**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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

# COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

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August 30, 2019

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NCTA – The Internet & Television Association ("NCTA") submits these comments in response to the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned docket.[1]

## I. INTRODUCTION AND SUMMARY

NCTA appreciates the Commission's ongoing efforts to ensure that all Americans—including those who live in multiple tenant environments ("MTEs")—have access to high-speed broadband. Cable providers have invested more than $290 billion over the last 20 years to deploy broadband, helping Americans nationwide access high-speed Internet and the opportunities connectivity provides. Competition in the provision of broadband is robust,[2] and MTEs present vigorously competitive environments. The effective and flourishing marketplace for service to MTEs reflects this competition.

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[1] *See Improving Competitive Broadband Access to Multiple Tenant Environments; Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 19-65 (rel. July 12, 2019) (subparts referred to as "*NPRM*" and "*Declaratory Ruling*", respectively).

[2] Sixty-four percent of the population has access to broadband speeds of 25/3 Mbps from more than one fixed terrestrial provider, and 80% of the population has access to broadband speeds of 10/1 Mbps from more than one fixed terrestrial provider. *See Broadband Availability in Different Areas*, FCC, https://broadbandmap.fcc.gov/#/area-comparison (last accessed Aug. 30, 2019). The availability of competitive options is even more robust in the non-rural areas where most MTEs are located.

Broadband providers and MTE owners both have strong incentives to ensure the availability of high-quality service at a competitive price for MTE residents and tenants, while overcoming the investment risks and technical challenges unique to MTE environments. In this proceeding, the Commission should be careful not to disrupt the marketplace—and ultimately "risk[] undermining the case to invest in broadband and video deployment to MTEs"[3]—by adopting new and unnecessary regulations governing the agreements between providers and building owners.

In addition, the Commission should refrain from mandating sharing of wiring or other facilities used to provide broadband in MTEs. Such a mandate would be counter to the Commission's goals, leading to decreased deployment and more limited service options for consumers. To the extent the Commission does regulate the MTE marketplace, the Commission should ensure that the regulations it imposes are competitively neutral and do not unfairly disadvantage any provider based on the technology it uses to provide service. Accordingly, any Commission regulation of MTEs should apply equally to all providers, whether the provider delivers service on a wired or wireless basis to the MTE.

## II. THE MARKET FOR PROVIDING SERVICE IN MULTIPLE TENANT ENVIRONMENTS IS COMPETITIVE

As the Commission notes, a significant number of Americans live in MTEs, and substantially more work in them.[4] These Americans demand broadband in their homes and at work, and a vibrant, competitive market has developed among MTEs and service providers to meet those demands. Building owners compete with each other to retain and attract tenants, and as such, they have strong incentives to ensure that robust broadband service is available in their

[3] *See NPRM* ¶ 7.

[4] *See id.* ¶ 1.

MTEs. Likewise, service providers, including cable operators, telephone companies, DBS providers, and others, compete vigorously for the opportunity to serve MTEs and their residents and tenants. MTEs are particularly attractive to providers due to the high density of potential customers in individual MTEs and large number of MTEs in the marketplace, particularly in urban areas. Given these business opportunities, service providers have powerful incentives to offer broadband and other services to MTEs and their residents and tenants, and do so under the most attractive terms and conditions. Unsurprisingly, this marketplace is characterized by a diversity of providers and service offerings.[5] This gives building owners the opportunity to negotiate contractual arrangements with providers that will provide the greatest value for their residents and tenants.[6]

The marketplace has also responded to what the Commission has correctly described as the "unique challenges to broadband deployment" in MTEs.[7] Wiring an MTE, or upgrading existing wiring in an MTE, is far more costly and complicated than wiring more traditional residential settings. Moreover, providers face the added risk of the property owner electing to switch to a different provider (or providers) in the MTE. As detailed further below, providers and building owners have overcome these challenges with market-based arrangements, such as provisions for the exclusive use of MTE-owned wiring and exclusive marketing, that take into account the unique circumstances of each building and enable providers to recover their costs

[5] *See, e.g.,* Mike Farrell, *Dish Targets MDU Market With Video, WiFi Bundle*, Multichannel News (June 26, 2019), https://www.multichannel.com/news/dish-network-tackles-mdu-market-with-dish-fiber; Jon Brodkin, *Starry aims to bring its $50, 200Mbps broadband to 25 more US states,* ArsTechnica (June 19, 2019), https://arstechnica.com/information-technology/2019/06/starry-aims-to-bring-its-50-200mbps-broadband-to-25-more-us-states/ (stating that "Starry's early rollouts have focused on multi-unit buildings in big cities").

[6] In some states, this determination has been made at the state level via mandates that building owners provide access to cable operators and/or telecommunications carriers.

[7] *NPRM* ¶ 1.

and make a return on their substantial investments. Given these market-driven dynamics, the Commission should decline to adopt new regulations and continue to allow competitive market forces to dictate the arrangements that provide the greatest benefit to consumers and businesses.

## III. THE COMMISSION SHOULD NOT REGULATE EXCLUSIVE WIRING, EXCLUSIVE MARKETING, OR REVENUE SHARING AGREEMENTS BETWEEN A PROVIDER AND A BUILDING OWNER

### A. Exclusive Wiring Agreements Increase Investment and Benefit Consumers

High-quality wiring is vital to delivering state-of-the-art broadband services in an MTE. However, deploying this wiring in a new building or upgrading existing wiring in an old building is a significant expense. In many cases, especially in older MTEs that were not pre-wired for modern digital video and high-speed broadband services, the high upfront cost to building owners of installing this wiring is the greatest impediment to making broadband available in a building. Exclusive wiring agreements, including sale-and-leaseback arrangements, help ensure that deployment of broadband, voice, and video services in MTEs is not hampered by these burdensome initial costs.

As the Commission states, in a sale-and-leaseback arrangement, the service provider incurs the expense of installing the wiring in the MTE.[8] The service provider then conveys the wiring to the building owner with the assurance that it will have exclusive use of the conveyed wiring for a set period of time, during which the provider is typically responsible for maintaining the wiring.[9] Providers must spend significant sums to install wiring in an MTE, and sale-and-leaseback arrangements and other exclusive wiring agreements provide a measure of certainty that service providers will have the opportunity to recover their investments by providing service

[8] *Id.* ¶ 24

[9] *Id.* These arrangements also often enable providers to upgrade wiring and associated technologies.

to the MTE's residents and tenants. Without this clear opportunity to recover their costs and earn a return on their investments, broadband providers would have less incentive to deploy newer wiring and technologies, to the ultimate detriment of Americans who live or work in MTEs.

Exclusive wiring arrangements are also pro-competitive, not anti-competitive. As the Commission rightly concluded in prior orders, exclusive wiring agreements do not "deny new entrants access to [residential MTEs] or real estate developments."[10] Any additional provider that wishes to serve a building may simply be required to install its own wiring—which may in any event be a technological necessity if the additional provider offers only one of the multiple services typically provided by a cable operator or telephone company.[11] Exclusive wiring arrangements in fact *encourage* deployment in MTEs. These arrangements—sometimes made in conjunction with bulk billing, exclusive marketing, and revenue agreements—grant companies of all sizes the incentive to invest in installing new wiring or upgrading existing wiring in MTEs, thereby enabling significant improvements in broadband performance and promoting competition and innovation. As the record in this proceeding makes clear, prohibiting exclusive wiring agreements could force some competitive providers out of the marketplace,[12] which would be contrary to the Commission's goals. The Commission should therefore reject proposals to regulate exclusive wiring agreements.

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[10] *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, ¶ 1, n.1 (2007).

[11] *See infra* Section IV.

[12] *See* Petition for Preemption of the Multifamily Broadband Council, MB Docket No. 17-91, at 7 (filed Feb. 24, 2017) (stating that to secure financing, MBC's members must submit indicators that they will be able to generate sufficient revenue, such as an exclusive wiring agreement and/or a bulk billing arrangement); Comments of Blue Top Communications, GN Dkt. No. 17-142, at 1 (filed Aug. 22, 2017) ("Without the use of [exclusive marketing, bulk service agreements, revenue sharing, and exclusive wiring agreements], Blue Top likely will not be able to compete[.]").

### B. The Commission Should Not Impose Disclosure Requirements on Exclusive Marketing Agreements

The Commission has rightly determined that exclusive marketing agreements benefit MTE residents and tenants because they "could lead to lower costs to subscribers or partially defray deployment costs borne by buildings, without prohibiting or significantly hindering other providers from entering the building."[13] Although the Commission wisely declines to revisit this conclusion in the *NPRM*, it asks whether it should impose disclosure or disclaimer requirements on providers to reduce possible confusion between exclusive marketing and exclusive access.[14] It should not.

As an initial matter, it is hard to see how MTE owners—businesses that routinely negotiate complex agreements regarding the rights and obligations associated with their buildings and property—would be confused about the Commission's rules. The Commission's rules bar MVPDs and telecommunications carriers from entering into exclusive *access* agreements,[15] but permit exclusive marketing agreements, and there is no reason that a building owner should be confused by how these rules affect an agreement with a service provider. There is no need to adopt onerous disclosure and disclaimer requirements to address likely isolated incidents of MTE owner confusion.

Furthermore, a disclosure requirement would not provide consumers with relevant information about the unit they are renting or the broadband services available to them, while adding more bulk to already-lengthy disclosures and increasing administrative burdens on

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[13] *NPRM* ¶ 27; *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd. 2460, ¶¶ 33-34 (2010).

[14] *NPRM* ¶¶ 27-28.

[15] As discussed in Section V, should the Commission retain its prohibition on exclusive access, it should extend the prohibition to DBS and broadband-only providers.

operators. Potential tenants typically make their rental decisions based on factors like price, amenities, or location. Disclosures about exclusive marketing arrangements do not bear on those considerations. And even if a potential tenant was particularly focused on which broadband provider(s) serve a building, knowledge of an exclusive marketing agreement would not address the broadband options available or the price and quality of those options.[16]

Moreover, as discussed further below in the context of revenue sharing agreements, disclosure of the terms of exclusive marketing agreements could have the unintended effect of inflating the costs associated with such agreements, as landlords may have the incentive to demand the most lucrative terms negotiated by service providers and MTEs in the broader marketplace. These higher costs may ultimately be borne by tenants.

For the foregoing reasons, the Commission should refrain from imposing disclosure requirements in connection with exclusive marketing agreements.

### C. Requiring Disclosure of Revenue Sharing Arrangements Would Be Counterproductive

The Commission also seeks comment on whether it should require disclosure or restrict the use of revenue sharing agreements for broadband service.[17] It should decline to do so.

Revenue sharing is a common mechanism through which service providers compensate building owners for use of the owners' facilities and the costs associated with such use. These agreements are designed to offset the costs that building owners incur installing, maintaining, and upgrading the infrastructure necessary for broadband service.[18] If the Commission prohibits

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[16] As a practical matter, consumers can easily determine whether service from their preferred provider is available to their unit by visiting the provider's website or otherwise contacting the provider, or by inquiring with building owners themselves. Indeed, disclosure of exclusive marketing agreements could lead to consumer confusion, as some consumers may wrongly conclude the agreements mean that a property owner does not allow additional service providers access to the building.

[17] *NPRM* ¶ 16.

[18] Comments of RealtyCom Partners, GN Dkt. No. 17-142, at 6 (filed July 24, 2017) ("RealtyCom Comments") ("It

them, building owners would find other ways to recoup these costs—for instance, via higher rent for residents or higher door fees (or other compensation) from providers—or would forgo or reduce infrastructure investment, to the detriment of MTE residents and tenants.

It also bears emphasis that revenue sharing arrangements, like the other arrangements discussed in the *NPRM*, are the result of negotiations between MTE owners and service providers in a marketplace that is competitive. Building owners have every incentive to grant access to competitive providers where such access could improve tenant experience. It would make little sense for a building owner to prioritize the limited revenues received from a revenue sharing agreement with an incumbent provider over the owner's ability to attract and retain tenants, who generate far more revenue for the owner.[19] This remains the case even if revenue sharing agreements are combined with other provisions, such as exclusive wiring or marketing. The Commission should therefore refrain from regulating such agreements.

The Commission should also not require disclosure of revenue sharing agreements. Disclosure of the existence of, or details regarding, a revenue sharing arrangement would provide no meaningful information to consumers. As noted above in the context of exclusive marketing agreements, this type of disclosure requirement does not give potential tenants information about factors relevant to deciding whether to rent space in a building, nor would such disclosure provide consumers with any meaningful information about the broadband

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is a simple reality that providing space and facilities for a Carrier in an MTE is not cheap. . . . Financial consideration in MTE owners' contracts with Carriers helps offset some of these costs, along with ongoing costs and obligations borne by the owner, better enabling provision of space and facilities necessary for competition between Carriers within the building."); Comments of Choice Property Resources, Inc., GN Dkt. No. 17-142, at 2 (filed Aug. 22, 2017) ("Revenue sharing payments assist property owners in offsetting costs associated with providing the required infrastructure[.]").

[19] *See also* RealtyCom Comments at 7 ("MTE owners are in fierce competition with each other to win and retain residents. Any owner that could be lured into saddling residents with uncompetitive service for some pocket change from a shoddy Carrier would witness a mass migration of residents to nearby properties with less short-sighted management.").

services available to them in the building. Disclosure requirements also could have the unintended effect of driving up costs to service providers and ultimately building tenants. If building owners know in advance the terms of revenue sharing agreements negotiated in the broader MTE marketplace, they may have the incentive and increased leverage to demand more generous terms from potential providers than they otherwise would. In contrast, keeping both the existence of, and terms for, such agreements confidential ensures that negotiations occur on an MTE-specific basis and that the economics of any agreement are tied to the individual circumstances of each MTE.

## IV. THE COMMISSION SHOULD NOT MANDATE SHARING OF WIRING OR OTHER FACILITIES USED TO PROVIDE BROADBAND

The Commission should not require any sharing of wiring or facilities in any part of an MTE. As the Commission determined in the *Declaratory Ruling*, sharing requirements depress investment and harm the quality of broadband service in MTEs.

Sharing requirements significantly reduce the incentive to install broadband facilities and equipment, whether the facilities and equipment are installed by the building owner or a service provider. A service provider, for instance, would be substantially less likely to invest in MTE wiring if the wiring it spent significant capital to install could be used—for free—by a competitor without regard to the investing service provider's need to generate a return on its wiring investment.[20] Without service provider investment in wiring, building owners would be forced to bear these high costs. This, in turn, would also result in less investment in broadband infrastructure because as the Commission acknowledges, sharing requirements "create[] a scenario in which building owners 'can no longer control the wiring they install,' thus making

[20] *See also Declaratory Ruling* ¶ 59 (finding that sharing requirements discourage infrastructure investment).

them 'far less likely to expend capital on state of the art fiber and other wiring needed to provide high-quality [s]ervices' within MTEs."[21] These conclusions are equally true for other types of broadband facilities and equipment, such as rooftop facilities.

Sharing requirements are harmful even in MTEs where the building owner and service provider have had the opportunity to recover the cost of their initial investment in broadband infrastructure. This is because sharing requirements also "deter[] owners and service providers from implementing upgrades to existing facilities and services, thereby reducing the quality of services for consumers and creating an upgrade gap between those consumers residing in MTEs and those who do not."[22]

Moreover, there are numerous technical reasons for avoiding sharing requirements. As a threshold matter, service providers typically use different technologies when deploying to an MTE. For example, a traditional cable operator may use one type of fiber technology, while telcos and other providers use different, incompatible technologies. In addition, different service providers have different ways of configuring their facilities, and a sharing requirement would result in multiple, back and forth configuration changes that would ultimately, and inevitably, degrade the quality of in-building wiring as providers cut and re-cut wiring as part of the process of deploying their own equipment and services. This would, in turn, dramatically increase the risk of service degradation. Another example of how service quality could be threatened is if an MTE resident were to purchase Internet service from an alternative provider while purchasing video service from a cable operator using the same wire. It would simply not be feasible for the two providers to provide service over this wire without potential service degradation or outages

[21] *Declaratory Ruling* ¶59 (quoting Comments of RealtyCom Partners, MB Dkt. No. 17-91, at 5 (filed May 17, 2017)).

[22] *Id.* ¶ 63

occurring for the residents.[23] For all of these reasons, it is better for consumers and building owners for each service provider to install their own wiring in the building rather than use the wiring of another provider.[24]

Mandating sharing as a means of increasing consumer choice would therefore be counterproductive, decreasing deployment, threatening the quality of service to MTE tenants, and limiting service options. The Commission should protect true competition and consumer choice and reject any proposals that favor "artificial 'competition' based on the shared use of facilities[.]" [25]

## V. THE COMMISSION SHOULD APPLY ANY MTE REGULATIONS EQUALLY TO ALL PROVIDERS

As discussed above, the marketplace to provide service to MTEs is competitive and working effectively, and the Commission should therefore allow market forces to continue to ensure the arrangements that provide the greatest benefits to MTE residents and tenants.

To the extent the Commission retains its MTE access regulations or adopts additional ones to govern revenue sharing, exclusive marketing, and exclusive wiring agreements or mandate facilities sharing—steps that NCTA opposes—it should apply these regulations to all providers of service to an MTE.[26] As the Commission has found, competitively and technologically neutral policies promote "more effective competition, resulting in more

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[23] *See also* Comments of NCTA – The Internet & Television Association, MB Dkt. No. 17-91, at 4 (filed May 18, 2017) (explaining the harmful interference caused to Cox's broadband signals when a competing MVPD began using Cox's wiring to provide video services to MTE residents who continued to purchase their Internet access service from Cox).

[24] *See e.g.,* Comments of Hotwire Communications, LLC, GN Dkt. No. 17-142, at 1, 8 (filed July 24, 2017) (noting that Hotwire is often the third of fourth service provider in a market, and that "[e]xclusively owning and controlling the wiring [it] installs is a dispositive factor in whether it can offer and maintain network service quality and reliability").

[25] *Declaratory Ruling* ¶ 69.

[26] *See, e.g.,* 47 U.S.C. § 335 (granting the Commission authority to "to impose, on providers of direct broadcast satellite service, public interest or other requirements for providing video programming").

efficient investment, innovation, and service provision."[27] Unfortunately, the Commission's regulation of the MTE marketplace fails to adhere to this principle, restricting only cable operators and telecommunications carriers, but not DBS or other providers. This regulatory disparity unfairly skews the marketplace, hamstringing cable operators and telecommunications carriers while leaving other providers free to offer building owners any arrangement they like, including exclusive access arrangements.

The impact of MTE access agreements on consumers does not vary based on the classification of the provider, and the Commission should not be in the business of picking winners and losers in the MTE marketplace through uneven application of its rules. The Commission should therefore act to eliminate the competitive disadvantage at which it has placed cable operators and telecommunications carriers.

There is also no reason to treat wired and wireless providers differently. Promoting competition in and increased deployment of wireless broadband service and infrastructure—which often requires placing facilities on MTE rooftops or installing DAS systems—is an important Commission goal, and many of the considerations above regarding wireline infrastructure and service in MTEs apply equally to wireless infrastructure and service in MTEs. As such, any Commission requirements related to building access, revenue sharing, marketing, or sharing of facilities should apply to MTE rooftop access and facilities and DAS as well, on a competitively and technologically neutral basis.

[27] *Implementation of Section 224 of the Act*, Report and Order and Order on Reconsideration, 26 FCC Rcd. 5240, ¶173 (2011).

## VI. CONCLUSION

Competition in the marketplace for broadband service to MTEs is thriving, to the benefit of consumers and businesses. The Commission should not disrupt this effective marketplace by mandating sharing of wiring or facilities used to provide broadband or regulating exclusive marketing, exclusive wiring, and revenue sharing arrangements. To the extent the Commission does regulate this marketplace, it must apply the regulations to all areas of MTEs and all broadband providers.

Respectfully submitted,

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