Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142

**FURTHER JOINT REPLY COMMENTS OF
THE NATIONAL MULTIFAMILY HOUSING COUNCIL,
THE NATIONAL APARTMENT ASSOCIATION,
THE COUNCIL FOR AFFORDABLE AND RURAL HOUSING, ICSC,
THE INSTITUTE OF REAL ESTATE MANAGEMENT, NAREIT,
THE NATIONAL LEASED HOUSING ASSOCIATION, AND
THE REAL ESTATE ROUNDTABLE
(the "Real Estate Associations")**

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SUMMARY

The National Multifamily Housing Council, the National Apartment Association, the Council for Affordable and Rural Housing, ICSC, the Institute of Real Estate Management, Nareit, the National Leased Housing Association, and The Real Estate Roundtable (the "Real Estate Associations") submit these Further Reply Comments in response to the comments of other parties filed pursuant to the Public Notice released on September 7, 2021 (the "*2021 Notice*").

After three rounds of comments, in response to the Notice of Inquiry,[1] the Notice of Proposed Rulemaking,[2] and now the *2021 Notice*, the proponents of regulation have yet to make their case. They have modified their positions in certain respects, but have never been able to draw any causal connections between the problems they allege and the contractual terms under review in this proceeding. For example, Public Knowledge's principal evidence consists of five social media posts. Other commenters do not do much better. There is no foundation for regulation in the record as it stands today.

The Real Estate Associations, on the other hand, have submitted a large quantity of factual information: two industry surveys and 26 sworn declarations. But this is not just a matter of the weight or quantity of evidence. What this evidence shows is that the types of contract terms under review in this proceeding are not anticompetitive. Furthermore, after taking into account the latest round of comments, the record as a whole confirms that Commission

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[1] *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383 (2017) (the "*2017 NOI*").

[2] *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Proposed Rulemaking, 34 FCC Rcd 5702 (2019) (the "*NPRM"*).

regulation is not necessary. Indeed, the kinds of rules that have been proposed would hinder further deployment and competition, and do nothing to improve access to broadband service in the low income communities where it is needed most.

There is ample competition in the multitenant market. Not only does the *NMHC/NAA 2021 Broadband Survey*[3] show that apartment residents have a choice of at least two providers in 79% of properties owned by the average respondent, but the record reflects that apartment owners are expanding competition to include three, four, and sometimes more providers. In fact, the data suggests that the number of properties with more than two providers has nearly doubled since 2019, and there is every reason to believe that growth will accelerate, as it has for other kinds of communications applications and services. Regulation of contract terms is not necessary because the free market is working, as competitive broadband providers demonstrate the value of their services and build their reputations.

Provider business plans, not contract terms, impede deployment to underserved Americans. Many parties have noted that low-income Americans too often lack access to adequate broadband service, or even to any broadband capability at all. The Real Estate Associations are committed to addressing this concern, but it is fundamentally a problem of provider economics. Providers either lack infrastructure capable of serving these properties or existing infrastructure is substandard. More needs to be done to deploy or upgrade in those areas. The Real Estate Associations support the significant funding allocated to broadband

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[3] The National Multifamily Housing Council and the National Apartment Association conducted a joint online survey of their members, titled "2021 Apartment Industry Survey on Broadband Choice, Competition, and Infrastructure" ("*NMHC/NAA 2021 Broadband Survey*"). *See* Further Joint Comments of the National Multifamily Housing Council, the National Apartment Association, the Council for Affordable and Rural Housing, ICSC, the Institute of Real Estate Management, Nareit, the National Leased Housing Association, and The Real Estate Roundtable (the "Real Estate Associations"), GN Docket No. 17-142 (filed Oct. 20, 2021) at 5, n. 10.

deployment in the recently enacted bipartisan infrastructure package and believe that the efforts of the Biden Administration, the Commission, and other federal partners are critical to closing the digital divide once and for all.

Regrettably, some parties continue to argue that the kinds of contracts used in properties at the upper end of the market are impeding access in housing supported by the Department of Housing and Urban Development ("HUD") and other affordable and low-income communities. This is not true. HUD rules allow public housing and affordable housing properties to enter into different types of exclusive agreements, as a way of earning revenue to support other activities, but in general the real problem is the failure of providers to extend their infrastructure.

To address this issue effectively, the Commission must recognize that any housing subject to HUD regulations is a special case. Furthermore, provider economics and resident demographics require that conditions in affordable housing communities not governed by HUD rules also be evaluated differently. There are approximately 21.9 million apartment units in the United States, of which 2.8 million are in HUD-assisted apartment properties and another 2.4 million are in other low-income apartment communities. The apartment industry is ready and willing to work with the Commission and providers to solve this problem – but the Commission will need to understand the true nature and scope of the problem before that can be done.

Exclusive use of wiring must be permitted because sharing of wiring is largely infeasible. The Real Estate Associations demonstrated in the Further Comments that sharing of wiring presents so many obstacles to the provision of reliable, good quality service that owners have learned to avoid it all costs. So have many competitive providers. In fact, the reason that owners enter into exclusive wiring agreements is that experienced providers of all types – the cable operators, the incumbent local exchange carriers, and many competitive providers – all

prefer to have control over their wiring. In fact, they demand it, because it is essential to quality control. A provider cannot be assured of delivering high quality service to its customers if it cannot control a fundamental component of the facilities needed to deliver that service.

In fact, even the provider representatives arguing that competitors should have the right to use the property of others at no cost do not call for the sharing of all wiring. INCOMPAS demands access to copper wiring installed by others, but goes on to say that "the cable inside wiring rules do not apply and should not be applied to fiber."[4] This kind of hypocrisy permeates this proceeding.

Regulation of fees on any basis is unjustified. Proponents of regulation also continue to argue for either banning fees paid to property owners entirely, or limiting fees to cost. The Real Estate Associations explained in the Further Comments that the Fifth Amendment prevents the Commission from requiring property owners to make wiring they own available to providers without charge. We also demonstrated the complexity of attempting to regulate so-called "above-cost" agreements. And finally, we have shown that the amounts paid to property owners typically do cover only a small portion of the owner's costs. Providers, on the other hand, have made no attempt to demonstrate that payment of fees to owners is actually a significant burden to them. They say they cannot afford to pay, but they don't show their work. In every other industry, if a person wishes to use the property of another, that person is expected to pay a fair market rate. The right to enter and use privately-owned buildings to reach potential broadband subscribers is no different.

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[4] Comments of INCOMPAS, GN Docket No. 17-142 (filed Oct. 20, 2021) ("INCOMPAS Comments"), at 17.

Mandatory access is not a lawful option. Public Knowledge and AARP call for the Commission to adopt a federal mandatory access rule, but fail to explain how the Commission might avoid violating the Takings Clause of the Fifth Amendment. Several other parties seem to have recognized that the Commission has no such power; they merely ask the Commission to urge the states to expand the scope of existing mandatory access statutes, or enact new ones. The Commission should take no action at all in this area, any more than it should act on any other proposal raised in this docket.

Disclosure of contract terms must be carefully crafted. The parties are divided on the need for disclosure of the terms of agreements between providers and property owners. Six commenters oppose disclosure, either expressly or by implication. Five parties call for disclosure of the terms of wiring agreements or marketing agreements or both. WISPA asks for a total ban on marketing agreements because disclosure would be ineffective. Public Knowledge agrees with WISPA's position, but also seems willing to accept a disclosure of compensation terms as an alternative. The Real Estate Associations are not necessarily opposed to properly tailored disclosure requirements, but we do question their utility. Furthermore, any such requirement would have to pass the Supreme Court's commercial speech test, meaning that the Commission would have to establish that the information to be disclosed would have a substantial relation to a governmental interest. Disclosure of contract terms between broadband providers and property owners to apartment residents or office or retail tenants would be unlikely to pass that test.

Regulation of in-building wireless facilities or rooftops would hinder deployment. Various parties call for Commission regulation of wireless facilities inside buildings, and for regulation of access to rooftops. Neither would be a sound policy. Property owners are currently

spending large sums on in-building wireless facilities, because ensuring effective coverage inside buildings is essential, and large mobile carriers will not pay for it. Those expenditures effectively subsidize the wireless industry, and the Commission should do nothing that might discourage deployment inside buildings.

Broadband industry representatives also have not justified regulation of access to rooftops. For one thing, they have not explained clearly what they want the Commission to do, because many refer vaguely to exclusivity without acknowledging that exclusivity is an essential term of any rooftop lease. Furthermore, they have not explained how the Commission could justify intervening in this market, which is fundamentally a market for access to physical space and therefore not within the Commission's jurisdiction.

The OTARD rule does not authorize the *per se* taking of real property. Finally, the Commission lacks statutory authority to adopt many if not all of the proposals under consideration. The Real Estate Associations have addressed those issues in earlier stages of the proceeding. INCOMPAS, however, introduces a new argument, asserting that under the Commission's most recent expansion of the Over-the-Air Reception Devices rule, 47 C.F.R. § 1.4000, the Commission could also grant tenants the right to require property owners to allow any broadband provider selected by a resident or tenant to install its facilities at the property. This would clearly constitute a taking under the Supreme Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). In fact, the Commission's latest OTARD order acknowledges that *Loretto* would preclude granting a third party the right to enter a building over the owner's objections.[5]

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[5] *Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Report and Order, 36 FCC Rcd 537 (rel. Jan 7, 2021) ("*2021 OTARD Order*"), at ¶ 32.

For all the foregoing reasons, the Commission should refrain from adopting any further regulation affecting broadband deployment in the multiple tenant environment market.

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Introduction

The Real Estate Associations respectfully submit these Reply Comments to address issues raised by other parties in response to the Commission's Public Notice (the "*2021 Notice*").[6] The Real Estate Associations oppose any further regulation of agreements between property owners and broadband providers because there is ample competition for broadband services inside buildings. Furthermore, the rate of competition is growing. None of the comments submitted by proponents of regulation contradicts those facts.

The Real Estate Associations urge the Commission to see through the smoke screen thrown up by the proponents of regulation. Throughout this proceeding their claims have been exaggerated, overbroad, and one might think calculated to confuse. To take just one example, the residential, office, and retail markets are all very different: the physical configurations of the

[6] *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Public Notice (rel. Sep. 7, 2021).

buildings, the activities conducted by residents, tenants and visitors, including their use of broadband services, and the very nature of the occupancies of apartment residents, office tenants, and retail stores are all distinct. Because of those differences, each industry sector has developed its own practices in dealing with broadband providers. Yet, in this proceeding, providers and their trade associations have routinely conflated all three classes of property as if they were identical and the types of agreements used to grant access to broadband providers were identical. Only Lumen, in its most recent filing, has clearly acknowledged the differences.[7] This failure to recognize facts of which the providers must be fully aware is, to say the least, unfortunate, and difficult to understand.

In the same fashion, proponents of regulation have obscured the level of competition in all three industries, especially in the apartment industry, which has been their main target. Only now is it becoming clear that they are seeking what we have argued all along: easier access to become the third provider in apartment properties where there is already competition. But better late than never.

The Real Estate Associations strongly believe that the true challenge facing the apartment and broadband industries is how to extend service and competition to lower-income communities. The limiting factor in addressing that challenge, however, is not the sort of agreements that are common in other sectors of the multifamily industry and that have been the focus of this docket, but the economics of extending infrastructure to and within those communities. That goal will not be reached in this proceeding, because it has been focused in

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[7] Comments of Lumen, GN Docket No. 17-142 (filed Oct. 20, 2021) ("Lumen Comments"), at 6. Lumen states that it sometimes pays fees in residential buildings, but other times does not, and adds that it usually pays no fees to obtain access to commercial buildings. *Id.*

the wrong direction and on the wrong issues. We would welcome the opportunity to work with the broadband industry and the Commission on ways to address that one big, central problem.[8]

Consequently, we again urge the Commission to terminate this proceeding without further action. We stand ready to assist in finding ways to address the digital divide by closing the infrastructure gap that has been limiting access to broadband in underserved communities.

I. After Three Rounds of Comments, the Proponents of Regulation Rely on the Same Baseless Claims and Have Failed to Refresh the Record.

This proceeding was formally opened on June 1, 2017. Since that day, the Commission has requested three rounds of comments.[9] The principal proponents of regulation in this docket – by which we mean INCOMPAS, the Fiber Broadband Association ("FBA"), Public Knowledge and Consumer Reports ("Public Knowledge"), Starry, and WISPA – have submitted almost no factual support for their position at any time. INCOMPAS has submitted one supporting declaration. FBA submitted results from a survey in 2019, but as we discussed in the *2019 Reply*[10], none of that information was actually germane to the issues raised in the *NPRM*.

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[8] The Infrastructure Investment and Jobs Act designates $42 billion for the Broadband Equity, Access and Deployment Program, a portion of which may be used for deploying infrastructure in underserved multifamily residential buildings.

[9] In addition to the *2021 Notice* these are: *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Inquiry 32 FCC Rcd 5383 (2017) (the "*2017 NOI*"); and *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Proposed Rulemaking, 34 FCC Rcd 5702 (2019) (the "*NPRM"*).

[10] Joint Reply Comments of the National Multifamily Housing Council, the National Apartment Association, the International Council of Shopping Centers, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association and the Real Estate

WISPA also submitted the results of a survey, but as we also established in the *2019 Reply*, that survey is of little use. Respondents were not asked about the level of competition in buildings they serve, and the questions were deeply flawed. The result was that when the *2021 Notice* was issued, these organizations had stated and restated their positions, but offered very little in the way of factual support. Their filings have been full of speculation, assumption, and innuendo, but devoid of anything one could call meaningful evidence.

And now, given another chance to support their positions, they have again restated those positions, with some modifications, but still without substantive support. In its latest comments, FBA submits no new information at all. INCOMPAS raises a few new claims regarding business practices, but it introduces no new factual evidence to support either the claim of a lack of competition or the connection between the contract provisions under review and any actual harm to consumers. Public Knowledge offers as evidence five social media posts that it claims demonstrate the harms of "de facto exclusive agreements," but offers no analysis that connects those complaints to exclusive wiring, exclusive marketing, or compensation agreements.[11] At one point, Public Knowledge asserts that "[o]ne reason for [an] outrageously high price *could be* a revenue sharing agreement (emphasis added)."[12] The combination of "could" and "be" is always a good indicator that a writer is speculating. Starry reviews some facts related to the

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Roundtable (the "Real Estate Associations"), GN Docket No. 17-142 (filed September 30, 2019) ("*2019 Reply*").

[11] Comments of Public Knowledge and Consumer Reports, GN Docket No. 17-142 (filed Oct. 20, 2021) ("Public Knowledge Comments"), at 3-4. Public Knowledge also cites a number of publications, none of which addresses the actual level of competition inside multitenant buildings or set forth the kind of analysis needed to support the claim that certain contract terms are in fact impeding competition. *Id.* at notes 12, 14, 18, 20, 29, 39.

[12] Public Knowledge Comments at 6.

rental market and the effects of the pandemic, but in restating its position on contract terms introduces no facts that support the conclusion it wishes the Commission to reach. Finally, WISPA begins with a general description of market conditions but, like the others, has little new to say after that, and WISPA's discussion of exclusive wiring agreements and compensation remains disconnected from any factual basis. WISPA and INCOMPAS appear to have conducted new surveys of their members, but these surveys seem to have yielded only anecdotes, not quantitative information or anything that would connect their allegations with their proposed remedies.

In sharp contrast, the real estate industry has submitted a substantial volume of detailed factual information to assist the Commission in understanding the complexity of the rental real estate market and relationships between different types of property owners and broadband providers. In response to the *NPRM*, the National Multifamily Housing Council ("NMHC") and the National Apartment Association ("NAA") conducted a survey of apartment owners, which asked numerous questions directly relevant to the issues raised in this docket.[13] When the *2021 Notice* was released, NMHC and NAA conducted a second survey,[14] the key results of which

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[13] Joint Comments of the National Multifamily Housing Council, the National Apartment Association, the International Council of Shopping Centers, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association and the Real Estate Roundtable (the "Real Estate Associations"), GN Docket No. 17-142 (filed Aug. 30, 2019) ("*2019 Comments*"), at 65-67.

[14] 2021 Apartment Industry Survey on Broadband Choice, Competition, and Infrastructure ("*NMHC/NAA 2021 Broadband Survey*").

After the filing of the Further Comments, additional property owners responded to the *NMHC/NAA 2021 Broadband Survey.* Consequently, some figures reported in the Further Comments have changed. The responding firms collectively own 1,213,199 units (up from 978,963) and manage 901,896 units (up from 770,640). The average respondent (or firm in the survey) indicated that apartment residents have a choice of provider in 79.3% of its portfolio's

were reported in our Further Comments. This survey resulted in updated information regarding competition in the residential market, as well as information regarding wiring sharing, and the types of costs borne by apartment owners.

Furthermore, our filings in each round have been supported by detailed declarations proposed by apartment owners and respected industry consultants, submitted under penalty of perjury. We have submitted a total of 26 declarations,[15] including two[16] with these Further Reply Comments. Seven of the 11 declarations submitted in response to the *2021 Notice* were prepared by individuals or organizations that had submitted earlier declarations, because they were asked to update their information.

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properties, up slightly from 78.5%. The property portfolio sizes represented by the survey ranged from 200 units to over 100,000 units.

In addition to updating those figures, the Real Estate Associations would like to introduce several other figures into the record. Because of the diversity and constant change in the apartment market, it can be difficult to find consistent statistics. For example, duplexes and quadruplexes may be included in some figures, whereas the apartment industry generally considers only properties with five or more units to be "apartment buildings." Various parties cited figures for different characteristics of the apartment industry, some of which are inaccurate. Consequently, we offer a comprehensive list of useful key data points at Exhibit A.

[15] *See* Reply Comments of the National Multifamily Housing Council, GN Docket No. 17-142 (filed Aug. 22, 2017) at Declaration of Alaine Walsh ("*2017 NMHC Reply Comments*"); *2019 Comments* at Exhibits B, D - J; Joint Reply Comments of the National Multifamily Housing Council, the National Apartment Association, the International Council of Shopping Centers, the Institute of Real Estate Management, Nareit, the National Real Estate Investors Association and the Real Estate Roundtable (the "Real Estate Associations"), GN Docket No. 17-142 (filed September 30, 2019) at Exhibit A ("*2019 Reply*"); *Further Comments*, Exhibits B - J. This includes six declarations that were submitted with the NMHC's comments filed in MB Docket No 17-91, *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No 17-91, Public Notice, DA 17-318 (rel. Apr. 4, 2017) (the "*MBC Petition*") and were incorporated in the record of this docket by reference in the Comments of the National Multifamily Housing Council, GN Docket No. 17-142 (filed June 9, 2017) ("*2017 NMHC Comments").*

[16] Declaration of William K. Dodd, attached as Exhibit B ("Dodd Decl."); and Declaration of Charlie Walker attached as Exhibit C ("Walker Decl.").

In short, the proponents of regulation have failed to make their case. Their claims are vague, overbroad, and based almost entirely on speculation.

II. Regulation Is Not Justified Because there Is Ample and Effective Competition in Residential, Office, and Retail Multitenant Properties.

Throughout this proceeding, the proponents of regulation have argued that Commission regulation is required because there is insufficient competition in all classes of rental properties, yet they have made no attempt to define either a desired level of competition, or the actual level. The Real Estate Associations, on the other hand, have demonstrated that the level of competition is quite high. The *NMHC/NAA 2021 Broadband Survey* shows that apartment residents have a choice of at least two providers in 79% of properties owned by the average respondent.

That level of competition in the apartment market was reached in an environment in which exclusive wiring and exclusive marketing agreements, pursuant to which providers typically pay owners for certain rights, have been common for many years. Indeed, all categories of provider, not just the cable operators and the incumbent local exchange carriers (the "ILECs"), rely on these types of agreements in one way or another. Certain individual companies and trade associations are attempting to gain a competitive advantage by having the Commission intervene, but their claims should not be allowed to obscure the fact that other competitors – small providers that have been serving the multitenant market for years – have proven that it is possible to compete successfully without the Commission's help.

Furthermore, there has been ample competition in office and retail properties for decades.

A. Broadband Competition in the Apartment Market.

In the most recent round of comments, several parties seem to have acknowledged that the position regarding competition set forth by the Real Estate Associations in response to the *NPRM* and in the Further Comments is fundamentally correct. Lumen has stated that "most [residential] MTEs are served by at least two wireline providers."[17] INCOMPAS says "[w]hile most Americans have one or two high-speed providers . . . very few actually have a third, competitive high speed or fiber option."[18] The emphasis on a third provider is the key here: although they have obscured the issue until now, often leaving the impression that a sizeable proportion of buildings have only a single provider, and never acknowledging that provider economics has anything to do with the problem, it seems clear now that what WISPA, INCOMPAS, FBA, and others want for their members is exactly what we have been asserting: to be, in most cases, the third or even fourth provider.

There is little doubt that the cable MSOs are currently serving nearly all apartment communities in the country in some fashion, or that the ILECs are also a strong presence in a large majority of buildings.[19] Despite the protestations of some, the Commission's rules are not being circumvented; indeed, they have succeeded, because fifteen years ago the ILECs entered the residential broadband market and ever since have been competing directly and strongly with the cable operators. In that environment, competitive providers in most buildings are likely to be

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[17] Lumen Comments at 4.

[18] INCOMPAS Comments at 6.

[19] Further Comments at 10-14, 18-19. AARP argues that incumbent providers and property owners engage in "parallel exclusion." Comments of AARP, GN Docket No. 17-142 (filed Oct. 20, 2021) ("AARP Comments"), at 7-8. The trouble with this theory is that there is actually a great deal of competition, so there is little, if any, exclusion of the sort AARP alleges.

the third entrants most of the time. But even when a third competitor is not present, outside of the lower income communities that we discuss in Part III,[20] apartment residents have a choice roughly three-quarters of the time or more.

NCTA has confirmed our position, noting that one of its members reports that in its service area "80% of residential MTEs with 50 or more units have at least two-facilities-based broadband providers . . . ."[21] ACA Connects agrees in more general terms: "MTEs in general are as competitive as other segments of the broadband marketplace, if not more so."[22] William Dodd, the CEO of GigaMonster Networks, LLC, states that his company "serves hundreds of communities that have multiple competitive service providers."[23] DC Access reports that "all of the MTEs that we have a relationship with have multiple Internet Service Providers (ISPs) available to residents and business within the MTE."[24]

We agree with NCTA on a second very important point, as well. The level of competition is increasing, without Commission intervention. NCTA reports that the cable operator referred to above has stated that "between 4Q2019 and 2Q2021, buildings with three or

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[20] The analysis in Part III suggests that two-provider competition is ubiquitous in apartment communities above an average annual household income threshold of somewhere between $20,000 and $35,000, and that apartment communities that lack competition or adequate broadband are heavily concentrated in communities below that income level.

[21] Comments of NCTA, GN Docket No. 17-142 (filed Oct. 20, 2021) ("NCTA Comments"), at 10.

[22] Comments of ACA Connects, GN Docket No. 17-142 (filed Oct. 20, 2021) ("ACA Connects Comments"), at 6.

[23] Dodd Decl. at ¶ 16.

[24] Comments of DC Access, GN Docket No. 17-142 (filed Oct. 20, 2021) ("DC Access Comments"), at 1.

more facilities-based broadband providers increased by 106%."[25] Although the *NMHC/NAA 2021 Broadband Survey* did not gather data on three-provider competition, we can see the same trend in the information submitted by property owners in declarations in 2019 and 2021. The table below shows that the proportion of properties served by three providers is increasing at about the same rate reported by NCTA:

INCREASE IN COMPETITION BETWEEN 2019 AND 2021

OWNER	**Properties with more than two providers (2019)**		**Properties with more than two providers (2021)**		**% Increase in number of properties**
	Number of Properties	Share of Portfolio	Number of Properties	Share of Portfolio	
AMLI	4	5.7%	15	19.5%	275%
AvalonBay	25	8%	28	9%	12%
GID/Windsor	15	15%	20	15.9%	33%
Essex	17	7%	87	36%	412%
Equity Resid'l	22	7%	32	11%	45%
TOTAL	83		150		81%

These five companies, which include the second, fourth, twelfth, twenty-sixth, and forty-third largest apartment owners in the U.S., have increased by 81% the combined proportion of their properties that are served by more than two broadband providers. While lower than NCTA's 106%, this figure still suggests that three-provider competition has nearly doubled in just two years. In addition to this comparison, Mill Creek Residential Trust, which did not

[25] NCTA Comments at 10.

submit a declaration in 2019, reports that 19% of its properties have at least three gigabit-speed providers.[26]

There are very likely four reasons for this growth in the level of competition. First, apartment residents are becoming aware of the availability of gigabit service from the newer competitive providers and either asking their current management about it or making it a factor when looking for a new home. Second, newer providers have become more established, have developed relationships with owners, and learned better how to approach owners, as well as which market sectors best suit their business plans. Conversely, for their part, owners have developed relationships with providers and are more willing to engage with those companies that have proven themselves in the marketplace.

The third reason is simply that when an industry has an attractive product, its penetration will increase over time – expansion is slow at first, then begins to take off, accelerates rapidly, and once a much higher level of penetration is reached, begins to level off. The communications industry has seen the same pattern develop with many services and applications.

Finally, owners compete with each other. Once an apartment property in a community introduces an attractive new product – whether it is a fitness facility, free property-wide WiFi, or a third provider offering gigabit service -- prospective residents will take note and so will owners of comparable properties. And once a capability becomes common at one level of the market, it

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[26] Kok Decl. at ¶ 7. Incidentally, INCOMPAS notes that "in urban areas, only 12.68% of the population has three or more providers offering 100/10 Mbps." INCOMPAS Comments at 6, n. 11. This, of course, says nothing about competition in the apartment market, but it does suggest that the apartment market is more competitive than the overall market in this regard.

will filter down to other sectors, provided that it can be delivered at an appropriate price level. These are basic aspects of economics, technology deployment, and business growth.

B. Broadband Competition in the Office and Retail Markets.

Over twenty years ago, the Commission banned exclusive access agreements for telecommunications services in non-residential buildings. In fact, the real estate industry proposed such a prohibition, in large part because the market for telecommunications services in office and retail buildings was already highly competitive and property owners saw no benefit in exclusivity.[27] The real estate industry also argued at the time that the residential market was different and should be treated differently. The same is true today. Anybody who has ever entered a shopping mall, an office building, or an apartment building knows that they are constructed differently and used differently. It stands to reason that the occupants of those different types of property will have different communications needs, and therefore that the kinds of arrangements made with communications providers will also be different.

For the past two decades there has not been a hint of a problem with broadband competition in the office or retail arenas, and even in this proceeding there is little evidence of

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[27] *Promotion of Competitive Networks in Local Telecommunications Markets, First Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 22983, 22996 (2000), at n. 70 ("*Competitive Networks Order*"). Consolidated Communications and Ziply Fiber argue that in that order the Commission found that property owners have market power. Comments of Consolidated Communications and Ziply Fiber, GN Docket No. 17-142 (filed Oct. 20, 2021), Consolidated Comments) at 4, 15. This overstates the Commission's findings, however. The Commission found only that "an exclusive contract may benefit a [commercial] building owner when it possesses some market power over tenants, such as where tenants are already committed to long-term leases and moving costs are prohibitive." *Competitive Networks Order* at ¶ 31; *see also* ¶ 21 (whether owner's control over access translates into ability to restrict access unreasonably "depends on the circumstances in particular real estate markets, as well as the time frame"); ¶ 32 (typical commercial building generates enough revenue from telecommunications service to support multiple providers).

it.[28] INCOMPAS discusses this question, but never offers a concrete example of any issues in the office market, and the best it can do with respect to shopping centers is to recycle the examples cited by CenturyLink in 2017, which Lumen acknowledges have been resolved.[29] At one point INCOMPAS says "increasingly in commercial settings, MTE owners are only permitting one provider, with which the owner has a revenue sharing agreement."[30] Is this a reference to the office market or the retail market? We don't know. In any case, INCOMPAS offers no evidence of this alleged problem beyond that single statement. Furthermore, INCOMPAS also says that the Commission must consider the consequences "if the largest

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[28] Several commenters raise issues related to broadband in smaller office buildings. *See, e.g.,* Express Comment of Molly Fitch (filed Sep. 8, 2021). Public Knowledge claims that small businesses suffer from a lack of competition because of "exclusive agreements" in commercial buildings, but offers no concrete examples or any kind of analysis, only a naked claim. Public Knowledge Comments at 12-13. In reality, exclusive agreements between owners of commercial buildings and communications providers that preclude access by competitors in any way are extremely rare, if they exist at all. This is not to say that there are not buildings that are served only by one provider.

We have no doubt that in smaller, older office buildings with older infrastructure, as in similar residential buildings, incumbent providers may be unwilling to upgrade wiring and competitors often may not be able to justify the investment. Rents in those buildings will often be below market, which limits the property owner's ability to contribute to the cost of infrastructure, as well. The result is that some office tenants may have access only to DSL or other substandard service from the ILEC, but this problem has nothing to do with any exclusivity terms. On the other hand, the Joint Parties state that many Class C and some Class B office and residential properties are underserved, and the investment community is willing to fund new entrants that can serve those properties if the providers are free to negotiate appropriate agreements. Comments of Joint Parties, GN Docket No. 17-142 (filed Oct. 20, 2021) ("Joint Parties Comments"), at 3-4.

[29] Lumen Comments at 9; INCOMPAS and Public Knowledge also cite this example, but neither offers any other evidence of a lack of competition or access to the provider of a tenant's choice in the retail context. INCOMPAS Comments at 14, n.27; Public Knowledge Comments at 8. Nor does any other party offer any concrete evidence of a problem in any commercial setting, office or retail, that arises because of the existence of an exclusive wiring or marketing arrangement.

[30] INCOMPAS Comments at 12.

property owners of commercial real estate use the same arrangements as retail MTE owners . . . ."[31] In other words, INCOMPAS doesn't even have evidence of a problem in the office market – it is just speculating about the future. And since the only concrete example any party has given pertaining to office or retail properties – from CenturyLink in 2019 – has been resolved, exactly what is the problem?[32]

Ordinarily we might be inclined to give INCOMPAS and others the benefit of the doubt, but this proceeding has been so full of mere speculation from the beginning that it is becoming difficult to credit their position. Furthermore, it simply makes no sense. For example, the standard practice in the office market in the Washington, D.C., area for many years has been for a provider to pay at most $100-$200 a month for access to an office building. This compensates the owner for staff time dealing with the provider's representatives when they are in the building, for addressing complaints from tenants when they arise, and for the fact that the provider is taking up space in equipment closets and risers. When a commercial entity is using the property of another in the course of its business, it is expected to pay for that right. Compared to the

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[31] INCOMPAS Comments at 15.

[32] An express comment submitted by Jay J. Morris, President of Morecomm Solutions, LLC (filed Oct. 20, 2021), objects to the practice of a certain retail center owner, but in that case it appears that there is competition. The objection is to a requirement that providers connect to the shopping mall's internal network, rather than being permitted to run their own connections through the mall to each individual customer's premises. This seems to be the sort of arrangement that INCOMPAS and Lumen address, although they conflate agreements in residential, office, and retail properties in ways that make it very hard to determine exactly what they mean. In any case, this arrangement sounds a lot like the neutral host networks some commenters advocate. The Real Estate Associations are not opposed to neutral host access networks; property owners should be free to employ the most appropriate technical solution for each property. Mandating one-size-fits-all solutions, without regard to the individual circumstances at each property, however, will not succeed.

thousands of dollars broadband providers earn from their customers in these buildings, this is a modest and very reasonable fee.

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In short, there is ample competition for broadband service all across the multitenant rental industry. Furthermore, although there is no legal standard for effective competition that demands it, the marketplace itself is promoting the deployment of three and more providers in apartment communities. With this level of organic competition, there is no justification for Commission regulation.

III. Competition and Service Quality in HUD-Supported Properties and Other Low-Income Housing Remain a Challenge Because of Federal Housing Rules and the Business Needs of Broadband Providers.

A number of commenters raised the issues of affordability and deployment and competition in low-income housing.[33] These commenters generally asserted that exclusive wiring and exclusive marketing agreements and payment of compensation to property owners are harmful, but did little to explain why low-income communities suffer from poor broadband service. The Real Estate Associations believe that much more can and must be done in this area; we also believe that this vital work begins with two steps. First, the Commission and all the

[33] Comments of Boston Housing Authority, GN Docket No. 17-142 (filed Oct. 20, 2021) ("Boston Housing Authority Comments"), at 1-2; DC Access Comments at 2; Public Knowledge Comments at 2, 10-11; Comments of Starry, Inc., GN Docket No. 17-142 (filed Oct. 20, 2021) ("Starry Comments"), at 2-4; Comments of Stewards of Affordable Housing for the Future, GN Docket No. 17-142 (filed Oct. 22, 2021) ("SAHF Comments"); Comments of Wireless Internet Service Providers Association, GN Docket No. 17-142 (filed Oct. 20, 2021) ("WISPA Comments") at 10-12.

interested parties need to develop a complete understanding of the economic factors at work. Second, the Commission needs to assess the scope of the problem: What kinds of properties are involved, and how many of them are there?

Extending high quality broadband throughout low-income apartment communities is a complex problem, and will not be resolved through the kind of regulation proposed in the *NPRM* or the *2021 Notice*.

A. Serving Low Income Properties Poses Particular Challenges to Broadband Providers and Housing Providers that Would Not Be Resolved by the Kinds of Regulation Being Considered in this Proceeding.

The commenters who raised the issue of affordability tended to do so in somewhat simplistic and even contradictory ways. For example, Public Knowledge states:

> 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 [footnote omitted]. 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.[34]

Note the tension between these two sentences. The first declares that larger ISPs are not delivering high quality broadband in certain areas; the second presumes that some form of broadband is available from the large ISP. This is a bit of a bait and switch. Are we talking about "high quality" broadband, however that's defined, or any broadband at all? And, of course, the second sentence is no more than speculation. Nowhere do Public Knowledge's comments explain how the "*de facto* exclusive agreements" preclude competition. In an earlier passage, Public Knowledge claims that revenue sharing agreements, exclusive wiring

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[34] Public Knowledge Comments at 11.

agreements, and exclusive marketing agreements "create effective monopolies," but doesn't trouble to explain how.[35]

Furthermore, the source Public Knowledge cites to support the claim in the first sentence – that larger ISPs have failed to provide high-quality broadband – is much more thorough and nuanced in its analysis.[36] That article does state that big providers "shun low-income communities,"[37] but later goes on to observe that federal infrastructure funding "could incentivize companies to build in areas they previously avoided" and that funding "could also tempt upstart competitors to serve the neighborhoods."[38] In other words, in some low-income communities there is no broadband service at all, and the cost of extending infrastructure hinders deployment for both incumbent providers and newcomers. As we will see, infrastructure costs are the paramount obstacle.

There are many considerations that affect deployment and competition in low-income areas, affordable housing, and public housing, as we noted in our Further Comments.[39] The most important factor is that even if a competitor is willing to serve, the existing wiring at a

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[35] *Id.* at 5-8. Starry and WISPA take the same tack. They say all the right things about the importance of addressing affordability, but do not grapple with the economics of the problem at all. Starry Comments at 4; WISPA Comments at 13. Their solution to everything is to ban certain agreements without justification.

[36] 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/ ("*Broadband Gap*").

[37] *Id*. at 2-3.

[38] *Id.* at 4.

[39] Further Comments at 75-79.

property may need to be upgraded. In fact, it almost certainly needs to be upgraded, as William Dodd of GigaMonster explains:

> [M]ost low-income housing was built 20+ years ago. In these properties, we find older cable types that cannot be used for what is classified as high-speed broadband. Cables such as RG59, Cat3 and older versions of Cat5 (Cat5E is only 20 years old as a cable type), will not carry the speeds and quality required today, especially for video streaming. So if we enter a property like that, we have to either upgrade the wiring, or, if existing wiring is not available because it's being used by an incumbent, overbuild the property with entirely new infrastructure.[40]

Commenters, however, do not seem to have taken this problem into account. The Boston Housing Authority states that "[c]ompetitive providers may be discouraged from serving BHA tenants due to the need for costly and redundant wiring."[41] This may be true in some cases, but it depends on the circumstances. Unfortunately, the Authority draws the wrong conclusion and says that exclusive wiring agreements inhibit entry of new providers.[42] This statement is presumably predicated on the idea that allowing competitors to share wiring with the incumbent would solve the problem. As we explained in the Further Comments, that would be a questionable proposition under the best of circumstances because of the myriad of problems created by sharing, but what if that wiring is out-of-date? Then there would be two providers, both trying to use the same inadequate wiring.

In reality, whether there is one provider at an affordable or HUD-supported property, or more than one, will depend on how much each provider must invest and how much revenue they

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[40] Dodd Decl. at ¶ 7.

[41] Boston Housing Authority Comments at 2.

[42] Stewards of Affordable Housing for the Future ("SAHF") makes a similar point, although in that case we believe that SAHF was not concerned with exclusive wiring agreements *per se*, but with the length of the terms of those agreements. SAHF Comments at 1. The *NPRM* and the *2021 Notice* did not ask about that issue and we have no opinion about it at this point.

can expect to earn. None will succeed without access to upgraded wiring that they each control.

Here is Mr. Dodd again:

> In some instances, in older communities, which tend to be in underserved communities, the cable is too old or of a type incapable of delivering high speed Internet services. In these instances, GigaMonster must install a new homerun cable in an existing community at considerable expense to GigaMonster. Therefore, it is imperative that GigaMonster be granted exclusive use of this cable, or risk it being used by another provider. In the event another provider was allowed to utilize the cable installed by GigaMonster, GigaMonster will be unable to justify the capital expenditure required to install that new cable. There are millions of multifamily residential units throughout the US, especially in underserved communities, where the existing cable is inadequate to serve high speed Internet. Therefore, any rule that will prevent a provider from obtaining exclusive use of the new cable will most certainly decrease the likelihood that a provider will install a new high-speed Internet service in this community.[43]

Another important factor concerns rate structures. If an incumbent is offering a very low-priced service, competitors may not be able to justify even attempting to serve the property, especially if they will have to upgrade wiring or install their own wiring.[44] Even if the competitive broadband offering is substantially better in quality, the price disparity (which is heavily influenced by the wiring cost) will discourage residents from subscribing to the competitive service. As we noted earlier, exclusive control of wiring by each provider is the only way to assure delivery of reliable, high-quality service.

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[43] Dodd Decl. at ¶ 9. *See also* Comments of Orlando Telephone Company, Inc., GN Docket No. 17-142 (filed Oct. 20, 2021) ("Orlando Telephone Comments"), at 2 ("exclusivity provides an assurance that these service providers will be able to recoup their initial capital expenditure"). Joint Parties Comments at 4 (private equity less likely to invest if Commission regulates revenue sharing, exclusive use of wiring, or exclusive marketing agreements).

[44] Dodd Decl. at ¶ 7.

The only commenter to specifically mention exclusive marketing agreements in this context was Stewards of Affordable Housing for the Future.[45] SAHF supports the use of exclusive marketing because such "arrangements can generate modest revenues to help support property operations and resident services that benefit residents."[46]

Finally, we return to the *Broadband Gap* article cited by Public Knowledge. As *Broadband Gap* makes clear, the deep problem in this area is the cost of extending networks. The author quotes the chief development officer for the Los Angeles housing authority: "[Our sites] were theoretically covered by a number of broadband providers, but the broadband providers would not invest in the infrastructure needed to actually bring and distribute that internet on site."[47] Nowhere does the article mention exclusive agreements of any kind.

B. Any Effort To Address Affordability and Choice in Low Income Communities Must Consider Department of Housing and Urban Development Regulations and Policies.

Broadband Gap also raises another factor, which is the effect of Department of Housing and Urban Development ("HUD") regulations. HUD funds can currently be used for service in common areas and for in-unit service for certain categories of subscribers.[48] HUD funds can

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[45] Public Knowledge would have the Commission ban all exclusivity arrangements, alleging that they prevent competitors from serving low-income areas. Public Knowledge Comments at 11.

[46] SAHF Comments at 2. SAHF also notes that marketing agreements often include provisions that ban the introduction of bulk service. As with the duration of exclusive wiring agreements, the *NPRM* and the *2021 Notice* did not ask about that issue and we have no opinion about it at this point.

[47] *Broadband Gap* at 10.

[48] *Broadband* Gap at 12; *see, e.g.*, 24 CFR § 5.100 (definition of broadband infrastructure); Narrowing the Digital Divide Through Installation of Broadband Infrastructure in HUD-Funded New Construction and Substantial Rehabilitation of Multifamily Rental Housing, 81 Fed. Reg. 92626, 92632-92633 (2016) (amending HUD rules to require installation of facilities capable of

also be used for broadband infrastructure, but at this time those uses are limited to in-unit wiring and WiFi or other wireless hardware. HUD funding is not available for wiring needed to connect to each unit; this wiring must be installed and paid for by a provider.[49]

Furthermore, and more to the point of this proceeding, HUD has stated that:

> HUD does recognize that it is important to provide as much choice as possible regarding service providers. However, sometimes, exclusive contracts allow for the provision of broadband service at a much lower rate than would otherwise be available. HUD therefore declines at this time to restrict housing providers' ability to enter into limited service contracts, but would like to recommend caution for public housing agencies (PHAs) considering exclusivity contracts.[50]

This passage is significant for two reasons. The first is to observe that the agency responsible for overseeing the expenditure of federal funds in public housing, Section 8 affordable housing, and related programs, has acknowledged the benefits of exclusivity under certain circumstances.[51] The second is to observe that these communities operate in a different

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delivering broadband services within units in new construction and substantial rehabilitation projects); OFFICE OF PUBLIC AND INDIAN HOUSING, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, USE OF PUBLIC HOUSING FUNDING TO SUPPORT INTERNET CONNECTIVITY FOR RESIDENTS (Jan. 19, 2019) at 2 (summary of permissible uses of funds for delivering service in individual units).

[49] 81 Fed. Reg. at 92633. DC Access offers a different example of restrictions that affect competition in public housing: It has been unable to serve public housing in the District of Columbia because of the housing authority's high insurance coverage requirement. DC Access Comments at 2.

[50] 81 Fed. Reg. at 92630.

[51] In 1996, the Assistant Secretary for Housing issued a notice to certain HUD management personnel and the owners and managers of multifamily projects, stating that in return for an exclusive agreement, certain providers had proposed "installing all necessary equipment . . . at no cost to the project, and, in some cases, returning a portion of subscriber fees paid by tenants for the services to the project as project income." Notice H 96-19 (HUD), DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, TELECOMMUNICATIONS SERVICES – CONTRACTS BETWEEN TELECOMMUNICATIONS SERVICE PROVIDERS AND PROJECT OWNERS (April 11, 1996). This notice expired a year later, but we believe it remains HUD policy.

regulatory and financial universe. While all involved – including especially the apartment industry -- desire strongly to find ways to deliver high-quality, competitive service to residents of HUD-supported housing, it does little good to blithely assert that certain types of contractual provisions are a significant factor in the challenges faced by those communities.

C. The Scope of the Affordability Problem Needs To Be Defined in Quantitative Terms.

The Real Estate Associations believe that if the affordability problem is to be fully addressed, its scope must be properly defined, beginning with HUD-supported properties. If the Commission will acknowledge that these properties are an important but special case, distinct from the larger universe of multifamily housing, then it becomes possible to further narrow the scope of the problem and develop more effective policies. So how many multifamily communities or households are there in this underserved category of HUD-funded and other affordable properties?

WISPA states that there are nine million low-income households in the United States, representing 27 percent of all households. This percentage is clearly incorrect, because there are over 128 million households in the country.[52] We believe that WISPA is referring either to households with annual household incomes of less than $20,000, which constitute 26 percent of all apartment households, or to households with annual household incomes of less than $35,000, which account for 8.8 million apartment households.[53] Nevertheless, WISPA is on the right track. The Real Estate Associations believe that the Commission should identify the universe of

[52] *See* Exhibit A.

[53] *See* Exhibit A.

American households that are underserved and concentrate its efforts at promoting deployment on that universe.

As just stated, there are 8.8 million households with incomes under $35,000 living in apartments, representing 44% of all apartment households.[54] Many of these households are served by more than one provider and have access to good quality broadband service, although we do not know how many. That is a question worthy of further study: There is a gray area between the upper 70-80% of the market and the low-income sector. There is no ambiguity, however, about where the most help is needed. There are 5.2 million households with incomes under $20,000 living in apartments, representing 26% of apartment households[55] – a very high proportion of these households certainly do not have access to competitive broadband service, if they have broadband at all. The latter group certainly belongs in the universe we are trying to define.

In addition, we know that there are approximately 2.8 million households living in HUD-assisted apartment communities of five units or more.[56] Presumably, all of these households are included in one or more of the two income groups referred to in the preceding paragraph.[57] These households should clearly be part of the larger target universe, but because they are

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[54] *See* Exhibit A

[55] *See* Exhibit A

[56]*See* Exhibit A.

[57] We note here that figures related to HUD-assisted households are derived from the American Housing Survey, whereas other figures cited in the general discussion are derived from the American Community Survey. *See* Exhibit A for sources. These two universes are not identical, although they are very similar. Again, we present this discussion as a way of showing in general terms (i) the work needed to address problems in HUD-assisted housing and other low-income communities, and (ii) that the actual scope of the problem intended to be addressed by this proceeding is very small, so that any regulation would be unlikely to improve the situation.

subject to HUD rules, any action aimed at assisting them must take those rules into account and be coordinated with the other responsible agencies.

To summarize, there are three categories of households living in apartments that either certainly do need assistance of some kind, or some proportion of which may need assistance: (i) 2.8 million in HUD-assisted apartments; (ii) 5.2 million with incomes under $20,000 (which include the first group); and 8.8 million with incomes under $35,000 (which include the first two groups). In fact, if we refer back to the competition information gathered in the *NMHC/NAA 2021 Broadband Survey*, it appears that the critical universe probably consists almost entirely of the first two groups. Using a conservative figure of 75%, rather than the 79% suggested by the survey, roughly 15 million of the 20 million apartment households in the country[58] have access to at least two broadband providers. That leaves around 5 million that are underserved, which must include a very large proportion of the 2.8 million in HUD-assisted apartments.

We do not mean to suggest that the 5.2 million low-income apartment households are identical to the 5 million underserved households, but clearly there is likely to be significant overlap. Further work would be needed to classify these groups more definitively. But we can say that we can now define our original three groups more narrowly and put them into three new groups: 2.8 million households in HUD-assisted apartments; (ii) 2.4 million (5.2 – 2.8) low-income households not in HUD-assisted apartments; and (iii) some other, but relatively small number of households with incomes between $20,000 and $35,000 and higher, that are also in

[58] *See* Exhibit A.

some way underserved.[59] It may be possible to improve on this analysis, but it appears to confirm our fundamental argument: the terms of contracts are not the problem. 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.

IV. PROPONENTS OF REGULATION IGNORE THE KNOWN PROBLEMS CREATED BY SHARING OF WIRING.

There are two fundamental issues in this docket. The first concerns the state of competition in the three categories of multitenant properties, which we addressed in Part II. The second concerns the practical feasibility of mandating the sharing of wiring. For over 20 years, the Commission's cable inside wiring rules have allowed property owners to choose between granting a single provider the right to use inside wiring at a property, or providing for sharing of wiring.[60] More recently, the Commission has recognized that sharing of "in-use" wiring presents serious technical and practical problems.[61] In fact, the problems created by sharing of wiring are not limited to the Commission's "in-use" category: they apply equally strongly to any wiring

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[59] All of these groups benefit from the Commission's Emergency Broadband Benefit program and other programs designed to lower the cost of individual subscriptions, but the first two categories especially need support for infrastructure deployment. *See* Dodd Decl. at ¶¶ 3, 9. It appears that funding provided by the Infrastructure Investment and Jobs Act will be available to deploy infrastructure in underserved multifamily residential buildings, but funding will also be needed for middle mile solutions to extend existing networks to such communities.

[60] 47 C.F.R. § 76.804.

[61] *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, 34 FCC Rcd 5702, 5724-5759 (2019).

scheme, as we have laid out in every round of comments in this proceeding,[62] and NCTA confirms in its most recent filing.[63]

Property owners are not the only participants in this market that object to sharing of wiring.[64] William Dodd of GigaMonster explains why his company negotiates exclusive wiring contracts:

> Based on my 21 years of experience providing high speed Internet services to thousands of multifamily communities, I have never had a successful outcome in a community where other providers were allowed to use the same homerun cables used by my company. There is no clear understanding of which provider is responsible for maintaining those homerun cable and there is no accountability of technicians who disconnect homerun cables while working in a common punch down panel having access to the same cables. In fact, I have had dozens of experiences where other providers have disrupted service while searching for a homerun cable needed to service one of their customers. When that technician cuts or disconnects the wrong cable, they have little incentive to repair it because it is not impacting their customer.[65]

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[62] Further Comments at 20-33; *2019 Comments* at 71-72; Reply Comments of National Multifamily Housing Council, MB Docket No 17-91 (filed June 9, 2017) ("*MBC Petition Reply")*, at 9; Comments of National Multifamily Housing Council, MB Docket No 17-91 (filed May 18, 2017) ("*MBC Petition Comments")*, at 12-14.

[63] NCTA Comments at 8-10.

[64] *See, e.g.,* Comments of Consolidated Smart Systems, LLC, MB Docket No. 17-91 (filed May 15, 2017), at 5-6; Comments of Data Stream Inc. MB Docket No. 17-91 (filed May 12, 2017), at 3-5; Comments of DIRECPATH, MB Docket No. 17-91 (filed May 18, 2017), at 2-3; Comments of Direct Plus, LLC, MB Docket No. 17-91 (filed May 17, 2017), at 3-5; Comments of Privatel, Inc., MB Docket No. 17-91 (filed May 14, 2017), at 3-4; Comments of Spot On Networks, LLC, MB Docket No. 17-91 (filed May 12, 2017), at 3-4; Comments of Vicidiem, Inc., MB Docket No. 17-91 (filed May 12, 2017), at 3-5

[65] Dodd Decl. at ¶ 11. *See also* Orlando Telephone Comments at 3 ("A service provider would be unwilling to invest into new wiring if later it is forced to share it with other service providers. . . . Under the sharing scenario, less and less service providers will be willing to enter the market and less wiring will be installed in MTEs. . . . Furthermore, sharing of building wires by different service providers would potentially lead to costly technical problems and network issues."); Walker Decl. at ¶¶ 7-11 (discussing use of wiring agreements to obtain higher customer service standards and speeds).

Proponents of regulation understandably choose to ignore these problems because the issue is so central to the docket: If sharing of wiring is impractical, then allowing the exclusive use of wiring is a sound policy.[66] But ignoring the issue in comments filed with the Commission does not mean it can be ignored in the field.

Of course, this is not the only point that FBA, INCOMPAS, Public Knowledge, Starry, WISPA and others ignore. None of them explain how the Commission can assert authority over wiring owned by property owners without violating the Fifth Amendment. This is a critical point because, as we have explained, essentially all home run wiring used by cable operators to serve apartment residents is the property of the building owner. The Commission has no authority to take that wiring or to establish a constitutionally-valid compensation scheme. The Fifth Amendment is not a loophole.

The same parties also ignore the disparate treatment of wiring owned by the ILECs. None of them addresses the fact that AT&T and Verizon will only install fiber facilities in a building if the owner allows the provider to install facilities all the way to each unit and agrees that the ILEC will hold title. Lumen has much the same policy; in fact, Lumen has stated that "exclusive use of wiring is essential to enable the provision of state-of-the-art communications services.[67] Furthermore, these companies assert that the cable inside wiring rules do not apply to

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[66] Of course, one reason certain parties give for promoting sharing of wiring is that constructing duplicate facilities is expensive. *See, e.g.,* INCOMPAS Comments at 19. This is true – but one could just as well say that duplicate facilities in the public rights-of-way are expensive and require sharing of those facilities. The Commission attempted this, found that it was not practical, and decided instead to actively promote facilities-based competition. The situation inside buildings is no different.

[67] Lumen Comments at 7.

those fiber installations, while also claiming to retain ownership of much of their old Title II copper facilities.

FBA, INCOMPAS, Starry, and WISPA are comfortable with this disparity because they want to take advantage of it for their own benefit. They want fixed wireless and fiber broadband competitors to be able to use wiring that others have installed, while preventing those other providers from using wiring that they install.

For example, INCOMPAS states that the Commission should prohibit "any wiring agreement that does not allow competitors to use copper-based wiring . . . "[68] Fair enough, because this statement is at least consistent with INCOMPAS's overall position. In the next paragraph, however, INCOMPAS adds that "the cable inside wiring rules do not apply and should not be applied to fiber."[69] And then, having had its cake and then eaten it, INCOMPAS asks the Commission for another helping, saying that open access fiber networks should be encouraged, and giving the example of an INCOMPAS member that sells wholesale access to its network, including to four retail ISPs on one college campus.[70] Note that the INCOMPAS member is <u>selling</u> access, not giving it away.

This is not to say that the Real Estate Associations are opposed to open access networks or any other business plan a broadband provider might choose to employ, as long as the rights of

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[68] INCOMPAS Comments at 16.

[69] INCOMPAS Comments at 17. Of course, those rules also do not apply to wiring that is the property of building owners.

[70] *Id.*

property owners are respected.[71] In fact, we appreciate INCOMPAS's candor, because it encapsulates what we have been saying all along: first, the current system is equitable because permitting property owners and cable operators to enter into exclusive wiring agreements creates a level playing field with the ILECs; and second, the changes proposed by INCOMPAS and others would be inequitable because they would remove the level playing field while allowing competitors to exercise the same rights as the ILECs or to use existing wiring under regulated terms, at their option.[72]

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[71] If a property owner determines that an open access network is feasible for meeting resident or tenant needs at a property, and makes economic sense, it should have that option -- but attempting to impose such a solution from the top down, even if it were lawful, would only cause disruption and delay in deployment.

[72] WISPA says that the Commission should consider "whether exclusive wiring agreements should be categorically prohibited." WISPA Comments at 16. But WISPA also says that it opposes mandatory sharing and that small providers should be protected so that providers that install their own wiring are not required to share it as long as it is used "to serve a customer, and no longer than necessary to allow the provider to recoup its investment." *Id*. at 15-16; *see also* Starry Comments at 9, n. 26. Note the ambiguity here: to serve a customer <u>and</u> no longer than necessary. Exactly when does the provider have to share the wiring under that formulation? And how do we know when it has recouped its investment? Who will determine that? Note also that WISPA cites the cable inside wiring rules, which do not apply to wiring owned by the building owner, nor to fiber facilities owned by the ILEC or a fiber-based broadband-only competitor. *Id.* at 16, n. 49.

FBA argues that exclusive access to wiring should be banned, unless an owner grants "expeditious access" to a building "on a reasonable basis" and without imposing "restrictive conditions on where and how new entrants may install wiring and other facilities." Comments of the Fiber Broadband Association, GN Docket No. 17-142, (filed Oct. 20, 2021) ("FBA Comments"), at 5-6. This would require direct Commission oversight of the property management practices of every apartment owner in the country. Needless to say, this proposal far exceeds the Commission's authority.

Finally, Starry calls for development of a "Gigabit Ready checklist" that would facilitate open and neutral access to buildings: but who will pay for that infrastructure, and will those entities be allowed to charge for use of facilities they paid for and presumably maintain? Given the costs associated with retrofitting the existing stock of apartment properties those would be the first questions that would need to be answered.

INCOMPAS's position leads the Real Estate Associations to ask what INCOMPAS might say if a property owner installed an open access network in an apartment community, office park, or shopping mall and then only allowed access to the network and the property upon payment of a "wholesale access fee?" We actually know the answer to this, because INCOMPAS suggests that the Commission consider rules that would require a provider that installs wiring (apparently only the first entrant) to donate the wiring to the building owner, and require the owner to offer the infrastructure to all others at "fair and reasonable terms."[73]

One obvious problem with INCOMPAS's position is that the Commission has no authority to convert property owners into wiring managers under such a structure because it has no power to compel property owners to do anything. In addition, the proposal is completely impractical. The first entrant would not actually donate the wiring to the owner because providers will refuse to pay for assets that they will immediately have to give away. Instead, the first entrant would insist that the owner pay for all of the infrastructure in the building, and then the owner would have to assume the burden of maintaining, managing, and obtaining compensation for those facilities, subject to the Commission's oversight. Once one realizes that this is what is being proposed, one can see that without new authority from Congress this and similar proposals are nonstarters.[74]

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[73] INCOMPAS Comments at 19.

[74] AARP calls for an equally impractical and unlawful open access scheme. AARP Comments at 3-4. AARP goes on to say that competitive forces will require that owners make this kind of investment anyway, so they should bear the cost. AARP also asserts that "It is difficult to imagine that any building constructed in the past 70 years would not have incorporated the availability of some type of telecommunications wiring or conduit . . . ." AARP Comments at 5. While technically correct, the latter statement suggests a lack of understanding of building architecture, especially in older buildings, of the challenges surrounding the installation of

Incidentally, we presume that INCOMPAS would still insist that its members have the right to install their own fiber for their sole use and would resist any rule that would force them to allow others to use it. Nor has INCOMPAS proposed that its members that sell wholesale access should do so at "fair and reasonable" rates regulated by the Commission.

In any case, any attempt to mandate sharing of wiring will fail. It is unlawful, as noted above and as discussed in the Further Comments. Both property owners and providers that currently install wiring will cut back on infrastructure spending. Competitive providers will have less capital available for new infrastructure because "the private equity community is less likely to embrace independent ISPs in the MTE market if those companies are prohibited from entering into revenue-sharing agreements, required to share the wiring that they deploy, or limited to non-exclusive marketing arrangements."[75] And in many cases, property owners that have suffered the consequences of wiring sharing in the past will be less likely to grant competitors access unless the provider is willing to install its own facilities. Imposing the sharing of wiring would be seriously misguided.

V. THERE IS NO JUSTIFICATION FOR REGULATING FEES PAID TO PROPERTY OWNERS.

It is often difficult to understand precisely to which payments certain parties object because of the way they conflate their treatment of various issues. Nevertheless, most parties

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multiple sets of facilities, and of the economic forces at work. We do, however, support AARP's call for competing providers to bear the cost of installing their own facilities. AARP Comments at 5.

[75] Joint Parties Comments at 4.

agree that it is appropriate for owners to be compensated,[76] although some would limit compensation to the owner's costs.[77] A few parties would ban any compensation at all.[78] Beyond that, the record is somewhat confusing, but there does seem to be broad agreement that there are three categories of compensation arrangement: (i) compensation for use of wiring, which some parties would limit to costs; (ii) compensation for marketing services, which some parties also suggest should be limited to costs; and (iii) access-only agreements, which some commenters argue should not involve payment of compensation at all. We will address each category separately, after making two general points about compensation.

First, regulation of fees would be unreasonable because of the small amounts involved. Although we have addressed this issue in detail, most proponents of regulation have avoided it, other than to imply that because the fees are allegedly harmful, they must also be large. WISPA now takes a different tack, saying instead that fees paid to owners "provide a relatively small ancillary revenue stream, [but] their true purpose is to create an economic barrier to entry."[79] If they are small (which is true), how do they create an economic barrier to entry? And how can

[76] ACA Connects Comments at 4; Comments of ADTRAN, Inc., GN Docket No. 17-142 (filed Oct. 20, 2021) ("ADTRAN Comments"), at 8; Comments of Extenet Systems Inc., GN Docket No. 17-142 (filed Oct. 20, 2021) ("Extenet Comments"), at 4-5; Comments of Honest Networks, LLC, GN Docket No. 17-142 (filed Oct. 20, 2021) (Honest Comments"), at 1-2; Joint Parties Comments at 4; NCTA Comments at 11; Orlando Telephone Comments at 4; SAHF Comments at 2.

[77] AARP Comments at 5 (must be cost basis for charges); FBA Comments at 3-4 (revenue sharing permissible to recover costs); INCOMPAS Comments at 11-12; Lumen Comments at 2; WISPA Comments at 23 ("non-cost based-revenue sharing" should be banned).

[78] Starry Comments at 7; Public Knowledge Comments at 5-6; Consolidated Comments at 15.

[79] WISPA Comments at 23-24.

WISPA argue that the "true purpose" is to create a barrier to entry in light of the evidence in the record of how much owners spend on infrastructure to support broadband providers?[80]

Second, nowhere has WISPA or any other proponent of regulation provided an analysis showing the effects of any of the fees normally charged on a typical provider's finances.[81] Without such an analysis, the claim that any of the agreements commonly used in the industry present barriers to entry falls flat. For one thing, WISPA and others never address their <u>other</u> costs in any detail. When planning to serve a particular property, it is not just whatever charge

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[80] Further Comments at 39-42. 50-59; *2019 Comments* at 14-16, 59-63.

[81] Consolidated Communications Holdings, Inc. ("Consolidated"), states that it is paying annual door fees totaling $1.5 million to obtain access to 42 buildings, and that paying such fees to obtain access to the 30,000 properties in its footprint is not a sustainable business model. Consolidated Comments at 9. That may be true – but there is a great deal that Consolidated has not told us. First, how many properties does Consolidated actually serve? The scale of the alleged problem is important. For instance, 42 is only 0.14% of 30,000. Granted, Consolidated presumably does not serve all 30,000, but then Consolidated surely serves more buildings than just those 42. If Consolidated is serving just 5% of the buildings in its footprint, that would be 1500, in which case 42 properties represents just 2.8% of the buildings to which Consolidated has obtained access. Of course, we do not know if Consolidated has obtained access to 1500 buildings, but that's the point: without knowing that figure, the Commission cannot assess the strength of Consolidated's claim. In addition, because Consolidated has said nothing about paying fees in its remaining properties, whatever that number is, it would be fair to assume that they are not paying anything. In other words, this example is typical of so many others in the record: incomplete and potentially misleading.

We would also be interested to know more about those 42 properties, because annual door fees are unusual. The typical practice is for door fees to be made in one or sometimes two payments, rather than annually. Consolidated, or a predecessor company, may have made a bad business deal in those 42 agreements, but that does not mean that door fees or other payments are anticompetitive.

Finally, Consolidated offers no other information about its costs: How much are the door fees, in comparison to the total costs of service and to other individual cost components? It is simply not possible to evaluate its claims without the full context.

the property owner thinks is reasonable that affects the viability of the project.[82] If a provider frequently finds that its projected total costs are too high, that suggests that its business plan is flawed.[83] Or, if a provider cannot afford to pay compensation in a particular scenario, that may simply mean that the particular project is not feasible under that provider's business plan. In any case, protecting providers against bad business judgment or simple misfortune is not the responsibility of the Commission.

A. Compensation for Use of Wiring.

As we discussed in the Further Comments, attempting to limit compensation to costs would be unlawful and far more complex than commenters suggest.[84] In the *2019 Comments* and the Further Comments, the Real Estate Associations provided detailed information regarding the costs assumed by apartment owners to support broadband infrastructure deployment, and the

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[82] As just noted, Consolidated complains about door fees but it is possible that the company has other failings that affect its cost of service.

[83] The Real Estate Associations do not believe this is actually the case. In general, fixed wireless and broadband competitors seem to be doing well, especially as knowledge of their services become more widely known among apartment residents and owners. *See, e.g.,* Further Comments, Ex. C, Declaration of AvalonBay Communities, Inc., at ¶ 5; Further Comments, Ex. D, Declaration of Jeffrey Kok at ¶ 12; Further Comments, Ex. E, Declaration of Andrew Smith at ¶ 11; Further Comments, Ex. F, Declaration of Kimberly Smith at ¶ 8; Further Comments, Ex. G, Declaration of Linda Wu at ¶ 8. As we discussed in the *2019 Reply* in analyzing the responses to the WISPA survey, it appears likely that some proportion of providers have occasionally found that serving a particular property was not feasible. *2019 Reply* at 14-16. Of course, this is difficult to assess, because of the paucity of quantitative information submitted by the proponents of regulation. Ziply has stated that "[w]hen attempting to gain access to residential MTEs, Ziply is confronted by some combination of these agreements as much as 30% of the time." Consolidated Comments at 7. This means that 70% of the time there was not such a combination of agreements, and furthermore Ziply does not state that it was unable to gain access on reasonable terms in those cases in which such agreements were in place.

[84] Further Comments at 48-61.

compensation they receive from providers.[85] As a general rule, the cable operators pay one-time door fees to compensate owners for costs incurred by the owner, under the terms of service agreements that address access to the building, terms of service in the building, installation or upgrade of facilities, and other matters. The ILECs, on the other hand, rarely (if ever) pay for access to wiring because they insist on retaining title to wiring they install or that owners install on their behalf. Other providers may or may not pay door fees; this depends on the provider and the property.

In any event, because the Real Estate Associations have already addressed payments in this context in detail, we will not discuss them further here.

B. Compensation for Marketing Rights.

All types of providers – MSOs, ILECs, and others – may enter into exclusive or nonexclusive marketing agreements, under which they pay marketing fees. Those fees are typically on a graduated scale.[86] Several parties assert that payments for exclusive marketing should be prohibited, either because they are "above cost" or because they allegedly exclude competitors.[87] Nevertheless, many competitive providers find exclusive marketing agreements to be essential in preserving their ability to compete. For example:

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[85] *See also* Walker Decl. at ¶¶ 13-15.

[86] *See, e.g.,* Declaration of Equity Residential, attached as Ex. J to the *2019 Comments*, at ¶ 15 (noting that Equity Residential typically is paid 3-6% under agreements with graduated payments, rather than the maximum, because competitors in the building preclude the provider with exclusive marketing rights from reaching a higher penetration level).

[87] WISPA Comments at 20-24 (calls for total ban on exclusive marketing, but also on graduated revenue share agreements, which are routinely associated with exclusive and nonexclusive marketing agreements); INCOMPAS Comments at 20-22; Starry Comments at 6-7 (would ban exclusive marketing and graduated revenue share agreements); Comments of the City of

> GigaMonster often relies on exclusive marketing agreements, in addition to exclusive use of wiring agreements, to justify spending the capital needed to install a new homerun cable in a multifamily community that does not have adequate wiring to deliver high speed Internet. This is because the existing Internet providers collectively have 100% of the residents who subscribe to Internet already as their customers at the time GigaMonster installs the upgraded cable. Without a marketing advantage, it is almost always impractical to invest the capital to install the new homerun cable.[88]

A ban on cash payments or other compensation in connection with a marketing agreement would be tantamount to prohibiting such agreements entirely because an owner would have no incentive to grant marketing rights, whether exclusive or nonexclusive, if it could not receive compensation for the rights it would otherwise grant. A complete ban on exclusive marketing agreements would also violate the commercial speech rights of both providers and owners.[89]

C. Access-Only Agreements.

There are two types of access-only agreements: those in which the owner grants access at no charge to the provider, and those in which the owner requests compensation even though it

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Longmont, GN Docket No. 17-142 (filed Oct. 20, 2021), at 3-4. The City of Longmont cites its experience with a property owner that had entered into an exclusive marketing agreement and chose not to grant access to the City's NextLight broadband service. It is clear from the attachment to the City's comments, however, that the property owner was fully aware of the fact that it could allow other providers to enter. Furthermore, the owner objected to negotiating with NextLight because of the behavior of NextLight representatives at the property, and NextLight's unwillingness to provide such critical information as the proposed build-out architecture, pricing, and its ability to provide service over existing wiring. That information may eventually have been provided to the owner, but this seems to be a case of an inexperienced provider failing to understand the owner's perspective. There may have been other considerations that affected the owner's decision, but we can only speculate about those. Before reaching any conclusions about an owner's decision, one must have all the facts, and there are many facts missing from the City's example.

[88] Dodd Decl. at ¶ 12; *see also* Joint Parties Comments at 4; SAHF Comments at 2.

[89] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 564 (1980).

is not providing access to wiring or providing marketing services. Some commenters object to the latter,[90] even though the concept that providers are somehow entitled to use the property of another at no cost runs contrary to the underlying premises of what it means to own property in our economy. Furthermore, a number of parties object to "above-cost" payments in any circumstance,[91] even though costs are rarely used as the basis of setting rents or prices for good or services. The market sets prices. In effect, when these commenters they object to above-cost access fees, they are advocating free access, because assigning costs in such situations will often be impractical if not impossible.

In any case, access-only agreements coupled with a payment are very rare in the residential market, whereas access-only agreements <u>without</u> any payment are fairly common.

A Commission rule banning any compensation or "above-cost" compensation, would raise the question of the Commission's statutory authority, because even setting aside the issue of the current status of the Commission's more general authority over broadband service, Congress has not granted the Commission any relevant authority over the charges providers pay for the use of real estate.[92] The Pole Attachments Act does not apply, if only because building owners are not utilities.[93]

Furthermore, such a rule would be of little benefit to anybody. Under current law, an owner might conclude that some compensation is appropriate for access only, but, as noted, this

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[90] Lumen Comments at 6 (unwilling to pay fees for access only).

[91] FBA Comments at 3-4; INCOMPAS Comments at 11-12; WISPA Comments at 23-24.

[92] Further Comments at 80-81; ADTRAN Comments at 8, n. 21.

[93] 47 U.S.C. § 224 (defining pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, or conduit owned or controlled by a utility").

is extremely rare in the apartment industry.[94] We estimate that on a percentage basis, out of all the kinds of agreements discussed in this proceeding, access-only contracts with compensation paid to the owner occur in the low single digits.

Owners look at a range of factors when they are considering entry by a provider, including the needs of residents and tenants, as well as the costs, burdens, and risks that might be imposed by allowing the provider on the property. How the owner evaluates those factors depends on circumstances at the property and the identity of the provider. An owner is most likely to be willing to accept the presence of the provider without any compensation when a significant number of residents can be expected to want service from that provider, the provider has a good track record, and the provider's presence will impose no expense on the owner. In fact, Verizon and AT&T currently enter into access-only contracts, bear the costs of installation or upgrade, and refuse to pay owners for access. Lumen apparently does much the same.[95] Owners also grant access without compensation to other providers precisely because those providers have developed good reputations and can deliver high speed service that is attractive to residents.[96] Nevertheless, at the margin, the effects of such a rule would tend to reduce competition and deployment because owners would be less inclined to grant entry to unproven providers.

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[94] Modest access fees are common, but not universal, in office buildings. *2019 Comments* at 64.

[95] Lumen Comments at 6.

[96] A close reading of the comments of Consolidated and Ziply suggests that they frequently obtain access without making any payment. Consolidated Comments at 6-7.

After considering the facts surrounding actual industry practice and discounting the unfounded speculation and accusation, there is no legal or policy justification for regulation of any compensation paid to property owners.

VI. THE COMMISSION SHOULD TAKE NO ACTION REGARDING MANDATORY ACCESS.

In the *2019 Comments* and *2019 Reply*, the Real Estate Associations explained why mandatory access in an outdated concept.[97] The state laws were enacted in a time when there was typically only one video provider and property owners were unsure that the benefits of allowing entry outweighed the drawbacks. Today, however, these laws are a relic because the cable MSOs have access to nearly every building in the country and there is competition in almost 80% of apartment communities owned by the average respondent to the *NMHC/NAA 2021 Broadband Survey*. Furthermore, accomplishing that goal did not require mandatory access, because only one-third of the states ever adopted such statutes.

Nevertheless, Public Knowledge and AARP would have the Commission adopt a federal mandatory access rule.[98] Neither organization identifies any provision of the Communications Act that empowers the Commission to adopt such a rule, nor do they explain how the Commission could overcome the decision of the Supreme Court *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). Perhaps they offer no such analysis because they recognize the statutory and constitutional obstacles.

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[97] *2019 Comments* at 75-77; *2019 Reply* at 26-27.

[98] Public Knowledge Comments at 15-16; AARP Comments at 3-4.

Other parties are more circumspect, presumably for the same reason. They ask that the Commission encourage the states to amend their existing laws or adopt new ones that would grant all providers access rights,[99] or they simply suggest that the Commission refrain from interfering with states that do so.[100] Of course, if the states perceived that broadband deployment was a problem, and that it could be addressed through mandatory access legislation, one would expect that they would be acting without any encouragement. In any event, it appears that these parties have concluded, quite correctly, that the Commission can do nothing of substance in this area.

INCOMPAS and Public Knowledge support their disparate positions[101] by referring to the report prepared by the Office of Economics and Analytics in 2019.[102] In doing so, however, both parties ignore the limitations of that report. The *Mandatory Access Report* itself states that "[t]his effect is not necessarily a causal one; it only reflects a positive association existent in the data . . . ."[103] In other words, the *Mandatory Access Report* does not state that mandatory access laws actually cause higher broadband penetration. In fact, the analysis of the *Mandatory Access Report* prepared by NMHC confirms that the relationship found by the *Mandatory Access Report* between mandatory access laws and non-MTE households "must stem from other compositional differences between states with and without mandatory access laws that were not explicitly

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[99] WISPA Comments at 25-29; INCOMPAS Comments at 24-25.

[100] FBA Comments at 7-8.

[101] INCOMPAS Comments at 25; Public Knowledge Comments at 16.

[102] S. Kauffman and O. Carare, *An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments*, Federal Communications Commission, Office of Economics and Analytics (July 2019), (the "*Mandatory Access Report*").

[103] *Id.* at 1.

controlled for in [the FCC's] model."[104] As we noted in the *2019 Comments*, one such factor could be population density: Of the 17 jurisdictions included in the FCC's study, ten are in the top 13 in the nation in population density and it is not surprising that densely populated states, with or without mandatory access laws, would have high broadband penetration rates. To date, no party has challenged the findings of the NMHC's critique.

VII. DISCLOSURE OF CONTRACT TERMS WOULD BE UNLIKELY TO BENEFIT APARTMENT RESIDENTS OR TENANTS OF OFFICE OR RETAIL PROPERTIES.

The parties are divided on the need for disclosure of the terms of agreements between providers and property owners. Six commenters oppose disclosure, either expressly or by implication.[105] Five parties call for disclosure of the terms of wiring agreements or marketing agreements or both.[106] WISPA asks for a total ban on marketing agreements because disclosure

[104] National Multifamily Housing Council, *Critique and Analysis of Mandatory Access Laws and Broadband Use in Residential Multi-Tenant Environments* (Aug. 2019), attached to the *2019 Comments* as Exhibit K.

[105] Extenet Comments at 7-8 (supports exclusive marketing, with no comment on disclosure); FBA Comments at 7 (in principle supports exclusive marketing, with no comment on disclosure); Joint Parties Comments (opposes any new regulations); Orlando Telephone Company Comments at 4 (disclosure would be ineffective); NCTA Comments at 12, 14 (disclosure would be ineffective).

[106] AARP Comments at 5-6 (disclosure of payment terms and other information to the public); ACA Connects Comments at 7-8 (tailored disclosure of compensation and exclusive marketing); INCOMPAS Comments at 12, 21 (disclosure of compensation; limited disclosure of marketing); Lumen Comments at 10 (disclosure of marketing terms to apartment residents); Comments of Next Century Cities, GN Docket No. 17-142 (filed Oct 20, 2021) ("Next Century Cities Comments"), at 10 (disclosure of length of agreements).

would be ineffective.[107] Public Knowledge agrees with WISPA's position, but also seems willing to accept a disclosure of compensation terms as an alternative.[108]

The Real Estate Associations are not necessarily opposed to disclosure requirements, although, like other parties, we have doubts about their utility. The theory behind broad calls for general disclosure of any type of provision is unclear, because different types of disclosure could have different effects. Furthermore, any such requirements must conform to the Supreme Court's test for restrictions on commercial speech.[109]

For example, AARP urges the Commission to require public disclosure of payment terms as well as information about the locations and sizes of individual buildings and the number of units in the owner's entire portfolio. Apparently, this information would be made available to the general public. This level of disclosure would be very difficult to square with the constitutional standard, even if limited to residents of a specific building.

INCOMPAS, on the other hand, has made a detailed proposal that merits discussion. INCOMPAS suggests that providers be required to send annual notices to owners stating that an exclusive marketing agreement is not an exclusive access agreement.[110] We have no objection to

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[107] WISPA Comments at 22, 25.

[108] Public Knowledge Comments at 6.

[109] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 564 (1980) (restriction on commercial speech must directly advance state interest); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) (requiring substantial relation between governmental interest and information required to be disclosed).

[110] INCOMPAS Comments at 21. INCOMPAS also calls for disclosure of compensation payments. INCOMPAS Comments at 12. This proposal raises a different set of issues. As discussed in the Further Comments, at p. 81, it is difficult to see how informing residents of such terms actually benefits the residents. If certainly would not affect the terms of their broadband service.

such a requirement, although it seems impractical. Who would receive the notices? Providers argue that building management is frequently confused about the terms of agreements with providers. In reality, what is more likely to happen is that requests are made to lower-level staff who may misunderstand a request or the situation at the property – but it is unreasonable to expect every one of an owner's employees to have that knowledge. It would also be impractical if not impossible to require that notices be sent to all such individuals. The burden is on the provider to make sure that its marketing staff takes the trouble to identify the responsible individuals and contacts them. For the same reasons, notices would need to be sent to the same people within the owner's management structure who are already most likely to know that exclusive marketing rights do not prohibit access by a competitor. Nevertheless, in principle, we have no objection to this proposal.

INCOMPAS also proposes that providers with exclusive marketing rights send notices to residents saying they can get service from the "provider of their choice."[111] The Real Estate Associations have no objection to providers sending any kind of notices to their own subscribers, as long as they are factually accurate. For instance, it would not be accurate to require providers to suggest that residents can get service from <u>any</u> provider: competitors must first have the right to serve the residents and not every provider is even willing to serve every property, even if it is within an existing footprint. In addition, sending notices to non-subscribers raises a different concern. Unless already required by the terms of a marketing agreement, owners have no obligation to provide address lists to anybody, and they must respect the privacy of their residents. In fact, such disclosure may be prohibited by the growing number of state-level

[111] *Id*. at 21.

consumer privacy laws, such as California's Consumer Privacy Act. In practice, this may not matter much, because those residents who do not subscribe to the provider with marketing rights presumably do not need to be told that an alternative is available. Nevertheless, the need to obtain an accurate list of all residents still presents a potential obstacle to this approach.

The foregoing discussion pertains to apartment buildings. Although some commenters address the issue of transparency in vague terms that could be extended to office and retail properties it is clear from the overall discussion in the record that disclosure of contracts involving such properties is not really an issue. For example, AARP's discussion of disclosure of payments is clearly concerned with residential buildings.[112] Lumen does call for disclosure of all agreements, but also states that marketing agreements are "less necessary in the commercial context" and that the benefits of exclusive marketing outweigh any concerns in that context.[113]

The Real Estate Associations believe that disclosure of contract terms is unlikely to benefit apartment residents or office or retail tenants. As noted above, we would not necessarily object to certain types of disclosure, but any specific proposal would need to be carefully evaluated to assess its likely practical effects and to ensure that it meets the constitutional standard.

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[112] AARP Comments at 5-6.

[113] Lumen Comments at 10.

VIII. REGULATION OF WIRELESS FACILITIES INSIDE BUILDINGS WOULD REDUCE DEPLOYMENT AND INTERFERE WITH TECHNOLOGICAL ADVANCEMENT.

Various parties urge the Commission to refrain from regulating in-building DAS and small cell installations, particularly neutral-host DASs.[114] Others, however, ask for the Commission to intervene by overriding agreements that may prevent providers from obtaining access to such networks on their preferred terms.[115]

The Real Estate Associations have described how building owners of all types of rental real estate – residential, office, and retail – contribute to the deployment of broadband infrastructure.[116] The real estate industry has invested hundreds of millions of dollars – perhaps billions – to ensure that apartment residents and office and retail tenants have high-quality, reliable wireless service inside buildings.[117] The wireless carriers have proven largely unwilling to bear the cost of in-building networks, which has forced property owners to do one of three things: (i) install single-carrier DASs or small cell networks to address coverage issues limited to the one carrier; (ii) install neutral host systems to ensure coverage for any provider that can connect to the system with the owner's consent; or (iii) engage a neutral host provider to install and manage such a system. Many owners prefer the latter solution because it relieves them of

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[114] Extenet Comments at 4-5; Additional Comments of Wireless Infrastructure Association, GN Docket No. 17-142 (filed Oct. 20, 2021) ("WIA Comments"), at 4-5.

[115] Comments of Competitive Carriers Association, GN Docket No. 17-142 (filed Oct. 20, 2021) ("Competitive Carriers Association Comments") at 2-3; Comments of T-Mobile USA, Inc., GN Docket No. 17-142 (filed Oct. 20, 2021) ("T-Mobile Comments"), at 6-8.

[116] *2019 Comments* at 16-17.

[117] *Id.*

responsibility for managing a technology with which they have no expertise, as well as the considerable up-front cost of installation.

The Real Estate Associations do not support calls for any regulation of any of these systems. Given that the real estate industry is already expanding access to wireless broadband services by funding in-building installations, any regulation would probably interfere with deployment: granting any provider the right to obtain access would undoubtedly raise the cost of installing and operating these networks, which in turn would tend to reduce investment.[118]

Furthermore, regulation could inadvertently distort technological advancement. For example, many property owners are deploying managed WiFi networks. These networks have the advantage of being inherently carrier-neutral to any user with a smartphone. They are also proving attractive to owners because they allow for implementation of property-wide IoT applications, such as building security and utility management. Many apartment residents and office and retail tenants find IoT applications attractive for their own purposes. This reduces the need for other technological approaches and is often a relatively low-cost solution. Commission regulation that attempts to solve one set of problems for the benefit of a particular group of providers, however, could distort incentives by discouraging the use of technical solutions that may in fact be superior.

Consequently, the Real Estate Associations urge the Commission not to adopt any regulations governing in-building wireless installations.

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[118] *See 2019 Comments* at 84-89; *2019 Reply* at 27-29.

IX. THE RECORD DOES NOT SUPPORT REGULATION OF ROOFTOP ACCESS.

Wireless providers want guaranteed access to rooftops, apparently believing that their needs trump all other considerations. WISPA asks the Commission to prohibit agreements that restrict access to the roof or common areas of a building.[119] T-Mobile says "restrictive agreements covering access to rooftops . . . should be prohibited."[120] Starry says "arrangements providing for exclusive access to rooftops (or common areas, pathway, or conduit) [inhibit] access to the building structure itself."[121]

There are at least three problems with this position. The first is the presumption that the exclusivity provisions are deliberately anti-competitive. The Commission would be much better served if certain commenters would attempt to present the facts fairly rather than attack the motives of property owners and their lessees.

The second problem, which is related to the first, is that it is overbroad. These commenters have not defined the problem well enough for the Commission to draft an effective rule or to assess the consequences of any potential regulation. Are commenters asking the Commission to preempt all exclusivity provisions that pertain to rooftops and common areas? Every rooftop lease is exclusive in at least one sense: What such lessees pay for is the exclusive right to use the space they have leased, to the exclusion of all others, with limited rights reserved by the property owner. Surely commenters don't mean to override that kind of exclusivity, but they have made no effort to be clear about that. What about the situation in which multiple

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[119] WISPA Comments at 19.

[120] T-Mobile Comments at 11.

[121] Starry Comments at 8.

providers are on a rooftop, each under its own exclusive lease, and there is simply no more room for an additional provider? Or when a rooftop has been leased for an entirely different purpose, such as for use as a solar power site?

Then there is the case of the wireless infrastructure provider that obtains a lease for an entire rooftop and then makes space available to as many providers as the rooftop will accommodate. It's difficult to see how this is anti-competitive. If anything, such arrangements should be encouraged, since the property owner has made a valuable piece of real estate available for use under terms that will most likely maximize its utility as a wireless site.

In other words, the wireless providers have not provided the Commission with a clear definition of an actual problem that would justify regulation.

The final problem is that the Commission has no authority to do what the providers have requested.[122] Rooftop leases are straightforward real estate transactions. WIA is correct when it says "that [p]arties generally enter into rooftop management agreements as they do lease agreements in the macrocell context."[123] The only authority the Commission has over any lease of real property is contained in the OTARD rule, and that rule does not apply in this instance. The Communications Act does not give the Commission plenary authority over every contract entered into by a communications provider.[124] Nor does the Communications Act give wireless providers any special rights regarding access to privately-owned real property. It is true that

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[122] *See* WIA Comments at p. 7, n. 15.

[123] WIA Comments at 7.

[124] T-Mobile argues that Sections 201 and 202 permit the Commission to regulate the practices of carriers, T-Mobile Comments at 12, but the terms of real estate leases are well removed from the scope of those statutes.

once one person is occupying a physical space, it is impossible for another to occupy the same space. From this it follows that the first person to obtain access to a space will probably have an advantage over any who seek access later. These are just facts that arise out of the nature of physical reality, not grounds for government regulation.

X. THE COMMISSION CONTINUES TO LACK LEGAL AUTHORITY TO REGULATE AGREEMENTS BETWEEN PROPERTY OWNERS AND BROADBAND PROVIDERS.

The Real Estate Associations have addressed the scope of the Commission's authority in earlier filings[125] and there is no need to restate those arguments here. INCOMPAS, however, has raised a new theory, which we now address.[126]

INCOMPAS argues that the Commission can rely on its ancillary authority and its authority to promulgate the OTARD rule to grant every class of broadband provider access to apartment communities and other buildings.[127] INCOMPAS cites as authority the Commission's

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[125] Further Comments at 80-81; *2019 Comments* at 42-52; *2019 Reply* at 3-11; *2017 NOI Comments* at 7-11.

[126] Public Knowledge suggests, without analysis or citing any decision of the Commission or a court, that property owners could be brought within the Commission's ambit by deeming them "agents" of providers under 47 U.S.C. § 217. Public Knowledge Comments at 16. That statute, however, explicitly states that it is to be applied "[i]n construing and enforcing the provisions of this chapter . . . ." The purpose of the statute is to ensure that carriers do not avoid their statutory duties by delegating them to third parties. *In the Matter of AT&T Services, Inc. and AT&T Corp. v. 123.Net, Inc.,* 35 FCC Rcd 6401, 6402 (2021). Section 217 grants no new substantive authority and the Commission cannot rely on it to extend its jurisdiction to encompass property owners.

[127] INCOMPAS Comments at 29-30.

most recent OTARD order,[128] but ignores the actual language of that order. The Commission has no such power, under any source of authority.

First of all, the Commission does not have broad authority to regulate property owners. "[T]he Communications Act does not . . . explicitly grant the Commission jurisdiction over the real estate industry, an area that is normally outside the Commission's scope of authority."[129] The court in *BOMA v. FCC* did not hold that the Commission had any general or inherent authority to override property rights, but only that it could do so if given that power by Congress.

Second, INCOMPAS ignores the court's analysis in *BOMA v. FCC*. The petitioners in that case had argued that preempting the terms of leases would violate the Takings Clause of the Fifth Amendment, citing the prohibition on "*per se*" takings of *Loretto v. Manhattan Teleprompter CATV.*[130] The basis for the claim was that to allow tenants to install equipment otherwise prohibited by the lease amounted to the grant of a property right that had been retained by the lessor. The court rejected that claim, however, because "the landlord affected by the amended OTARD rule will have voluntarily ceded control of an interest in his or her property to a tenant. Having ceded such possession of the property, a landlord thereby submits to the Commission's rightful regulation of a term of that occupation." *BOMA v. FCC,* 254 F.3d at 98. There was no *per se* taking, said the court, because in *Loretto* the property owner had not given

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[128] *Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Report and Order, 36 FCC Rcd 537 (rel. Jan. 7, 2021) ("*2021 OTARD Order*").

[129] *Bldg. Owners and Managers Ass'n Internat'l et al. v. FCC,* 254 F.3d 89, 94 (D.C. Cir. 2001) ("*BOMA v. FCC*").

[130] *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982) (New York statute granting cable operator right to attach cable to building exterior without owner's consent violated Fifth Amendment).

the cable company any rights in the first place: "The *Loretto* court emphasized that the *per se* taking rule is 'very narrow' and applies only to regulations that 'require the landlord to suffer the physical intrusion of his building by a third party.'" *BOMA v. FCC,* 254 F.3d at 97.

But INCOMPAS's proposal is different. INCOMPAS is arguing that if a property owner has granted access to one communications provider, it has opened its property up to invasion by any other provider whose presence on the property has been requested by a tenant. This, however, is exactly what the Supreme Court in *Loretto* defined as a *per se* taking. Under the logic of INCOMPAS's theory, once an apartment owner grants access to one resident, all other prospective residents would have the right to occupy the property. This is not just unlawful, but absurd, because it would eliminate the right of private property. Just this year, the Supreme Court affirmed that "[t]he right to exclude is 'one of the more treasured' rights of property ownership," citing *Loretto*.[131]

INCOMPAS's proposal would establish a form of mandatory access, and therefore is subject to all of the failings we have already identified.[132] Apartment residents and office and retail tenants can certainly install fixed wireless antennas and other devices covered by the OTARD rule. But they cannot demand that the property owner allow access by their preferred broadband provider "no matter the technology used to reach the customer," as proposed by INCOMPAS. If the Commission adopts a rule that requires property owners to accept the

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[131] *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021). In *Cedar Point Nursery*, the Supreme Court ruled that a California labor regulation allowing union organizers to enter the nursery's property at will for three hours a day, 120 days a year, was a *per se* physical taking. This makes clear that any government-authorized physical invasion of private property raises a claim under the Fifth Amendment.

[132] Further Comments at 69-71.

installation of such equipment, the Commission will have crossed the line drawn by *BOMA v. FCC* and stepped into *Loretto* territory.

Finally, the Commission has already acknowledged this point. In the *2021 OTARD Order*, the Commission described the limits of its latest expansion of OTARD rights:

> The OTARD rule does not permit service providers to install hub and relay antennas on common property without a property owner's consent. . . . [The *2021 OTARD Order*] does not change any other aspect of the current OTARD rule, including the requirement that, for the OTARD rule to apply, the antenna must be installed "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property." [footnote omitted] A tenant may allow a wireless service provider to place a hub or relay antenna on property that is within the tenant's exclusive use or control where the tenant has a direct or indirect ownership or leasehold interest in the property.[133]

Apartment residents and office and retail tenants have no right to install any kind of equipment outside of their demised premises. Nor can they grant a third party any such rights. The concept that, by granting one or more communications providers access to a building, the owner has surrendered its Fifth Amendment rights as to all other providers is equally off the mark.

The purpose of ancillary authority is to close gaps, not to open new fields for regulation, nor to violate the Constitution.

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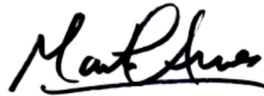
[133] *2021 OTARD Order*, at ¶ 32.

CONCLUSION

For all the foregoing reasons, the Commission should refrain from adopting any further regulation affecting broadband deployment in the multiple tenant environment market.

Respectfully submitted,



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November 19, 2021

EXHIBIT A

Apartment Industry Statistics

EXHIBIT A

APARTMENT INDUSTRY STATISTICS

Number of apartment units (5+ units):	21.9 million *Source:* **NMHC tabulations of 2019 American Community Survey (US Census Bureau)**
Proportion of all Americans living in apartments: (5+ units)	12% *Source:* **NMHC tabulations of 2019 American Community Survey (US Census Bureau)**
Proportion of renters living in apartments (5+):	37% *Source:* **https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-characteristics/**
Apartment households, income under $20,000:	5.2 million, representing 26% of apartment households (5+ units) *Source:* **https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-incomes/**
Apartment households, income under $35,000:	8.8 million, representing 44% of apartment households (5+ units) *Source:* **https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-incomes/**
Median household income in apartments (5+):	$43,000 (2020) *Source:* **https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-incomes/**
Households in the United States:	128,451,000 (2020) *Source:* **https://www.census.gov/topics/families/families-and-households.html**

Households in apartments (5+ units):	19,997,161
	Source: **https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-characteristics/**
Households in mobile homes:	1,881,729
	Source: **https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-characteristics/**
Households in 2-4 unit properties:	7,630,423
	Source: **https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-characteristics/**
HUD-assisted public housing, private multifamily:	2,325,143
(total rental units)	*Source*: **NMHC tabulations of the 2019 American Housing Survey (variable HUDSUB – subsidized renter status and eligibility)**
HUD-assisted Housing Choice Voucher Program:	2,184,371
(total rental units)	*Source:* **NMHC tabulations of the 2019 American Housing Survey (variable HUDSUB – subsidized renter status and eligibility)**
HUD-assisted public housing, private multifamily:	1,685,261
(5+ rental apartment units)	*Source*: **NMHC tabulations of the 2019 American Housing Survey (variable HUDSUB – subsidized renter status and eligibility)**
HUD-assisted Housing Choice Voucher Program:	1,103,203
(5+ rental apartment units)	*Source:* **NMHC tabulations of the 2019 American Housing Survey (variable HUDSUB – subsidized renter status and eligibility)**

EXHIBIT B

Declaration of William K. Dodd

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Competitive Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF WILLIAM K. DODD IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, William K. Dodd, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I currently serve as Chairman and CEO of GigaMonster Networks, LLC ("GigaMonster"). GigaMonster Networks, formed in 2015 and based in Marietta, Georgia, is a private fiber-based gigabit Internet service provider, offering voice and Internet services to residential multi-tenant properties in direct competition with larger, well-funded entities.

3. I have served as Chairman and CEO since 2015. I have previously served in executive leadership positions in similar companies to that of GigaMonster Networks, including OpenPoint Networks, President (2000-2003), Biltmore Communications, President (2003-2007), and DIRECPATH, President (2007-2008), CEO (2008-2013), and Chairman & CEO (2013-2015), and I have over 21 years of experience in the delivery of video, broadband, and other communications services in multifamily environments.

4. GigaMonster provides its services to hundreds of properties in approximately 50 metropolitan markets throughout the U.S., representing tens of thousands of multifamily residential units. GigaMonster's services are highly competitive – the company offers Internet plans to its customers ranging from 50 Mbps to 10 Gbps, as well as domestic and international voice service—all at prices at or below those of the incumbent telco and cable providers. GigaMonster also serves affordable housing, assisted living, and student housing communities – delivering services that in many cases are not available, or not available at affordable prices from large incumbent carriers.

5. GigaMonster selects the properties it desires to serve based on its ability to provide significant value to the residents and under a structure that provides reasonable assurances that GigaMonster can earn a profit on the capital investment required to provide its services to the residents. As generally the unknown provider in a multifamily community, GigaMonster relies on certain agreement types, such as exclusive marketing and exclusive use of homerun cabling, in order to allow GigaMonster to effectively compete against the incumbents by overcoming the marketing advantage that incumbents have in each market afforded by their density of operations and advertising. Without such agreements GigaMonster could not justify its investment in the capital required to serve the community and thereby all but guarantee that the property will have less competition, not more.

6. GigaMonster generally will not install its network to provide services in multifamily communities where it cannot be assured that it has exclusive access to at least one of the existing homeruns. If GigaMonster does not have exclusive access to its own homerun cable, other providers will be allowed to access the same cable used by GigaMonster, which can and does result in service disruptions as other providers attempt to use the same cable to provide a different service, such as video. This type of "free-for-all" in the telecom closets of a

multifamily community is costly to GigaMonster and creates bad customer experiences for residents. Therefore, GigaMonster generally will not serve multifamily communities where exclusive access to homerun cabling does not exist. Further, in several instances, GigaMonster has had to spend considerable capex to provide services in multifamily communities where an incumbent refuses to provide service due to a lack of their facilities in that location. In these cases, GigaMonster must obtain exclusive marketing rights to protect its considerable capex investment if at some point in the future the incumbent were to choose to provide services at the community. This is especially true in underserved markets.

7. One of the issues GigaMonster runs into in serving older low-income housing is the combination of the cost of wiring upgrades and rate structures. For example, most low-income housing was built 20+ years ago. In these properties, we find older cable types that cannot be used for what is classified by the FCC as high-speed broadband. Cables such as RG59, Cat3 and older versions of Cat5 (Cat5E is only 20 years old as a cable type), will not carry the speeds and quality required today, especially for video streaming. So, if we enter a property like that, we have to either upgrade the wiring, or, if existing wiring is not available because it's being used by an incumbent, overbuild the property with entirely new infrastructure. So that's the first issue. Next, we must recover our costs; to do that, we have to attract enough subscribers able to pay a reasonable rate. Sometimes that is feasible – but when an incumbent is offering low prices for their broadband through a discount program, such as AT&T's "Access from AT&T" program (https://www.att.com/internet/access/) the numbers just don't work out for us. The AT&T program is an amazing program where low-income families can get access to good quality broadband as long as the incumbent also upgrades its facilities. (If they don't upgrade, residents may get broadband, but it won't be fast or reliable.) But there is no business model that will succeed for us in those cases when we must invest in infrastructure and then compete against $10

Internet, even when our service is better. This is why it is so difficult to get competition in affordable housing and other low-income properties. The only way we can build a big enough subscriber base is through the combination of exclusive access to wiring (either our own or what was already in place) and some type of favorable marketing advantage. We can get the marketing advantage either through a bulk billing arrangement or an exclusive marketing agreement. And every other competitor will be in the same position.

8. To further illustrate the financial challenges in providing broadband to underserved communities, low-income garden-style communities with older cable types, require substantial capital investment to install the new cables capable of providing high speed broadband. This generally costs in excess of $1,200 per residential unit to overbuild the network infrastructure due to fiber trenching and fishing cables from the attics down through the walls of each residential unit. As such, the capital required for a 280-unit garden community is approximately $336,000. Assuming an average Internet package price in a low-income community of $50 per residential unit for high-speed broadband, and assuming we achieved a 50% market share over a period of several months, netting out operating costs, it will take over 5 years just to break even. If there were 3 total providers in this community, and our market share fell to 30%, it would take over 10 years just to break even, which of course is not feasible. Therefore, if a 3rd, 4th, or 5th provider were allowed to begin providing services at the property at any time after we installed this new cabling, there is no viable business case to ever invest in these communities to begin with, especially if that future provider has the ability to assume possession of the new high speed broadband cables we installed for their own use.

9. The number of telecommunication cable homeruns installed in most multifamily communities are sufficient to allow multiple providers to service the community. These homerun cables are generally limited to two or three cables. In almost all multifamily communities, there

is at least one copper phone or Ethernet cable and one coaxial copper cable installed by the owner, or installed by others and the ownership then transferred to the owner. In some instances, there are three homerun cables present, with the third cable being fiber. GigaMonster can provide services over all three of these cable types. In some instances, in older communities, which tend to be in underserved communities, the cable is too old or of a type incapable of delivering high speed Internet services. In these instances, GigaMonster must install a new homerun cable in an existing community at considerable expense to GigaMonster. Therefore, it is imperative that GigaMonster be granted exclusive use of this cable, or risk it being used by another provider. In the event another provider was allowed to utilize the cable installed by GigaMonster, GigaMonster will be unable to justify the capital expenditure required to install that new cable. There are millions of multifamily residential units throughout the US, especially in underserved communities, where the existing cable is inadequate to serve high speed Internet, as discussed in Section 6 above. Therefore, any rule that will prevent a provider from obtaining exclusive use of the new cable will most certainly decrease the likelihood that a provider will install a new high-speed Internet service in this community.

10. GigaMonster generally enters into agreements with owners that grant GigaMonster exclusive use of one homerun cable. GigaMonster needs that dedicated cable to provide its services. These agreements generally run between five and ten years in length, with ten-year terms typically needed by GigaMonster to justify making a capital investment in a property with multiple competitors. Unlike in single family homes, GigaMonster must build its network with the capacity to serve 100% of the residential units because it is unknown which units will subscribe to GigaMonster's services. This "build it and they will come" approach means that GigaMonster must build a network capable of serving 100% of the units, while practically speaking it will only serve a fraction of those units due to competition in the community.

Without any protection from multiple providers providing service over and above the one or two existing competing providers present at the time GigaMonster invests in its network, it would be impractical for GigaMonster and other providers, to invest the capital. This uncertainty in the number of providers will therefore undoubtedly result in less competition, not more.

11. Based on my 21 years of experience providing high speed Internet services to thousands of multifamily communities, I have never had a successful outcome in a community where other providers were allowed to use the same homerun cables used by my company. There is no clear understanding of which provider is responsible for maintaining those homerun cable and there is no accountability of technicians who disconnect homerun cables while working in a common punch down panel having access to the same cables. In fact, I have had dozens of experiences where other providers have disrupted service while searching for a homerun cable needed to service one of their customers. When that technician cuts or disconnects the wrong cable, they have little incentive to repair it because it is not impacting their customer.

12. GigaMonster often relies on exclusive marketing agreements, in addition to exclusive use of wiring agreements, to justify spending the capital needed to install a new homerun cable in a multifamily community that does not have adequate wiring to deliver high speed Internet. This is because the existing Internet providers collectively have 100% of the residents who subscribe to Internet already as their customers at the time GigaMonster installs the upgraded cable. Without a marketing advantage, it is almost always impractical to invest the capital to install the new homerun cable.

13. When possible, GigaMonster and other providers use the existing homerun cables when installing their service network in a multifamily community. Almost always those existing homerun cables were paid for in full or in part by the owner and usually maintained by the owner

in the event of damage to a cable that was not caused by the provider. Therefore, GigaMonster deems that it is a fair business practice to pay the owner a "door fee" and a share of its revenues ("revenue share") for the right to use that cable that GigaMonster did not pay to have installed and maintained. If owners are not paid these "door fees" and "revenue shares" for use and maintenance of the homerun cables and to provide other services such as electricity to power our equipment in the telecom closets, they undoubtedly would have to pass those costs on to the resident in the form of higher rent. This concept of paying to use infrastructure paid for by others is present in most business models across most industries.

14. GigaMonster does not believe that paying "door fees" and "revenue share" puts GigaMonster at a competitive disadvantage. In fact, the cost of GigaMonster to install those cables would in fact put GigaMonster at a competitive disadvantage if it had to pay those costs without exclusive protections, such as exclusive marketing. Therefore, the use of "door fees" and "revenue share", allow for more competition at lower prices to the residents.

15. Without agreements with owners of multifamily communities, GigaMonster would likely never make a capital investment in a multifamily community. These agreements define multiple items required to successfully provide services by a non-incumbent operator like GigaMonster. Some of these items include, but not limited to, the right for GigaMonster to: a) dispatch technicians to enter the property and perform work, b) obtain electrical power to operate GigaMonster's equipment, c) mount antennas on the roof of the community in order to bring in primary or backup circuits to provide Internet services to the residents, and d) utilize common area infrastructure, in an organized manner, such as telecom closets.

16. GigaMonster serves hundreds of communities that have multiple competitive service providers. Based on each of our agreements with the owners around use of homerun wiring and common facilities, such as power and closet space, among other things, GigaMonster effectively

competes in an organized manner, which greatly encourages competition. Without these agreements and exclusive use of homerun cabling, chaos would exist, and the resident would be the most disadvantaged by this chaos. By operating in this controlled environment, service providers can work together under a common set of requirements and therefore service providers are not in need of regulation to coexist in an effective competitive environment. Regulations designed to enhance competition will, without question, result in the opposite of the desired result—creating fewer competitors, higher prices, and worse service for the residents.

17. My personal experience in negotiating service provider agreements with owners has been very positive over my 21 years serving multifamily communities. GigaMonster provides a service that residents want. I have found that owners want to make their residents happy to keep them there as tenants. As such, I have never found owners to put door fees and revenue share over providing desirable broadband services at fair prices to their residents, especially given that these revenue shares and door fees are very small amounts compared to the monthly rents they receive from tenants. In summary, it is my firm belief, based on 21 years in this industry, that a regulatory environment that allows a "free-for-all" for providers in a multifamily community will cripple our industry, resulting in fewer providers, less choice for residents, and higher consumer prices.

I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 16th day of November, 2021, at Marietta, Georgia.

EXHIBIT C

Declaration of Charlie Walker

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Improving Competitive Broadband Competitive Access to Multiple Tenant Environments	GN Docket No. 17-142

DECLARATION OF CHARLIE WALKER IN SUPPORT OF FURTHER COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Charlie Walker, declare as follows:

1. I submit this declaration in support of the Further Comments of the Real Estate Associations in response to the Commission's Public Notice dated September 7, 2021, in the above-captioned matter.

2. I serve as Assistant Vice President - IT for Equity Residential ("Equity"). According to the most recent survey data from the National Multifamily Housing Council, Equity is the second largest apartment owner in the United States and tenth largest apartment manager in the United States. As of November 15, 2021, Equity owns and manages a total of 293 apartment communities, containing 78,029 units, located in seven states and the District of Columbia.

3. I have been employed by Equity since 2018 and I have over 18 years of experience in the procurement of communications services, including broadband services, video

services, and telephone services. My duties include soliciting and evaluating proposals from services providers for the provision of communications services, negotiating the terms of the services agreements with services providers, and monitoring the performance of services providers during the term of services agreements.

4. Equity almost always engages at least two service providers to deliver broadband services at its apartment communities. These services providers typically include the local franchised cable multiple system operator ("MSO"), the local exchange carrier ("LEC"), and, increasingly, one or more independent internet services providers ("ISPs"). At least 59% of Equity's apartment communities are served by at least two broadband services providers, and of those, at least 11% have three or more broadband services providers.

5. To provide best in class service to our residents, Equity seeks out ISPs to provide high speed, highly reliable Internet service within our portfolio. We pursue the model of having multiple options for a resident to select from. We also work with the provider(s) in each property to upgrade their service to high-speed fiber internet. As well, we provide complimentary Common Area and Amenity Space WiFi at all properties in our portfolio. The following describes the types of services providers and services agreements currently in place at Equity's apartment communities, excluding apartment communities at which broadband services are available on a bulk basis:

- Of our 293 Property Portfolio, 86 Total properties have exclusive marketing rights
    - 28 properties on that list have more than one provider
    - The remaining 58 properties have one provider available

6. Of the 3 apartment communities developed by Equity, or a partner of Equity, since January 1, 2020, 2 of those apartment communities have three broadband services providers, each capable of delivering gigabit broadband services to residents, and 1 has two broadband services providers, both capable of delivering gigabit broadband services to residents. These percentages reflect Equity's dedication to providing its residents a choice in broadband services providers.

7. Our most important goal in negotiating agreements with broadband providers is to give residents access to high quality service. We have found that being able to negotiate exclusive wiring agreements is very important because providers will often agree to higher customer service standards than might be available in the surrounding community. By acting as the intermediary between the provider and our residents we can also help to ensure those standards are met.

8. A couple example Service Level Agreements ("SLA") that contractually bind a provider to high speed and high quality service are: 1) Total Downtime Per Month of <99.75% (this SLA ensures that a resident experience less than 45 minutes of total downtime per month); and 2) Resident Hold Time < 3 Minutes per call average per quarter (this SLA ensures that residents do not experience long wait times when calling for Customer Support issues). At a property in Bethesda Maryland, for example, we received multiple negative reports on a provider's service. These SLAs were used to hold the ISP accountable for not only service enhancements, but also reporting to Equity on exactly what the issues were that caused the interruptions and delays.

9. We have found it beneficial to have providers market competitive services such as Streaming TV options, as a means to utilizing a single Internet Package vs. Internet + Cable TV bundled together, as a way of creating savings to the resident. This access to marketing on site can provide an Independent Internet Service Provider with the motivation to enter into a property and compete with other providers.

10. Another benefit of being able to negotiate exclusive wiring and exclusive marketing agreements is that providers will sometimes agree to provide higher broadband speeds that those otherwise available in the vicinity of a property. For example, we are bidding many of our properties in Seattle and California to Independent ISPs, who will routinely include Exclusive Marketing as a condition of the bid, or a condition of a pricing advantage. Since many of these bids are for Property Wide WiFi, the requirement for Exclusive Wiring Use is necessary to ensure property wide coverage.

11. The following table shows the maximum speeds available in our portfolio.

a.	Up to 10/1Mbps	No._____	%_____
b.	Up to 25/3 Mbps	No._____	%_____
c.	Up to 50/5 Mbps	No._____	%_____
d.	Up to 100/10 Mbps	No._216_	%_73__
e.	Up to 250/25 Mbps	No._____	%_____
f.	Up to 500/25 Mbps	No._____	%_____
g.	Up to 1 Gbps/35 Mbps	No._____	%_____
h.	More than 1 Gbps	No._77__	%_26__
i.	TOTAL	No. _____	100%

12. Equity owns or manages some apartment properties in which one provider has exclusive marketing rights. However, at many of our properties where one provider has exclusive marketing rights, other providers are still serving our residents either without a contract

or in some cases with a contract that does not include marketing rights (an "access only" contract). 63% of Equity's apartment communities have non-exclusive marketing agreements in place while only 27% have an exclusive marketing agreement. 7% of properties with exclusive marketing agreements are serviced by more than one provider - normally the second provider is an Independent ISP. Many of the Exclusive Marketing Agreements in place are with LECs or Cable TV providers (AT&T, Comcast, Verizon) and their Independent ISPs alongside them are companies such as Wave, Starry or WebPass.

13. Equity frequently agrees to install facilities at our expense and to incur other costs for the benefit of broadband providers. These costs will include labor, materials and project management resources for planning and executing trenching fiber into the premise, allocating MDF space along with electrical buildout, power conditioning, air conditioning and/or ventilation, building modifications to create conduits between floors, construction of IDFs with necessary electrical work, preparing hallways with hatches to enable pulling cable into apartment units, rooftop preparation including installing weatherhead and electrical for roof-mount fixed wireless antennae, and in unit modifications such as media panel installation, inside wiring, patching and painting. ISPs will typically fund the installation and provisioning of service into the property, as well as the installation of their own backbone and distribution electronics.

14. Here are the costs associated with adding a provider into a property in Newcastle, Washington ("The Notch Apartments") consisting of 158 apartment units

Network Electronics: $60,487

Labor for Network Installation: $14,831

Fiber and Ethernet Backbone: $27,023

Ethernet Cabling - Homeruns: $60,000

Project Management: $15,000

Total Project Cost: $177,341

Per Unit Cost: $1,122

15. In new construction, typically providers will only supply physical cabling delivered to the construction site, as well as the fiber/ethernet backbone between their IDF and their equipment in the MDF. To protect development timeframes and schedule, developers will encumber all other costs of installation listed above.

16. Residents are very much aware that both the franchised cable operator and the local exchange carrier typically offer broadband service and we need to offer both options to meet resident demand. It is very rare for a property not to be served by the cable operator, and in most cases we are able to obtain service from the telephone company. But it is not unusual for Verizon or AT&T to refuse to extend broadband service to a building or refuse to upgrade their existing copper facilities to fiber so that higher speed broadband service is available to the residents. At Park Place San Mateo Apartments in California, the following providers are in competition: AT&T, Comcast and Wave. After many complaints from residents and staff about AT&T service, we asked multiple providers to service the property and were told in many cases that without a Bulk Internet Service commitment, the cost of adding new service to the location would be prohibitive given the amount of competition present.

17. We welcome competition from the newer ISPs, but their service is typically only available within the footprints where they have deployed fiber or Roof Mount Wireless Networks. Thus, for some of our properties, there are no competitive ISPs available to provide

broadband service. Furthermore, even within their footprints, ISPs often will only serve selected properties that they determine can meet their internal rate-of-return requirements. We are currently building relationships and entering into commitments with Independent ISPs such as Starry, GiGStreem and AerWave. There have been instances, however, when we have had discussions with such a provider and the provider ultimately chose not to serve our property, such as the above listed Park Place San Mateo. In one case, the provider did not have plans to service the region, and instead focused on expanding service within our East Coast portfolio. In another case, the provider could not meet the Rate-of-Return given the number of providers already on site, and the size of an investment needed to expand service within the property.

18. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 17 day of November, 2021, at Chicago, Illinois.

Charlie Walker