

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

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

**COMMENTS OF THE FIBER BROADBAND ASSOCIATION ON
THE NOTICE OF INQUIRY**

The Fiber Broadband Association (“Fiber Broadband” or “Association”) hereby submits these reply comments in response to the Federal Communications Commission’s (the “Commission’s”) Notice of Inquiry in the above-captioned proceeding seeking comment on “ways to facilitate greater consumer choice and enhance broadband deployment in multiple tenant environments (“MTEs”).”¹ In its initial comments, Fiber Broadband explained that, to facilitate the deployment of fiber and other advanced infrastructure to customers in MTEs, the Commission (1) should not interfere with State and local mandatory access laws that promote competition in broadband deployment in MTEs; (2) should continue to allow broadband providers to enter into marketing and bulk-billing arrangements with MTE owners; and (3) should act expeditiously to prohibit exclusive leaseback arrangements within MTEs except where providers can show they are not anti-competitive. In its reply comments, the Association responds to comments addressing the subjects above as well as comments addressing revenue sharing.

¹ See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Inquiry, FCC 17-78 (rel. June 23, 2017) (“NOI”).

I. STATE AND LOCAL MANDATORY ACCESS LAWS ADDRESS LOCAL DEPLOYMENT ISSUES AND ENHANCE COMPETITION

In response to the NOI, many commenters demonstrated that State and local mandatory access laws do not interfere with broadband investment and deployment, but rather can be an effective mechanism of promoting competition in cable and telecommunications services in MTEs.² As the City and County of San Francisco observed, “the Commission has recognized that mandatory access statutes complement the Commission’s policy to ensure that occupants of MTEs can choose among the various providers serving their community.”³ While some commenters urge the Commission to either refrain from endorsing or affirmatively preempt State and local mandatory access requirements for MTEs, arguing that such laws and regulations hinder the deployment of broadband, these commenters present no evidence to support a shift in Commission policy on this point.⁴ Contrary to the assertion that “[a] patchwork of state or local government inside wiring rules can only hinder broadband deployment,”⁵ mandatory access laws in fact have had the opposite effect by addressing localized deployment issues.⁶ Thus, the

² See Comments of the Fiber Broadband Association on the Notice of Inquiry, GN Docket No. 17-142, at 5 (filed July 24, 2017) (“Fiber Broadband Comments”); Comments of the Institute for Local Self-Reliance and Next Century Cities, GN Docket No. 17-142, at 3-5 (filed July 24, 2017) (“ILSR Comments”); Comments of INCOMPAS, GN Docket No. 17-142, at 20-23 (filed July 24, 2017) (“INCOMPAS Comments”); Comments of the City and County of San Francisco, GN Docket No. 17-142, at 6-8 (filed July 24, 2017) (“San Francisco Comments”).

³ San Francisco Comments at 8; *see also* Fiber Broadband Comments at 7-9.

⁴ See Comments of Camden Property Trust, GN Docket No. 17-142, at 10-13 (filed July 24, 2017) (“Camden Property Trust Comments”); Comments of NCTA – The Internet and Television Association, GN Docket No. 17-142, at 10-11 (filed July 24, 2017) (“NCTA Comments”).

⁵ Camden Property Trust Comments at 11.

⁶ See ILSR Comments at 5 (noting that “[w]hile federal and state laws have the potential to help cities and counties, local communities are best at determining their needs.”). *See also* INCOMPAS Comments at 21-22 (noting that as a result of San Francisco’s Article

Commission should maintain its longstanding policy of acknowledging the jurisdiction of State and local governments to adopt mandatory access laws where State and local lawmakers perceive the need.

II. EXCLUSIVE MARKETING AND BULK BILLING ARRANGEMENTS MAKE INFRASTRUCTURE BUILDS POSSIBLE AND TEND TO IMPROVE SERVICE QUALITY WITHOUT STIFLING COMPETITIVE ENTRY

Numerous comments in response to the NOI, like Fiber Broadband, support the Commission’s permission of exclusive marketing and bulk billing arrangements between service providers and MTE owners. They demonstrate that such arrangements have been effective tools for offsetting the substantial upfront expenditures needed to build infrastructure for fiber and other advanced, high-performance communications networks.⁷ In addition to facilitating deployment, bulk billing arrangements also may allow for other ancillary benefits to MTE customers, such as free community Wi-Fi, capped price increases, and guarantees for superior

52, competitive provider Sonic Telecom “has been significantly more successful in gaining access to MDUs in San Francisco”).

⁷ See Camden Trust Comments at 3 (noting that bulk billing arrangements allow residents of Camden Trust properties to obtain service “at rates that, on average, are 46% below the service providers’ standard retail rates in the communities in which its residential properties are located”); Comments of RealtyCom Partners, GN Docket No. 17-142, at 2 (filed July 24, 2017) (“RealtyCom Partners Comments”) (observing that in addition to resident cost savings, bulk billing arrangements also enable MTE owners to “persuade Carriers to offer more and better services to small properties and affordable housing projects than they would otherwise be able to justify”); Comments of the National Multifamily Housing Council, GN Docket No. 17-142, at 4-8 (filed July 24, 2017) (“NMHC Comments”); NCTA Comments at 5-7; Comments of Apartment and Investment Management Company et al., GN Docket No. 17-142, at 1-2 (filed July 24, 2017) (“Apartment Industry Comments”); Comments of Summit Broadband, GN Docket No. 17-142, at 1 (filed July 24, 2017) (“Summit Broadband Comments”).

customer service.⁸ At the same time, such arrangements generally do not preclude competitive entry in MTEs.⁹

Some commenters claim that bulk billing and exclusive marketing arrangements harm competition.¹⁰ However, these commenters offer little to no support for these assertions that would justify the Commission’s reconsideration of its earlier finding. Indeed, the most prevalent “harm” that these commenters proffer in support of their positions, particularly with regard to exclusive marketing arrangements, is that they inhibit competition in practice because MTE owners misinterpret the otherwise acceptable terms of the agreement.¹¹ Assuming *arguendo* the validity of such a concern, it could be addressed by adopting the proposal in the NOI to “require specific disclaimers or other disclosures by providers with an exclusive marketing agreement in

⁸ See Comments of Hotwire Communications, LLC, GN Docket No. 17-142, at 5-6 (July 24, 2017) (“Hotwire Comments”).

⁹ See Comments of Summit Broadband at 1; RealtyCom Partners Comments at 3 (“The allegation that exclusive marketing arrangements hinder competition in MTEs cannot be reconciled with the dual observations that (a) such arrangements are fairly common, and (b) one or more additional providers typically serve an MTE even if another provider has the exclusive right to conduct on-site marketing activities.”).

¹⁰ See Comments of Horry Telecom Cooperative, Inc., GN Docket No. 17-142, at 2-5 (filed July 24, 2017) (“Horry Telecom Cooperative Comments”); INCOMPAS Comments at 16-17 (INCOMPAS opposes exclusive marketing arrangements, but supports continued use of bulk billing arrangements); Comments of Public Knowledge, GN Docket No. 17-142, at 3-4 (filed July 24, 2017) (“Public Knowledge Comments”); San Francisco Comments at 9-10; Comments of Starry, Inc., GN Docket No. 17-142, at 5-6 (filed July 24, 2017) (“Starry Comments”).

¹¹ See *id.* at 5 (claiming that “[w]hile marketing exclusivity agreements do not explicitly bar other broadband providers from providing service within a building, the overly restrictive language and threatening tone leaves building owners and managers with the impression that they will face litigation for simply allowing their residents a choice in internet providers.”); INCOMPAS Comments at 16 (“while marketing exclusivity has a lesser impact on competition than wiring exclusivity, the existence of these agreements limits the manner in which information is distributed to tenants and has the potential to create confusion by the landlord about what is and what is not allowed.”).

an MTE to make clear that there is no exclusive service agreement.”¹² Additionally, as the Association proposed in its initial comments, the Commission should clarify that such arrangements may not prohibit MTE owners from providing information about other service providers upon request of a tenant or responding to inquiries by tenants or would-be tenants as to other providers in the MTE. Placing this permission explicitly in an exclusive marketing agreement should be either encouraged or required to further reduce the potential for MTE owner misinterpretation and administration of the contract with anticompetitive practical effect. The claim that exclusive marketing agreements prohibit new service providers from entering an MTE or conducting any marketing is similarly unavailing because “while exclusive marketing agreements may allow preferential advertising, such as the placement of brochures in welcome packs for new residents, competing providers may advertise via numerous other methods, including mail, the Internet, television, radio, billboards, etc.”¹³ Therefore, in light of the continued benefits that consumers, service providers, and MTE owners reap from bulk billing and exclusive marketing agreements, the Commission should not amend its policy that allows service providers and MTE owners to enter into such arrangements.¹⁴

¹² NOI, para. 13.

¹³ NMHC Comments at 8.

¹⁴ At most, the Commission should examine the potential anti-competitive effects of bulk billing and exclusive marketing arrangements on a case-by-case basis. As Fiber Broadband noted in its initial comments, Commission involvement with exclusive marketing and bulk billing arrangements is less imperative because such arrangements are subject to scrutiny under State laws that govern the rights of residents of homeowners’ and condominium associations and other MTEs to obtain services of their choice from providers of their choice. These State regulatory schemes provide protection to the association for service contracts entered into with developers before turnover of control of the association to the unit owners.

III. COST-BASED AND NON-DISCRIMINATORY REVENUE SHARING SHOULD BE PERMITTED

Commenters noted, and Fiber Broadband agrees, that MTE owners may incur substantial costs when a service provider deploys facilities and offers service.¹⁵ Cost-based arrangements to share in a provider's revenues from tenant accounts can provide additional incentives for landlords to allow competitive providers to extend their networks to the property. Such arrangements defray costs incurred by the MTE owner (*e.g.*, costs incurred to manage and administer access) in connection with allowing the provider access to and use of the property.¹⁶ Consequently, the Association does not oppose arrangements whereby providers pay MTE owners to reimburse the owner for expenses incurred as a result of conferring the provider with access to the MTE. However, such fees should reflect the reasonable costs incurred by the MTE owner in connection with the provider's access to and use of the MTE¹⁷ and be non-

¹⁵ See NMHC Comments at 10 (“Revenue sharing agreements represent a small percentage of the costs of the installation and maintenance of the wiring and equipment needed to provide state-of-art communications services. The service provider may provide compensation to the MTE owner to offset the overall communications infrastructure construction costs associated with serving a property.”); RealtyCom Partners Comments at 5 (“Carriers may offer consideration to partially offset the variety of costs associated with facilitating the Carrier's service to the property.”).

¹⁶ See, *e.g.*, RealtyCom Partners Comments at 5-6 (explaining generally the sources of costs to MTE owners when providing access to service providers).

¹⁷ For example, such arrangements should not allow for reimbursement of costs such as “expenses for low-voltage expertise and legal representation.” RealtyCom Partners Comments at 5. Such limitations would be consistent with Commission precedent in other contexts. See *Classic Telephone, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 13082, 13103 (1996) (in discussing the compensation provisions of Section 253(c) of the Communications Act, the Commission explained that state and local authorities were permitted to recover from telecommunications carriers utilizing public rights-of-way, those “increased street repair and paving costs that result from repeated excavation.”).

discriminatory.¹⁸ This will prevent the MTE owner either from extracting excessive rents or undermining access by providers that tenants may wish to use for service.

IV. EXCLUSIVE WIRING ARRANGEMENTS CONTRAVENE THE COMMISSION'S OBJECTIVE OF PROMOTING DEPLOYMENT AND COMPETITION FOR BROADBAND

In its comments, Fiber Broadband stated that providers should be able to control use of inside wiring that they install and that they continue to own under the Commission's inside wiring framework. Comments in support of exclusive wiring arrangements tout the supposed benefits of such arrangements, including creating incentives for investment and clarifying maintenance obligations for inside wiring.¹⁹ However, INCOMPAS correctly notes in its comments that this is a "false nexus" and perpetual "[e]xclusive wiring agreements foreclose competition without any benefit to consumers."²⁰ While control is essential if a provider is going to receive a sufficient return on its investment to enter the MTE and deploy its facilities, once a provider cedes ownership, it is appropriate to assess the conditions under which competitive providers should gain access. A particularly troubling situation, in terms of the development of competition, is where a service provider transfers ownership of its wiring to the MTE owner and then obtains exclusive and perpetual lease-rights. As Fiber Broadband noted in its comments, such exclusive "leaseback" arrangements amount to an end run around the Commission's rules designed to facilitate competitive access to provider-owned wiring in the event of termination of

¹⁸ As such, a fee based, for instance, solely on the service provider's revenue generated from the MTE tenants' subscription fees should be deemed impermissible.

¹⁹ *See, e.g.*, RealtyCom Partners Comments at 1-2; Camden Property Trust Comments at 7-8; NCTA Comments at 3-5.

²⁰ INCOMPAS Comments at 15.

the incumbent provider's service.²¹ The Commission should therefore review such arrangements closely, and should permit them, if challenged, only where the provider can demonstrate that they are not anti-competitive.

CONCLUSION

Fiber Broadband respectfully submits that the Commission should (1) not interfere with State and local mandatory access laws that promote competition in broadband deployment in MTEs; (2) continue to allow broadband providers to enter into marketing and bulk-billing arrangements with MTE owners that are beneficial to MTE tenants, subject to the conditions discussed herein; (3) prohibit non-cost-based fee requirements and discriminatory revenue sharing arrangements between MTE owners and service providers; and (4) prohibit exclusive leaseback arrangements within MTEs except where providers can show they are not anti-

²¹ *Id.* See also Public Knowledge Comments at 4 (“Exclusive wiring arrangements are a particularly pernicious attempt to subvert the FCC’s efforts to promote BIAS competition.”). NMHC posits that “[i]nside wiring owned by MTE owners is not subject to Commission jurisdiction ... [and] [l]imitations on the terms of [exclusive wiring] agreements for the use of space in a building would be a regulation of the MTE owner’s business.” NMHC Comments at 10-11. This statement underscores the reality that service providers and MTE owners are subverting the Commission’s prohibition against exclusive service arrangements by putting formal title to inside wiring in the hands of the property owner, while giving the service provider perpetual control or exclusive rights to it.

competitive. To effect these changes, the Commission should proceed to a rulemaking expeditiously.

Respectfully Submitted,

FIBER BROADBAND ASSOCIATION

A handwritten signature in cursive script, appearing to read "Heather Burnett Gold".

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