

**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
)	

REPLY COMMENTS OF INCOMPAS

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REPLY COMMENTS OF INCOMPAS

INCOMPAS hereby submits these reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking (“NPRM”)¹ on facilitating consumer choice and enhancing broadband deployment in multiple tenant environments (“MTEs”).

I. INTRODUCTION & SUMMARY

Communications services providers have sent a clear signal that the Commission should scrutinize, and in most instances prohibit, exclusive commercial arrangements between incumbent providers and building owners that prevent competitors from gaining access to MTEs to deliver communications services. The record provides overwhelming evidence that the commercial arrangements at issue in this proceeding—graduated revenue sharing agreements, rooftop and Distributed Antenna System (“DAS”) access, and wiring and marketing

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”).

exclusivity—operate, particularly when combined, as *de facto* exclusive access agreements. As described in the NPRM, the Commission prohibited exclusive service contracts in 2007 because they “discourage the deployment of broadband facilities” and impede entry by competitive providers.² Despite the prohibition on exclusive access, the record is replete with details about how incumbent providers have employed various contractual provisions to preserve their monopolistic access to MTEs at the expense of competition and consumer choice.

Furthermore, the record challenges the assertions of those opposed to action in this proceeding that market forces for communications services are promoting deployment and competition in residential and commercial MTEs. The Commission need only examine the diversity of providers that have weighed in to express concern to recognize that use of some commercial arrangements to deny competitors rightful access to MTEs is pervasive throughout the industry. Unless you are the rare major provider with economies of scale, access to MTEs is going to continue to be a competitive impediment. Competitive fiber providers, fixed wireless providers, mobile wireless carriers, wireless infrastructure providers, and telcos are now on record as being turned away by building owners that participate in these arrangements, even when tenants in their buildings seek alternate communications services. The clearest path to establishing “effective, clear policy that is carefully tailored to promote broadband deployment in MTEs”³ is to promulgate rules that honor consumer choice, to prohibit exclusive arrangements

² NPRM at ¶ 4 (quoting *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, 22 FCC Rcd 20235, 20243-44, ¶ 16 (2007) (*2007 Exclusive Service Contracts Order*), *aff'd*, *Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

³ See NPRM at ¶ 15.

that encourage scarcity, higher prices, and slower broadband, and to promote and enable competitive building access on a non-discriminatory basis.

II. EXCLUSIVE COMMERCIAL ARRANGEMENTS THAT IMPEDE COMPETITION IN MTEs AND CONSTRAIN CONSUMER CHOICE ARE A PERVASIVE PROBLEM THAT THE COMMISSION MUST ADDRESS.

The record makes clear that the commercial arrangements at issue in the NPRM, with limited exceptions,⁴ have the effect of preventing successful competition in MTEs. Despite some parties' insistence that the market for communications services in MTEs is competitive,⁵ our members' experiences reflect the concerns of the wider industry that incumbent providers and building owners are "systematically blocking competitive providers' access to MTEs."⁶

INCOMPAS represents companies that are aggressively expanding their networks at a time when the Commission is increasingly focused on bridging the digital divide and encouraging facilities-based deployment. A recent study conducted by INCOMPAS shows that

⁴ Neutral host providers appear to be an exception as their arrangements with building owners "create opportunity for wireless broadband competitors by readying rooftops for access by multiple providers." See Comments of INCOMPAS, GN Docket No. 17-142, MB Docket No. 17-91 (filed Aug. 30, 2019), at 19 ("INCOMPAS Comments"). As noted by Crown Castle, which provides these services, a neutral host operator "promote[s] broadband access and competition" by facilitating access to rooftops for multiple providers. Whereas most commercial arrangements create a scarcity of choice and access, neutral host operators work with building owners to provide abundant access to as many providers as can be accommodated according to safety and technical requirements. See Comments of Crown Castle International Corp., GN Docket No. 17-142 (filed Aug. 30, 2019), at 3. The distinction between arrangements that create scarcity and those that create abundance offers a valuable guidepost for the types of agreements that should be prohibited.

⁵ See Comments of NCTA—The Internet & Television Association, GN Docket No. 17-142 (filed Aug. 30, 2019), at 2-4 ("NCTA Comments"); see also Joint Comments of the National Multifamily Housing Council, *et al.*, GN Docket No. 17-142 (filed Aug. 30, 2019), at 10-14 ("Real Estate Associations Comments").

⁶ See Comments of Starry, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019), at 5 ("Starry Comments").

its small fiber providers are building more fiber than, and offering service that is competitive to, large incumbents,⁷ and its fixed wireless members are delivering high-speed broadband to consumers in urban and rural America. These fiber and fixed wireless networks will be critically important to the delivery of new services, like 5G, and data-intensive applications that require significant amounts of backhaul. Like other diverse industry participants in this proceeding, INCOMPAS members see residential and commercial MTEs as an important component of their network deployment plans.

When possible, competitors work diligently to foster partnerships with building owners who recognize the value from wiring buildings with broadband networks that deliver faster speeds at more affordable prices for tenants.⁸ These building owners are often rewarded with greater loyalty from tenants and increased property values. At the same time, our members attempt to make inroads in buildings where consumers are requesting their services. Unfortunately, in many instances, our members are shut out of consideration for access to MTEs, or confronted with terms that make it impossible to justify the investment. Communications service providers from all corners of the industry have expressed similar concerns in the record about lack of access to MTEs or anticompetitive contract provisions.

INCOMPAS has shared concerns about graduated revenue sharing agreements in which a provider “pays to play” and offers a property owner a sum based on penetration rates and

⁷ See Opposition of INCOMPAS, FISPA, Midwest Association of Competitive Communications, and the Northwest Telecommunications Association, WC Docket No. 18- 141 (filed Aug. 6, 2018), Attach. 2—Declaration of William P. Zarakas, at 3-4 (“INCOMPAS Opposition”) (finding that CLECs, more so than ILECs, are migrating from UNE-based services to full facilities-based services by actively deploying fiber).

⁸ See Attachment—Declaration of Dane Jasper at ¶¶ 4-5 (“Jasper Declaration”).

revenue per unit on a quarterly or annual basis.⁹ Across the industry there is broad recognition of the considerable time and resources to deploy broadband networks, and that building owners who permit access to communications providers to wire a building for broadband services should be compensated for costs associated with the project. However, agreements often go well beyond cost-recovery and end up being a supplemental source of income for building owners. Competitive providers are commonly asked to match or exceed the revenue sharing agreement that a building owner has with an incumbent provider, making it difficult to justify deployment.¹⁰ For example, Uniti Fiber, an INCOMPAS member, indicates “MTE owners may impose such high costs that all but incumbent providers or large cable operators, who can spread those costs across a large customer base, can afford to serve a building.”¹¹ The Commission should prohibit these graduated revenue sharing agreements in favor of “cost-based and non-discriminatory” revenue sharing arrangements.¹²

⁹ INCOMPAS Comments at 10.

¹⁰ See Jasper Declaration at ¶ 6 (“Sonic is consistently asked to engage in revenue sharing in order to gain access to MTEs, with most owners asking the company to match what they are currently receiving from the incumbent provider.”)

¹¹ Comments of Uniti Fiber, GN Docket No. 17-142 (filed Aug. 30, 2019), at 8 (“Uniti Comments”). Uniti further proposes that the Commission, in accordance with a recommendation from the Broadband Deployment Advisory Committee, provide guidance on “fair and reasonable fees” for revenue sharing agreements. As discussed further below, INCOMPAS suggests that any “fair and reasonable fees” should be cost-based.

¹² See Comments of the Fiber Broadband Association, GN Docket No. 17-142 (filed Aug. 30, 2019), at 4 (“FBA Comments”) (“[R]evenue sharing agreements should only be presumed to be consistent with the public interest if they are cost-based and non-discriminatory. Cost-based agreements reflect the reasonable and direct costs incurred by an MTE owner in connection with a provider’s access to and use of the MTE . . . For these agreements to be non-discriminatory, MTE owners cannot extract greater fees from one provider over another provider if the actual costs associated with the provider’s access and use of the MTE are not greater.”). See also Comments of CenturyLink, GN Docket No. 17-142 (filed Aug. 30, 2019), at 14 (“CenturyLink

Similarly, a variety of stakeholders argue that exclusive wiring arrangements, like sale-and-leaseback agreements, amount to an end run around the Commission’s existing cable inside wiring rules.¹³ The Commission’s cable inside wiring rules were intended to promote competition and consumer choice by making fallow or unused wiring available to competitive providers. Sale-and-leaseback arrangements, in which an incumbent transfers control of inside wiring to the building owner and then leases it back on an exclusive basis, “are clever contrivances designed to circumvent the protections afforded by the Commission’s inside wiring regulations by creating a *de facto* exclusive access agreement under the guise of an exclusive wiring agreement.”¹⁴ Like our members, others have found that these arrangements “erect insurmountable economic barriers to new entrants” who cannot take advantage of fallow or unused wiring to reach interested MTE customers.¹⁵ If wiring is not made available due to such an agreement, competitors that still can access the building face the unenviable choice of rewiring the building or abandoning the project. Starry, another INCOMPAS member, notes that “a new entrant is far less likely to enter because of the upfront cost of wiring the entire building.”¹⁶ To prevent this end run around the rules, the Commission should adopt new

Comments”) (insisting that providers should be prohibited from entering into revenue sharing and other access agreements that compensate the MTE owner beyond its actual cost).

¹³ See Comments of the Wireless Internet Service Providers Association, GN Docket No. 17-142, (filed Aug. 30, 2019), at 18 (“WISPA Comments”). See also FBA Comments at 7 (“sale-and-leaseback arrangements have the indicia of being anticompetitive and can be used to evade the Commission’s rules against exclusive access agreements”).

¹⁴ WISPA Comments at 18.

¹⁵ Comments of Common Networks, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019), at 9 (“Common Networks Comments”).

¹⁶ Starry Comments at 10.

protections and ensure that competitive providers can access unused wiring when a customer that has discontinued an incumbent's service.

With respect to exclusive marketing agreements, the record confirms INCOMPAS members' experiences. When used in concert with other commercial arrangements, like revenue sharing, exclusive marketing can result in, at best, "yet another barrier for providing service to tenants of the MTE"¹⁷ and, at worst, *de facto* exclusive access.¹⁸ When INCOMPAS members have been contacted by potential customers in MTEs, exclusive marketing agreements make it difficult to achieve take rates and return on investment needed to justify deploying new facilities. Particularly when an incumbent's exclusive marketing agreement is combined with a bulk billing and graduated revenue sharing arrangement, a building owner has no incentive to allow competitive providers access to the building because of the negative impact it can have on the total amount of revenue that is ultimately shared. Furthermore, exclusive marketing agreements are being taken to abusive extremes. One INCOMPAS member's technician was not allowed to wear clothing with any type of company insignia while installing facilities based on the property owner's fear that it would violate the terms of its marketing agreement with the incumbent. Similarly, Common Networks indicates that it received a legal notification that it was in violation of a marketing agreement when it used the image of an MTE it served in a direct mailing to tenants.¹⁹ Exclusive marketing agreements also lead to confusion by property

¹⁷ Common Networks Comments at 9.

¹⁸ WISPA Comments at 21.

¹⁹ Common Networks Comments at 9.

managers and landlords regarding the rights of consumers to choose their own service provider.²⁰ These agreements should be prohibited. As noted in our comments, 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. In the alternative, the Commission should require disclosure of these agreements to tenants to make it clear that while an incumbent may have an arrangement in place, the tenant still has a right to select the communications service provider that best meets their needs.

Like INCOMPAS, other stakeholders harbor concerns that exclusive rooftop agreements between building owners and an incumbent could “prevent subsequent carriers from securing access on equal footing . . . [and] ensuring ubiquitous coverage to their customers.”²¹ Fixed wireless providers, among others, are increasingly installing equipment (i.e., transceivers and antenna) on rooftops to provide broadband service. Without access to rooftops, fixed wireless providers are unable to serve customers within a building.²² Exclusive rooftop access agreements serve no purpose other than to secure an incumbent’s monopoly position. As fixed wireless providers observe, “there is no safety or operational reason to prohibit additional fixed wireless equipment from being installed on a roof.”²³ Eliminating exclusive rooftop agreements would further allow providers to enjoy the additional benefits of rooftop deployments, such as

²⁰ See Jasper Declaration at ¶ 9 (describing an “education gap over these exclusivity provisions and the right of competitive providers to offer services in MTEs”).

²¹ Comments of T-Mobile USA, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019), at 13.

²² See Starry Comments at 11.

²³ *Id.*

addressing limited tower availability²⁴ and overcoming line-of-sight restrictions to provide service to adjacent buildings and communities.²⁵

As part of its efforts to streamline the deployment of facilities that will support 5G service, the Commission should continue to permit building owners to employ neutral host operators to maximize the space available on MTE rooftops. The network densification that 5G will require with respect to small cell deployment, installation of backhaul connections, and fixed wireless solutions will require significant investment in rooftop equipment. A neutral host operator, working to prepare MTE rooftops to accept the maximum number of providers, can ease 5G deployment and ensure that competitive providers have opportunities to succeed.

Finally, consumer advocates urge the Commission to prohibit any exclusive arrangements that “reduce choice and harm competition.”²⁶ As INCOMPAS has noted, consumers who enjoy the benefits of competition in MTEs receive faster broadband at lower costs. Removing contractual provisions that protect monopolies or duopolies in MTEs will encourage more competition to the direct benefit of the consumers.²⁷ The record presents a

²⁴ Comments of the Competitive Carriers Association, GN Docket No. 17-142 (filed Aug. 30, 2019), at 4.

²⁵ WISPA Comments at 23.

²⁶ Comments of Public Knowledge and New America’s Open Technology Institute, GN Docket No. 17-142 (filed Aug. 30, 2019), at 9 (arguing that exclusive agreements “stifle competition and have negative consequences for consumers”).

²⁷ RealtyCom’s reply comment confirms INCOMPAS’s assertion that most apartment communities are served by “at best a duopoly.” RealtyCom indicates that only ten percent of its 2300 apartment communities are served by three or more providers. *See* Reply Comments of RealtyCom Partners, GN Docket No. 17-142 (filed September 27, 2019), at 4. INCOMPAS has previously submitted to the Commission an economist’s report discussing why reliance on monopolies and duopolies is inappropriate. In his report, David Sappington, the former Chief Economist for the FCC, writes “[i]t is generally inappropriate to rely on duopoly competition to protect consumers. Indeed, economists have cautioned for nearly a century that duopoly may fail

compelling case for Commission action to make MTEs, and in turn the broadband market, more competitive. The Commission should prohibit any exclusive commercial arrangement that impedes competitive providers' access to MTEs or that makes unreasonable, anticompetitive, or discriminatory demands of a provider.

III. CONCLUSION

With 30% of Americans living in MTEs and the majority of Americans having only one, or at best two choices, for home broadband service, Commission action in this proceeding is warranted. Accordingly, INCOMPAS urges the Commission to ban any exclusive commercial arrangement that impedes competitive providers' access to MTEs or that makes unreasonable, anticompetitive, or discriminatory demands of a provider.

Respectfully submitted,

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to serve consumers any better than monopoly.” According to the report, empirical evidence documents that “industry prices increase as industry concentration increases, and that collusive outcomes can emerge under duopoly supply.” See INCOMPAS Opposition, Attach. 1, *David E.M. Sappington*, PREMATURE, UBIQUITOUS FORBEARANCE WILL HARM CONSUMERS, at 9-10.

ATTACHMENT

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DECLARATION OF DANE JASPER, SONIC TELECOM, LLC

1. My name is Dane Jasper, I am the Co-Founder and Chief Executive Office of Sonic.net, LLC and Sonic Telecom, LLC (“Sonic”). Sonic is a full facilities-based broadband Internet access and telecommunications company and is a Competitive Local Exchange Carrier (CLEC). Sonic launched as a small startup in 1994, and over the last 25-years has grown into the largest independent broadband internet access service provider in Northern California. Today, Sonic provides retail voice and high-speed, broadband internet access services to over 100,000 residential, small business, and enterprise customers in California.

2. Sonic’s primary product is Fusion Broadband+Phone, an internet access and voice telephone service that it offers for \$40 per month to residential customers, with an option for faster service through a bonded (two-line) offering for \$70. A similar offering with bonded (two-line) broadband speed is offered to very small business locations for \$90 per month. Fusion provides residential internet access at up to 1 Gbps symmetrical when provided over Sonic’s own fiber. The voice services include unlimited nationwide calling, unlimited calling to fixed lines in sixty-six countries, and all voice features including Robocall blocking, caller ID, and voicemail, all at no extra charge.

3. Today, Sonic serves customers in Sonoma County, the San Francisco Bay Area, Sacramento and many communities in the Los Angeles metropolitan area. Sonic also partners with small ISPs and other wholesale customers. Sonic has traditionally used unbundled network elements to enter new markets, establish a market share to justify fiber construction, and create revenue flows that fund debt for fiber construction. Residential customers in San Francisco Bay-Area have responded very positively to Sonic’s Gigabit Fiber services and we have seen significant and sustained demand. This includes customers in single dwelling units as well as tenants in multiple tenant environments (“MTEs”).

4. Because of the recent success Sonic has had in deploying its fiber networks, the company has been able to cultivate considerable interest in our services, and especially in our premier product. However, the company continues to have difficulty gaining access to MTEs in our service areas, even in situations where residents have contacted us requesting to subscribe to our broadband service. Despite our best efforts to foster and encourage fair competitive practices in terms of access to communication services, our cheaper pricing for broadband service, and our 1 Gig symmetrical service, a number of obstacles—such as revenue sharing requests from the building owner and exclusivity provisions in the contract with the building’s current service provider—has precluded us and others from provisioning broadband services to these buildings.

5. Sonic aims to compete on its reputation, its competitive pricing, and the quality of its service and makes every effort to establish a collaborative relationship with building owners and property managers. While seeking access to a building, Sonic provides detailed company information, site surveys, building installation plans (wire plans) and timelines. Sonic’s Fusion Gigabit Fiber product is deployed by pulling fiber facilities into an MTE and running it through

the building risers and conduit to deliver it to the door of each individual unit of the building where we have a request for service from the tenant. I would note that access to twisted-pair telephone wire, which we use to deliver Sonic's DSL services, is not at all contested or controversial, but unlike our fiber service, does not require building access.

6. Unfortunately, there are many instances in which a building owner will have a compensation agreement or contractual provisions—exclusive wiring, rooftop, or marketing arrangements—that make it exceedingly difficult for Sonic to compete with its fiber service. Sonic is consistently asked to engage in revenue sharing in order to gain access to MTEs, with most owners asking the company to match what they are currently receiving from the incumbent provider. In our experience, our larger competitors, with their ability to spread these costs across their business, are more easily able to enter into these agreements in exchange for access—and in many cases *de facto* exclusive access—to MTEs. For smaller providers, revenue sharing, in which a provider is asked to offer quarterly or annual compensation based on penetration or take rates, is not a realistic path to follow and often precludes Sonic from serving interested customers within MTEs.

7. Sonic has seen examples of this repeatedly throughout our service area. For example, there is a large property management company with control over a number of MTEs in the East Bay. We have been unable to access more than ten buildings under their management due to their request for significant compensation. The property management company continues to cite to larger competitors that have been able to accommodate their financial requests.

8. Exclusive arrangements between property owners and communications service providers also make it less likely that new entrants will be allowed to compete. These arrangements, whether they include exclusivity over access, wiring, rooftops, or marketing,

contribute to confusion over communication service providers' ability to access MTEs and, in some cases, are conflated with exclusive access agreements by building owners and managers. It is also common for Sonic to make inquiries about providing service in MTEs only for there to be no response from the building owners or their representatives. In some cases, Sonic's request to provide service is being ignored, but in others, there is an education gap over these exclusivity provisions and the right of competitive providers to offer services in MTEs.

9. In 2017, the City and County of San Francisco passed a mandatory access ordinance intended to give tenants greater ability to choose their broadband service provider. This ordinance has proven to be essential for competitive access and has allowed Sonic to make inroads with building owners and property management companies that it might not have been able to otherwise. As Sonic continues to increase its brand awareness and collaborative approach, we have received better participation from landlords and owners. To date, since the ordinance was adopted, Sonic has gained access to over 1000 buildings in and around the San Francisco region. These types of mandatory access laws are critical to bridging the digital divide and expanding the scope of competitive broadband access in the country.

10. I declare the foregoing to be true and correct to the best of my knowledge, under penalty of perjury.

/s/ Dane Jasper

Dane Jasper
Chief Executive Officer
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