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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Wireline Competition Bureau Seeks to Refresh Record on Improving Competitive Broadband Access to Multiple Tenant Environment, GN Docket No. 17-142

Dear Ms. Dortch:

The Office of Advocacy respectfully submits this *ex parte* letter for consideration by the Federal Communications Commission in the above-referenced proceeding.

About the Office of Advocacy

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration (SBA), so the views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (RFA) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.¹ Congress crafted the RFA to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or to comply with federal laws.² In addition, the RFA's purpose is to address the adverse effect that "differences in the scale and resources of regulated entities" has had on competition in the marketplace.³

Background

Broadband is a critical input for small businesses, and the COVID-19 pandemic has underscored this fact. Broadband is enabling small businesses that have had to pivot relentlessly to survive. The labor market is tight, consumer demand is high, employees are increasingly working remotely⁴, and businesses increasingly rely on broadband enabled technology to serve

¹ Pub. No. 96-354, 94 Stat. 1164 (1980).

² Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

³ Pub. L. 96-354, Findings and Purposes, Sec. 4, 126 Cong. Rec. S299 (1980).

⁴ Approximately 45% of employees are working from home either part-time (20%) or full-time (25%) per Gallup's 2021 September employment trends update. Gartner estimates this number will rise to 53% in 2022, rather than fall.

customers. Businesses that do not have access to adequate, affordable broadband are at a severe disadvantage in today's business climate.

Yet, recent studies show that approximately 2-3 million U.S. small businesses lack access to broadband at the Commission's benchmark speeds, which is arguably inadequate for many small businesses even when it is available.⁵ Given these shortfalls, removing barriers to competition for broadband providers is essential work for the Commission. Advocacy supports efforts to examine where removing barriers to competition in broadband would increase the quality of service available to small businesses.

In this case, the Commission is focused on the question of whether consumers in multi-tenant environments (MTEs) are receiving the benefits of a competitive market for broadband.⁶ The record supports the conclusion that there are significant barriers to competition in MTEs that the Commission may be able to eliminate through use of its regulatory authority.

Small Businesses Benefit from Broadband Competition

Small businesses are essential to the economy but face many disadvantages. Access to broadband should not be an impediment for small businesses when there are service providers who are eager to compete for their business, as comments in the record appear to show. Certain commercial agreements between MTE owners and incumbent broadband providers may be in the way of that competition. The record reflects significant concerns by competitive broadband service providers about barriers to competition in MTEs. Many of these service providers are small businesses themselves. These providers share that they are willing and able to invest in MTEs but for the existence of anti-competitive agreements between incumbent providers and building owners. These competition chokepoints could be causing losses not only to the businesses that buy broadband service, but their customers as well.

Competitive broadband markets allow small businesses to choose the level of service they need, at various price points, while balancing their own unique needs and cost limitations. Many, if not most, small businesses operate in MTEs and would benefit from more affordable and reliable broadband choices. Some commenters note that more than twenty percent of residential MTE tenants have fewer than two choices for broadband service in *support* of their position that the market is adequately competitive⁷ — other commenters disagree with that conclusion and argue that this suggests a problem that the Commission should act to address.⁸ Additional commenters

⁵ Government Accountability Office Report to Congress, "Broadband: FCC Should Analyze Small Business Speed Needs", at 12 (July 8, 2021).

⁶ See Wireline Competition Bureau Seeks to Refresh Record on Improving Competitive Broadband Access to Multiple Tenant Environments, Public Notice, GN Docket No. 17-142, DA 21-1114 (2021).

⁷ See Further Joint Reply Comments of the Real Estate Associations, GN Docket No. 17-142 (Filed November 17, 2021) at 7 ("Real Estate Association Reply Comments"), (Citing the NMHC/NAA 2021 Broadband Survey showing that apartment residents have a choice of at least two providers in 79% of properties owned by the average respondent).

⁸ See Reply Comments of the Wireless Internet Service Provider Association, GN Docket No. 17-142, at vi ("WISPA Reply Comments"), (Stating that the position "...ignores that fact that more than 20 percent of MTEs, representing millions of people across the country, are served by only one provider or are without any access to affordable high-speed broadband, especially MTEs serving low-income consumers.").

have shared that businesses in retail locations are increasingly seeing a lack of choice among broadband providers.⁹

Advocacy has spoken with small business owners who worry about the costs and reliability of their broadband services. When a business relies on a sole provider for this essential service, a service interruption can mean shutting down. Some small businesses have expressed that they would prefer to pay to have two or more service providers to avoid service disruptions. In a time when margins are thinner than ever for small businesses¹⁰, any lost business means more to the bottom line, as do any cost savings than can be achieved through lower overhead.

The Commission Should Prohibit Agreements That Create Barriers to Competition

There is a consensus among many competitive broadband providers that certain revenue sharing agreements, door fees, exclusive wiring agreements, and exclusive rooftop access agreements all serve to create significant barriers to competition. Additionally, small providers have expressed support for the Commission to either prohibit exclusive marketing arrangements or require greater transparency to ensure customers understand the choices available to them in an MTE.¹¹ Advocacy recommends the Commission conduct an economic analysis examining the impact that prohibiting the agreements above would have on competition and broadband deployment, as well the impact of policy alternatives on small businesses, as required by the Regulatory Flexibility Act.¹² After conducting such an analysis, the Commission should use its authority to regulate broadband service providers to prohibit anti-competitive conduct that hurts consumers, including small businesses.

While some commenters argue that some of the agreements listed above are necessary to incentivize deployment, this consideration must be weighed against the costs of foreclosing competition by service providers that are willing and able to deploy without the use of such arrangements. If there are situations where an MTE would not be served at all absent exclusive agreements or revenue sharing, the Commission should consider whether there are better means to support broadband deployment in those locations. One would expect to find that such locations generally lack competition for structural reasons that require public investment to

⁹ See Reply Comments of INCOMPAS, GN Docket No. 17-142 (filed November 19, 2021), at 12 (“INCOMPAS Reply Comments”).

¹⁰ As of the end of June 2021, total small business revenue was down 42.5% from the beginning of 2020. (www.tracktherecovery.org). 74.2% of small businesses indicated that they pay higher prices for goods and services than they did prior to the pandemic, while only 1.7% indicated they pay lower prices. (<https://portal.census.gov/pulse/data/>).

¹¹ See e.g. Comments of INCOMPAS, GN Docket No. 17-142 at 21 (filed October 20, 2021) (Suggesting that if the Commission does not prohibit exclusive marketing “...INCOMPAS suggests that providers be required to: (1) send an annual notice to MTE owners stating explicitly that the arrangement with building does not constitute an exclusive access agreement and that the MTE is free to consider and invite competitive providers to offer service; and (2) provide disclaimers to residents indicating residents may select the broadband provider of their choice. Such notices should also be required prior to signing a lease or renewing a lease.”). See also Reply Comments of ACA Connects at 7-8, GN Docket No. 17-142 (filed November 19, 2021) (Urging the Commission to adopt an appropriately tailored disclosure requirement to address potential harms of exclusive marketing arrangements).

¹² 5 U.S.C. § 607

overcome.¹³ In its analysis of regulatory alternatives, the Commission should consider if there are ways to overcome obstacles to deployment other than allowing broadband providers to create monopolies in individual MTEs. Recently funded broadband grant programs funded under the 2021 Infrastructure Investment and Jobs Act may provide support for further broadband deployment in these areas.

There are significant harms that consumers face in non-competitive markets. Permitting providers to secure monopolies in locations that lack a business case for competitive entry could cause harm by locking tenants into one service provider as technology and communities' needs change. This could have the effect of worsening existing digital divides, stranding underserved communities with outdated and insufficient broadband service.¹⁴ Furthermore, the record does not appear to support allowing these agreements to act as barriers to entry in markets where there are better incentives for providers to enter a location.

Revenue Sharing Agreements May Create Barriers to Competition

The Commission has specifically asked for comment on the effect of revenue sharing agreements between broadband providers and MTE owners. The Commission mentions door fees, pro-rata agreements, and graduated pro-rata agreements as being of concern. These types of revenue sharing agreements may hurt consumers because they provide economic incentives for MTE owners to contract with the highest cost providers and limit competition. Additionally, allowing MTE owners to recover costs through these agreements is inefficient and could be resulting in higher costs to tenants than would otherwise be the case.

MTE owners that charge door fees (one-time payments charged to broadband providers as a condition of access) have an economic incentive to set those fees at the highest level a single provider will accept—that provider would likely be a larger provider, not a smaller provider seeking to grow its customer base.¹⁵ In the case of *pro-rata* revenue sharing, there is also an incentive for a building owner to allow only the single highest paying provider to serve a building. Graduated revenue sharing (where the percentage of revenue increases as the number of subscribers increases) is even more troublesome because these arrangements provide an MTE owner with an incentive to exclude competitors so that they can achieve maximum returns under the agreement. The Commission should weigh whether the potential of such harms is greater than any benefits of maintaining the *status quo*.

¹³ See Real Estate Associations Reply Comments at 25 (“The problem is that around a quarter of apartment residents live in communities that are underserved because the combination of the cost of extending or upgrading infrastructure and the low incomes of the residents makes it difficult for providers to meet their return-on-investment criteria.”)

¹⁴ See Comments of the Wireless Internet Service Provider Association at 11, GN Docket No. 17-142 (filed October 20, 2021) (“WISPA Comments”) (Arguing that the exclusionary agreements allow new MTEs to be “dominated by large cable and telecommunications providers, squeezing out smaller competitive providers” and that “eliminating the various market entry barriers in MTEs *now* can do more to foster affordability and access to competitive broadband than pending government funding, especially in underserved and unserved geographic areas and low-income communities.”).

¹⁵ See Reply Comments of ACA Connects at 8-9, GN Docket No. 17-142 (filed November 19, 2021) (Stating that door fees “significantly raise the upfront costs of entering an MTE and may disadvantage less capitalized smaller providers, even in circumstances where such fees are assessed equally on all”).

Some commenters argue that revenue sharing agreements are necessary for MTE owners to recover costs associated with installing and maintaining wiring; however, the most economically efficient place to capture those costs may be in prices charged directly to tenants, not to broadband service providers, who can then charge above-market prices if they are the only provider in a building. Customers benefit from lower prices and higher quality service that result when multiple broadband providers compete. Ideally, any potential rent increases associated with increased costs to MTE owners would be offset by those consumer gains. Additionally, MTE owners should be able to recover actual costs to build and maintain building infrastructure absent harmful restrictive agreements with broadband service providers. For example, MTE owners can require broadband providers to bear specific costs without requiring door fees or revenue sharing as a condition of access.¹⁶

Exclusive Wiring and Rooftop Access Agreements May Create Barriers to Competition

Current FCC regulations prohibit exclusive access agreements between broadband providers and MTE owners; however, the experience of many would-be competitors is that exclusive rooftop access agreements and exclusive wiring agreements operate as *de facto* exclusive access agreements because these agreements prohibit competitors from either installing their own equipment or negotiating terms with MTE owners to utilize *unused* wiring to serve customers. These commenters argue such practices exclude competitors outright, or raise the cost of offering competitive service prohibitively, thereby acting as exclusive access agreements.¹⁷

If the above is the case, exclusive wiring and exclusive rooftop access agreements may undermine the Commission's intent to have providers compete to offer the best services for their respective markets, leaving MTE tenants stuck with one-size-fits-all offerings. Some commenters argue that prohibiting these agreements would discourage investment and competitive entry; however, given that many broadband providers have stated they are willing to make investments without such agreements, it is unclear how that can be the case. This is especially true because the overall cost of deploying a competitive broadband offering to a building is decreasing as technology changes, particularly for fixed wireless service.¹⁸ The Commission should examine these claims closely to determine if competitive entry is harmed or helped by these agreements and prohibit any agreements that circumvent the Commission's existing regulations.

Conclusion

Small businesses rely on broadband and benefit from competition among broadband service providers. The Commission should carefully examine the record and conduct an analysis of the regulatory alternatives suggested by commenters, looking specifically at whether prohibiting the

¹⁶ See Reply Comments of Verizon at 5, GN Docket No. 17-142 (filed November 19, 2021) (Arguing that the Commission can minimize potential of revenue sharing arrangements to foster exclusionary behavior by “(1) requiring that service providers enter into revenue sharing arrangements only on a voluntary basis and not as a condition of access, and (2) requiring that any payments from the provider are reasonably related to the MTE owner's costs to enable service in the building.”).

¹⁷ See Comments of INCOMPAS, GN Docket No. 17-142 at 19 (filed October 20, 2021), (Arguing that shared access to wiring is necessary because “installing parallel infrastructure is wasteful and often an impossibility in finished space.”).

¹⁸ See WISPA Comments at 7, (“Fixed wireless can be deployed at approximately 10 percent of the capital cost of fiber and be installed in a matter of days – not months or years.”).

agreements discussed above will increase competition, and ultimately foster greater broadband deployment. In that analysis, the FCC should consider the impact of various policy alternatives on small businesses. If the Commission finds that allowing certain exclusive agreements has the effect of foreclosing competition and/or slowing deployment of advanced communications, the Commission should use its regulatory authority to prohibit such agreements where possible, and require providers to be more transparent about any agreements they have with MTE owners.

Thank you for considering the concerns of small businesses in this proceeding. Should you have any questions please contact me or my staff at (202) 516-6290.

Respectfully submitted,

/s/ Major L. Clark III
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