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
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	)	

COMMENTS OF INCOMPAS

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INCOMPAS hereby submits these comments in response to the Federal Communications Commission's ("Commission" or "FCC") *Public Notice* seeking to refresh the record on facilitating consumer choice and improving competitive broadband access in multiple tenant environments ("MTEs").[1]

I. INTRODUCTION & SUMMARY

INCOMPAS, the Internet and competitive networks association, 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. Our members include small fiber providers that are building more fiber than and offering services competitive to large incumbents. We also represent companies providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes. We have wireless and satellite members that are offering services to residential and business customers. Finally, we represent transit and backbone providers that carry broadband and Internet traffic, and online content and

[1] *See Wireline Competition Bureau Seeks to Refresh Record on Improving Competitive Broadband Access to Multiple Tenant Environments*, Public Notice, GN Docket No. 17-142, DA 21-1114 (rel. Sep. 7, 2021) ("*Public Notice*").

video distributors ("OVDs") that offer various content and communications services and video programming over BIAS to consumers.

INCOMPAS is active in promoting the growth of next-generation networks through pro-competition policies that will unleash network investment and pave the way for the critical deployment of wired and wireless networks, including 5G service. INCOMPAS seeks to lower barriers to broadband deployment by advancing policies that permit competitive access on reasonable terms to telecommunications infrastructure, like poles, ducts, conduits, and rights-of-way, and premises where competitors have historically been denied access, like multiple tenant environments ("MTEs"). INCOMPAS members are advocates for maintaining critical, competitive statutory policies that promote the widespread deployment of broadband and the potential of next-generation networks to bridge the Digital Divide and bring faster speeds and more opportunities to consumers.

Throughout this proceeding, INCOMPAS has consistently advocated for the Commission to revisit business practices and commercial arrangements that restrict competitors' access to MTEs, and is pleased that the agency is seeking to refresh the record on these issues in its *Public Notice*. In 2017, the Commission issued a *Notice of Inquiry* "[w]ith an eye towards both promoting competition and easing deployment of broadband services within MTEs."[2] In response to the Commission's *MTE NOI* and subsequent *Notice of Proposed Rulemaking*,[3] communications services providers sent a clear signal that the Commission should scrutinize,

[2] *See Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Inquiry, FCC 17-78 (rel. June 23, 2017) ("*2017 MTE NOI*").

[3] *See Improving Competitive Broadband Access to Multiple Tenant Environments et al.*, GN Docket No. 17-142 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 34 FCC 5702 (2019) ("*2019 MTE NPRM*").

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 Commission is no longer alone in seeking answers on how best to "facilitate enhanced deployment and greater consumer choice for Americans living and working in" MTEs.[4] This July, the Biden Administration issued an *Executive Order on Competition in the American Economy* explaining that "Americans . . . pay too much for broadband, cable television, and other telecommunications services, in part because of a lack of adequate competition."[5] The *Executive Order on Competition* recommends that the Chair of the Commission consider several actions "to promote competition, lower prices, and a vibrant and innovative telecommunications ecosystem,"[6] including "initiating a rulemaking to prevent landlords and cable and Internet service providers from inhibiting tenants' choices among providers."[7] That the Administration recognizes that tenants and business customers in MTEs lack competitive options for broadband and telecommunications services should compel the Commission to act in this proceeding and restrict commercial arrangements that serve as *de facto* exclusive access agreements.

While the Commission seeks to update the record specifically on whether or not there have been changes in the market in the two years since the *MTE NPRM* was released, the

[4] *2019 MTE NPRM* at 5710-11, para. 14.

[5] Exec. Order No. 14036, 86 Fed. Reg. 36987, 36988 (July 9, 2021), *available at* https://www.govinfo.gov/content/pkg/FR-2021-07-14/pdf/2021-15069.pdf ("*Executive Order on Competition*")

[6] *Id*. at 36994.

[7] *Id*. at 36995.

unfortunate reality is that the market, according to our members, is relatively unchanged and the environment for broadband deployment in residential and commercial MTEs does not uniformly promote competition. Indeed, some of our members have indicated that some MTEs, like retail shopping centers, have been locked up even more in the last several years.

Competitive providers are still asked to participate in revenue sharing arrangements or are routinely denied access to MTEs because of exclusive wiring or marketing agreements between an incumbent provider and a building owner. Because the practices that INCOMPAS described in its comments for the *MTE NOI* and *2019 MTE NPRM* are still applicable today, INCOMPAS incorporates by reference these comments and urges the Commission to review them in order to have a comprehensive picture of the obstacles that competitive providers face when attempting to gain access to MTEs.[8]

When allowed to compete, INCOMPAS members are able to cultivate considerable interest in their competitive broadband service amongst consumers and businesses, as well as MTE owners and property managers. Consumers and businesses are regularly turning to online alternatives, such as streaming video, voice, and cloud services, some of which are competing directly against incumbents' traditional service offerings; thus, it is important that they have choice for their broadband provider. INCOMPAS and its members are actively engaged in outreach to develop constructive partnerships with MTE owners and to build the case that expanding fiber networks is a win-win for consumers, property owners and providers alike as leveraging gigabit level and beyond Internet will make these buildings more attractive to renters

[8] *See* Comments of INCOMPAS, GN Docket No. 17-142 (filed July 24, 2017) ("INCOMPAS NOI Comments"); Reply Comments of INCOMPAS, GN Docket 17-42 (filed Aug. 22, 2017) ("INCOMPAS NOI Reply Comments"); Comments of INCOMPAS, GN Docket No. (filed Aug. 30, 2019) ("INCOMPAS NPRM Comments"); Comments of INCOMPAS, GN Docket No. 17-142 (filed Sep. 30, 2019) ("INCOMPAS NPRM Reply Comments").

seeking reasonably priced, high-speed broadband. INCOMPAS' members make every effort to understand the concerns of its partners and to build cooperative partnerships by negotiating mutually beneficial, cost-based agreements with property owners whenever possible.

That said, smaller competitive providers and new entrants that do not have as large of an embedded customer base as incumbents face significant barriers to build out their networks, even when they can make the business case to do so.[9] In addition to the expense and time of expanding their networks, our member companies find that property owners are often unwilling to allow competitive broadband services in premises where they already have exclusive arrangements and revenue sharing agreements with incumbent providers. As a result of these barriers, competitors return on investment is impacted, further impeding their ability to deploy additional broadband.[10] In those cases, consumers and businesses lose out on the faster speeds, lower pricing, and better customer service that competitors offer. By taking immediate action to prohibit anticompetitive arrangements, competitors seek a level playing field and an opportunity to compete on service, price, and reputation.

Ideally, it would be good public policy for the FCC to ban common industry practices that act to make it tougher for new entrants to effectively compete in MTEs. These practices include Graduated Revenue Share Agreements, Exclusive Wiring Arrangements (including sale

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[9] *See* ANGIE KRONENBERG, INCOMPAS, BROADBAND BLUEPRINT: HOW TO ACHIEVE UNIVERSAL AVAILABILITY 3 (October 2020), *available at* https://www.incompas.org/Files/filings/2020/INCOMPAS%20Broadband%20Blueprint%20Paper.pdf.

[10] *See* Ryland Sherman, *America's Broadband Moment: Facilitating Competition in Apartment Buildings*, BENTON INSTITUTE FOR BROADBAND & SOCIETY (July 22, 2020), https://www.benton.org/blog/americas-broadband-moment-facilitating-competition-apartment-buildings (contending that policy improvements to increase competition in MTEs will "facilitate better broadband options in nearby neighborhoods as well, as networks realize economies of scale").

and leaseback deals) and Exclusive Marketing Arrangements. Unless and until the FCC bans these activities, they will prevent competitors from accessing customers in MTEs.

In this comment, INCOMPAS updates the Commission on the use of these contractual provisions to deny competitive providers entry to MTEs, includes edited responses from INCOMPAS members to the *Public Notice's* set of inquiries, urges the Commission to continue to support mandatory access laws like Article 52 of the San Francisco Police Code which is helping competitive providers in that city gain unprecedented access to MTEs, and presents further analysis of the Commission's authority to act in this proceeding to prohibit these anticompetitive commercial arrangements.

II. COMPETITION IN THE MTE MARKET IS LIMITED AND RECENT COMMISSION ACTIONS AND FEDERAL FUNDING OPPORTUNITIES SHOULD ENCOURAGE THE AGENCY TO IMPROVE COMPETITORS' ACCESS

Unfortunately, competition in the residential fixed BIAS marketplace and business marketplace is very limited at this time. While most Americans have one or two high-speed providers to serve their homes and business location(s), very few Americans actually have a third, competitive high-speed or fiber option.[11] This is reflected in the MTE market as well. Residential MTEs constitute approximately 30 percent of American homes and the tenants in

[11] *See* Area Comparison | Fixed Broadband Deployment Data | Federal Communications Commission (fcc.gov) shows that in urban areas, only 12.68% of the population has three or more providers offering 100/10 Mbps—which currently is the entry level of broadband cable BIAS providers offer. Indeed, just over a majority (53.18%) of Americans have two (or more) choices. (This information, of course, reflects the overstated level of choice that the Commission's current data gathering process has permitted, and the Commission during the last administration stopped heeding its own prior advice that its data should not be used for assessing where there actually is competitive choice given the significant limitations of its data.) Competitors, especially a third fixed terrestrial BIAS competitor, make all the difference—they bring faster speeds, lower pricing, and much better customer service to the communities they serve.

these buildings similarly have limited choices—typically, at best, a duopoly—when it comes to selecting a communications provider.[12] Given the lack of competition, U.S. consumers end up paying a higher average monthly cost for broadband than consumers in Europe, Asia, and other countries in North America.[13] With rental activity getting back to pre-pandemic levels and rental prices increasing rapidly across the country,[14] tenants that have come to rely on their locked-in broadband service, particularly during the pandemic, will continue to feel an economic pinch, even though faster and more affordable options are available.

Despite the demand in MTEs for better, faster, and more affordable broadband service, competitive providers are routinely turned away or denied access to buildings by landlords or owners.[15] Often, a building owner will require a competitive provider to confer a "door fee" or engage in a "pay to play" revenue sharing arrangement in order to gain access. Indeed, a landlord's incentive to provide tenants with quality communications services—from competitive

[12] *See* Reply Comments of RealtyCom Partners, GN Docket No. 17-142 (filed September 27, 2019), at 4 (indicating that only ten percent of its 2300 apartment communities are served by three or more providers).

[13] *See* Becky Chao & Claire Park, *The Cost of Connectivity 2020*, NEW AMERICA OPEN TECHNOLOGY INSTITUTE, Global Findings (2020), https://www.newamerica.org/oti/reports/cost-connectivity-2020/ (finding that Americans pay an average monthly price of $68.38 for internet service, data overage penalties, equipment fees, installation fees, and activation fees).

[14] *See* Jennifer A. Kingson, *The days of cheaper rentals are over*, AXIOS (Oct. 6, 2021), https://www.axios.com/the-days-of-cheaper-rentals-are-over-e9eefe04-2711-4d8f-b4c5-189263a29f69.html?utm_source=newsletter&utm_medium=email&utm_campaign=newsletter_axioswhatsnext&stream=science (reporting that rents are up 9.6% nationwide in 2021 and that rent increases of 20-80% are common).

[15] *See* Comments of Starry, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019) at 5 ("Starry Comments"); Reply Comments of T-Mobile USA, Inc., GN Docket No. 17-142 (filed Sep. 30, 2019) at 2; Comments of the City and County of San Francisco on the Notice of Proposed Rulemaking, GN Docket No. 17-142 (filed Aug. 30, 2019) at 1; Comments of Uniti Fiber, GN Docket No. 17-142 (filed Aug. 30, 2019) at 3 ("Uniti Comments").

fiber to wireless last mile services—can be contrary to their tenants' best interests if they become beholden to revenue sources based on commercial arrangements with large incumbent providers, such as graduated revenue sharing agreements. The ongoing shortage of housing in urban environments and the high cost of moving leads to residents that are deprived of choice and that pay more for inferior services they do not want. Commercial tenants, who often require multiple providers to address areas of need like redundancy, are also similarly denied competitive alternatives, including fiber-based Gigabit service, in retail settings across the country.[16]

As the Commission considers how to increase competition for broadband services in residential and commercial properties, installations that are critical to the deployment of new fixed broadband options, like fiber, must be considered. Companies are deploying fiber to the premise networks, fiber to the fixed wireless network, and fiber to the satellite network. The need for fiber deployment to support the operations of *every* broadband network serving the U.S. is not surprising. Every aspect of the economy is becoming more reliant on fast, interconnected networks for their operations—from manufacturing to education—that has become even more evident during the COVID-19 pandemic. Specifically, the pandemic has shown us the importance of broadband connectivity, and that the U.S. is in danger of falling behind other nations that, upon recognizing the need for faster broadband connectivity, have set fiber and/or gigabit goals.[17]

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[16] *See* Uniti Comments at 3 (discussing the disadvantage enterprise customers are likely to experience from exclusive agreements between building owners/managers preferred providers); *see also* Letter of Craig J. Brown, Assistant General Counsel, CenturyLink, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 & MB Docket No. 17-91 (filed Oct. 30, 2019) at 4 ("CenturyLink Letter").

[17] *See* INCOMPAS/Broadland Report—*The Race to Faster Broadband Speeds: A Look at the Internet Speed Goals of Other Nations*, July 26, 2021, *available at* https://www.incompas.org//Files/filings/2021/FINAL%201%20Gigabit%20and%20Fiber%20Goals%20in%20Other%20Nations%204%20(2).pdf.

It is also important to remember that Commission policies during the last administration that removed the availability of wholesale access via regulated rates in order to promote more facilities-based competition means that competitors must deploy their own networks.[18] In order to achieve the Commission's goals in its *Unbundling and Resale Order* and its *2017 BDS Order* to obtain more facilities-based competitive options, it is important that deployment policies at every level of government, such as mandatory access regulations, promote and enable competitive deployment, not deter it. As such, continued efforts to open markets for both wired and wireless deployments is important to enable faster and more cost-effective broadband networks to be built. 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. Improving access to MTEs will ensure that competitors' builds to these unserved and underserved areas will be facilities-based.[19]

Furthermore, the ongoing COVID pandemic has shown us not only the importance of broadband connectivity, but that there are significant gaps in broadband network access that need to be addressed. To meet this shortfall and to bridge the Digital Divide, Congress has provided for broadband network funding in the CARES Act and the American Rescue Plan and is considering additional infrastructure funding that would encourage more fiber deployment and the expansion of new wireless technologies, including fixed wireless services and 5G. Barriers

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[18] *See Modernizing Unbundling and Resale Requirements in an Era of Next-Generation Networks and Services*, WC Docket No. 19-308, Report and Order, FCC 20-152 (rel. Oct. 28, 2020) ("*Unbundling and Resale Order* ") (discontinuing certain unbundling and resale rules in order to promote facilities-based competition).

[19] *See* Letter from Neil Ovenden, et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 (filed July 17, 2020) (supporting Commission efforts to ensure greater facilities-based, broadband competition in MTEs).

to broadband and fiber deployment in MTEs, like "door fees," "pay to play" schemes, and exclusive commercial arrangements, will have the pernicious effect of diverting federal infrastructure spending from its intended purpose—to deploy broadband networks. INCOMPAS submits that this is contrary to Congress' intent, which is to maximize and expedite broadband infrastructure deployment.

III. THE COMMISSION MUST PROHIBIT EXCLUSIVE COMMERCIAL ARRANGEMENTS THAT ADVERSELY AFFECT COMPETITION IN MTEs AND INHIBIT CUSTOMER CHOICE

The Commission seeks comment 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 within MTEs. Specifically, the Commission asks about revenue sharing agreements, exclusive wiring and marketing arrangements, and other contractual provisions and practices that affect competition or limit tenant choice.[20] INCOMPAS members continue to be impacted by each of the arrangements described in the *Public Notice* and the association urges the Commission to prohibit communications service providers from entering into any of arrangements with the owner of an MTE if its intention is to limit competition.

INCOMPAS has previously described how each of these practices has been used by incumbent providers and MTE owners to deter competitors from offering competitive broadband service to tenants, even in situation where the tenant contacts the competitive provider to initiate service.[21] Following a general overview of each disputed commercial arrangement, INCOMPAS includes below edited responses to the Commission's questions in the *Public Notice* from a survey conducted of our members.

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[20] *Public Notice* at 1.

[21] *See* INCOMPAS NPRM Comments at 9-18.

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.[22] Members indicate that this particular commercial arrangement is the most common demand from MTE owners, particularly those with a preferred or incumbent provider. This kind of "pay to play" arrangement could also be considered a kickback of revenues that a provider pays a property owner for each resident who subscribes to that provider's service. A graduated revenue sharing agreement is typically determined by a formula[23] and provided to the owner on a monthly or quarterly basis.[24] Competitive providers or new entrants are typically expected to match or exceed the benefits being obtained from an incumbent; however, many competitive providers are unable to provide this kind of ongoing payment to MTE owners and are therefore not allowed to offer services to the MTE's residents.[25] Revenue sharing agreements add no

[22] Further reference 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 a cost-based arrangement associated with the providers' use of the property. Agreements that compensate MTE owners based on costs may not have the same anticompetitive impact of graduated revenue sharing arrangements. For example, some competitors have agreed to compensate an MTE owner through a one-time fee for new subscribers that covers the reasonable costs associated with provisioning service to a new subscriber. While those arrangements are not exclusive, they add to the cost of deployment making it important that those fees be cost-based.

[23] Providers offer owners a variable percentage of revenue based on penetration rates as well as revenue per unit (which varies depending on the type of service to which a resident subscribes). *See* INCOMPAS NPRM Comments at 10.

[24] *See* Dean Compoginis, *Smart Apartments: What Investments Are the Right Ones to Make?*, IOT FOR ALL (Sep. 30, 2021), https://www.iotforall.com/getting-smart-about-smart-apartments-which-tech-investments-are-the-right-ones-to-make (suggesting that revenue sharing agreements with a managed service provider can "generate an additional $20-$30 per month per apartment for just internet services alone").

[25] 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

value for consumers, they stifle competition, and they incentivize owners to encourage only one provider.

With respect to the Commission's specific inquiries in the *Public Notice*, our members offer the following:

Should the FCC require the disclosure or restrict the use of RSAs for broadband service?

Requiring disclosure would provide much needed transparency to both residents and providers. Restricting the use of pay to play fee schemes would also promote competition, support consumer choice, and encourage property owners to engage in good faith negotiations to allow competitive access on a reasonable basis. Increasingly in commercial settings, MTE owners are only permitting one provider, with which the owner has a revenue sharing agreement, to offer broadband service. This agreement serves as a *de facto* exclusive access arrangement as competitive providers are effectively blocked from servicing their own multi-location customers within these buildings, because the exclusive provider will limit the products it offers for resale and/or make them cost prohibitive.

Should the FCC restrict above-cost revenue sharing agreements and if so, how should the FCC define costs?

It is unreasonable and potentially discriminatory for broadband service providers to be asked to enter into above-cost arrangements. The FCC should restrict "above-cost revenue sharing agreements" and define that term as "any ongoing payment arrangement that exceeds an owners reasonable installation costs." This includes, but is not limited to, revenue sharing arrangement that include percentage of service costs, pay per subscriber arrangements, or time based payouts.

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demonstrated how in a tier structure a property owner's revenue share could drastically increase when a single provider offers service in an MTE. 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. *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); *see also* Starry Comments at 7-9 (urging the Commission to prohibit tiered revenue sharing agreements).

Should the FCC restrict graduated revenue sharing agreements? To what extent do such agreements lead building owners to favor one provider over others and to exclude competitors?

Graduated revenue sharing agreements incentivize building owners to favor one provider over competitors. When providers offer building owners revenue on a per subscriber basis, it stifles competition because the building owner, with a new passive income stream from the provider, then becomes an agent on their behalf. As a result, that building owner, will prohibit other providers from gaining access to the property or use their means to prevent tenants from subscribing to a provider that is offering superior service.

Should the FCC restrict RSAs containing exclusivity provisions that may prevent building owners from offering equal terms to other providers? Do such provisions negatively affect competition and deployment in MTEs?

Exclusivity provisions eliminate consumer choice while simultaneously benefiting the property owner and their preferred provider and should therefore be restricted. It is not practical for a competitive provider to engage with a building owner that requires revenue sharing agreements because take rates will erode and the cost of deployment is impacted by the terms of the agreement. Furthermore, these exclusivity provisions favor incumbents that can outspend smaller providers. This negatively affects competition because exclusivity prevents providers' access even in the case where a tenant requests a particular provider.

Have there been changes over the last two years as to how frequently these agreements are used in MTEs?

Not only are these agreements still commonly used in MTEs, but INCOMPAS members have seen their use increase. This is particularly true for providers that have expanded their service area. Additionally, as the use of third-party aggregators has increased over the last two years, the utilization of these types of agreements has also exploded. Third-party aggregators have demanded higher door fees from competitors to allow access to customers.[26] Finally, in

[26] Third-party aggregators are entities used by MTE owners to encourage multiple service providers to bid for access to the building under a revenue sharing agreement. The service provider that offers the best terms in a revenue sharing agreement is selected and the aggregator takes a referral fee. Third party aggregators should be distinguished from a "neutral host operator" that works with a building owner to prepare MTE rooftops for 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, that works to accept the maximum number of providers, can ease 5G deployment and ensure that competitive providers have opportunities to succeed. *See* Comments of Crown Castle International Corp., GN Docket No. 17-142 (filed Aug. 30, 2019) at 3 (describing the function of the neutral host model as "bring[ing] multiple communications providers to the rooftop").

commercial MTEs, the largest mall landlords have created a "monopoly in the mall" by forcing the largest retailers in the country to do business with one service provider. Exclusive commercial MTEs handcuff tenants to a specific provider, and even large service providers are prevented from delivering service.[27]

How do these agreements affect the ability of tenants to choose their service provider? How do they affect the prices that tenants ultimately pay for service?

In most cases, all these agreements are used by the property owner as a way to limit choice as the property owner is being paid on the penetration rate of the property by the incumbent service provider. Tenants lose the ability to choose between service providers as ownership will not allow competition on the property. The tenants often cancel service or rescind an order from a competitive provider and are forced to order from a "preferred provider" for internet and pay the service cost even if that cost is higher than that of a denied provider. This impacts quality of service and affordability for tenants.

In commercial settings where there are revenue sharing agreements in place, tenants do not have a choice of broadband provider and the pricing is non-negotiable. Typically, there are no market constraints to pricing, and customers inevitably pay above-market rates for comparable products. The agreements prevent competitive providers from delivering service and force the tenants to buy service from one supplier. When limited products are made available for resale to competitive providers, competitive providers pay substantially more for broadband service than they would in competitive buildings with multiple broadband providers. Tenants are forced to use one service provider at higher Ethernet over fiber rates as opposed to lower-priced cable and ILEC business fiber service. The costs can be hundreds more a month per service by comparison.

What are the effects of these agreements on competition among service providers?

These agreements limit or prevent competition by creating an unfair advantage for incumbent providers. This first-comer advantage for incumbents eliminates a level playing field for providers and choice for consumers blocks competition. Tenants cannot take advantage of better service offerings or price points as the ownership will not allow other providers on the property. And in commercial properties, it prevents competitors from providing service in the largest retail spaces in the country.

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[27] *See* CenturyLink Letter at 4 (relaying the inability of CenturyLink to deliver service in shopping malls due to a "recent uptick . . . of MTE owners refusing to allow CenturyLink to fulfill requests for service in the MTE except through a wholesale arrangement with the property owner's preferred provider). CenturyLink's experience in commercial MTEs closely resembles that of several INCOMPAS members that serve national, multi-location retail stores in shopping malls across the country.

In what ways do revenue sharing agreements affect how service providers compete for customers?

Revenue sharing agreements create an immediate imbalance by employing the building owner on the side of the highest paying provider. This creates an unfair advantage and prevents open and fair competition (ultimately limiting the number of service providers allowed on property). Tenants' choice of service provider is influenced and limited. Furthermore, providers are paying twice to deploy their network, the first time when they deploy infrastructure or facilities to a location and again through an ongoing and endless revenue sharing agreement. Revenue sharing agreements favor providers with more revenue or incumbents that have locked up the majority of subscribers in a MTE. Also, now that third party aggregators are becoming more involved in the provision of service, the price of "pay to play" continues to rise for service providers, eliminating competition for customers and causing tenants to pay higher internet service bills. Finally, the Commission must take into consideration how this might impact commercial tenants if the largest property owners of commercial real estate use the same arrangements as retail MTE owners (including cutting exclusive agreements and forcing customers to use a single provider).

Do they encourage or discourage service providers to compete on the basis of price or service quality?

Revenue sharing agreements discourage competitive providers to even enter the building because of the cost pressure of honoring the agreement.

If RSAs function to prevent competing providers from deploying, does the MTE in effect become a locational monopoly?

Effectively, yes, as that outcome is the genesis of the pay to play scheme that comes to the forefront with any agreement. And in commercial settings, it is a locational monopoly with just one provider for all the business customers located in the retail buildings.[28]

How would any such restrictions impact tenants?

Restricting revenue sharing agreements would benefit tenants. Tenants would have access to more service options allowing them to choose a provider that is affordable and meets their service quality needs. Providers would have to make the business decision to build into a facility or not based solely on the success they believed they would have in gaining customers without regard for the RSAs.

[28] *See id*. at 4 (describing the situation in commercial MTEs as "*De Facto* Exclusive Access Arrangements" or essentially a locational monopoly).

How could the Commission best and most effectively monitor compliance?

The simplest way to monitor compliance would be to prohibit these types of agreements and fine providers that continue to enter into them. Should RSAs continue to be permitted, however, the FCC should require disclosure of any such existing agreements to the public and certainly to the tenants in the building prior to entering into a lease and during lease renewals. Broadband providers also should be required to disclose to the public those buildings where it has RSAs. Absent a prohibition, Commission could address carrier contract requirements (e.g., conditioning payment of the agreement on non-exclusivity provisions) or provide compulsory resale or discount obligations to competitive providers to allow for retail competition in the building.

b) Exclusive Wiring Arrangements ("EWAs")

Sections 76.802(j) and 51.319(b)(2) of the Commission's rules prohibit service providers from preventing or impeding competitive providers from gaining access to fallow or unused wiring at or near an MTE.[29] However, incumbent providers and MTE owners have manipulated the Commission's current allowance for exclusive wiring arrangements through 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, representing the most pernicious subset of exclusive wiring arrangements. Sale-and-leaseback agreements amount to an end run around the Commission's existing cable inside wiring rules, which were created to promote competition and consumer choice[30] and the Commission would be well served by prohibiting any wiring agreement that does not allow competitors to use copper-based wiring that is inherently interoperable among providers. Giving a building owner the option to sell or lease a service by using existing wiring is no different from

[29] 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).

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

other exclusivity arrangements as the MTE owner is able to resell the service at any price due to a lack of regulation.

It is important to note that the Commission's existing cable inside wiring rules do not apply and should not be applied to fiber.[31] Fiber installations are generally not compatible across companies and fiber providers are primarily interested in deploying their own proprietary facilities. Furthermore, competitive providers are using fiber installations to develop open access arrangements that make dedicated fiber available to other providers on a wholesale and non-discriminatory basis. Like the neutral host operators discussed above,[32] open access fiber networks maximize capacity and enable consumer choice. For example, an INCOMPAS member offers wholesale access in one of its open access networks to four retail ISPs over shared infrastructure on a college campus and plans to replicate that business model on other campuses.

With respect to the Commission's specific inquiries in the *Public Notice*, our members offer the following:

Should the FCC revisit its conclusion that exclusive wiring arrangements generally do not preclude access to new entrants, and thus do not violate its rules?

Exclusive wiring agreements prohibit competition and force customers to use a specific vendor for inside wiring, creating a monopoly in the building for those facilities. If the largest commercial real estate owners employed a similar tactic and used the same tactics and essentially forced all their tenants to use one supplier for wiring it would wipe out thousands of jobs and put a lot of structured cabling and sub-contractors out of business.

[31] Regardless of the type of wiring, however, demarcation boxes should not be physically blocked (they are often blocked with a lock box) such that competitors cannot access it to deploy their own wiring. For pathways that are owned by the building, conduit from the demarcation point to the unit should be made available for all providers to use.

[32] *See supra* note 26.

What are the practical effects of exclusive wiring arrangements in today's communications marketplace?

INCOMPAS members are being required by MTE owners that own the rights to the inside wiring to use specific wiring vendors. In this instances, the owner becomes a monopoly, and while exclusive wiring agreements are not as pervasive as revenue sharing agreements, they can still amount to de facto exclusive access agreements, particularly where buildings have only one set of wires.

Can exclusive wiring arrangements otherwise circumvent Commission rules?

Exclusive wiring agreements amount to an end run around the Commission's wiring rules. As the Commission notes in the *2019 MTE NPRM*, communications providers are given three options with respect to home run wiring: (1) offer to sell to the building owner any cable home wiring within the individual dwelling units that the incumbent provider owns, (2) abandon the cable home wiring, or (3) pull out the cable home wiring and restore the units.[33] Exclusive wiring arrangements are no more than an attempt to contravene these requirements.

What anticompetitive effects or adverse impacts on deployment, if any, do exclusive wiring arrangements have?

EWAs tend to benefit the initial provider and limits competition by preventing future provider's access to the inside wiring. With respect to standard cable wiring, most buildings have existing wiring that is compatible with multiple service providers. However, with an exclusive wiring arrangement, the wiring is not open to sharing as it is under the exclusive control of the service provider that installed it. The maintenance, repair, and upkeep all fall to that provider that owns the wiring and in some situations, this wiring is no longer accessible. If that wiring is needed to deliver service to units, the MTE owner is unlikely to provide access preventing the provider reaching the customer. Therefore, any agreement provided by a service provider is an effort to limit or discourage the deployment of any other provider into the property.

Do exclusive wiring arrangements affect tenants' choice in providers? Do they inhibit entry by competing service providers and do they encourage or discourage service providers to compete on the basis of price or service quality?

Yes, future providers will be unable to enter the building if existing wiring is needed to connect tenants. This will directly affect a tenant's choice in providers at the building.[34] Also, the service provider who obtains the exclusive wiring arrangements typically provides financial incentives

[33] *2019 MTE NPRM* at 5711, para. 5.

[34] *See* Comments of the Boston Housing Authority, GN Docket No. 17-142 (filed October 19, 2021) (asserting that EWAs "limit tenants' choices, frustrate competition, inhibit entry of new providers, and reduce the potential for improvements to service quality or speed").

to MTE owners to ensure they are the only provider on the property (i.e., a *de facto* exclusive access agreement).

Are there specific varieties of exclusive wiring arrangements, such as those containing provisions for exclusive use of MTE-owned wiring, that the Commission should study?

A MTE may contain multiple cable infrastructures (i.e. Cat3, Cat5, Fiber, Coax) with multiple providers vying to use the same infrastructure. Use of the shared provided infrastructure should be studied. Defining a required practice for operating in this environment is required to ensure competitive access for the tenants. The building owners simply do not want the administrative burden of managing the interaction between the providers and the facilities; instead, a way of "sharing" the infrastructure should be defined. In many cases, the first provider that enters the facility will install their own equipment and terminate the infrastructure into their gear. Gaining access to the infrastructure for additional provider use is typically difficult even under ideal circumstances and installing parallel infrastructure is wasteful and often an impossibility in finished space. The challenge is further exacerbated when you consider that some providers will install cabling at the time of build. The provider would obviously have exclusive use of this cabling, making it cost prohibitive for the building owner and/or competitive ISP to deliver services. One practical solution to this problem would be to require this cable to be donated to the building owner and require the building owner to offer this infrastructure to all other providers at fair and reasonable terms.

What are the benefits and drawbacks of shared access to wiring and other facilities, in contrast to exclusive wiring arrangements?

Shared access requires a clearly defined ruleset to ensure providers have fair and equitable access to the infrastructure. The building owner may or may not be a part of the process, and the solution would need to encompass both situations. Sharing infrastructure ensures the lowest cost delivery of competitive services. Exclusive wiring arrangements require duplicative efforts to install infrastructure, limited choice and higher costs.

Regardless, should the FCC adopt a new rule prohibiting such arrangements, or prohibit them in limited circumstances?

Exclusive wiring arrangements should be prohibited when they apply to the only available wiring in the building, when they cover the only available conduit, or when the building will not allow any additional wires. Furthermore, in circumstances where an owner will only permit one set of wiring on its premises, the effect is tantamount to an exclusive access agreement.

c) Exclusive Marketing Arrangements

Exclusive marketing arrangements ("EMAs"), which give a service provider the exclusive right to market and advertise its service offering in an MTE, particularly when used in conjunction with revenue sharing agreements and exclusive wiring arrangements, can amount to a *de facto* exclusive access agreement or raise such confusion that MTE owners or landlords often believe other providers are prohibited from offering service in the building. Exclusive marketing agreements prohibit other providers from advertising their service or encouraging tenant adoption which might ensure a competitive provider can make the business case to deploy to a particular building where residents have started to request service. EMAs can restrict competitors from wearing uniforms that bears a company insignia and have been used to denied access to offer an educational seminar on the use of free internet services for under connected residents.[35] Above all, exclusive marketing agreements can lead to confusion among property owners, building boards, and landlords over the existence of an otherwise prohibited exclusive access agreement with the incumbent provider.[36] For this reason alone, the Commission should prohibit EMAs.

With respect to the Commission's specific inquiries in the *Public Notice*, our members offer the following:

[35] INCOMPAS urges the Commission to consider issues of digital equity and underserved residents' access to and adoption of low-cost, high-speed broadband offerings when considering actions on exclusive marketing arrangements.

[36] *See* CenturyLink Letter at 3 (describing how "misinformed owners and tenants" will conflate exclusive marketing agreements with exclusive access agreements).

Are there specific circumstances in which exclusive marketing agreements result in *de facto* exclusive access?

Property owners often have exclusive marketing agreements that provide preferential treatment to incumbents while preventing competitors from advertising in MTEs. These arrangements give preferred providers a competitive advantage by granting them the ability to post ads, appear in newsletters and other tenant communications by the owner. This has the effect of limiting consumer awareness of other broadband services, and inhibits the tenant's understanding of his, her, or their service alternatives. Despite these agreements being limited to marketing, they often influence the property owner to also prevent access while denying the existence of an exclusive access agreement. Exclusive marketing practices amount to *de facto* exclusive access and reduce the odds of a competitive provider being able to achieve penetration rates in MTEs that bring an acceptable return on their investment.

To what extent is there confusion among tenants and/or building owners regarding the distinction between exclusive access agreements, which are not permitted by the Commission's rules, and EMAs, which are permitted? How prevalent is this confusion?

In our experience, most owners do not understand the distinction, nor do they know what is or is not permitted. In fact, many building owners have an assumption that their EMA also applies to access, and they keep competitive providers from offering service in the building.

What might be done to correct possible consumer confusion?

INCOMPAS suggests eliminating the use of exclusive marketing agreements by rule, holding providers accountable for what the rules are, or requiring transparency to residents of any arrangements made by building owners on their behalf.

Should the FCC require specific disclaimers or other disclosures by carriers and covered MVPDs making clear that there is no exclusive access agreement and that customers are free to obtain services from alternative providers? When, where, how, and in what circumstances should we require providers to make such disclosures?

If the Commission were to require disclaimers, INCOMPAS suggests that providers be required to: (1) send an annual notice to MTE owners stating explicitly that the arrangement with building does not constitute an exclusive access agreement and that the MTE is free to consider and invite competitive providers to offer service; and (2) provide disclaimers to residents indicating residents may select the broadband provider of their choice. Such notices should also be required prior to signing a lease or renewing a lease.

Are there benefits of EMAs, particularly with respect to small competitive carriers? Do the benefits of such arrangements outweigh the costs?

Most small carriers will not likely have the marketing dollars to promote services and therefore relies on the cooperation of the owners to assist with marketing. By nature EMAs are designed to limit competition, limit consumer access to other providers, and limit additional infrastructure investment into the property by another carrier.

Do disclosure requirements affect tenant choice in providers, or the ability of competitors to deploy and do they affect how service providers compete, such as in terms of price or service quality?

In most EMA environments, building owners use the existence of an EMA to prohibit other providers from installing or upgrading services to their property. A disclosure requirement would level the playing field.

What impact does this have on tenants? Have there been developments over the last few years that should impact the Commission's analysis on this issue?

Tenants are routinely told they have no choice of carriers due to other providers being in the building under an exclusive marketing agreement. These EMAs provide an incentive to the building owner which is typically the reason entry to the new carrier is denied. EMAs are regularly combined with other exclusivity agreements like revenue sharing agreements, exclusive wiring arrangements, and sale-and-leaseback arrangements or compensated service to the building in exchange for what amount to de facto exclusivity. Tenants will then choose to use the existing carrier with the agreement/arrangement rather than wait on the new carrier to gain entry. Each INCOMPAS member that responded to the survey shared multiple anecdotal accounts of residents ordering service from ISP X and that ISP technician being turned away by MTE management because they have an agreement with ISP provider Y. This limits tenant choice, cost savings to the tenant that may be realized by another provider promotion, and better quality of service that the tenant could have received but for the EMA.

d) Other Issues

Other Exclusivity Provisions. In the *Public Notice*, the Commission seeks comment on "whether there are other types of contractual provisions and non-contractual provisions that affect competition, limit tenant choice, or lead to increased prices or decreased service quality."[37] Several of our member that serve commercial properties have been asked to enter into "building

[37] *Public Notice* at 8.

access agreements," which require annual fees or broad termination rights. What makes these provisions anticompetitive is that commercial property owners have pushed for the ability to be able to terminate a competitive providers' access to the facility as a pre-condition for granting access to deploy infrastructure. Rather than accept these unreasonable conditions, which would put the provider under the constant threat of sudden termination at the convenience of the property owner, our members and other competitive providers refrain from offering service to the building. It is counterintuitive to spend significant amounts of capital to wire a building without greater assurances from the owner. This makes competing with incumbents, who have already recovered their deployment costs, difficult in these instances. INCOMPAS urges the Commission to prohibit unreasonable termination clauses. "Unreasonable" should be defined as "requiring immediate termination, or termination before competitive providers are allowed to recover their deployment costs." Additionally, INCOMPAS members have been subject to various practices and provisions in service agreements with building owners that impact their delivery of service, including denial of access to conduits, charging for easements on a property, and arbitrary deployment of internal infrastructure that makes it difficult for another provider to deliver service.

Shared Facilities: With respect to the benefits of shared access to facilities and whether sharing of facilities can increase competition, INCOMPAS generally concurs that the practice services to boost competition and tenant choice in MTEs.[38] If a MTE is in control of the shared facilities and each carrier is given a designated amount of space, then it can support competition and tenant choice. In members' experiences, sharing conduit between providers can be difficult

[38] *See* Section III.c) *supra* on Open Access Fiber Networks.

as space is very limited and conduits can only be filled up to about forty percent before they are considered full. Ownership of the conduit in this context is very important as well. If a carrier pays for the conduit or installs it, then it is owned by that carrier. If one carrier damages the conduit or another carrier's lines in the shared conduit, then a process needs to be determined for repair and reimbursement within that building. While service providers may have to support different technology types in order to provide services, the sharing of facilities would generally increase competition and consumer choice.

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.[39] Mandatory access laws are enabling competitive providers' entry into MTEs, and giving consumers access to more service offerings from the providers of their choice. The San Francisco Ordinance also known as Article 52 is a prime example of the kind of main mandatory access law that the Commission should support.[40] The mandatory access provisions of Article 52 of the San Francisco Police Code have fostered an environment that has allowed Sonic to access thousands of new buildings in the area.[41] This law has also helped define what an MTE is, what the installation process

[39] *2019 MTE NPRM* at paras. 40-41.

[40] *See generally* S.F., Cal., Police Code art. 52.

[41] *See* INCOMPAS NPRM Reply Comments, Attachment 1: Declaration of Dane Jasper, Sonic Telecom, LLC at 17 ("Sonic Declaration") (noting that as a result of the ordinance, the provider had gained access to over 1000 buildings in and around the San Francisco region by September 30, 2019). Since this reply, Sonic and other INCOMPAS members have continued to build their networks and gain access to MTEs in San Francisco, and we estimate at least several thousand have been brought online in the last two years.

should look like, and how to deal with barriers to entry. While this policy does not have effect outside of the city of San Francisco, it is a good example of baseline requirements for building owners to provide access to all qualified communications providers based on a tenant requesting a provider's service. As the FCC's Office of Economics and Analytics ("OEA") determined in 2019, "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."[42] OEA further surmised that mandatory access laws "are associated . . . with a modest increase in the supply of broadband in MTEs."[43] In fact, if MTE owners and landlords were required to permit competitive providers access to their premises for purposes of providing service and were required to provide dedicated space, it would significantly enhance competitive options for MTEs and their residential and commercial tenants. As these state and local policies become more prevalent nationwide, the Commission should continue to analyze their impact on increased broadband deployment.

V. THE COMMISSION HAS SUFFICIENT LEGAL AUTHORITY TO ADDRESS ANTICOMPETITIVE PRACTICES BY BROADBAND-ONLY PROVIDERS IN MTEs

Consumers and businesses should have the right to choose the communications provider, including broadband provider, of their preference without interference from their landlord. There are a number of reasons why the Commission should take action in this proceeding and promulgate a rule that ensures customers know they may exercise this right. First, competition

[42] 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").

[43] *Id*.

for broadband service—especially at higher speeds—is limited and is even worse in MTEs.[44] Second, the pernicious agreements have locked up access to buildings which is harming the business case for deploying competitive, higher speed broadband.[45] Third, when competitive broadband is deployed, customers get faster speeds, more affordable pricing and better customer service. Customers need all of these benefits.[46] And finally, competitive broadband can close the gap between our nation and those countries that are committing to fiber and/or gigabit goals.[47] In sum, the FCC should issue a rule that clarifies that broadband-only providers also are prohibited from engaging in these anticompetitive practices with landlords.

In this proceeding, the association has made the case that the Commission has the legal authority to prohibit actions by broadband providers that offer that service in addition to an MVPD or a telecom service, and we incorporate by reference our earlier legal analysis in our filings with respect to prohibiting those providers from entering into anticompetitive

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[44] *See supra* note. 11; *see also FACT SHEET: Executive Order on Promoting Competition in the American Economy*, THE WHITE HOUSE (July 9, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/ (last visited Oct. 20, 2021) (citing FCC data on Fixed Broadband Deployment that "[m]ore than 200 million U.S. residents live in an area with only one or two reliable high-speed internet providers, leading to prices as much as five times higher in these markets than in markets with more options").

[45] *See* Letter of Stephen Bradley, Director of Consumer Sales & Marketing, Sonic Communications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 (Nov. 23, 2020) at 4 ("Sonic Letter") (asserting that building owners demand for "unreasonably high fee sharing agreements" adds costs to fiber broadband projects that makes them "untenable economically").

[46] *See* Sherman, *supra* note 10.

[47] *See* INCOMPAS/Broadland Report—*The Race to Faster Broadband Speeds: A Look at the Internet Speed Goals of Other Nations*, July 26, 2021, *available at* https://www.incompas.org//Files/filings/2021/FINAL%201%20Gigabit%20and%20Fiber%20Goals%20in%20Other%20Nations%204%20(2).pdf.

arrangements with landlords.[48] Specifically, the Commission has both direct and ancillary authority under sections 201(b) and 628 of the Act to prohibit the execution and enforcement of anticompetitive contractual arrangements for the provision of communications services, including common carrier and MVPD service. In addition, the FCC also can prohibit broadband-only providers via its ancillary authority from entering into these agreements with building owners and managers, and it also can use its ancillary authority to issue a rule that permits a customer to exercise their right to choose.

As Public Knowledge and New America's Open Technology Institute discussed in an earlier filing in this proceeding, ancillary authority allows the FCC to regulate services where there is otherwise no direct authority, if it can demonstrate that its actions are "reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities,"[49] and if necessary to "perform any and all acts, make such rules and regulations, and issue such orders … as may be necessary in the execution of its functions."[50] The Commission could find, for instance, that it is not able to effectively carry out its duty to promote video competition and prevent discrimination in telecommunications services unless it promulgated rules that apply to all communications infrastructure in buildings, regardless of its regulatory classification.

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[48] *See* INCOMPAS NPRM Comments at 23-28 (indicating that the Commission has sufficient direct and ancillary authority to prohibit the execution and enforcement of anticompetitive contractual arrangements for the provision of communications services and agreeing with the NPRM's conclusion the agency has authority over infrastructure that can be used for the provision of both telecommunications and BIAS on a commingled basis).

[49] Comments of Public Knowledge and New America's Open Technology Institute, GN Docket No. 17-142, et al., (filed Aug. 30, 2019) at 6-7 (quoting American Library Ass'n v. Federal Commns. Comm'n, 406 F.3d 689, 692 (D.C. Cir. 2005).

[50] 47 U.S.C. § 154(i).

Indeed, the Commission's recent *2021 OTARD Order* extended the protections afforded to over-the-air reception devices to certain categories of "hub and relay" antennas used for the distribution of broadband-only service to multiple customer locations.[51] In doing so, the FCC was enabling fixed wireless broadband-only service providers to compete with other service providers that offer broadband service vis a vis their earlier deployments for their cable/MVPD or telecom service. The FCC stated that this "rule change should allow fixed wireless service providers to bring faster Internet speeds, lower latency, and advanced applications—like the Internet of Things, telehealth, and remote learning—to all areas of the country."[52] Given that customers are now accessing video and telecom services via their broadband connections, the Commission must ensure that customers have competitive options for broadband so that they can access the online video content and telecom service of their choice.

Moreover, Commission action would level the competitive playing field of all broadband providers—whether or not they offer commingled MVPD or telecom service—that already face a prohibition on exclusive access. The extension of the agency's wireless antennae protections in the *2021 OTARD Order* confirms the Commission can act to ensure that broadband-only providers have the opportunity to compete in MTEs which is a win for customers who want to choose that broadband service.[53] However, without also confirming in the instant proceeding that all broadband-only providers are prohibited from exclusive access agreements, the Commission cannot guarantee a level competitive playing field for all such providers.

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[51] *Updating the Commission's Rules for Over-the-Air Reception Devices*, WT Docket No. 19-71, Report and Order, FCC 21-10 (rel. Jan. 7, 2021) at para. 1 ("*2021 OTARD Order*").

[52] *Id*.

[53] *See id*. at n. 110 (explaining that the Commission's decision "will also provide a level-playing field for broadband-only fixed wireless providers").

Accordingly, it should extend its finding in the *2021 OTARD Order* and issue a rule that restricts all broadband providers from engaging in exclusive arrangements with MTE owners/managers.

Furthermore, the FCC's authority over fixed wireless antennae and ensuring customers have the right to choose their broadband provider should be used to promulgate a rule that every customer has the right to choose their broadband provider no matter the technology used to reach the customer without landlord interference. As the Commission's record already demonstrates, landlords can still restrict customer choice and limit their options[54]—which is contrary to the OTARD rule and governing statute which is intended to promote a level competitive playing field. For example, once San Francisco issued a new ordinance that ensures customers can exercise their right to choose a broadband provider, INCOMPAS' members have been able to access thousands of more buildings, allowing for higher speed competitive broadband to reach more customers.[55]

Similarly, the FCC should issue a rule that encapsulates a customer's right to choose, and in doing so, it is appropriate for the FCC to use its ancillary authority based on the OTARD rules and its most recent *Order*. The OTARD rules prohibit landlords from restricting their tenants from using antenna to access broadband service via fixed wireless antenna located on their leased

[54] *See* Comments of Competitive Carriers Association, GN Docket No. 17-142 (filed Aug. 30, 2019), at 3; Comments of T-Mobile USA, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019) at 14 ("The Commission should apply this prohibition [in current regulations] against exclusivity agreements to all providers under its jurisdiction and to all agreements that restrict others' access, whether explicitly or implicitly though the inclusion of onerous terms and conditions or unreasonable fees." (citing to 47 C.F.R. §§ 76.200 and 64.2500)).

[55] *See* INCOMPAS NPRM Reply Comments, Attachment 1: Declaration of Dane Jasper, Sonic Telecom, LLC at 17 ("Sonic Declaration") (noting that as a result of the ordinance, the provider had gained access to over 1000 buildings in and around the San Francisco region by September 30, 2019). Since this reply, Sonic and other INCOMPAS members have continued to build their networks and gain access to MTEs in San Francisco, and we estimate at least several thousand have been brought online in the last two years.

property, including those that offer broadband-only service.[56] The OTARD rules recognize the right of consumers to choose the provider of their own preference—not just those that their landlord may prefer.[57] The FCC should exercise its ancillary authority to also prohibit landlords from restricting tenants from exercising their choice of broadband providers who use other types of technology to provide broadband service. Doing so will ensure that consumers have choice between broadband-only providers, and it will level the competitive playing field among all providers offering broadband.

Moreover, landlords have already opened their buildings for communications service from at least one provider; a requirement that they do so for all where their tenant wants a competitive service will ensure that their tenants obtain the competitive benefits intended by the OTARD rule and other provisions of the Act. Indeed, as INCOMPAS' members attest, the failure of landlords to allow a tenant to choose an alternative provider is impacting the availability of higher-speed, competitive networks to reach customers, which is contrary to the Commission's competition mission as set forth in the '96 Act.[58]

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[56] 47 C.F.R. § 1.4000(a)(3).

[57] *See 2021 OTARD Order* at para. 12 ("In taking this action, the Commission embraces its longstanding policy objective of promoting competition among broadband and video providers and giving consumers, including those in rural and remote areas, more choices among wireless providers, products, and services.")

[58] *See* Sonic Letter at 3 (describing the hurdles erected by building owners that prevent fiber providers from service MTE tenants); Letter of Virginia Lam Abrams, SVP of Government Affairs & Strategic Advancement, Starry, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 (filed Oct, 30, 2020) at 4 ("Starry Letter") ("[M]any times, Starry's and other providers' ability to offer a broadband alternative is impeded by outdated regulations and systemic obstacles that curb competitive offerings. Specifically, deployments in MTEs are particularly difficult when exclusivity arrangements are in effect . . . These agreements are designed by incumbents simply to create economic and contractual barriers to entry."); Uniti Comments at 7.

Taking immediate action to prohibit contractual provisions and arrangements that inhibit competitive entry in MTEs is also consistent with the agency statutory mission and recent Congressional directives. The Commission's statutory mission is to "make available, so far as possible, to all of the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," and "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[59] Additionally, the RAY BAUM'S Act requires the Commission, in the Communications Marketplace Report, to assess the state of competition in the communications marketplace, assess the state of deployment of communications capabilities, and to assess whether laws, regulations, regulatory practices or demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services.[60] The Act also requires the Commission to describe how it will address "the challenges and opportunities in the communications marketplace that were identified through the assessments."[61] Prohibiting exclusivity agreements in MTEs would address one such challenge.

[59] 47 U.S.C. §§ 151, 1302(a).

[60] 47 U.S.C. § 163(b)(1)-(3).

[61] 47 U.S.C. § 163(b)(4)-(5).

It is evident that the MTE marketplace is broken and too many customers are stuck with a monopoly provider.[62] The FCC can use its direct and ancillary authority over providers as we argued earlier in the proceeding and it can go directly at the heart of the issue by adopting a pro-customer rule that encapsulates their right to choose no matter the technology used. INCOMPAS supports an all of the above approach.

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 anticompetitive commercial arrangements between communications service providers and MTE owners, including graduated revenue sharing agreements, exclusive wiring and marketing arrangements, and other provisions like building access 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 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 to prohibit the commercial arrangements that are excluding competitors from accessing MTEs.

[62] *See* Starry Letter at 3 (sharing a survey of consumers living in MTEs across several major cities and reporting that "57% of individuals disliked the fact that, prior to Starry, their building previously had only one provider option for internet access").

Respectfully submitted,

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