

**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

**REPLY COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

Louis Peraertz, Vice President of Policy

Stephen E. Coran
S. Jenell Trigg
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
*Counsel to the Wireless Internet Service Providers
Association*

September 30, 2019

Table of Contents

Summary iii

Discussion 3

I. UPDATING THE COMMISSION’S MTE ACCESS RULES WILL PROMOTE DEPLOYMENT OF AFFORDABLE BROADBAND SERVICE AND HELP BRIDGE THE DIGITAL DIVIDE 3

II. THERE IS AMPLE EVIDENCE IN THE RECORD TO JUSTIFY THE COMMISSION’S PROHIBITION OF ANTI-COMPETITIVE REVENUE SHARING AGREEMENTS AND BEHAVIOR..... 7

 A. Some Forms Of Revenue Sharing Agreements Cause Consumer Harm And Prevent Or Delay Deployment For Competitive Providers 7

 B. The Commission Must Prohibit Non-Cost-Based Revenue Sharing Agreements That Are Unreasonable And Not Justified By The Real Estate Industry 11

III. THE COMMISSION MUST PROHIBIT EXCLUSIVE MARKETING AGREEMENTS THAT HARM COMPETITIVE CARRIERS AND CONSUMERS 13

 A. The Commission Must Address Confusion And Deliberate Actions By Some MTE Owners Regarding Interpretation of the Commission’s Prohibition Of Exclusive Access Agreements 13

 B. The Record Clearly Illustrates That Exclusive Marketing Agreements Are Anti-Competitive And Should Be Prohibited 15

IV. THE COMMISSION MUST PROHIBIT EXCLUSIVE WIRING AGREEMENTS THAT ARE BEING USED TO DENY OR DELAY COMPETITIVE BROADBAND DEPLOYMENT AND SERVICE 16

 A. Exclusive Wiring Agreements Provide Anti-Competitive Preferred Treatment And Exclusive Rights For Incumbent Providers 16

 1. Prohibiting exclusive wiring agreements does not require mandatory sharing of MTE wiring nor would it prevent the ability to repair or maintain an MTE’s wiring or facilities 17

 2. Exclusive wiring agreements must be prohibited because they unreasonably prevent, deny and delay MTE service by competitive providers..... 19

B.	Prohibiting Exclusive Wiring Agreements Will Eliminate The Anti-Competitive Impact Of Such Agreements When Combined With Other Preferred Or Exclusive Benefits	21
V.	PROPOSED CONSUMER DISCLAIMERS AND DISCLOSURES IN LIEU OF REGULATORY ACTION ARE INEFFECTIVE, UNREASONABLE AND IMPOSE UNNECESSARY BURDENS ON PROVIDERS	23
VI.	NON-EXCLUSIVE ROOFTOP ACCESS HELPS BRIDGE THE DIGITAL DIVIDE BY EXPEDITING THE DEPLOYMENT OF BROADBAND, WI-FI, DAS, AND 5G TECHNOLOGY	26
A.	Non-Exclusive Rooftop Access For Broadband Services Is Critically Important For Reaching Low-Income And Other Underserved Communities	27
B.	The Record Supports Prohibiting Exclusive Rooftop Access Agreements That Prevent The Deployment Of Competitive DAS, 5G And Future Technologies	28
VII.	THE COMMISSION SHOULD ADOPT ADDITIONAL RECOMMENDATIONS THAT FOSTER INCREASED DEPLOYMENT, OR ALTERNATIVELY SEEK FURTHER PUBLIC COMMENT.....	31
	Conclusion	33

Summary

The administrative record in this proceeding reflects strong support for Commission regulation to promote deployment of affordable broadband service in multi-tenant environments (“MTEs”). The Wireless Internet Service Providers Association (“WISPA”) and many other commenters support Commission action to minimize the effects of several long-standing barriers to entry and growth for competitive providers. Regulatory action is necessary to fulfill the Commission’s objectives to (1) promote broadband access for the millions of Americans who live and work in MTEs but lack access to affordable broadband services; (2) encourage facilities-based broadband deployment and competition in MTEs, and as a result; (3) promote competition in the video distribution market and for other communications services. Moreover, assessing and eliminating regulatory and demonstrated marketplace practices that serve as barriers to entry and growth, especially for small providers, serve the public interest and is authorized by the RAY BAUM’S Act. This statute re-codified and expanded the provisions of Section 257 of the Communications Act of 1934, as amended, to require the Commission to consider market entry barriers for entrepreneurs and other small businesses in the communications marketplace in accordance with the national policy under Section 257(b).

WISPA, fiber, wireless and fixed wireless providers, as well as public advocacy and consumer-oriented commenters, demonstrate that Commission regulation to prohibit non-cost-based revenue sharing agreements, exclusive marketing and wiring agreements, and certain types of exclusive rooftop agreements are necessary to foster increased competition in MTEs. The vast majority of commenters (including commenters that oppose any limitations on revenue sharing agreements) agree that transparency disclaimers or disclosures would be ineffective and

would not benefit consumers. WISPA and several commenters also explain why any disclaimer or disclosure could unreasonably burden providers of all sizes, especially small providers.

Opposition to Commission intervention comes primarily from real estate industry owners and managers, and the cable industry. Both of these groups argue that the MTE marketplace is working and that there is no need to change the status quo. This opposition is not surprising because cable operators in particular have enjoyed incumbency, if not monopoly, status in MTEs for decades and continue to receive preferential treatment from the real estate industry as well as from majority of State mandatory access laws regarding MTE deployments. Commenters demonstrate that real estate industry owners and managers have received compensation for their investments in broadband infrastructure in MTEs and often demand various forms of additional non-cost-based revenue to add to their bottom line. The record also documents that non-cost-based revenue payments, whether they are used as incentives from providers *to* MTE owners or demanded *by* MTE owners from providers to secure access to MTEs, are anti-competitive for new and small providers seeking to deploy service in MTEs.

Many commenters, including real estate associations that represent condominium and homeowner associations, agree with WISPA that there are concerns about the anti-competitive impact of exclusive marketing agreements, especially when used combination with revenue sharing and exclusive wiring agreements. The record further illustrates that incumbent provider efforts to enforce exclusive marketing agreements that exclude competitive providers from access to MTE tenants in any manner can be egregious, can harm consumers and competitive providers alike, and can lead to results that are inconsistent with the Commission's objectives to foster deployment and bridge the digital divide.

In sum, now is the time for the Commission to take immediate and meaningful measures to promote technology-neutral competition in MTEs of all sizes and in all locations.

(“MTEs”) of all sizes and geographic locations, support the status quo.⁴ Conversely, new entrants and competitive providers (such as WISPA’s members who predominantly use fixed wireless technologies), fiber providers and even a large national telecommunications company overwhelmingly request the Commission to take immediate action to prohibit the anti-competitive behavior that has been documented in this proceeding record since 2017, and over many decades in previous proceedings.⁵ The record favors a regulatory solution to this problem.

Likewise, the views of the real estate industry are also mixed and generally split into two camps: one that represents MTE owners and managers and the other that represents condominium and homeowner associations (i.e., residents and consumers). On one hand, MTE owners/managers wish to maintain the status quo and preserve the benefits of their longstanding and cozy relationships with incumbents. Their positions largely align with those of the cable

⁴ Comments of NCTA – The Internet & Television Ass’n, GN Docket No. 17-142 (filed Aug. 30, 2019) (“NCTA Comments”) at 11 (“[T]he marketplace to provide services to MTEs is competitive and working efficiently, and the Commission should therefore allow market forces to continue to ensure the arrangements that provide the greatest benefits to MTE residents and tenants.”); *see also* Comments of the Wireless Infrastructure Ass’n, GN Docket No. 17-142 (filed Aug. 30, 2019) (“WIA Comments”) at 13 (“[T]he Commission should stay its current course [of light-touch regulatory approach] and avoid unintended consequences by refraining from imposing additional regulations on network deployment in MTEs.”).

⁵ *See* Comments of Wireless Internet Service Providers Ass’n, GN Docket No. 17-142 (filed Aug. 30, 2019) (“WISPA Comments”) at 5 (“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.”); Comments of The Fiber Broadband Ass’n, GN Docket No. 17-142 (filed Aug. 30, 2019) (“FBA NPRM Comments”) at 3 (“Given the continued existence of deployment barriers, FBA commends the Commission for reviving its efforts to accelerate the deployment of next-generation networks and services within MTEs and urges it to act expeditiously in doing so.” (quotations removed)); Comments of CenturyLink, GN Docket No. 17-142 (filed Aug. 30, 2019) (“CenturyLink Comments”) at 2 (“In recent years, CenturyLink has increasingly encountered unreasonable access fees and other serious impediments to serving MTEs, including refusals to allow on-net access. These practices violate the spirit, if not always the letter, of the Commission’s rules. Given these trends, CenturyLink believes that Commission action is both appropriate and necessary to ensure that property owners and service providers act in the best interest of those who live and work in MTEs.”); and Comments of INCOMPAS, GN Docket No. 17-142 (filed Aug. 30, 2019) (“INCOMPAS NPRM Comments”) at 8 (citing to INCOMPAS’ efforts since 1997 to address barriers to entry in the MTE marketplace).

industry incumbents that seek to fully preserve revenue sharing agreements, exclusive wiring and marketing agreements, and rooftop exclusivity.⁶ On the other hand, the MTE consumer-oriented associations are less supportive of certain types of agreements between MTEs and providers and express concern over the anti-competitive contractual provisions and practices that impact consumer choice and competition. This acknowledgment affirms WISPA’s assertion that the MTE marketplace is not working. The Commission should take decisive action to make MTEs more accessible and to prevent the longstanding discriminatory practices in the industry in order to promote deployment of competitive broadband and other services at affordable prices.

Discussion

I. UPDATING THE COMMISSION’S MTE ACCESS RULES WILL PROMOTE DEPLOYMENT OF AFFORDABLE BROADBAND SERVICE AND HELP BRIDGE THE DIGITAL DIVIDE

As the Commission has stated, “[s]upporting the deployment of 5G and other next-generation wireless services through smart infrastructure policy is critical. . . . Removing barriers can also ensure that every community gets a fair shot at these deployments and the opportunities they enable.”⁷ To help advance this goal, WISPA’s members are working to deploy 5G and other advanced technology,⁸ while at the same time focusing on ensuring that those Americans

⁶ Joint Comments of The Nat’l Multifamily Housing Council, The Nat’l Apartment Ass’n, The Int’l Council of Shopping Centers, The Institute of Real Estate Mgmt., Nareit, The Nat’l Real Estate Investors Ass’n, and The Real Estate Roundtable, GN Docket No. 17-142 (filed Aug. 30, 2019) (“Real Estate Ass’ns NPRM Comments”) at 2 (“The Real Estate Associations strongly oppose the proposals set forth in the *NPRM*. They are unnecessary and unwise.”); and Comments of RealtyCom Partners, GN Docket No. 17-142 (filed Aug. 30, 2019) (“RealtyCom NPRM Comments”) at 6 (“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.”). Collectively, the two aforementioned commenters are called “The Real Estate Industry Commenters.”

⁷ *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, et al.*, WT Docket No. 17-79, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9089 ¶ 2 (2018).

⁸ See e.g., Comments of Common Networks, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019) (“Common Networks Comments”) at 1-3.

across the country that currently have “no G” – regardless of the type of structure they live or work in – are also part of the digital economy.⁹ Importantly, the significant growth of new competitors in local broadband service markets since 2014 “is coming from service providers who use fixed wireless technology to deliver broadband service to that block, either in tandem with wireline service delivery, or as ‘pure’ fixed wireless technology ISPs.”¹⁰

Other commenters also illustrate that anti-competitive agreements and behavior regarding MTEs foreclose consumer access to new technology and other upgrades.¹¹

The Commission’s priority objectives for this specific proceeding are to (1) “promote broadband access for the millions of Americans who live and work in MTEs” but lack access to affordable broadband services; (2) “encourage facilities-based broadband deployment and competition in MTEs,” and as a result; (3) “[promote] competition in the video distribution market and for other communications services.”¹² WISPA

⁹ See The Carmel Group, *Ready for Takeoff: Broadband Wireless Access Providers Prepare to Soar with Fixed Wireless* (2017), http://www.wispa.org/Portals/37/Docs/Press%20Releases/2017/TCG's_2017_BWA_FINAL_REPORT.pdf (last visited Sept. 26, 2019) at 8 (“Without [fixed wireless providers], America’s broadband gap already would be much larger.”). It is well documented that fixed wireless technology can be deployed at a much faster rate and at considerably less cost than traditional technologies. *Id.* at 12-13.

¹⁰ Kenneth Flamm and Pablo Varas, *Quality Competition at the Competitive Margin in US Residential Broadband Markets* 13 (Unpublished working paper presented at the 47th Research Conference on Communications, Information, and Internet Policy, Sept. 20, 2019), <https://ssrn.com/abstract=3427582> (last visited Sept. 26, 2019) (“Flamm and Varas TPRC 2019 Paper”).

¹¹ Comments of Competitive Carriers Association, GN Docket No. 17-142 (filed Aug. 30, 2019) (“CCA Comments”) at 3-4 (“[E]xclusivity agreements between individual providers and building owners or building management firms may restrict the ability of other providers to attach to an existing DAS or deploy their own coverage solutions [and] . . . even when they are permitted to access existing networks, those existing networks may be outdated, yet new entrants are prohibited from implementing their own upgrades.”); CenturyLink Comments at 3 (“[A]bsence of competitive choice, in turn, may diminish the preferred provider’s incentive to upgrade service in the MTE, at least during the term of the preferred provider arrangement.”); See Comments of Sprint Corporation, GN Docket No. 17-142 (filed Aug. 30, 2019) (“Sprint NPRM Comments”) at 10 (“Exclusive contracts for DAS access have already materially hindered wireless broadband deployment, and as the nation’s carriers transition to 5G, the effects will only get worse.”).

¹² *NPRM* at 5703 ¶ 2.

and several other commenters support these three laudable goals. For example, Starry, Inc. stated that competitive access to MTEs is an “overriding public interest.”¹³ As Adtran recognized, “the Commission should consider robust and ubiquitous broadband as a loadstar” and noted that “broadband competition as a means of spurring broadband deployment is embedded in the Communications Act.”¹⁴ Uniti Fiber recognizes “that broadband deployment is facilitated by enhanced competition and reduced barriers to investment.”¹⁵

It is very clear from the record that each of these three important objectives can be furthered in this one proceeding but only if the Commission takes affirmative and decisive action now to prevent the decades-old anti-competitive behavior that continues to stifle access and growth in broadband service to MTEs.

Notwithstanding the benefits that would stem from rule changes, the Real Estate Associations claim that the *NPRM* is based on flawed premises¹⁶ and that the Commission does not understand how the industry works.¹⁷ It complains that only a few disgruntled new competitive fiber providers claim anti-competitive behavior and now seek government assistance when their own business plans are insufficient, when they have not demonstrated demand for their services or they are unable to work cooperatively with MTE owners/managers.¹⁸ The extensive record in this proceeding belies this self-serving view.

The record shows that experienced and successful competitive carriers, who are deploying various technologies – not just fiber – and have longstanding mutually-beneficial

¹³ Comments of Starry, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019) (“Starry NPRM Comments”) at 3.

¹⁴ Comments of Adtran, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019) (“Adtran Comments”) at 2.

¹⁵ Comments of Uniti Fiber, GN Docket No. 17-142 (filed Aug. 30, 2019) (“Uniti Comments”) at 1.

¹⁶ Real Estate Ass’ns NPRM Comments at 19.

¹⁷ *Id.* at 18.

¹⁸ *See id.* at 19.

working relationships with many MTEs have demonstrated there are ongoing obstacles to entering other MTEs that have nothing to do with business plans or demand.¹⁹ In fact, the very reason that some providers approach an MTE is because of consumer demand – a consumer has requested a new competitive service other than the sole option offered by the MTE. And the size of the provider does not matter when it comes to MTE obstacles to entry. Providers ranging from large national providers to small new entrants have raised issues regarding the anti-competitive nature of all types of exclusivity agreements.²⁰ Clearly, the myopic view of the real estate industry does not reflect marketplace reality.

WISPA emphasizes that the tremendous growth in the broadband industry since 2014 is due to the emergence of fixed wireless broadband providers.²¹ Major technical improvements in the delivery of fixed wireless broadband to the home, business, community anchor institutions and other structures are a direct cause of significant entry into local broadband markets.²²

¹⁹ See e.g., Starry NPRM Comments at 5 (“[I]f a company is able to finance the construction of a network, build a business and brand focused on providing quality service to customers, and develop relationships with building owners to bring new competitive service to their buildings, that new entrant should not be stymied by anti-competitive contract provisions that exist solely as barriers to entry.”); Common Networks Comments at 5 (“Common’s graph-based network extends coverage to residences within its service footprint at 1/50th of the cost it would take to extend fiber to these residences. Yet, even with this cost advantage, door fees and revenue sharing demands often make it cost prohibitive for Common to access customers in many MTEs. . . . Despite Common’s cost advantage, incumbents with deeper pockets can offer revenues shares that far exceed the MTE’s cost of providing service and far exceed what smaller competitive providers can offer.”); CenturyLink Comments at 5-6 (stating that “[i]n recent years, CenturyLink has encountered three worrisome and growing trends when trying to fulfill requests for service in MTEs: excessive access fees, MTE owners and tenants that are misinformed about their rights and responsibilities under applicable preferred provider arrangements, and MTE owners that prohibit on-net service except by their preferred provider.”).

²⁰ Comments of T-Mobile USA, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019) (“T-Mobile Comments”) at 14 (“The Commission should apply this prohibition [in current regulations] against exclusivity agreements to all providers under its jurisdiction and to all agreements that restrict others’ access, whether explicitly or implicitly though the inclusion of onerous terms and conditions or unreasonable fees.” (citing to 47 C.F.R. §§ 76.200 and 64.2500)); CCA Comments at 3-4; and WISPA Comments at 11-12.

²¹ See Flamm and Varas, TPRC 2019 Paper at 13.

²² See *id.* at 5; see also Carmel Group Report at 5 (noting that fixed wireless speeds are increasing and can support Gigabit download speeds).

Many commenters, including public advocacy organizations and consumers recognize that the Commission’s efforts to foster competitive and affordable broadband service in MTEs have fallen far short. Public Knowledge and New America’s Open Technology Institute stated that the Commission’s past attempts to promote competitive access to MTEs have not been “beneficial for customers . . . and anti-competitive arrangements between MTE owners and BIAS providers remain problematic.”²³ One apartment resident expressed great frustration that his provider of choice, a small ISP with great service and affordable rates, was unceremoniously replaced by the MTE owner/manager with a larger ISP with lesser service and considerably higher rates.²⁴ He blames the Commission’s failure to prevent “MTEs’ use of anticompetitive techniques” such as exclusive wiring agreements.²⁵

II. THERE IS AMPLE EVIDENCE IN THE RECORD TO JUSTIFY THE COMMISSION’S PROHIBITION OF ANTI-COMPETITIVE REVENUE SHARING AGREEMENTS AND BEHAVIOR

A. Some Forms Of Revenue Sharing Agreements Cause Consumer Harm And Prevent Or Delay Deployment For Competitive Providers

Not surprisingly, the Real Estate Industry Commenters do not support restrictions on revenue sharing agreements.²⁶ They offer various reasons why such restrictions would be unreasonable, including unsupported claims that revenue sharing agreements “cause no actual harm”²⁷ to either providers or subscribers, and that regulation of revenue sharing agreements “will not help new competitors.”²⁸ The record itself in this proceeding proves that such claims

²³ Comments of Public Knowledge & New America’s Open Technology Institute, GN Docket No. 17-142 (filed Aug. 30, 2019) (“PK/OTI Comments”) at 2.

²⁴ Comments of Jacob Donnelly, GN Docket No. 17-142 (filed Aug. 29, 2019) at 2.

²⁵ *Id.*

²⁶ Real Estate Ass’ns NPRM Comments at 78; RealtyCom NPRM Comments at 4.

²⁷ Real Estate Ass’ns NPRM Comments at 78.

²⁸ *Id.* at 82.

are meritless and that not only are MTE tenants harmed,²⁹ but consumers that live and work in the MTE's surrounding communities are also harmed. For example, Common Networks, a well-financed competitor, deploys a high-quality, affordable broadband service using millimeter wave spectrum. Its antennas located on MTE rooftops not only facilitate service to tenants of an MTE, but also service to consumers in surrounding communities.³⁰ However, "door fees and revenue sharing demands often make it cost prohibitive for Common Networks to access customers in many MTEs," notwithstanding that Common Networks can deploy high-speed broadband service at 1/50th of the cost of fiber technology.³¹

Other reasons the Real Estate Industry Commenters use to justify why anti-competitive revenue sharing agreements should remain the status quo are that MTE owners/managers make "significant" or "substantial" financial investments in building infrastructure to allow broadband service in MTEs,³² and that if an MTE owner/manager did not receive some compensation from providers to recover its investment, "basic economic principles suggest that any new regulation must have the effect of discouraging owner investment in facilities."³³ This argument fails on multiple levels and is inconsistent, if not in conflict, with other claims made by the Real Estate Industry Commenters. First, even the Real Estate Association admits that MTE owner/managers

²⁹ See, e.g., CCA Comments at 1 ("certain forms of exclusivity arrangements may foreclose competitive access and prevent customers in MTEs from enjoying the price, quality, and service benefits that flow from fair competition.").

³⁰ Common Networks Comments at 3.

³¹ *Id.* at 5.

³² Real Estate Assn's NPRM Comments at 78-79; see also RealtyCom NPRM Comments at 4.

³³ Real Estate Assn's NPRM Comments at 83 ("From an economic perspective, this is a straightforward conclusion. If owners are unable to earn *any* compensation for investments in broadband infrastructure, they will spend less on that infrastructure." (emphasis added)).

are not the sole investors or suppliers of broadband infrastructure.³⁴ In many instances, the first provider to serve the MTE will install conduits and wiring, and “entrance facilities from [the] public right of way to [the] building and often installs (all/some) home run wiring to each unit for its exclusive use.”³⁵ Subsequent providers also provide and upgrade infrastructure, reducing infrastructure investment by an MTE owner/manager.³⁶ This includes Wi-Fi infrastructure, which is often installed and managed by third-party contractors or providers.³⁷ Furthermore, the record clearly demonstrates that MTE owners/managers are not the only ones that expend their own capital in developing infrastructure for broadband services in MTEs.

Second, the empty claim that MTE owners/managers will no longer invest in providing infrastructure if they cannot receive some compensation from providers fails because of basic economic principles set forth by the Real Estate Industry itself. Such a response would result in a self-defeating over-reaction. The Real Estate Associations assert that the amount of revenue they receive from providers “is small compared to the investment in the building and the income received from residents in rent.”³⁸ The examples of revenue sources provided by the Real Estate Associations illustrate that the maximum rent payment far exceeds potential compensation from

³⁴ *Id.* at 60 (“Verizon and AT&T, the two largest national telecommunications companies that offer fiber-based broadband service, *routinely insist on installing and retaining title to their own fiber home run wiring*. In other words, they own all the fiber in a building from the minimum point of entry of the building, up to each apartment unit.” (emphasis added)); *see also* WISPA Comments at 7; Comments of Community Ass’ns Institute, GN Docket No. 17-142 (filed Aug. 30, 2019) (“CAI Comments”) at 8 (“CAI members understand that *providers incur significant expense in laying wires to access a community association* and incur an expense when installing home run wire in associations.” (emphasis added)).

³⁵ Keller & Heckman LLP, *New FCC Policy on Service Provider Access to MDUs & Possible Limits on MDU Broadband/Wireless Deals*; D.C. Bar Corporation, Finance and Securities Law Community CLE (Sept. 12, 2019) (“FCC MDU Policy CLE”) at 9, <https://webcast.dcbbar.org/store/streaming/index.php>. “Wiring from a unit’s wall plates to unit’s Optical network terminals (ONTs) or media units are installed by the MTE owner/manager.” *Id.*

³⁶ WISPA Comments at 10.

³⁷ Comments of Wireless Infrastructure Ass’n, GN Docket No. 17-142 (filed Aug. 30, 2019) (“WIA Comments”) at 8; *see also* FCC MDU Policy CLE at 9.

³⁸ Real Estate Ass’ns Comments at 79.

a provider, begging the question why would an MTE owner/manager jeopardize its biggest revenue source.³⁹ Surely, “[o]wners are not foolish enough to let the revenue they receive from providers put their core business at risk,” which is to meet resident and tenant demand.⁴⁰ It is obvious that because broadband service is very important to tenants, MTE owners/managers will make the necessary investments to ensure they can offer that service.

The Real Estate Associations also assert that they are already subsidizing the broadband industry by reducing the providers’ cost to serve the property, and that the mere existence “of a new apartment community, office building, retail property or other commercial real estate development” creates a new market for broadband services.⁴¹ Without such MTE properties, they say, “there would be less need for wireline broadband connections and therefore a smaller market for fixed broadband subscriptions.”⁴² But in reality, there would be less need for *any new apartment community, office building, retail property or other commercial real estate development* if such properties did *not* have access to affordable broadband services. Stated another way, it would be very difficult, if not impossible, to populate any property with residents and tenants if there was no broadband service. Build it *without broadband*, and they will *not* come.⁴³ Making broadband service available allows MTE owners/managers to obtain higher

³⁹ *Id.* at 80-81.

⁴⁰ *Id.* at iv (“Simply put, the revenue owners receive from providers is not sufficient to overcome the strong pressure from residents and tenants for competitive choices.”) and 81 (“Losing a simple resident per year over bad broadband service or a lack of choice is much greater disincentive to an owner.”). Starry cites to a recent study that illustrates that MTE residents “place significant value in access to competitive, well-priced broadband services.” Starry Comments at 4. Residential renters “rate high-speed and reliable broadband as the most important amenity, and its own analysis shows that 46% of the respondents to a recent survey said that they consider broadband service options when selecting where to live. *Id.*”

⁴¹ Real Estate Ass’ns Comments at 81.

⁴² *Id.*

⁴³ See Real Estate Ass’ns Comments at 2 (“[T]he real estate industry is underwriting the expense of infrastructure deployment at a cost of billions of dollars, simply because property owners operate in a competitive market economy and *must* make competitive broadband service available.” (emphasis added)).

rents and less turnover, and therefore justifies the investment. The Real Estate Industry is not subsidizing broadband providers, but rather making it available as a basic necessity to remain viable and competitive.⁴⁴ If anything, it is the opposite.⁴⁵

B. The Commission Must Prohibit Non-Cost-Based Revenue Sharing Agreements That Are Unreasonable And Not Justified By The Real Estate Industry

WISPA and other commenters have not requested a blanket prohibition on all forms of revenue sharing agreements. There is universal agreement that MTE owners/managers should be compensated fairly to help offset their infrastructure costs.⁴⁶ Significantly, the need for cost-recovery is the primary argument of MTE owners/managers in support of revenue sharing agreements.⁴⁷ Therefore, there should be no objections to a rule that only allows cost-based revenue agreements.

For many years, some MTE owners/managers have increased their efforts to monetize access to a property via various types of fees and arrangements. The concerns with such fees are that many are not cost-based and are merely used as additional revenue sources.⁴⁸ CenturyLink

⁴⁴ *See id.* at 79 (“Owners must work to ensure that residents and tenants can obtain high quality, reliable broadband service and have a choice of providers.”). The Real Estate Associations also claim that if the Commission restricted compensation paid by providers to MTE owners/managers, it would be a violation of Section 254 of the Communications Act of 1934 as a subsidy to the broadband industry “by government fiat.” Real Estate Ass’ns NPRM Comments at 82. There is nothing in Section 254 to support this argument.

⁴⁵ CenturyLink Comments at 6 (“Multiple communications providers now vied for the opportunity to serve desirable MTEs, and some were willing to pay the property owner for that privilege, especially if they were accorded preferential treatment, such as an exclusive marketing or exclusive wiring arrangement. A new market had been created in which some MTE owners sold access to their property to the highest bidder.”).

⁴⁶ WISPA Comments at 6, 10; *see also* CenturyLink Comments at 13; Sprint NPRM Comments at 9; INCOMPAS NPRM Comments at 11, 13; FBA NPRM Comments at 4.

⁴⁷ Real Estate Ass’ns NPRM Comments at 78-79; RealtyCom NPRM Comments at 4.

⁴⁸ *See, e.g.*, FBA NPRM Comments at 5 (“Above-cost revenue sharing agreements harm deployment and consumers because they create a perverse financial incentive for MTE owners to either exclude access to competing service providers when it would reduce the owner’s share or upcharge those service providers if they want to deploy within the MTE to maximize profits.”).

accurately identified that the increase in competition in the communications industry vying for the opportunity to serve MTEs created a new market for MTE owners/managers in which some MTE owners sold their property to the highest bidder.⁴⁹ Too many MTE owners/managers impose “unreasonable” fees that do not reflect the cost of infrastructure, and “significantly exceed the MTE owner’s cost of accommodating service provider’s access to the property.”⁵⁰ CenturyLink also lists other “pay-to-play” fees imposed by MTEs, especially in commercial MTEs in major markets. These fees include “inflated attorneys’ fees, ‘administrative’ fees, and riser management fees. These fees sometimes account for 20 to 30 percent of the cost of extending service to a customer in an MTE. And, in some cases, the fees cause CenturyLink to reject MTE tenants’ requests for service, simply because CenturyLink no longer has a viable business case to serve the tenant.”⁵¹

The record clearly illustrates that non-cost-based fees impose additional costs to competitive providers, and too often prohibit competitive providers from serving MTEs or individual tenants in the MTE at all. Therefore, permitting non-cost-based revenue sharing and other payments are not in the public interest and should be prohibited.

⁴⁹ CenturyLink Comments at 6.

⁵⁰ *Id.* at 7 (providing example of a “flat fee of \$300 per month for access to each individual tenant [for MTEs in 20 states] that has no apparent connection to the property owner’s minimum administrative costs of allowing . . . access to the property”); Sprint NPRM Comments at 3; INCOMPAS NPRM Comments at 10-11.

⁵¹ CenturyLink Comments at 8.

III. THE COMMISSION MUST PROHIBIT EXCLUSIVE MARKETING AGREEMENTS THAT HARM COMPETITIVE CARRIERS AND CONSUMERS

A. The Commission Must Address Confusion And Deliberate Actions By Some MTE Owners Regarding Interpretation of the Commission’s Prohibition Of Exclusive Access Agreements

The *NPRM* sought comment on whether MTE owners/managers are confused about the difference between the types of exclusive agreements that are prohibited and those that are allowed such as marketing agreements.⁵² Specifically, the Commission asks “whether and to what extent there is confusion among tenants and/or building owners regarding the distinction between exclusive access agreements, which are not permitted by the Commission’s rules, and exclusive marketing agreements, which are permitted. If such confusion exists, how prevalent is it and what might be done to correct it?”⁵³ In response to this query, WISPA and other several commenters described anti-competitive behavior believed to be based on confusion about the differences between acceptable and non-acceptable agreements.⁵⁴

By contrast, NCTA and several real estate industry commenters assert that there is no such confusion. NCTA claims that “it is hard to see how MTE owners – businesses that routinely negotiate complex agreements regarding the rights and obligations associated with their building and property – would be confused about the Commission’s rules.”⁵⁵ RealtyCom adds that there is “no uncertainty among MTE owners about the distinction between exclusive

⁵² *NPRM* at 5718 ¶ 27.

⁵³ *Id.*

⁵⁴ WISPA Comments at 20-21; CenturyLink at 9 (“More likely, the MTE owner or its agent is simply misinterpreting the agreement as imposing a blanket ban on other competitors providing service in the MTE.”); INCOMPAS *NPRM* Comments at 17-18 (“Sometimes, exclusive marketing agreement run with the MTE from owner to owner. Thus, a current owner or landlord may be subject to an agreement that they did not execute and do not understand.” (citation omitted)); Comments of Crown Castle Int’l Corp., GN Docket No. 17-142 (filed Aug. 30, 2019) (“Crown Castle Comments”) at 15 (“[E]xclusive marketing arrangements between a MTE and a common carrier providing service to tenants often confuses MTE tenants. . . . Because of this widespread confusion, the FCC should prohibit telecommunications carriers that market directly to MTE tenants from entering into exclusive marketing agreements with MTEs.”).

⁵⁵ NCTA Comments at 6.

marketing and exclusive access agreements” and that “we have seen no confusion at all.”⁵⁶

Underlying these broad statements is the presumptive inclusion of smaller MTE owners and those in small communities that may own or manage a single MTE that are more likely to lack experience and sophistication with complex federal regulations.⁵⁷

If MTE owners are professional, experienced, familiar with complex agreements and are *not* confused, this means that the real-world examples of anti-competitive behavior cited extensively in this record were calculated, deliberate and willful efforts to stifle competitive entry which makes such actions worthy of the Commission’s intervention and regulation – even if such behavior is attributed to only a few MTE owners/managers.⁵⁸ For those MTE owners/managers, who already comply with the Commission’s current rules, they would still be in compliance even if the FCC adopted new restrictions on exclusive agreements. For those that own or manage one or a few smaller buildings, they will indeed benefit from rules that would make clear the distinction between exclusive agreements and exclusive marketing agreements.

Significantly, none of the Real Estate Industry Commenters attest that personnel down the chain of command within a large property management company comply with Commission rules or that all personnel involved understand what is prohibited and what is acceptable. It is clear from the record that other MTE personnel are either confused, do not understand the requirements, or ignore management dictates because examples of anti-competitive behavior still exist today. It is also evident that the existence of revenue sharing agreements, exclusive wiring

⁵⁶ RealtyCom NPRM Comments at 2.

⁵⁷ See Starry NPRM Comments at 6 (“While some MTE owners are large, sophisticated companies that rely on experienced outside counsel to represent them in negotiations with providers, many are small owners that may have fewer resources to engage in a negotiation with a large incumbent’s legal department.”).

⁵⁸ See NCTA Comments at 6 (“There is no need to adopt onerous disclosure and disclaimer requirements to address likely isolated incidents of MTE owner confusion.”) For the record, WISPA is on record also opposing any disclosure and disclaimer requirements but for different reasons. WISPA Comments at 22.

and exclusive marketing agreements not only deny competitive access but also “protract[] the negotiation and due diligence process, delaying the delivery of competitive broadband services to MTE residents.”⁵⁹

B. The Record Clearly Illustrates That Exclusive Marketing Agreements Are Anti-Competitive And Should Be Prohibited

Although Community Associations Institute (“CAI”) members strongly support exclusive marketing agreements, even CAI, whose members are MTE residents, raises concerns when providers have tried to include “unusual or highly specific contract terms that are inconsistent with community association values and best practices” such as, in at least one case, a demand that an association “contact law enforcement if representatives from competitor providers entered the association.”⁶⁰ Fortunately for competitive providers, the CAI member rejected such an onerous clause. Other commenters also recognized that exclusive marketing agreements are more egregious when combined with other agreements.⁶¹

Exclusive marketing agreements have been allowed to continue for decades because of previous Commission inaction based on its refusal to acknowledge any harm to providers or consumers.⁶² In this proceeding, WISPA and other commenters have provided real-world examples of how incumbents have over-reached and used very aggressive enforcement tactics to enforce exclusive marketing agreements, harming both providers and consumers, as well as causing results that are inconsistent with the Commission’s objectives to foster deployment and

⁵⁹ Starry NPRM Comments at 6.

⁶⁰ CAI Comments at 4; *see also* FBA NPRM Comments at 8 (“Nevertheless, while FBA generally supports exclusive marketing arrangements and does not believe they are inherently anticompetitive, they could be viewed as exclusive access arrangements *if they prohibit other providers from, for instance, distributing information to tenants or going on the premises to market to prospective tenant customers.*” (emphasis added)).

⁶¹ INCOMPAS NPRM Comments at 12.

⁶² WISPA Comments at 19.

bridge the digital divide.⁶³ It is now time for the Commission to prohibit exclusive marketing agreements, particularly when such agreements are coupled with other exclusive agreements.

IV. THE COMMISSION MUST PROHIBIT EXCLUSIVE WIRING AGREEMENTS THAT ARE BEING USED TO DENY OR DELAY COMPETITIVE BROADBAND DEPLOYMENT AND SERVICE

A. Exclusive Wiring Agreements Provide Anti-Competitive Preferred Treatment And Exclusive Rights For Incumbent Providers

WISPA recommends that the Commission prohibit exclusive wiring agreements because they are used by incumbent providers and MTE owners/managers to circumvent the Commission's inside wiring rules and to unduly prevent the use of wiring owned by an MTE owner/manager and a competitive provider's use of its existing wiring that is dormant or abandoned.⁶⁴ Other commenters wholeheartedly agreed, as described below.

Arguments from the real estate industry attempting to justify exclusive wiring agreements are not only inconsistent, but do not reflect reality. For example, the Real Estate Associations claim that "agreements with providers are typically right of access or license agreements that grant the provider the right to install its facilities or use owner-installed infrastructure for the purpose of serving one or more tenants at the property. Any fees charged are modest and *are not tied to any form of exclusivity.*"⁶⁵ But the Real Estate Associations directly contradict this claim of "no exclusivity" with their own admission that the local cable MSO "will contract with the property owner to use home run wiring that is the property of the owner *on an exclusive basis.*

⁶³ WISPA Comments at 20-21; Common Networks Comments at 9; INCOMPAS NPRM Comments at 19.

⁶⁴ WISPA Comments at 16-18.

⁶⁵ Real Estate Ass'ns Comments at iv (emphasis added).

*In exchange for such exclusivity, the cable MSO will agree in the contract to be responsible for all maintenance and repair of the home-run wiring.*⁶⁶

1. **Prohibiting exclusive wiring agreements does not require mandatory sharing of MTE wiring nor would it prevent the ability to repair or maintain an MTE's wiring or facilities**

For the record, WISPA did not recommend in its Comments nor does it support mandatory access to *all* existing wiring in an MTE.⁶⁷ Rather, WISPA agrees with several commenters that sharing *in-use* wiring installed or under control of a provider could deter investment and cause undue technical issues or disruption in the quality of service.⁶⁸

A few commenters do not appreciate this distinction and argue that without exclusive wiring arrangements, providers will be required to share their own internal wiring and “wiring or facilities in any part of an MTE” with competitors.⁶⁹ NCTA explained that exclusive wiring agreements are important to promote facilities-based competitive providers, as such agreements will force a competitive provider to build its own network and systems and not “piggyback on the capital investment of others.”⁷⁰ However, providing “facilities-based” broadband service does not mean that Commission policies and regulations require a provider – big or small – to waste time and money when a more efficient process or option is readily available to help accelerate deployment and reduce waste.⁷¹ Many of WISPA’s members do not have money to waste as they have financed their businesses using their own capital. And the Commission’s

⁶⁶ *Id.* at 60. The Real Estate Associations also explained that after the Commission’s *Sheetrock Order*, cable MSOs preferred that the “owners hold title to the inside wiring so that the MSO could contract with the owner *for the exclusive right to use the inside wiring* or at least the home run wiring portion, but in fact control, if not actual title had already passed to the owners under the law.” Real Estate Assn’s Comments at 36-37 (italic emphasis added; underline emphasis in original).

⁶⁷ See WISPA Comments at 30.

⁶⁸ See NCTA Comments at 2; RealtyCom NPRM Comments at 3; Real Estate Ass’n’s NPRM Comments at 71.

⁶⁹ NCTA Comments at 9-10.

⁷⁰ RealtyCom NPRM Comments at 3.

⁷¹ WISPA Comments at 18-20; Adtran Comments at 8.

inside wiring rules clearly contemplate a situation where the incumbent provider abandons or no longer uses its own inside wiring and such wiring can be used by a competitor.⁷²

Any issues related to the mandatory sharing of existing in-use wiring was resolved with the Commission's *2019 Declaratory Ruling* on San Francisco's Article 52 that accompanied the *NPRM*, which preempted the only law in the country that could be interpreted to mandate the sharing of existing *in-use* wiring.⁷³ The Commission explained that "[i]n-use wire sharing upsets the balance struck by the Commission in its cable inside wiring rules [which are] aimed to promote competition while preserving incentives for the deployment and maintenance of modern in-building facilities."⁷⁴ This action by the Commission negates any justification for retaining exclusive wiring agreements based on an unfounded fear of mandatory sharing of in-use wiring owned or controlled by the provider.

Other concerns regarding any restrictions on exclusive wiring agreements are related to the repair and maintenance of MTE wiring by a qualified professional.⁷⁵ WISPA and other commenters fully understand the importance of qualified service repair and maintenance of building wiring and facilities.⁷⁶ And MTE owners are usually not skilled communications professionals, nor do they have the time to maintain building wiring and facilities.⁷⁷ However, such repair and maintenance duties can be assigned and addressed without a full exclusive wiring

⁷² Adtran Comments at 4-6.

⁷³ *2019 Declaratory Ruling* at 5743 ¶ 86.

⁷⁴ *Id.* at 5722 ¶ 36.

⁷⁵ RealtyCom *NPRM* Comments at 3; Real Estate Ass'ns at 59-60.

⁷⁶ *See, e.g.*, CenturyLink Comments at 11-12.

⁷⁷ Real Estate Ass'ns *NPRM* Comments at 60; *see also* Comments of ExteNet Systems, Inc., GN Docket No. 17-142 (filed Aug. 30, 2019) ("ExteNet Comments") at 11 (discussing the benefits of other types exclusive agreements ExteNet points out that companies that enter these agreements with MTEs generally have "telecommunications expertise, experience, and contacts to leverage economies of scale allowing them to invest substantial capital and retain the requisite technically proficient personnel to efficiently deploy high-quality in-building wireless telecommunication facilities[,]” implying that MTE owners often do not).

agreement. The problem with full exclusive wiring agreements as discussed below is that once the incumbent provider abandons or is no longer serving the property or providing any repair or maintenance, the exclusive agreement is used by either the incumbent provider or the MTE owner/manager to prevent entry by a new provider that wishes to use the existing but unused wiring.

2. **Exclusive wiring agreements must be prohibited because they unreasonably prevent, deny and delay MTE service by competitive providers**

The real estate industry also claims that exclusive wiring agreements are not anti-competitive because they do not prevent or deny access to competitive providers.⁷⁸ The record does not support this claim. Nor do the comments of CAI, which represents condominium associations, homeowner associations and housing cooperatives.⁷⁹

CAI members share WISPA's concern over exclusive wiring agreements in two circumstances: "disposition of abandoned wiring installed by a provider no longer serving the community and agreements that combine so-called 'company' wiring and association owned internal wiring into one system accessible exclusively by the provider."⁸⁰ The first circumstance is a frequent problem where "the provider maintains ownership of abandoned wiring and prohibits other providers from using the idle wiring to reach consumers. The wire also occupies space that could be put to productive use."⁸¹ CAI also states that incumbent providers commonly abandon existing wiring.⁸²

⁷⁸ Real Estate Ass'ns NPRM Comments at ii-iii.

⁷⁹ CAI Comments at 7-8. CAI represents more than 40,000 members including community association volunteer leaders, professional managers, community management firms and other professionals and companies that provide products and services to community associations (i.e., homeowner associations, condominium associations, and housing cooperatives). *Id.* at 1 n.1.

⁸⁰ *Id.* at 6.

⁸¹ *Id.*; see also Common Networks Comments at 8.

⁸² CAI Comments at 6.

To resolve this problem, CAI reports that many of its members only agree to contractual terms that require the provider to remove its wiring within a reasonable designated timeframe, after which time the ownership of the abandoned wiring transfers to the MTE owner/manager or community association for use by competitive providers.⁸³ This is certainly a prudent approach, but unless all MTE owners/managers and associations demand that these terms be provided in all wiring installation agreements in a clear and conspicuous manner, MTE owners/managers will continue to deny entry to competitive providers for fear of violating an exclusive contract with the incumbent provider. If the Commission continues to permit exclusive wiring agreements, it should at a minimum ensure that wiring will be deemed abandoned after a certain time period and thereafter be available to subsequent broadband providers.

WISPA also shares CAI's concern about exclusivity provisions for shared wiring systems, where the agreement combines "'company' wire and home run wire (potentially home wire as well) into a single 'system' reserved for the exclusive use of a provider" to the detriment of competitive providers.⁸⁴ If a competitive provider requested access to the MTE wiring, from a practical perspective, how would a MTE owner/manager or other building personnel know where the provider's wire ended and the MTE's wiring begins?

Moreover, the actual contract provisions that govern this type of single system as cited to by CAI are very strict and clearly prohibit any third party access for *any* reason: "Neither the Association nor any third party shall tap into, use or otherwise interfere with the System for any purpose."⁸⁵ This provision is not only unreasonable and acts as a *de facto* exclusive access agreement, it can also be interpreted to violate CALEA and other federal or state laws that

⁸³ *Id.*

⁸⁴ *Id.* at 7.

⁸⁵ *Id.*

require access to communications systems for law enforcement and/or national security purposes.

B. Prohibiting Exclusive Wiring Agreements Will Eliminate The Anti-Competitive Impact Of Such Agreements When Combined With Other Preferred Or Exclusive Benefits

CAI also expressed concerned over an incumbent provider having multiple exclusive rights, which compounds the anti-competitive behavior.⁸⁶ Although CAI believes that bulk billing arrangements, exclusive marketing agreements, and certain exclusive wiring agreements “have facilitated growth of in-home broadband interest service,”⁸⁷ CAI also suggests that Commission consider the impact on competition when providers condition exclusive marketing agreements on acceptance of an exclusive wiring arrangement.”⁸⁸

Several other comments shared WISPA’s concerns about another similar form of exclusive wiring agreement that benefits cable incumbents in particular – “sale-and-lease back” agreements.⁸⁹ NCTA expressly acknowledges that exclusive wiring agreements, including sale-and-leaseback arrangements, “provide a measure of certainty that service providers will have the opportunity to recover their investment by providing service to the MTE’s residents and tenants.”⁹⁰ The Real Estate Associations claim that such agreements are “very rare” and that “[m]ost of the national cable operators assume that the property owner owns all of the existing wiring inside an apartment building, for legal and practical reasons.”⁹¹ WISPA recognizes that “most” is not “all” and the record illustrates that incumbent cable providers still benefit from the

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 10.

⁸⁸ CAI Comments at 5.

⁸⁹ WISPA Comments at 17-18; Adtran Comments at 8; FBA Comments at 7; INCOMPAS NPRM Comments at 15-16; Comments of The City & County of San Francisco, GN Docket No. 17-142 (filed Aug. 30, 2019) (“City of SF Comments”) at 6.

⁹⁰ NCTA Comments at 4-5.

⁹¹ Real Estate Ass’ns Comments at 74 (emphasis added).

anti-competitive nature of sale-and-leaseback agreements.⁹² If in fact sale-and-leaseback agreements are “very rare,” then prohibiting them should have very little impact on the industry and, in any event, will prohibit those few contracts that act as a bar to competitive access.⁹³

The Real Estate Associations also offer an obtuse defense against sale-and-leaseback agreements that wiring contracts “just state with clarity that the owner owns the inside wiring but there is no language in the contract that ‘sells’ the wiring to the owner.”⁹⁴ This argument is a red herring. The term “sale-and-leaseback” has been used in the industry to identify any agreement in which there is a transfer of wiring ownership or control rights from the provider to the owner, or for the provider to acquire rights in MTE-owned wiring it did not install. There are several ways that a transfer of ownership or rights for control can be executed under the radar; it does not have to be via a “sale.”⁹⁵ As CAI so aptly explained, “[e]xclusive wiring arrangements are complicated contracts and ownership rights of internal wiring is often not clear even to attorneys with experience negotiating these agreements. Opaque contracts that in one clause affirm an association’s ownership of home run and home wiring and in subsequent clauses subjugate this same wire to one provider’s exclusive access can have negative impacts on competition and association residents.”⁹⁶

⁹² NCTA Comments at 4.

⁹³ FBA NPRM Comments at 6 (“[S]ale-and-leaseback arrangements of inside wiring between providers and MTE owners are rarely used in the market, but to the extent they are, they can be anticompetitive and allow for circumvention of the Commission’s rules proscribing exclusive access agreements.”).

⁹⁴ Real Estate Ass’ns Comments at 74.

⁹⁵ “[I]ncumbents may require exclusive access to wiring that already exists in a building and belongs to the owner. This is wiring that the incumbent did not install, assumed no cost of construction for, and otherwise has no right to use. Nonetheless, the incumbent will include a provision in its access agreement that gives it the exclusive right to use the wiring for an extended period of time and may bolster that right by seeking an easement or other quasi-property right to the wire or conduit (which again, it did not install). There is no justification for this type of provision, other than to prohibit competitive entry into the building, plain and simple.” Starry Comments at 10.

⁹⁶ CAI Comments at 8.

It is also very difficult for a competitive provider to determine whether there is a separate sale-and-leaseback provision appended via a separate agreement to the main wiring agreement, or the wiring agreement itself provides for exclusive wiring access by a provider for all wiring in an MTE. All such agreements are usually subject to a non-disclosure agreement and are not shared with a competitive provider. Nonetheless, the record clearly illustrates that this supposedly “very rare” form of agreement continues to be a problem in the industry.

It is evident that the reasons for retaining exclusive wiring agreements in light of the Commission’s recent *2019 Declaratory Ruling* and evidence of misuse and harm to providers and consumers herein are no longer justified. The Commission must act and prohibit exclusive wiring agreements.

V. PROPOSED CONSUMER DISCLAIMERS AND DISCLOSURES IN LIEU OF REGULATORY ACTION ARE INEFFECTIVE, UNREASONABLE AND IMPOSE UNNECESSARY BURDENS ON PROVIDERS

In response to the *NPRM’s* inquiry whether the Commission should impose requirements on providers to publicly disclose that they are engaged in revenue sharing agreements or exclusive marketing or wiring agreements, WISPA asserted that any consumer disclaimer or disclosure requirement in lieu of strong regulatory action to curb anti-competitive behavior is a waste of time, money and resources, serving as further barriers to entry for small providers.⁹⁷ Imposing any such disclosure or disclaimer requirements would not satisfy Congress’s direction under the RAY BAUM’S Act to identify and address marketplace practices that are barriers to entry and growth, especially for small providers.⁹⁸ More importantly, any such disclaimers and

⁹⁷ WISPA Comments at 14, 22; *see also* Common Network Comments at 7.

⁹⁸ 47 U.S.C. §§ 163(b)(3), 163(d)(3). In fact, this entire proceeding should be considered and implemented within the congressional mandates of the RAY BAUM’S Act to “assess the state of deployment of communications capabilities, including advanced telecommunications capability (as defined in [section 1302 of this title](#)), regardless of the technology used for such deployment.” *Id.* § 163(b)(3).

disclosures and would do little, if anything, to benefit consumers,⁹⁹ and would be difficult to enforce.¹⁰⁰ Those few commenters supporting a public disclosure and disclaimer requirement have not considered the immense burden on providers, especially small providers, to implement any such requirement.¹⁰¹

The vast majority of commenters agree with WISPA, even those commenters that do not support restrictions on revenue sharing agreements. For example, NCTA states that

[d]isclosure of the existence of, or details regarding, a revenue sharing arrangement would provide no meaningful information to consumers. As noted above in the context of exclusive marketing agreements, this type of disclosure requirement does not give potential tenants information about factors relevant to deciding whether to rent space in a building, nor would such disclosure provide consumers with any meaningful information about the broadband services available to them in the building.¹⁰²

Likewise, the Real Estate Associations acknowledge that “disclosure requirements are not only unnecessary, but they would harm property owners. Providers would be less inclined to enter into them because of the additional costs and other burdens of compliance. They would offer little information of actual value to subscribers, and would instead create opportunities for complaints to owners from residents, for no good reason.”¹⁰³

Incumbent and competitive providers and even public advocacy organizations question the merits of any disclosure or disclaimer requirements. Public Knowledge/Open Technology Institute stated that transparency requirements for exclusive marketing agreements “might help a

⁹⁹ WISPA Comments at 15, 22.

¹⁰⁰ Common Network Comments at 7.

¹⁰¹ See CenturyLink Comments at 16-17; INCOMPAS NPRM Comments at 13; Crown Castle Comments at 15.

¹⁰² NCTA Comments at 8-9.

¹⁰³ Real Estate Ass’ns NPRM Comments at 89-90, 92.

little[], [b]ut they would not level the playing field between incumbent providers and competitors, and in innumerable small ways the mere fact of any exclusive agreement between an ISP and a landlord would favor the chosen ISP.”¹⁰⁴ Common Networks explained that “mandating the disclosure of revenue share agreements will not materially address the competitive harm caused by these agreements.”¹⁰⁵ Even though Starry supports clear and transparent disclosures to tenants because tenants would better understand why they do not have broadband choices,¹⁰⁶ it also acknowledged that such agreements would have only marginal impact and “[w]ith respect to the tenants, transparency regarding the existence of exclusive provisions may have little impact.”¹⁰⁷

Significantly, NCTA admits that such transparency requirements also entice even more anti-competitive behavior that would “drive[] up costs to service providers and ultimately building tenants.”¹⁰⁸ Increased service costs would make the impact of exclusivity agreements subject to the disclosure even more harmful to consumers, defeating the very purpose of transparency.

In sum, the Commission should not adopt public disclosures and disclaimers for any purpose as they are unreasonably burdensome and would be ineffective in resolving or mitigating the anti-competitive impact of revenue share agreements, exclusive marketing or

¹⁰⁴ PK/OTI Comments at 9-10.

¹⁰⁵ Common Networks Comments at 7.

¹⁰⁶ Starry Comments at 11.

¹⁰⁷ *Id.* at 12.

¹⁰⁸ NCTA Comments at 9 (“If building owners know in advance the terms of revenue sharing agreements negotiated in the broader MTE marketplace, they may have the incentive and increased leverage to demand more generous terms from potential providers than they otherwise would. In contrast, keeping both the existence of, and terms for, such agreements confidential ensures that negotiations occur on an MTE-specific basis and that the economics of any agreement are tied to the individual circumstances of each MTE.”).

wiring agreements. The only viable solution is for the Commission to restrict and/or prohibit harmful agreements and behavior in a meaningful way.

VI. NON-EXCLUSIVE ROOFTOP ACCESS HELPS BRIDGE THE DIGITAL DIVIDE BY EXPEDITING THE DEPLOYMENT OF BROADBAND, WI-FI, DAS, AND 5G TECHNOLOGY

The *NPRM* invited comment on whether the Commission “should act to increase competitive access to rooftop facilities, which are often subject to exclusivity agreements.”¹⁰⁹ Although the Commission acknowledged that exclusive rooftop agreements exist and several commenters in response to the *MTE NOI* have argued that such agreements can cause anti-competitive problems with no consumer benefits,¹¹⁰ the Real Estate Associations contend that exclusive rooftop agreements are “rare.”¹¹¹ The record proves that the Commission’s statement is accurate. Additionally, the record does not support assertions that rooftop exclusivity agreements have nothing to do with providing service or coverage to tenants inside the MTE and that the Commission need not address rooftop exclusivity arrangements in this proceeding. The record clearly indicates that fixed wireless antennas provide high-speed affordable service to tenants in the MTE,¹¹² and therefore, it is appropriate for the Commission to address this issue in this proceeding. Not only are exclusive rooftop agreements prevalent, they continue to deny or delay competitive deployment inside *and* outside MTEs, and to low-income and other unserved communities.

¹⁰⁹ *NPRM* at 5713-4 ¶ 21 (citations omitted).

¹¹⁰ *Id.* at 5714 ¶ 21.

¹¹¹ Real Estate Ass’ns *NPRM* Comments at 69-70.

¹¹² *See infra* page 27 (citing to Common Networks and CenturyLink’s millimeter wave broadband services).

A. Non-Exclusive Rooftop Access For Broadband Services Is Critically Important For Reaching Low-Income And Other Underserved Communities

The California Public Utility Commission “recognizes that exclusivity agreements which limit access to building rooftops can impede the provision of high-speed broadband internet to low-income tenants in residential MTEs” and details the technological advantages and public interest that access to rooftops provides:

Nondiscriminatory rooftop access by multi-tenant public housing property owners allows for easy and relatively inexpensive installations of a licensed or unlicensed radio links. These links provide access to high-capacity backhaul and, therefore, enable the provision of high-speed broadband internet services to the low-income residents. The provision of fiber to a location in a dense urban area would be cost-prohibitive and time consuming.¹¹³

Other commenters agree that rooftop access is important for deploying newer technologies that can serve more consumers in a variety of geographic areas. Rooftops, especially those on taller MTEs, offer unobstructed line-of-sight required by fixed wireless millimeter wave technologies and wireless small cells. Common Networks explained that “exclusive rooftop agreements prevent [it] from providing service [via millimeter wave technologies] both to tenants within an MTE and to hundreds of nearby homes.”¹¹⁴ T-Mobile observed that exclusivity agreements also “prevent carriers from deploying small cells within buildings as an alternative coverage solution.”¹¹⁵

¹¹³ Comments of the California Public Utility Commission on Notice on Proposed Rulemaking, GN Docket No. 17-142 (filed Sept. 5, 2019) (“CPUC Comments”) at 4.

¹¹⁴ Common Networks Comments at 3; *see also* CenturyLink Comments at 20 (“fixed wireless technologies are not feasible, however, if another provider has been given access to the rooftop facilities in an MTE.”).

¹¹⁵ T-Mobile Comments at 8.

Access to rooftops also can reduce deployment costs. CCA noted that “[a]ccess to rooftops also can help to curb unnecessary fees for tower collocations and can be a near-term solution to address limited tower availability in a given area.”¹¹⁶ Further, in-building infrastructure is often out-of-date, technically incompatible or physically unavailable to a competitive provider.¹¹⁷ This situation requires a competitive provider to rewire a building or provide new conduits, which is often cost-prohibitive even for relatively large service providers.¹¹⁸ Rooftop access provides a viable and affordable solution to deploy broadband service to tenants in an MTE.¹¹⁹ However, there is a trend of incumbent providers inserting “stealth” clauses in contracts with MTE owners/managers that grant the provider exclusive rooftop access, to the detriment of competitive providers.¹²⁰

The record illustrates how exclusive rooftop agreements can hamper, if not deny, the Commission’s advancement of its overarching objective for universal access to broadband services for all Americans, and its development of 5G and newer technologies.

B. The Record Supports Prohibiting Exclusive Rooftop Access Agreements That Prevent The Deployment Of Competitive DAS, 5G And Future Technologies

In response to the Commission’s inquiry whether it should take action on access to distributed antenna systems (“DAS”),¹²¹ WISPA and other commenters recognized that not all DAS and rooftop operators are telecommunications providers, and the potential for anti-

¹¹⁶ CCA Comments at 4.

¹¹⁷ See CenturyLink Comments at 19-20; Sprint NPRM Comments at 3-4.

¹¹⁸ See CenturyLink Comments at 19-20 (“CenturyLink is constantly looking for the most cost-effective way to upgrade broadband service to an existing building. Sometimes that means rewiring the MTE with fiber, but other times such rewiring may be too expensive or may not even be physically possible because the conduit is full.”).

¹¹⁹ See *id.* at 20.

¹²⁰ *Id.* Unlike inside wiring, DAS in-building transport can be shared without undue disruptions in service or interference. See Crown Castle Comments at 13. Therefore, multiple providers can share wiring and facilities for DAS.

¹²¹ NPRM at 5714 ¶ 22.

competitive behavior will vary depending on the type of entity that serves as the “gatekeeper” for access to MTE rooftop facilities.¹²² Therefore, Commission action must be commensurate with the potential for harm. There is some consensus that there is less potential for anti-competitive harm for exclusive rooftop agreements between a neutral host DAS provider and an MTE, as compared to a telecommunications DAS provider and an MTE.¹²³ By its very nature, a neutral host DAS provider has little, if any, incentive to keep other DAS providers from access to the MTE’s DAS facilities, as the neutral host is compensated by bringing in multiple competitive providers.¹²⁴ Telecommunications DAS providers simply do not have the same incentive, as they are likely to protect their own provision of DAS services.¹²⁵ Therefore, many commenters argue that the Commission should only prohibit exclusive DAS rooftop access agreements for when the gatekeeper is an incumbent telecommunications provider.¹²⁶ WISPA agrees with this recommendation, however, with one caveat and a word of caution.

WISPA understands that DAS hosts spend considerable time and money to design, construct, and manage a DAS, and the DAS host should be reasonably compensated for that investment, no different than MTE owners/managers. Nonetheless, to ensure that neutral host

¹²² WISPA Comments at 24-25; *see also* Crown Castle Comments at 11.

¹²³ Crown Castle Comments at 10.

¹²⁴ ExteNet Comments at 7, 9 (“Neutral host providers are already incentivized to make use of their DAS facilities the best and preferred option for the maximum number of telecommunications carriers.”); Crown Castle Comments at 11 (“[N]eutral host DAS networks lower barriers to entry for new market participants . . . and promote competition because their business model incentivizes them to add carrier customers to their DAS.”); WIA Comments at 7 (“Neutral-host DAS networks are beneficial to wireless deployment because this shared-infrastructure model lowers barriers to entry for new market participants and encourages broadband deployment by providing cost-savings and enhancing a carrier’s speed to market.”); INCOMPAS NPRM Comments at 19 (“Neutral host providers create opportunity for wireless broadband competitors by readying rooftops for access by multiple providers.”).

¹²⁵ Crown Castle Comments at 12 (“Wireless carrier-operated DAS operators also may have incentives to limit access to their competitors, which would reduce consumer choice and limit competition within an MTE.”); Starry NPRM Comments at 11 (exclusive access to rooftop agreements are part of a “systematic approach by incumbents” to restrict competition).

¹²⁶ *See* Crown Castle Comments at 10; ExteNet Comments at 7-9; INCOMPAS NPRM Comments at 19.

DAS operators do not undertake other anti-competitive behaviors addressed in the *NPRM*, WISPA recommends that any revenue sharing agreements between a neutral host DAS operator and a competitive carrier be reasonable and cost-based to mitigate the potential for undue market entry barriers.¹²⁷ Additionally, the privilege of exclusive rooftop access agreements with a MTE should come with certain responsibilities, such as upgrading facilities and ensuring that the DAS is compatible with other network architecture.¹²⁸ If the neutral host DAS operator does not upgrade its facilities and equipment to meet certain compatibility or future proofing requirements,¹²⁹ it will effectively shut-out certain providers from the MTE that are using advanced technologies. Some neutral host DAS providers state that they currently ensure that such upgrades in technology are made.¹³⁰ Technology-neutral upgrades and competitive access must be the standard.

Arguably, an exclusive rooftop agreement between a neutral host provider and the MTE is not really exclusive as to who can provide DAS service, which is a primary concern. The MTE simply gives the neutral host the exclusive responsibility to construct, manage, and repair the DAS facilities, as well as review, negotiate and process all applications from providers that wish to access the MTE's DAS facilities.¹³¹

¹²⁷ See T-Mobile Comments at 5 (“[T]hese [exclusive DAS] agreements can make it economically infeasible for subsequent carriers to provide service by forcing carriers to pay unreasonable, non-cost-based fees for the right to access an existing DAS, with no recourse for alternate arrangements.”).

¹²⁸ See *id.* at 5.

¹²⁹ *NPRM* at 5715 ¶ 23.

¹³⁰ Crown Castle Comments at 13; ExteNet Comments at 9; Boingo Comments at 8.

¹³¹ Boingo Comments at 3.

VII. THE COMMISSION SHOULD ADOPT ADDITIONAL RECOMMENDATIONS THAT FOSTER INCREASED DEPLOYMENT, OR ALTERNATIVELY SEEK FURTHER PUBLIC COMMENT

WISPA supports a several new recommendations from a diverse selection of commenters that will increase broadband deployment and consumer choice. WISPA supports Starry's recommendation that the Commission introduce a "Gigabit Ready" program that has a voluntary checklist "designed to ensure that new buildings and renovated buildings are appropriately wired for high-speed broadband and require that the wiring be neutrally available to any provider to promote broadband competition within a building."¹³²

WISPA also supports Uniti's recommendation that the Commission promote Articles 3 and 7 of the Broadband Deployment Advisory Committee's Model State Code in this proceeding to ensure reasonable access to MTEs.¹³³ Uniti highlights that Article 3 provides that "building spaces and other assets may be leased to 'any private sector Communications Provider' on a 'non-exclusive' and 'non-discriminatory' basis, and on terms pursuant to 'reasonable negotiations.'"¹³⁴ Article 7, which governs buildings and network access points, "mandates that any entity controlling access to a network access point 'meet all reasonable requests for access from Communications Providers on a fair and non-discriminatory terms and conditions.'"¹³⁵ INCOMPAS emphasizes that Article 7 also requires all MTE owners/managers to renovate or equip the MTE 'with sufficient Network Access Points and high-speed network compatible Conduits so as to make the building high-speed network ready.'"¹³⁶

¹³² Starry NPRM Comments at 14.

¹³³ Uniti Comments at 5; *see also* INCOMPAS NPRM Comments at 22. Adtran also supports the Model Code's Article 7. Adtran Comments at 7.

¹³⁴ Uniti Comments at 5.

¹³⁵ *Id.*

¹³⁶ INCOMPAS NPRM Comments at 22.

WISPA also supports Uniti's request that the Commission "streamline the dispute resolution process for competitive providers to challenge violations of the MTE Rules."¹³⁷ Uniti recognizes that litigation as the first, if not only, recourse for an aggrieved provider violations is not reasonable. The vast majority of WISPA's members are small businesses and the monetary cost and time it takes to litigate a matter is simply not realistic and serves as yet another market entry barrier for new entrants.

Several commenters recommend that the Commission support or at least not interfere with State and local government adoption of mandatory access laws.¹³⁸ WISPA reiterates its position that the Commission should, "at a minimum" encourage States and municipalities to make all current and future mandatory access laws technology-neutral. Current laws foster discriminatory treatment to competitive providers that are not cable or telecommunications providers and ignore newer and more efficient technology used to deploy high-speed broadband.¹³⁹

¹³⁷ Uniti Comments at 11-12; CenturyLink Comments at 18 (recommending adoption of a "shot clock and expedited enforcement mechanism to ensure timely and reasonable access to that property"); PK/OTI Comments at 15 (recommending a "rocket docket" for enforcement proceedings).

¹³⁸ *See, e.g.*, FBA NPRM Comments at 3-4; INCOMPAS NPRM Comments at 20-21.

¹³⁹ WISPA Comments at 27-30.

Conclusion

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

Respectfully submitted,

**WIRELESS INTERNET SERVICE
PROVIDERS ASSOCIATION**

By: /s/ Louis Peraertz
Louis Peraertz, Vice President of Policy

Stephen E. Coran
S. Jenell Trigg
Lerman Senter PLLC
2001 L Street, NW, Suite 400
Washington, DC 20036
202-429-8970
Counsel to the Wireless Internet Service Providers Association

September 30, 2019