Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)	MB Docket No. 17-91

COMMENTS OF INCOMPAS

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INCOMPAS hereby submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") Notice of Proposed Rulemaking ("NPRM")[1] soliciting input on ways to facilitate consumer choice and enhance broadband deployment in multiple tenant environments ("MTEs").

I. INTRODUCTION & SUMMARY

INCOMPAS is the preeminent national industry association for providers of internet and competitive communications networks. We represent companies that provide competitive residential broadband Internet access service ("BIAS"), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas, including small fiber providers that are building more fiber than, and offering service that is competitive to, large incumbents such as AT&T and Comcast, as well as fixed wireless entities delivering high-speed broadband to MTEs. We also represent companies providing business

[1] *Improving Competitive Broadband Access to Multiple Tenant Environments, Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, GN Docket No. 17-142, MB Docket No. 17-91, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 19-65 (rel. July 12, 2019) ("NPRM" or "Declaratory Ruling").

broadband services to anchor institutions, hospitals and clinics, and businesses of all sizes. Our wireless and satellite members offer services to residential and business customers. Finally, we represent transit and backbone providers that carry broadband and Internet traffic, and online content and video distributors ("OVDs") that offer various content and communications services and video programming over BIAS to consumers.

INCOMPAS members are dedicated to deploying the next generation of high-speed networks and eager to compete for customers seeking faster broadband service at lower prices. Consumers appreciate choice and are increasingly turning to competitive, online alternatives to traditional services, including streaming video, voice, and cloud services. These innovative offerings allow the association's members to compete, where possible, with incumbents and ensure that consumers are able to engage in the digital economy and benefit from broadband competition.

Despite our members' best efforts, however, competitive providers continue to struggle to secure access to MTEs to deploy broadband, fixed wireless, and other communications services. The ability to access MTEs is a significant economic factor for firms in determining their ability to deliver competitive broadband networks to areas that are lacking broadband choice. Certain practices and agreements between incumbent providers and building owners, such as graduated revenue sharing and exclusive wiring, marketing, and rooftop arrangements restrict competitive access, even when consumers have requested service from a competitive provider. Since the Commission issued a *Notice of Inquiry* in 2017 on improving competitive broadband access to MTEs, INCOMPAS has consistently advocated for changes to the Commission's rules that will prohibit pervasive revenue sharing and exclusivity provisions that stifle competition and delay achievement of the Commission's broadband deployment goals.

Specifically, INCOMPAS asks the Commission to prohibit commercial agreements between communications providers and landlords that deter the deployment of next generation broadband networks such as graduated revenue sharing and wiring, marketing, and rooftop exclusivity agreements. These practices amount to an end run around the Commission's prohibition on exclusive service agreements and result in higher costs to consumers, increase the costs of competitive entry, and reduce choice for communications services.

INCOMPAS also encourages the Commission to investigate other practices, such as business access agreements that include broad termination provisions that deter competitors from provisioning broadband to commercial properties. Finally, INCOMPAS urges the Commission to support a new generation of state and local mandatory access laws that address the lack of competition and consumer choice in MTEs.

II. THE COMMISSION HAS THE OPPORTUNITY TO ADDRESS KEY PRACTICES THAT HAVE STIFLED COMPETITION IN THE MTE MARKET.

Despite recent gains, competition in the market for fixed terrestrial broadband service remains inadequate, leading to limited consumer options for BIAS.[2] The lack of competition for broadband service is even more acute in MTEs, including apartment buildings, condominiums, and cooperatives. Today, approximately 30 percent of Americans live in MTEs,[3] a figure that

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[2] *See Communications Marketplace Report, The State of Mobile Wireless Competition, Status of Competition in the Market for the Delivery of Video Programming, Status of Competition in the Market for the Delivery of Audio Programming, Satellite Communications Services for the Communications Marketplace Report*, GN Docket No. 18-231, WT Docket No. 18-203, MB Docket No. 17-214, MB Docket No. 18-227, IB Docket No. 18-251, Report, 33 FCC Rcd 12558 (19), ¶ 188 & Fig. D-5 (rel. Dec. 26, 2018) ("Communications Marketplace Report") (estimating that 14.1 percent of Americans have no choice of providers for fixed advanced telecommunications capability, 27.6 percent of Americans only have one option, and 58.3 percent of Americans have a choice of more than one provider).

[3] *See* Table from the U.S. Census Bureau's 2013-2017 American Community Survey 5-Year Estimates, (*cont.*)

appears to be increasing given the popularity of multifamily housing.[4] As INCOMPAS noted in the Commission's 2017 *Notice of Inquiry*,[5] MTE residents have fewer options for robust, high-speed broadband than consumers living in single-family homes, and the services that are offered are typically more expensive.[6] Property owners will routinely enter into commercial arrangements and exclusive agreements with a provider in exchange for the provision of communications services. As a result, residents of MTEs often have limited choices—typically a monopoly and at best a duopoly—when it comes to selecting a communications provider. These arrangements can lock residents into contracts for slower service throughout the duration of their time in the building. The problem is exacerbated due to the growing shortage of housing in urban environments.[7]

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https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B25024&prodType=table (showing that approximately 30 percent of American homes are in multifamily buildings). Using U.S. Census data, the National Multifamily Housing Council reports that there are over 57 million residents living in rental households of two or more units. *See* Quick Facts: Resident Demographics, NATIONAL MULTIFAMILY HOUSING COUNCIL, https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/ (last visited Aug. 27, 2019).

[4] Tim Wang and Julia Laumont, *Renter Nation: The Rise of Multifamily Housing*, LEGG MASON (Nov. 29, 2018), https://www.leggmason.com/en-sg/campaigns/alternatives/renter-nation-the-rise-of-multi-family-housing.html# (reporting that occupied apartment units rose by 20 percent above the prior ten-year period and describing the conditions for that change).

[5] *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Inquiry, FCC 17-142, (rel. June 23, 2017) ("MTE NOI").

[6] *See* Comments of INCOMPAS, GN Docket No. 17-142 (filed July 24, 2017), at 3.

[7] *See* Patrick Sisson, Jeff Andrews, and Alex Bazeley, *The affordable housing crisis, explained*, CURBED (May 15, 2019, 1:30 PM), https://www.curbed.com/2019/5/15/18617763/affordable-housing-policy-rent-real-estate-apartment (explaining the market forces, policy decisions, and demographic changes that make building affordable housing "difficult" and "politically fraught").

Consumers find themselves at a disadvantage when trying to avail themselves of robust, high-speed broadband, because the marketplace does not uniformly promote competition. As the Commission is well aware, deploying broadband—regardless of the technology used—can be an expensive proposition, especially for smaller competitors seeking to establish an embedded customer base. With residents of MTEs composing nearly a third of the U.S. broadband market, providing service to MTEs is a critical element of most competitive providers' deployment plans. INCOMPAS members—many of them fiber or fixed wireless providers—have cultivated considerable interest in their competitive broadband services among consumers and MTE owners and managers in the hopes of bringing faster service to MTEs. INCOMPAS members are constantly working to build strategic partnerships with owners of MTEs. When competitive providers can deploy facilities in MTEs, residents benefit from faster service at lower prices, and property owners experience increased rental and sales value.

Despite the added value derived from competition, competitive providers commonly are refused access to MTEs despite receiving unsolicited orders for high-speed broadband service from tenants. If landlords become beholden to revenue sources based on commercial arrangements with large incumbent providers, their incentives to provide tenants with quality communications services—from competitive fiber to fixed wireless last mile services—decrease. New entrants and smaller providers cannot overcome anticompetitive and discriminatory practices between incumbent providers and building owners and managers—like graduated revenue sharing and exclusive wiring and marketing agreements—that aim to ensure that a single provider monopolizes an MTE in exchange for compensation to the MTE owner.[8] Due to these practices, competitors that are either unable or unwilling to "pay to play" or provide a "door fee"

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[8] *See* Comments of Starry, Inc., GN Docket No. 17-142 (filed July 24, 2017), at 3.

to property owners are excluded from the property. Being denied access to an MTE where service has been requested can impact a competitors' return on investment and may impede the ability of the provider to deploy additional broadband services. In those buildings where competitors are denied access, residents will continue to be served by a monopoly (or at best a duopoly) and lose out on faster speeds, lower prices, and better customer service.

While the Commission has sought to address these barriers to entry on four other occasions,[9] incumbent providers and property owners continue to engage in behavior that circumvents the Commission's ban on exclusive access agreements. It is the Commission's duty to promote broadband deployment and competition throughout the nation, including for the third of Americans who reside in MTEs. INCOMPAS is pleased that the Commission is seeking additional information on how several commercial arrangements "affect the provisioning of broadband to MTEs" and urges the Commission to prohibit business practices that result in provider exclusivity and restricts competitors' access to MTEs. The public and broadband market would be well served by rules that provide competitors with a level playing field and an opportunity to compete on service, price, and reputation.

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[9] *Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-376, 13 FCC Rcd. 3659 (1997) ("*1997 Inside Wiring Order*"); *Telecommunications Services Inside Wiring, Customer Premises Equipment, Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, FCC 03-9, 18 FCC Rcd. 1342 (2003) ("*2003 Inside Wiring Order*"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, FCC 07-189, 22 FCC Rcd. 20235 (2007) ("*2007 Exclusive Service Contracts Order*"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, FCC 10-35, 25 FCC Rcd. 2460 (2010) ("*2010 Exclusive Service Contracts Order*").

III. THE COMMISSION SHOULD PROHIBIT COMMERCIAL PRACTICES THAT ADVERSELY AFFECT COMPETITION IN MTEs.

With the NPRM, the Commission seeks to refresh the record on additional actions that the agency could take to accelerate the deployment of next-generation networks and services to the people that live and work in MTEs. Specifically, the Commission seeks comment on how revenue sharing agreements, exclusive wiring and marketing arrangements, rooftop antenna access, other contractual provisions and practices, and state and local policies and regulations impact competitive providers' access to MTEs. INCOMPAS members indicate each of these arrangements is being used to prevent competitors from provisioning broadband to MTEs.

a. Revenue Sharing Agreements

Revenue sharing agreements, and in particular graduated revenue sharing agreements, continue to represent the single biggest barrier to competitive providers' access to MTEs.[10] Revenue sharing agreements have a significant impact on competition and deployment within MTEs. These agreements are common practice and competitive providers that do not have the financial resources required to "pay to play" are routinely denied access to MTEs.[11] For example, Rocket Fiber, an INCOMPAS member offering gigabit broadband service to residential and commercial customers in Detroit, has encountered numerous buildings where, despite

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[10] Any further references in these comments to revenue sharing between MTEs and providers refer to graduated revenue sharing, as described in this section. INCOMPAS distinguishes graduated revenue sharing from the practice of sharing revenue to cover the costs associated with the providers' use of the property. Agreements that compensate MTE owners based on costs to them may not have the same anti-competitive impact of graduated revenue sharing arrangements. For example, some competitors have agreed to compensate an MTE owner through a one-time "door fee" for new subscribers. While those arrangements are not exclusive, they add to the cost of deployment. Thus, it is important that those fees be cost-based.

[11] *See e.g.*, Comments of FastMesh, LLC, GN Docket No. 17-142 (filed July 24, 2017), at 1 (noting that building owners and managers routinely request a "kickback" from revenues earned).

overwhelming consumer demand for its service, the company has been blocked from providing service in an MTE due to existing revenue share agreements with an incumbent provider. According to another member based in California:

> We have seen examples of [revenue sharing agreements] frequently in the MDU department. For instance, there is a fairly large property management company with a lot of control in the East Bay, which we have been at a standstill with in regards to more than ten buildings under their management due to their request for significant compensation, with them citing that the larger incumbents have been able to accommodate their requests.

Most INCOMPAS members lack the resources to participate in revenue sharing agreements, preferring to use that money to deploy and operate their networks, leading them to examine other value-added propositions to gain access to MTEs.

Under a graduated revenue sharing agreement, a provider pays a property owner a specific sum, determined by a formula, for each resident who subscribes to that provider's service. On a monthly or quarterly basis, incumbents offer property owners a variable percentage of revenue based on penetration rate (i.e., the percentage of units in an MTE that subscribe to a service) as well as revenue per unit (that varies depending on the type of service to which a resident subscribes). If a competitor seeks to enter an MTE with this type of revenue sharing agreement in place, the building owner is likely to want the competitor to match (or in some cases exceed) the benefits being obtained from the incumbent. Such agreements are anti-competitive for both residential and commercial properties as they are specifically designed to exclude new entrants.

Revenue sharing provisions usually take two forms. First, a revenue sharing agreement may be structured into tiers, with the MTE owner receiving a higher rate of compensation when penetration is highest. INCOMPAS has previously demonstrated how in a tier structure a property owner's revenue share could drastically increase when a single provider offers service in an MTE.[12] Thus, the loss of a potential revenue stream from a revenue sharing agreement lowers the incentive for an MTE owner to grant access to competitive providers. In addition to retaining revenue sharing requirements, the second type of agreement prohibits property owners or landlords from entering a revenue sharing agreement with a new entrant.

Realtors and property owners have not made a sufficient economic justification for entering into revenue sharing agreements that exceed the cost of service and result in exclusion of competitors. Revenue sharing agreements that go beyond cost-recovery are specifically designed to disincentivize an MTE owner from allowing a competitive provider to offer alternate services. Large incumbent providers leverage revenue sharing to bar new entry, and to redistribute resources from the tenant, to the incumbent, and then back to the building. Building owners have come to rely on revenue share as an ancillary benefit and source of supplemental revenue. As such, it is not surprising to see property owners protect their "right" to revenue share in exchange for access to their building.

Revenue sharing agreements, however, significantly harm consumers. While the agreements may generate a minor boost to the economic return profile for real estate projects, the net effect for tenants is limited broadband choices, limited access to new technologies, and limited opportunities to subscribe to faster broadband at cheaper prices, with revenue share fees ultimately passed onto the consumer. Furthermore, tenants are often left in the dark about the existence and practical impact of a revenue sharing agreement (or other commercial agreements between communications providers and building owners) and are therefore routinely frustrated in

[12] *See* Reply Comments of INCOMPAS, GN Docket No. 17-142 (filed Aug. 22, 2017), at 9-11 (contesting RealtyCom's suggestion that graduated revenue sharing serves no purpose other than to reimburse property owners by showing how a property owner could see a significant increase in its revenue share by permitting a single provider to offer broadband service).

their efforts to select a service provider other than the incumbent.

When revenue sharing agreements are combined with other contractual provisions, such as exclusive marketing agreements (which often occurs), the MTE owner is further disincentivized from allowing competitive access. Even if a competitor can provide the same revenue share as the incumbent, the presence of a second provider makes it that much more difficult for each provider to meet the necessary thresholds to maximize revenue for the building. Every new subscriber that the new entrant takes would carry an incremental loss in revenue to the building. For the new entrant, the exclusive marketing agreement between the MTE owner and the incumbent provider makes it difficult for competitors to attract customers in that building. For example, competitors typically are not permitted to engage in marketing activities specific to that building that would require access to the MTE, such as distributing door hangers or visiting tenants to introduce them to the new service.

MTEs have entered into revenue sharing and exclusive marketing agreements with another provider ***after*** a competitor already has access to an MTE that has impeded the ability of competitors to provide service to tenants after they have invested in deploying to the building. This can detract from the new entrant's return on investment ("ROI") and impede further broadband deployment plans by the competitor. For example, one INCOMPAS member gained access to an MTE and incurred considerable cost in pre-installing customer premise equipment. At a later date, the MTE owner entered a revenue sharing and exclusive marketing agreement with a competitor. The MTE owner exclusively marketed the other provider's broadband service resulting in our member being unable to generate enough interest in its service. Eventually, the member abandoned its initial investment.

Because revenue sharing agreements are being used to discourage competitive entry to MTEs and to circumvent the prohibition on exclusive access agreements, INCOMPAS urges the Commission to ban graduated revenue sharing agreements. The Commission has long held that agreements that provide exclusive access are anticompetitive and do not benefit consumers.[13] As demonstrated above, graduated revenue sharing agreements limit competitive options in MTEs. Consistent with the Act's requirements and the FCC's longstanding principles, this behavior that prevents consumers from accessing competitive communications services should be barred.

Alternatively, the Commission could permit cost-based revenue sharing agreements. Arrangements that allow property owners to recover any reasonable costs expended when a competitive provider installs inside wiring or retrofits an older building to accommodate fiber or fixed wireless facilities would be allowed. Cost-based revenue sharing agreements, however, should be required to explicitly state that they may not be used to restrict competitive access.

Providers should be required to make these agreements public so that tenants and new entrants may review the terms and conditions. In our members' experience, property owners and managers do not disclose the existence of revenue sharing agreements, and in some cases, may deny that an arrangement exists at all. This can be confusing and frustrating for tenants seeking alternative service and for communications providers left in the dark about the status of their access requests. A mandatory disclosure requirement may deter the use of anticompetitive agreements. At the very least, disclosure would help to provide clarity to tenants and new entrants about preexisting arrangements with incumbents inhibit competition. Such transparency would give residents and competitive providers the answers that often elude them. Moreover, a

[13] *See NPRM* at para. 4 (citing *2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1; *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1; *2008 Competitive Networks Order*, 23 FCC Rcd at 5386, para. 5; *2010 Exclusive Service Contracts Order*, 25 FCC Rcd 2460).

disclosure requirement would help competitors manage tenants' expectations, and potentially may help level the playing field by informing new entrants about barriers that should be taken into account during negotiations with MTE owners.

b. Exclusive Wiring and Sale-and-Leaseback Arrangements

The existence of available inside wiring can significantly alter the economics of serving an MTE. Competitors can dedicate more resources to network deployment if not forced to take on the capital-intensive task of adding duplicative wiring to a building. As noted in the NPRM, when the Commission last considered the issue of exclusive wiring arrangements, it found that the practice does "not *absolutely* deny new entrants access to [residential MTEs] or real estate development."[14] The Commission based its finding on the fact that, in limited circumstances, competitors could gain access to home run and cable home wiring inside MTEs, and residents were not harmed by the dearth of competition. However, incumbent providers and MTE owners have manipulated the Commission's current allowance for exclusive wiring arrangements to ensure that competitors can no longer access fallow or unused cable wiring. Exclusive wiring agreements amount to an end run around the Commission's existing cable inside wiring rules, which were created to promote competition and consumer choice.[15]

Sale-and-leaseback arrangements, in which a communications provider sells its home wiring to a property owner before a customer terminates service and then leases back the wiring on an exclusive basis, represent the most pernicious subset of exclusive wiring arrangements. These agreements ensure that "the inside wiring will be unavailable for use by competitors when

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[14] *Id.* (quoting the *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20237, para. 1 & n.2.) (emphasis added).

[15] Comments of the Fiber Broadband Association, MB Docket No. 17-91 (filed May 18, 2017), at 15-16 ("FBA Comments")

the customer is ready to change providers."[16] According to our members, sale-and-leaseback arrangements and other exclusive wiring arrangements become most problematic when there is only one wire available in a building. In that case, these arrangements serve effectively as exclusive service agreements and bar the provision of competitive services. These agreements clearly violate section 76.802(j) and section 51.319(b)(2) of the Commission's rules[17] and should be prohibited, particularly when they apply to the only available wiring or conduit, or when the MTE will not allow for installation of any additional wires.

Sale-and-leaseback arrangements can also allow property owners to resell communications services at exorbitant prices. If a property owner has taken possession of the rights to home wiring in an MTE, and is working with more than one provider, it can force competitive providers to match the rate incumbents charge for similar communications services. Much like a revenue sharing agreement, competitors' hands are tied, as they are forced to provide service at specific price points in exchange for access to the wires. Furthermore, some smaller providers may not be able to provide service because owners who control their home wiring will more likely admit a provider who is willing to share a certain percentage of what a tenant pays for service. This result of sale-and-leaseback agreements is a distortion of the Commission's original purpose for inside wiring access[18] and ensures that consumers cannot

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[16] *Id*.

[17] 47 C.F.R. § 76.802(j) (requiring cable providers not to "prevent, impede, or in any way interfere with a subscriber's right to use his or her home wiring to receive an alternative service"); 47 C.F.R. § 53.319(b)(2) (requiring carriers to provide non-discriminatory access to competitors to access wiring at or near an MTE).

[18] *See* NPRM at para. 5 (establishing inside wiring rules, at the direction of Congress in 1992, to "facilitate competitive access to unused cable wiring").

reap the benefits of faster speeds and lower prices that competitive providers could otherwise provide.

Our members report that the existence of a state or local access law makes it more likely that competitive providers will be able to discuss issues related to exclusive wiring agreements with property owners. The San Francisco mandatory access ordinance at issue in this proceeding is an example of a local access law that was intended to address issues with exclusive wiring. Additionally, the Commission's own analysis indicates that mandatory access laws have a positive effect on broadband adoption.[19] Given the number of options available to incumbent providers and property owners when a tenant terminates service, the Commission's inside wiring rules often require clarification from competitive providers. While mandatory access laws may not always guarantee that a competitive provider will be allowed to provide service to an MTE, it ensures that the parties can have a more comprehensive discussion of the options.

c. Exclusive Marketing Arrangements

Despite the Commission's insistence that exclusive marketing arrangements do not harm MTE residents,[20] the practice significantly inhibits competition in MTEs, particularly when used in conjunction with revenue sharing agreements or wiring exclusivity. When used in tandem, these practices amount to a firewall that results in *de facto* exclusive access and serves no legitimate purpose other than to protect incumbents and prevent competitive providers from successfully accessing an MTE. For instance, when a marketing agreement is combined with revenue sharing, competitive providers often cannot achieve penetration rates requisite to an acceptable ROI.

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[19] *See infra* n. 26.

[20] *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2471, para. 29.

On their own, exclusive marketing agreements are an artificial barrier to entry and frustrate competitive providers' ability to effectively compete on a level playing field for customers against an entrenched incumbent.[21] With exclusive marketing agreements, tenants are generally unaware they have a choice among broadband providers; the only marketing a competitor can do is to send direct-mailers and hope for word of mouth publicity among tenants.[22] INCOMPAS members frequently encounter exclusive marketing provisions that make it nearly impossible to enter an MTE, even if tenants have requested their services. For example, one member offered free gigabit service in a public housing project, but the housing authority had an exclusive marketing agreement with a major cable provider. As a result, the member was not allowed to conduct educational workshops about the service or otherwise educate low-income residents about the availability of the free service.

These agreements can also generate confusion among building owners and property managers about the effects of an exclusive marketing agreement. In some instances, these agreements are conflated with exclusive service agreements. To make matters worse, members indicate that most property owners are aware that exclusive access agreements are prohibited by the Commission, but are also aware that exclusive marketing arrangements are allowed and yield the same anti-competitive outcome. Sometimes, exclusive marketing arrangements run with the

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[21] *See generally* Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, Wired (June 26, 2016), https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with- internet-providers/.

[22] Some marketing exclusivity provisions require building owners to go to incredible lengths to hide the fact that other providers have the right to provide services. For example, an INCOMPAS member received a request from a building owner to have technicians remove all "branded" uniforms while installing wiring. The member was told that failure to abide by these terms would constitute a violation of the terms of the exclusive marketing agreement the building owner had signed with an incumbent provider.

MTE from owner to owner.[23] Thus, a current owner or landlord may be subject to an agreement that they did not execute and do not understand.

A simple and effective solution is to prohibit these arrangements. While marketing agreements may have benefits related to bulk billing, property owners could just as easily realize the same benefits by encouraging residents to sign up for an incumbent's service when a tenant visits a leasing office. To the extent exclusive marketing agreements prevent competitors from deploying next generation networks to MTEs, these practices harm residents and should be restricted. If the Commission continues to allow exclusive marketing agreements, explicit contractual provisions should be required that indicate that the arrangements do not give property owners the right to deny competitive providers' access to MTEs. Additionally, the Commission can require that marketing agreements be made transparent to competitive providers and tenants.

The Commission also seeks comment on whether to require specific disclosures to make it clear to residents that they can obtain services from alternative providers. While a disclosure requirement would help on the margins, for it to be effective the incumbent provider must make clear in the contract that the exclusive marketing clause does not constitute exclusive access. Further, the Commission must enforce these provisions and find providers in violation of its exclusive access rule if the building owner refuses to provide access to the building based on the exclusive marketing provision. This would incent providers to make clear to the building owners that they cannot exclude competitors from their buildings.

d. Rooftop Exclusivity

Like exclusive wiring agreements, rooftops present an opportunity for incumbent providers and property owners to turn scarcity into monopoly profits. Rooftop exclusivity

[23] *See* Comments of INCOMPAS, GN Docket No. 17-142 (filed July 24, 2017), at 17.

agreements are used primarily by fixed wireless communications providers to prevent competitors from accessing space on an MTE's rooftop to establish or improve wireless backhaul services. While not as prevalent as some other commercial exclusivity practices discussed herein, rooftop exclusivity could disadvantage competitive providers preparing their networks for next generation services, like 5G. To ensure that the country is well positioned to deploy the massive amounts of 5G infrastructure and facilities, the Commission should prohibit exclusivity agreements intended to create scarcity or monopoly access to MTE rooftops. Additionally, the Commission should prohibit all anticompetitive terms or conditions that otherwise make it difficult for competitive providers to add facilities to MTE rooftops.

Should the Commission adopt prohibitions on rooftop exclusivity agreements, however, it should distinguish neutral host providers. Neutral host providers create opportunity for wireless broadband competitors by readying rooftops for access by multiple providers. Neutral host providers negotiate an exclusivity arrangement with building owners to manage rooftop rights while providing a percentage of rental fees that providers pay for rooftop access.[24] Companies that perform this service make an upfront investment to prepare the rooftop for wireless installations (or other tenants like utilities or fiber) and then engage in the necessary structural analysis and consulting required to ensure that providers do not have interference or installation issues. Neutral host providers and property owners are rewarded for densifying the network, providing fixed wireless backhaul, and leasing access to satellite and fixed wireless providers operating wireless antennae. Accordingly, any action taken on exclusive rooftop rights should permit neutral host providers.

[24] Unlike graduated revenue sharing where property owners profit by excluding competitors, this revenue share agreement rewards property owners, who might have been considering rooftop deployments, for accommodating multiple entities.

e. Other Contractual Provisions and Practices

In addition to concerns identified in the NPRM, INCOMPAS members seeking to serve commercial MTEs have also been asked to enter into "building access agreements." These agreements typically require annual fees or incorporate broad termination rights that allow a commercial property owner or landlord to abruptly terminate a competitive provider's access to the facility as a condition prior to deploying infrastructure. Competitive providers generally lack the capacity and resources to spend significant amounts of capital to wire a building only to be under constant threat of sudden termination for the convenience of the property owner. Thus, our members have not been able to serve potentially lucrative properties. In contrast, incumbents either are not asked to agree to these terms, or have the leverage to challenge the provisions. INCOMPAS urges the Commission to investigate these contractual provisions and prohibit unreasonable termination clauses that require immediate or sudden termination, or termination without cause, before competitive providers can recover their deployment costs.

IV. THE FCC SHOULD PROMOTE STATE AND LOCAL POLICIES THAT ENCOURAGE MTE COMPETITION.

INCOMPAS supports the Commission's decision to encourage "state and local experimentation regarding policies to promote broadband and video competition in MTEs," such as mandatory access laws that have been adopted across the country.[25] Mandatory access laws are enabling competitive providers' entry into MTEs, and giving consumers access to more service offerings from the providers of their choice. For example, mandatory access laws have allowed Sonic, a fiber provider serving the San Francisco area, to gain entry to over 1,000

[25] *Declaratory Ruling* at paras. 40-41.

buildings where tenants interested in the provider's affordable, gigabit broadband offering requested its service. As the FCC's Office of Economics and Analytics ("OEA") recently determined, "the presence of mandatory access laws is on average associated with a higher rate of terrestrial fixed broadband subscription for residential occupants of MTEs and non-MTEs."[26] OEA further surmised that mandatory access laws "are associated . . . with a modest increase in the supply of broadband in MTEs."[27] As these state and local policies become more prevalent nationwide, the Commission should continue to analyze their impact on increased broadband deployment.

Putting aside the Commission's concerns about in-use shared wiring—since those were addressed in the *Declaratory Ruling*—the San Francisco mandatory access ordinance offers a good example of a local regulation that has successfully promoted broadband deployment, competition and access to MTEs.[28] The ordinance allows residents in MTEs with four or more units the right to choose their internet service provider. This opens the door for a more collaborative relationship with the building owner who must entertain the idea of permitting a new communication provider access on behalf of its residents. The opportunity to educate building owners about the rights of tenants, where feasible, to select a service provider has also provided additional flexibility that allows competitive providers to show how they might be able

[26] STEVEN KAUFFMAN AND OCTAVIAN CARARE, FED. COMMC'N COMM., OFFICE OF ECON. & ANALYTICS, AN EMPIRICAL ANALYSIS OF BROADBAND ACCESS IN RESIDENTIAL MULTI-TENANT ENVIRONMENTS ii (2019) ("OEA MTE Report").

[27] *Id*.

[28] The Commission's decision not to preempt other aspects of Article 52 ensures that competitive service providers serving San Francisco are still able to avail themselves of the mandatory access provisions of the ordinance. *See Declaratory Ruling* at para. 44 (denying the MBC Petition to the extent it sought preemption of the sharing of unused wiring and other aspects of Article 52).

to add value to a property by, for instance, providing Wi-Fi in common areas or creating new connections in a leasing office, gym, or rooftop. The success that providers like Sonic have had in accessing new buildings speaks for itself, and the spirit and mandates of Article 52 should be modeled in other mandatory access laws across the country.

At the same time, INCOMPAS is aware of two examples of local regulations that deter broadband deployment. The first relates to local rules and processes that unreasonably delay deployment of base station equipment. Streamlining local rules to eliminate any unreasonable delays for the deployment of fixed wireless solutions is reasonable and will ensure that fixed wireless providers can more nimbly address network deployment. Second, the Commission should encourage other cities to pass local regulations that require building owners to provide more than the bare minimum support for existing wiring. Generally, there are no consequences for an owner who unjustly denies someone else the ability to provide service. Most competitive providers are willing to install their infrastructure for free, so owners need only be concerned about how the work is done and if the network is installed properly. To the extent property owners are unwilling to prepare their buildings for next generation networks, INCOMPAS encourages the Commission to promote Article 7 of the Model State Code drafted by the Broadband Deployment Advisory Committee, which would require all MTEs to renovate or equip "with sufficient [Network Access Points] and high-speed network compatible Conduits so as to make the building high-speed network ready."[29]

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[29] BROADBAND DEPLOYMENT ADVISORY COMM., FED. COMMC'N COMM., STATE MODEL CODE FOR ACCELERATING BROADBAND INFRASTRUCTURE DEPLOYMENT AND INVESTMENT, 30 (Dec. 6, 2018), *available at* https://www.fcc.gov/sites/default/files/bdac-12-06-2018-model-code-for-states-approved-rec.pdf.

V. THE COMMISSION HAS LEGAL AUTHORITY TO ADDRESS ANTICOMPETITIVE PRACTICES BY COMMUNICATIONS PROVIDERS IN MTEs PURSUANT TO TITLES II AND VI.

The 1996 Telecommunications Act was bipartisan legislation passed by a Republican Congress and signed by a Democratic president to usher in competitive choice for consumers and businesses for communications services throughout the U.S. To ensure that consumers and businesses can exercise that choice, the Commission has had to address the anticompetitive and unfair practices in MTEs that locked-in incumbent service. In the last two decades, the Commission (under both Republican and Democratic leadership) has exercised its authority to bring the Act's competitive benefits to residents and businesses in MTEs.[30] As demonstrated here, the Commission's current MTE rules and policies do not sufficiently protect and promote competition in MTEs. Revenue sharing arrangements and exclusive agreements act to exclude competitors in conflict with the Commission's rules. Accordingly, the Commission should prohibit carriers and MVPDs from revenue sharing and other exclusive arrangements with MTEs impede competition and broadband deployment.

The Commission has both direct and ancillary authority under the Act to do so. The Commission has found that sections 201(b) and 628 of the Act provide the necessary authority to prohibit the execution and enforcement of anti-competitive contractual arrangements that grant exclusive access to commercial and residential MTEs to common carriers and MVPDs.[31] Section 201(b) of the Act expressly authorizes the Commission to regulate all "charges,

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[30] *See NPRM* at paras. 4-5 (describing the Commission's actions to promote competition in MTEs).

[31] *See* 47 U.S.C. §§ 201(b), 548(b), (g).

practices, classifications, and regulations for and in connection with [interstate or foreign] communication service," to ensure that such practices are "just and reasonable."[32] In the *2008 Competitive Networks Order*, the Commission found that a carrier's execution or enforcement of an exclusive access provision within an MTE is an "unreasonable practice," and that the Commission has "ample authority" under section 201(b) to prohibit such exclusivity provisions in the provision of telecommunications services.[33] Similarly, section 628 makes it unlawful for a covered MVPD "to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing . . . programming to subscribers or customers."[34] In the *2007 Exclusive Service Contracts Order*, the Commission held that it had "ample authority under Section 628(b) of the Act to adopt rules prohibiting [covered MVPDs] from executing or enforcing contracts that give them the exclusive right to provide video programming services alone or in combination with other services to [residential MTEs]."[35] This view was upheld by the D.C. Circuit.[36]

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[32] 47 U.S.C. § 201(b).

[33] *See 2008 Competitive Networks Order*, 23 FCC Rcd at 5391, paras. 14-15 (citing 47 U.S.C. § 201(b)); *see also* 47 U.S.C. § 254(b)(3) (detailing the Act's overarching commitment to universal service and ensuring consistently competitive and diverse telecommunications service regardless of demographics).

[34] 47 U.S.C. § 548(b), (j).

[35] *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20254, para. 40. The Commission recognized that the business model for competitive entrants was a triple-play bundle of video, broadband, and telephone, and that "[a]n exclusivity clause in a [residential MTE's] agreement with [an] MVPD denies all these [competitive] benefits to the [MTE's] residents." *Id.* at 20245, para. 19.

[36] *NCTA*, 567 F.3d at 666 (concluding "that Section 628(b) authorizes the Commission's action" in the *2007 Exclusive Service Contracts Order*).

The Commission has sufficient authority under sections 201(b) and 628 to prohibit the execution and enforcement of anticompetitive contractual arrangements for the provision of communications services, including common carrier and MVPD services. As demonstrated above, INCOMPAS members have seen how revenue sharing and exclusive marketing agreements are used individually and together to exclude competitors offering alternative services. Exclusive rooftop and wiring agreements can have the same pernicious effect of limiting choice for alternative communications services. Rather than competing on the merits of their services, incumbents can lock-up buildings, and the tenants who want a competitive service are denied that choice. The result is higher pricing for residents and small businesses and potentially slower broadband, with worse customer service.

INCOMPAS also agrees with the NPRM's conclusion that the Commission has authority over infrastructure that can be used for the provision of both telecommunications and broadband internet access service on a commingled basis.[37] Given that incumbent and competitive providers often offer telecommunications and/or MVPD service over their broadband networks, it is appropriate and lawful for the Commission to exercise its section 201(b) and 628 authority to prohibit arrangements that are excluding competitors from accessing MTEs. Likewise, the Commission should promote MVPD and video competition over broadband facilities by

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[37] *See 2018 Wireline Infrastructure Third Report and Order*, 33 FCC Rcd at 7790, para. 167; *Restoring Internet Freedom Order*, 33 FCC Rcd at 424-425, paras. 188-190 (reaffirming that the Commission retains statutory authority to regulate facilities that provide commingled services where the Commission has statutory authority over one of the services); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5924, para. 65 (2007) (applying section 224 to facilities that provide both telecommunications and wireless broadband Internet access service, and applying section 332(c)(7)(B) to facilities providing personal wireless service and wireless broadband Internet access service).

exercising section 628 authority to prohibit unfair methods of competition and unfair deceptive acts or practices by MVPD providers. INCOMPAS encourages the FCC to take these steps to promote competition and deployment of telecommunications, broadband, and competitive video services in MTEs.

Section 706 states that the Commission must encourage deployment of advanced telecommunications capability—now known as broadband—on a reasonable and timely basis, by using measures to promote competition in the local telecommunications market or through other regulating methods that remove barriers to infrastructure investment.[38] Prohibiting arrangements used to exclude competitors from MTEs will enable competitive broadband deployment, delivering alternative and improved services that will best serve consumers and businesses. While the current Commission has chosen not to use its section 706 authority, its finding that the provision is merely hortatory is being challenged by INCOMPAS and others and is under review in the U.S. Court of Appeals for the D.C. Circuit. If the court reverses the Commission in *Mozilla et al. v. FCC*,[39] it would be appropriate for the Commission to use its section 706 authority in the MTE context.

Several sections of the Act would offer support for transparency requirements for revenue sharing and exclusive agreements for common carriers. Section 201(a) states that it is "the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request."[40] When a carrier is prohibited from delivering its service due to an MTE's agreement with another provider, it is important that

[38] 47 U.S.C. § 1302(a).

[39] Case No. 18-1051.

[40] 47 U.S.C. § 201(a).

the carrier be informed of such an agreement to report to the Commission that it cannot meet its obligations under section 201(a). By requiring every carrier to disclose these agreements, the FCC will be better able to determine whether a carrier is meeting its section 201(a) obligations.

Section 201(b) states that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful."[41] Revenue sharing and exclusive marketing, rooftop, and wiring agreements are not just and reasonable as they prevent carriers from meeting their obligations under section 201(a) to furnish communication service upon reasonable request. Further, section 201(b) states that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[42] Thus, the Commission may require that agreements be disclosed so that both the Commission and the carriers that have the obligation to provide service upon reasonable request understand why carriers cannot meet their section 201(a) obligations.

The Commission also may require carriers to file MTE agreements pursuant to sections 211(b), 218, or 219. Section 211(b) states that the Commission "shall have authority to require the filing of any other contracts of any carrier."[43] Section 218 provides that the Commission may obtain "full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created,"[44] and section 219 authorizes the

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[41] 47 U.S.C. § 201(b).

[42] *Id.*

[43] 47 U.S.C. § 211(b).

[44] 47 U.S.C. § 218.

Commission to obtain annual reports from carriers that "shall also contain such information in relation to charges or regulations concerning charges, or agreements, arrangements, or contracts affecting the same, as the Commission may require."[45] All of these provisions provide the necessary authority to require carriers to file their MTE agreements with the Commission, which may then make them available to other carriers and/or the public in furtherance of section 201(a) objectives.

It is necessary and appropriate for the Commission to require MVPDs to disclose agreements so that it can review them for section 628(b) compliance. Similarly, the Commission can require the agreements to be made available for public review. The specific reasons why an MTE refuses to agree to a competitor accessing the building are often not expressed in negotiations. Public availability of MTE agreements would offer the transparency needed to support the Commission's public interest objectives.

VI. CONCLUSION

INCOMPAS is pleased that the Commission is exploring how to accelerate broadband deployment, including by improving the market for competition in MTEs. The Commission should act to prohibit the use of anti-competitive commercial arrangements between MTE owners and incumbents, including graduated revenue sharing agreements, exclusive wiring and marketing agreements, and rooftop exclusivity agreements that lead to scarce rather than abundant broadband availability. The Commission should also collect information on the use of broad termination agreements in commercial properties to ensure that providers have a reasonable opportunity to provision competitive broadband offerings. The Commission should encourage state and local governments to adopt or reform pro-competition mandatory access

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[45] 47 U.S.C. § 219.

laws that can complement the Commission's own rules in seeking to close the digital divide. Finally, the Commission has direct and ancillary legal authority under sections 201(b) and 628, among others, to prohibit the commercial arrangements that are excluding competitors from accessing MTEs.

Respectfully submitted,

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