

**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

Petition for Preemption of Article 52 of  
the San Francisco Police Code Filed by  
the Multifamily Broadband Council

MB Docket No. 17-91

**COMMENTS OF PUBLIC KNOWLEDGE  
AND NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE**

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## I. INTRODUCTION & SUMMARY

Public Knowledge and New America's Open Technology Institute ("commenters") submit these comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking ("NPRM") and Declaratory Ruling in the Improving Competitive Broadband Access to Multiple Tenant Environments proceeding.<sup>1</sup> As already suggested by commenters,<sup>2</sup> the Commission should move forward expeditiously to improve choice, competition, affordability, service quality, and deployment of broadband internet access services ("BIAS") in multiple tenant environments ("MTEs").

The FCC is seeking comments to find "additional actions [it] could take to accelerate the deployment of next-generation networks and services within MTEs" as well as "encourage facilities-based broadband deployment and competition in MTEs—and, as a result, competition in the video distribution market and for other communication services."<sup>3</sup> The FCC has historically enacted rules intended to "encourage[e] facilities-based competition by broadly promoting *access* to customers and infrastructure, including MTEs and their occupants, while sharply

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<sup>1</sup> See Improving Competitive Broadband Access to Multiple Tenant Environments proceeding, GN Docket No. 17-142, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 19-65, (rel. July 12, 2019).

<sup>2</sup> See Comments of Public Knowledge in *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142 (July 24, 2017) ("PK 2017 Comments"); Comments of New America's Open Technology Institute, the Institute for Local Self-Reliance, National Association of Telecommunications Officers and Advisors, National League of Cities, & Next Century Cities, In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket No. 17-142, August 17, 2018, at 19.

<sup>3</sup> See Improving Competitive Broadband Access to Multiple Tenant Environments proceeding, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), at 2.

limiting to only narrow circumstances and mandatory *sharing* requirements that reduce incentives to invest.”<sup>4</sup>

While the Commission has acted on several occasions to promote competitive access to MTEs,<sup>5</sup> these efforts have not, as the Commission acknowledges, been sufficient to achieve the desired results and may not have been most beneficial for customers. Thus, anti-competitive arrangements between MTE owners and BIAS providers remain problematic.<sup>6</sup> This proceeding offers the Commission another opportunity to take a strong stand to effectively promote competition and protect consumers from the potential abusive conduct from providers, high prices, and bad service that could result from the lack of options for customers. To achieve these goals, the Commission should prohibit any kind of exclusive agreement between landlords and Internet service providers. Additionally, landlords should be required to let multiple providers access their buildings.

However, the FCC’s recent classification of BIAS as an information service stands as a rather significant legal roadblock to the Commission enacting such consumer-friendly policies.<sup>7</sup> The Commission’s use of authority specific to multichannel video programming distributors (“MVPDs”) can achieve only part of the goal, as not all BIAS providers are also MVPDs. The other sources of authority the NPRM proposes are simply unavailable post-classification. Because it would be

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<sup>4</sup> See Improving Competitive Broadband Access to Multiple Tenant Environments proceeding, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), at 3.

<sup>5</sup> See e.g., 2007 *Exclusive Service Contracts Order*, 22 FCC Rcd; 2010 *Exclusive Services Contracts Order*, 25 FCC Rcd.

<sup>6</sup> See e.g. Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, Wired, June 27, 2016.

<sup>7</sup> See *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, FCC 17-166 (rel. January 4, 2018) (“Restoring Internet Freedom NPRM”).

counterproductive for the Commission to issue rules with obvious vulnerability to the attack of incumbent BIAS providers, landlords, or other parties, commenters propose other sources of authority the Commission can rely on, if it takes them up in a further notice.

**II. TO ASSURE A PRO-COMPETITIVE OUTCOME, THE COMMISSION SHOULD PUT FORWARD A BETTER THEORY OF AUTHORITY THAN IT HAS THUS FAR**

The NPRM states that “in prohibiting exclusive access agreements, the Commission has previously relied on sections 201(b) and 628 of the Act.”<sup>8</sup> The NPRM states that these two statutory provisions invest the FCC with authority to “prohibit the execution and enforcement of anti-competitive contractual arrangements granting common carriers exclusive access to commercial and residential MTEs and covered MVPDs exclusive access to residential MTEs.”<sup>9</sup> While Section 628 does provide the Commission with limited authority in this area, Section 201(b) is unavailable, because the Commission has classified broadband as an information service. If the Commission issues a Further Notice of Proposed rulemaking that revisits some of its recent precedents concerning broadband regulation, however, Section 201(b) and other provisions may be available as sources of legal authority.

Section 628 prohibits “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or

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<sup>8</sup> See Improving Competitive Broadband Access to Multiple Tenant Environments proceeding, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), at 19.

<sup>9</sup> *Id.*

consumers”<sup>10</sup> The DC Circuit has found that this provision grants the Commission “broad and sweeping”<sup>11</sup> authority to promote video competition, and commenters agree that Section 628 provides the Commission with sufficient authority to promote competitive access to MTEs, to the extent that broadband providers are also MVPDs. Because Section 628 grants the Commission the authority to prohibit any practice “the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers,” it may also provide the Commission with the authority to directly promote broadband access, if the Commission were to find that it is possible to access Title VI MVPDs “over the top.”<sup>12</sup> (Such a step, of course, would likely require a further notice in this proceeding.)

It is difficult to see, however, how the Commission can directly rely on Section 201, a provision which it has cited, but which is applicable only to common carriers. Section 201(b)’s requirement that “all charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable,” and that “any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful,”<sup>13</sup> would indeed be useful in promoting pro-competitive goals. But the Commission, in a decision currently being challenged in the DC Circuit, has found that

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<sup>10</sup> 47 U.S.C. § 548.

<sup>11</sup> Nat. Cable & Telecommunications Assoc. v. FCC, 567 F. 3d 659, 664 (DC Cir. 2009).

<sup>12</sup> See generally Comments of Public Knowledge in MB Docket No. 14-261, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services* (March 3, 2015), for one potential path for realizing this option.

<sup>13</sup> 47 U.S.C. § 201.

broadband is not a common carrier telecommunications service,<sup>14</sup> removing the ability of the Commission to rely on this provision to directly promote broadband.

In 2017, Public Knowledge warned the Commission that its ability to rely on pro-competitive provisions such as this would be eliminated or reduced should the FCC reclassify BIAS under Title I.<sup>15</sup> To be sure, similar to Section 628 and MVPDs, the Commission may rely on this provision to the extent that BIAS providers also provide Title II voice service, by enacting telecom-specific MTE rules. But absent the Commission's taking this opportunity to issue a Further Notice of Proposed Rulemaking and revisiting its past, erroneous classification of broadband as a Title I information service, Section 201 is unavailable as a source of authority to directly promote MTE access for BIAS providers. The FCC cannot deregulate ISPs one day by excusing them from the consumer protections enacted by Title II, and nevertheless seek to apply Title II to them the next.

Although the Commission's current view is that Section 706 is merely "hortatory,"<sup>16</sup> it nevertheless has the option of revising that view. This provision directs the Commission to adopt "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."<sup>17</sup> Section 706 "is evidence of a general Congressional mandate to the FCC to promote telecommunications competition, which includes ensuring that all providers have an equal chance of providing service to MTE occupants."<sup>18</sup> As the DC Circuit explained, "section 706 of the Telecommunications

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<sup>14</sup> See Restoring Internet Freedom, WC Docket No. 17-108, Notice of Proposed Rulemaking, FCC 17-166, (rel. January 4, 2018), at 26.

<sup>15</sup> See PK 2017 Comments at 7.

<sup>16</sup> Restoring Internet Freedom, Declaratory Ruling, Report & Order, and Order, 33 FCC Rcd 311, ¶ 263 (2018).

<sup>17</sup> 47 U.S.C. § 1302.

<sup>18</sup> See PK 2017 Comments at 7.

Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.”<sup>19</sup> Among other reasons, MTE access promotes the deployment of broadband infrastructure by providing broadband and video competitors access to a customer base that might otherwise be cut off to them by restrictive landlord agreements. Thus Section 706 furnishes the Commission with clear authority to promote MTE access, and the Commission’s reluctance to follow the DC Circuit’s interpretation of this provision simply removes one of the statutory tools it could use to accomplish a pro-competition agenda.

The Commission could also, after a further notice, rely in part on its ancillary authority.<sup>20</sup> Ancillary authority allows the FCC to regulate services where there is otherwise no direct authority, if it can demonstrate that its actions are “reasonably ancillary to the ... effective performance of its statutorily mandated responsibilities,”<sup>21</sup> and if necessary to “perform any and all acts, make such rules and regulations, and issue such orders”... as may be necessary in the execution of its functions.”<sup>22</sup> The Commission could find, for instance, that it is not able to effectively carry out its duty to promote video competition and prevent discrimination in telecommunications services unless it promulgated rules that apply to all communications infrastructure in buildings, regardless of its regulatory classification. (The Commission’s over-the-air reception device rules, discussed below, could also be encompassed in such a new rulemaking.) While *Verizon v. FCC*<sup>23</sup> found that 47 U.S.C. § 153(51) prevents common carrier regulation

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<sup>19</sup> *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

<sup>20</sup> 47 U.S.C. § 154(i).

<sup>21</sup> *American Library Ass’n v. Federal Commns. Comm’n*, 406 F.3d 689, 692 (D.C. Cir. 2005).

<sup>22</sup> 47 U.S.C. § 154(i).

<sup>23</sup> 740 F. 3d 623 (D.C. Cir. 2014).

of non-common carriers, there is no reason to think that infrastructure and buildout-related rules are similar to the common carriage-like traffic management rules discussed in that case. MTE rules do not create a duty to serve or relate to traffic management practices, and 47 U.S.C. § 153(51) has never been found to prohibit existing MTE rules with respect to MVPDs. Thus ancillary authority appears to be a legally-viable avenue the Commission could pursue to better carry out pro-competition goals.

In short, the NPRM's discussion of legal authority leaves Commission with, at most, the ability to strengthen MTE rules with respect to MVPDs, with increased choice of actual BIAS providers (to the extent that BIAS is offered on the same wires as MVPD service) a fortunate side effect. But it has not articulated any authority that applies to ISPs as such. It can remedy this in a few ways, as described above, but it is again worth emphasizing that reclassifying broadband providers under Title II of the Communications Act provides the Commission with the most comprehensive set of tools it needs to promote broadband deployment in this and other contexts.

While the defects as to legal authority in the Commission's NPRM are curable before it issues any rules, its attempt to use its flawed and incomplete authority to preempt San Francisco's Article 52 are not. The Commission's power to preempt is concomitant with its power to regulate.<sup>24</sup> The FCC "cannot regulate (let alone preempt state regulation of) any service that does not fall within its Title II jurisdiction over common carrier services or its Title I jurisdiction over matters

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<sup>24</sup> See Comments of Public Knowledge in the Implementation of Section 621(a) (1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311, November 14, 2018, at 1.

‘incidental’ to communication by wire.”<sup>25</sup> Commissioner Rosenworcel said it well when she stated that “we [the FCC] somehow claim we have unfettered authority when it comes to broadband in buildings but disown our general authority over the same in our net neutrality proceeding, where we pronounced broadband beyond the reach of this agency.”<sup>26</sup>

Because the FCC disavowed its regulatory power over BIAS when it classified it as an information service and has not asserted ancillary jurisdiction over BIAS nor asserted any other viable theory of authority, it now lacks a clear foundation to enact pro-competitive MTE rules regarding broadband service directly. It should take the opportunity of this proceeding to issue a new notice that corrects this defect, by using ancillary authority, Section 706, or most directly, by reclassifying broadband as a telecommunications service.

### **III. EXCLUSIVE ARRANGEMENTS OF ANY KIND BETWEEN LANDLORDS AND COMPANIES SHOULD BE PROHIBITED**

The FCC seeks comment on different arrangements between landlords and Internet service providers “that may affect the provisioning of broadband to MTEs, including exclusive marketing and wiring arrangements, revenue sharing agreements, and state and local regulations.”<sup>27</sup> According to the FCC, the goal of seeking comments is to “facilitate the development of a more detailed record to

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<sup>25</sup> See *Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510, 1515 n. 6 (D.C. Circ. 1990).

<sup>26</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments* proceeding, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), Appendix A, at 17.

<sup>27</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments* proceeding, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), at 10.

establish effective, clear policy that is carefully tailored to promote broadband deployment to MTEs.”<sup>28</sup>

Past attempts to narrowly ban certain kinds of egregious exclusive contracts have not worked as well as they should. Both providers and landlords have the incentive to find other ways of achieving the same goal of restricting tenant choice. As an initial matter, then, in order to achieve the Commission’s stated goals, the FCC should prohibit all exclusive agreements between landlords and providers relating to the provision of broadband services. All of these agreements stifle competition and have negative consequences for consumers. Even exclusive marketing arrangements, which do not completely prevent tenants from choosing from various providers,<sup>29</sup> make choice difficult since only one company is permitted to market its services to tenants. Tenants are not aware of the different options they have, or are even given incorrect information, so they cannot effectively make a choice. In any case exclusive marketing agreements pose a significant barrier to new entrants. Exclusive agreements should be judged on their effects, not their form, and the effect of any exclusive agreement is to reduce choice and harm competition.

The Commission has suggested that competitive problems arising from exclusive marketing arrangements may be addressed with transparency requirements. These might help a little. But they would not level the playing field between incumbent providers and competitors, and in innumerable small ways the

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<sup>28</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), at 10.

<sup>29</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments proceeding*, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), at 17, citing 2010 Exclusive Service Contracts Order, 25 FCC Rcd at 2471, ¶ 29.

mere fact of any exclusive agreement between an ISP and a landlord would favor the chosen ISP. Moreover, transparency requirements in this context would be effectively impossible to enforce—how is the FCC to know whether a landlord or property rental company, or the ISP, is following the requirements? How is a competitor? And if tenants don't know that an exclusive agreement exists, they have no way of knowing if transparency requirements are being followed.

Like all exclusive agreements, the Commission should forbid *exclusive* revenue-sharing agreements, as well. It is true that even non-exclusive revenue-sharing agreements can provide landlords with an incentive to push tenants toward particular providers. Additionally, tenants should not have to pay for services they don't use as a “baked in” part of their rent. But non-exclusive revenue-sharing agreements lessen these potential pitfalls, and can provide an additional incentive for landlords to facilitate access by competitors. While there may be instances where the evidence suggests that the Commission should forbid even non-exclusive agreements between ISPs and landlords, some smaller competitors have found that non-exclusive revenue-sharing agreements can be beneficial.<sup>30</sup> (Of course were mandatory access requirements in place, even these would be unnecessary.) As pointed out by New America's Open Technology Institute in previous comments on the state of fixed broadband competition, the Commission needs to study these practices and subsequently address the problem in instances where non-exclusive revenue sharing agreements are anticompetitive or harmful to consumers.<sup>31</sup>

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<sup>30</sup> Public Knowledge has previously asked the Commission to ban all revenue sharing agreements. However, their use by new entrants, if non-exclusive, can give tenants additional choice, if structured correctly. *See, e.g.,* Starry, <https://starry.com/bostonupgrade>.

<sup>31</sup> *See* Comments of New America's Open Technology Institute, the Institute for Local Self-Reliance, National Association of Telecommunications Officers and Advisors, National League of Cities, &

The Commission’s authority (if it is properly articulated) in this area extends to landlords, not just to MVPDs, BIAS providers, and other traditionally-regulated entities. Indeed, it has taken action to directly regulate landlords and property owners and to preempt private contracts and other agreements before. In its Over-the-Air Reception Devices rules, the Commission specifically prohibits “[a]ny restriction, including but not limited to any state or local law or regulation, including zoning, land-use, or building regulations, or any private covenant, contract provision, lease provision, homeowners’ association rule or similar restriction” that hinders competition and consumer choice by preventing residents from using the antennae and other equipment they need to access communications services.<sup>32</sup>

For the above reasons, the Commission should forbid ISPs and landlords from entering into, or enforcing, all exclusive agreements, instead of trying to determine which can be beneficial, and which are harmful. They are all harmful.

#### **IV. LANDLORDS SHOULD BE REQUIRED TO LET ANY PROVIDER OFFER SERVICE IN THEIR BUILDINGS**

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Next Century Cities, in *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, August 17, 2018, at 19.

<sup>32</sup> 47 C.F.R. § 1.4000. The Commission was directed to promulgate these rules by Section 207 of the Telecommunications Act of 1996, which directed the Commission, “pursuant to section 303 of the Communications Act of 1934, promulgate regulations to prohibit restrictions that impair a viewer’s ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals, multichannel multipoint distribution service, or direct broadcast satellite services.” Neither Section 207 of the 1996 Act, nor Section 303 of the 1934 Act (which grants the Commission general power over wireless communications and is currently codified at 47 U.S.C. § 303) expressly granted the Commission power over landlords, lease agreements, and the like, but nevertheless the Commission has authority over these things because such authority is necessary for it to carry out its statutory directives effectively. Similarly, because promoting effective competition for broadband service requires that the Commission enact rules that are applicable to landlords directly, including prohibitions on all exclusive agreements with ISPs and mandatory building access provisions, the Commission has such authority under the Communications Act.

As Commissioner Rosenworcel has rightly noted, “across the country consumers want more choices when it comes to broadband. Because Washington is doing little to increase competition, cities and states have stepped into the breach. They are developing their own efforts to increase consumer choice.”<sup>33</sup> States and localities should remain free to adopt pro-competitive rules that go beyond federal policy. But when states implement an effective pro-competitive policy the FCC should feel free to adopt it on a national level. In this vein, the FCC should follow the example of governments that have enacted “mandatory access” statutes in order to increase competition and protect consumers. For instance, Los Angeles and West Virginia have mandatory access rules on the books.

Even forbidding exclusive access agreements, or exclusive agreements generally, by itself does not guarantee that competitors will be able to access a building. For example, a landlord with a marketing or revenue share agreement with an ISP—even a non-exclusive one—may be disinclined to actually permit a competing ISP to access its building. Or a landlord might not think that giving tenants the practical ability to avail themselves of competitive services is worth the minor hassle of providing keys, opening doors, and so on. Therefore, a ban on exclusive contracts should be accompanied by a requirement that landlords allow any qualified ISP<sup>34</sup> to access their premises to provide service to tenants.

As the Commission’s Office of Economics and Analytics found in its 2019 empirical analysis of broadband access in residential MTEs, “the presence of a

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<sup>33</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments* proceeding, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), Appendix A, at 17.

<sup>34</sup> It would be necessary, of course, for the Commission to determine a means to distinguish which kinds of providers are guaranteed building access. The easiest way to do this is to reclassify broadband as a Title II service, which provides a clear legal distinction between broadband providers, and other kinds of information service providers.

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. The presence of a mandatory access law is also associated, on average, with an increase of about 2 percentage points in the fraction of households living in non-MTEs that have a broadband subscription.”<sup>35</sup> According to the study, “the increase in broadband uptake in MTEs in mandatory access states may be the result of a reduction in either the marginal or the fixed cost of supplying broadband in MTEs or the result of an increase in consumer choice.”<sup>36</sup> Regardless, the effect is notable, and more clarity as to the legal rights of tenants and new entrants would likely strengthen the pro-competitive outcome.

Similarly, Commissioner Carr,<sup>37</sup> who believes requiring the sharing of communications facilities with competitors reduces investment incentives, has argued that “at the same time, promoting access to an MTE, including the conduit needed to reach an apartment, can encourage new entrants to build out their own facilities and increase competition.”<sup>38</sup> Given the incentives of incumbent providers, ISPs, and the difficulty for the FCC in policing agreements between landlords and ISPs—which may even be unwritten or informal—the only practical way to ensure that competitors can access facilities is to require it.

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<sup>35</sup> Steven Kauffman & Octavian Carare, *An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments*, Federal Communications Commission, Office of Economics and Analytics, July 2019, at 13.

<sup>36</sup> Kauffman & Carare at 13.

<sup>37</sup> Kauffman & Carare at 16.

<sup>38</sup> See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, *Notice of Proposed Rulemaking and Declaratory Ruling*, FCC 19-65, (rel. July 12, 2019), Appendix A, at 16.

One example of a mandatory access statute that the FCC can look to for guidance (modified to apply to broadband, not just MVPDs) is from West Virginia.<sup>39</sup> It provides that:

- (a) A landlord may not:*
- (1) Interfere with the installation, maintenance, operation or removal of cable television facilities upon his property or multiple dwelling premises.*
  - (2) Demand or accept any payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or multiple dwelling premises, or from any cable operator in exchange therefor except as may be determined to be just compensation in accordance with this article;*
  - (3) Discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.*

While such a law would require regulatory clarification and enforcement to address specific situations, this statute shows that states have already thought through what the legal rights and responsibilities of landlords, tenants, and providers should be with respect to competition and building access.

## **V. THE COMMISSION SHOULD CONSIDER FURTHER MEASURES TO PROMOTE COMPETITION IN MTEs**

The Commission could consider further measures to promote broadband competition, as well. As Susan Crawford argued in 2016, every city in the U.S. should follow the example of some cities like Brentwood, CA and Loma Linda, CA, and require new buildings to be fiber-ready from the start.<sup>40</sup> The FCC should follow this example as well and investigate ways to facilitate or require such rules.

With regard to existing buildings, the Commission should consider 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

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<sup>39</sup> West Virginia (Stat. § 24D-2-3 (1997)). See also a list of states that have implemented mandatory access statutes and their effects in broadband subscription in Kauffman & Carare at 3.

<sup>40</sup> See Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, Wired, June 27, 2016.

existing wiring if it can be done in a non-interfering manner. Particularly with home-run wiring that connects a unit, e.g., to a telecommunications closet or some other connection point, it is simply pointless to require that a new competitor install a parallel infrastructure. (Thus, in addition to its complete lack of legal authority for taking such an action, the Commission's preemption of the San Francisco ordinance was bad policy.) Allowing a competitor to use this kind of wiring provides a benefit to both consumers and competition and does not prejudice the ISP who installed the wiring, should the resident wish to switch providers again. At most, the Commission could consider some kind of limited window of exclusivity (possibly determined according to standard depreciation practices) to encourage new fiber installations in a building, if a provider agrees to wire every unit in an MTE in exchange.

Finally, as Public Knowledge argued in 2017,<sup>41</sup> the Commission should establish a "rocket docket" for the rapid enforcement of its rules. Under a "rocket docket," the Commission would be required to provide notice to MTE owners inhibiting access by competitive BIAS providers and a "show cause" order asking why the Commission should not find the landlord in violation of the FCC's rules. The FCC would then schedule a hearing to determine whether the landlord has denied BIAS providers entry in violation of the FCC's rules, with the burden on the MTE owner to show that its refusal to provide entry is consistent with the rules. If the landlord failed to make a prima facie case, the Commission would issue an order requiring the landlord provide access, and the order would be enforceable in the local federal district court, pursuant to 47 U.S.C. § 401(b). Additionally, the

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<sup>41</sup> PK 2017 Comments at 8.

injured party could request the Commission forward the order for enforcement to the relevant U.S. Attorney's office under 47 U.S.C. § 401(c).

## **VI. CONCLUSION**

Exclusive agreements between landlords and BIAS providers hinder competition and could lead to potential abusive conducts from providers and bad services, all of which may have direct negative consequences on consumers. The FCC should prohibit any kind of exclusive agreement between landlords and BIAS providers as well as require landlords to let any provider offer services in the buildings, and make facilities and inside wiring that is not in use available to any provider. In order to do this, the Commission should first address its deficiency of authority, and the most efficient way of doing this is reclassifying broadband as a Title II service.

Respectfully submitted,

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