

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

In the Matter of)
)
#Solutions2020 Call to Action Plan)

COMMENTS OF INCOMPAS

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INCOMPAS, by its undersigned counsel, submits these comments in response to Commissioner Clyburn’s #Solutions2020 Call to Action Plan, which introduces steps that can be taken by all levels of public and private stakeholders in the communications sector over the next four years to address burgeoning telecommunications challenges and to narrow the opportunities divide for all Americans.¹

I. INTRODUCTION AND SUMMARY

With the #Solutions2020 Call to Action Plan, Commissioner Clyburn seeks comment on a series of recommendations developed to ensure the delivery of “robust, affordable connectivity within the next four years” of next-generation communications services.² INCOMPAS, the Internet and competitive networks association, has championed policies that enable competitive retail solutions in the communications marketplace and urges the Commission to formally consider several of the policy recommendations in the Call to Action Plan. Specifically, INCOMPAS supports lowering the barriers to deployment of next-generation communications services like broadband Internet access service (“BIAS”) in order to ensure affordable

¹ See *FCC Commissioner Mignon Clyburn Releases Draft #Solutions2020 Action Plan*, Public Notice (Dec. 19, 2016) (“#Solutions2020 Call to Action Plan”).

² #Solutions2020 Call to Action Plan at 1.

communications. This can be accomplished by “reform[ing] pole attachment rules to increase access and reduce the cost of deployment” and by providing competitive access to multiple dwelling units (“MDUs”) and residential infrastructure, such as existing internal wiring. We also examine issues that impede smaller MVPDs and new entrants’ access to video programming, such as retransmission consent, which can have a deleterious effect on network deployment. Furthermore, we explain how the Commission can streamline access to Lifeline service to ensure that low-income Americans take advantage of the broadband subsidy instituted in the Commission’s recent reform efforts. By working in concert with all levels of public and private stakeholders on these issues, the Commission can ensure that its policies put carriers in the best possible position to achieve the goals envisioned in the Action Plan.

II. THE COMMISSION SHOULD ENCOURAGE POLE ATTACHMENT REFORM TO REMOVE BARRIERS TO DEPLOYMENT OF NEXT GENERATION COMMUNICATIONS SERVICES

The market for next-generation communications services like broadband will flourish when regulatory agencies work in concert to lower the barriers to deployment. The #Solutions2020 Call to Action Plan recognizes that one area of action to promote broadband deployment is reform of pole attachment rules. Generally, it is critical that federal, state, and local regulatory agencies work to facilitate access to rights-of-way and infrastructure, such as conduit and poles. Reform of these rules is necessary because current make-ready processes do not allow affordable, timely, or efficient construction of competitive networks.³

³ See White Paper, Fiber To The Home Council Americas: Roll of State and Local Governments in Simplifying the Make-Ready Process For Pole Attachments, 11, 14 (Nov. 2015), file:///C:/Users/cshipley/Downloads/OneTouchMakeReadyWhitePaper_2016.pdf (explaining that an “umbrella” make-ready policy “that adopts a single pole administrator as well as one touch make-ready would facilitate a smooth, efficient, and highly equitable process that would reduce disruption and increase public safety while also speeding the availability of new services to residents”).

Under the current regime, each existing service provider, or “attacher,” moves their equipment and attachments individually and sequentially. INCOMPAS members report that some attachers are taking more than 90 days to complete their make-ready work and that, as a result, the process for competitors to gain complete access to poles typically takes many months. The problem is exacerbated by the fact that there are no “shot clocks” to ensure that attachers complete work on a timely basis. Each attacher waits for the other to begin and complete their work to move attachments to make room for new attachers. Delays add up quickly and drag out the entire process. A single delayed pole can interrupt INCOMPAS members from deploying and beginning to serve an entire area for months.

There are a number of reforms the Commission can adopt to streamline the make-ready process for Commission-regulated poles. First, INCOMPAS recommends that the Commission amend its pole attachment rules⁴ to authorize “one touch make-ready”—whereby a contractor approved by the pole owner could do all make-ready work at once. Louisville,⁵ Nashville,⁶ and San Antonio⁷ have adopted one touch make-ready policies, with the Mayor of Nashville calling the city’s ordinance a “common-sense way of speeding up deployment of high-speed Internet.”⁸

⁴ See generally 47 C.F.R. Part 1, Subpart J.

⁵ See Sean Buckley, *AT&T sues Louisville, Ky. to block Google Fiber from gaining pole access*, FIERCE TELECOM (Feb. 26, 2016, 1:11 PM), <http://www.fiercetelecom.com/telecom/at-t-sues-louisville-ky-to-block-google-fiber-from-gaining-pole-access>.

⁶ See *Metro Council approves Google Fiber’s One Touch Make Ready plan*, WKRN (Sep. 20, 2016, 8:08 PM), <http://wkrn.com/2016/09/20/metro-council-approves-google-fibers-one-touch-make-ready-plan/>.

⁷ See CPS ENERGY, POLE ATTACHMENT STANDARDS, 22 (May 1, 2016), available at <https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/Pole%20Attachment%20Standards.pdf>.

⁸ *Mayor Barry Statement on One Touch Make Ready Ordinance*, NASHVILLE.GOV (Sep. 20,

Additionally, the Commission has called one touch make-ready laws “consonant with the goals of federal telecommunications policy” and noted that they encourage “timely deployment of advanced telecommunications services to all Americans.”⁹ These cities’ experiences should be instructive to the Commission’s efforts to promote more competitive deployment.¹⁰

Second, make ready charges are not predictable or verifiable in many cases, which makes it difficult for competitors to plan their builds, including to accurately predict the costs to construct. To that end, the Commission should revisit its decision in its *2011 Pole Attachment Order* not to require utilities to provide schedules of common make-ready charges.¹¹ By requiring pole owners to provide a statement of charges for make-ready work for poles, competitive providers will be able to more accurately plan for the costs to construct their competitive networks.

With respect to residential BIAS, it is evident from the Commission’s data that market concentration is high, and the majority of residential BIAS customers still have very limited options for high-speed service. Fifty-one percent of Americans have only one fixed high-speed

2016), <https://www.nashville.gov/News-Media/News-Article/ID/5686/Mayor-Barry-Statement-on-One-Touch-Make-Ready-Ordinance.aspx>.

⁹ Letter from Howard J. Symons, General Counsel, Fed. Commc’n Comm’n, to Benjamin C. Mizer, Principal Deputy Assistant Attorney General, Civil Division, U.S. Dep’t of Justice, 5-6 (Oct. 31, 2016), *available at* <https://assets.documentcloud.org/documents/3211861/Fcc-Att-Louisville.pdf> (requesting that the DOJ file a Statement of Interest in BellSouth’s litigation with the city and county explaining that there is no conflict between federal pole attachment regulations and Louisville’s one touch make-ready ordinance).

¹⁰ *See supra* note 3 (examining municipal authority to enact one touch make-ready policies and how these policies might accelerate deployment of modern broadband networks).

¹¹ *Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, FCC 11-50 (rel. Apr. 7, 2011) at 6 (“2011 Pole Attachment Order”).

broadband option, and ten percent have no option at all.¹² Only 38% have a choice of providers, but the FCC has not provided additional detail of how many residential customers have three or more choices—most likely because it is a tiny fraction of American consumers.¹³ There is evidence that when a third provider enters the market, the telco and cable incumbents respond, including by increasing speeds, upgrading their infrastructure, and lowering prices.¹⁴ Studies indicate that the entrance of a new firm can reduce prices on a 100 mbps or more service by approximately \$27 dollars per month (a reduction of 25% from the standard price).¹⁵ Thus, moving to three options in the marketplace is very beneficial for consumers. As INCOMPAS has noted before, barriers to entry are very high and often cannot be surmounted. With governmental intervention to lower the barriers to entry via competitive access to poles, ducts

¹² *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, FCC 16-6, ¶ 86 & Table 6 (Jan. 29, 2016) (“2016 Broadband Progress Report”).

¹³ Moreover, mobile broadband is not a true substitute for most residential subscribers because the data limitations and costs are significant factors that limit the substitutability of mobile for fixed BIAS. A limited number of Americans—only 13%—have cut the broadband cord and rely solely on mobile broadband. Home Broadband 2015, Pew Research Center, *available at* <http://www.pewinternet.org/2015/12/21/home-broadband-2015/>. The Commission has stated that “American consumers simply do not treat the two services as functional substitutes.” 2016 Broadband Progress Report ¶ 40.

¹⁴ *Google’s fiber effect: Fuel for a broadband explosion*, CNET, Apr. 30, 2014, *available at* <https://www.cnet.com/news/googles-fiber-effect-fuel-for-a-broadband-explosion/>; *Google Gets Beaten to the Punch by AT&T on Super-Fast Broadband*, Bloomberg Technology, Apr. 25, 2016, *available at* <https://www.bloomberg.com/news/articles/2016-04-25/google-gets-beaten-to-the-punch-by-at-t-on-super-fast-broadband> (“Markets that Google enters enjoy a \$20-a-month drop in prices on average.”).

¹⁵ Fiber to the Home Council, *When gigabit Internet comes to town, it means savings for consumers*, MEDIUM (Oct. 18, 2016), <https://medium.com/@FTTHCouncil/when-gigabit-internet-comes-to-town-it-could-mean-savings-for-consumers-4feccd69223#.j9sagtpdl>.

and conduits, however, the Commission can help address some of the barriers that competitive broadband providers face which ultimately benefits consumers.

III. INCUMBENTS' EXCLUSIVITY AND OTHER CONTRACTUAL PROVISIONS LIMIT COMPETITIVE ACCESS TO MDUs AND DISCOURAGE BROADBAND DEPLOYMENT

Competitive providers of fixed and mobile broadband services also continue to face challenges in gaining access to many customers who want their service. INCOMPAS members have indicated that their efforts to expand their service footprints have been frustrated by obstacles to or a complete inability to secure access to customers residing in MDUs. Incumbents have used a number of contractual methods to stymie deployment of competitive video and BIAS services to MDUs, including exclusive marketing agreements and revenue sharing demands. In 2010, the Commission reaffirmed its rules permitting MVPDs to enter into marketing arrangements with MDU owners to obtain exclusive rights to advertise their services in building common areas, on MDU websites, and in new resident materials.¹⁶ However, incumbent providers and property owners have combined these arrangements with other contractual mechanisms to effectively deny (or create a perverse incentive to deny) competitive access. In other situations, property owners have demanded revenue sharing arrangements with competitive providers.¹⁷ Competitive broadband and video providers that are unable or unwilling to participate in this kickback scheme are denied access to MDUs.

Moreover, wiring exclusivity arrangements have allowed incumbent MVPDs to prevent

¹⁶ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, ¶¶ 29-30 (2010).

¹⁷ Susan Crawford, *Dear Landlord: Don't Rip Me Off When it Comes To Internet Access*, BACKCHANNEL (Jun. 27, 2016), <https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9#.gt2zhyfc4>.

utilization of existing inside wiring even after a customer has ceased service. As the Commission is aware, the incumbent provider is required by law to either make the wiring available to another MVPD or remove it.¹⁸ However, incumbents enter into agreements with MDUs to lease this fallow wiring on an exclusive basis, forcing competitive providers into the difficult position of having to choose between installing duplicative in-unit wiring or not serving the building at all. As explained recently by ITTA, this access “is required by law to ensure that consumers in apartment buildings and similar places can obtain video service from a competing provider.”¹⁹ This exclusive leasing practice is now defeating that intent and deterring competitive providers from serving those MDUs.

The net impact of these practices is that deployment of competitive broadband and video services are discouraged, and in some instances, denied altogether. When deploying competitive networks, it is critical that competitive providers can reach as many potential customers as possible with their networks. When access to customers residing in MDUs is thwarted, the business case to build a competitive network is significantly impacted, further jeopardizing the competitive provider’s ability to offer its services to a community.²⁰ Accordingly, INCOMPAS urges the Commission to re-examine these issues and address these artificial barriers to broadband and video competition.

¹⁸ 47 C.F.R. § 76.802(a).

¹⁹ Comments of ITTA—The Voice of the Mid-Sized Communications Companies, MB Docket 16-247 (filed Sept. 21, 2016), at 9 (referencing 47 CFR § 76.2000).

²⁰ Comparable laws pertaining to cable providers have been passed in 18 different states and a number of municipalities. These laws have helped promote choice and level the playing field in the cable space and similar reforms will bring the same benefits to the broadband market. *See* White Paper, Fiber to the Home Council Americas: Residents’ Choice: Ensuring Consumers in Multiple-Dwelling Units Can Choose Their Communications Provider, 4-5 (Nov. 2016), *available at* <http://toolkit.ftthcouncil.org/d/do/2210>.

IV. ROBUST WIRELINE BROADBAND COMPETITION AND DEPLOYMENT DEPENDS ON COMPETITIVE NETWORK PROVIDERS' ABILITY TO PROCURE THE RIGHTS TO AND DELIVER VIDEO PROGRAMMING

The Commission has long recognized that consumers prefer to purchase broadband and linear video services together in a bundled product.²¹ When smaller service providers offer video programming and broadband services together, broadband adoption increases by 24%.²² In an effort to compete in the residential broadband marketplace, competitive network providers, typically new entrants and smaller MVPDs, must provide linear video services—not just broadband services—to achieve higher broadband adoption rates.²³

Obtaining video programming rights is an essential prerequisite to offering linear video service. However, as reported by the Commission in its *Seventeenth Report*, video content costs continue to rise significantly.²⁴ Last year, the American Cable Association (“ACA”) submitted data to the Commission demonstrating that over the “last eight years, total programming fees for

²¹ See, e.g., FCC, *Connecting America: The National Broadband Plan*, 38 (2010), available at <http://transition.fcc.gov/national-broadband-plan.pdf>.

²² COMPTTEL, 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”).

²³ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶¶ 51, 62 (2006) (“The record here indicates that a provider’s ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.”).

²⁴ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventeenth Report, MB Docket No. 15-158, ¶ 56 (May 6, 2016) (reporting that, according to SNL Kagan, programming costs rose 16.5% from 2012 to 2014).

the U.S. multichannel video industry have more than doubled.”²⁵ Moreover, per subscriber programming fees “increased an average of 9.4% a year between 2010 and 2015”—excluding fees paid for regional sports networks and local broadcast stations.²⁶ For smaller MVPDs, the increase in fees has been even greater at 10.6%.²⁷ Likewise, the American Television Alliance (“ATVA”) has reported that retransmission consent fees grew 8,600% between 2005 and 2012.²⁸ 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%, from \$7.8 million in 2013 to \$12.7 million in 2014.²⁹

ACA’s research predicts that while programming fees will continue to grow rapidly in the future,³⁰ retail prices for video subscribers likely will be more constrained due to direct MVPD competition and availability of OVDs.³¹ Due to this squeeze on providers as

²⁵ 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”).

²⁶ *Id.*

²⁷ *Id.*

²⁸ ATVA *et. al* Ex Parte Notice, MB Docket No. 10-71 (July 17, 2015) (*citing* SNL Kagan, *Broadcast Investor Deals & Finance: Retrans Projections Update: \$10.3B by 2021*, June 30, 2015 (“SNL Kagan June 30, 2015”)).

²⁹ *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).

³⁰ ACA Research Paper at 5. Similarly, SNL Kagan estimates that TV broadcasters’ retransmission consent fees will reach \$10.3 billion by 2021 compared to the projected level of \$6.3 billion in 2015. SNL Kagan June 30, 2015.

³¹ ACA Research Paper at 6.

programming fees increase faster than retail charges, 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.³² Many INCOMPAS members are already offering linear video service at a loss, forfeiting providing a video service entirely, or outsourcing this service, all of which impedes broadband network expansion and upgrades.

INCOMPAS members have found the struggle to secure access to video content at affordable rates and under reasonable terms mirrors the experience of members of ITTA, NTCA – The Rural Broadband Association, and WTA. ITTA has criticized the “helium-infused trajectory of retransmission consent fees” and reported that its members have faced cost increases of 77% annually since 2008.³³ Similarly, a survey conducted by NTCA of its members found that the increase in retransmission consent fees and programming costs has led nearly all respondents to pass along those costs to subscribers with an average per subscriber cost increase of \$5.78 per month.³⁴ WTA has previously indicated that its members’ network upgrades have not affected favorably their abilities to compete given their inability to secure reasonable rates for video programming.³⁵

Even 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

³² *Id.* at 9.

³³ Comments of ITTA – The Voice of Mid-Sized Communications Companies, MB Docket No. 16-274 (filed Sept. 21, 2016) (“ITTA Comments”), at 4-5.

³⁴ *See* Comments of NTCA – The Rural Broadband Association, MB Docket No. 16-274 (filed Sept. 21, 2016) (“NTCA Comments”), at 4.

³⁵ WTA Comments, MB Docket No. 15-158, at 2 (Aug. 21, 2015).

as a circumstance that significantly influenced its acquisition of DirecTV³⁶, and Time Warner Cable and Charter recognized in their merger proceeding that high programming costs have a negative impact on broadband deployment.³⁷

A joint survey conducted by INCOMPAS and NTCA in late 2015 (“2015 Video Competition Survey”) illustrates the challenges smaller MVPDs and new entrants face in order to compete effectively in the video programming market. The survey captured quantitative data regarding members’ provision of video service and experiences negotiating to obtain carriage rights for broadcast channels.³⁸ Ninety-five percent of survey respondents indicated that lack of access to reasonably priced programming is the single biggest barrier to providing video

³⁶ 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.”).

³⁷ 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.”).

³⁸ See NTCA’s and INCOMPAS’s 2015 Video Competition Survey at 3 (Oct. 30, 2015), www.incompas.org/files/The%20RuralBroadbandAssociationandINCOMPAS2015VideoCompetitionSurvey.pdf (“2015 Video Competition Survey”). A total of 226 companies participated in the survey. Survey results can be estimated to be accurate within +/-6% at the 95% confidence level.

service.³⁹ Seventy-two percent of respondents have considered eliminating certain broadcast and/or non-broadcast programming and/or refrained from entering the MVPD market altogether due to rising programming costs.⁴⁰ Forty percent of respondents reported that they faced an increase in retransmission consent fees of more than 100% (with 11% reporting increases of more than 200%) during the contract cycle covered by the survey.⁴¹ Similarly, 79% of respondents reported an increase of 20% or less for non-broadcast programming fees during the contract cycle covered by the survey.⁴² These cost increases are extreme when compared to the growth in the Consumer Price Index (which grew 0.2% over the last year) and are well in excess of inflation over the course of the previous contract cycle. While INCOMPAS's and NTCA's 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 providers' abilities to upgrade their networks and deploy additional competitive broadband services are compromised.

To promote broadband deployment and consumer choice, the Commission must ensure that video competition is possible. The Commission has recognized the importance of “removing barriers to investment and lowering the costs of broadband build-out.”⁴³ To enable

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 2.

⁴¹ *Id.* at 3.

⁴² *Id.*

⁴³ Hearing on Oversight of the Federal Communications Commission: Before the Subcomm. on Commc'ns and Tech. Comm. on Energy and Commerce, 114 Cong. 4 (2014) (statement of FCC Chairman Tom Wheeler).

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 by carefully examining and taking action on the retransmission consent regime.

a. Last Minute Negotiations and Other Anticompetitive Practices Used To Obtain Retransmission Consent Harm the Market for Delivery of Video Programming.

Video programming prices and retransmission consent negotiation practices make it particularly difficult for INCOMPAS members to offer content in competitive retail packages that reflect what consumers want and can afford. To enable providers to secure video programming at reasonable and non-discriminatory rates, terms, and conditions, the Commission must address long-standing concerns over how retransmission consent agreements are negotiated. Smaller MVPDs and new entrants lack the scale or bargaining leverage to secure access to broadcast programming at sustainable rates. The Commission's decision not to adopt changes to the good faith negotiation rules after amassing a robust record detailing problematic practices was disappointing for INCOMPAS members.⁴⁴ As a result, smaller providers and new entrants have continued to face unreasonable negotiation tactics by broadcasters.⁴⁵

INCOMPAS members have been subject to several of these same practices over the last year.⁴⁶ For instance, perhaps emboldened by the Commission's insistence that changes to the

⁴⁴ See FCC Chairman Tom Wheeler, *An Update on Our Review of the Good Faith Retransmission Consent Negotiation Rules*, FCC Blog (July 14, 2016, 10:37 AM), <https://www.fcc.gov/news-events/blog/2016/07/14/update-our-review-good-faith-retransmission-consent-negotiation-rules> (signaling that the Commission would not revise or update the existing rules related to the totality of the circumstances test for retransmission consent).

⁴⁵ See ITTA Comments at 5, 7; see also NTCA Comments at 10-11, 13.

⁴⁶ INCOMPAS detailed several of the harmful negotiation practices its members experienced in

good faith negotiating framework are unnecessary, INCOMPAS members have faced last-minute renewal proposals with an intractable set of terms and conditions one to two months before the current agreement expires. Faced with imminent expiration of a current agreement, most MVPDs are left with insufficient time to negotiate complex terms about technology and rates in an evolving video market. Instead, MVPDs end up capitulating to higher prices and less favorable terms to avoid a blackout. As the Commission is aware, given the relative size of INCOMPAS's members providing video service, as well as their status as new competitive entrants, any loss of programming could harm subscribership to their video and broadband services. As such, small providers lack the luxury of waiting until an impasse to allege a breach of the duty to negotiate in good faith, and oftentimes lack the resources or time to bring a complaint to the FCC.

Commission action is still warranted to improve retransmission consent with respect to competitive video providers. INCOMPAS stands by its proposal in the good faith proceeding for a longer negotiation window with set times for presenting key terms of the agreement.⁴⁷ Requiring a six-month window for negotiations would reasonably ensure that both sides can conduct bona fide negotiations with sufficient time to discuss contract terms and present alternate proposals. In addition, the Commission should find that refusal of the parties to engage in regular discussions of the proposed agreement would violate the good faith standard. Having a clear start date for negotiations and requiring regular communication should provide the

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.

⁴⁷ *Id.* at 11-12.

necessary lead-time for the parties to come to an agreement and prevent an impasse.

To ensure that both parties can engage in a robust series of negotiations once the proposal has been delivered, the renewal proposal provided by the broadcasters also should include the material terms of the renewal long-form agreement, including a justification for any proposed rate increases based on direct and legitimate economic factors.⁴⁸ This will increase the likelihood that parties will reach a new agreement and provides the parties with an opportunity to seek regulatory relief at the Commission for a breach of the duty to negotiate in good faith, well in advance of the current agreement's expiration date if negotiations falter.

V. LIFELINE SHOULD CONTINUE TO PLAY A CRITICAL ROLE IN DRIVING BROADBAND ADOPTION

The #Solutions2020 Call to Action Plan also posits that streamlining access to the Lifeline program is another way to ensure “access to quality communications services at just, reasonable, and affordable rates.”⁴⁹ As the Commission has recognized, broadband is essential to participate in today's society and economy. It is a critical tool that is needed by *all* Americans, including low-income Americans.⁵⁰ The Commission should continue to promote access to the Lifeline program's services to fulfill its statutory directive to ensure that all

⁴⁸ See generally ITTA Ex Parte Notice, MB Docket No. 10-71 (Aug. 18, 2015) (proposing that it be a *per se* violation for broadcasters to “[d]iscriminate in price among MVPDs in a market unless the broadcaster can demonstrate that there are direct and legitimate economic benefits associated with charging different prices to different MVPDs”).

⁴⁹ #Solution2020 Call to Action Plan at 2.

⁵⁰ The network effects of connecting *all* consumers promotes use of the broadband networks and services that INCOMPAS members offer. As the Commission has found, “network effects arise when the value of a product increases with the number of consumers who purchase it.” See *Connect America Fund, et al.*, Report and Order and Further Notice of Proposed Rulemaking, WC Docket No. 10-90 et al., FCC 11-161, ¶ 1336 (2011), *aff'd sub nom. In re FCC 11-161*, 703 F.3d 1015 (2014).

Americans have access to both basic and advanced communications services.⁵¹ As such, INCOMPAS continues to support the Commission’s efforts to modernize the Lifeline program to enable low-income Americans to experience in the benefits of broadband. Providing access to the digital economy and critical online resources via a broadband connection is the first step in ensuring that Lifeline participants are capable of navigating a “pathway out of poverty.”⁵² Lifeline’s new broadband subsidy can narrow the digital divide that impedes low-income Americans’ search for employment, it can provide access to job training and any number of avenues for upward social and economic mobility, and it can provide instant access to NG911 and other public safety and emergency services to those in need.

The Commission’s recent reforms emphasized the importance of digital inclusion to understand the “non-price barriers” that impede consumer adoption of this program.⁵³ INCOMPAS urges the Commission to be sensitive to the challenges faced by low-income Americans in signing up for Lifeline services. Often Lifeline applicants are itinerant—moving frequently or living in group homes or homeless shelters. Lifeline applicants frequently are entirely reliant on public transportation to reach an eligible telecommunications carrier’s (“ETC”) location, which imposes substantial burdens in terms of time and cost if the consumer is forced to make more than one trip. In addition, in cases of illiteracy problems or other

⁵¹ See 47 U.S.C. §§ 254 & 157.

⁵² *Lifeline and Link Up Reform and Modernization, et al.*, WC Docket No. 11-42, *et al.*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd. 7950 FCC 15-71, Statement of Commissioner Clyburn at 2 (rel. June 22, 2015).

⁵³ *Lifeline and Link-Up Reform and Modernization, et al.*, WC Docket No. 11-42, *et al.*, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, ¶ 379 (rel. Apr. 27, 2016).

disabilities, an eligible applicant's ability to sign up for Lifeline service may be hampered and even defeated if the process imposes delays or multiple steps beyond what is required today. These are several reasons why Commissioner Clyburn's research indicates that only a third of eligible U.S. households currently subscribe to Lifeline services.

Given this reality, INCOMPAS supports efforts by the FCC, states, and other interested third-party organizations to make available at "common touchpoints" such as clinics, community anchor institutions, and places where potential applicants receive social benefits, information about the Lifeline program.⁵⁴ To the extent that particular Lifeline providers' promotional materials are distributed, INCOMPAS encourages such distribution to contain all possible Lifeline options for consumers in that geographic area to ensure that the Commission and states maintain competitive neutrality and do not inadvertently promote one provider's services over another. Additionally, INCOMPAS recommends that the Consumer and Governmental Affairs Bureau include this and like-minded action items from the #Solutions2020 Plan in the comprehensive plan on digital inclusion it is required to complete as part of the Lifeline modernization proceeding.

VI. CONCLUSION

INCOMPAS urges the Commission to consider the above-mentioned recommendations as it addresses the challenges identified in the #Solutions2020 Call to Action Plan. Removing barriers to broadband deployment, particularly with respect to pole attachments and access to MDUs, securing video content at affordable rates and under reasonable terms, and working to increase subscribership to the Lifeline program will ensure that competitive providers play a significant role in helping the Commission meet the Plan's stated goal of "narrow[ing] the

⁵⁴ See #Solutions2020 Call to Action Plan at 3.

opportunities divide, supporting the growth of our economy and greatly improv[ing] the quality of life for all Americans.”

Respectfully submitted,

INCOMPAS

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