

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
Improving Competitive Broadband Access)	GN Docket No. 17-142
to Multiple Tenant Environments)	
)	MB Docket No. 17-91
To: Office of the Secretary)	
)	

COMMENTS OF MULTI-FAMILY BROADBAND COUNCIL

I. EXECUTIVE SUMMARY

The MultiFamily Broadband Counsel (“MBC”) is a trade association composed of independent, competitive broadband service providers and their vendors serving the multifamily industry throughout the United States. MBC members deploy a broad spectrum of technology platforms, including wireless, cable modem, DSL, active Ethernet and fiber-to-the-home, to deliver cutting-edge digital communications services to residents of multifamily communities from coast to coast. MBC also represents vendors that support service providers including manufacturers, content providers, distributors, network engineers, equipment suppliers and consultants.

Rather than state its position on most of the issues raised in the *MTE Access NPRM*,¹ in these Comments MBC will reiterate an important point previously made to the Commission in other related proceedings – namely, that small, independent, competitive broadband service providers,

¹ *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Proposed Rulemaking and Declaratory Ruling (“*MTE Access NPRM*”), GN Docket 17-142, MB Docket No. 17-91 (2019).

which constitute the bulk of MBC's membership, are the only real competition to large and entrenched franchised cable operators and telecommunications carriers which have in the past and continue in the present to dominate the market for broadband services in multitenant environments ("MTEs") in the United States. In the absence of such smaller independent operators, the market domination of incumbents would be all but absolute. Therefore, whatever particular regulatory changes the Commission may ultimately implement as a result of the *MTE Access NPRM*, it is crucial that – at the very least – those changes not harm, and at best enhance the ability of MBC members to gain access to MTE properties and the approximately one-third of Americans who reside in MTEs. MBC hopes that these Comments will provide the Commission with a better understanding of the inherent disadvantages under which MBC members must compete with large, well-entrenched incumbents, and that with that understanding the Commission will be best positioned to address the particular issues raised in the *MTE Access NPRM* in ways that benefit small independent broadband providers by leveling the playing field. Only in this way can the Commission hope to achieve its stated goal of advancing broadband competition in multitenant environments.

II. INTRODUCTION

The MTE NPRM seeks comments on several issues affecting competitive access to MTEs, including:

1. Revenue Sharing. Whether the Commission should require the disclosure or restrict the use of revenue share agreements for broadband service.² The term "revenue share agreements" refers to an arrangement between the service provider and the MTE owner

² *MTE Access NPRM*, ¶¶ 16 – 20.

under which the owner receives compensation from the service provider in any of a variety of ways, including a pro rata share of revenue generated from subscribing MTE residents, door fees and provider contributions to building infrastructure.

2. Rooftop Antenna. Whether to prohibit or limit exclusive rooftop access agreements for covered telecommunications carriers and covered MVPDs.³
3. DAS Facilities Access. Whether to prohibit, limit or otherwise regulate agreements for the deployment of distributed antenna system (“DAS”) devices in MTEs.⁴
4. Exclusive Use of Inside Wiring. Whether to prohibit, limit or otherwise regulate so-called “sale and leaseback” arrangements under which a designated service provider sells its wiring to an MTE owner and then leases back the wiring on an exclusive basis; whether to prohibit, limit or otherwise regulate other contractual arrangements under which one service provider is given the exclusive right to use in-building wiring.⁵
5. Exclusive Marketing. Whether to prohibit, limit or otherwise restrict contractual arrangements under which one service provider is given the exclusive right to certain means of marketing its service at an MTE.⁶

³ *MTE Access NPRM*, ¶ 21.

⁴ *MTE Access NPRM*, ¶¶ 22 – 23.

⁵ *MTE Access NPRM*, ¶¶ 24 – 26.

⁶ *MTE Access NPRM*, ¶¶ 27 – 28.

III. COMMENTS

MBC applauds the Commission's past and continuing initiatives and efforts to enhance competitive access to MTEs. Among those past initiatives, the *MTE Access NPRM* mentions, among others, the 1997 *Inside Wiring Order*,⁷ the 2003 *Inside Wiring Order*,⁸ 2007 *Exclusive Service Contracts Order*⁹ and the 2010 *Exclusive Service Contracts Order*.¹⁰ In its present and prior incarnations (including the Independent Multi-Family Communications Council or IMCC and the Independent Telecommunications & Cable Association or ICTA), MBC has been an active participant in each of the above-mentioned proceedings, and those efforts have produced rules that have been extremely effective in enabling smaller, independent entrepreneurial companies to compete with large and well-funded incumbent franchised cable operators and telephone companies in MTE markets from coast to coast. As the collective voice of competitive broadband service providers serving MTE customers, MBC remains fully committed to the Commission's goals as stated in the *MTE Access NPRM* and related proceedings.

The Commission affirms that its goal in the *MTE Access NPRM* is the same goal it has sought to achieve in each of the several proceedings mentioned above – namely, to encourage facilities-based broadband deployment and competition in MTEs for the millions of Americans who live and work in multi-tenant environments of one sort or another. In order to achieve that goal, the Commission must recognize that smaller, independent service providers – epitomized by MBC's membership – *are* the competition, and in fact the *only* real competition that offers

⁷ *Telecommunications Services Inside Wiring et al.*, CS Docket No. 95-184, MM Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997).

⁸ *Telecommunications Services Inside Wiring et al.*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003).

⁹ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235 (2007).

¹⁰ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd 2460 (2010).

MTE residents a real and meaningful choice among broadband service providers. Therefore, when the Commission speaks of taking actions to “encourage competition” in MTEs, it is implicitly referring to actions that help rather than hinder the ability of small independent carriers – MBC members – to effectively gain access to customers residing in MTE buildings under real-world conditions.

These assertions may strike the reader as bold, but they are true and justified due the fact that large cable and telco incumbents do not generally compete against each other in most regions of the country. Rather, they tend to divide up the most lucrative geographical regions amongst themselves so that there is often only one cable operator and one telephone company offering services to MTE residents within each region. This is especially true in areas of the country where populations are not highly concentrated – rural and lower income areas in particular – where incumbent providers tend not to invest heavily in the deployment of broadband infrastructure. As a result, across the country generally and in under-served areas in particular, independent providers offer the *only* competitive alternative to large cable and telco incumbents for MTE residents.

A. How MBC Members Compete against Incumbents

Because they operate under certain constraints that do not apply to big cable and telecommunications carriers, MBC members are able to compete against incumbents *only* by distinguishing themselves in ways that really matter to MTE owners and residents. Such distinguishing features include the offering of benefits that are simply not available from cable and telco incumbents, and those benefits are expressed as legally enforceable commitments in access agreements negotiated between competitive providers and MTE owners. The requirement that, in order to compete, the small independent provider must meaningfully distinguish itself

from incumbents explains why the typical access agreement negotiated by an MBC member is much more rigorous, detailed and demanding than the typical cookie-cutter form agreement used by incumbents at most MTE properties. Moreover, unlike the form agreements used by incumbents, small independent providers are willing and committed to negotiating access agreements that are specifically tailored to the particular needs and desires of each MTE community, taking into account its unique architectural, demographic and technical characteristics.

For example, a typical negotiated access contract involving an innovative competitive broadband provider commits the provider not only to the delivery of high-quality advanced technology and service offerings tailored to meet the community's needs, but to detailed and enforceable service level agreements (SLAs) as well – SLAs that require strict adherence to tight time deadlines in responding to and curing service related problems, including limitations on customer hold-times, maintenance of detailed customer service records (available to the customer upon request), network neutrality commitments and guarantees that circuit saturation during peak usage hours will not exceed a specific benchmark. In addition, many MBC members offer their MTE customers direct access to top decision-makers within the company, so that if there is a service-related problem at an MTE property, the property owner or the individual resident-customer is often not just able but encouraged to contact a high-level company representative who is directly responsible for and dedicated to ensuring a quality customer experience at that specific MTE community. Such benefits are simply not available to customers of large, monolithic incumbents which almost *never* offer a meaningful SLA, and utilize a monolithic, top-down approach to customer service such that it is only with great difficulty that a property owner or resident may eventually reach a regional representative with decision-making

authority for timely resolution of service-related problems. These facts, among others, explain why large incumbent cable and telecommunications carriers are consistently among the lowest-rated corporations in America on consumer surveys year after year. From the consumer's point of view, large cable and telecom carriers are simply too big to care about individual MTE communities and customers.

B. Inherent Disadvantages under which MBC Members must Compete

In terms of network deployment and access to MTE properties, the primary and most obvious differences between an independent competitive provider and a huge cable or telecom incumbent have to do with costs and with access to capital. In terms of costs, large incumbents have access to lower priced labor as well as lower priced video content, equipment, bandwidth and wireless access points. Smaller independents often have no option other than to buy raw goods and bandwidth from the very same incumbent companies they compete against. In terms of access to capital, incumbents have much greater access to the funds needed to build out the network required to deliver services to MTE residents. Incumbents not only possess pre-existing multiple strategically-located headend facilities and existing fiber along public rights-of-way, but also and most importantly have ready access to unlimited cash reserves that can easily be drawn upon to extend their existing networks to MTE buildings within their respective service areas.

Lower costs and greater access to capital explain why large incumbents tend to view their MTE business from the same perspective from which they view their single-family homes business. However, as noted in the *MTE Access NPRM*, unlike service to single-family homes, “deployment to MTEs involves three, rather than two, interested parties – the broadband provider, the end-user tenant, *and* the premises owner or controlling party – all of whom must

take coordinated action for deployment to occur.”¹¹ The three-party structure of the typical MTE broadband service transaction implies that the service provider must gain access to the MTE owner’s private property in order to install infrastructure and equipment and deliver services to tenant-subscribers.

In order to gain access to customers in an MTE property, the typical MBC member must secure a loan or a line of credit from a bank or other lender in order to finance construction of a single distribution system at each specific multitenant property. The loan or line of credit will not be approved absent concrete evidence that the provider can successfully serve a sufficient number of resident-customers to generate a reliable revenue stream. Typically, such concrete evidence is provided in the form of a written agreement that grants to the provider legally enforceable access rights, such as the right to undisturbed use of in-building wiring owned by the MTE owner, or a bulk billing arrangement under which the property owner purchases the services by agreeing to pay to the service provider a monthly bulk service fee, so that the bulk services can be provided as an amenity for all residents at a steep discount relative to regular retail pricing. Third-party financing is a requirement of doing business because most MBC members lack sufficient resources to pay to an MTE owner a large “door fee,” revenue sharing, or other compensation used by cable and telecommunications incumbents to buy access to MTE customers.

The requirement to secure third-party financing for each property-specific network buildout accounts for the importance and value of the negotiated *property access deal* to MBC members. MBC has emphasized this point of late in its recently-filed Comments in the Commission’s

¹¹ *MTE Access NPRM*, ¶ 1.

Updating the Commission's Rule for Over-the-Air Reception Devices rulemaking proceeding.¹²

As stated in those Comments, MBC members view their relationship with MTE owners “not as irrelevant or adversarial but as a mutually beneficial partnership that encourages healthy competition among service providers. The negotiation of property access deals provides the foundation for the mutually productive partnership relationship between ... providers and [MTE] owners.”¹³

For this reason, inherent advantages possessed by large incumbents are *magnified* by policy initiatives that, if implemented, would marginalize or render irrelevant the negotiated access deal between service provider and MTE owner. As a consequence, and contrary to first impressions, such initiatives would effectively *diminish* rather than enhance MTE competition because while property access deals are viewed by incumbents as an unnecessary inconvenience, such access deals are the essential foundation upon which the smaller competitor's business model is built. To the extent that Federal or state regulatory rules diminish or eliminate the need for the service provider to negotiate an access deal with the MTE owner, the competitive pressure that MBC members are able to exert is diminished, leaving large incumbents free to divvy up MTE market into regional monopolies for themselves.

As described earlier in these Comments, without a property access deal (in the form of a written agreement granting enforceable rights), MBC members are unable to secure the financing they need in order to build out property-specific broadband networks. This requirement does not apply to large cable and telecommunications incumbents. Indeed, apart from the requirements of real property law, big incumbents don't need or want a property access deal with MTE owners,

¹² *Updating the Commission's Rule for Over-the-Air Reception Devices*, Comments of Multifamily Broadband Council, GN Docket No. 19-71, filed on June 3, 2019, pages 5 – 7.

¹³ *Id.*, p. 5.

because they already possess the in-house capital reserves required to build broadband signal distribution systems at MTE properties without third-party financing. This fact explains why it is that large, well-funded cable and telecom incumbents tend to support policy initiatives that would allow the service provider direct access to MTE residents, bypassing the MTE owner altogether. Such policy initiatives *seem* to promote competition, but appearances can be deceiving. In the real world, any policy change that effectively deletes the MTE owner from the service provider/MTE customer transaction, or effectively renders the negotiated access deal ineffective or irrelevant – any such change will at the end of the day undermine rather than promote broadband competition in MTE markets. That proposition states a verifiable fact because, as stated above and not only in this particular proceeding, *small independent providers, which comprise the bulk of MBC's membership, are the competition that the Commission seeks to promote and encourage by means of the MTE Access NPRM.*

Rather than take a position on each of the five questions raised in the *MTE Access MPRM*, MBC again emphasizes that the playing field upon which its members compete against large incumbents is already tilted in favor of incumbents for the reasons described above. MBC supports any policy initiative that tends to reduce rather than magnify the inherent disadvantages under which MBC members are forced to compete against large incumbents. Keeping these general points in mind, we will conclude these Comments with a few observations on one of the issues raised.

The *MTE Access NPRM* proposes to prohibit, limit or otherwise regulate so-called “sale and leaseback” and/or similar arrangements under which a designated service provider is given the exclusive right to use in-building wiring. However, to prohibit contractual clauses allowing the undisturbed use of inside wiring would be, in effect, to allow mandatory sharing of wiring that is

being used by a service provider. In the Declaratory Ruling portion of the *MTE Access NPRM* – which preempts those portions of San Francisco Ordinance Article 52 that mandate forced sharing of inside wiring that is in use – the Commission wrote: “Requiring the sharing of in-use facilities reduces investment, slows the deployment of new facilities in MTEs, poses significant technical issues, and undermines the quality of communications services. To the extent that Article 52 requires in-use wiring sharing, we find that it interferes with federal policy established by the Act, infringes on the Commission’s regulation of cable inside wiring, and intrudes on the Commission’s authority over cable signal quality and technical standards.”¹⁴ Therefore, the proposal outlined in paragraphs 24 through 26 of the *NPRM* is not consistent with the Commission’s own affirmative findings in the Declaratory Ruling portion of the same document.

In addition, as described earlier in these Comments, unlike large incumbents, independent competitive service providers usually require third-party financing in order to fund construction of a property-specific network at an MTE building. In order to secure such third-party funding, the service provider must demonstrate the ability to successfully serve a sufficient number of resident-customers to generate a reliable revenue stream, and such a demonstration usually entails proof that the provider has the unhampered right to use the wiring needed to deliver services to MTE customers. Prohibition of so-called “exclusive wiring use” clauses in access agreements would therefore place an additional burden on MBC members striving to compete against deep-pocketed incumbents.

The Commission’s approach to this and each of the other issues raised in the *MTE Access NPRM* must be to *reduce* rather than contribute to the challenges faced by competitive independent broadband providers, given the real-world conditions under which such small

¹⁴ *MTE Access NPRM*, ¶ 42.

providers must operate competitively. MBC urges the Commission to take into account these realities in the course of this proceeding, because without the viable participation of independent entrepreneurial providers in MTE markets, large cable and telecommunications incumbents face no competition at all.

Respectfully submitted,

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Dated: August 28, 2019