

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

In the Matter of)	
)	
Improving Competitive Broadband Access to)	GN Docket No. 17-142
Multiple Tenant Environments)	
)	

REPLY COMMENTS OF INCOMPAS

INCOMPAS hereby submits these reply 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

Despite the efforts of the Commission to “increase competition among service providers and reduce potential barriers to broadband deployment in MTEs,”² the comments in response to the Commission’s *Public Notice* in this proceeding reveal that the competitive provision of broadband and other mass-market and business services remains frustrated by the widespread use of exclusive commercial arrangements, like graduated revenue sharing, exclusive wiring arrangements, and exclusive marketing agreements. In most cases, these arrangements act as *de facto* exclusive access agreements that preserve an incumbent provider’s ability to offer services

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*”).

² *Public Notice* at 1.

within a building without facing competition—granting them an effective monopoly—and shutting out the benefits of faster speeds and more affordable service.³ As a result, under the current regulatory framework, competitive providers continue to struggle to gain a foothold in residential and commercial MTEs, even when contacted by tenants who are seeking an alternative service to that offered by the incumbent and building owner.

INCOMPAS appreciates the opportunity to supplement the record in this proceeding with additional information and perspectives about how these arrangements dampen competition and deployment at a time when the nation is poised to take aggressive steps to bridge the Digital Divide and reach unserved and underserved communities with critical new infrastructure funding.⁴ In addition, we highlight the considerable evidence submitted into the record by other fiber providers, fixed wireless providers, public interest organizations, municipal governments

³ See Comments of INCOMPAS, GN Docket No. 17-142 (filed Oct. 20, 2021), at 3, 20 (“INCOMPAS Comments”); Comments of Consolidated Communications and Zply Fiber, GN Docket No. 17-142 (filed Oct. 20, 2021), at 6 (“Consolidated Communications Comments”); Comments of Public Knowledge, Consumer Reports, GN Docket No. 17-142 (filed Oct. 20, 2021), at 5 (“Public Knowledge Comments”); Comments of Next Century Cities, GN Docket No. 17-142 (filed Oct. 20, 2021), at 4 (“NCC Comments”); Comments of the Wireless Internet Service Providers Association, GN Docket No. 17-142 (filed Oct. 20, 2021), at 14, 20 (“WISPA Comments”); Comments of EducationSuperHighway, GN Docket No. 17-142 (filed Nov. 15, 2021), at 5 (“EducationSuperHighway Comments”).

⁴ See News Release, Nat’l Telecomm. and Info. Admin., Statement of Acting Assistant Secretary Remaley on the Infrastructure Investment and Jobs Act (Nov. 15, 2021), *available at* <https://www.ntia.doc.gov/press-release/2021/statement-acting-assistant-secretary-remaley-infrastructure-investment-and-jobs> (describing NTIA’s efforts to administer the \$42.5 billion Broadband Equity, Access, and Deployment Program “which will fund the infrastructure buildouts needed to connect every American to reliable, high-speed affordable broadband” as well as other NTIA programs on digital inclusion and equity and Tribal connectivity); *see also Wireline Competition Bureau Seeks Comment on the Implementation of the Affordable Connectivity Program*, WC Docket No. 21-450, Public Notice, DA 21-1453 (rel. Nov. 18, 2021) (asking for public comment on the requirements for the Affordable Connectivity Program which “modifies and extends the Emergency Broadband Benefit Program to a longer-term broadband affordability program”).

and education advocates that are similarly calling on the Commission to take action to increase competitive access to MTEs. The record clearly demonstrates that the current state of competition is harmful to consumers and that prohibiting exclusive access, graduated revenue sharing, and other exclusive commercial arrangements would substantively improve competition and provide benefits for consumers in the form of faster and more affordable broadband service.

II. THE COMMISSION SHOULD EXTEND PROHIBITIONS ON ALL EXCLUSIVE COMMERCIAL ARRANGEMENTS THAT INHIBIT PROVIDERS' ACCESS TO MTEs

The record in this proceeding clearly indicates that the best way to facilitate enhanced deployment and to address the “persistent barriers to competition”⁵ in residential and commercial MTEs is to take decisive action that would prohibit telecommunications providers from entering into exclusive or above-cost commercial arrangements with building owners that foreclose competitive broadband providers from gaining access to these buildings.⁶ To do otherwise, or to simply extend the exclusive access prohibition to all providers of broadband services without addressing these other exclusive commercial arrangements, would preserve the troublesome status quo that has installed building owners and incumbent providers as monopoly gatekeepers to competition in the MTE broadband market.

While competitive and alternative providers are seeking improved access to provide broadband and other telecommunications services in MTEs, incumbents have used this

⁵ Comments of Starry, Inc., GN Docket No. 17-142 (filed Oct. 20, 2021), at 1, 3-4 (“Starry Comments”) (indicating that the fixed broadband market faces challenges “particularly . . . in the last 100 feet of deployment” due to the use of “anti-competitive tactics to prohibit competitive entry in MTEs”).

⁶ See Comments of Lumen, GN Docket No. 17-142 (filed Oct. 20, 2021), at 5 (agreeing that providers should be prohibited “from entering agreements that require revenue sharing or other above-cost fees as a condition of access to” MTEs).

opportunity to refresh the record to ask the Commission to extend the previously-adopted exclusive access prohibition to all broadband providers.⁷ INCOMPAS supports this request and agrees that the Commission’s previous determination that exclusive access clauses “discourage the deployment of broadband facilities to American consumers” should be applied in this instance regardless of the classification of the provider.⁸ Given the current regulatory disparity between broadband providers and MVPDs and telecommunications carriers, the Commission is well within its authority (which extends to infrastructure that can be used for the provision of both telecommunications and broadband internet access service (“BIAS”) on a commingled basis) to prohibit exclusive access agreements for the provision of BIAS or business-related broadband services.⁹ INCOMPAS concurs that such an action would “promote competition, deployment, and consumer choice” which should be the Commission’s objective as it examines each of the arrangements at issue in this proceeding.¹⁰

However, the record also reflects that anticompetitive commercial arrangements, such as graduated revenue sharing agreements, exclusive wiring arrangements, and exclusive marketing agreements, among others, similarly discourage the deployment of broadband facilities leaving

⁷ See Further Comments of NCTA—The Internet and Television Association, GN Docket No. 17-142 (filed Oct. 20, 2021) at 3 (“NCTA Comments”) (arguing that prohibiting all exclusive access agreements for the provision of broadband service “would promote competition”).

⁸ *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, para. 16 (2007).

⁹ See Comments of INCOMPAS, GN Docket No. 17-142, MB Docket No. 17-91 (filed Aug. 30, 2019), at 25 (“INCOMPAS NPRM Comments”) (supporting the Commission’s conclusion that it has authority to address anticompetitive practices by communications providers in MTEs pursuant to Titles II and VI).

¹⁰ NCTA Comments at 3.

consumers in MTEs with limited broadband options. Competitive and alternative providers,¹¹ their trade associations,¹² wireless carriers,¹³ fiber providers,¹⁴ public interest groups,¹⁵ and municipal governments¹⁶ in this most recent round of filings have added new evidence to how exclusive commercial arrangements such as those mentioned above are being used by building

¹¹ See, e.g., Starry Comments at 4-9; Consolidated Communications Comments at 8-14 (asserting that exclusive marketing agreements and revenue sharing “significantly restrict competition in MTEs” and “harm consumers”).

¹² See WISPA Comments at 14-25 (contending that exclusive agreements “still exist and continue to be executed and enforced in anticompetitive ways, limiting consumer choice for providers *and* services, as well as increasing consumer costs”); see also Comments of the Competitive Carriers Association, GN Docket No. 17-142 (filed Oct. 20, 2021), at 2.

¹³ See Comments of T-Mobile USA, Inc., GN Docket No. 17-142 (filed Oct. 20, 2021), at 6-11 (asserting that exclusive agreements inhibit fair access to MTEs for distributed antenna systems and small cells).

¹⁴ See Fiber Broadband Association, GN Docket No. 17-142 (filed Oct. 20, 2021), at 3-7 (“FBA Comments”).

¹⁵ See Public Knowledge Comments at 2-10 (contending that incumbent providers use loopholes in the Commission’s rules to employ anticompetitive practices that create effective monopolies); Comments of AARP, GN Docket No. 17-142 (filed Oct. 20, 2021), at 8 (noting that the agreements at issue in the Public Notice amount to exclusionary behavior that should be banned); Reply Comments of New America’s Open Technology Institute, GN Docket No. 17-142 (filed Nov. 4, 2021), at 5 (indicating that the Commission should require more transparency and public disclosure of restrictive MTE practices).

¹⁶ See Comments of the City of Boston, Massachusetts, GN Docket No. 17-142 (filed Oct. 20, 2021), at 4-7 (citing the negative impact exclusive arrangements have on consumer choice); Comments of the City of Longmont, Colorado, GN Docket No. 17-142 (filed Oct. 20, 2021), at 2 (“City of Longmont Comments”) (urging the Commission to “prohibit *all* arrangements between MTE owners and ISPs that have the practical effects of an exclusivity agreement, including exclusive marketing agreements, revenue-sharing agreements, and sale-and-leaseback arrangements”). Cf. Comments of the National League of Cities, GN Docket No. 17-142 (filed Oct. 20, 2021), at 3-4 (arguing on behalf of the nation’s cities, towns and villages that the Commission “do what it can within its legal authority to limit the chilling effect on broadband competition and choice that exclusive wiring agreements, exploitative revenue sharing agreements, and exclusive marketing agreements may have”).

owners and incumbent providers to inhibit competitors' access to MTEs. INCOMPAS urges the Commission to improve competitors' access to MTEs by prohibiting providers from entering into graduated revenue sharing agreements (or compensation agreements that exceed a building owner's deployment-related costs) as well as exclusive commercial arrangements that adversely affect competition and limit consumer choice.

In our comments, INCOMPAS members indicated that each of these commercial arrangements are being used in both residential and commercial settings to exclude competition and lock up potential customers in MTEs.¹⁷ That experience is mirrored by the Wireless Internet Service Providers Association ("WISPA") which indicates that "incumbent providers are working hard to preserve the status quo in MTEs and retain broadband subscribers by preventing direct competition by using" revenue sharing, exclusive wiring arrangements, and exclusive marketing agreements.¹⁸ Next Century Cities ("NCC"), which works with municipal governments to support the deployment of broadband and expand access to the service, also noted that exclusive arrangements are being used for anticompetitive purposes declaring that "even though cities are interested in increasing broadband competition, exclusive agreements prevent new entrants from accessing portions of the city's MTEs."¹⁹ Furthermore, NCC asserts that providers "are advertising higher speeds as a way to entice MTE owners into exclusive agreements" and then locking MTE owners and residents into broadband service for which it has

¹⁷ See INCOMPAS NPRM Comments, Section III (a)-(e) at 9-20, INCOMPAS Comments, Section III (a)-(d) at 10-24 (describing how these agreements discourage competitive broadband deployment in MTEs).

¹⁸ WISPA Comments at 9.

¹⁹ NCC Comments at 4.

“little to no incentive to compete on either price or service quality.”²⁰ These commercial arrangements amount to an end run around the Commission’s exclusive access prohibition and the Commission must consider changes to its rules to give new entrants and alternative providers the opportunity to compete for residential and commercial customers who are desperate for faster and more affordable broadband services.

In commercial MTEs, building owners have significant bargaining power and are often using that power to create local monopolies that force the largest retailers in the country to do business with one service provider, even though many of these companies seek service diversification and network redundancy for transactions and operations.²¹ Furthermore, some commercial MTEs have exclusive wiring installation agreements that require competitive providers to use specific wiring vendors.²² In these instances, the owner, who owns the rights to the wiring, 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.

²⁰ NCC Comments at 6.

²¹ The Real Estate Association’s complete mischaracterization of the commercial real estate market belies the experiences of our members. Despite many retail tenants having national agreements with specific broadband providers, including our members, shopping center owners are still interfering with those relationships and making it incredibly difficult and sometimes impossible, for competitive providers to serve customers. As INCOMPAS and others in the record have explained, even where competitive providers that are permitted to serve their customers, they are typically required to buy wholesale service from a pre-approved provider at exorbitant prices. *See* Further Joint Comments of the National Multifamily Housing Council, *et al.*, GN Docket No. 17-142 (filed Oct. 20, 2021), at 18-19 (“Real Estate Associations Comments”) (claiming that shopping owners “would gain nothing if they attempted to interfere with those relationships”). *Cf.* INCOMPAS Comments at 13-14.

²² *See* INCOMPAS Comments at 18.

Given these concerns and the variety of anticompetitive behavior discussed extensively in the record, the Commission cannot simply extend the prohibition on exclusive access to broadband providers in this proceeding and call it a success. Instead, it must closely examine the record evidence and prohibit exclusive and other commercial arrangements that are preventing competition and limiting consumers' choice of broadband provider.

III. RESTRICTING ANTICOMPETITIVE COMMERCIAL ARRANGEMENTS IN MTEs WILL STIMULATE THE BROADBAND MARKET AND GIVE COMPETITIVE PROVIDERS MORE OPPORTUNITY TO BRIDGE THE DIGITAL DIVIDE

In this proceeding, INCOMPAS has reported how our members are actively engaged in outreach to develop constructive partnerships with MTE owners and to build the case that expanding broadband networks is a win-win for consumers, property owners and providers alike as making gigabit-level and beyond Internet available will make these buildings more attractive to renters seeking reasonably priced, high-speed broadband.²³ Providers then leverage this foothold in an MTE to make the business case for deploying competitive, higher speed broadband networks further into a community, including anchor institutions and underserved areas. Having the chance to serve new customers, including tenants in MTEs that desire a competitive provider's faster and more affordable service, as the opportunity presents itself is fundamental to the ability of these providers to deploy more facilities-based networks. That said, competitive providers find it exceedingly difficult to compete and to establish a market share to justify additional construction in situations where building owners require compensation agreements or have other anticompetitive contractual provisions in place with an incumbent. As Starry describes in its comments:

²³ See INCOMPAS NPRM Comments at 7.

If a company can finance the construction of a network, build a brand focused on providing quality service to customers, and develop relationships with building owners to bring new competitive service to their properties, then that new entrant should not be inhibited by anti-competitive contract provisions that exist solely as barriers to entry in certain buildings.²⁴

When a provider cannot compete based on its reputation, competitive pricing, and quality of service because access to a building is foreclosed by a pre-existing commercial arrangement between an owner and incumbent provider, it makes it less likely that competitive providers will enter a market or expand their networks.²⁵ On the other hand, competitive providers that gain access to MTEs have the potential to “stimulate the broadband market and encourage innovation for more affordable next-generation services.”²⁶ Indeed, incumbents respond to this competition by improving their service which allows all consumers to benefit—even those who do not switch to the competitive service.

In addition, competitive providers assist the Commission in its efforts to bridge the digital divide. Competitive providers enter the market to fill a need in unserved and underserved communities for faster and more affordable telecommunications services. The provision of competitive and innovative broadband services in unserved and underserved areas is critical to creating more digital equity and connectivity, and INCOMPAS members are engaged across the country in meeting the needs of communities without reliable or affordable broadband service. INCOMPAS members regularly serve public housing where they can gain access to the building,

²⁴ Starry Comments at 10.

²⁵ See Reply Comments of INCOMPAS, GN Docket No. 17-142 (filed Sep. 30, 2019), at Attachment 1: Declaration of Dane Jasper, Sonic Telecom, LLC, 16-17 (asserting that exclusive arrangements “make it less likely that new entrants will be allowed to compete” and “contribute to confusion over communication service providers’ ability to access MTEs”).

²⁶ Starry Comments at 9.

have made free service²⁷ and digital literacy training available in low-income housing,²⁸ and almost three-quarters of our members who offer residential service are participating in the Emergency Broadband Benefit (“EBB”) Program to assist those financially impacted by the COVID-19 pandemic.²⁹

Claims that competitive providers are ignoring communities with limited service options and are instead “grabbing the low-hanging fruit in more profitable communities” are simply specious attempts to divert the Commission’s attention from the behavior of building owners and incumbents that engage in discriminatory behavior.³⁰ The record makes clear that the reason public housing and MTEs with low-income residents suffer from a lack of competition and service offerings is, in part, provider discouragement over anticompetitive practices and exclusive arrangements, such as exclusive marketing and wiring agreements.³¹ According to

²⁷ *See, e.g.*, Letter of Stephen Bradley, Director of Consumer Sales & Marketing, Sonic Communications, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 (filed Nov. 22, 2020), at 3 (“Sonic Letter”) (reporting on the additional MTEs designated as low-income housing that Sonic has been able to serve by expanding its footprint in San Francisco and Oakland); Notice of Ex Parte from Virginia Lam Abrams, SVP, Gov. Affairs & Strategic Advancement, Starry, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, MB Docket No. 17-91 (filed Oct. 30, 2020), at 2 (describing Starry’s commitment to providing free Starry Connect service to residents of public housing in the City of Los Angeles)

²⁸ *See* Reply Comments of INCOMPAS, GN Docket 17-42 (filed Aug. 22, 2017), at 12.

²⁹ Those members who have opted not to participate are typically very small companies who do not have the personnel to oversee the implementation of the program.

³⁰ Real Estate Associations Comments at 8.

³¹ *See* EducationSuperHighway Comments at 7 (insisting that “lack of awareness” caused by agreements that limit marketing activity in MTEs “stands out as one of the biggest barriers to Americans making the most of opportunities to receive better, lower-cost Internet”). *See also* Comments of the Boston Housing Authority, GN Docket No. 17-142 (filed Oct. 19, 2021), at 2 (indicating that the need for “costly and redundant wiring” due to exclusive wiring arrangements and exclusive agreements precluding building owners from “seeking out discounted residential services” discourage competitive providers from serving BHA tenants).

EducationSuperHighway, exclusive marketing agreements “can hamper or prohibit resident access to free or subsidized broadband.”³² Removing these “potential roadblocks” can “significantly reduc[e] the number of unconnected households in this country.”³³

WISPA, whose fixed wireless members have similarly been subject to discriminatory treatment, suggests leveling the playing field to access MTEs in order to increase competition from alternative providers and serve low-income residential MTEs.³⁴ “Competitive providers want to offer their service to lower-income households,” Public Knowledge declares noting that the prevalence of exclusive agreements is one of the primary factors leading to the digital divide.³⁵ INCOMPAS agrees as our members indicate that their ability to serve MTEs in low-income communities is impaired more by door fees and exclusive arrangements between building owners and incumbents than an interest in providing service to underserved communities.³⁶

Without addressing exclusive and other anticompetitive contractual arrangements, the EBB Program and Affordable Connectivity Program (“ACP”), which will extend and expand the

³² EducationSuperHighway Comments at 5.

³³ *Id.* at 2.

³⁴ *See* WISPA Comments at 13 (insisting that opening MTEs to increased competition “benefits the consumers that live there as well as the entire community”).

³⁵ Public Knowledge Comments at 13.

³⁶ *See* Sonic Letter at 4. Sonic notes that advocates for MTE owners “recognize that the cost of extending infrastructure and delivering service is a barrier to entry for broadband providers” but disregard their contributions to the problem by “demanding unreasonably high fee sharing agreements. . . . Adding a monthly fee for the building owner makes the project uneconomic.”

EBB Program for millions of eligible consumers in MTEs, will not be as effective.³⁷ Eligible subscribers living in MTEs with exclusive agreements with providers that are not voluntarily participating in the EBB and ACP will be unable to avail themselves of this benefit,³⁸ and the lack of competition in MTEs means consumers will continue to face higher prices for their broadband service and their EBB and ACP benefits will not stretch as far. As noted by the City of Longmont, the presence of exclusive contractual arrangements limits consumers' options for broadband and effectively "negates the intent" of the affordability program.³⁹ With over seven million subscribers currently enjoying this benefit,⁴⁰ the Commission must act to preserve and further enable this program and its successor to be more effective.

Indeed, an INCOMPAS staff member, who resides in an MTE that is not subject to incumbent arrangements, reported just this week that she has received notice that one of INCOMPAS' members has been able to enter the apartment building and offer BIAS service at one-third of the cost of the incumbent. Similar competition is needed in every MTE to help drive broadband costs down for consumers across the nation—in urban, suburban, and rural markets—including those who are in the EBB and ACP.

³⁷ See NCC Comments at 9 ("Since providers voluntarily participate in the [EBB] program, the existence of exclusive wiring and revenue sharing agreements may inhibit some residents from enrolling with the participating provider of their choice simply because the MTE owner's agreement prevents them from doing so.")

³⁸ See City of Longmont Comments at 5

³⁹ *Id.*

⁴⁰ *Additional EBB Program Data*, UNIVERSAL SERV. ADMIN. CO., <https://www.usac.org/about/emergency-broadband-benefit-program/emergency-broadband-benefit-program-enrollments-and-claims-tracker/additional-ebb-program-data/> (last visited Nov. 19, 2021) (reporting that the total number of subscribers to the Emergency Broadband Benefit Program is currently 7,120,912).

IV. CONCLUSION

INCOMPAS is pleased that the Commission is exploring how to accelerate broadband deployment, including by improving the market for competition in MTEs. The Commission should act to prohibit the use of anti-competitive commercial arrangements between MTE owners and incumbents, including graduated revenue sharing agreements, and exclusive wiring and marketing agreements, where these practices inhibit competition and limit consumer choice.

Respectfully submitted,

/s/ Christopher L. Shipley

Angie Kronenberg
Christopher L. Shipley
INCOMPAS
1100 G Street NW
Suite 800
Washington, DC 20005
(202) 296-6650

November 19, 2021