



November 4, 2021

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

**Re: Wireline Competition Bureau Seeks To Refresh Record On Improving Competitive Broadband Access To Multiple Tenant Environments, GN Docket No. 17-142**

Dear Ms. Dortch,

New America's Open Technology Institute ("OTI") supports the Bureau's renewed interest in competitive, affordable, and high-quality broadband access for people living in multiple tenant environments ("MTEs").<sup>1</sup> We also support President Biden's recent executive order highlighting this issue and the need for regulatory action to promote broadband competition and affordability.<sup>2</sup> We submit these comments in response to the Public Notice and argue as follows:

1. The record shows ample evidence of anticompetitive conduct in MTEs
2. Restrictive MTE practices disparately harm low-income households
3. Fixed wireless providers and open access networks can improve MTE competition
4. The Commission should require public disclosure of restrictive MTE practices
5. The Commission should revise its rules to improve competitive access to MTEs

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment To Refresh Record On Improving Competitive Broadband Access To Multiple Tenant Environments*, GN Docket No. 17-142 (Sep. 7, 2021) ("Public Notice"). All references to comments refer to those filed in this docket since Sep. 7, 2021, unless otherwise specified.

<sup>2</sup> United States, Briefing Room. "Fact Sheet: Executive Order on Promoting Competition in the American Economy." *The White House*, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

## **1. The record shows ample evidence of anticompetitive conduct in MTEs**

Contrary to the claims of several industry commenters,<sup>3</sup> the record clearly demonstrates that ISPs are circumventing the Commission's rules to thwart competition in MTEs. The record reflects widespread agreement that a variety of tactics—including revenue sharing, exclusive marketing, exclusive wiring, and bulk service agreements—preclude access to new entrants, create a monopoly in the building, and allow a broadband provider to extract monopoly rents from tenants.

Many commenters catalogue the various types of revenue sharing agreements currently in use. The Wireless Internet Service Providers Association (WISPA), Starry, and Ziply all describe numerous schemes, including: door fees as consideration for entry (also called access fees), revenue sharing agreements with escalation clauses, and perpetual or automatically-renewing revenue sharing agreements. The City of Longmont, AARP, the National League of Cities, T-Mobile, MoreComm Solutions, and Greenfield Community Energy and Technology all confirmed that larger companies and incumbents use kickbacks as financial leverage that smaller companies cannot match, thus incentivizing landlords to favor incumbent exclusivity.<sup>4</sup>

The record also documents widespread frustration with revenue sharing agreements—particularly the ways in which they block new entrants to the broadband market. Ziply attests that it is routinely denied access by the MTE owner on the grounds that residents switching from the incumbent cable operator to Ziply would decrease the MTE owner's compensation from the cable operator, clearly demonstrating the pay-to-play nature of revenue sharing agreements.<sup>5</sup> Next Century Cities describes how revenue sharing prevented new entrants from accessing MTEs in their member cities and created de facto local monopolies.<sup>6</sup> Lumen agreed that above-cost revenue sharing agreements that compensate the MTE owner beyond its actual cost of enabling service and performing any other contractual obligations on the provider's behalf should be prohibited.<sup>7</sup> OTI shares the concerns of INCOMPAS, which describes revenue sharing as the “single biggest barrier to competitive providers' access to MTEs,” fostering an expectation that new entrants match or exceed the benefits offered by an incumbent.<sup>8</sup>

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<sup>3</sup> Comments of Chamber of Commerce at 1; Comments of NCTA at 11.

<sup>4</sup> Comments of The City of Longmont, AARP, the National League of Cities, T-Mobile, MoreComm Solutions, and Greenfield Community Energy and Technology.

<sup>5</sup> Comments of Ziply at 8.

<sup>6</sup> Comments of Next Century Cities at 4.

<sup>7</sup> Comments of Lumen at 5.

<sup>8</sup> Comments of INCOMPAS at 11.

The record also includes an extensive discussion of exclusive marketing agreements, which often prohibit new entrants from advertising or holding sales events in the MTE. WISPA notes that members are restricted from advertising in newsletters, door hangers, or flyers in MTEs that have exclusive marketing agreements with other providers.<sup>9</sup> Starry, the City of Longmont, the National League of Cities, T-Mobile, INCOMPAS, the City of Boston, Consolidated Communications and Ziply Fiber, AARP, Honest Networks, MoreComm Solutions, DC Access, and individual consumers all agree that marketing restrictions lead to reduced competition in MTEs.<sup>10</sup> Honest Networks found that the average number of subscribers for their network relative to the number of total units in the MTE is only 8% in properties where an incumbent provider has exclusive marketing rights, compared to 29% in properties where Honest Networks had non-exclusive marketing rights.<sup>11</sup>

So-called “bulk ban” provisions are especially concerning, as they can bar housing providers from contracting for telecommunications services on a bulk basis. Essentially, ISPs have identified a choke point to restrict property owners from establishing building-wide Wi-Fi systems as an amenity for all tenants.<sup>12</sup> Bulk bans can prevent affordable housing providers from offering low-cost or free internet service—an outcome that contravenes the public interest and the Commission’s efforts to close the digital divide. The Commission should consider banning these bulk bans.

## **2. Restrictive MTE practices disparately harm low-income households**

OTI’s recent study on broadband pricing found that internet service is unaffordable throughout the United States.<sup>13</sup> Although the reasons for this affordability crisis are multifaceted, the lack of competition in MTEs is a contributing factor. Exclusivity schemes create hyper-localized monopolies, leaving little incentive for ISPs to compete on price in these buildings.<sup>14</sup> Public Knowledge and Consumer Reports note that where people have a monopoly provider, they often pay higher prices.<sup>15</sup> Next Century Cities notes that lack of competition can also lower service quality and lock consumers out of network upgrades in the future.<sup>16</sup>

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<sup>9</sup> *Id.* at 20-21.

<sup>10</sup> Comments of Consolidated Communications, Ziply Fiber.

<sup>11</sup> Comments of Honest Networks at 3.

<sup>12</sup> Comments of Stewards of Affordable Housing for the Future.

<sup>13</sup> Becky Chao and Claire Park, *The Cost of Connectivity 2020*, (July 2020) <https://www.newamerica.org/oti/reports/cost-connectivity-2020/focus-on-the-united-states/>.

<sup>14</sup> See Comments of INCOMPAS at 17; Comments of Fiber Broadband Association at 4.

<sup>15</sup> Comments of Public Knowledge and Consumer Reports at 7-8.

<sup>16</sup> Comments of Next Century Cities at 5-6 (“Providers have little to no incentives to compete on either price or service quality... Therefore, a deal which may seem good at the time of signing is not future proof and locks consumers out of meaningful upgrade choices”)

The consequences of higher prices and lower quality are especially burdensome on low-income people, who already struggle to pay for internet service. Moreover, the mobility of low-income tenants is impaired by scarce affordable housing and the costs of relocating, meaning they are typically unable to move if they dislike their building's ISP or the property owner's policies.<sup>17</sup>

The record includes many examples of restrictive practices in low-income MTEs. The Boston Housing Authority offers a cautionary tale: “[A] significant portion of residents struggle to afford, enroll in, and benefit from internet service. Competitive providers may be discouraged from serving BHA tenants due to the need for costly and redundant wiring... Exclusive agreements may effectively preclude MTE owners from seeking out discounted residential services at higher speeds, or free internet service as a mitigation or public benefit agreement.”<sup>18</sup> DC Access, a small provider in Washington, D.C., described being unable to expand service to low-income housing in the city due to an exclusive wiring agreement that would have required DC Access to pay for their own wiring and offer \$5 million in insurance simply because the incumbent provider was able to provide that money up front.<sup>19</sup>

Relatedly, restrictive MTE practices could undermine the Commission's ongoing efforts to enroll people in the new Emergency Broadband Benefit (EBB). Many ISPs have declined to participate in EBB, making consumer choice a critical factor in the success of the program. Congress created EBB to close the digital divide and tackle broadband affordability. Accordingly, the Commission should closely scrutinize whether restrictive MTE practices disparately impact low-income households.

### **3. Fixed wireless providers and open access networks can improve MTE competition**

Due to the exorbitant fixed costs associated with laying new fiber to MTEs, fixed wireless networks could provide a cost-effective and efficient solution to injecting competition in MTEs. However, exclusivity arrangements relating to wiring and rooftop access have hindered the potential of these networks. WISPA notes that its member companies “wish to provide Wi-Fi in the common areas and to the community as an added benefit or at the request of the MTE owner/manager” along with fixed wireless services but are obstructed by the prevalence of “provisions restricting access to rooftops, conduits and wiring in MTEs” which “create de facto exclusive access agreements.”<sup>20</sup> Starry testifies that these anticompetitive deals “inhibit technological advancement by preventing buildings from allowing additional service providers to deploy newer, more innovative technologies over the often-lengthy life of

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<sup>17</sup> Comments of Bay Area Legal Services at 1.

<sup>18</sup> Comments of the Boston Housing Authority at 2.

<sup>19</sup> Comment of DC Access at 2.

<sup>20</sup> *Id.* at 18-20.

the exclusive agreement,” which Starry notes can be as long as 10 years.<sup>21</sup> Community Wi-Fi networks can be a critical lifeline for tenants to access work, education, healthcare, and many other crucial services, particularly during a global pandemic where connectivity has been so invaluable. The Commission should heed the experiences of these providers and protect competitive access to wiring and rooftops.

Additionally, the Commission should promote open access networks as a way to combat restrictive MTE practices. As Next Century Cities argues, “Absent access to wiring in MTEs, wireline competitors do not have the physical infrastructure they need to offer service to MTE tenants,” a problem which can be addressed by creating incentives for “MTE owners to own the wiring in their buildings and make it available to any provider that tenants choose.”<sup>22</sup> OTI has long supported open access networks which can facilitate both competitive fixed networks and provide the backhaul for fixed wireless networks. A recent study by the Electronic Frontier Foundation highlights how open access networks represent the “most cost-effective and efficient way to end the digital divide that has left millions of people, particularly those in rural and low-income areas, with inadequate or no internet service.”<sup>23</sup>

#### **4. The Commission should require public disclosure of restrictive MTE practices**

At a minimum, the Commission must create more transparency around these practices to better inform and empower tenants. OTI’s research has found that broadband pricing is extremely opaque and that consumers struggle to navigate the complexities of internet service offerings—a confusion that extends to any restrictive deals that their landlord may have struck with an ISP.<sup>24</sup>

Accordingly, OTI has long advocated for the creation of a “broadband nutrition label” as a standardized, consumer-friendly way to disclose information about broadband service.<sup>25</sup> The Commission created such a label on a voluntary basis in 2016, and President Biden endorsed

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<sup>21</sup> Comments of Starry at 8.

<sup>22</sup> Comments of Next Century Cities at 9-10.

<sup>23</sup> “Open Access Fiber Networks Will Bring Much-Needed High-Speed Internet Service and Competition to Communities More Efficiently and Economically: Report,” Electronic Frontier Foundation (Oct. 27, 2021), <https://www.eff.org/press/releases/open-access-fiber-networks-will-bring-much-needed-high-speed-internet-service-and>.

<sup>24</sup> Becky Chao and Claire Park, *The Cost of Connectivity 2020*, July 15th, 2020 <https://www.newamerica.org/oti/reports/cost-connectivity-2020/us-policy-recommendations>.

<sup>25</sup> “Broadband Truth in Labeling,” New America’s Open Technology Institute, 2009, [https://newamericadotorg.s3.amazonaws.com/documents/2009\\_Truth\\_in\\_Labeling.pdf](https://newamericadotorg.s3.amazonaws.com/documents/2009_Truth_in_Labeling.pdf); Emily Hong, Laura Moy, Isabelle Styslinger, *Broadband Truth-In-Labeling: Empowering Consumer Choice Through Standardized Disclosure*, July 2015, <https://ecfsapi.fcc.gov/file/100178467295/Broadband%20Truth-in-Labeling%202015%20Report.pdf>.

the concept in a recent executive order.<sup>26</sup> OTI urges the Commission to revive this label as a general matter and, for the purposes of the instant proceeding, to consider incorporating MTE disclosures into the revived label.

Disclosures about exclusive deals in MTEs could also benefit the Commission's broadband availability maps. Lack of information about restrictive MTE deals is one of the factors that undermines the map's accuracy, particularly in urban census tracts. Information about MTE access could be incorporated into the maps to enhance their accuracy and utility for consumers.

However, transparency alone will not cure the anticompetitive harms associated with these practices. Disclosures would help prospective tenants make more informed choices and potentially help current tenants advocate for changes, but many consumers would likely remain locked into whatever restrictions their landlord has brokered. Merely informing a consumer that they live in a monopolized building will not give them more choices or remove barriers to entry.

## **5. The Commission should revise its rules to improve competitive access to MTEs**

The record demonstrates a need for more than just transparency—we need new rules that promote MTE competition and close loopholes in the Commission's current regime. These rules should guarantee all providers access to a building's wiring and prohibit landlord interference. Moreover, we reiterate our 2019 recommendation that the Commission adjudicate violations under expedited review.<sup>27</sup> Such a "rocket docket" would prevent ISPs and landlords from exhausting tenants and new entrants, who may lack resources to engage in drawn-out regulatory fights. Importantly, Title II provides the clearest legal authority for the Commission to promulgate these rules. Section 217 would make ISPs liable for the acts or omissions of their agents or employees, and landlords may be considered agents of the ISP.<sup>28</sup> The Commission could also rely on the relative uncertainty of ancillary jurisdiction, but consumers, new entrants, and the public interest would be best served if the Commission promulgated these rules under reclassified Title II authority.

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<sup>26</sup> United States, Briefing Room. "Fact Sheet: Executive Order on Promoting Competition in the American Economy." The White House, July 9, 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/07/09/fact-sheet-executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>27</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 (Aug. 30, 2019).

<sup>28</sup> See Comments of Public Knowledge and Consumer Reports at 18.

OTI appreciates the Bureau's efforts to refresh the record in this proceeding and to ensure that our nation's multi-tenant environments are connected and competitive. The record makes clear that entrenched interests have circumvented this objective for many years, creating localized monopolies that harm consumers and small businesses. We look forward to working with the Bureau and the Commission to develop policies that will close these loopholes and give tenants the choice, affordability, and freedom they deserve.

Respectfully submitted,

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