

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

In the Matter of	)	
	)	
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

**PETITION FOR RECONSIDERATION OF INCOMPAS**

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INCOMPAS, by its undersigned counsel, hereby submits this Petition for Reconsideration of the Federal Communications Commission’s (“Commission” or “FCC”) *Order on Remand* (“*Remand Order*”).<sup>1</sup> INCOMPAS requests that the Commission reconsider and reverse its decision to uphold the reclassification of broadband Internet access service (“BIAS”) as a Title I information service and to reinstate BIAS as a Title II telecommunications service and reissue its open internet rules. The *Remand Order* did not properly address the concerns of the U.S. Court of Appeals for the D.C. Circuit in *Mozilla*<sup>2</sup> when considering how the reclassification of BIAS impacts public safety and the ability of BIAS-only providers to access poles, ducts, and conduit via section 224. Under the current case law, the Commission cannot ensure the public interest is met in either of these areas but-for exercising its oversight authority

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<sup>1</sup> *In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization, Order on Remand, WC Docket Nos. 17-108, 17-287, 11-42 (rel. Oct. 29, 2020) (“Remand Order”).*

<sup>2</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (“*Mozilla*”).

pursuant to Title II with BIAS as a telecommunications service.<sup>3</sup> As such, it should reverse its decision in the *Restoring Internet Freedom Order*<sup>4</sup> and reclassify BIAS, and it should issue a Notice of Proposed Rulemaking to reinstate the open internet rules and assert its jurisdiction and oversight of interconnection practices by the large BIAS providers. INCOMPAS also supports Congressional action to reinstate open internet protections.

## **I. INTRODUCTION AND SUMMARY**

INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications networks, including both wireline and wireless providers in the broadband marketplace. We represent fixed broadband companies, including small local fiber and fixed wireless providers that provide residential BIAS, as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas. We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes, including regional fiber providers; transit and backbone providers that carry broadband and Internet traffic; online video distributors (“OVDs”) which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

INCOMPAS has long supported the FCC exercising its jurisdiction and authority via open internet rules and policies to ensure that BIAS users have access to the content and services of their choice over the Internet without disruption or interference from their BIAS provider.

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<sup>3</sup> INCOMPAS believes that under current legal precedent, the only way for the Commission to have authority over BIAS and issue strong open internet rules is by reclassifying BIAS as a Title II service.

<sup>4</sup> *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (rel. Jan. 4, 2018) (“*RIFO*”).

Before 2018, the Commission’s targeted rules and interconnection policy ensured that no matter who consumers chose for their BIAS provider, they could access the content of their choice without blocking, throttling, and other forms of unreasonable discrimination. In turn, content providers were able to provide their content without disruption from the BIAS provider.

INCOMPAS therefore opposed the Commission’s fundamental policy shift in its so-called *Restoring Internet Freedom Order* (“*RIFO*”) and was a Petitioner in *Mozilla*. Although *Mozilla* upheld the FCC’s reclassification of BIAS, it remanded three issues to the Commission for further consideration due to arbitrary and capricious decision-making.<sup>5</sup> The Commission then had to reconsider and refresh the record on how its reclassification of BIAS and repeal of open internet rules in *RIFO* affect the regulation of pole attachments, public safety, and the Lifeline program. This Petition for Reconsideration focuses specifically on the remanded issues of public safety and pole attachments.<sup>6</sup>

The *Remand Order* did not sufficiently explain how reclassification of BIAS will impact the remanded issues. Instead, it restated its positions from *RIFO* and overlooked harms explained in the record. After considering the issues identified by *Mozilla* and the record that developed from it, the *Remand Order* sees “no grounds” to alter the Commission’s prior conclusions, continuing to find that *RIFO* promotes public safety, facilitates broadband infrastructure

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<sup>5</sup> *Mozilla*, at 18.

<sup>6</sup> INCOMPAS has raised its concerns of the impact of reclassification on the FCC’s legal authority to support broadband access in the Lifeline program. See INCOMPAS’ Comments *In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, Order on Remand, WC Docket Nos. 17-108, 17-287, 11-42 (filed Apr. 20, 2020), at 12-14 (“INCOMPAS Comments”); see also INCOMPAS’ Reply Comments (filed May 20, 2020), at 17-18 (“INCOMPAS Reply Comments”). We support the FCC’s reconsideration of the *Remand Order* due to the harms to Lifeline consumers; however, our Petition focuses on public safety and pole attachments as these issues directly relate to our members’ interests in the proceeding.

deployment, and allows the Commission to continue to provide Lifeline support for BIAS.<sup>7</sup> It concludes that any potential adverse impacts that the reclassification may have on the remanded issues are limited and would not change its classification decision even if such adverse impacts were substantiated because the “overwhelming benefits of Title I classification and restoration of light-touch regulation outweigh any adverse effects.”<sup>8</sup> To justify its decision, the *Remand Order* repeatedly relies on the claim that Title I classification of BIAS would facilitate broadband investment and innovation by removing regulatory uncertainty and lowering compliance costs.<sup>9</sup>

The overall reasoning throughout the *Remand Order* is deeply flawed. The Commission’s main priority must be to protect the public interest, yet the *Remand Order* turns its back on the historical role of the Commission to protect the public’s ability to connect without permission, and comes at a time when the need for rules to guarantee an open internet is only growing due to the overwhelming reliance on BIAS by every economic sector. This is especially true during the COVID-19 pandemic as more Americans are working, schooling, and conducting much of their lives online to protect themselves from the deadly virus.<sup>10</sup> The Commission should *re-reclassify* BIAS to a Title II service because the Commission will not be able to properly ensure public safety needs are met or that BIAS-only providers have access to poles, conduit, and ducts unless it does so.

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<sup>7</sup> See *Remand Order*, at ¶ 2.

<sup>8</sup> *Id.* at ¶ 18.

<sup>9</sup> See, e.g., *id.* at ¶¶ 20, 32-36, 80.

<sup>10</sup> To the extent that that this Petition relies on facts and circumstances related to COVID-19 that transpired after the date for reply comments, it falls within 47 CFR § 1.429(b)(1).

## **II. BIAS MUST BE CLASSIFIED AS A TITLE II SERVICE IN ORDER FOR THE COMMISSION TO ENSURE PUBLIC SAFETY NEEDS ARE MET DUE TO THE RELIANCE OF PUBLIC SAFETY COMMUNICATIONS OVER BIAS.**

Congress created the Commission to “promot[e] safety of life and property through the use of wire and radio communications,”<sup>11</sup> and the Commission recognizes that “[a]dvancing public safety is one of our fundamental obligations.”<sup>12</sup> However, the Commission did not sufficiently address the issue of public safety in the *Remand Order*. Had it done so, the *Remand Order* would have concluded that public safety concerns cannot be addressed satisfactorily without open internet rules, especially given that open internet rules are necessary to ensure that public safety communications carried by all types of online content providers are not disrupted. The FCC’s rules must rest on a foundation of certainty of properly addressing the public safety issues, and its *Remand Order* does not. The *Mozilla* Court remanded the public safety issue back to the Commission because the “disregard of its duty to analyze the impact of the 2018 Order on public safety renders its decision arbitrary and capricious in that part and warrants a remand with direction to address the issues raised.”<sup>13</sup> However, the *Remand Order* did not fully grapple with the record. As such, the FCC’s decision to reclassify BIAS and repeal its open internet rules is arbitrary and capricious, and the FCC should reverse itself. If not overturned, the *Remand Order* will have serious implications for public safety.

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<sup>11</sup> 47 U.S.C. § 151.

<sup>12</sup> *Remand Order*, at ¶ 21.

<sup>13</sup> *Mozilla*, at 100.

**(a) The FCC’s decision to reclassify BIAS relies on an unsubstantiated claim of increased investments.**

The *Remand Order* concludes that the benefits of increased innovation, investment, and regulatory certainty from *RIFO* will enhance public safety,<sup>14</sup> and that the benefits of Title I classification outweigh any potential harms *even if there were some adverse impacts on public safety applications*.<sup>15</sup> The *Remand Order* explains that regulatory certainty and a light-touch approach give BIAS providers a stronger incentive to upgrade to 5G networks, paving the way for new and innovative applications and services that can benefit public safety.<sup>16</sup> It then concludes that *RIFO* benefits public safety communications “by encouraging the deployment of more robust, resilient broadband services networks and infrastructure over which public safety communications to, from, and among the public ride.”<sup>17</sup>

To justify its conclusions, the *Remand Order* relies heavily on a claim of increased investment, yet this claim has not been fully substantiated in the record. In fact, there is strong counter evidence in the record that the FCC ignored. For example, INCOMPAS’ Reply Comments cited that AT&T had announced it would cut its capital investment by \$3 billion in 2020, and at least half the 5.6 million new fiber-connected homes in 2018 were included as a condition of AT&T’s merger with Time Warner.<sup>18</sup> Those comments also cited a recent study

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<sup>14</sup> See *Remand Order*, at ¶¶ 20, 32-36.

<sup>15</sup> See *id.* at ¶ 20 (emphasis added).

<sup>16</sup> See *id.* at ¶ 34.

<sup>17</sup> *Id.* at ¶ 36.

<sup>18</sup> See INCOMPAS Reply Comments, at 12 (citing Jon Brodtkin, *AT&T will slash \$3 billion off its capital investments next year* (Oct. 30, 2019), available at <https://arstechnica.com/information-technology/2019/10/att-is-cutting-capitalinvestment-from-23-billion-to-20-billion/> and citing Karl Bode, *The White House is using fuzzy math to justify net*



from the George Washington University, which concludes that the passage and repeal of open internet rules had no meaningful impact on broadband investment.<sup>19</sup> The *Remand Order* also conveniently ignores Free Press’ ex parte letter detailing that broadband investment has actually *decreased* since *RIFO* due to the cyclical nature of business, and that the Commission is “relying solely on evidence-free speculation and self-serving industry comments about the improved broadband deployment and performance allegedly (but not actually) attributable to the repeal.”<sup>20</sup> While this and other evidence in the record demonstrates that the FCC’s repeal of open internet rules did not increase investment, the FCC continues to rely on a claim of increased investment in order to justify its position that increased investment trumps public safety concerns. In reality, according to the experience of INCOMPAS’ member-companies, what truly drives more deployment is the demand for online video, cloud services, and 5G services for consumers and businesses, including the need for online access during the pandemic—not the classification of BIAS. Indeed, INCOMPAS’ BIAS members continue to deploy their networks and invest significantly in response to the demand for faster speeds and better customer service, and they did so during the time that BIAS was classified as a telecommunications service and as an information service. Some BIAS providers’ unfounded fear of overreach by the FCC with respect to the Commission’s authority in Title II did not deter investment in the networks, and

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*neutrality veto* (Apr. 9, 2019), available at <https://www.theverge.com/2019/4/9/18302113/net-neutrality-veto-white-housedonald-trump-save-the-internet-act-broadband>).

<sup>19</sup> See Christopher Alex Hooton, *Testing the economics of the net neutrality debate*, George Washington University, Institute of Public Policy (Sept. 2019), available at <https://assets.documentcloud.org/documents/6430695/Net-Neutrality.pdf>; see also INCOMPAS Reply Comments, at 12-13.

<sup>20</sup> Free Press, *Notice of Written Ex Parte Presentation*, WC Docket Nos. 17-108, 17-287, 11-42 (filed Oct. 20, 2020) (“Free Press Ex Parte Letter”), at 4.

the FCC’s continued reliance on an unsubstantiated claim that it did is contrary to the facts and demonstrates that the FCC acted in an arbitrary and capricious manner.

**(b) The *Remand Order* overlooks the harms to public safety that are explained in the record if BIAS is classified as a Title I service.**

As the *Mozilla* Court said, “whenever public safety is involved, lives are at stake.”<sup>21</sup> Yet the Commission disregards real harms to public safety in its cost-benefit analysis. The *Remand Order* concludes that the record reflects insufficient evidence of harms as a result of *RIFO* or that such harms are likely to arise, and that the likely benefits of *RIFO* for public safety outweigh any potential harms.<sup>22</sup> It claims that the record does not reveal credible claims that ISPs would harm public safety in a manner that would require *ex ante* public safety-focused legal protections, and that commenters raised an array of situations “where it is doubtful that ISP conduct would result in meaningful harm, let alone loss of life.”<sup>23</sup> It further states that commenters claiming potential harms to public safety “can only point to a few heavily-contested public-safety-related incidents” and that this “dearth of evidence” is “unsurprising, as ISPs lack an economic incentive to engage in such practices, especially when they may harm public safety.”<sup>24</sup>

The Commission’s justifications here are unjustifiable. In response to warnings from commenters on potential harms to life and property, the *Remand Order* states: “it is doubtful that ISP conduct...would result in meaningful harm, let alone loss of life.”<sup>25</sup> However, the

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<sup>21</sup> *Mozilla*, at 98.

<sup>22</sup> *See Remand Order*, at ¶ 37.

<sup>23</sup> *Id.* at ¶ 44.

<sup>24</sup> *Id.* at ¶ 45.

<sup>25</sup> *Id.* at ¶ 44.

Government Petitioners’ Brief in *Mozilla* has an entire section arguing that “the Commission disregarded the serious risk that providers will engage in abusive practices that undermine the open internet,” which is part of the record.<sup>26</sup> As the Petitioners explained:

The Commission’s assertion that BIAS providers will voluntarily refrain from blocking, throttling, and similar practices incorrectly assumes that providers historically displayed such self-restraint. But it was the Commission’s long-standing enforcement of open Internet policies that *compelled* BIAS providers to refrain from harmful practices that injure consumers and undermine public safety. The relatively minimal evidence of such harms in the United States is the result of the protective rules that the Commission has abandoned, rather than evidence that those rules are unnecessary. The Commission also unreasonably disregarded evidence showing that BIAS providers intentionally engaged in harmful conduct when protective regulations were not in place.<sup>27</sup>

Other commenters highlighted serious concerns. For example, as INCOMPAS explained:

It is apparent, especially during the current COVID-19 pandemic, that access to OTT information and services over BIAS is necessary to keep our nation’s citizens informed and engaged. We have witnessed time and again that consumers use OTT services to stay connected in life or death situations. For example, in 2017, Twitter and Facebook were key in the wake of Hurricane Harvey . . . as a way for ordinary citizens engaging in rescue efforts of their neighbors. Citizens took to social media and used hashtags to flag rescuers and to compile helpful databases.<sup>28</sup>

The impact of relying on BIAS during a global pandemic or a natural disaster is not something the Commission can shrug off as a “heavily-contested public-safety-related incident” or a “dearth of evidence,”<sup>29</sup> or tuck away in a footnote.<sup>30</sup>

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<sup>26</sup> See Proof Brief for Government Petitioners, *Mozilla Corp. v. FCC* (filed Aug. 20, 2018), at 16 (“Proof Brief for Government Petitioners”).

<sup>27</sup> *Id.* at 17-18.

<sup>28</sup> See INCOMPAS Comments, at 9-10; see also *Remand Order*, at ¶ 29.

<sup>29</sup> *Remand Order*, at ¶ 45.

<sup>30</sup> See *id.* at n.15 (citing INCOMPAS Comments).

To further support its findings, the *Remand Order* states that reclassifying BIAS had no bearing on the 2018 Santa Clara County incident because the service was not a mass-market service so the provider’s conduct would not have been prohibited under Title II.<sup>31</sup> It also explains that once Verizon learned of the complaint, Verizon “immediately and publicly addressed the situation,” so the issue was quickly addressed due to public awareness and market-based pressure.<sup>32</sup> However, one of the takeaways from the Santa Clara County incident is not only to show that the provider potentially violated open internet rules, but also that there is currently no agency authority to determine *whether* it violated the rules, and that in itself is dangerous for public safety. The *Remand Order* may be confident that actions like Verizon’s show that the private sector can handle public safety issues, but as the Government Petitioners explained: “[t]he free market cannot always be trusted to advance the public good.”<sup>33</sup> Moreover, “[n]othing in the *Order* would stop a BIAS provider from abandoning its voluntary commitments.”<sup>34</sup> The Commission must grapple with the aforementioned public safety risks rather than continuing to rely on the claim that investment and regulatory certainty are more important for public safety.<sup>35</sup> The Commission’s primary consideration must be the public interest, not the investment plans or revenue goals of a handful of large companies.

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<sup>31</sup> *See Remand Order*, at ¶ 46.

<sup>32</sup> *See id.*

<sup>33</sup> Proof Brief of Government Petitioners, at 16.

<sup>34</sup> *Id.* at 19.

<sup>35</sup> *See Remand Order*, at ¶¶ 32-36.

The *Remand Order* emphasizes that there are non-BIAS services that public entities use to communicate with each other and the public.<sup>36</sup> However, the *Remand Order* also acknowledges that many entities do in fact rely on BIAS services for public safety and the importance of BIAS services during emergencies to communicate. As it states: “[t]he record suggests that most data communications between public safety entities and individuals likely take place over broadband Internet access services, and not enterprise or dedicated services,” and that “[m]embers of the public often rely on broadband services during emergencies to enable them to find and receive potentially life-saving information.”<sup>37</sup> The Commission should not ignore the effects of reclassifying BIAS on public safety by conflating the idea that non-BIAS services are also used to address public safety issues.

The *Remand Order* also claims that more robust broadband networks and services have significant benefits for communications between public safety entities and the public.<sup>38</sup> To help bolster its argument, the *Remand Order* relies on comments from Electronic Frontier Foundation that state: “[t]hree in ten Americans describe themselves as ‘constantly’ online,” and that “the best way to reach them will be for public safety communication to also take place online.”<sup>39</sup> It

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<sup>36</sup> *See id.* at ¶¶ 23-26.

<sup>37</sup> *Id.* at ¶ 29; *see also* ¶ 27 (stating “[t]hrough many communications between public safety entities increasingly take advantage of these enterprise-level dedicated public safety broadband services, the record reflects that public safety entities employ broadband Internet access services for their communications between public safety officials as well.”; *see also* ¶ 30 (stating how “‘public safety’ communications may encompass more than just communications during emergencies, as the COVID-19 pandemic has demonstrated, with many Americans relying on telemedicine over mass-market broadband services for ‘routine health care, triage, and basic health advice’ as well as for updates on public health information and stay-at-home and quarantine orders.”).

<sup>38</sup> *See id.* at ¶ 35.

<sup>39</sup> *Id.*

also relies on comments from Edward Davis Company explaining that “better, faster, and more widespread broadband connections make it easier for the public to contact public safety in times of need and help public safety respond more quickly.”<sup>40</sup> However, these comments do not strengthen the Commission’s arguments. If so many Americans rely on the Internet for public safety communications, there must be an open internet without large BIAS-providers acting as gatekeepers, and the record clearly supports the need for FCC authority over BIAS to assure that communications will not be disrupted by BIAS providers. Currently, the FCC has no jurisdiction or rules in place to ensure that result, and has chosen instead to rely on trusting the industry.

**(c) The *Remand Order* overlooks the importance of having an expert agency with authority to create *ex-ante* rules, especially regarding public safety.**

The FCC has a fundamental obligation to promote and protect public safety, and this includes ensuring that emergency situations are prevented, mitigated, and/or handled immediately. The “wait-and-see” approach that the Commission condones here is very dangerous for public safety. Issuing *ex-post* rules that will necessarily come from *RIFO* will not allow the Commission to deal with public safety issues before or as they arise, and forcing consumers to wait for a response after an emergency occurs is dangerous and unacceptable. As the Government Petitioners explained: “prophylactic rules are especially necessary for BIAS because consumers have limited provider options, face high switching costs, and are at a substantial informational disadvantage.”<sup>41</sup> Indeed, as INCOMPAS has highlighted in this proceeding and others, the lack of competitive alternatives, especially for residential BIAS, and the market power of the largest BIAS providers, supports the need for open internet rules and policies and oversight by the Commission. The Commission needs authority to deal with public

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<sup>40</sup> *Id.*

<sup>41</sup> Proof Brief of Government Petitioners, at 20.

safety issues *before* a public safety situation arises—not afterwards, as the *Remand Order* suggests. The FCC is the most appropriate agency to have authority over these services given its expertise of communication networks and its relatively quick ability to address problems through a myriad of ways. This includes its ability to make *ex-ante* rules as well as oversee informal complaints, which typically encourage providers to address the issue through mediation.

The *Remand Order* claims that other areas of the law will protect consumers from any potential harms to public safety.<sup>42</sup> It claims that *RIFO* is unlikely to harm public safety communications and any harm that it could cause would be minimal.<sup>43</sup> To explain this analysis, the Commission relies on other areas of law: (1) the transparency rules adopted in *RIFO*, explaining that public attention, not regulation, “has been most effective in deterring ISP threats to openness;”<sup>44</sup> (2) antitrust law, under the premise that “if an ISP attempts to block or degrade traffic in a manner that is anticompetitive, relief may be available under the antitrust laws;”<sup>45</sup> and (3) consumer protection laws, which are now enforced by the FTC.<sup>46</sup> However, these alternative legal routes are not always viable. For example, company commitments not to block or throttle services are voluntary, and there is no legal recourse if companies break these promises. The Commission cannot expect consumers to rely on voluntary commitments and the threat of reputational harm when public safety is on the line. Moreover, the possibility of reputational harm is not always a powerful deterrent given that the lack of competition in the residential

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<sup>42</sup> See *Remand Order*, at ¶¶ 37-44.

<sup>43</sup> See *id.* at ¶ 37.

<sup>44</sup> See *id.* at ¶ 38.

<sup>45</sup> See *id.* at ¶ 41.

<sup>46</sup> See *id.* at ¶ 42.

BIAS market means consumers have few, if any, options to switch providers.<sup>47</sup> In addition, relying on the FTC to enforce consumer protection laws is not a helpful solution. The FTC does not have the authority to address non-antitrust issues. It also has limited resources and cannot take up each case that comes before it, so even if it can act, FTC cases can take a long time and public safety cannot wait. Private antitrust lawsuits can take even longer than federal cases and last for years,<sup>48</sup> and class action suits are ordinarily even longer, adding an additional one or two years to the litigation.<sup>49</sup> Congress tasked the FCC with oversight of public safety over our nation's networks. The Commission cannot ignore its obligation to ensure that all public safety communications carried over BIAS reach the public.

**(d) The *Remand Order* completely overlooks the lack of competition in the residential BIAS market and the harm that *RIFO* will have on edge providers, smaller BIAS providers, and new entrants.**

The inadequate competition in the residential, high-speed BIAS market continues to give large BIAS providers the incentive and ability to discriminate against edge providers and smaller BIAS providers.<sup>50</sup> Large BIAS-providers have enormous power to block or throttle edge providers that provide crucial services because there are no rules preventing them from doing so at any time, much less during public safety events. Even if large BIAS providers violate open internet principles, millions of Americans do not have the option to switch providers given the lack of competition in the residential BIAS market as cable continues to dominate. As reported

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<sup>47</sup> See INCOMPAS Reply Comments, at 5-8; see also discussion *infra* Section II.d.

<sup>48</sup> Private antitrust cases take an average of two to five years, not including appeals. See Hogan Lovells, *Private Litigation Guide* (Dec. 2019), at 458; see also Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, Vand. L. Rev 63, no. 2 (2010), at 691-93 (citing that the average private antitrust lawsuit takes over six years to disposition).

<sup>49</sup> See Mayer Brown LLP, *Private Antitrust Litigation* (2010), at 148.

<sup>50</sup> See INCOMPAS Reply Comments, at 5-12.



by the Institute of Local Self-Reliance: “[t]he broadband market is broken. Comcast and Charter maintain an absolute monopoly over at least 47 million people and millions more only have slower and less reliable DSL as a ‘competitive’ choice.”<sup>51</sup> Further, “[m]illions of Americans still do not have a real choice when it comes to their Internet service. In urban areas, a relative majority can choose between two or more providers . . . [i]n rural areas the situation is worse.”<sup>52</sup> As the Petitioners in *Mozilla* explained, almost 50% of Americans have either one or no choice for residential high-speed wireline broadband providers (download speeds of 25 Mbps and higher and upload speeds of 3 Mbps and higher), and another 45% have only two high-speed wireline options.<sup>53</sup> And there is even less competition at higher speeds.<sup>54</sup> As a result, BIAS providers can throttle, discriminate against traffic, and consumers cannot switch—and they certainly cannot do so in the middle of a public safety crisis. The FCC must consider this imbalance of power and lack of customer choice in its analysis.

The Commission should not depart from precedent and abdicate its role in ensuring an open internet. Harms posed by large BIAS providers are real and tangible—they have the incentive and ability to harm competition and consumers as they have done in the past and will continue to do in the future if the Commission does not reclassify BIAS and reinstate open

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<sup>51</sup> H. Trostle and Christopher Mitchell, *Profile of Monopolies: Big Cable and Telecom*, Institute for Local Self-Reliance (rel. Aug. 2020), at 21.

<sup>52</sup> *Id.* at 1.

<sup>53</sup> *Mozilla*, at 88.

<sup>54</sup> See *In the Matter of Communications Marketplace Report*, 2020 Communications Marketplace Report, GN Docket No. 20-60 (rel. Dec. 31, 2020), at ¶ 84 (which likely overstates consumer options given that it relies on Form 477, which the FCC acknowledged is flawed); see also INCOMPAS Reply Comments, at 6-8.

internet protections.<sup>55</sup> This is especially true today—only a handful of large BIAS providers dominate the industry and, as they have moved into vertical integration of video distribution services, BIAS providers have the incentive to guard against competitive threats from network-dependent companies. In fact, the D.C. Circuit has concluded that “the threat that broadband providers would utilize their gatekeeper ability to restrict edge-provider traffic is not . . . ‘merely theoretical.’”<sup>56</sup> During the Comcast-NBCU merger, the Commission clearly understood the incentives and abilities of large companies to violate open internet principles and adopted several open internet principles as conditions to approving the merger.<sup>57</sup> The lack of competition in the residential BIAS market is an even bigger threat during the COVID-19 pandemic as Americans have become increasingly reliant on Internet services, and at higher speeds, for various activities, including public safety information and updates from news websites and social media platforms. Recently, a small Idaho ISP blocked popular social media platforms in response to the edge providers’ business decision to remove content that violated their terms.<sup>58</sup> While that provider reversed course under public scrutiny, similar actions are not inconceivable to come from larger

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<sup>55</sup> See Comments of INCOMPAS, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108 (filed July 27, 2017), at 13-23.

<sup>56</sup> See *id.* at 8, n.9 (citing Verizon, 740 F.3d at 648 and 646: “Although Verizon dismisses the Commission’s assertions regarding broadband providers’ incentives as ‘pure speculation,’ those assertions are, at the very least, speculation based firmly in common sense and economic reality.”).

<sup>57</sup> See *id.* at 8, n.10 (citing 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*, 26 FCC Rcd. 4238, 4275 ¶ 94 (2011) (“[N]either Comcast nor Comcast-NBCU shall prioritize affiliated Internet content over unaffiliated Internet content.”)).

<sup>58</sup> See Karl Bode, *ISP Blocks Twitter and Facebook to Protest Anti-Trump ‘Censorship,’* VICE (Jan. 11, 2021), available at <https://www.vice.com/en/article/m7a5ay/isp-blocks-twitter-facebook-protest-trump-ban-censorship>.

providers. Without rules in place that prevent such behavior, large BIAS providers can block services or de-facto block them by charging unreasonable interconnection fees, and the *Remand Order* fails to acknowledge what the effect of uncertainty will be on edge innovators who will no longer know whether their customers will be able to access their content and services. This is a serious concern especially since the D.C. Circuit recently voided Charter’s merger condition on interconnection,<sup>59</sup> and as INCOMPAS members voice concerns that they face increasing interconnection fees that are unreasonable. The Commission needs to look out for consumers, edge providers, and OVDs, which it can do by reinstating its Title II authority over BIAS.

In response to the record, the *Remand Order* states: “[w]e find no basis on this record to conclude that ISPs have engaged or are likely to engage in blocking or throttling that cause harm to public safety in a manner that would have been prohibited under Title II . . . [t]he record does not contain even one recent example of such conduct harmful to public safety that would have been prohibited under Title II.”<sup>60</sup> Notably, in making this finding, the Commission only cites to comments from Verizon, USTelecom, ACA, and AT&T, which represent some of the largest BIAS providers in the nation. The Commission clearly either did not read or chose to ignore the full record because commenters laid out many examples of ISPs engaging in behavior without open internet obligations that are bound to harm public safety.<sup>61</sup> The *Remand Order* unapologetically concludes that the overall benefits of *RIFO* are more important than potential

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<sup>59</sup> See *Competitive Enterprise Institute v. FCC*, No. 18-1281 (D.C. Cir. 2020), at 2.

<sup>60</sup> *Remand Order*, at ¶¶ 50-51.

<sup>61</sup> See, e.g., 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), available at <https://news.northeastern.edu/2019/08/27/northeastern-university-researcher-finds-that-wirelessnetworks-are-throttling-video-streaming-24-7/>.

harms to public safety.<sup>62</sup> This is a clear rejection of the FCC’s statutory duty to protect public safety and should be reversed.

### **III. BIAS MUST BE CLASSIFIED AS A TITLE II SERVICE IN ORDER FOR THE COMMISSION TO REGULATE POLE ATTACHMENTS EFFECTIVELY.**

The *Mozilla* Court directed the FCC to “grapple with the lapse in legal safeguards” that results from reclassification eliminating section 224 pole attachment rights of BIAS-only providers that, by definition, lack a commingled telecommunications or cable service.<sup>63</sup> The Commission’s reasoning in the *Remand Order* does not satisfy the Court’s instructions. As a result, the Commission should reclassify BIAS as a Title II service in order to be able to properly regulate pole attachments, especially for BIAS-only providers, today and in the future.

**(a) The FCC’s decision to strip BIAS-only providers of their section 224 rights overlooks the importance of these rights and its effects on competition as laid out in the record.**

The *Remand Order* finds that “the benefits of returning to a light-touch information service classification adopted in [*RIFO*] far outweigh any limited potential negative effects resulting from the loss of section 224 rights for broadband-only ISPs.”<sup>64</sup> It explains that any drawbacks of reclassification are limited because, in the areas where federal pole attachment regulation applies, almost all ISPs’ pole attachments still remain subject to section 224 as they commingle cable or telecommunications services with their broadband services.<sup>65</sup> It then suggests that BIAS-only providers can always gain the status of a telecommunications provider

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<sup>62</sup> See *Remand Order*, at ¶ 67.

<sup>63</sup> *Mozilla*, at 108-109.

<sup>64</sup> *Remand Order*, at ¶ 68.

<sup>65</sup> See *id.* at ¶ 71.

and become eligible for their section 224 protections by simply partnering with an existing cable or telecommunications provider.<sup>66</sup> The Commission is convinced that reclassification does not significantly limit new entrants to the marketplace as BIAS-only providers now have the “regulatory flexibility to enter into innovative and solution-oriented pole attachment agreements with pole owners.”<sup>67</sup>

The Commission glosses over the real harms that can occur to BIAS-only providers, including losing their statutory rights to access and occupy infrastructure, which are not “speculative” concerns.<sup>68</sup> The *Remand Order* states that there is “only limited evidence in the record that a small number of broadband-only providers have experienced increased costs to obtain access to poles.”<sup>69</sup> However, this overlooks the examples in the record of BIAS-only providers currently being disadvantaged, including from WISPA and Google Fiber.<sup>70</sup> While there may not be an abundance of examples in the record of BIAS-only providers currently being stripped of statutory protections, the Commission should also be future-oriented and promote the deployment of competitive BIAS. The Commission has greatly overlooked the future realities of BIAS-only providers and the resulting harms that its decision will yield. As consumers become more reliant on BIAS and cut their wired voice and cable services, there is no reason to doubt that more providers will be offering BIAS-only services and have no rights pursuant to section 224. Furthermore, competitors need not offer these additional services as consumers move to

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<sup>66</sup> *See id.* at ¶ 73.

<sup>67</sup> *Id.* at ¶ 74 (citing ACA Connects Reply at 7-8).

<sup>68</sup> *See id.* at ¶ 78.

<sup>69</sup> *Id.* at ¶ 74.

<sup>70</sup> *See id.*

over-the-top service providers. However, the FCC is asking BIAS-only providers to change their business model to gain their statutory rights by either becoming a telecommunications provider or partnering with one—that is not an easy, or appropriate, ask for the Commission to make. Forcing providers to offer an additional telecommunications or cable service to secure section 224 access rights will add costs, potentially further entrenching incumbent providers and limiting additional competition in the already highly concentrated residential BIAS market. The FCC should instead ensure that these providers have their section 224 protections today as these types of providers will likely arise more frequently in the future. Moreover, the Pennsylvania’s PUC’s comments highlight concerns that the disparate pole attachment rights for telecommunications carriers will likely result in an impediment for universal broadband deployment by disincentivizing potential attachers from providing BIAS-only services since they now may be burdened by a requirement to comingle services.<sup>71</sup> It warned that classifying BIAS as an information service “may distort the nationwide market for the growing number of services which rely on pole attachments.”<sup>72</sup>

**(b) The *Remand Order*’s baseless claim that a lack of section 224 rights will benefit BIAS-only providers is not substantiated in the record and is contrary to INCOMPAS-members’ experiences as pole attachers.**

The *Remand Order* claims that a lack of section 224 rights will be beneficial for BIAS-only providers as it will allow for flexible and innovative access.<sup>73</sup> However, if this were true, Congress would not have created section 224 rights intended to enable network deployment.

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<sup>71</sup> Comments of the Pennsylvania Public Utility Commission, *In the Matter of Restoring Internet Freedom, Bridging the Digital Divide for Low-Income Consumers, Lifeline and Link Up Reform and Modernization*, WC Docket Nos. 17-108, 17-287, 11-42, at 7.

<sup>72</sup> *Id.*

<sup>73</sup> See *Remand Order*, at ¶ 74.

Moreover, this argument is not proven in the record. INCOMPAS members are very concerned about the FCC’s decision and have reported the opposite impact—without section 224 rights, they are not able to attach on a reasonable basis. As Free Press explained: “[i]t may be easy for this Commission to conclude that stripping away parties’ rights and legal recourse is good . . . but notably the competitive providers who’ve lost these rights tend to take a different view than the Commission that took them away.”<sup>74</sup>

If FCC jurisdiction does not apply, these providers can be denied access or charged unreasonable rates. Even providers *with* pole rights are fighting for pole access, including INCOMPAS members who offer telecommunications service and clearly have section 224 rights.<sup>75</sup> For BIAS-only providers stripped of their section 224 rights, the power is left solely to the pole owners, who can then raise rates and in turn harm competition. As a result, BIAS-only providers will have no recourse when denied pole access or when charged much higher rates. The *Remand Order* does not reflect the reality of what BIAS-only providers are facing and will continue to face without reclassification. The FCC has clearly ignored the record and therefore its decision is arbitrary and capricious.

**(c) The *Remand Order* does not resolve the issue of state authority to regulate pole attachments.**

The *Remand Order* justifies its conclusion by relying on reverse-preemption—where a state can adopt a different approach and oversee pole attachments. As it explains: “[t]he limited impact of the loss of section 224 rights for BIAS-only providers is further diminished by the fact that states have the ability to reverse-preempt the Commission’s rules under section 224(c)—and

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<sup>74</sup> Free Press Ex Parte Letter, at 4.

<sup>75</sup> See generally Petition for Expedited Declaratory Ruling, NCTA—The Internet & Television Association, WC Docket No. 17-84 (filed July 16, 2020).

a substantial minority have in fact done so.”<sup>76</sup> To further its argument, the *Remand Order* explains: “several states that have reverse preempted currently regulate pole attachments by information service providers,” citing four state codes that have reverse preempted the Commission’s rules and regulate pole attachments by information service providers.<sup>77</sup>

The FCC’s reliance on state reverse-preemption is fraught for two reasons. First, although the *Remand Order* cites the various state codes where states regulate information service providers, there are some state codes that reverse-preempt but specifically rely on section 224 as a reference point in their pole attachment regulations.<sup>78</sup> These state codes will be affected by the FCC’s regulations even though these states have reverse-preempted the Commission. Second, even if states have authority over information services, some states have legislation that prevents their public utility commissions from having authority over broadband services regardless of how it is classified. As a result, some state commissions have no authority over BIAS-only service regardless of whether it is considered a telecommunications or information service, and it is unclear how these states would still be able to regulate pole attachments.<sup>79</sup> Without federal or state pole attachment rights, broadband-only providers in these states have nowhere to turn if they face unjust or unreasonable prices or behavior from pole owners.

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<sup>76</sup> *Remand Order*, at ¶ 76.

<sup>77</sup> *See id.* at ¶ 76 & n. 312.

<sup>78</sup> *See* Pennsylvania Code §§ 77.1 – 77.5; *see also* Michigan Code 460.38a § 8a; *see also* West Virginia Code §31G-4-4(b).

<sup>79</sup> *See generally* National Regulatory Research Institute, *Examining the Role of State Regulators as Telecommunications Oversight is Reduced*, Report No. 15-07 (Aug. 2015).



**(d) Reclassifying BIAS as a Title II service impacts public interest broadly.**

This proceeding focuses on the effects of reclassification on the three remanded issues, and this Petition focuses more specifically on its effects on public safety and pole attachments. While reclassifying BIAS to a Title II service leads to stronger oversight of public safety, promotes access to infrastructure, and will enable more BIAS competition, it is important to acknowledge that these are only two areas where Title II classification would allow for more effective advancement of the public interest. Other key provisions in Title II promote public interest and consumer protection. For example, Title II authority allows for stronger universal service support under USF and increased affordability for low-income consumers; protecting consumers from privacy violations; and ensuring consumers with disabilities have equitable access to telecommunications networks.<sup>80</sup>

**IV. CONCLUSION**

The *Mozilla* Court gave the Commission another opportunity to explain how the reclassification of BIAS and its repeal of open internet rules would impact public safety communications and pole attachments of BIAS-only providers. However, upon issuing the *Remand Order*, the Commission failed to properly engage with the potential harms explained in the record. As a result, INCOMPAS requests that the Commission reconsider and reverse its decision to uphold the reclassification of BIAS as a Title I information service and to reinstate BIAS as a Title II telecommunications service, which remains the legally sound method for the Commission to properly execute its authority to oversee public safety communications over

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<sup>80</sup> See Gigi Sohn, *Real net neutrality is rooted in Title II*, Axios (Mar. 2, 2017) available at <https://www.axios.com/real-net-neutrality-is-rooted-in-title-ii-2293797788.html>; see also Yosef Getachew, *Beyond Net Neutrality: The Importance of Title II for Broadband*, Public Knowledge (May 2017); available at <https://www.publicknowledge.org/blog/beyond-net-neutrality-the-importance-of-title-ii-for-broadband>.

BIAS and BIAS-only pole attachments. Finally, the Commission also should proceed with issuing a Notice of Proposed Rulemaking to reinstate its open internet rules and oversight of the interconnection practices of the large BIAS providers.

Respectfully submitted,

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