the FCC—to ensure an open internet policy in the U.S. is readily available will best serve broadband customers and their access to competitive online content, applications, and services.

It should not depend on the state a consumer lives in or where a small business purchases broadband as to whether net neutrality protections apply. A federal framework that focuses on net neutrality and does not seek to overextend its reach to issues such as security will best serve the public interest in ensuring access to an open internet throughout the nation. INCOMPAS believes a federal approach would benefit ISPs as well—especially where state laws may conflict and would be preempted, as we discuss further below.

General Conduct Rule. INCOMPAS also supports the general conduct rule as adopted in the *2015 Open Internet Order* and agrees with the Commission's view that the rule as crafted

¹²⁵ We believe the transparency rule is sufficient as is, and it would be less burdensome for ISPs who already meet the transparency requirement for the Commission to change it, especially given that the broadband labels are in process. The FCC could revisit the need for additional transparency at some future date if needed.

We agree with the FCC's tentative conclusion that the transparency rule on its own is not sufficient to protect customers because it does not restrict ISPs from engaging in harmful behavior and that the *RIF Order's* framework was inadequate by largely relying on transparency disclosure and FTC antitrust oversight. *See NPRM*, at paras. 134-146. *See also* INCOMPAS Comments, *Restoring Internet Freedom*, WC Docket No. 17-108, at 69-83 (fil. July 17, 2017); INCOMPAS Reply Comments, WC Docket No. 17-108, at 18-30 (fil. Aug. 30, 2017).

provides sufficient guidance to ISPs to ensure compliance.¹²⁶ As to whether there are any specific practices that would or would not violate this proposed rule, for example, zero rating or sponsored data practices,¹²⁷ INCOMPAS believes that the case-by-case approach continues to be the proper course. As INCOMPAS noted in 2016, that approach allows the Commission to promote consumer benefits and competition that new service offerings may bring,¹²⁸ while continuing to monitor adherence to the principles of net neutrality.

The Commission recognized in 2015 that zero rating models can offer specific benefits to consumers.¹²⁹ This may be particularly true for consumers that are subject to a limited data usage allowance under their broadband subscription plan.¹³⁰ Because accessing some online activities

¹²⁶ *NPRM*, at para. 167 (“We believe that the general conduct standard we propose today, mirroring that adopted in the 2015 Open Internet Order, provides sufficient guidance to ISPs for purpose of compliance, a conclusion affirmed by the D.C. Circuit.”).

¹²⁷ *Id.*

¹²⁸ See Letter from Chip Pickering, Chief Executive Officer, INCOMPAS, to the Honorable Tom Wheeler, Chairman, Federal Communications Commission (June 3, 2016) (“it is important that the agency, in its case-by-case review of zero rating plans, remain mindful of its finding in the Open Internet Order that “new service offerings, depending on how they are structured, could benefit consumers and competition.”) (citing *2015 Open Internet Order*, at para. 152), available at <https://www.incompas.org/Files/filings/2016/06-03-16%20INCOMPAS%20Letter%20to%20Chairman%20Wheeler.pdf>.

¹²⁹ *2015 Open Internet Order*, at para. 152.

¹³⁰ INCOMPAS remains concerned about data caps from incumbent, dominant wireline BIAS providers. See, e.g., *Conditions Imposed in the Charter Communications-Time Warner Cable-) Bright House Networks Order*, Petition to Deny, WC Docket No. 16-197, at 22-27 (fil. July 22, 2020), (describing the potential for data caps from dominant, incumbent wireline providers to harm consumers and online content and urging the agency to deny Charter’s request for relief from its merger condition not to impose data caps and engage in usage-based pricing) available at <https://www.fcc.gov/ecfs/document/1072213590372/1>). Nevertheless, INCOMPAS supports the Commission’s prior finding that particularly in the wireless BIAS ecosystem, zero-rating plans can provide benefits to consumers. As the Commission stated in the *2015 Open Internet Order*, “evidence in the record suggests that [zero-rating] models may in some instances provide benefits to consumers, with particular reference to their use in the provision of mobile services.”

consumes a lot more data than others—such as streaming audio or video, video calls, or downloading large files—for those consumers, a zero rating plan could enable them to more fully participate in the internet ecosystem without incurring sometimes significant data overage fees. Zero rating practices could therefore make broadband more affordable and increase consumers’ ability to access the content and applications of their choosing. Such practices potentially allow consumers to experience more diverse and innovative content and expand their opportunity to work remotely, engage in online education, use telehealth services, and keep in touch with friends and family. Rather than an ‘all or nothing’ approach to such models, INCOMPAS encourages the Commission to follow the sound policy approach it adopted in 2015, whereby zero-rating practices are reviewed on a case-by-case, fact-specific basis to determine whether any concerns are presented or, conversely, whether the practice has pro-consumer benefits that further the Commission’s goal of broadband for everyone.

Preemption. As it proposes, the Commission should exercise its preemption authority to preclude states from imposing net neutrality obligations on BIAS that are in conflict or otherwise inconsistent with the Commission’s proposed net neutrality regulations, including by imposing additional requirements where the FCC intentionally declined to do so. Given the inherent interstate nature of most traffic and the need to avoid a patchwork of net neutrality regulation, INCOMPAS believes total preemption is appropriate for net neutrality. However, the FCC should not preempt state regulations that promote network market entry and wholesale access to BIAS, and in all events, state regulations promoting network market entry and wholesale access

2015 Open Internet Order, at para. 151. Accordingly, we support the Commission continuing its approach of permitting zero-rating subject to ex post review on a holistic, case-by-case basis.

to BIAS should only be preempted when in conflict with the Commission’s network neutrality regulations.

X. FORBEARANCE MUST BE ADMINISTERED TO AVOID UNNECESSARY REGULATIONS, WHILE MAINTAINING THOSE TITLE II PROVISIONS THAT ARE REQUIRED TO ENSURE SERVICE IS JUST AND REASONABLE, CONSUMERS ARE PROTECTED, AND THE PUBLIC INTEREST IS MET.

INCOMPAS agrees that many of the Title II provisions are not necessary for the Commission to maintain proper oversight of BIAS and the providers that are offering broadband. However, we disagree with the Commission’s *NPRM* analysis with respect to Section 254(d) and Section 214.

A. The FCC Should Not Forbear on Section 254(d).

The Commission seeks comment on its proposal to “forbear in part from the first sentence in section 254(d) and our associated rules ‘insofar as they would immediately require new universal service contributions associated with’ BIAS, as the Commission did in 2015.”¹³¹ In the *2015 Open Internet Order*, the Commission explained the following: “*for now* we do forbear in part from the first sentence of section 254(d) and our associated rules insofar as they would immediately require new universal service contributions associated with broadband internet access service.”¹³² The Order went further to explain the potential benefits of expanding the base to include BIAS revenues:

“... newly applying universal service contribution requirements on broadband internet access service potentially could spread the base of contributions to the universal service fund, providing at least some benefit to customers of other services that contribute, and

¹³¹ *NPRM*, at para. 105.

¹³² *2015 Open Internet Order*, at para. 488 (emphasis added).

potentially also to the stability of the universal service fund through the broadening of the contribution base.”¹³³

The Commission explained, however, that it did not expand the base at that time because the Commission had an open proceeding on contribution reform that sought comment on three proposals in 2012.¹³⁴ In addition, at that time, the Commission had referred the question of how to reform the USF contribution methodology to the Federal-State Joint Board on Universal Service (“Joint Board”) and was waiting on its recommended decision to be submitted the following month.¹³⁵

While the FCC may have had reasons to forbear from section 254(d) in 2015, today’s circumstances are very different: (1) the contribution factor has doubled—and is now at 34.5%;¹³⁶ (2) data shows the contribution factor is going to continue to rise without reform;¹³⁷ (3)

¹³³ See *id.* at para. 489.

¹³⁴ In 2015, it made more sense for the FCC to view the pending contribution reform proceeding as still developing given that the proceeding had opened three years prior, and it had requested the Joint Board’s recommendation. Today, however, the proceeding is ripe for a decision. With the precipitously rising contribution factor, the significant burden on customers paying an additional 34.5% on their telecom bills, potential gaming of the system occurring because of the high fee, and many parties urging the Commission to act by including BIAS revenues—it would not be a wise policy choice for the FCC to bind itself as a legal matter from acting on much needed reform that has garnered significant support from competitors, incumbents, and public interest stakeholders.

¹³⁵ See *id.* at para. 489 & n.1471.

¹³⁶ FCC, *Contribution Factor & Quarterly Filings - USF Management Support*, available at <https://www.fcc.gov/general/contribution-factor-quarterly-filings-universal-service-fund-usf-management-support>.

¹³⁷ See Carol Matthey, *USForward*, at 3 (Sept. 2021) (“Assuming a continuation of historical trends, the contribution factor could approach 40% or more in the coming years.”), available at https://www.incompas.org/Files/filings/2021/USForward%20Report%202021%20for%20Release_FINAL.pdf; see also The Brattle Group, *The Economics of Universal Service Fund Reform*, at Executive Summary (“Without funding reform we predict [the contribution factor] will be 44.0% in 2025 and 49.7% in 2027.”), available at

there is a large coalition made up of over 332 diverse organizations—including public interest groups, anchor institutions, trade associations, and industry—that all agree that the revenue base should be expanded to include BIAS revenues and has asked the FCC to move on reform;¹³⁸ and (4) the referral of this issue to the Joint Board is effectively over—the state commissioners have already given their recommendation and the current Joint Board does not appear to be working on this issue any longer.¹³⁹

These changes in circumstances have also impacted the underlying policy justifications for why it no longer makes sense to forbear from section 254(d). Today, BIAS is an essential communications service. As the *NPRM* explains, “BIAS connections have proved essential to every aspect of our daily lives, from work, education, and healthcare, to commerce, community, and free expression.”¹⁴⁰ As evidence of the importance and prevalence of broadband, all of the USF distribution programs today have been modernized to support BIAS services in order to increase broadband availability and affordability. In fact, USF now mostly supports broadband services compared to telecom services. However, unlike the other USF-supported telecom services, BIAS revenues do not contribute to the USF. Moreover, according to the statute, “every telecommunications carrier that provides interstate telecommunications services shall contribute,

https://www.incompas.org/Files/filings/2023/The%20Economics%20of%20USF%20Reform%20Brattle_FINAL.pdf.

¹³⁸ See USForward Coalition, *Repairing the FCC’s Universal Service Fund Contribution Mechanism*, A Call to Action, WC Docket Nos. 21-476 & 06-122 (fil. Feb. 14, 2022), available at <https://www.fcc.gov/ecfs/document/102141954517172/2>.

¹³⁹ See *Federal State Joint Board on Universal Service et al.*, WC Docket Nos. 96-45, 06-122, 09-51, Recommended Decision (rel. Oct. 15, 2019) (recommending “the Commission adopt a connections-based assessment on residential services and an expanded revenues-based assessment on business services.”).

¹⁴⁰ *NPRM*, at para. 17.

on an *equitable* and *nondiscriminatory* basis.”¹⁴¹ Whether or not BIAS is classified as a Title I or Title II service, it can still contribute for purposes of USF—the Commission has recognized that BIAS “has always had a telecommunications component”¹⁴² and court precedent shows us that the FCC can require providers of a telecommunications service to contribute without classifying its service, which the FCC did for interconnected VoIP service.¹⁴³ As such, providers of BIAS service should start contributing to the USF to make the contribution system more equitable and nondiscriminatory and put it on a sustainable path so that it can continue to meet its statutory mandate to ensure universal service is achieved in the U.S.

Furthermore, and perhaps most importantly, forbearing from Section 254(d) does not meet the forbearance standard. Section 10 of the Communications Act provides that the Commission can forbear from applying any regulation or provision of the Communications Act to telecommunications carriers or services if the Commission determines that: (1) enforcement of the regulation is not necessary to ensure that the classification or regulation is just and reasonable; (2) enforcement of the regulation is not necessary for consumer protection; and (3) forbearance is consistent with the public interest—where the Commission must consider whether forbearance will promote competitive market conditions.¹⁴⁴ Forbearing here does not meet this test. Rather, enforcing Section 254(d) is just and reasonable given that BIAS is an essential service that is supported by the USF but does not pay in; it is necessary to protect consumers

¹⁴¹ 47 U.S.C. § 254(d).

¹⁴² *2018 RIFO*, at para. 52.

¹⁴³ *Vonage v. FCC*, 489 F.3d 1232 (D.C. Cir. 2007).

¹⁴⁴ 47 U.S.C. § 160(a)-(b).

from paying a higher contributor factor each year; and forbearing is not in the public interest and will harm competition in the market as customers game the market to buy similar, substitutable, non-USF-assessed services to avoid paying a high contribution fee.¹⁴⁵

Moreover, if the FCC were to forbear—even temporarily—it must then “unforbear” in the future in order to expand the revenue base to include BIAS revenues. This raises the legal bar of finding that it no longer meets the forbearance test—potentially impeding necessary reform in the future. INCOMPAS maintains that contribution reform is necessary and that the FCC should move forward with reform, and therefore, it should not forbear. To the extent that the FCC is concerned that not forbearing will trigger the statutory requirement that BIAS providers must contribute based on their revenues, the FCC can instead clarify that it will pause from immediately enforcing the statute and that BIAS providers are not required to include those revenues until the Commission moves to Order on the contribution reform.

B. The Commission Should Forbear on Section 214.

In the *NPRM*, the Commission tentatively concludes to exclude Section 214 from forbearance and seeks comments on any implementation issues arising from doing so.¹⁴⁶ INCOMPAS advises the Commission against this tentative conclusion given the incredibly burdensome implementation issues that would result. INCOMPAS maintains that a requirement that every BIAS provider obtain a Section 214 authorization (domestic or international) to conduct its current business is inadvisable. The burden this will place on the agency, Team

¹⁴⁵ See The Brattle Group, *The Economics of Universal Service Fund Reform*, at 15-23; see INCOMPAS, *How to Save the USF*, available at <https://www.youtube.com/watch?v=1PpKuxLeN8>; see Angie Kronenberg, *USF Reform Needs to Happen Now: Here's How to Do It*, Medium (Sept. 18, 2023), available at <https://medium.com/@akronenberg/usf-reform-needs-to-happen-now-heres-how-to-do-it-750378987ef7>.

¹⁴⁶ *NPRM*, at para 108.

Telecom, and the providers themselves will be tremendous. Given the record in the pending international 214 proceeding—where there is unanimous concern from industry on the new proposed regulatory regime for international Section 214 authorizations—the FCC should forbear on this statutory provision and rules for BIAS providers, and at the very least waive Section 214 requirements and seek further comment on the appropriate (if any) 214 regime for BIAS providers.

As explained above, Section 214 authority should not be a prerequisite for BIAS providers. Indeed, a number of INCOMPAS members with foreign ownership already have undergone CFIUS review and have national security agreements in place that cover their network operations. INCOMPAS has expressed serious reservations with recent proposals by the agency to vastly expand its regulatory requirements for current international Section 214 holders.¹⁴⁷ Concerns we raised in that proceeding are applicable here. Requirements that all BIAS providers obtain domestic and international Section 214 authorizations and/or undergo CFIUS review will be costly and time consuming, without any evidence that the costs justify the benefits gained. INCOMPAS cautions the agency on the significant impact this could have on numerous small BIAS providers, which could negatively affect their ongoing investment in their deployment and upgrades of their networks. Requiring all BIAS providers to meet the requirements under Section 214 and its requisite rules would be a significant burden. For those

¹⁴⁷ INCOMPAS Comments, *Review of International Section 214 Authorizations to Assess Evolving National Security, Law Enforcement, Foreign Policy, and Trade Policy Risks et al.*, IB Docket No. 23-119 & MD Docket No. 23-134 (fil. Aug. 31, 2023), available at <https://www.incompas.org/Files/filings/2023/08-31-23%20INCOMPAS%20Comments%20FCC%20International%20Section%20214%20Proceeding%20FINAL.pdf>; INCOMPAS Reply Comments, IB Docket No. 23-119 & MD Docket No. 23-134 (fil. Oct. 2, 2023), available at <https://www.incompas.org/Files/filings/2023/10-02-23%20INCOMPAS%20Reply%20Comments%20for%20FCC%20International%20Section%20214%20Proceeding%20FINAL.pdf>.

entities with foreign ownership to report and potentially undergoing the CFIUS/Team Telecom review process will lead them into an uncertain process with other government agencies, will require hiring outside counsel with expertise in this area, and will be a costly endeavor. The significant burden and undefined outcome for BIAS providers that do not have Section 214 authorizations and CFIUS/Team Telecom approvals outweigh the potential for harm. It certainly is not justified by the *NPRM* at this time.

Finally, forbearance of Section 214 meets the statutory test. Enforcing Section 214 is not necessary to ensure that the service is just and reasonable, and Section 214 has not been required of BIAS providers. It also is not necessary to protect consumers given that a Section 214 authorization has not been required for the provision of service. And as we describe above, forbearance is in the public interest given the significant burden and uncertainty requiring them will cause. Indeed, potentially competition in the market could be harmed as entities divert resources to meeting the requirements rather than deploying and upgrading their networks. Accordingly, INCOMPAS supports forbearance on Section 214 obligations for BIAS providers.

C. INCOMPAS Supports the Commission’s Proposal to Forbear on Rate Regulation.

The Commission seeks comments on its proposal to “forbear from all provisions of Title II that would permit Commission regulation of BIAS rates.”¹⁴⁸ INCOMPAS supports this proposal. We agree with the Commission’s assessment that the FCC can instead rely on Sections 201, 202, and 208 to enforce the proposed net neutrality rules as well as oversight of interconnection and internet traffic exchange for BIAS providers, and that forbearance meets the

¹⁴⁸ *NPRM*, at para. 105.

three-part test required by the agency.¹⁴⁹ Clarifying that the FCC will not regulate retail BIAS rates will provide providers the certainty they need that retail rate review will not be part of the Commission's proceeding or future agenda.

INCOMPAS' members are deploying their networks and offering BIAS service in the retail market. Other INCOMPAS members are offering resold BIAS based on underlying network owners' retail prices. In both cases, our members base their rates based on their costs and in response to the incumbents' rates. We know that competition is key to bringing affordable BIAS to customers. Due to FCC forbearance here, states that are increasing competition by encouraging wholesale access to BIAS networks that are funded by BEAD and other grant programs will be able to freely move forward and not be impacted by any FCC rate regulation.

¹⁴⁹ *Id.* at para. 202.

XI. CONCLUSION

For the reasons stated herein, INCOMPAS urges the Commission to consider the recommendations in its comments as it examines the issues raised in the *NPRM*.

Respectfully submitted,

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December 14, 2023

Appendix A

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

In the Matter of)	
)	
Safeguarding and Securing the Open Internet)	WC Docket No. 23-320
)	
Restoring Internet Freedom)	WC Docket No. 17-108
)	
Bridging the Digital Divide for Low-Income Consumers)	WC Docket No. 17-287
)	
Lifeline and Link Up Reform and Modernization)	WC Docket No. 11-42

MOTION FOR WAIVER OF PAGE LIMIT

INCOMPAS hereby requests that the Commission waive the page limitation set forth in Section 1.429 of the Commission’s rules that applies to Oppositions to Petitions for Reconsideration and Replies to Oppositions as pertaining to the above-referenced matter.¹⁵⁰

The Commission’s Notice of Proposed Rulemaking (“NRPM”) in this proceeding addresses a myriad of complex and challenging issues.¹⁵¹ While INCOMPAS adhered to the rule’s 25-page limit when filing its Petition for Reconsideration,¹⁵² the page limit for responses to the Petition for Reconsideration, as well as to the other petitions on file in the same proceeding, does not allow for a full and complete discussion of the issues. The issues that would be discussed regarding the Petition for Reconsideration and in comments responding to the NPRM are interrelated and, as such, we intend to address them in a single, consolidated filing. A

¹⁵⁰ 47 C.F.R. §§ 1.429 (f)-(g).

¹⁵¹ *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320 (rel. Oct. 20, 2023).

¹⁵² *Restoring Internet Freedom et al.*, Petition for Reconsideration of INCOMPAS, WC Docket Nos. 17-108, 17-287 & 11-42 (fil. Feb. 4, 2021).

single filing in this instance would eliminate the need for duplicative pleadings, thereby reducing the burden on all parties to the proceeding and conserving Commission resources.

Although the Commission does not routinely grant waivers of the page limitations, it will do so for good cause shown and when the public interest would be so served, such as the number and complexity of issues addressed as well as reducing the number of paperwork filed with the Commission.¹⁵³ INCOMPAS respectfully submits that the public interest would be best served if the Commission waives the page limit for filings addressing issues in the Petitions for Reconsideration filed in this proceeding.

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¹⁵³ See, e.g., *Advanced Television Systems and their Impact Upon the Existing Television Broadcast Service*, Order Permitting the Filing of Combined Petitions, MM Docket No. 87-268 (June 5, 1997); *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 Bands et al.*, Order, WT Docket No. 03-66, RM-10586 (Jan. 25, 2005); *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996 et al.*, Order, MB Docket No. 02-277 (Aug. 15, 2003).