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

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

To: The Commission

COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

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Summary

The Wireless Internet Service Providers Association ("WISPA") supports the Commission's efforts to revisit its rules governing competitive access to Multiple Tenant Environments ("MTEs"). Taking stock in the effectiveness of its rules and examining ways to enable greater access and competition in MTEs is consistent with the Commission's top priority of closing the digital divide and ensuring that all Americans have access to high-speed broadband, regardless of where they work or live. When 30 percent of Americans live in MTEs and millions more work in office buildings, the outcome of this rulemaking will have a substantial impact on how and when affordable broadband is deployed to every American.

The issues raised in the *NPRM* are not new. Over the past three decades, the Commission has sought comment on whether various types of exclusivity agreements and other incumbent provider practices are anti-competitive or, instead, provide consumer benefits that outweigh any potential harm. The Commission historically has found that the benefits of many standard MTE service practices -- revenue sharing, exclusive marketing agreements, and exclusive wiring arrangements – far outweighed the harm caused by potential anti-competitive conduct that could deny or delay access to MTEs by competitive providers.

However, previous rulings do not reflect today's reality. The MTE marketplace has changed dramatically since the Commission's last review in 2010, and many long-standing practices and relationships between incumbent providers and MTEs are no longer in the public interest because they now constitute barriers to entry by competitive providers.

What is also very different today is that fixed wireless technology is widely available and provides high-speed broadband service in a very efficient, expeditious and cost-effective manner in urban, suburban and rural areas. As WISPA has previously noted in other proceedings, there

is evidence that consumers in MTEs are being denied access to competitive broadband services that could be provided by fixed wireless Internet service providers ("WISPs"). Real-world examples of barriers to entry in MTEs experienced by small competitive providers like WISPs include demands for revenue sharing agreements that have no correlation to an MTE owner/manager's investment in infrastructure, and exclusive marketing agreements that are overly broad, misinterpreted or misunderstood, or are being used in anti-competitive ways to prohibit or delay access by competitive providers. MTE owners/managers and incumbent providers also have used exclusive wiring agreements to prohibit or delay entry by WISPs, even when the existing wiring is not in use. Individually, each of these practices is anti-competitive and the harm to competition outweighs any consumer benefit. Collectively, the harms of these agreements compound and thus operate as *de facto* exclusive access agreements. They should therefore be prohibited.

When the Commission evaluates barriers to entry for competitive providers, it should acknowledge new technology used to deliver broadband services, and it must also acknowledge and mitigate the long-standing discriminatory practices against new entrants that are allowed, if not reinforced, by statutory classifications and various State mandatory access laws that harken back to a binary market that no longer exists. Therefore, it is critically important for the Commission to conduct a full review of all legacy agreements and practices and not rely on previous assumptions or previous claims.

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The Wireless Internet Service Providers Association ("WISPA")[1] hereby submits its Comments on the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.[2] WISPA appreciates the Commission's efforts to revisit and re-evaluate its rules that govern competitive access to Multiple Tenant Environments ("MTEs") and the purported consumer benefits of various types of exclusivity agreements enjoyed by incumbent providers. This proceeding complements the Commission's ongoing proceeding that proposes a narrow modernization of its OTARD rule so that zoning laws and homeowners' association restrictions can no longer prohibit hub and relay antennas at residences. Both proceedings recognize that times have changed and the critical importance of ensuring that consumers are not denied choice

[1] WISPA is the trade association that represents the interests of wireless Internet service providers ("WISPs") that provide IP-based fixed wireless broadband services to consumers, businesses, and anchor institutions across the country. WISPA's members include more than 800 WISPs, equipment manufacturers, distributors and other entities committed to providing affordable and competitive fixed broadband services. WISPs use unlicensed, lightly-licensed, and licensed spectrum to deliver last-mile broadband and voice services to more than four million people, many of whom reside in rural, unserved, and underserved areas where wired technologies, such as FTTH, DSL and cable Internet access services may not be available. WISPs are increasingly deploying fiber in combination with fixed wireless technologies where the business model can justify the higher costs.
[2] *Improving Competitive Broadband Access to Multiple Tenant Environments,* Notice of Proposed Rulemaking, GN Docket No. 17-142, FCC 19-65 (rel. July 12, 2019) ("*NPRM*"). The *NPRM* was published in the Federal Register on July 31, 2019. *See* 84 Fed. Reg. 37219 (July 31, 2019).

and competition in broadband services merely based on technology differences or where they live or work.

Introduction

Many of the issues raised in the *NPRM* regarding competitive options and consumer choice for those that live and work in MTEs are not new; the Commission has sought comment on various exclusivity agreements and alleged anti-competitive practices by incumbent providers for decades.[3] However, the marketplace has changed since the Commission last reviewed MTE practices in 2007 and 2010. One primary development is the availability of new technology that provides high-speed broadband service in a very efficient, expeditious and cost-effective manner.[4] Fixed wireless technology was not as prevalent in 2007 when the Commission last addressed MTE practices and the impact of such practices on competition and consumer choice.[5] At that time, the dominant fixed broadband technologies were twisted pair, coaxial, fiber and DSL used by traditional cable operators and Local Exchange Carriers ("LECs"). It is hard to believe that, years ago, two of the largest telecommunications providers in the country were new entrants into MTEs and struggled to gain entry against incumbent cable providers that used exclusivity agreements and discriminatory tactics to preserve their status quo.[6] These telecommunications companies were considerably larger and more dominant at that time as new

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[3] *See, e.g., Telecommunications Services Inside Wiring and Customer Premises Equipment,* Notice of Proposed Rulemaking, 11 FCC Rcd 2747 (1996) (seeking comment on how to revise the Commission's cable home wiring rules to reflect new developments and promote competition).
[4] *See* The Carmel Group, *Ready for Takeoff: Broadband Wireless Access Providers Prepare to Soar with Fixed Wireless*, (2017) *available at* http://www.wispa.org/Portals/37/Docs/Press%20Releases/2017/TCG's_2017_BWA_FINAL_REPORT.pdf (last visited Aug. 12, 2019).
[5] *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, MB Docket No. 07-51, 22 FCC Rcd 20235, ¶ 1 (2007) ("*2007 Exclusive Service Contracts Order*"), *aff'd, National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).
[6] *Id.* at 20243, ¶ 16 n.44.

entrants than WISPA's members are today, yet still experienced competitive disadvantage in gaining access to and serving MTE residents and businesses. The current obstacles to entry based on technology,[7] compounded by unreasonable denial of access and discriminatory practices, create many more entry barriers for much smaller competitive providers like WISPs.

State mandatory access laws in effect at the time also were designed to ensure that *new entrant* cable/MVPD providers and LECs were able to compete more effectively with *incumbent* cable/MVPD providers.[8] Mandatory access laws primarily benefitting cable/MVPD and telecommunications providers still exist today, but now serve as market entry barriers for providers, like WISPA's members, that do not meet the Title II and Title VI statutory classifications on which those laws are predicated, especially where new entrants also are disadvantaged by revenue sharing, wiring, marketing and rooftop access exclusivity agreements enjoyed by incumbents.

This proceeding is very important to the small, competitive broadband providers that comprise WISPA's membership. WISPs typically do not have the resources or leverage to challenge MTE owners/managers or incumbent providers that exercise their gatekeeper status to deny or delay the availability or marketing of competitive services, access to a property (including rooftops), and existing wiring that is not in use. The obstacles WISPA's members face to providing service to MTEs are many and include incumbents' use of revenue sharing

[7] Comments of Starry, Inc., GN Docket No. 17-142 (filed July 24, 2017) ("Starry Comments") at 2 ("With the advent of '5G' technologies and new access networks that blend fixed and mobile technologies, the Commission has a unique role to play in ensuring that these innovations continue to grow unimpeded. . . . However, if marketplace practices make it impossible for providers to deploy and consumers to access these new technologies, the benefits from these innovations will be lost.").

[8] *See 2007 Exclusive Service Contracts Order* at 20237, ¶ 3 (reporting that "the entry of incumbent LECs into the MVPD business has led incumbent cable operators to increase their use of exclusivity clauses in order to bar or deter the new entrants"). Today both LECs and cable/MVPD providers now engage in anti-competitive practices to preserve their incumbent positions.

agreements, exclusive wiring and exclusive marketing agreements, preferences by building property owners/management to do business with traditional phone or cable companies, and other market-distorting practices.[9] The Commission's effort to update its rules must encourage competition at the doorstep, account for technological advancements, and eliminate legacy statutory classifications that continue to hamper, if not prohibit, the ability of WISPA's members to provide affordable broadband service to MTEs across the country.

These Comments reflect the information and concerns shared by the WISPA members in a survey on their experiences in MTEs, and discussions with individual WISPA members.[10] Almost 69 percent of the MTE Survey respondents are currently providing broadband service to MTEs using various technologies (i.e., fixed wireless, fiber, coaxial, hybrid (fiber and coaxial), DSF and twisted pair). The MTE Survey Summary illustrates that the Commission's policies have had a positive impact on the ability of some WISPs to compete in the MTE marketplace, but more can and should be done. There remain, however, several major entry barriers caused by ongoing anti-competitive practices that have prevented WISPA members from entering the MTE marketplace, and those that are currently serving MTEs from gaining access to more buildings and tenants. Of the 31 percent of WISPA members that are not currently providing service to MTEs, the vast majority (77 percent) are interested in entering the MTE marketplace and serving both residential and business consumers.

[9] *See generally* the results of WISPA's member survey ("MTE Survey Summary"), Appendix A hereto; *see also* Comments of Netmoby, Inc., GN Docket No. 17-142 (filed July 24, 2017) at 3 ("The evidence in this proceeding supports the conclusion that significant FCC action is needed to eliminate barriers to entry and ensure competition in the MTE marketplace.").

[10] The MTE Survey Summary was completed in August 2019. The results show that WISPA members serving MTEs are more likely to be competitive providers, but some are incumbent providers serving the whole building (9 percent); others serve only individual tenants (19.7 percent). A large percentage of survey respondents serve both the whole building and individual tenants (70 percent).

The Commission has the opportunity in this proceeding to take decisive action to eliminate long-standing MTE entry barriers that were established for different purposes and at a very different time, when the MTE service provider landscape was dominated by our nation's largest telecommunications and cable companies. Today, the marketplace includes multiple providers that are competitively constrained by laws, rules, and practices predicated on a now non-existent binary market. Consumers have more options, and should not be prohibited from exercising choice based on outdated legacy statutory classifications and discriminatory practices.

Discussion

I. REVENUE SHARING AGREEMENTS ARE ANTI-COMPETITIVE PRACTICES WITH NO BENEFIT TO CONSUMERS AND SHOULD BE RESTRICTED

A. Revenue Sharing Agreements Stifle And Delay, If Not Eliminate, Competition And Deployment Of Broadband Services

Commission rules do not currently prohibit or restrict revenue sharing agreements.[11] These agreements have terms that can be in the form of a flat annual and/or monthly fee, a percentage of gross revenue, a *pro rata* share of the revenue generated from subscriptions, or a "door fee" based on the number of units in an MTE.[12] In the past, MTE owners/managers requested revenue sharing payments from large incumbent providers,[13] but today, MTE owners/managers typically demand payment for entry into an MTE from new and small competitive providers, often at the same level as the incumbent.[14] Given that almost 33 percent

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[11] *See Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, 32 FCC Rcd 5383, 5384-85 ¶¶ 4-6 (2017) ("*MTE NOI*") (recapping "Previous Commission Actions;" revenue sharing agreements are not mentioned). Revenue sharing agreements are defined as consideration received by the MTE owner/manager "from the communications provider in return for giving the provider access to the building and its tenants." *See also NPRM*, ¶ 16.

[12] *NPRM*, ¶ 16; *see also* Jameson Zimmer, *Apartment Landlords Are Holding Your Internet Hostage*, Broadband Now (July 14, 2016) available at https://broadbandnow.com/report/apartment-landlords-holding-internet-hostage/ (last visited Aug. 26, 2019) ("*Holding Your Internet Hostage Article*")

[13] *See id*.

[14] For example, a large owner/manager of a MTE with more than 40 units in Santa Clara County, California terminated further discussions with a well-established WISP to provide alternative broadband

of WISPA's survey respondents are currently engaged in revenue sharing agreements,[15] WISPA recognizes that revenue sharing agreements may help small competitive providers enter an MTE being served by a larger incumbent.[16] However, as explained below, these agreements do not really level the playing field for small providers where incumbents benefit from additional exclusive arrangements or mandatory access laws. To address this market disparity, the Commission should amend its rules to limit revenue sharing agreements between providers and MTE owners/managers to the amount covering the actual costs the MTE owner/manager incurs, thereby eliminating ongoing revenue sharing payments that ensure *de facto* exclusivity by denying entry into the MTE.

Supporters of revenue sharing agreements argue that these agreements "are a key tool in building owners' ability to build out, maintain, and upgrade their networks . . . [and] enable MTE owners to use the consideration they receive from communications providers to offset infrastructure costs associated with providing broadband service to tenants, and that restricting these types of agreement will induce MTE owners to raise rents or cut costs by reducing

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service because the revenue share offered by the WISP was not comparable to the share paid by the incumbent providers (there were at least two providers already in the building). Significantly, the WISP offered a more affordable service to tenants based on the highest tier plan from the incumbent providers. *See also* Reply Comments of Lumos Networks Inc., Lumos Networks of West Virginia Inc., and Lumos Networks LLC, GN Docket No. 17-142 (filed August 22, 2017) at 3-4 ("For example, some MTE building owners and/or property managers request a percentage of telecommunications gross revenues from competitive broadband providers before said provider is granted building access or is even permitted to market its service to the tenants located within the building.") ("Lumos NOI Reply Comments").

[15] Of the MTE survey respondents that are currently engaged in a revenue sharing agreement, they were required to enter into such agreements for the following reasons: (1) as a condition of entry (38.71 percent); (2) as a condition of speaking or dealing with the MTE owner/manager (29.03 percent); (3) because the incumbent is also under a revenue sharing agreement (16.13 percent); and (4) "other" reasons (16.13 percent). "Other" reasons include revenue sharing as a requirement to win the right for exclusive marketing. MTE Survey Summary.

[16] *See NPRM*, ¶ 17 and n.79 (citing to Blue Top Communications NOI Reply Comments at 1 (stating that "without the use of these tools, Blue Top likely will not be able to compete with the cable and telephone monopolies who have been given service rights to our communities over the last 100 years").

infrastructure investment."[17] Conversely, detractors of revenue sharing agreements observe that such agreements are long-standing market entry barriers because "they reduce incentives for building owners to grant access to competitive providers" and "inhibit competition by preventing providers from deploying broadband services on a timely basis" given protracted negotiations over these types of agreements.[18] Consequently, certain revenue sharing agreements benefit only the MTE owner/manager.

The Commission has long recognized the MTE industry's justification of the use of revenue sharing agreements as a means to compensate the MTE owner/manager for the cost of infrastructure or other building expenses to bring communications services to the building.[19] But today, revenue sharing payments often exceed the MTE owner/manager's infrastructure costs. Based on the experiences of WISPA members, some, if not all, of the infrastructure costs are paid for by the provider, not the MTE owner/manager.[20] Many revenue sharing provisions are subject to perpetual renewal. Also, as WISPA survey respondents reported, MTE

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[17] *Id.* at ¶ 17; *see generally Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, MB Docket No. 07-51, 25 FCC Rcd 2460 (2010) ("*2010 Exclusive Service Contracts Order*").

[18] *NPRM*, ¶ 18 and n.82 (citing to Lumos NOI Reply Comments at 3-4 and FastMesh NOI Comments at 1). A WISPA member reported that, after requests for service and seeing a need at dorms at the local college, it proposed a buildout plan. The decision makers took a great deal of time telling the WISP that they had a contract with a major cable provider or a telecom provider and even if students were asking for better service, it was a moot point. "Exclusive broadband agreements between apartment building owners and internet providers in cities like Los Angeles are common, leaving renters with no choice but to pay inflated costs for sub-par service — and rewarding landlords for keeping it that way." *Holding Your Internet Hostage Article*.

[19] *See NPRM*, ¶ 17; *id.* at ¶ 5 ("The Commission has been cautious to regulate only where necessary and to avoid risking undermining the case to invest in broadband and video deployment to MTEs."). However, agreements that limit deployment, competition and consumer choice with little countervailing benefits to the public interest should not be off limits for the Commission's consideration.

[20] *See also Ex Parte* Letter from Another Corporate ISP, LLC, dba Monkeybrains, to Secretary Marlene H. Dortch (filed July 3, 2019) at 1-2 ("Monkeybrains Ex Parte Letter") ("As a matter of course, Monkeybrains and other ISPs always build their own infrastructure including wiring and switching to each Intermediate Distribution Frame ("IDF") in a building, and then may make use of an existing wire from the nearest IDF to the unit.")..

owners/managers' overall compensation may be based on securing revenue sharing agreements, which provides a very different incentive for demanding revenue sharing payments from providers. MTE owners/managers cannot continue to justify infrastructure costs as the basis for all revenue sharing agreements because there is little correlation of the amount of the revenue sharing payments to infrastructure costs incurred by the MTE owner/manager.

Moreover, new entrants often cannot compete with high revenue shares paid by established incumbents with deeper pockets, long-standing revenue sources, established relationships and, in some cases, government support. Revenue sharing agreements also increase a competitive provider's financing need because revenue sharing agreements increase the cost of doing business for the provider, assuming it can even get in the door. Said another way, any money that a competitive provider would pay to the MTE owner/manager is less money available to build and enhance the network, upgrade equipment, market the business, or hire more personnel.

In today's MTE marketplace, revenue sharing agreements primarily benefit MTE owners/managers and not MTE tenants, and certainly do not promote competitive entry by newcomers that may offer better service and better technology.[21] The MTE owner/manager elects a provider(s) that agrees to a revenue sharing agreement and pays the highest share of revenue. Tenants do not know nor do they understand that revenue sharing agreements limit their choice of providers and ultimately increase subscription costs because the cost of revenue sharing agreements is ultimately passed down by the provider to the tenant in higher subscription

[21] "Revenue share arrangements are also straightforward (if not strictly legal): an ISP offers building owners a percentage of revenue from subscribers in their building. The more subscribers, the higher the share — incentivizing landlords to work against competing ISPs and prevent renters from gaining bargaining power." *Holding Your Internet Hostage Article*.

costs, or delay in enhancing services. The harm to consumers from perpetual revenue sharing agreements outweighs the purported benefits to MTE owners/managers.

Consistent with the Commission's objective to promote competitive access to MTEs that provide consumers with more affordable choices while providing incentives to MTE owners/operators to invest in infrastructure that supports broadband deployment, the Commission should restrict revenue sharing agreements to cover only infrastructure costs actually incurred by an MTE owner/manager.

1. **Restricting revenue sharing agreements should not result in reduced infrastructure investment or increased costs for tenants because there is little justification for revenue sharing agreements as consideration for covering infrastructure costs**

The Commission asks whether restricting revenue sharing agreements will induce MTE owners/managers to raise rents or cut costs by reducing infrastructure investment.[22] The Commission has previously expressed its concern that "long-term exclusive contracts may raise anti-competitive concerns because they 'lock-up' properties, preventing consumers from receiving the benefits of a newly competitive market."[23] In today's competitive marketplace, perpetual exclusive contracts of any kind are anti-competitive. Infrastructure investment, especially after the initial construction phase, is not usually an ongoing budget item for MTEs because infrastructure costs are borne by incumbent and competitive providers.[24] As stated

[22] *NPRM*, ¶ 18.
[23] *Telecommunications Services Inside Wiring, et al.*, Report & Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 95-184, MM Docket No. 92-260, 13 FCC Rcd 3659, 3754 ¶ 203 (1997) ("*Inside Wiring Order*").
[24] *See* Lumos NOI Reply Comments at 4 (citing to its experience after completing installation to a medical facility's satellite location situated in a business park at its own expense, the business park owner demanded a formal "Right of Access" agreement that required a flat annual fee of $2500 in addition to an annual revenue contribution equal to 5% of Lumos' gross revenue). The business park owner incurred no additional expense to bring service to the medical facility because no new infrastructure was needed. The annual fee and revenue share from Lumos would have been *in addition* to any previous revenue share and fees derived from previous providers over the years. *See also Holding Your Internet Hostage Article*.

above, WISPA does not propose an outright ban on revenue sharing agreements to the extent they cover the actual costs an MTE owner/manager incurs. However, revenue sharing agreements should not be used as an ongoing annuity above and beyond the MTE owner/manager's actual infrastructure costs to install the service.

The MTE owner/manager generally decides the type of infrastructure, services, and level of connectivity options to provide its tenants. During the initial construction phase, the MTE owner/manager will incur costs for internal wiring, conduit, antennas and other infrastructure to enable service availability to those residents that desire broadband access. For new buildings, the MTE owner/manager typically will enter into an exclusive contract with a provider to install the infrastructure because it will cost much less to do so during construction than it would be to later retrofit the building. If enhancements are needed, the incumbent provider (and often a competitive provider), not the MTE owner/manager, will pay for wiring and conduit upgrades.[25] If the MTE owner/manager incurs any cost for initial infrastructure, this cost is likely covered in the first term of the exclusive agreement.

In practice, revenue sharing payments traditionally continue throughout the life of the relationship including any renewal periods, resulting in perpetual payments and windfall revenue to the MTE owner/manager. Deploying initial infrastructure is a one-time cost and is therefore not an ongoing operating cost or budget item because MTE owners/managers generally do not incur additional infrastructure costs beyond the initial construction phase. Therefore, eliminating revenue sharing payments except to cover an MTE owner/manager's actual infrastructure costs should not lead to increased cost flowing to its tenants. Other providers choosing to enter a

[25] "We're not cutting into the building, not drilling, *just using existing conduit*, but they want to charge us $1,500 a month to bring in this tiny cable." *Holding Internet Hostage Article (*citing to interview with Stealth Communications in Manhattan) (emphasis added)).

building will be responsible for either utilizing existing wiring, or running new wiring or conduit as needed at their own expense. Revenue sharing agreements that extend past the initial term of a service agreement to include renewals with an MTE cannot be justified as a business necessity because the revenue sharing extends beyond the period necessary for the MTE owner/manager to recoup its investment.[26]

2. **Certain revenue sharing agreements serve as *de facto* exclusive access agreements and therefore are inherently anti-competitive and should be prohibited**

The Commission asks whether "revenue sharing agreements reduce incentives for building owners to grant access to competitive providers when any subscriber gained by such a provider means reduced income to the building owner."[27] In short, the answer is "yes."

Since 2007, Commission rules have prohibited MVPDs and telecommunications carriers from entering into exclusive access agreements with MTEs.[28] The Commission found that "these exclusive access agreements 'discouraged the deployment of broadband facilities' and 'hindered' entry by competitive" MVPDs and telecommunications providers.[29] Nonetheless, MTE owners/managers often use revenue sharing agreements with escalation clauses – provisions that increase revenue to MTE owners/managers as the number of subscribers increases – as the basis for prohibiting access to competitive providers, in essence serving as *de*

[26] *Inside Wiring Order* at 3750-51 ¶ 195.
[27] *NPRM*, ¶ 18.
[28] *Id.* at ¶ 4.
[29] *Id.* (citations omitted). The Commission's prohibition of exclusive access agreements must ensure access for all competitive providers, regardless of technology, in order to meet the Commission's primary objective to ensure that all Americans have access to high speed broadband. *See id.* at ¶ 1-2; *see also Rural Digital Opportunity Fund*, Notice of Proposed Rulemaking, WC Docket Nos. 19-126 and 10-90, FCC 19-77 (rel. Aug. 2, 2019) at 2 ¶ 1 (emphasizing the Commission's "top priority of bridging the digital divide").

facto exclusive access agreements. To prevent this anti-competitive practice, the Commission should prohibit escalation clauses from permissible revenue sharing agreements.[30]

Statements from WISPA members confirm that an MTE owner/manager operating under an escalation clause (also called a "graduated" revenue sharing agreement) will not engage in discussions with a qualified competitive provider, claiming that the revenue sharing agreement is exclusive to the incumbent. In reality, the MTE owner/manager is benefitting from the increased revenue generated by an escalation clause that pays a higher percentage of revenue share to the MTE owner/manager when the number of subscribers increases for the incumbent provider.[31] Escalation clauses are not uncommon tools used to incentivize MTE owners/managers to encourage more tenants to subscribe to the incumbent's service.[32] They are not based on recovery of infrastructure costs incurred by the MTE owner/tenant, but serve a distinctly anti-competitive purpose of disincentivizing entry by other providers.[33]

The Marketing Support Compensation Schedules chart below illustrates how an escalation clause encourages exclusivity by increasing revenue share:[34]

[30] Comments of INCOMPAS, GN Docket No. 17-142 (filed July 24, 2017) at 9 ("The most pernicious of these [commercial] practices is graduated revenue sharing agreements between communications providers and landlords.") ("INCOMPAS NOI Comments"); *see also* Reply Comments of the Fiber Broadband Association on the Notice of Inquiry, GN Docket No. 17-142 (filed August 22, 2017) at 6 ("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 MTE and be nondiscriminatory. This will prevent the MTE owner either from extracting excessive rents or undermining access by providers that tenants may wish to use for service.") (citations omitted).
[31] *See Holding Your Internet Hostage Article.*
[32] *Id.*; *see also* INCOMPAS NOI Comments at 9-10.
[33] *Id.* at 9 n.19 ("Graduated revenue sharing agreements should be distinguished from agreements in which landlords receive payments that are tied to actual costs for the provider's use of the property.").
[34] *Id.* (citing to Wired Magazine). This chart is from 2016 and may not reflect the current percentages of revenue under a subscriber escalation clause. It does, however, illustrate the inequities inherent in such agreements against competitive entry. For a current example of how graduated revenue shares operate, *see* INCOMPAS NOI Reply Comments at 9-12.

Marketing Support Compensation Schedules

Proposed Video Scale	
Penetration %	**Rev Share %**
<=50%	0%
51%-55%	5%
56%-60%	7%
61%-65%	8%
66%-71%	9%
>=72%	10%

Proposed Data Scale	
Penetration %	**Rev Share %**
<=24%	0%
25%-35%	1%
36%-45%	4%
46%-55%	5%
56%-75%	6%
>=76%	10%

Proposed Voice Scale	
Penetration %	**Rev Share %**
<=24%	0%
25%-35%	3%
36%-45%	4%
46%-55%	5%
56%-59%	6%
>=60%	10%

Plus: Up To $130 Per Unit → One Time Compensation Payment

In this example, in addition to receiving a one-time door fee, the MTE owner/manager is incentivized to have all tenants use one provider for each of the three services offered – video, data *and* voice – so that it can secure higher penetration rates and thus a higher revenue share. If the MTE owner/manager brought in a competitive provider to offer just one service, it would cannibalize its own revenue opportunity. In this case, the MTE owner/manager has every incentive to deny access to another provider so that it will receive – at minimum – more than 60% + penetration. At that point, any revenue share from a competitor would not equal what the MTE owner/manager would receive from the incumbent provider.

To make matters worse for smaller providers seeking access, the anti-competitive impact of escalation agreements is exacerbated when combined with any other exclusivity agreement or mandatory access laws that guarantee access to the building only by Title VI cable/MVPD or Title II telecommunications providers. Under these circumstances, competitive providers have no opportunity to enter a building, denying tenants competition and the benefits of lower rates and increased services. To address this market imbalance and facilitate competition, the

Commission should prohibit providers from entering into revenue sharing agreements with escalation clauses.

B. Public Disclosure Of Revenue Sharing Agreements Is Not A Viable Or Reasonable Alternative To Restricting Or Prohibiting Such Agreements Because Such Disclosures Provide No Consumer Benefit

As an alternative to restricting or prohibiting revenue sharing agreements, the Commission seeks comment on whether it "should require all broadband service providers or only telecommunications carriers and covered MVPDs to disclose the existence of revenue sharing agreements to the public."[35] It suggests that "[d]isclosure requirements are less burdensome than outright prohibitions and can promote informed decision-making."[36]

WISPA does not believe that disclosure requirements would be an effective substitute for the restrictions on revenue sharing agreements and escalation clauses that WISPA recommends. There are two major problems with requiring disclosure as the sole basis for protecting consumers and promoting more robust competition.

First, public disclosure of revenue sharing arrangements would not benefit consumers. Tenants are not likely to understand how revenue sharing agreements work, so the disclosure of the existence of any such agreement would be meaningless unless the cost and impact of the revenue sharing agreement is fully disclosed.[37] But even this higher degree of detailed transparency would be difficult for providers to assess, calculate, and disclose for public consumption because it would require undue public disclosure of a provider's confidential business operations. Simply put, providing sufficient detail to adequately inform consumers places extraordinary burdens on providers and, even so, are not likely to be effective.

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[35] *NPRM*, ¶ 19.
[36] *Id.*
[37] This would include disclosure how the presence of a revenue sharing agreement has increased the cost of subscriptions or delayed the investment or introduction of new services or speeds.

In this respect, it is important to note that imposing a public disclosure requirement unfairly distributes the burden of the requirement, again with no benefit to consumers. In reality, both the provider and MTE owner/manager benefit from revenue sharing agreements. But under the Commission's proposal, only the provider would be subject to a public disclosure – the Commission lacks legal authority over the MTE owner/manager to make public disclosures.[38]

More importantly, disclosure does not address the issue of whether tenants will have informed choices because the choice of providers has *already* been made by the MTE owner/manager. Thus, a disclosure from the selected broadband provider is meaningless when competitive providers do not even have an opportunity to provide service given the limitations of revenue sharing agreements or any exclusivity agreement. In other words, the competitive harm will have already occurred.

Second, WISPA questions the *NPRM*'s assertion that public disclosures are "less burdensome" than a prohibition of or restrictions on revenue sharing agreements for broadband providers. A written disclosure presumably would impose regulatory burdens on providers of all sizes, including small providers that comprise the vast majority of WISPA's members. There are business and legal costs in drafting even simple disclosures, publishing and distributing the disclosures, and responding to questions and comments from tenants. These costs would be borne disproportionately by small providers who would prefer to invest in growing the business.

Simply put, public disclosure of revenue sharing agreements would not solve the problem resulting from anti-competitive provisions and practices and do not provide a viable or reasonable alternative to restricting or prohibiting revenue sharing agreements.

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[38] *See NPRM*, ¶¶ 32-35 (discussing the Commission's jurisdiction and statutory authority solely over cable/MVPD and telecommunications carriers, citing to Sections 201(b) and 628 of the Communications Act of 1934, as amended).

II. THE COMMISSION SHOULD PROHIBIT EXCLUSIVE WIRING AND MARKETING AGREEMENTS

The Commission has previously "recognized the importance of permitting some measure of exclusivity in other arrangements between MTE owners and providers, in order to encourage MTE owners, MVPDs, and telecommunications carriers to invest in infrastructure in the MTE and to lower costs for MTE residents."[39] As a result, the Commission has historically rejected requests to eliminate exclusive wiring and marketing agreements and continued to permit such agreements.[40] Now, the Commission seeks comment whether it should revisit its earlier decisions and requests additional feedback on the competitive impact of such agreements.[41]

Exclusive wiring and marketing agreements individually act as significant barriers to market entry and collectively serve as a *de fact*o exclusive access agreement because they compound the difficulties of competitive providers to gain entry to MTEs. Accordingly, the Commission should prohibit exclusive wiring and marketing agreements.

A. Exclusive Wiring Agreements Make Competitive Entry More Expensive And Often Operate As *De Facto* Exclusive Access Agreements

Exclusive wiring agreements also act as a market barrier for competitive providers because MTE owners/managers may not know which wiring is exclusive to a specific provider and therefore will prohibit access to all wiring – in-use, fallow, or abandoned – in fear of violating any exclusive agreement(s) with the incumbent.[42] In such instances, the incoming

[39] *NPRM*, ¶ 4.
[40] *See id.* (citations omitted).
[41] *Id.* at ¶ 26 (exclusive wiring agreements) and ¶ 7 (exclusive marketing agreements).
[42] Some WISPs reported experiencing very unfair equipment placement requirements compared to the telco/cable providers. Other WISPs have been kept out of MTEs, even when they were specifically contacted by the residents requesting service from the WISP (and the WISP offered much lower pricing to the resident). Another was refused access to existing cabling even in the absence of an incumbent operator.

competitive provider would need to rewire the building at its own expense[43] or walk away from the opportunity because it is too expensive and its costs cannot be recovered. Regrettably, there are no requirements for providers to clearly label wiring in a building, or to fully disclose to the MTE owner/manager what wiring does (or does not) belong to the provider. A WISPA survey respondent shared a recent example of a "nest of different wires/cables running in all directions," but the MTE owner/manager did not know who owned what and on that basis prohibited the provider's use of all wires/cables, even dark wire that ran into the WISP's designated telecom closet. This example illustrates a frequent problem for competitive providers – that access to a building with an exclusive wiring agreement will cost considerably more for competitive providers, even when existing wiring is not in use.[44]

Sale-and-leaseback agreements, which are subsets of exclusive wiring agreements, transfer wiring the incumbent provider has installed in a building to the MTE owner/manager, which then leases the wiring back to the incumbent provider under an exclusive wiring agreement.[45] The Commission's rules mandate that a cable/MVPD provider must "take reasonable steps within its control to ensure that an alternative service provider has access to the home wiring at the demarcation point" and to not "prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service."[46] However,

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[43] Rewiring a building when there is readily available wiring that can be used under the FCC's inside wiring rules unreasonably increases the cost of doing business. This means that competitive providers, especially small providers, have to spend more money to bring competitive services to an MTE. In turn, this affects the price of service, financing costs and ability to upgrade and enhance the network.

[44] WISPA survey respondents reported that incumbent providers have also installed wiring configurations that only benefit them, making it impossible for a competitive provider of any size to use wiring even after it has been abandoned or no longer in use. Although the incumbent provider may not be operating under an exclusive wiring agreement, the technical and practical impact is the same -- competitive providers are shut out. In other instances, WISPs have been refused access to existing cabling even in the absence of an incumbent provider.

[45] *NPRM*, ¶ 24.

[46] *Id.* at ¶ 25 (citing to 47 CFR 76.802(j)). This rule only applies to home wiring owned by the cable/MVPD provider. *See* 47 CFR 76.802(j) ("Cable operators are prohibited from using any ownership

sale-and-leaseback agreements modify the ownership of the wiring and thus make inside wiring leased back to the incumbent unavailable after a tenant terminates service or when the tenant is ready to change providers, contrary to the Commission's rules to allow access.

These agreements are clever contrivances designed to circumvent the protections afforded by the Commission's inside wiring regulations by creating a *de facto* exclusive access agreement acting under the guise of an exclusive wiring agreement.[47] They also create major financial obstacles for competitive providers, especially small providers that cannot afford to rewire the building when existing wire is not in-use and readily available. This anti-competitive impact on small providers is compounded by revenue sharing agreements and exclusive marketing agreements – when used in combination, competitive access to an MTE will not occur, to the detriment of consumers that may desire choice. The Commission should prohibit all exclusive wiring agreements, including sale-and-leaseback agreements that are often not labeled as such and are difficult to detect but create and ensure ongoing *de facto* exclusive access.[48]

interests they may have in property located on the subscriber's side of the demarcation point, such as molding or conduit, to prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service."). WISPA does not propose changes to the Commission's inside wiring rules in this proceeding.

[47] *See NPRM*, ¶ 25 and nn.104 and 106, (citing collectively to FBA NOI Comments at 13, INCOMPAS NOI Comments at 15 n.39; INCOMPAS NOI Reply Comments at 13; Lumos NOI Reply Comments at 6-7). *See also* Reply Comments of INCOMPAS, GN Docket No. 17-142 (filed August 22, 2019) at 14 ("These exclusive wiring agreements amount to an end run around the Commission's existing cable inside wiring rules, which were created to promote competition and consumer choice.").

[48] *See* Comments of the Fiber Broadband Association on the Notice of Inquiry, GN Docket No. 17-142 (filed July 24, 2017) at 12 ("As for wiring arrangements whereby a service provider sells its wiring to the MTE owner and then obtains exclusive lease-rights, they should be presumed prohibited unless the provider and MTE owner can demonstrate they are not anti-competitive.") ("FBA NOI Comments").

B. Exclusive Marketing Agreements Are Anti-Competitive, Have No Consumer Benefit, Operate As *De Facto* Exclusive Access Agreements, And Should Be Prohibited

In 2010, the Commission declined to regulate exclusive marketing agreements, finding that "exclusive marketing 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."[49] Curiously, the Commission states in the *NPRM* that "we do not revisit that conclusion at this time."[50] This conclusion appears to be contrary to the current administrative record, and ignores the fact that tenants ultimately bear the cost of MTE infrastructure deployment. The failure to revisit an outdated conclusion also contradicts the stated objective of this *NPRM* to "facilitate enhanced deployment and provide greater consumer choice for workers and residents of MTEs."[51]

In reaching its conclusion in 2010, the Commission explained that none of the commenters that sought regulation of exclusive marketing agreements "cite[d] any instance where marketing exclusivity has, in practical effect, excluded or hindered a competitor from entering an MDU."[52] This is not the case today. In a modern market where there are multiple providers, not the either-or choice between cable/MVPD and telecommunications companies, exclusive marketing agreements greatly impede entry *and* growth for competitive providers.[53]

[49] *NPRM*, ¶ 27.
[50] *Id.*
[51] *Id.* at ¶ 2.
[52] *2010 Exclusive Services Order*, *supra* note 18, 25 FCC Rcd at 2473 ¶ 36.
[53] More than 27 percent of the MTE Survey respondents stated that "Prohibited by exclusive marketing agreement with incumbent" was one of the reasons why WISPs are not serving MTE customers or not able to serve more MTEs. MTE Survey Summary. In response to the question, "What is your #1 problem," almost 7 percent listed "Prohibited by exclusive marketing agreement with incumbent." *Id.* Additional primary problems include WISP is "NOT a phone or cable company" (15.79 percent); "Prohibited by exclusive wiring agreement with incumbent" (7.89 percent); and "Other" (25 percent). The majority of individual responses for "Other" reported that there were few or no MTEs in the area or that the area was a small town.

Whatever benefits consumers may have once enjoyed from exclusive marketing agreements are far outweighed by the anti-competitive impact and unreasonable burden on consumers to seek out competitive providers when such providers are not allowed to advertise or market their services in the smallest way.[54] Not only are exclusive marketing agreements used more frequently to deter entry, the types of prohibited marketing or advertising has expanded. Exclusive marketing agreements traditionally prohibit marketing via materials or events in the lobby (e.g., pizza or donuts/coffee) and other common areas, door knob hangers, emails, newsletters from building owner/manager or other standard marketing tools.[55] Recently, exclusive marketing agreements also have prohibited a competitive provider's use of the building's name, address, and publicly-available photos of the building in any form of advertising or marketing to a tenant, even on the provider's own website.[56] Significantly, exclusive marketing agreements are aggressively enforced by incumbent carriers and therefore are a major market entry barrier for competitive providers.[57]

The real world impact of these restrictions means that tenants desiring a choice of providers or wishing to change service providers are totally unaware that a competitive provider

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[54] *See* Starry Comments at 3 ("Exclusive building marketing agreements, which in practice act like exclusive building access agreement, significantly hinder new broadband providers from providing service to MDUs and should be prohibited.") and at 6 ("And while Starry is fortunate to be able to address these challenges [of exclusive marketing agreements] head-on, they cost the company deployment time and financial resources and in some cases, our creative solutions cannot overcome the challenges posed by these agreements.").

[55] *See Holding Your Internet Hostage Article, supra* note 13.

[56] *See* Starry Comments at 5 (overly restrictive language and threatening tone leave building owners and managers with the impression that they will face litigation for simply allowing their residents a choice in internet providers").

[57] *See id*. (referring to typical scare tactics of incumbent providers using cease and desist letters that overstate the legal restrictions in the marketing agreements). In an example provided by a WISPA member, the incumbent cable provider sent a cease-and-desist letter to an MTE owner/manager of a community park in California because a WISP used a photo of the building taken from the public sidewalk to advertise its competitive services to the park via direct mail. Incumbent providers have also prohibited the use of Google photos, which are readily available to the public.

may be ready and willing to provide service to a particular building.[58] Mass media advertising (e.g., radio, TV, other media), as supported by the Commission in 2010 as an acceptable means to reach specific tenants,[59] is not, nor has it ever been, a realistic or cost-effective choice of marketing or advertising for small providers, especially those that provide service in a limited service area.[60] And under today's broad marketing restrictions, the competitive provider may not be able to identify where it provides service without a challenge by the incumbent. Instead, tenants must randomly contact a competitive provider to ask whether that provider can serve a particular address or building. This example, among many, illustrates how exclusive marketing agreements serve as *de facto* exclusive access agreements and should be prohibited.

Of major significance, there is increased confusion by MTE owners/managers that do not understand the limited scope of the marketing agreement or the specific terms, and simply follow the requests and demands of incumbent providers.[61] To help resolve or mitigate the issues with this practice, the Commission asks whether it should require disclaimers or other disclosures by

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[58] This includes prohibitions on marketing imposed by the MTE owner/manager on a competitive provider to inform other tenants in the building after the competitive provider has provided service to an individual tenant. *See* Lumos NOI Reply Comments, at 7 ("Most often, Lumos is prohibited from providing services beyond the initial tenant being served without the express authorization from the building owner and/or property manager. In other instances, this initial service restriction is combined with an additional prohibition on the marketing or advertising of its services to other tenants located within the MTE building.").

[59] *2010 Exclusive Services Order* at 2473 ¶ 35 ("MVPDs are still able to reach residents through many other channels such as television, mail, newspapers, billboards, and sponsorship of public events."); *id.* at ¶ 36 ("Neither does marketing exclusivity prevent or significantly hinder other MVPDs from reaching MDU residents via television, radio, and other media [or] deter MDU residents from subscribing to other MVPDs' services."). Significantly, the cease-and-desist letter mentioned above was for marketing via direct mail, one of the acceptable marketing vehicles that the Commission highlighted in 2010.

[60] *Id.* at ¶ 34 (citing to a small new entrant provider that argued that small new entrants cannot afford high-priced mass media advertising that large incumbent cable operators and LECs usually use, and a large LEC that stated that "one-building-at-a-time arrangements help a new entrant to overcome the greater name recognition of the entrenched incumbent cable operator").

[61] *See NPRM*, ¶ 27 (citing to FBA NOI Comments at 3); *see also* Lumos NOI Reply Comments at 7 ("the existence of [marketing exclusivity] agreements not only limits the manner in which competitive information is potentially distributed to tenants, but also has the potential to create confusion about what is and what is not allowed within the MTE Building").

carriers and covered MVPDs to "make[] clear that there is no exclusive access agreement and that customers are free to obtain services from alternative providers?"[62]

Imposing this disclosure requirement would not eliminate the negative impact of exclusive marketing agreements. As is the case with disclosure of revenue sharing agreements, no disclosure would be effective because MTE owners/managers and tenants may not fully understand exactly what "exclusive access" means. A disclaimer does not solve the problem that a tenant is unaware of a competitive provider's willingness to provide service to their building, or provide useful information how a tenant can contact that provider, or vice versa.

Any disclaimer and disclosure requirements would be ineffective as well as burdensome, especially for small providers that have limited human and financial resources.[63] Moreover, there are significant legal issues regarding who would be required to make such disclaimers. As stated previously, the Commission's express legal authority to require any disclosure does not extend to MTE owners/managers and only governs cable/MVPD and telecommunications providers under Titles VI and II, respectively.

III. EXCLUSIVE ROOFTOP ACCESS AGREEMENTS ARE ANTI-COMPETITIVE AND DETER BROADBAND DEPLOYMENT TO MTES AS WELL AS SURROUNDING COMMUNITIES

A. Exclusive Rooftop Agreements Foreclose Competition And Serve As *De Facto* Exclusive Access Agreements

The Commission seeks comment whether it should "increase competitive access to rooftop facilities, which are often subject to exclusivity agreements."[64] Like escalation clauses and sale-and-leaseback provisions, rules and practices that prohibit access to common rooftops effectively deny MTE tenants access to competitive services because new entrants cannot gain

[62] *NPRM*, ¶ 28.
[63] *See* Section I.B, *infra*.
[64] *NPRM*, ¶ 21.

access to the physical locations necessary to offer their services.[65] For example, a resident in an MTE may desire to receive broadband service from a provider that would like to place an antenna on the common rooftop to receive a fixed wireless signal. Accessing the rooftop would, in many cases, be a more aesthetically pleasing alternative than having the resident mount an individual antenna on its balcony or outer wall. It may also be easier for the competitive provider to access the facilities on the rooftop than at each residence. Further, access to rooftops can enable a fixed wireless provider to use the height of the building to overcome line-of-sight restrictions to provide service to consumers in nearby communities, buildings, and homes. Access to rooftops will be of particular benefit in suburban environments, where WISPs are increasingly offering competition to incumbent providers.

Moreover, there are cases where the MTE owner/manager or a homeowners' association may seek to leverage its gatekeeper power to deny access, even in the absence of an exclusive arrangement. Here again, competitive providers are victims of *de facto* exclusivity that create competitive imbalance and limit consumer choice. The Commission therefore should prohibit service providers from entering into exclusive rooftop access agreements.

B. Access To Distributed Antenna Systems ("DAS") Can Provide Competitive Entry To Wi-Fi Services And High Speed Broadband To Surrounding Communities And Therefore Access Should be Technology Neutral

According to the *NPRM*, certain commenters claim that fixed wireless providers or third party operators enter into "private agreements . . . for control over the deployment of wireless

[65] *See* Lumos NOI Reply Comments at 8 ("In Lumos' experience, these agreements can effectively be used to restrict, condition or deny competitive access to a MTE building's rooftop facilities even when such rooftop facilities can efficiently and safely accommodate multiple service providers."); *see also* INCOMPAS NOI Comments at 18 ("Rooftop exclusivity agreements . . . are fundamentally identical to wiring exclusivity agreements, they provide essentially no benefit to consumers."). Based on comments from its members, WISPs have been refused access for mounting gear particularly in MTE environments even where OTARD should have allowed it. Landlords do not want equipment in the common area, or "just doesn't want" our equipment there.

broadband service via [distributed access service ("DAS")] facilities," and that these fixed wireless providers and third party operators "benefit from private arrangements by charging 'monopoly rents' or otherwise restricting access to their facilities, to the detriment of competition and ultimately consumers."[66] To be clear, WISPA members are not engaging in these agreements and are not providing DAS. The *NPRM*'s references to "fixed wireless providers" as barriers to other wireless providers' access to DAS – at least to the extent such references could be read as referring to WISPs – is incorrect, and not supported by the comments cited in the *NPRM*.[67] DAS is primarily used by Wi-Fi providers (e.g., Boingo, ExteNet) and mobile wireless providers.[68]

That being said, access to DAS facilities is an increasingly important aspect of the competitive landscape and the Commission should take appropriate action to facilitate access. The harm to competition is greatest in the case of a single carrier that provides and operates DAS to reach tenants. As T-Mobile stated in response to this proceeding's Notice of Inquiry, "[o]ne of the most problematic aspects of typical DAS facilities is that they are often subject to agreements that limit access by competitive providers or put a wireless competitor in charge of the DAS system."[69]

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[66] *NPRM*, ¶ 22 (citing INCOMPAS, Sprint, and T-Mobile Comments).
[67] *Id.* T-Mobile only mentions the terms "wireless competitor," "competitive carrier," and "incumbent carrier" when referring to DAS. Reply Comments of T-Mobile USA, Inc., GN Docket No. 17-142 (filed Aug. 22, 2017) at 3-4 ("T-Mobile NOI Reply Comments"). Sprint refers to "another wireless carrier" and "DAS provider or another carrier." Comments of Sprint Corporation, GN Docket No. 17-142 (filed July 24, 2017) at 2. INCOMPAS refers to "national wireless carriers." INCOMPAS NOI Comments at 18. Lumos did refer to "fixed wireless communications providers" using rooftop exclusivity agreements, but did not specifically identify these entities as WISPs. *See* Lumos NOI Reply Comments at 8.
[68] In addition, the Commission's definition of DAS should not include external antennas and in-building wiring used by fixed wireless broadband internet access providers. *NPRM*, ¶ 23.
[69] *See* T-Mobile NOI Reply Comments at 4 ("One of the most problematic aspects of typical DAS facilities is that they are often subject to agreements that limit access by competitive providers or put a wireless competitor in charge of the DAS system."); *see also id.* at 3 and n.6 (noting other, less problematic, instances of DAS facility operation).

Access to DAS wiring controlled by a single carrier is problematic for all of the same reasons access to MTE wiring is generally difficult.

The Commission should not, however, limit access to DAS facilities to certain types of providers or technologies. WISPs have the capability to provide Wi-Fi to all common areas and support residential intranet services at the request of MTE owners/managers. Therefore, DAS rules should be technology-neutral and not deter competitive access based merely on the different types of wireless and fixed providers. And in facilitating access, the Commission must prohibit DAS operators from charging unreasonable, non-cost related fees for access to a DAS, especially when the DAS is provided by a wireless competitor.[70] Consistent with the Commission's more general MTE rules, competitors must also be granted full access to existing DAS wiring not currently in use and wiring that is shared. WISPs and other competitors can efficiently provide affordable Wi-Fi in MTEs without having to bear the additional cost of installing new redundant wiring in a building. WISPA also emphasizes that there is a significant difference between access to unused or shared DAS wiring facilitating Wi-Fi, as opposed to access to the Wi-Fi system itself (comprising routers and antennas). Only DAS wiring should be subject to access by competitive providers. The Wi-Fi system should be proprietary to the provider that installed it and subject to private negotiations. Limiting access to only DAS wiring as opposed to the full system should not cause any consumer harm because a competitive provider will provide its own antennas and other equipment if it has access to DAS wiring.

As discussed previously, technical and/or physical configurations for any rooftop wiring or antennas, including DAS, that are only compatible with the equipment of the incumbent

[70] *See* INCOMPAS NOI Comments at 18 ("Commercial and public venues are increasingly bestowing private access agreements on national wireless carriers and requiring that competitive carriers lease capacity on that carrier's facilities (which is often just a single DAS). These carriers benefit from these private access agreements by charging monopoly rents on access to their facilities.").

provider (even in the absence of a written agreement) serve as *de facto* exclusive access agreements and should similarly be prohibited.

IV. BULK BILLING CAN BE BENEFICIAL BUT IN CERTAIN CIRCUMSTANCES CAN HAVE AN ANTI-COMPETITIVE EFFECT

Unlike the *MTE NOI*, the *NPRM* does not seek comment on the benefits and harms of bulk billing agreements.[71] The *NPRM*, however, does request comment on whether combining revenue sharing agreements with other contractual agreements such as bulk billing, exclusive marketing or wiring agreements, affects competition and deployment within MTEs.[72] As a general proposition, WISPA believes that bulk billing agreements can be beneficial to providers, MTE owners/managers and tenants alike.[73] This is consistent with the Commission's findings in 2010.[74] Bulk billing typically helps lower costs of service for consumers by lowering transaction costs for providers, especially in low-income areas or buildings with a large percentage of tenants with fixed-income (e.g., senior and student housing). These are worthy consumer benefits.

However, under certain circumstances, bulk billing can act as a competitive barrier to new entrants, particularly when competition is limited by revenue sharing and *de facto* exclusive arrangements. A competitive provider that wishes to enter an MTE under a bulk billing arrangement can be at a major disadvantage. Bulk billing provides the incumbent with a lower

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[71] *MTE NOI*, *supra* note 12, at 5388 ¶ 13.
[72] *NPRM*, ¶ 18.
[73] *See, e.g.,* INCOMPAS NOI Comments at 12 ("Though bulk billing is an imperfect practice, INCOMPAS believes that the Commission should continue to allow it . . . for residential service only and when it is not otherwise used to exclude competitive options."); Hotwire Communications, LLC Comments, GN Docket No. 17-42 at 3 (filed July 24, 2017) ("Circumstances in the marketplace have not changed since the Commission concluded, in 2010, that 'bulk billing arrangements predominantly benefit consumers through reduced rates and operational efficiencies, and by enhancing deployment of broadband.'").
[74] *2010 Exclusive Service Contracts Order*, *supra* note 18, 25 FCC Rcd at 2465-67 ¶¶ 16-20.

cost of service and no monthly billing/payment hassle for the tenant, lowering transaction costs for the incumbent provider. Additionally, a tenant may not have the opportunity to opt out of a bulk billing agreement in order to engage with a new provider. WISPA understands that an opt-out option for tenants is a practice honored by some, but not all, MTE owners/managers. As a result, then, a tenant ultimately will pay for an incumbent's service even after switching to a competitive provider. On top of other restrictions competitors may face, bulk billing can act as yet another factor to diminish or even completely foreclose competition. The right to opt out of any bulk billing agreement should thus be available to all tenants to avoid having to pay for two service providers, and the Commission should require that service providers offering bulk billing arrangements do so if they also allow tenants to opt out.

If the Commission adopts WISPA's proposal to restrict revenue sharing agreements and prohibit *de facto* exclusive arrangements as described above, then the Commission will have taken significant steps to open access to MTEs to new entrants, which WISPA's proposed restriction on bulk billing will complement. But without eliminating other anti-competitive practices that often accompany bulk billing arrangements,[75] bulk billing can cause more harm than good and must be restricted as WISPA proposes.

V. MANY STATE AND LOCAL MANDATORY ACCESS REGULATIONS AND POLICIES ARE NOT TECHNOLOGY NEUTRAL AND ARE HARMFUL TO COMPETITIVE PROVIDERS THAT ARE NOT CABLE/MVPD OR TELECOMMUNICATIONS PROVIDERS

The Commission seeks comment on examples of State and local regulations or other policies that have successfully promoted broadband and those that have deterred broadband

[75] *See* INCOMPAS NOI Comments at 12 ("Specifically, INCOMPAS asks the Commission to state that providers should not be permitted to use bulk billing arrangements as a pretext to bar competition in all cases. Nor should providers be allowed to pair bulk billing with other anti-competitive arrangements – namely, wiring exclusivity.").

deployment and competition.[76] WISPA acknowledges that some mandatory access laws have been helpful to secure entry to smaller MTEs for some competitive providers, including some small WISPs.[77]

However, mandatory access laws also can hinder competitive entry for non-cable/MVPD and telecommunications providers because the vast majority of mandatory access laws grant access only to covered cable/MVPDs.[78] According to a study by the Commission's own staff, 13 of a total of 17 state mandatory access laws require access only for certain cable/MVPD providers.[79] The OEA Staff Report shows that only four of the total mandatory access laws apply to telecommunications providers, and none guarantee access for providers that are neither cable/MVPD nor telecommunications providers.[80] Only one State law mentioned in the OEA Staff Report would be considered to be technology neutral, and therefore, could be used by a broadband provider that operates on non-cable or non-telecommunications infrastructure.[81]

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[76] *NPRM*, ¶30.

[77] Monkeybrains *Ex Parte* Letter, *supra* note 20, at 3 ("Overall, [San Francisco] Article 52 revolutionized the situation in favor of tenants and small ISPs like Monkeybrains. Before Article 52 passed in 2016, we had a 0% rate of servicing 40+ unit MTEs with active revenue share agreements with larger, established companies. Since Article 52 passed, we have a 60% rate of servicing 40+ unit MTEs with active revenue share agreements without invoking Article 52, and a 75 percent rate after invoking Article 52. As one example, a building where we invoked Article 52 and now have dozens of customers paying $35/month and receiving over 100 Mbps symmetrical speeds is also a 100% below-market-rate building in the Mission Bay neighborhood. Article 52 is already keeping money in the pockets of working-class San Francisco families and will continue to do so as long as it is utilized.")

[78] A WISP approached several MTE locations and was told that MTE owners/managers were not interested because the WISP was not a phone or cable company. As substantiated by WISPA's survey, property managers do not want to take the time to talk to WISPs.

[79] *See* Steven Kauffman and Octavian Carare, OEA Staff Working Paper 49, *An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments, FCC Office of Economics & Analytics* (July 2019) at 3, Table 1: Mandatory Access Laws (MAL).

[80] *Id.*

[81] *Id*. at 3; *see also* Lumos NOI Reply Comments at 10 ("[T]hese same mandatory access laws have increasingly served only to preserve preferential treatment for cable service providers at the expense of new competitive entrants."); INCOMPAS NOI Comments at 21 ("[O]ver the years, this formulation [of mandatory access laws] has served to grant those cable operators special treatment over new entrants, with the potential for anti-competitive results."). Rhode Island is the only State mandatory access law in the country that governs access for information service providers, regardless of technology used. *See* RI

This is not surprising because State legislators penned mandatory access laws decades ago when only traditional cable providers provided video services to MTEs, and their intent was to help promote access by new entrant MVPDs and telecommunications providers. Today, these technology-specific mandatory access laws put non-cable and non-telecom providers at a major disadvantage.[82] In fact, WISPA's survey reports that the number three reason for denial of entry into an MTE is that the WISP is not a phone or cable company.[83] Statutory provisions predicated on a binary choice of either cable/MVPD or telecommunications have outlived their purpose and now act to foreclose competitive choice that can be offered by providers that do not fall within these antiquated classifications.

Although the Commission recognized more than two decades ago how the anti-competitive effects of "discriminatory local mandatory access statutes can operate to hinder the growth of alternative distribution services,"[84] WISPA is not at this time asking the Commission to preempt State or local laws that provide only certain providers with mandatory access rights. Instead, WISPA requests that the Commission, at a minimum, encourage States and municipalities to modify current mandatory access laws *and* make any new mandatory access laws technology neutral and not dependent on whether the provider is a Title II or Title VI entity.[85] States and municipalities that have mandatory access laws should not create special

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Gen. Laws Ann. § 39-19-10 (governing installation of cable television, telephone, telecommunications or information service in multiple dwelling or commercial units).

[82] *Id.*

[83] MTE Survey Summary. The top obstacle to WISPA members is that a property owner/manager refused to deal or to speak to the WISP (34.21 percent of respondents). This problem is also related to a lack of mandatory technology-neutral access laws.

[84] *Telecommunications Services Inside Wiring et al.,* First Order on Reconsideration and Second Report and Order, CS Docket No. 95-184, 18 FCC Rcd 1342, 1357, ¶ 36 (2003).

[85] In 2003, the Commission stated that it would "urge states and municipalities that have mandatory access laws to carefully consider the level of effective competition among MVPDs in the MDU market place, and if competition is found to be lacking, to determine whether a repeal or reform of such laws might enhance such competition and thereby benefit consumers." *Id.* at 1358, ¶ 39.

rights for certain categories of providers at the expense of others merely based on regulatory classification that has been rendered arbitrary by the passage of time.

WISPA also understands that not all States or municipalities have mandatory access laws, and that the barriers imposed by mandatory access laws are not universal. Where those laws exist, however, the barriers they impose are far reaching and the Commission should take any State- and local-imposed market entry barriers into account when evaluating MTE competition and consumer choice today, recognizing that "even if competitive access is available in some MTEs, competitive carriers may be unable to succeed economically, and thus offer competitive choices to any customers, without broad access to MTE markets."[86]

To this end, WISPA supports technology-neutral mandatory access laws that require access by all providers to the building or property overall. The competitive provider would then be required to install its own wiring, systems and equipment in order to provide service, unless existing wiring was not in-use.

VI. THE COMMISSION SHOULD SEEK FURTHER COMMENT ON OTHER CONTRACTUAL PROVISIONS AND BUSINESS PRACTICES THAT UNREASONABLY BAR ENTRY TO MTES

The Commission seeks comment on other contractual provisions and non-contractual practices that impose market entry barriers for competitive providers.[87] As informed by WISPA's members, there are several that deny access to competitive providers and deter broadband deployment:

- *Arbitrary limitation by a building owner/manager on the number of providers in a building (e.g., no more than three (3) providers).* The benefits of increased price and

[86] *Promotion of Competitive Networks in Local Telecommunications Markets, et al.*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 22991, ¶ 12 (2000).
[87] *NPRM*, ¶ 29.

service competition far outweighs the administrative burden, if any, on an MTE owner/manager.[88]

- *Delays in negotiations/discussions by MTE owner/manager with competitive provider based on reports that fiber is coming to the area, or other misconceptions about available technology.* Such reports may or may not be substantiated. Moreover, it could be years before fiber is actually deployed for service, which puts tenants at a disadvantage by not having competitive choice today.

- *MTEs managed by regional or national companies often have Master Service Agreements with an incumbent cable/telco for multiple properties.* According to WISPA members, MTE owners/managers do not want to deal with small local providers for individual properties.

WISPA understands that, given the scope of the *NPRM*, the Commission may not be able to address all of the above-mentioned barriers to entry in this proceeding. Accordingly, WISPA respectfully requests that the Commission adopt a further notice of proposed rulemaking so that these important issues may be fully considered. Such further notice should seek comment on WISPA's arguments against these practices and explore their impact on competitive entry to MTEs.

[88] Some MTE owner/managers limit the number of providers to the incumbent provider because they do not feel the tenants need more options.

Conclusion

WISPA respectfully requests the Commission to take action in this docket consistent with the views expressed in the Comments.

Respectfully submitted,

WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION

By: */s/ Louis Peraertz*
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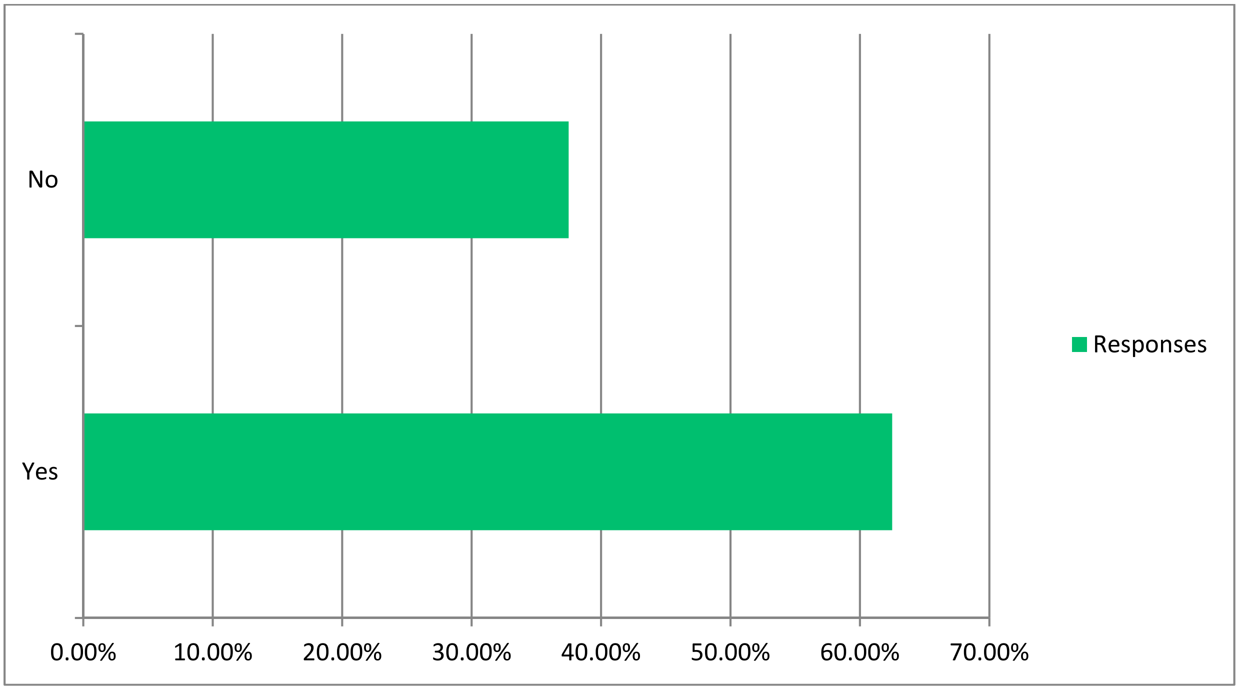
August 30, 2019

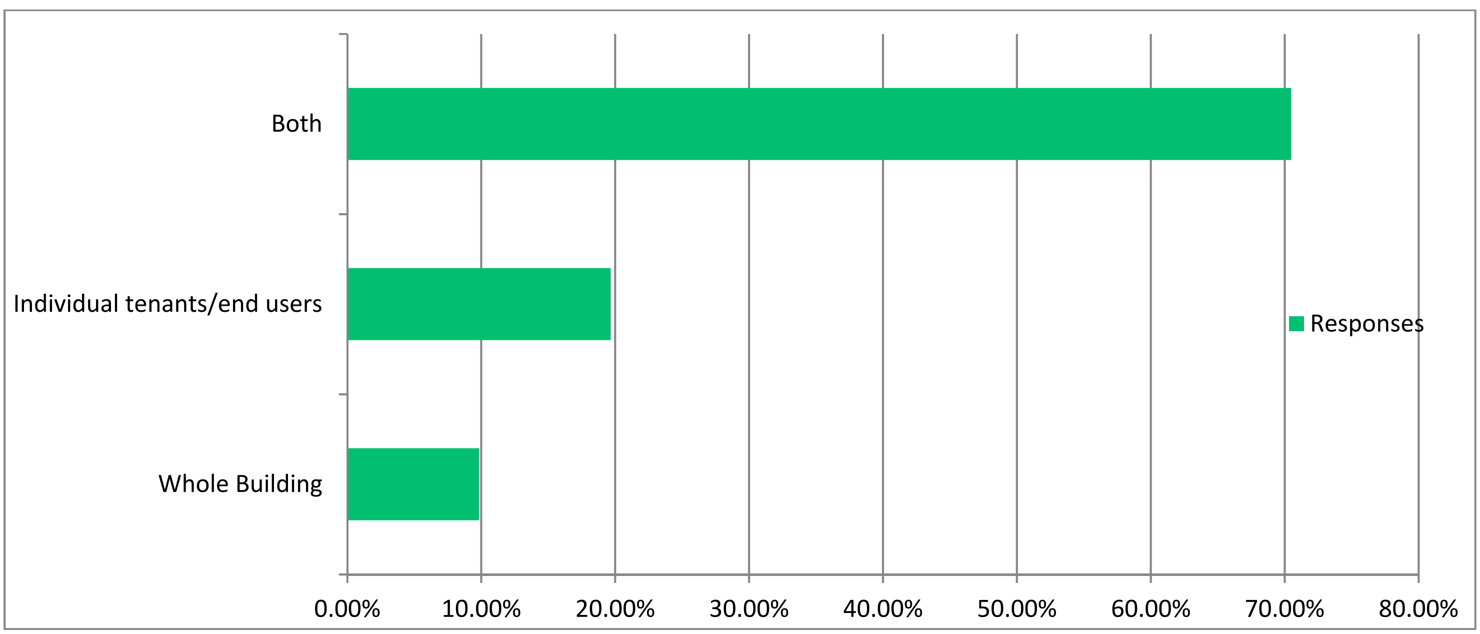
Appendix A

SURVEY QUESTIONS FOR MTE DEVELOPMENT ACCESS
GN DOCKET NO. 17-142

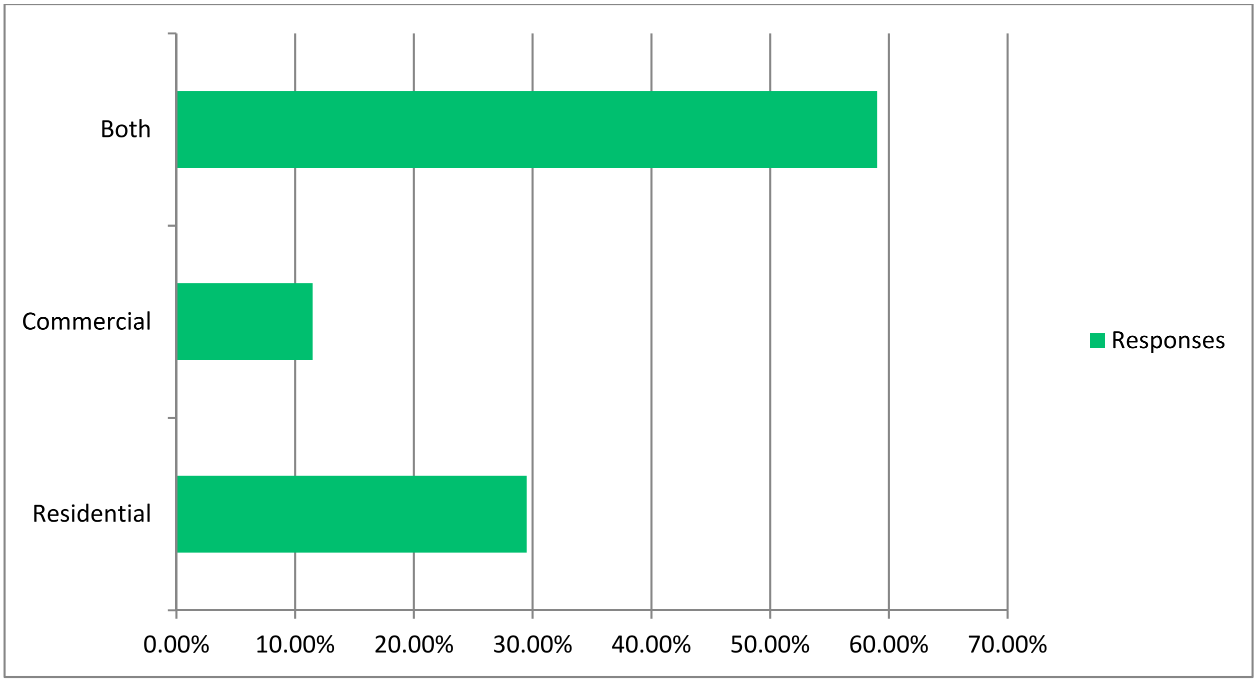
Do you currently provide Wi-Fi to MTEs?



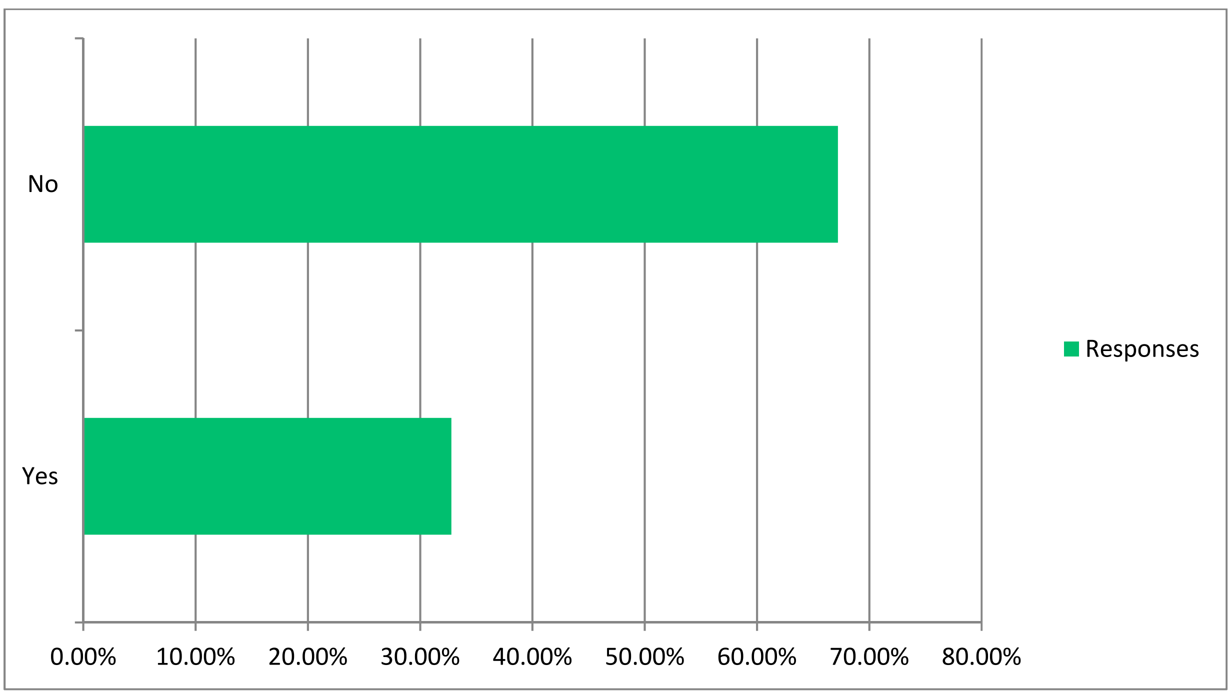
If you provide BIAS, what/who do you serve?



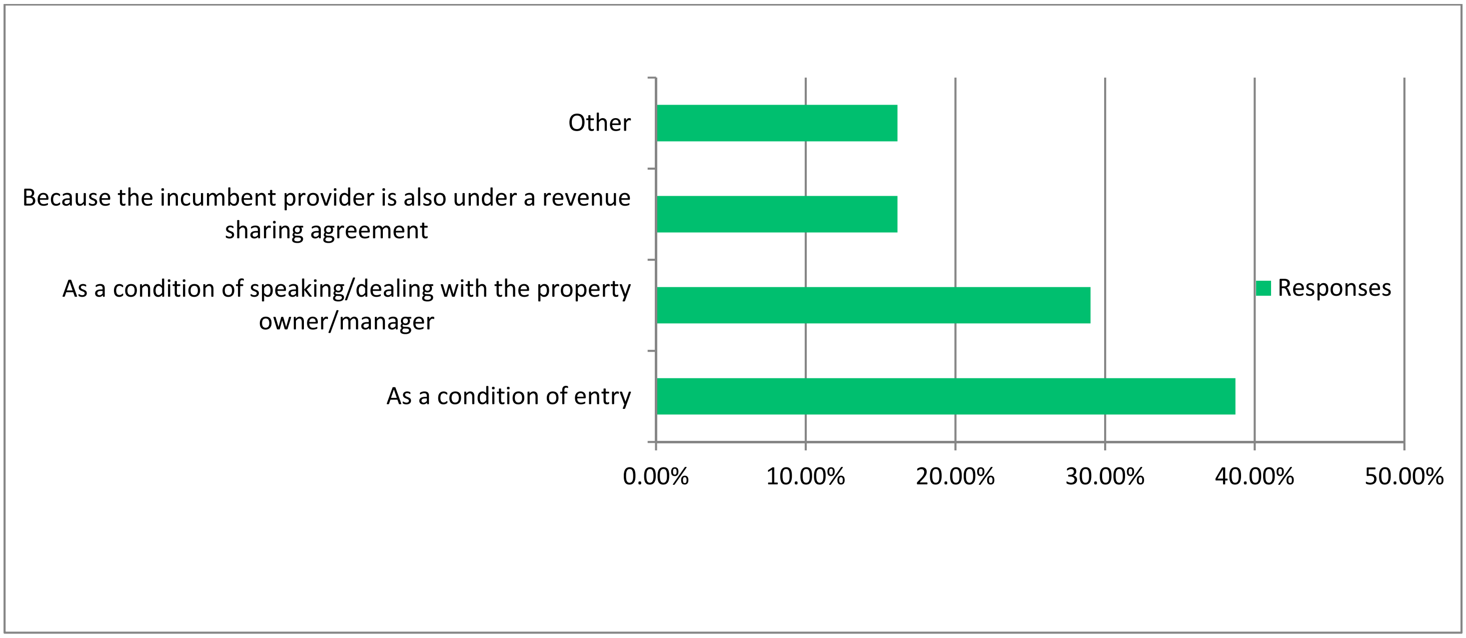
Who are your current tenants/end users?



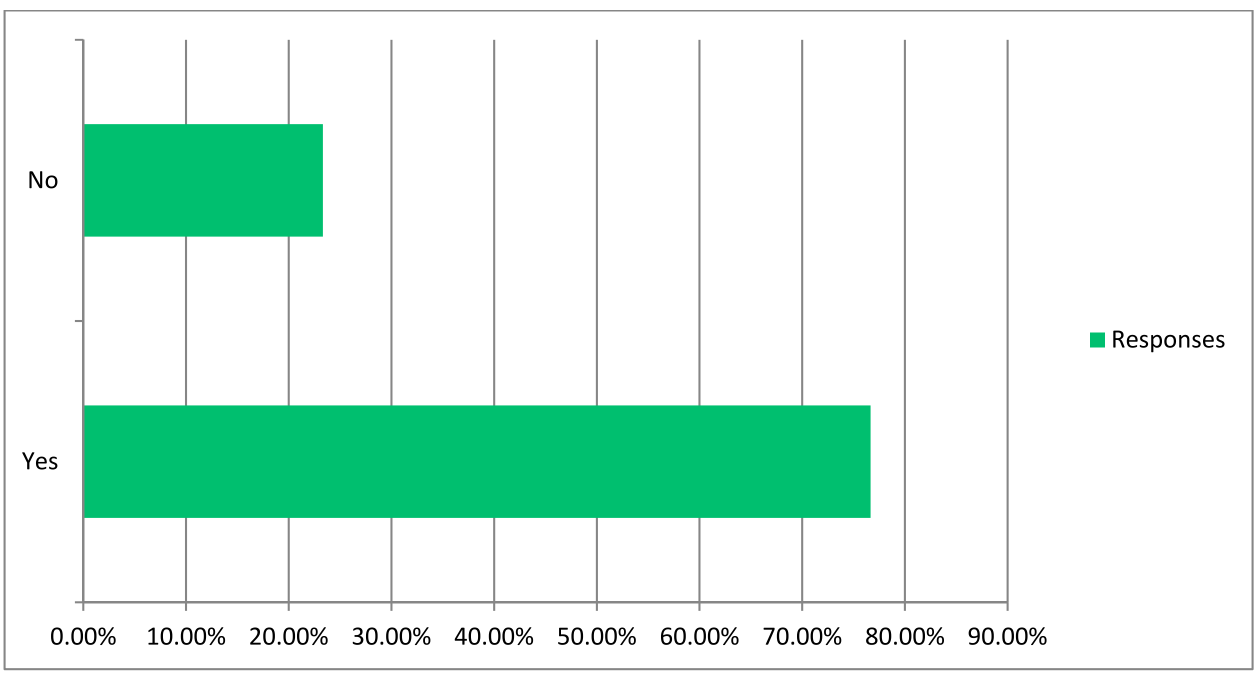
Are you currently engaged in a revenue sharing agreement with the MTE property owner/manager?



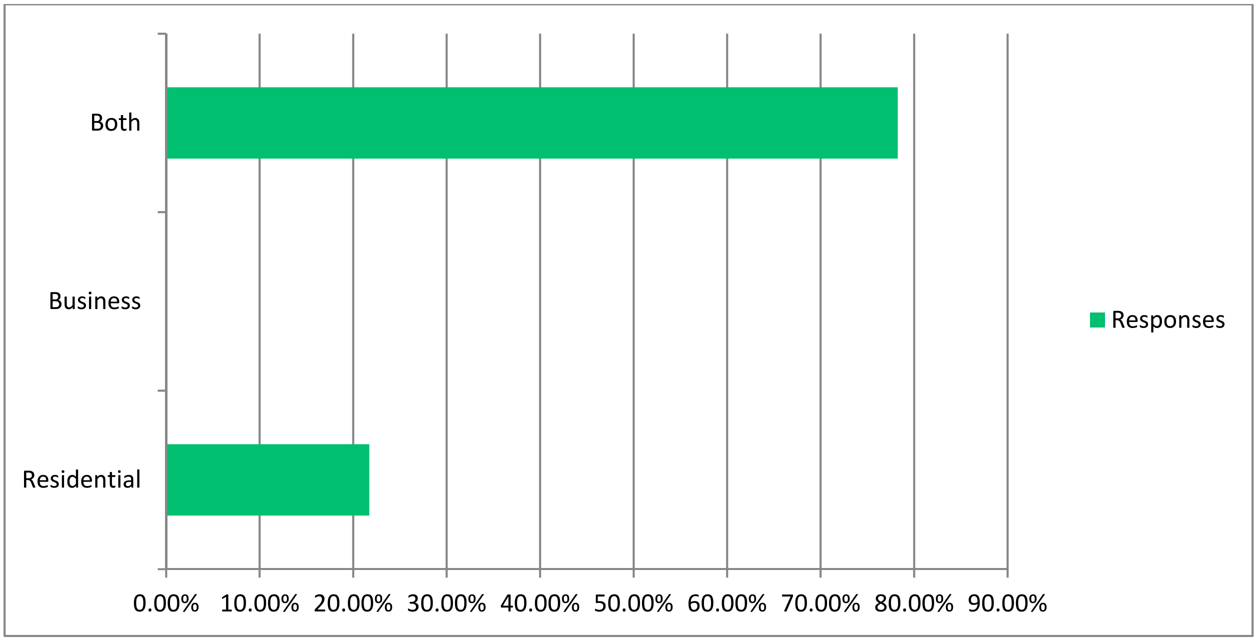
Were you required to enter into a revenue sharing agreement for any of the following reasons? [Please check all that apply.]



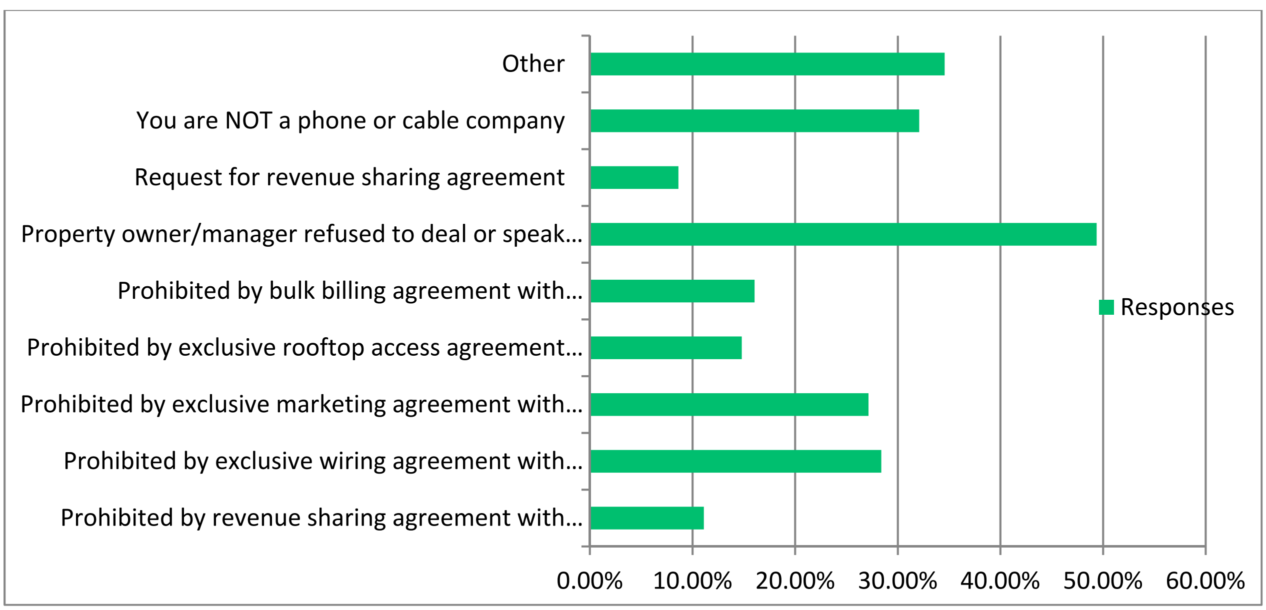
If you are NOT currently providing BIAS service to MTEs, are you interested in providing service to MTEs?



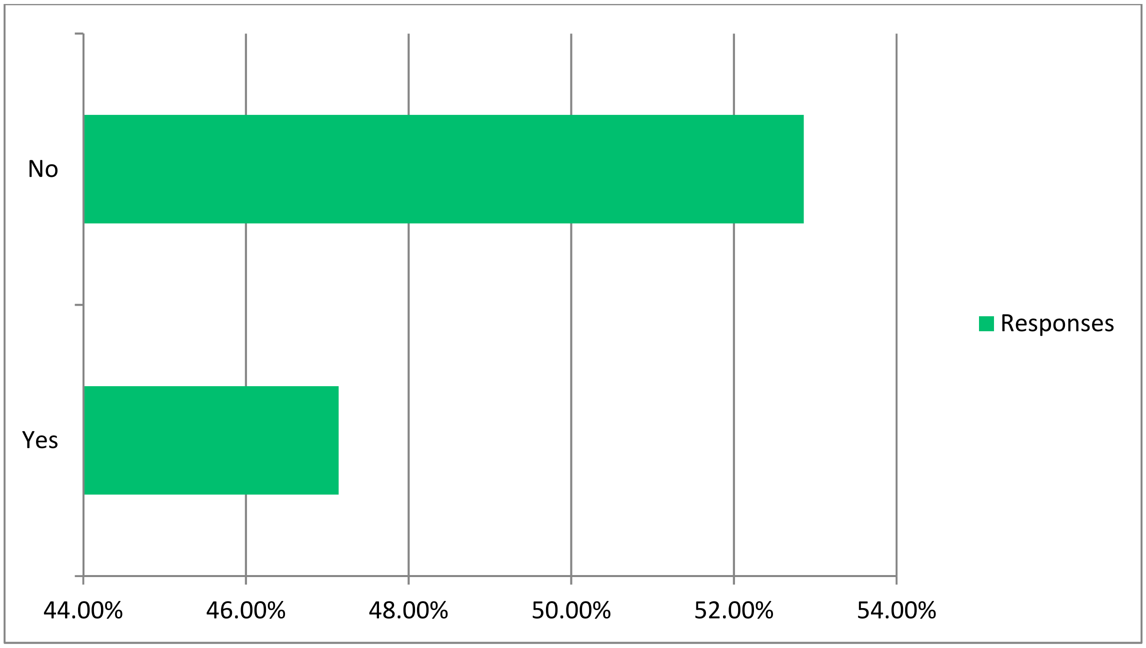
Who are your intended customers?



What are the reasons you are NOT serving MTE customers or NOT able to serve more MTEs? [Please check all that apply.]



Have you ever been denied entry based on other agreements or circumstances?



Does your service area have a “mandatory access” law, which is a statute, regulation, or ordinance that requires a competitive carrier’s access to a building and/or a tenant’s wiring and the opportunity to provide service in the building?