

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS OF
REALTYCOM PARTNERS**

August 30, 2019

INTRODUCTION.

RealtyCom Partners ("RealtyCom") is a telecommunications management consulting firm serving multifamily owners, developers, and property managers who collectively own or manage approximately 2,300 apartment communities, totaling approximately 527,000 apartment homes. These communities are located in 41 states and consist of a mix of affordable, senior, market rate, and luxury apartment homes. RealtyCom submits these comments to the Federal Communications Commission ("FCC" or "Commission") in response to the Commission's Notice of Proposed Rulemaking and Declaratory Ruling ("NPRM") adopted July 10, 2019, in the matter of Improving Competitive Broadband Access to Multiple Tenant Environments ("MTEs").

I. Exclusive Marketing Arrangements: Confusion and Transparency.

In 2010, the Commission declined to regulate exclusive marketing arrangements, concluding that such arrangements "have no significant effects harmful to [MTE] residents and have some beneficial effects".¹ The Commission now asks "whether and to what extent there is confusion among tenants and/or building owners regarding the distinction between exclusive

¹ 2010 Exclusive Service Contracts Order, 25 FCC Rcd at 2471, para. 29.

access agreements, which are not permitted by the Commission's rules, and exclusive marketing agreements, which are permitted."²

RealtyCom has seen no uncertainty among MTE owners about the distinction between exclusive marketing and exclusive access agreements. Naturally, not everyone on an MTE owner's payroll will have familiarity with FCC orders, immediate access to relevant contract documents, and the time and expertise to correctly read and interpret them. Those resources generally lie with a team of personnel in an MTE owner's company offices; and, among those personnel, we have seen no confusion at all. On the contrary, most MTE owners regularly demonstrate their understanding of FCC regulations and orders (e.g., cable inside wiring rules, demarcation rules, prohibitions on exclusive provider arrangements for video and broadband services, the "sheetrock rule," etc.) by making real world use of them to bring competitive services to residents.³

The Commission asks, "Should we 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?"⁴ RealtyCom has no objection to the Commission requiring a disclaimer of this type. As a matter of course, RealtyCom ensures that every broadband service contract it assists with include an explicit statement that the provider does not have the exclusive right to provide Internet service. RealtyCom has never encountered any resistance from broadband providers on this point. It is not, and should never be, a point of controversy.

² MTE NPRM, para. 27.

³ RealtyCom and our clients occasionally encounter service provider access agreements or easements that directly conflict with FCC regulations and orders. Though this is by no means a majority practice of service providers, MTE owners see enough of it that they are experienced in using the tools the Commission has given them to swat down improper claims of exclusive provider rights, exclusive use of cable home wiring, etc.

⁴ MTE NPRM, para. 28.

II. Exclusive Use of Designated Wiring.

The Commission asks, "If we were to revisit the Commission's policy about exclusive wiring arrangements, should we prohibit providers from entering into these arrangements? What are the estimated costs and benefits of this potential action?"⁵

RealtyCom previously summarized many of the documented costs:

"NCTA described how 'exclusive wiring arrangements promote deployment and availability of broadband service in MTEs.'⁶ The National Multifamily Housing Council observed that exclusive wiring arrangements often relieve property owners of 'the significant maintenance responsibilities that come with communications facilities, including diagnosing and fixing wiring problems' and help avoid a tragedy of the commons with respect to building infrastructure.⁷ The Multifamily Broadband Council, on behalf of its membership of small, independent service providers, showed that securing financing for construction of broadband infrastructure requires that the provider 'submit indicators of likely success, such as an agreement granting the provider undisturbed use of inside wiring owned by the property owners.'⁸ Mill Creek Residential Trust described how San Francisco's evisceration of exclusive wiring arrangements has had a chilling effect on broadband investment, with providers reluctant to install inside wiring, refusing to maintain and upgrade home run wiring, refusing to deploy unless the owner bears the entire expense for their system, and, in one case, stating that it can no longer justify doing business in San Francisco under Article 52.^{9"} ¹⁰

The principal benefit of such a policy change would be to permit some small ISPs to piggyback on the capital investments of others—usually their competitors and/or building

⁵ MTE NPRM, para. 26.

⁶ Comments of NCTA - The Internet and Television Association, GN Docket No. 17-142, pp. 3 - 5.

⁷ Comments of The National Multifamily Housing Council, GN Docket No. 17-142, p. 4.

⁸ MBC Preemption Petition, p. 7.

⁹ Reply Comments of Mill Creek Residential Trust to MBC Preemption Petition, pp. 3 - 5.

¹⁰ Reply Comments of RealtyCom Partners, August 22, 2017, GN Docket No. 17-142, p. 9.

developers and owners. RealtyCom believes that this benefit is too slight and too short-term to warrant the enormous cost shifting, investment disincentives, and disruption that such a policy change would produce.

III. Monetary Consideration in Service Contracts and Disclosure.

The Commission seeks comment "on what impact revenue sharing agreements have on competition and deployment within MTEs."¹¹ As RealtyCom previously stated, monetary consideration in contracts between service providers and MTE owners "flows directly from: (a) significant capital costs MTE owners bear in providing space and facilities for carrier use; (b) ongoing operational costs to MTE owners in performing their obligations under the agreements; and (c) MTE owners' reluctance to have to distribute such costs to tenants in the form of higher rents."¹² RealtyCom demonstrated the inadequacy of "revenue share" payments to fully offset such costs by detailing budgets and revenue share returns for two projects (in Denver and in the San Francisco Bay Area).¹³ Prohibiting or limiting these financial arrangements would require that MTE owners and residents more heavily subsidize any broadband provider that comes into a property. In addition to higher development costs for MTE owners and higher rents for residents, this would result in less infrastructure investment within MTEs and, therefore, less facilities-based competition.

The Commission asks whether it should require Internet service providers to "disclose the existence of revenue sharing agreements to the public."¹⁴ We would only note that disclosing the existence or details of a revenue sharing agreement would provide a partial, and often misleading, picture of the overall transaction. If a resident knows—per one case study we previously provided—that an MTE owner received \$250 per unit in upfront payments from service providers, but does *not* realize that the MTE owner spent over \$830 per unit in materials

¹¹ MTE NPRM, para. 17.

¹² Reply Comments of RealtyCom Partners, August 22, 2017, GN Docket No. 17-142, p. 2.

¹³ Reply Comments of RealtyCom Partners, August 22, 2017, GN Docket No. 17-142, p. 2-5.

¹⁴ MTE NPRM, para. 19.

and labor for dedicated system components to be used by those very same providers, he may draw misguided conclusions about the nature of those transactions.¹⁵

For those with industry experience, there are simply too many "known unknowns" that would contextualize that information. Lack of monetary consideration could result from any number of factors, such as:

- A provider having unusually high capital costs in extending its outside plant to the property, due to distance, geographical barriers (e.g., a river or pond), or other obstacles (e.g., crossing an interstate highway or railroad tracks);
- A provider deciding that its return on investment would be limited by the property's size or target demographic (e.g., affordable housing);¹⁶
- The developer deciding to forego consideration in exchange for making the provider responsible for a broader scope of on-site work; or
- The owner having been advised by tax counsel that such consideration would constitute unrelated business taxable income (UBTI).

RealtyCom has encountered some properties with only one service provider, offering uncompetitive service, with no revenue share arrangement. But we have also assisted owners in developing properties with three or more competitive providers offering state-of-the-art services, each with a revenue share arrangement. Despite many decades of combined experience negotiating service agreements on behalf of MTE owners, RealtyCom would be able to discern precious little about the competitive position of a property on the basis of a bare

¹⁵ Reply Comments of RealtyCom Partners, August 22, 2017, GN Docket No. 17-142, p. 3-4.

¹⁶ Some large incumbent providers routinely discriminate against low-income and affordable housing projects by declining to bring service to them or by refusing to offer door fees or revenue share arrangements. Since this monetary consideration functions as a partial offset against construction costs for the service providers' on-site system components, providers' failure to bear their own costs of installation or to contribute to the MTE owners' costs in a nondiscriminatory way effectively *taxes* affordable housing developers and residents. With the erosion of municipal franchise build-out requirements (for MSOs) and carrier-of-last-resort obligations (for ILECs), this leaves affordable housing developers in a vulnerable position. The tools under discussion in this proceeding—bulk service arrangements, exclusive wiring rights, and exclusive marketing rights—play a critical role in affordable housing developers' ability to ensure that residents have the services they need, often from independent service providers. This is the front line in the battle to close the Digital Divide.

statement of door fees and revenue share. We are not optimistic that the general public, unaware of the many factors that come into play in these transactions, would glean any useful information at all.

CONCLUSION.

For the reasons discussed above, the Commission should not pursue further rulemaking regarding arrangements for monetary consideration, exclusive use of designated wiring, or exclusive marketing rights, as the market is functioning well, with no adverse impact to the availability of broadband services to MTE tenants. Indeed, MTE tenants have more and better service options available to them today than they ever have before.

Respectfully submitted,
REALTYCOM PARTNERS, LLC
999 Fifth Avenue, Suite 420
San Rafael, CA 94901

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