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

In the Matter of	)	
	)	
Status of Competition in the Market for the Delivery of Video Programming	)	MB Docket No. 17-214
	)	

COMMENTS OF INCOMPAS

INCOMPAS, by its undersigned counsel, submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") *Public Notice* soliciting data, information, and comment on the state of competition in the market for the delivery of video programming for the Commission's Nineteenth Report.[1]

I. INTRODUCTION

INCOMPAS, the Internet and competitive networks association, represents companies that provide residential broadband Internet access service ("BIAS"), as well as other mass market services, such as linear multichannel video programming distribution ("MVPD") and voice services in urban, suburban, and rural areas. Given consumers' preference for bundled broadband and MVPD services, INCOMPAS members have entered the video marketplace to compete with incumbent cable and telco providers in order to achieve higher take rates of broadband service. INCOMPAS also represents online video distributors ("OVDs") that offer video programming over BIAS to consumers. In these Comments, INCOMPAS examines issues that impede smaller MVPDs and new entrants' access to video programming, with a focus on

[1] *Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming*, Public Notice, MB Docket No. 17-214 (Aug. 24, 2017) ("Public Notice").

retransmission consent. In addition, we incorporate by reference our filings in the Commission's proceeding to improve competitive broadband access to multiple tenant environments ("MTEs").[2] The record in that proceeding shows that building owners and large incumbent cable and telco providers have worked in concert to prohibit competitive access to MTEs, and that Commission action to address these pernicious practices would promote video choice and competitive broadband availability, benefitting consumers.

We also incorporate by reference our filings in Commission's net neutrality proceeding.[3] The Commission's open internet policy has been a significant cornerstone to the development and availability of alternative OVD services.[4] Indeed, with the continued evolution and availability of competitive OVDs, competitive broadband providers may be able to focus their efforts on the delivery of competitive broadband, without incurring the significant costs of offering video programming service themselves.

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[2] *See* INCOMPAS Comments, MB Docket No. 17-142 (filed July 24, 2017) (encouraging the Commission to examine the state of competition in apartment buildings, condominiums, cooperatives, and commercial venues); *see also* INCOMPAS Reply Comments, MB Docket No. 17-142 (filed Aug. 22, 2017).

[3] *See* INCOMPAS Comments and Reply Comments, WC Docket No. 17-108.

[4] INCOMPAS has demonstrated in the net neutrality record that large, fixed BIAS providers that also are MVPDs have the incentive and ability to thwart OVD competition (to protect their MVPD revenues) without open internet protections, and we have urged the Commission to maintain the 2015 Order's protections and rules, including continuing its oversight of interconnection. *See* Comments of INCOMPAS, WC Docket No. 17-108 (filed July 17, 2017), at 15, 21.

II. RISING CONTENT COSTS HAVE HINDERED THE ABILITY OF COMPETITIVE NETWORK PROVIDERS TO SECURE THE RIGHTS TO VIDEO PROGRAMMING AND SLOWED WIRELINE BROADBAND COMPETITION AND DEPLOYMENT.

To promote broadband deployment and consumer choice, the Commission must ensure that video competition is possible. The Commission's most recent data concerning availability of wireline broadband network options for residential BIAS suggests that 38 percent of households have just two provider choices (typically, the incumbent cable provider and incumbent telco). Fifty-one (51) percent of households have the option of obtaining service only from a single provider—in other words, no competitive choice.[5] The Commission has recognized the importance of removing barriers to investment and lowering the costs of broadband build-out and Chairman Pai has made bridging the digital divide and increasing broadband adoption a cornerstone of his administration. To enable broadband providers to compete head-to-head on linear video service to attract consumers to broadband service, the Commission should address the ease with which smaller MVPDs and new entrants can gain access to video programming. In particular, the Commission should renew its examination of the retransmission consent regime and determine whether the practices employed by video programmers harm the market for the delivery of video programming.[6]

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[5] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, GN Docket No. 15-191, ¶ 86 (Jan. 29, 2016).

[6] INCOMPAS detailed several of the harmful negotiation practices its members experience in retransmission consent negotiations, including stall tactics and forced tiering and bundling, in its comments in the Commission's review of the retransmission consent totality of the circumstances test. *See* Comments of INCOMPAS, MB Docket No. 15-216 (filed Dec. 1, 2016), at 11-14.

The Commission has long recognized that consumers prefer to purchase broadband and linear video services together in a bundled product.[7] Competitive network providers, typically new entrants and smaller MVPDs, have worked, when possible, to incorporate this consumer trend into their business models. In order to be competitive in the residential broadband marketplace, these companies have found that take rates increase if they also provide linear video services in addition to BIAS. In fact, INCOMPAS, along with several other trade associations representing smaller service providers, has found that when video programming and broadband services are offered together, broadband adoption increases by 24 percent.[8]

Obtaining video programming rights is an essential prerequisite to offering linear video service. However, as reported by the Commission in its *Eighteenth Report*, video programming costs continue to rise.[9] According to the Commission, programming costs increased 8.1 percent in 2015, an increase over similar figures from 2013 and 2014.[10] These cost increases are extreme when compared to the growth in the Consumer Price Index (which grew 1.9% over the last year) and are well in excess of inflation over the course of the previous contract cycle.[11] Furthermore,

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[7] *See*, *e.g.*, FCC, *Connecting America: The National Broadband Plan*, 38 (2010), *available at* http://transistion.fcc.gov/national-broadband-plan.pdf.

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

[9] *See, e.g.*, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report Report, MB Docket No. 16-247, ¶ 72 (Jan. 17, 2017) ("*Eighteenth Report*").

[10] *Id*. (indicating programming costs increases of 6.8 percent in 2014 and 7.4 percent in 2013).

[11] BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX (Aug. 14, 2017), *available at* www.bls.gov/cpi/news.htm.

the Commission notes that "MVPDs spent over half of their video revenues on programming in 2015."[12] Total programming fees for the U.S. multichannel video industry continue to increase and per subscriber programming fees have increased nearly ten percent a year from 2010 to 2015.[13] While content creators are entitled to fair and reasonable compensation for the programming that they produce, lost revenues from securing programming contribute to competitive providers being prevented from deploying their networks and, in most cases, relegate them to being the second or third broadband option for consumers.

While representing just a portion of these programming fees, one of the main causes of the price increases has been the rise in fees that broadcasters recover from MVPDs for retransmitting their programming. Last year, SNL Kagan forecasted that retransmission fees would increase over 50% by 2022 with broadcasters sharing $11.6 billion (up from $7.7 billion in 2016).[14] Even the Commission's most recent study of the average annual total amount paid for retransmission consent by an MVPD showed an increase of 63.2 percent, up from $7.8 million in 2013 to $12.7 million in 2014.[15]

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[12] *Id*. (citing to data from SNL Kagan).

[13] Comments of the American Cable Association, MB Docket No. 15-158, High and Increasing Video Programming Fees Threaten Broadband Deployment Research Paper, at 5 (Aug. 21, 2015) ("ACA Research Paper").

[14] David Lieberman, *Retransmission Payments Will Leap 51% To $11.6B By 2022: Forecast*, DEADLINE (June 29, 2016), http://deadline.com/2016/06/retransmission-consent-payments-increase-forecast-snl-kagan-1201781097/.

[15] *See Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, MM Docket No. 92-266, ¶ 25 (Oct. 12, 2016).

INCOMPAS members report that programming fees continue to grow rapidly, while the retail prices paid by video subscribers will likely be more constrained due to direct MVPD competition and the availability of OVDs. As the Commission notes in the *Eighteenth Report*, the margins for video service are the smallest of any of the services that providers offer.[16] Due to this squeeze on providers as programming fees increase faster than retail charges, INCOMPAS agrees with research conducted by the ACA that the business case for new broadband deployment in the near future will be even "less tenable" for rural expansion, new fiber deployments, and incumbent telco deployments.[17]

Many INCOMPAS members are already offering linear video service at a loss, forfeiting providing a video service entirely, or outsourcing this service.[18] While INCOMPAS members historically have absorbed these costs to remain competitive in the marketplace and keep consumers' costs low, such dramatic increases in video programming costs pose a long-term threat to the viability of these providers' video operations, and thus to their broadband operations. Moreover, these costs compromise providers' abilities to upgrade their networks and deploy additional competitive broadband services.

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[16] *Eighteenth Report* at ¶ 72 (noting that video margins "were just over 10 percent" as opposed to margins of 60 percent for Internet services).

[17] ACA Research Paper at 9.

[18] Indeed, in two new markets, one fiber broadband provider reportedly is not going to offer MVPD service, and it is raising its rates to cover content costs where it already offers MVPD service. *Google Fiber to offer internet-only service in Louisville, San Antonio, plans to raise TV rates*, FIERCETELECOM (Oct. 5, 2017, 12:44 PM) *available at* http://www.fiercetelecom.com/telecom/google-fiber-to-offer-internet-only-service-louisville-san-antonio-plans-to-raise-tv-rates?utm_medium=nl&utm_source=internal&mrkid=707636&mkt_tok=eyJpIjoiT0RneU9UQTBabUkwTkdWaSIsInQiOiJGOHFHT296ZjJmbUs3M1dxVGhuaG1HRTQrVEF4Q3hBQkxCZ3AzV1E0ZVB3NFNCanBCTlllMjFcL0tJaElpZ0s4Wm1FZkkrU2IrZW42VVdyejVTRnM0MHlIS2Z2XC82UjNZbzJaVEZIS001TkN4eHYwSTBrNlNwMnVxZzJxQlNWRTk4In0%3D.

INCOMPAS members' struggles to secure access to video content at affordable rates and under reasonable terms mirror the experience of both other small providers and large providers. For large companies, the provision of video services can be a loss leader and has been a material factor in industry consolidation and recent mergers. AT&T cited this challenge significantly influencing its acquisition of DirecTV,[19] and Time Warner Cable and Charter stated that high programming costs have a negative impact on broadband deployment.[20] However, large MVPDs and competitive providers benefit from the bargaining leverage that they may have over video programmers. A recent white paper found that:

> [L]arge MVPDs have significant bargaining power over video programmers . . . larger MVPDs pay significantly lower per subscriber licensing fees to video programmers as a result of their greater bargaining power relative to smaller MVPDs.

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[19] *See* Statement of Randall Stephenson, Chairman, CEO, and President, AT&T, Inc., The AT&T/DIRECTV Merger: The Impact on Competition and Consumers in the Video Market and Beyond: Examining the Comcast-Time Warner Cable Merger And The Impact On Consumers: Hearing Before the S. Judiciary Comm., Subcomm. on Antitrust, Competition Policy and Consumer Rights, 113th Cong. at 3 (June 24, 2014), *available at* http://www.judiciary.senate.gov/download/06-24-14-stephenson-testimony; *see also Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd. 9131, at ¶ 3 (2015) ("With fewer than 6 million subscribers, AT&T's video product is hampered by higher costs of procuring programming—limiting its ability to both offer lower consumer prices and expand its high-speed broadband footprint.").

[20] *See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, Public Interest Statement, MB Docket No. 15-149 (June 25, 2015) ("Even as robust competition and consumer demand have driven each Applicant to invest many billions of dollars to expand and upgrade their broadband networks, the profitability of each Applicant's video business has declined significantly in recent years – a trend that is expected to continue, in light of video programming costs that have increased at a rate that far exceeds the growth in MVPDs' revenues.").

> In late 2015, Comcast, the largest MVPD at that time, paid 28 percent less than Cablevision, a mid-sized MVPD. Time Warner Cable paid 20 percent less and Charter 8 percent less than Cablevision.[21]

Until competitive providers are able to secure pricing that is substantially similar to that of large providers, they will constantly be at a disadvantage in the video programming marketplace.

III. CONCLUSION

INCOMPAS urges the Commission to work with competitive providers to address the high barriers to video and broadband competition. By examining the access that small MVPDs and new entrants have to video content, the Commission will be better able to address its broadband deployment goals, because these providers use video service to gain access to new markets and customers. Wireline broadband competition is intertwined with the availability of video programming, and the Commission must address long-standing programming acquisition issues to promote both video and broadband competition.

Respectfully submitted,

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[21] David S. Evans, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, 24 (Aug. 29, 2017), http://www.competitioninstitute.org/Portals/0/Evans%20White%20Paper%20on%20Economics%20of%20Wired%20Broadband%2029Aug2017%20Final%20for%20Publication%20%28002%29.pdf.