

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

In the Matter of Improving Competitive )  
Broadband Access to Multiple Tenant )  
Environments )  
)  
)

GN Docket No. 17-142

**COMMENTS OF PUBLIC KNOWLEDGE, CONSUMER REPORTS**

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President urged the FCC to initiate “a rulemaking to prevent landlords and cable and Internet service providers from inhibiting tenants’ choices among providers.”<sup>4</sup> We agree that the Commission must take action.

The loopholes used include all of the agreements the Commission seeks comment on in this proceeding: revenue sharing agreements, exclusive wiring arrangements, and exclusive marketing arrangements. However, other practices -- such as bulk service agreements, a failure to share wiring, and new practices that might emerge after the Commission engages in any rulemaking -- also jeopardize competition without evidence of countervailing benefits. These harms can be exacerbated for low-income communities and small businesses. Thus, the FCC must prohibit exclusive agreements that are known to limit competition in both residential and commercial MTEs, create mandatory access laws to enable all ISPs to enter the building if doing so won’t interfere with existing service, and create a “rocket docket” to preempt new loopholes from limiting competition.

## **II. ISPs REGULARLY EXPLOIT LOOPHOLES IN COMMISSION RULES**

The Commission is seeking information about how it can best “facilitate enhanced deployment and greater consumer choice for Americans living and working in multi-tenant environments.”<sup>5</sup> As a part of this proceeding, it is asking whether the FCC should limit three types of agreements between landlords and ISPs: revenue sharing agreements, exclusive wiring arrangements, and exclusive marketing arrangements. In short, all three of these types of

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[releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/](https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/).

<sup>4</sup> *Executive Order on Promoting Competition in the American Economy*, White House (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>5</sup> *Improving Competitive Broadband Access to Multiple Tenant Environments*, *supra* note 1.

agreements, as well as other agreements not discussed in the Public Notice (such as bulk billing, steering, and ISPs refusal to share wiring), can prevent those living and working in MTEs from accessing a competitive marketplace.

Despite the Commission's 2008 ban of exclusive agreements in MTEs, these loopholes create localized monopolies that fail to meet consumer needs in many apartment, condo and commercial buildings. Reddit is replete with stories of consumers forced to use the service provider of their landlord's choice. Below is a sample of stories from consumers forced into a de facto exclusive agreement despite the practice being outlawed:

- A Reddit user in Indianapolis wrote that their "apartment complex just sent out a notice that they are installing Xiber fiber-optic internet on the property and says it will be mandatory to switch to this service."<sup>6</sup> In response, another user commented that their condo only had Xiber available as well and that they "had [a] terrible experience with them as a provider..." because "every time it storms it seems our internet goes out..." and the internet had "been down for several days at a time without any customer service to call."
- Another user in Indiana said that "On April 1, 2021, I was furnished a letter at my door stating that a new Fiber internet service was being installed in the apartment complex and would be completed sometime in May, at which point all residents would be required to switch to this service."<sup>7</sup> They were concerned about switching because they had already

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<sup>6</sup> *Xiber Internet?*, /r/indianapolis, Reddit (Apr, 1, 2021, 3:50 PM), [https://www.reddit.com/r/indianapolis/comments/mi3gb5/xiber\\_internet/](https://www.reddit.com/r/indianapolis/comments/mi3gb5/xiber_internet/).

<sup>7</sup> *Landlord requiring an internet service provider switch mid-lease*, /r/legaladvice, Reddit (Apr. 4, 2021, 9:30 PM), [https://www.reddit.com/r/legaladvice/comments/mjwbih/landlord\\_requiring\\_an\\_internet\\_service\\_provider/](https://www.reddit.com/r/legaladvice/comments/mjwbih/landlord_requiring_an_internet_service_provider/).

signed a year-long contract with another provider, who might charge them a fee for early termination.

- Last year a user living in an apartment complex in Howard County, Maryland wrote “I received an email today saying that when the lease is renewed I will be forced to use Comcast at a “special price” that will be included in my bill. I currently use a different isp and honestly would rather commit mass murder than go over to comcast which is notably terrible in the area. Constant outages, regular bandwidth throttling, etc.”<sup>8</sup>
- A Michigan resident posted a notice from their landlord noting that the building had "entered into an agreement with [redacted ISP] to be your new TV and internet supplier," and noting that "[redacted] Cable's services will be disconnected from the building."<sup>9</sup> The post notes that the tenant does “not want to switch, as the new provider is more expensive and the service is considerabl[y] worse.”<sup>10</sup>
- Another Redditor in Rancho Cucamonga, California posted that they have “tried calling all local ISPs and they claim our landlord has blocked all providers from accessing our property. Leaving us with the leasing company’s one provided contractor who is asking for \$300 just to connect us, and \$130 a month for his slowest internet package with a mandatory two year agreement when the avg lease in our community is only a year.”<sup>11</sup>

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<sup>8</sup> *Can my landlord force me to pay for an ISP? [MD]*, /r/legaladvice, Reddit (May 6, 2021, 10:13 PM), [https://www.reddit.com/r/legaladvice/comments/gexw6i/can\\_my\\_landlord\\_force\\_me\\_to\\_pay\\_for\\_an\\_isp\\_md/](https://www.reddit.com/r/legaladvice/comments/gexw6i/can_my_landlord_force_me_to_pay_for_an_isp_md/).

<sup>9</sup> *Apartment trying to force exclusive internet provider*, /r/legaladvice, Reddit (Apr. 9, 2018, 7:07 PM), [https://www.reddit.com/r/legaladvice/comments/8b2w3n/apartment\\_trying\\_to\\_force\\_exclusive\\_internet/](https://www.reddit.com/r/legaladvice/comments/8b2w3n/apartment_trying_to_force_exclusive_internet/).

<sup>10</sup> *Id.*

<sup>11</sup> *[CA]Apartment company only allows internet through one specific contractor*, /r/legaladvice, Reddit (Sept. 8, 2018, 1:45 AM),

Thus, despite regulation precluding exclusive arrangements, consumers across the country are living in MTEs with a monopoly on internet service in defiance of the Commission's clear intent to prohibit such arrangements.

#### **A. Revenue Sharing Agreements Create Effective Monopolies**

Exclusive revenue sharing agreements incentivize landlords to keep competition out of the building. In many revenue sharing agreements, ISPs will pay landlords for each tenant that subscribes to the service (and sometimes will only pay if a certain percentage of tenants subscribe). For example, Comcast reportedly offered to share 10% of the revenue if more than 76% of the building uses their data services.<sup>12</sup> In this scenario, the landlord is incentivized to keep competing ISPs out of the building so that they can receive the maximum revenue share. As Starry -- a small competitive ISP -- explains, in buildings with revenue sharing agreements, "the building will perpetually 'lose' revenue share from every subscriber a new entrant wins, because it will always be at a lower revenue share rate associated with a lower penetration level." Thus, the landlord usually only allows one provider into the building. That provider is often a large incumbent provider, since they are often the only ones that can afford the agreement.<sup>13</sup>

These agreements may be more harmful than others the Commission is evaluating in this proceeding because they directly incentivize higher prices. People with a monopoly provider pay

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[https://www.reddit.com/r/legaladvice/comments/9e20ux/caapartment\\_company\\_only\\_allows\\_internet\\_through/](https://www.reddit.com/r/legaladvice/comments/9e20ux/caapartment_company_only_allows_internet_through/).

<sup>12</sup> Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, Wired (June 27, 2016, 12:00 AM), <https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/#.imkopy6uv>.

<sup>13</sup> Comments of INCOMPAS, *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, at 7 (filed Sept. 30, 2019).

more than those with access to a competitive marketplace.<sup>14</sup> In addition monopoly ISPs with a revenue sharing agreement can pass along the cost of revenue sharing to the consumer. As noted above, one Redditor is being charged \$130 a month for the monopoly ISP's slowest internet package, when the average price of broadband in the United States is \$68.38.<sup>15</sup> One reason for this outrageously high price could be a revenue sharing agreement.

The Commission asks if, as an alternative to banning revenue share agreements, it should require disclosure of these agreements.<sup>16</sup> Disclosure of revenue sharing agreements would alert tenants of the reason why they don't have their choice of ISP, but would not force landlords to allow competitive providers into the building. Such a solution is not sufficient because it puts the burden on tenants to negotiate with their landlords, and realistically, the ISP has greater bargaining power than the tenants. Even so, tenants should not have to jump through hoops to access the internet provider of their choice. Disclosure of these agreements to competitive ISPs trying to enter the building may better enable competitors to fight for entry into an MTE, but are nevertheless less effective than simply banning these arrangements.

## **B. Exclusive Wiring Use and Agreements Create Effective Monopolies**

Exclusive wiring agreements enable a landlord to offer just one ISP the exclusive rights to use a building's wiring, thereby preventing competition. In places where these agreements are outlawed competition has flourished. In 2017, San Francisco enacted Article 52, an ordinance

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<sup>14</sup> *Broadband Survey: A Nationally Representative Multi-Mode Survey*, Consumer Reports (July 2021), [https://advocacy.consumerreports.org/wp-content/uploads/2021/08/CR\\_Broadband-Survey\\_8\\_2021\\_VF.pdf](https://advocacy.consumerreports.org/wp-content/uploads/2021/08/CR_Broadband-Survey_8_2021_VF.pdf).

<sup>15</sup> *[CA]Apartment company only allows internet through one specific contractor*, *supra* note 11.

<sup>16</sup> *Wireline Competition Bureau Seeks to Refresh Records on Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Public Notice, 86 FCC Rcd 52120, at 52123, (Sept. 7, 2021).



that prohibits landlords from “interfer[ing] with the right of an occupant to obtain communications services from the... provider of the occupant’s choice.”<sup>17</sup> One competitive ISP, Monkeybrains, estimates that the law enabled it to serve 1,800 new units in 2020 alone.<sup>18</sup> Likewise, Sonic has reported being able to access over 3,000 new buildings because of Article 52.<sup>19</sup>

However, the inside wiring of a building is not always owned by landlords; sometimes the wiring is owned by another entity, such as an ISP. Other times the landlord may establish a third party as the owner of the inside wiring to evade the rules. For example, when the Commission created its inside wiring rules, ISPs evaded them by selling their wires to landlords.<sup>20</sup> If the owner of the wiring, whoever it may be, refuses to share it, consumers in MTEs may still face effective monopolies.

### **C. Exclusive Marketing Agreements Create Effective Monopolies**

Exclusive marketing agreements give just one ISP the ability to market in the building. Even on its own, these agreements could stop competitive ISPs from winning business despite service offerings that might appeal to residents. According to Starry “approximately 20% of our subscribers are acquired directly from an in person or in building activity.”<sup>21</sup> Starry notes that

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<sup>17</sup> S.F. Mun. Code §5201 (2017).

<sup>18</sup> Preston Rhea, *San Francisco’s Communications Choice Ordinance is Working*, San Francisco Examiner (Feb. 21, 2020, 11:40 AM), <https://www.sfexaminer.com/opinion/san-francisco-communications-choice-ordinance-is-working/>.

<sup>19</sup> Letter from Christopher L. Shipley, Attorney and Policy Advisor to INCOMPAS, to Marlene H. Dortch, Secretary, FCC, *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142 (filed Aug. 28, 2020).

<sup>20</sup> Carl Kandutsch, *Are the FCC’s Inside Wiring Rules Still Relevant? Part I: Home Run Wiring Rules*, Broadband Communities Magazine (January 2011), at 64, [https://www.bbcmag.com/pub/doc/BBP\\_JanFeb11\\_FCCRules.pdf](https://www.bbcmag.com/pub/doc/BBP_JanFeb11_FCCRules.pdf).

<sup>21</sup> Comments of Starry, Inc, *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, *Petition for Preemption of Article 52 of the San*

small ISPs can be particularly impacted by exclusive marketing agreements because “we do not have universal brand recognition, and in-person sales events are an effective way to build brand awareness.”<sup>22</sup> Thus, without the ability to market in a building, competitive ISPs are unable to reach potential customers and incumbent ISPs do not need to actively compete with smaller, less established competitors.

However, there have also been reports of building managers misunderstanding the nature of the exclusive marketing agreement, and believing that they have a broader exclusive agreement. For example, CenturyLink was told by a landlord in Hawaii: “Per our ground lease telecom and internet services must be provided by [Preferred Provider]. We are not permitted to allow any other providers for these services at this time.”<sup>23</sup> In another instance described to Public Knowledge, a purchaser of a condominium was told that they had an exclusive deal with Comcast to provide internet access service. Because this person was a communications lawyer, he asked to see the contract between Comcast and the condominium association. It turned out to be an exclusive marketing agreement, not an exclusive access agreement. If interpreted as exclusive agreements by landlords, as they apparently are, these agreements are equally harmful to competition and deny consumers choice.

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*San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, at 9 (filed Aug. 30, 2019).

<sup>22</sup> *Id.*

<sup>23</sup> Comments by CenturyLink, *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, at 9 (filed Aug. 20, 2019).

#### **D. Bulk Service Agreements Create Effective Monopolies**

Although the Commission did not ask about bulk service agreements in its Public Notice, these agreements can also effectively prevent consumers from accessing their choice of broadband provider. In a bulk service agreement, a landlord pays for internet service for all tenants and factors that fee into rent. Oftentimes, landlords with bulk service agreements don't let competitive providers into the building, however, even if a competitive ISP can enter the building, residents, particularly low-income residents, may not be able to subscribe because they still have to pay for the bulk service as factored into their rent. Thus, if a resident does not like the bulk service provider and chooses a different one, that consumer would pay double for internet service: once as factored into their rent due to the bulk service agreement, then separately for their preferred service. For most consumers this is unfeasible, and even for those who can afford it, it's unfair.

#### **E. Steering by Landlords Create Effective Monopolies**

Landlords have a unique position with regard to tenants, especially when a tenant is first selecting an ISP. As an initial matter, the dynamic between the landlord and the tenant gives the landlord a unique position to pressure and persuade the tenant to select a specific ISP. The tenant frequently needs to resolve details quickly so that service will begin as soon as possible on occupying the premises. Tenants are often moving from other markets, and therefore do not have information on potential providers other than the landlord until they have time to conduct their own research. Tenants also have a strong incentive to remain on good terms with their landlords. Additionally, renting a property involves signing many documents and attending to many details. Individual renters rarely have the time or legal training to carefully read their contracts. Finally,

the landlord themselves may be confused as to the nature of their agreement with the ISP, and inform the tenant that they have an exclusive agreement when the agreement is simply an exclusive marketing agreement. All of these factors give landlords unfair advantage when they steer customers to a specific ISP.

Anecdotal evidence supports the use of steering as a powerful tool for protecting exclusivities and deterring competition. One renter informed Public Knowledge that at the time he signed the rental agreement, he asked if he could subscribe to the ISP of his choice. The landlord answered in the affirmative, and gave the renter a business card for the person “who will hook up your Wi-Fi.” When the renter called the number on the card, he was told that it was a Comcast sales representative and could not take orders for any other ISP. Rather than delay internet service, and conscious of the fact that the landlord clearly preferred the tenant use Comcast, the tenant ordered service from Comcast on the call.

#### **F. Future Loopholes Could Create Effective Monopolies**

As evidenced by the many loopholes ISPs and landlords already use to evade the Commission’s rules, businesses will create loopholes if they can. If the Commission’s rules are not broad enough, new practices could emerge that limit competition in MTEs. The Commission should consider potential new loopholes, and not limit its examination of this issue to just the loopholes it’s already familiar with.

### **III. A LACK OF COMPETITION IN MTEs HARMS CONSUMERS AND BUSINESSES**

All of the aforementioned practices -- revenue sharing, exclusive wiring agreements or exclusive use of wiring, exclusive marketing agreements, bulk billing, and steering -- limit competition. In doing so, providers can charge higher rates and offer lower quality service. This

particularly harms lower-income consumers, who struggle to afford broadband as it is, and small businesses who need the internet for most of their operations.

**A. *De Facto Exclusive Agreements Harm Consumers, Particularly Low-Income Consumers***

A disproportionate number of lower-income consumers live in MTEs. According to the National Multifamily Housing Council, in 2020, the median household income of apartment dwellers was \$43,000, as compared to \$67,463 for all households.<sup>24</sup> Because lower-income consumers struggle to pay inflated prices, exclusivity agreements will preclude the U.S. from better closing its digital divide.

Many competitive providers want to offer their service to lower-income households, whereas larger ISPs have intentionally declined to serve lower-income areas with high quality broadband.<sup>25</sup> If any of these *de facto* exclusive agreements preclude competitive providers from entering the building, and a lower-income consumer can't afford the monopoly provider, they won't be able to subscribe to internet service at all.

Both Congress and President Biden have sought to increase competition in MTEs as a part of their efforts to close the digital divide. In July of 2021, President Biden released an executive order on competition urging the FCC to “prevent ISPs from making deals with landlords that limit tenants’ choices” because these agreements negatively impact low-income

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<sup>24</sup>Claire Gray, *Household Incomes*, National Multifamily Housing Council (2021), <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-incomes/>.

<sup>25</sup>Shara Tibken, *The broadband gap's dirty secret: Redlining still exists in digital form*, CNET (June 28, 2021), <https://www.cnet.com/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form/>.

and marginalized communities.<sup>26</sup> Also in July of 2021, Representative Yvette Clarke introduced the "Anti Digital Redlining Act of 2021," which prohibits communications providers from entering into agreements with landlords that prevent ISPs from serving building residents."<sup>27</sup> According to Representative Clarke, getting rid of these types of agreements, "will dramatically subvert barriers faced by historically underrepresented and marginalized communities," and promote "equitable access to high-quality broadband."<sup>28</sup> However, without this action, the digital divide will remain open because lower-income consumers cannot afford to connect.

## **B. Lack of Competition Harms Small Businesses**

As with consumers, small businesses benefit from the lower prices and better service that flows from competition. In addition, small businesses may have special requirements that a single vendor with an exclusive agreement may not accommodate.

### *1. Business Have Diverse Service Needs Harmed by Effective Monopolies*

The FCC has long recognized the importance of a competitive service environment for small businesses. An architecture firm or medical practice in an office park may need to send high-bandwidth files on a regular basis, while a retail outlet may need many low-bandwidth credit card readers and cash registers operating non-stop. In an environment where these businesses can negotiate with multiple providers, it is easier and more affordable to get customized care. By contrast, a provider with an exclusive agreement with an MTE can offer

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<sup>26</sup> *FACT SHEET: Executive Order on Promoting Competition in the American Economy*, *supra* note 3.

<sup>27</sup> Anti Digital Redlining Act of 2021, H.R.4875, 117th Cong. §7 (2021).

<sup>28</sup> *Clarke Applauds Biden Executive Order Promoting Competition in the American Economy*, Rep. Clarke Congressional Office (July 9, 2021), <https://clarke.house.gov/clarke-applauds-biden-executive-order-promoting-competition-in-the-american-economy/>.

small business tenants “take it or leave it” terms. In other words, small businesses have as great, or even greater, need for choice and flexibility when selecting an ISP compared to residential customers.

Large businesses also suffer from a lack of choice when commercial MTEs sign exclusive deals with ISPs. Large businesses often have many branches, such as banks with ATMs in many shopping centers, grocery stores, and retail chains. Such businesses often want a single provider to serve all locations because this creates consistency of service, and allows the business to negotiate for bulk discounts and specialized services. In places where market factors dictate renting space in a specific commercial MTE, the business customer is denied these benefits. Even if a business is large in an absolute sense, it is unlikely to be able to negotiate for an exception with a commercial MTE. A grocery store chain such as Whole Foods may be a large business in an absolute sense, but to the strip mall where it is located, the supermarket represents a single store like any other business. This increased cost and lack of consistent service trickles down to consumers, who must make up for the added expense and experience poorer quality connectivity as a consequence.

## *2. Effective Monopolies Prevent Businesses From Multihoming*

Network outages, which can be negated by having access to multiple ISPs, are particularly harmful for businesses. In many cases, it can become effectively impossible for a small business to carry on operations without internet access. For example, retailers cannot process credit cards, run modern internet-enabled cash registers, or place or receive orders for goods and services online if they do not have internet access. Similarly, ATMs do not work

without a network connection.<sup>29</sup> Simply put, without the internet, many critical business operations become impossible. As the recent Facebook outage demonstrated, an internet failure can prevent even a company's doors from opening.<sup>30</sup>

Many businesses attempt to address this potential vulnerability by "multihoming." Multihoming is the practice of connecting a host or computer network to more than one network.<sup>31</sup> If the primary network experiences an outage, the company can rely on the alternative network.<sup>32</sup> In addition, multihoming has numerous advantages even when both networks are operational. As explained by Techopedia, the advantages of multihoming include reducing the likelihood of system failure, the ability to spread the load during peak demand between the networks serving the business, and enhancing disaster recovery capabilities.<sup>33</sup>

MTEs with exclusive or *de facto* exclusive arrangements prevent small businesses from multihoming. This increases their vulnerability and denies them the network management benefits that multihoming provides. Prohibiting these agreements will allow small and large businesses to increase their network resilience and reliability through multihoming.

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<sup>29</sup> *What is a Point of Sale System? The Definitive Guide*, Lightspeed, (Mar. 25, 2021) <https://www.lightspeedhq.com/blog/what-is-a-pos-purchase-and-other-pos-term-clarifications/>; *How Do ATMs Work*, National ATM Systems, <https://www.nasatm.com/pages/how-do-atms-work>, (last visited Oct. 20, 2021).

<sup>30</sup> See Rebecca Cohen and Azmi Haroun, "Facebook Employees Reportedly Couldn't Access Conference Rooms and Other Systems Amid Widespread Outage," Business Insider (October 4, 2021). Available at: <https://www.businessinsider.com/facebook-employees-no-access-conference-rooms-because-of-outage-2021-10> (Facebook's outage was attributable to a Facebook internal error, but it demonstrates the general vulnerability of relying on a single network for critical functions.)

<sup>31</sup> See Wikipedia, "Multihoming," available at: <https://en.wikipedia.org/wiki/Multihoming>

<sup>32</sup> It is useful to note that while few consumers multihome with two wireline networks, the majority of consumers multihome by having both a wireline and wireless broadband connection.

<sup>33</sup> Techopedia, "Techopedia Explains Multihoming," available at: <https://www.techopedia.com/definition/24984/multihoming>



#### **IV. THE COMMISSION MUST PROMULGATE RULES TO PROMOTE CONSUMER CHOICE IN MTEs**

The Commission must promulgate regulation that will prevent ISPs and landlords from continuing to exploit loopholes that limit residential and business consumer choice in MTEs. This should be a three step process. Declining to do any one step will leave up barriers to competitive broadband deployment in MTEs.

##### **A. The Commission Must Ban Practices That Reduce Customer Choice**

First, the Commission must, to the maximum extent possible, forbid both ISPs and landlords from entering into any type of agreement which has the impact of reducing consumer choice. As noted above, ISPs have exploited loopholes in regulations preventing exclusive agreements. Instead of preventing exclusive agreements, or preventing particular types of agreements, the Commission must ban ISPs from engaging in *all* practices that have the impact of limiting competition. This will ensure that the Commission can also prevent future practices that might create monopolies in MTEs.

Because this restriction would lie against the regulated entity rather than falling on the landlord, it falls most easily within the Commission's authority. Even if the Commission continues to rely on its Section 628(b) authority,<sup>34</sup> practices that are "unfair and unreasonable" practices in light of the record firmly establish the need for vigorous, affirmative action to promote competition.

Additionally, the Commission should impose obligations on MTEs insofar as its authority allows. Section 501 requires all persons, whether or not otherwise regulated by the Commission,

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<sup>34</sup> 47 U.S.C. § 548(c).

to obey the lawful orders and rules of the Commission.<sup>35</sup> The question is therefore whether the Commission has authority to issue landlord regulations. If broadband was classified as a telecommunications service under Title II, the answer would be a simple and straightforward yes. Section 217 makes carriers liable for the acts or omissions of their agents or employees.<sup>36</sup> Landlords acting on commission or pursuant to other incentives may be considered agents of the ISP. Thus, if the Commission changes its classification of broadband, it should immediately create regulations to prevent landlords from limiting consumer choice of ISP in MTEs. Absent Title II, the Commission must rely on the uncertainty of ancillary jurisdiction to impose specific obligations on MTEs to ensure that consumers are aware of their right to select the ISP of their choice. Nevertheless, the Commission should consider what regulations its existing authority may allow, and make every attempt to eliminate practices that perpetuate effective monopolies.

#### **B. The Commission Must Enact Mandatory Access Regulations**

Moreover, the Commission must create mandatory access regulations that grant all ISPs access to a building and its wiring, no matter who owns the wiring. Traditional mandatory access laws prohibit landlords from interfering with the ability of ISPs to install the facilities needed to offer service in the building. As the Commission’s Office of Economics and Analytics found in its 2019 report that “the presence of a mandatory access law is associated, on average, with an increase of about 2.4 percentage points in the fraction of households living in MTEs that have a broadband subscription.”<sup>37</sup> Moreover, as we noted in 2019, “the Commission should consider

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<sup>35</sup> 47 U.S.C. § 501.

<sup>36</sup> 47 U.S.C. § 217.

<sup>37</sup> Steve Kauffman & Octavian Carare, *An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments*, Office of Economics and Analytics, FCC, at 13 (July 8, 2019).

whether to require that competing providers be permitted to use existing wires and fiber connections that are not currently in use by any other provider, or even to use existing wiring if it can be done in a non-interfering manner.<sup>38</sup> If any entity owns and maintains exclusive use of the wires, but need not in order to deliver quality service to tenants, that may well impact competition without “evidence of countervailing benefits.”<sup>39</sup>

**C. The Commission Should Create a “Rocket Docket” to Address Enforcement of Competition Rules for MTEs**

The Commission should create a “rocket docket” for the rapid enforcement of its rules. Absent enforcement, we fear that landlords and ISPs will continue to violate the rules. As we noted in 2019, under such a docket, the Commission could hold a hearing to determine if the landlord and/or ISP has violated the Commission’s rules, with the burden on the landlord and/or ISP to show that they did not.<sup>40</sup> If found in violation, the Commission could order the landlord and/or ISP to provide access, and that order could be enforced in the local federal district court, pursuant to 47 U.S.C. § 401(b). The injured party could also request that the Commission forward the order for enforcement to the relevant U.S. Attorney’s Office under 47 U.S.C. §401(c).

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<sup>38</sup> Comments of Public Knowledge & New America's Open Technology Institute, *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91 (filed Aug. 30, 2019).

<sup>39</sup> *Promotion of Competitive Networks in Local Telecommunications Markets*, *Supra* note 2 at 5387.

<sup>40</sup>Comments of Public Knowledge & New America's Open Technology Institute, *Supra* note 38 at 15; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91 (filed Aug. 30, 2019).

**D. The Commission Should Have A Single Regulatory Regime for Residential and Commercial MTEs**

Finally, the Commission should create just one regulatory regime for residential and commercial MTEs. In its Public Notice, the Commission discusses those “living and working” in MTEs, which indicates that it intends to extend the same protections to businesses in MTEs, as well as residences.<sup>41</sup> However, given the importance of business access to multiple ISP options, the Commission should clearly articulate that any rules adopted apply to both types of MTEs.

Many MTEs have mixed use environments. For example, a building might have stores on the ground floor but residential apartments on higher stories. A condominium complex may contain both commercial customers and offices as well as residential units. Determining whether a specific MTE is “residential” and therefore subject to whatever rules are adopted, or “commercial” and therefore exempt, is likely to create confusion, incentivize loopholes and delay enforcement. Separate regulatory regimes for different MTEs creates the opportunity for loopholes and regulatory arbitrage. The Commission should therefore create a single regulatory regime applicable to all MTEs both for the public and for Commission enforcement.

**V. CONCLUSION**

The record already demonstrates the need for the Commission to improve ISP choice for residents and businesses in MTEs. By refreshing the record, the Commission will have all it needs to move forward with this proceeding and issue rules that promote consumer choice in MTEs. Once it does, the Commission can ensure that broadband users can benefit from the lower prices, increased reliability, and higher quality service that result from competition.

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<sup>41</sup> *Wireline Competition Bureau Seeks to Refresh Records on Improving Competitive Broadband Access to Multiple Tenant Environments*, *Supra* note 16.