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

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")

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SUMMARY

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") respectfully urge the Commission to refrain from any regulation of agreements between property owners and broadband providers for the following reasons:

1. The Commission lacks statutory authority to adopt any of the proposed regulations. There is no statute that grants the Commission comprehensive authority over the terms of contracts for the installation and use of broadband facilities inside buildings. The current regulatory structure is based on a patchwork of authority that has been pushed to its limit. Furthermore, the Commission orders cited in the Notice of Proposed Rulemaking and the comments of INCOMPAS for the proposition that the Commission has broad authority over infrastructure matters do not support such a conclusion. All they actually say is that the Commission carved out an exception in the *Internet Freedom Order* for pole attachments under Section 224. This in turn raises two points. First, the Section 224 exception applies only to matters governed by Section 224, and the issues addressed in this proceeding have nothing to do with pole attachments. Second, because the *Internet Freedom Order* placed most matters related to broadband service beyond the Commission's reach, the Commission cannot address the issues presented in this docket without either revisiting that decision entirely, or carving out a new exception based on statutory authority other than Section 224. In any event, because the Commission is already at the limit of its powers, there is no authority on which to base such a new carve-out.

2. Regulation is unnecessary because there is ample competition for broadband service in buildings of all kinds. The proponents of regulation simply cannot get around the fact that apartment residents and commercial tenants have competitive choices, despite the existence of exclusive wiring, exclusive marketing and revenue sharing agreements. It is not the presence of those kinds of contracts that pose problems for new, smaller competitors, it is the presence of multiple providers in most buildings. Instead of seeking government help, providers need to build relationships with property owners and demonstrate both to owners and potential subscribers the value and reliability of their services.

3. The proponents of regulation are unable to formulate a credible argument because they simply do not understand how the Commission's existing rules operate. None of the commenters has addressed (i) the fact that 47 C.F.R. § 804(a) expressly permits building-by-building competition and that unit-by-unit competition under 47 C.F.R. § 804(b) is merely an option; (ii) the effects of the sheetrock rule, which removed all incentive for cable MSOs to own wiring inside buildings; or (iii) the effects of the Commission's LEC fiber orders, which appear to allow LECs to retain control of fiber facilities all the way to the unit premises, without sharing.

4. Competitive fiber broadband providers oppose revenue sharing not because of ostensible harm to consumers but because they do not wish to compensate owners. According to a survey conducted by the Wireless Internet Service Providers Association ("WISPA"), most competitive providers do not enter into agreements requiring them to compensate owners. Furthermore, the Real Estate Associations have shown that revenue sharing agreements are common in buildings with two or more providers, and therefore are not hindering competitive entry. The primary reason building owners grant access to multiple providers is simply resident

and tenant demand. Nevertheless, the comments of WISPA and other providers reveal that they oppose revenue sharing agreements because if one provider agrees to pay, others may be asked to as well.

5. Commenters raised few issues regarding access to commercial buildings and retail properties because such properties are typically served by multiple broadband providers. No commenter has asserted that exclusive wiring agreements or exclusive marketing agreements are an issue in commercial and retail properties. For one thing, those agreements developed in the context of the residential market, where the one set of wiring that was available belonged to the cable MSO and was theoretically available for sharing under the Commission's Part 76 rules. The same is true of "revenue sharing" agreements. Neither door fees nor true revenue sharing appear in contracts between office building owners or retail property operators and providers serving tenants in their buildings, and no commenter suggests otherwise.

6. Transparency requirements would be impractical. A broad range of commenters opposes regulations that would mandate the disclosure of contract terms. Benefits to consumers, if any, would be marginal and the administrative burden on providers would be significant.

7. Mandatory access statutes are outdated and unnecessary. WISPA correctly points out that mandatory access laws are unfair. Those statutes were nearly all enacted at a time when the cable industry and legislators believed that apartment owners did not appreciate all of the benefits offered by cable service. Consequently, with few exceptions, they are written to benefit only the local franchised cable operator. Furthermore, mandatory access statutes are unnecessary. As the Real Estate Associations showed in our opening comments, two-provider competition is actually the norm today, and three or more providers in an apartment building is not uncommon. There is simply no valid argument for mandatory access today.

The Real Estate Associations oppose any regulation of distributed antenna system ("DAS") or rooftop agreements. The Real Estate Associations oppose any regulation of rooftop access. We also oppose any regulation of in-building DAS facilities, and any requirement that could be construed to give carriers the right to install equipment in buildings without the consent of the property owner. The Real Estate Associations do support neutral host DAS installations, because they offer fair and cost-effective ways to meet the needs of consumers, carriers and building owners. Nevertheless, in many cases, owners must solve problems pertaining only to a single carrier. Neutral host systems may not be practical if the other carriers are not willing to participate. Consequently, installation of neutral host systems should not be mandatory.

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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 Notice of Proposed Rulemaking (the "*NPRM*").[1] The Real Estate Associations oppose any further regulation of agreements between property owners and broadband providers[2] because there is ample competition for broadband services inside buildings of all kinds. None of the comments submitted by proponents of regulation contradicts that fact. What proponents want is not relief from an uncompetitive market, but relief from competition itself.

[1] *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Proposed Rulemaking (rel. July 12, 2019) (the "*NPRM"*).
[2] For ease of reference we will refer to four general classes of providers throughout these reply comments: franchised cable multiple system operators (the "cable MSOs"); incumbent local exchange carriers (the "LECs"); competitive fiber broadband providers (the "CFB providers"); and satellite-based private cable operators (the "PCOs").

The fundamental flaw underlying this proceeding is that neither the *NPRM* nor any commenter has stated a standard by which the state of competition in the MTE market might be measured. This is important for three reasons.

First, the Commission's existing cable inside wire rules, on which proponents of regulation rely so heavily, actually anticipate that there might only be one provider in a building. The CFB providers and other commenters rely on 47 U.S.C. § 804(b), which allows property owners to establish unit-by-unit competition in a building, but they never mention 47 U.S.C. § 804(a), which anticipates building-by-building competition, which is to say, service by a single provider that is brought in to replace an incumbent. Consequently, under the Commission's rules today, there is no principled basis for objecting if a building owner chooses to allow for only a single service provider in a building.

Of course, we know from the opening comments of the Real Estate Associations that in fact most buildings today are served by two providers.[3] This is the second reason that the *NPRM*'s failure to define a standard is important: the only analogous statement from Congress on the subject, the definition of effective competition in 47 U.S.C. § 543(l)(1), sets two wireline providers in a geographic area as the standard.[4] In the context of cable rate regulation, Congress deemed two providers to be sufficient to warrant deregulation.

Thus, service by just one provider is lawful and unobjectionable under existing rules. Furthermore, two providers -- the standard Congress set for deregulation -- has been met in a

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[3] Comments of National Multifamily Housing Council, *et al*, GN Docket No. 17-142 (filed August 30, 2019) at pp. ii, 11 ("Real Estate Association Comments").

[4] Starry claims that there is no "effective competition," without defining the term. Comments of Starry Inc., GN Docket No. 17-142 (filed August 30, 2019) at p. 5 ("Starry Comments"). The only definition in the Communications Act is the one we discuss here and in our opening comments.

large proportion of buildings. There is nothing in the law that says that a third provider is obligatory or that companies that seek to enter a market in which there are already multiple providers are entitled to any special treatment.

This brings us to the third point. It is unreasonable to impose on owners of private property any obligation to make concessions to new competitors, or to interfere in their existing arrangements with incumbent providers, when most Americans living in single family housing have access to at most two wireline broadband providers and almost certainly will never have access to more. The real estate industry has not only built and paid for the venues that the broadband providers seek to serve, but it actively seeks competition to serve those venues. Any rule that would impose on the real estate industry, either directly or indirectly, a higher standard than exists for the marketplace as a whole, would be arbitrary, capricious, and an abuse of discretion.

I. THE PROPONENTS OF REGULATION OFFER NO CREDIBLE ARGUMENT IN SUPPORT OF THE COMMISSION'S AUTHORITY.

One of the more remarkable things about this proceeding is the lack of discussion of the Commission's authority. Aside from the Real Estate Associations, only Public Knowledge, *et al*,[5] and INCOMPAS[6] address the issue in any detail. This is not because the Commission's authority is so manifest that it can be presumed. It is precisely because the arguments for authority are weak. Furthermore, no party has made the case for a theory that would justify regulation in an environment in which it is clear that effective competition exists.

[5] Comments of Public Knowledge, *et al*, GN Docket No. 17-142 (filed August 30, 2019) at pp. 3-8 ("Public Knowledge Comments").

[6] Comments of INCOMPAS, GN Docket No. 17-142 (filed August 30, 2019) at pp. 23-28 ("INCOMPAS Comments").

In fact, what most commenters seem to argue is that there is actually competition inside buildings and they cannot compete because some aspect of the incumbents' agreements is unfair. And yet these competitors are all currently serving many buildings and there are many thousands more buildings that they are not serving and where they have not sought access. Essentially, what the competitors want is the right to use the property of others – whether it be access to wiring or simply access to a building – without paying for it. The incumbents, both cable MSOs and LECs, typically pay for the wiring they use or for access to the building in some fashion: no commenter has made a convincing argument that it is unfair or anticompetitive for competitors to have to meet the same standard.[7] All the arguments against revenue sharing and exclusive use of wiring amount to the same thing: asking the government to give them something that belongs to somebody else.

Section 201(b) is not a source of authority. The Real Estate Associations agree with the fundamental point made by Public Knowledge: "Section 201(b) is unavailable, became the Commission has classified broadband as an information service."[8] Although we take no position on Public Knowledge's broader argument about the validity of the *Internet Freedom Order*, we agree that as long as that order is in effect, broadband service providers are not subject to regulation under Title II of the Communications Act. Consequently, T-Mobile and INCOMPAS's claim that the Commission has authority under Section 201(b) has no merit.[9] In

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[7] And in any case, CFB providers often do not pay for the right to serve a property anyway. *See* Comments of Wireless Internet Service Provides Association, GN Docket No. 17-142 (filed August 30, 2019) ("WISPA Comments") at Appendix A at p. A-2 (one-third of WISPA members have entered into at least one revenue sharing agreement, two-thirds have not).

[8] Public Knowledge Comments at p. 3.

[9] T-Mobile Comments, GN Docket No. 17-142 (filed August 30, 2019) at pp. 16-17 ("T-Mobile Comments"); INCOMPAS Comments at pp. 23-25.

fact, INCOMPAS implicitly acknowledges this failure when it states that "the Commission has chosen not to use its section 706 authority."[10] The Commission can only extend Section 201(b) to broadband providers through Section 706, and because the Commission ruled in the *Internet Freedom Order* that Section 706 is only hortatory, neither statute authorizes regulation in this case.

The Commission's authority over facilities used to provide multiple classes of service is limited to matters addressed by its pole attachment rules. INCOMPAS cites the Commission's authority over facilities that provide commingled services as justification for regulating contracts between building owners and service providers. There are two problems with this commingled services argument. First, it is conclusory. None of the orders cited by INCOMPAS or the NPRM actually analyze any Commission authority that might apply in this instance. Second, the fact that the FCC can regulate pole attachments does not mean that the Commission has the power to regulate all aspects of the facilities used to provide broadband services or commingled services, or every contract entered into by an owner or user of such facilities. We will address each point in turn.

INCOMPAS and the NPRM cite four Commission orders for the proposition that the Commission has authority over infrastructure used to provide both telecommunications and other services. In reality, however, none of those decisions actually has anything to say about the issues in this proceeding.

The four orders are:

- *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Third Report and Order, 33 FCC Rcd 7705 (2018) (the "*Infrastructure Order*");

[10] INCOMPAS Comments at 26.

- *Acceleration of Broadband Deployment: Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, Report and Order, 29 FCC Rcd 12865 (2104) (the "*Wireless Facility Siting Order*");
- *Restoring Internet Freedom*, Report and Order, 33 FCC Rcd 311 (2017) (the "*Internet Freedom Order*"); and
- *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (the "*Wireless Broadband Access Order*").

The *Infrastructure Order* cites to the *Internet Freedom Order* and the *Wireless Broadband Access Order*, but contains no separate legal analysis.[11] This ruling thus offers nothing to support the claim of Commission authority. Furthermore, it is currently under appeal.[12]

The *Wireless Facility Siting Order* merely ruled that DAS and small cell facilities are subject to the same application processing timeframes as other wireless facilities.[13] Again, there is no separate legal analysis that bears on or might shed light on the different and much more complex issues in this proceeding.

The *Internet Freedom Order* contains a more extensive discussion than the two orders discussed above, but it is not much more significant. Notwithstanding the Commission's interpretation of Section 706 and consequent refusal to extend Title II rules to broadband services, the *Internet Freedom Order* created an exception for pole attachment rights under 47 U.S.C. § 224 and access to infrastructure under its pole attachment rules. In doing so, the Commission cited the *Wireless Broadband Access Order* and stated that "commingling services

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[11] *Infrastructure Order* at ¶ 167.

[12] *City of Portland v. United States,* No. 18-72689 (9th Cir. filed Dec. 20, 2018).

[13] *Wireless Facility Siting Order,* 29 FCC Rcd 12865, 12876 at ¶ 22.

does not change the fact that the facilities are being used for the provisioning of services within the scope of the statutory provision . . . ."[14]

In other words, the *Internet Freedom Order* does nothing more than preserve the Commission's authority over pole attachments. It says nothing about contracts governing wiring inside buildings, the FCC's Part 76 inside wiring rules, regulation of marketing, compensation for the use of the property of a person that is not subject to Section 224, or any of the other issues in this proceeding.

Finally, the *Wireless Broadband Access Order* itself merely authorizes wireless service providers to obtain the benefits of Section 224. It makes no broader finding about the scope of the Commission's authority in any respect and, like the *Internet Freedom Order*, it says nothing about the issues in this docket.

Consequently, the *Infrastructure Order* and the *Wireless Facility Siting Order* are not relevant to this discussion. Indeed, neither are the *Internet Freedom Order* or the *Wireless Broadband Access Order*. The most that can be said is that the Commission has carved out an exception from the *Internet Freedom Order* for pole attachment rights. Perhaps the Commission could create another exception to address one or more issues in this docket, but it has not actually done so and the *NPRM* does not explain how it might. Nor has INCOMPAS laid out any rationale or analysis that would justify such a ruling by the Commission.

The second flaw in the commingled services argument is that there is no statute comparable to Section 224 that the Commission could rely on to regulate facilities inside buildings in a fair and rational manner. Nor is the right to use wiring owned by a person that is not subject to the Commission's statutory jurisdiction the same as the right to attach to a pole

[14] *Internet Freedom Order*, 33 FCC Rcd 311, 384 at ¶ 189.

owned by a regulated utility pursuant to a rule adopted in response to an express grant of authority from Congress. To put it another way, just because wiring is needed to deliver broadband and other services does not mean that the Commission has plenary authority over every agreement that is somehow connected to such wiring. In fact, the United States Supreme Court has held, in an analogous situation, that because the Communications Act did not specifically empower the Commission to adjudicate the terms of a contract between two parties, the Commission has no such power.[15]

Finally, we must consider the consequences of any ruling asserting such broad authority, without Congressional approval. For example, Corning sells vast amounts of fiber optic cable and other equipment to providers of communications services. Does the Commission have the authority to regulate the prices or other terms under which Corning sells cable to Verizon? As a very large customer, does Verizon get a better deal than a small provider? The Multifamily Broadband Council has stated that small providers have trouble competing precisely because "large incumbents have access to lower priced labor as well as lower priced video content, equipment, bandwidth and wireless access points."[16] If the Commission's goal is to promote smaller competitors, perhaps it should consider regulating the prices those competitors pay for the direct inputs into the costs of their businesses. Of course, that would amount to a return to utility-style regulation and nobody is advocating such an approach. But there is no fundamental difference between regulating that kind of input and regulating the prices providers pay for

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[15] *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950) ("The Commission may impose on an applicant conditions which it must meet before it will be granted a license, but the imposition of the conditions cannot directly affect the applicant's responsibilities to a third party dealing with the applicant.").

[16] Comments of Multifamily Broadband Council, GN Docket No. 17-142 (filed August 30, 2019) at 7 ("MBC Comments").

access to wiring owned or controlled by building owners, or any of the other terms under consideration in this proceeding.

The analysis might be different if exclusive access agreements were still permitted. But they are not. And despite the claims of some providers that the existing contractual arrangements are the equivalent of exclusive access agreements, either singly or in combination, the record shows that this is not true.[17]

Imposing Title II utility oversight requirements would be impractical and unwise. INCOMPAS claims that Sections 211, 218 and 219 permit the imposition of transparency requirements. This argument fails for two reasons. First, Sections 211, 218 and 219 are Title II provisions that cannot be extended to broadband service providers without amending the Commission's findings in the *Internet Freedom Order*. Second, these three statutes, allowing for the filing of contracts, inquiries into management, and provision of reports, lie at the heart of the utility-style regulations that the Commission has spent the past 20 years moving away from.

The *Internet Freedom Order* expressly rejected such an approach to the regulation of broadband services in general. Consequently, it would be illogical to try to use these provisions to regulate facilities used by broadband providers. Indeed, to begin carving out further exceptions to the logic underlying the *Internet Freedom Order* would only strengthen arguments for the reversal of the decision. In addition, simply as a practical matter, establishing such a scheme would impose substantial burdens on providers, building owners and the Commission.

Section 628 does not apply because the current competitive marketplace is permitting and expanding access to programming. Public Knowledge and INCOMPAS argue that Section 628

[17] Declaration of Art Hubacher, attached as Exhibit E to Real Estate Association Comments at ¶ 8, Appendix A ("Hubacher Decl.").

authorizes the regulation of exclusive wiring and exclusive marketing agreements.[18] That statute, however, only allows regulation if in fact video programming distributors are being prevented from providing programming to customers through unfair competition or deceptive acts. Even assuming that Section 628 can be extended to broadband service, the record shows that there is ample competition in buildings of all kinds.[19] Furthermore, as we have shown,[20] the types of contracts under examination are merely adaptations to the regulatory environment established by the Commission. There is nothing anticompetitive or deceptive about them. Indeed, competitive providers are perfectly free to enter into the same kinds of contracts, and the record also shows that they often do.[21]

Furthermore, not only do a large majority of buildings host two providers, but a similar percentage host both the cable MSO and the LEC broadband product, and roughly seven to 25 percent host at least three providers.[22] Because so many providers are able and willing to compete on these terms, the question is not whether exclusive wiring hinders competition, but why the complaining providers are not willing to serve more widely.

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[18] Public Knowledge Comments at pp. 3-4; INCOMPAS Comments at pp. 23-26.

[19] *See* Hubacher Decl. at Appendix A and Appendix B ; RealtyCom Comments at p. 5.

[20] Real Estate Association Comments at pp. 57-64.

[21] *See* Comments of Wireless Internet Service Provides Association, GN Docket No. 17-142 (filed August 30, 2019) ("WISPA Comments") at Appendix A at p. A-2.

[22] Real Estate Association Comments at p. 66:

> The NMHC MTE Survey mentioned above found that an average of 76% of properties in the sample offer more than one provider, only slightly lower than the 80-90% range in Table 2. This compares very favorably to the 44% of the entire U.S. population that has access to two wireline broadband providers (see Part II.B). The range of 7% to 25% for properties with more than two providers is comparable to the national number of 14%.

Section 628 is not a general grant of authority to regulate building access. That statute only permits the Commission to act if a given practice causes a lack of access to programming. If there is a lack of access to programming today, it is because the economics of delivering service make certain categories of buildings unattractive to certain providers.

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No commenter has explained how it would be reasonable to adopt any further regulation that does not resolve the inequity in the FCC's outdated inside wiring rules. The inconsistent treatment of the cable MSOs and the LECs described in our opening comments may have been justified at one time, but today the result is discriminatory and unfair. Any further regulation that does not address that issue would be arbitrary and capricious and therefore contrary to law.

II. THE FACTS DO NOT JUSTIFY REGULATION: PROPONENTS RELY ENTIRELY ON ANECDOTE AND SPECULATION, OFFER NO EVIDENCE OF A SIGNIFICANT NATIONAL OR INDUSTRY-WIDE PROBLEM, AND IGNORE THE FACT THAT COMPETITION IN BUILDINGS OF ALL KINDS IS THE NORM.

The Real Estate Associations have established, through sworn declarations and survey information, that there is ample competition for broadband service inside buildings. In fact, in our opening comments we submitted information indicating that as many as 80 to 90 percent of apartment buildings are served by at least two broadband providers, and between 7 and 25 percent are served by more than two.[23] This competition exists in buildings where exclusive wiring, marketing and revenue share agreements all exist and in buildings where none exist. There is simply no truth to the claim that any of those types of agreements impede competition.

[23] Real Estate Association Comments at p. 66.

To supplement the information regarding the state of competition presented in our opening comments, we offer here three additional references:

- The Declaration of AvalonBay Communities, Inc., attached as Exhibit A, describes the approach of the nation's third-largest apartment owner and eleventh-largest apartment manager to the delivery of broadband services to residents. Eighty-seven percent of AvalonBay's communities are served by at least two broadband providers. AvalonBay also works actively to bring in service from competitive providers other than the cable MSO and the LEC.
- Property owners across the country are building apartment communities that are designed to adapt as new technologies and applications enter the market. These developers are the leading edge today, but they illustrate how the real estate industry responds to market demand. J. Bosquin, *Tech Towers*, MULTIFAMILY EXECUTIVE (July 31, 2019), available at https://www.multifamilyexecutive.com/technology/tech-towers_o.
- For a detailed description of the complexity of real estate development today, see David Garcia, *Making it Pencil: The Math Behind Housing Development,* TERNER CENTER FOR HOUSING INNOVATION, UC BERKELEY (August 2019), available at https://ternercenter.berkeley.edu/making-it-pencil.

Regrettably, the proponents of regulation rely entirely on speculation and anecdote. None of their claims are supported by sworn declarations or quantitative information of any kind. For example, Starry says the incumbents rely on "scare tactics" without defining what those tactics are or offering any sense of how often such "tactics" are used.[24]

As another example, WISPA says "a large owner/manager of a MTE with more than 40 units in Santa Clara County, California terminated further discussions with a well-established WISP to provide alternative broadband service because the revenue share offered by the WISP was not comparable to the share paid by the incumbent providers (there were at least two providers already in the building)."[25] In a nation in which there are approximately 20.8 million apartment units and 5.6 million commercial buildings of all types, including 1 million office

[24] Starry Comments at pp. 1, 2, 6, 14.

[25] WISPA Comments at pp. 5-, fn 14.

buildings, one example is meaningless. How many buildings has the WISP from the example applied to serve? How many buildings does it actually serve? How many times has it been rebuffed? If one percent of attempts are unsuccessful because the WISP is unwilling to match what others are paying, is that a problem? What is the threshold at which an allegation is transformed into a problem? We cannot possibly determine that based on the current record because none of the proponents of regulation have made any effort to gather that kind of data.

Furthermore, because we are only presented with one side of the story and the anecdotes never reveal who the property owner was,[26] they are impossible to verify. This is a problem for the Commission, because the Commission must be able to base its decisions on sound evidence and verifiable facts. Otherwise, it is regulating in the dark: its solutions will be ineffective or even harmful if based on inaccurate information. It is also a problem for the public, because the public must have confidence that the government has considered the relevant factors and has not made an error in judgment.[27] Thus, it is not in the public interest for the Commission to rely on such evidence. This is especially the case when it is possible to gather quantitative evidence regarding the underlying issues, as we discuss in our opening comments.[28]

Even if a particular anecdote on its face supports the Commission's preferred policy choice, such evidence is unreliable because it is incomplete. Providers may claim that in a particular instance they have been prevented from advancing the Commission's goals because of a particular circumstance, such as the existence of a certain kind of contract provision, but such a

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[26] The one exception to this is CenturyLink's allegations regarding certain shopping centers. We address this issue in Part IV, below.

[27] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).

[28] See Real Estate Association Comments at pp. 23, 27.

naked claim is just that, a claim. It is not evidence, much less proof, because we do not actually know what motivated the property owner. For example, what if the owner had a previous experience with the accusing provider at a different property? For instance, what if the provider had caused damage that the owner was forced to repair at its own expense? Or, what if residents or tenants who subscribed to that provider's service were dissatisfied and made that dissatisfaction known to the property manager? There are many legitimate reasons why a property owner or manager might deny a provider access to a building.

In other words, the various anecdotes cited by commenters are not an adequate basis for decision. While they may seem to support the arguments of the commenters who cite them, in fact they are of no more value than the naked claims, because if they are in fact false or misleading they illustrate nothing.

Two commenters, WISPA and the Fiber Broadband Association ("FBA"), have submitted surveys to support their arguments. In principle, a properly constructed survey can be very useful. Regrettably, both surveys are flawed in critical ways. First, neither of them asks any questions regarding the presence of competitors or the number of competitors present in the buildings under consideration. This is a central issue in this proceeding, yet neither survey present any information on that point. Furthermore, neither the questions that are asked nor the answers do much to support the positions of either commenter. For example:

- Roughly one-third of respondents to the WISPA survey say they have at least one revenue share agreement.[29] This fact says nothing to support the argument that revenue share agreements are harmful or should be regulated. If anything, it says that a significant number of WISPA members have found it in their interest to enter into a revenue share agreement, which suggests that they are not harmful. Note, however, that we do not learn, either from this question or any other, what proportion of all agreements entered into by WISPA members involve payment of compensation to the

[29] WISPA Comments at Appendix A, p. A-2.

property owners. Thus, the question does not actually tell us what it purports to tell us, which is how common revenue share agreements are.

- Roughly two-thirds of respondents to the WISPA survey say they have not entered into any revenue share agreements.[30] This is more interesting, because it suggests even more strongly that revenue share agreements are not a problem. Roughly two-thirds of WISPA's members are delivering services in the MTE marketplace without being required to compensate property owners at all. Furthermore, when combined with the proportion of agreements for the remaining third of WISPA members that are not revenue share agreements (whatever that may be -- see above), it would appear that the vast majority of agreements between property owners and WISPA members do not involve payment of compensation. Thus, revenue share agreements are not causing any direct harm to WISPA members.
- The WISPA survey asked whether the respondent was "required to enter in a revenue sharing agreement for any of the following reasons?"[31] The answers to this question are ultimately meaningless, because the critical point is that the provider agreed to enter into the contract. No sensible provider would agree to contract terms that were not in its business interests, unless the circumstances involved coercion of some kind. But there cannot be coercion here, because under the law today, no provider is under any obligation to serve any building. If a provider agrees to pay a property owner today, it can only be because the provider decided that it was in its business interests to do so. Furthermore, the three options stated in the question as reasons for having been required to enter into an agreement are meaningless: (1) 15% of respondents said the reason was that the incumbent provider was also under a revenue sharing agreement. This is odd, given that there is no legal requirement that competitors enter on the same terms as an incumbent, but it is hard to see why being asked to serve on nondiscriminatory terms presents a policy problem for the Commission to address. (2) nearly 30% gave as the reason "as a condition of speaking/dealing with the property owner/manager." Again, this is odd, because there is no such legal obligation. If such a request is unacceptable, the provider can move on to the next prospect. If what is meant by the reason is that the owner insisted on compensation, then this statement in indistinguishable from the third reason. (3) Finally, nearly 40% gave the reason "as a condition of entry." This actually makes sense: It is a fundamental principle of our legal system that property owners are permitted to deny entry to persons who wish to use their premises to conduct a business, and the concept that such persons may be required to pay for access underlies the entire commercial real estate industry. Furthermore, as we discussed above, it appears that only a third of WISPA members actually have had to pay for access to even one

[30] *Id.*

[31] *Id.* at p. A-3.

property, and in all likelihood only a very small fraction of all contracts between WISPA members and property owners involve any cash compensation.

- The WISPA survey next asked "[w]hat are the reasons you are NOT serving MTE customers or NOT able to serve more MTEs."[32] This is a textbook example of a bad survey question. The proposed answers are biased in favor of a particular result; for instance, although "other" is an option, none of the options refers to such things as lack of capital, or other factors that might affect the ability to expand a business. Furthermore, the options are presented in such a way that a single instance of an event allows the respondent to give that answer. For instance, nearly half of respondents gave as a reason that property owners refused to deal or speak with them. Does that mean that in every instance at every property the provider has been rebuffed? Of course not. Maybe it only happened once to each respondent. And if a respondent has requested access to 1000 buildings and been turned down only once, is that a problem worthy of Commission action? Furthermore – and this is important – just over half did not give that reason, which suggests that they have never been rebuffed, even once. Finally, five of the answer options begin with the words "prohibited by," but in reality only one of those options ("prohibited by exclusive rooftop access agreement") is an actual prohibition. Bulk agreements, exclusive marketing agreements, exclusive wiring agreements, and revenue sharing agreements are not prohibitions.
- The FBA survey merely confirms what we already know about multiple dwelling unit owners and residents: broadband is very important.[33]
- The FBA survey includes a question about "reported fiber broadband availability by apartment characteristics."[34] Unfortunately, it is not clear whether the question refers to fiber to the building or fiber to the unit. In any case, it is not surprising that very large properties are more likely to be served by fiber (whether to the building or the unit) than properties of 50 units or less. This merely supports a point the Real Estate Associations have made all along: fiber broadband providers prefer to serve large buildings, and smaller buildings have trouble attracting competitors. Rather than worrying about contract terms between providers and building owners, the Commission and the broadband industry should be finding ways to get better service to those smaller, less lucrative properties.

The WISPA and FBA surveys are typical of the comments in this docket. They offer no insight into the actual relationship between exclusive marketing, exclusive wiring, or revenue

[32] *Id.* at p. A-4.

[33] FBA Comments, Appendix A, at pp. 1-2, 5-6.

[34] *Id.* at Appendix A, at p. 8.

sharing agreements and the presence of competition inside buildings. In fact, as the Real Estate Associations have amply demonstrated, such agreements in no way impede competition.

III. PROPONENTS OF REGULATION SEEM NOT TO UNDERSTAND HOW THE COMMISSION'S INSIDE WIRING RULES ACTUALLY WORK.

No commenter discusses the "sheetrock rule" or how it affects incentives for owning wiring. No commenter notes how the Commission's rules treat cable operators differently from other entities.[35] As we discussed in our opening comments, understanding the application and effects of the cable inside wiring rules is essential to understanding the issues in this proceeding. Furthermore, at their heart, the claims of CFB providers and other proponents of regulation is that those rules – the Part 76 cable inside wiring rules – are being used in an unfair manner. Yet they either ignore or do not understand how the rules actually work.[36] In either case – lack of

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[35] NCTA does mention the treatment of PCOs, which is relevant for reasons we discuss in our opening comments, but does not go to the central issue here, which is the ability of broadband providers and apparently the LECs to enter into agreements giving them the right to install and the exclusive right to use fiber facilities extending all the way to each residential unit or other tenant premises in a building. NCTA Comments at p.11, n 26.

[36] For example, the Community Associations Institute ("CAI") makes several statements that suggest confusion about how the Commission's Part 76 rules work. This is not surprising, given that other parties have ignored the sheetrock order and other issues discussed in our opening comments. First, CAI states that providers sometimes abandon wiring when no longer serving a community, and later try to deny a new provider the right to use that wiring. Comments of the Community Associations Institute, GN Docket No. 17-142 (filed August 30, 2019) at 6 ("CAI Comments"). The Real Estate Associations do not understand this concern, because 47 C.F.R.§ 76.804(e) states: "Incumbents are prohibited from using any ownership interest they may have in property located on or near the home run wiring, such as molding or conduit, to prevent, impede, or in any way interfere with, the ability of an alternative MVPD to use the home run wiring pursuant to this section." Consequently, if the wiring is truly abandoned, in the legal sense, the provider has no control over it, and even if it is not technically abandoned, the Commission's rules transfer control (but not title) to the condominium association or other property owner.

CAI also expresses concern over agreements in which the provider is given control, by contract, of wiring owned by the association as well as wiring owned by the provider. CAI Comments at

candor or lack of understanding – the only proper response is to reject the proposed solution because the problem has not been correctly defined.

Instead, the record is full of mischaracterizations and incorrect statements such as:

- Public Knowledge claims that "it is pointless to require a new competitor to install parallel infrastructure."[37] But we know that LECs do just that – install parallel infrastructure -- willingly in every building they serve, and CFB providers often do so as well.[38]
- WISPA repeatedly cites as evidence an article titled "Holding Your Internet Hostage" from the online publication "Broadband Now." The article suggests – without evidence or argument -- that revenue share arrangements are "not strictly legal;" the title of the publication is all that is needed to understand its editorial slant.
- WISPA also claims, at p. 14, the "incumbent providers and MTE owners had manipulated the Commission's current allowance for exclusive wiring arrangements to ensure that competitors can no longer access fallow or unused cable wiring." As we explained in our opening comments, this is false. The Commission's sheetrock ruling effectively undercut the original inside wiring rules and eliminated any incentive for the cable MSOs to own inside wiring, especially when the LECs are permitted to own wiring all the way to each apartment unit without sharing their facilities.
- FBA alleges that "if a provider sells its wiring to an MTE owner and leases it back before a resident/subscriber terminates the provider's services, the Commission's rule giving the subscriber the opportunity to purchase the wiring upon termination are triggered."[39] This may be true as far as it goes, but it is not what happens in reality. Once again, in new construction – because of the sheetrock rule – cable MSOs rarely, if ever, take title to the wiring in the first place. This does not violate any Commission rule; for one thing, a building owner always has the right to pay for and install wiring itself, and then make it available

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pp. 7-8. This is a standard form of exclusive wiring agreement. All of the concerns expressed by CAI can be and typically are dealt with in contract negotiations. When the contract expires, the provider will no longer have control over the wiring inside each unit. Furthermore, providers will agree to terms that provide for nonexclusive use of in-unit wiring, so that multiple providers can serve the property. Because the issues raised by CAI are routinely addressed by counsel in negotiations there is no need for Commission oversight.

[37] Public Knowledge Comments at p. 15

[38] *See* Real Estate Association Comments at p. 39 (LECs) and pp. 61-62 (CFBs); *see also* Hubacher Decl. at ¶ 8.

[39] FBA Comments at p. 7.

to a provider. Furthermore, for all the reasons previously stated, in older buildings there is no sale and leaseback – the wiring is controlled by the building owner by operation of the Commission's rules.

- Despite INCOMPAS's claims, sale and leaseback arrangements are not common. *See* FBA Comments at p. 6 ("sale-and-leaseback arrangements . . . are rarely used in the market"). Furthermore, banning them would have no effect: In new construction, the provider rarely holds title to the wiring at all, so there is nothing to sell, and in existing properties, title is often already in the owner. This is all addressed in our opening comments at pp. 62, 74.
- INCOMPAS also claims, at p. 6, that "MTE residents have fewer options for robust-high-speed broadband that consumers living in single-family homes, and the services they are offered are typically more expensive." This is not only not true, but the sources cited by INCOMPAS do not actually support the proposition. They consist of articles that make assertions without actual evidence.
- Common Networks claims that "[s]haring broadband fees with property owners/ managers and/or paying door fees for access to a unit is a de facto requirement for gaining entry to a tenant of an MTE in today's broadband market." This is also not true, as our opening comments demonstrated.[40] Monetary compensation is common, but by no means universal.
- Starry claims that "[e]xclusive provisions serve no legitimate purpose other than to create barriers to new providers entering an MTE and are not in the MTE owner's interest."[41] This is a strange statement. The Real Estate Associations represent a broad range of property owners across the country, and we have shown (i) that exclusive wiring agreements serve a critical purpose, whether entered into by the cable MSO or the LEC or even a CFB provider; and (ii) apartment owners represented by competent counsel knowingly enter into such agreements as a way of ensuring that their residents obtain access to high quality competitive broadband services.

In fact, this entire docket is largely built on a misunderstanding of the Commission's rules and how they actually apply. While the Part 76 rules were designed to allow for the possibility of unit-by-unit competition, in which wiring could be shared, they were also designed to allow for building-by-building competition, in which there is only one set of wiring and only

[40] Real Estate Association Comments at pp. 58, 78-79.

[41] Starry Comments at p. 6.

one provider in the building.[42] So the Commission's rules themselves have allowed and anticipated the presence of only a single competitor. And yet, the market has evolved so that most buildings today are served by two providers. And a significant number – perhaps as many as 25% -- are served by three or more.[43]

Furthermore, as explained above, "sale and leaseback" arrangements are not only rare, but essentially irrelevant to how the market actually works. Exclusive use of wiring only impedes competition if one believes that competitors have an inalienable right to use the property of third parties without paying for it.

IV. NOTHING IN THE RECORD JUSTIFIES ANY REGULATION OF AGREEMENTS PERTAINING TO ACCESS TO OR SERVICE IN COMMERCIAL AND RETAIL PROPERTIES.

Although many commenters address the issues presented in the NPRM in a general way, suggesting that access to non-residential properties is a significant concern, in reality this is not true. Aside from the issues surrounding access to rooftops and DAS facilities, commenters do not discuss access to commercial buildings and retail properties because it is not a significant concern in the real world.[44] As we described in our opening comments, tenants in office

[42] *Compare* 47 C.F.R. 76.804(a) ("Building-by-building disposition of home run wiring") and 47 C.F.R. § 76.804(b) ("Unit-by-unit disposition of home run wiring").

[43] Real Estate Association Comments at pp. 23, 66.

[44] For example, the comments of Common Networks, Inc., Starry, Inc. WISPA, FBA and INCOMPAS all focus entirely on residential service. Aside from a single paragraph describing vague concerns about "building access agreements" for what appear to be commercial buildings (INCOMPAS comment at 20) and a cross-reference to a business park cited by Lumos in earlier comments (WISPA Comments at p. 9, n. 24), commenters do not raise concerns about contracts with commercial property owners regarding service inside their buildings.

buildings, retail and other commercial properties routinely have access to the provider of their choice, and even if that is not the case they still have a choice of providers.[45]

No commenter has asserted that exclusive wiring agreements or exclusive marketing agreements are an issue in commercial properties. For one thing, those agreements developed in the context of the residential market, where the one set of wiring that was available belonged to the cable MSO and was theoretically available for sharing under the Commission Part 76 rules.[46] The same is true of "revenue sharing" agreements. Neither door fees nor true revenue sharing appear in contracts between office building owners and providers serving tenants in their buildings, and no commenter suggests otherwise.

CenturyLink is the only party that raises specific examples to support its claims. CenturyLink alleges that it has been denied access to customers in several shopping centers because of preferred provider arrangements and that these arrangements amount to exclusive access contracts. Comments of CenturyLink, GN Docket No. 14-142 (filed August 30, 2019) at pp. 8-11 ("CenturyLink Comments"). Upon investigation, the International Council of Shopping Centers has found that in the handful of instances cited by CenturyLink, it appears that the company's representatives approached the incorrect individuals at the facility to which they were seeking access and in subsequent communications CenturyLink has acknowledged that it

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[45] For an example of how apartment owners are meeting the broadband and other communications needs of their residents, *see* S. Buckley, *Making Mobile Service an Amenity, Fourth and Madison, Seattle, Washington*, BROADBAND COMMUNITIES (March/April 2019), available at https://www.bbcmag.com/multifamily-broadband/property-of-the-month/making-mobile-service-an-amenity-fourth-and-madison-seattle-washington ("*Making Mobile Service an Amenity"*). In this case, there are four broadband providers serving the building as well as all four major wireless carriers.

[46] *See discussion in* Real Estate Association Comments at pp.33-36.

has been allowed to provide service to the tenant.[47] Consequently, these examples merely illustrate the need for providers to work diligently in dealing with property owners. Furthermore, CenturyLink is the third largest telecommunications company in the United States and serves millions of customers across 37 states. If a company that size can only cite a handful of examples, even if there actually were a problem it would not be so substantial as to justify regulation.

We understand that ICSC members often work with a preferred provider in order to provide telecommunications services for their tenants as a means of limiting disruption to customers and other tenants. The relationship with the preferred provider does not limit a tenant from having access to a telecommunications provider of choice, as long as the provider agrees to enter into an access agreement with the property owner. These agreements reflect the cost to the property owner (*e.g.*, energy costs, existing fiber) and are essential to ensure physical safety, cyber safety and uphold relevant environmental standards associated with the property.

Consequently, the Real Estate Associations urge the Commission to avoid any action that could be construed as interfering with or affecting the enforcement of agreements pertaining to access to and service in commercial buildings and retail properties.

[47] Email from Jennifer Platt, Vice President, Federal Operations, International Council of Shopping Centers, to Matthew Ames, Counsel, Hubacher Ames & Taylor, and Kevin Donnelly, Vice President, Government Affairs, National Multifamily Housing Council (September 27, 2019) (on file with counsel).

V. IN A COMPETITIVE MARKET ECONOMY, REVENUE SHARING AND OTHER MECHANISMS FOR COMPENSATING PROPERTY OWNERS ARE THE NORM.

The CFB providers object to revenue sharing agreements for two reasons. First, they do not want to be required to pay for any rights they may obtain to serve or install facilities inside a building.[48] This is simply not a valid reason for the Commission to intervene in this market.

Second, they claim that receiving compensation from incumbents causes owners to discriminate against them. This argument may seem logical, but it ignores the fact that building owners are very much aware of the desire of their residents and commercial and retail tenants for competition. Furthermore, in our opening comments, we demonstrated that owners routinely grant access to multiple providers even when not receiving compensation. Thus, this argument is simply incorrect.

It makes no difference whether the compensation is paid in connection with an exclusive wiring agreement, an exclusive marketing agreement, a nonexclusive marketing agreement or any combination. It makes no difference whether the compensation is in the form of a flat door fee or a true revenue share. Despite the allegations of some commenters,[49] property owners know their business and understand that they must meet resident and tenants needs if they are to succeed.

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[48] *See* WISPA Comments at p. 5; INCOMPAS Comments at pp. 7-8; Comments of CenturyLink, GN Docket No. 17-142 (filed August 30, 2019) at pp. 6-7 ("CenturyLink Comments"); Starry Comments at p. 6.

[49] *See* INCOMPAS Comments p. 7; Public Knowledge Comments at p. 12; Starry Comments at p. 5; Comments of Uniti Fiber, GN Docket No. 17-142 (filed August 30, 2019) at p. 3 ("Uniti Fiber Comments"); WISPA Comments at p. 11.

Finally, the concept that compensation can or should be limited to costs in some form is fundamentally unfair.[50] As we pointed out in our opening comments, none of the issues under discussion in this proceeding would even be in question were it not for the enormous investments made by property developers in the first place.[51]

[50] FBA Comments at p. 4; INCOMPAS Comments at p. 13, WISPA Comments at p. 6.

[51] Real Estate Associations Comments at pp. 7-8, 78-81.

VI. COMMENTERS AGREE THAT THE PROPOSED TRANSPARENCY REQUIREMENTS ARE IMPRACTICAL.

Public Knowledge and WISPA are correct when they say that transparency requirements would be ineffective.[52] Granted, they reject such rules because they prefer more direct regulation, but their criticisms remain valid. There would be no practical way to enforce such requirements, even if they were needed or lawful. NCTA also opposes disclosure requirements because they would provide no meaningful information to consumers.[53]

INCOMPAS, FBA, and others that promote some form of disclosure have not explained how transparency would work in practice, nor how it would actually help residents.[54] Would residents and commercial tenants be entitled to receive a copy of every agreement between a property owner and a provider? And exactly how would knowledge of the contents of such agreements help tenants, and especially apartment residents? Starry acknowledges that any benefit to apartment residents would only be marginal, precisely because the issues addressed in such agreements are not central to the issues that most concern residents.[55]

The real reason competitive providers want disclosure is not to help consumers, but so they can see the terms under which their competitors are serving.[56] Yet, as WISPA notes, disclosure presumably would be required of all providers, including smaller competitors.[57] Not only is this burdensome and therefore costly, but it is by no means certain that such disclosure

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[52] Public Knowledge Comments at 10; WISPA comments at 14-15; *see also* Common Networks Comments at 7.

[53] NCTA Comments at pp. 8-9.

[54] INCOMPAS Comments at p. 13; FBA Comments at pp. 4-5; 8-9.

[55] Starry Comments at pp. 11-12; *see also* WISPA Comments at p. 14.

[56] Starry Comments at p. 12.

[57] WISPA Comments at p. 13.

might not actually harm new competitors that might negotiate terms more favorable than those of the incumbents.

In any event, for all the reasons laid out in our opening comments, there is no problem in the marketplace that disclosure requirements would solve, because in reality there is ample competition inside buildings of all kinds.

VII. MANDATORY ACCESS IS AN OUTDATED AND UNNECESSARY CONCEPT.

WISPA is correct: mandatory access laws are unfair.[58] They were nearly all enacted at a time when the cable industry and legislators believed that apartment owners did not appreciate all of the benefits offered by cable service. Consequently, with few exceptions, they are written to benefit only the local franchised cable operator. Thus, advocates of any policy initiatives that rely on mandatory access legislation have their work cut out for them: the statutes must be amended in nearly all of the states that have adopted them, and the other two-thirds of the states have never seen any advantage to them in the first place.

One reason so many states never adopted mandatory access legislation is the knowledge that forcing a property owner to accept the physical occupation of its property violates the Constitution, as the Supreme Court found in *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).

Furthermore, mandatory access statutes are not only unfair, but unnecessary. As we have shown, two-provider competition is actually the norm today, and three or more providers in a

[58] *Id.* at pp. 27-30.

building is not uncommon.[59] There is simply no valid argument for mandatory access today. Even under existing mandatory access statutes providers are required to install and pay for their own facilities: mandatory access does not demand sharing of facilities of third parties, aside from the property of the building owner. In fact, for that reason alone the call for mandatory access by commenters in this docket illustrate the incoherence of their position: on one hand they support wire sharing and object to exclusive use of wiring, on the other hand they support laws that grant access but require installation of separate facilities that are used on an exclusive basis.

Finally, the Commission has no power to compel property owners to accept the presence of any provider: Such a positive duty on the part of property owners would be unlike the other rules adopted by the Commission that affect property owners, but only impose obligations on providers subject to Commission jurisdiction.

VIII. ATTEMPTING TO REGULATE DAS AGREEMENTS AND ROOFTOP LEASING ARRANGEMENTS WOULD DISRUPT A MARKET THAT IS CURRENTLY MEETING NEEDS AS THEY ARISE, EFFECTIVELY AND EFFICIENTLY.

Various commenters ask the Commission to regulate rooftop access agreements and DAS agreements. The Commission should reject all of these proposals.

T-Mobile argues that exclusive agreements among carriers, infrastructure providers, and building owners restrict T-Mobile's ability to connect to DAS facilities or install its own facilities.[60] T-Mobile claims that the use of incompatible technical architectures and unreasonable fees restricts competition. T-Mobile seeks access to conduit within and outside a

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[59] Real Estate Associations Comments at pp. 11-12, 63-66.

[60] T-Mobile Comments at pp. 14-15.

building,[61] and appears to want the unilateral right to install small cell facilities.[62] Sprint raises similar concerns, primarily with respect to the ability to deploy its services in large venues.[63] Common Networks and other commenters ask the Commission to give them access to rooftops as well as wiring.[64]

The Real Estate Associations oppose any regulation of rooftop access. We also oppose any regulation of in-building DAS facilities, and any requirement that could be construed to give carriers the right to install equipment in buildings without the consent of the property owner. As we described in our opening comments, the real estate industry as a whole is spending hundreds of millions – if not billions – of dollars to improve wireless capacity and coverage inside buildings, with no hope of recovering that expense.[65] Commission regulation promises only to intrude on the effective and efficient management of private property, while imposing both additional direct expense and costly restrictions.

The Real Estate Associations support neutral host DAS installations, for all the reasons stated by various commenters. They offer fair and cost-effective ways to meet the needs of consumers, carriers and building owners. Nevertheless, in many cases, owners must solve problems pertaining only to a single carrier. It is very common for a property owner to find that apartment residents or commercial or retail tenants who subscribe to a particular wireless carrier are having capacity or coverage problems, while subscribers to other carriers are not. Neutral host systems may not be practical if the other carriers are not willing to participate.

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[61] *Id.* at p. 10.

[62] *Id.* at pp. 8-9.

[63] Sprint Comments at pp. 1-2.

[64] Common Networks Comments at pp. 2-4; T-Mobile Comments at pp. 12-15.

[65] *See Making Mobile Service an Amenity.*

Consequently, no such system or comparable solution should be mandated unless owners are fully compensated for all costs.

The Real Estate Associations oppose all of the following:

- Any form of mandatory or forced access that allows carriers or other providers to install facilities inside a building without negotiating an agreement with the owner.
- Any limitation on the owner's rights to manage and control access to the roof of a building.
- Any requirement that imposes expense or other cost on owners, without their consent.
- Any requirement that restricts the ability of owners to obtain compensation, should they invest in a DAS or comparable infrastructure.
- Any regulation that limits the ability of owners to install single-carrier solutions, unless the regulation mandates that all carriers connect to a facility at no cost to the owner.

We believe that market forces are working and that no regulation of rooftop access or DAS facilities is required.

CONCLUSION

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

Respectfully submitted,

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September 30, 2019

EXHIBIT A

DECLARATION OF AVALONBAY COMMUNITIES, INC.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

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

DECLARATION OF AVALONBAY COMMUNITIES, INC., IN SUPPORT OF COMMENTS OF THE REAL ESTATE ASSOCIATIONS

I, Alaine Walsh, declare as follows:

1. I currently serve as Senior Vice President, Operations & Investment Services, for AvalonBay Communities, Inc. ("AVB"), the third largest apartment owner in the United States and the 11th largest apartment manager in the United States, according to the most recent survey data compiled by the National Multifamily Housing Council.[1] In this position, I am responsible for coordinating management and delivery of television service, telephone service, and broadband Internet service (collectively, "communications services") to AVB communities.

The Importance of Broadband Service.

2. AVB's goal is to create a better way to live. AVB accomplishes this goal by offering distinctive apartment living experiences, which includes ensuring the availability of communications services, with a focus on high-speed Internet service (hereinafter, "broadband service") at AVB's communities. AVB recognizes that prospective residents have many options when choosing where to

[1] *See* "Top 50 Apartment Owners (Rankings)" reported on NMHC's website at: https://www.nmhc.org/research-insight/the-nmhc-50/top-50-lists/2019-owners-list/. As of June 30, 2019, AVB had a direct or indirect ownership interest in and operated a total of 294 apartment communities, comprising 86,184 units, located in 12 states and the District of Columbia.

live, and the availability of broadband service is necessary to attract prospective residents to, and to retain existing residents at, AVB communities.[2]

3. Given the importance of ensuring residents have access to quality broadband service, AVB employs an in-house telecommunications team that tracks communications services trends, identifies viable communications service providers capable of serving AVB communities, and negotiates service agreements with communications services providers. The AVB telecommunications team works with broadband service providers of all sizes across the AVB footprint. AVB also engages attorneys who focus on communications services to help negotiate services agreements with service providers. AVB's service agreements routinely obligate broadband service providers to deploy state-of-the-art broadband service systems that deliver bandwidth speeds and product pricing equal to the best bandwidth speeds and product pricing that each broadband service provider makes available in AVB's footprint. AVB goes to these lengths not only because research shows the importance of broadband service to current and prospective residents, but also because AVB utilizes broadband service across a growing number of its daily operating systems and quality broadband service is imperative for the operation of AVB's communities.

4. If AVB is unable to meet resident broadband service expectations, residents can and will move. On a national basis, approximately 50% of apartment residents move every year. Research shows that when residents move out, property owners incur "turn costs" of roughly $1,800 per apartment home in order to secure a lease with a new resident and to make the vacated apartment home ready for the next resident to occupy.[3] Based on that average, a company the size of AVB incurs annual turn costs totaling nearly $77 million. This number alone provides abundant justification for property owners to dedicate significant time and attention to the procurement of quality broadband service.

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[2] See "2017 NMHC/Kingsley Apartment Resident Preferences Survey" at https://www.nmhc.org/research-insight/research-report/2017-nmhc-kingsley-apartment-renter-preferences-report [nmhc.org]. According this Survey, broadband service is cited by residents as one of the most important amenities when choosing an apartment home, with 93% of apartment residents citing broadband service as being important to them, and 60% stating they would not rent without it.

[3] See "Breaking Down Turnover Costs" reported on NAA's website at https://www.naahq.org/read/partner-perspectives/breaking-down-turnover-costs.

5. Most commentators also seem to be unaware of the importance of broadband service to multifamily owners. During the construction period before an apartment community opens for leasing, AVB uses broadband service daily at its on-site construction trailers. The leasing office and clubhouse require broadband service during pre-leasing. And it would be virtually unprecedented to open an apartment community without broadband service available when apartment homes receive certificates of occupancy and residents begin to occupy apartment homes. It is imperative that the selected broadband service providers meet contractually agreed-upon construction and deployment schedules or AVB risks costly construction delays and lost profits resulting from late opening. Once a community opens for leasing, dozens of AVB's operating systems and software require broadband service on a continuous basis.

6. For the preceding reasons, AVB places a premium on broadband service, and AVB contracts with broadband service providers who agree to timely deploy high quality broadband service to AVB communities and who are able to execute accordingly. When possible, AVB contracts with multiple broadband service providers for AVB communities.

Broadband Service at AVB Communities.

7. At the typical AVB community, at least two broadband service providers offer broadband service to residents. These broadband service providers include a combination of the local franchised cable multiple system operator ("MSO"), the incumbent local exchange carrier ("ILEC"), and/or one or more independent internet service provider ("ISPs"). Eighty-seven percent of AVB's communities are served by at least two broadband service providers. In the rare instance where only one broadband service provider serves an AVB community, it is typically due to the unavailability of a second broadband service provider that is able to provide at least 50-100 Mbps broadband service at the community.

8. Nearly all AVB communities are served by the MSO for the market area, as these providers have ubiquitous networks and a large and heavily advertised presence in the market area. In rare instances, AVB has developed a community where the MSO would not provide communication services; at other communities, the MSO did not serve the community at the time AVB purchased the community.

9. Most of AVB communities are served by the ILEC, particularly where the ILEC is able to deliver fiber-based broadband service. Sometimes an ILEC refuses to extend fiber-based broadband service to a new construction community. ILECs routinely refuse to upgrade legacy copper facilities to fiber, leaving those communities with low-speed Internet services that may or may not meet the minimal FCC definition of "broadband service." Over the past several years, ILECs have declined to deploy fiber-based broadband service at over 50 AVB communities containing more than 13,000 apartment homes in five states, citing various discretionary justifications, including a lack of available funding in the ILEC's budget, the ILEC lacking a video franchise in the market area of the community, or the ILEC's unwillingness to deploy fiber unless AVB incurs all of the ILEC's costs for deployment.

10. ISPs increasingly present a good alternative for broadband service, but their broadband service is often only available within limited service footprints. At many AVB communities, no competitive ISPs exist to provide broadband service. AVB is open to broadband service from ISPs, whether delivered via fixed wireless or fiber-based facilities, and AVB has entered into service agreements with ISPs to serve many AVB communities. ISPs are widely available in AVB's Pacific Northwest market, where 70% of AVB communities are served by an ISP. AVB is also currently evaluating service proposals from multiple ISPs for broadband service in numerous AVB markets. There have been many instances where AVB requested broadband service proposals from an ISP and the ISP ultimately declined to serve for a host of reasons, including failure of the proposed deployment to meet the ISP's internal rate-of-return requirements, a lack of fiber or line-of-sight transport options, or the community residing outside the ISP's current footprint.

Non-Residential Consumers of Broadband Service.

11. All property owners, including AVB, are consumers of broadband service. AVB uses broadband service for a wide range of operational purposes, including connectivity for: construction trailers; communications service among leasing, operating, and maintenance personnel; accessing and using software systems; common area WiFi services and exercise equipment needs; and operation of building access systems, building management systems, and smart home systems. No property owner would knowingly enter into a broadband service arrangement that impedes its ability to effectively operate

its communities. Any community that lacks at least one quality broadband service provider seriously impacts the ability of the property owner to succeed in an industry that increasingly runs on IP-based platforms, particularly the many vendor platforms that have transitioned to software-as-a-service systems. Further, communities lacking multiple quality high-speed broadband service providers constrain the broadband service options available to not only residents but also the property owner, while preventing the property owner from negotiating for superior broadband service and improved business terms. These operational requirements are extremely important to the success of a community.

12. A growing number of communities are "mixed-use" and consist of both a residential portion as well as commercial portions. Commercial tenants expect choice in broadband service providers. Many commercial tenants are subject to franchise requirements that mandate certain broadband service throughput. Some commercial tenants even have national corporate accounts with select broadband service providers. Again, no property owner would knowingly enter into a broadband service arrangement that impedes its ability to lease its commercial space.

Wiring Usage.

13. The Competitive Broadband Access NPRM raises questions about exclusive wiring usage arrangements between property owners and service providers. In AVB's experience, exclusive wiring arrangements exist because the shared use of wiring by multiple service providers results in service issues for residents and operational problems for property owners. Simply put, competing service providers consistently demonstrate an inability to properly share wiring. Providers do not have accountability and resort to finger pointing when wiring is shared.

14. There are many examples demonstrating the problems resulting from service providers sharing wiring. For example, when a resident changes service from Provider X to Provider Y, a technician for Provider X will cut the connector off the ends of the wiring (claiming the connector constitutes the property of Provider X) and then Provider Y's technician arrives and tells the resident that the "owner's wiring" is damaged but the technician can either (i) fix it for a fee to be paid by the resident or (ii) the resident can wait for the property owner to fix the damaged wiring at some point in the future. Either way, the resident sustains unwarranted repair fees or delayed service activation. Eventually, the

repeated truncation of the wiring causes the wiring to become too short for use, and then it must be replaced, most often at the expense of the property owner. A painful example of this scenario played out at an AVB community in Maryland, but instead of either service provider informing AVB that the shared wiring had become too short to use, the providers simply ran their own above ground wiring. The new wiring created trip hazards throughout the community and left unsightly exposed wiring running up the exterior of buildings at the community. Ultimately, the situation required considerable AVB time and resources to resolve, during which time it impacted the quality of communication services delivered to residents and it reflected poorly on both community management and the service providers.

15. Another example of wire sharing problems can be found in the use of diplexers. In this situation, Cable Provider X delivers its cable modem broadband service to a resident's apartment home using a coaxial home run wire, and Satellite Provider Y installs a diplexer to transmit its video signal over the same coaxial home run wire. For whatever reason, it seems that Cable Provider X and Satellite Provider Y are never able to deliver their communication services properly to the resident's apartment home. After many truck rolls and much finger pointing to fix the performance problems, the resident eventually gives up and attempts to sign a double-play video and Internet agreement with a single service provider. At that point, the abandoned provider demands an "early termination fee" from the resident, which causes stress for the resident and public relations problems for the property owner.

16. After suffering through years of these types of problems due to the shared use of wiring, industry members began to realize that allocating dedicated wiring to individual service providers eliminates most of the problems. Allocating dedicated wiring to individual providers also means service providers will assume responsibility for the maintenance and repair of that dedicated wiring, and some service providers will also agree to upgrade that dedicated wiring as needed over time, thereby "future proofing" the wiring. Almost immediately after allocating separate wire for use by each service provider, service providers proved able to promptly resolve wiring problems on installation day because the service provider is responsible for the wiring and will not be compensated for a second truck roll. Residents no longer suffered service delays and wiring repair fees. And property owners no longer incurred the blame for "damaged wiring" or the expense of repairing damaged wiring caused by service providers.

17. Again, a real world example proves demonstrative. At an AVB community in Virginia, two service providers shared wiring and the community consistently experienced a high frequency of wiring issues. Different apartment homes experienced problems as a result of one provider allegedly disconnecting the other provider's wiring. Service technicians told new residents that wiring must be replaced due to problems with the owner's wiring. After months of meetings and attempts at improved coordination between the service providers, the situation miraculously seemed to resolve itself without further AVB involvement. AVB learned that the situation resolved itself only because one service provider installed a fiber-to-the-home upgrade and, therefore, the two service providers no longer shared wiring. Since installation of the fiber, the two providers no longer share wiring and there have been no further wiring issues.

18. Over time, service providers began to request the exclusive right to use certain wiring to avoid these undesirable results. Property owners then began incurring increased costs to either (i) install multiple different sets of wiring for multiple service providers, or (ii) accommodate multiple service providers' desire to install their own wiring for their own use.

Expenses Incurred by Property Owners.

19. Many years ago, the ILEC would install its entire "phone system" and the MSO would install its entire "cable system" at no cost to property owners. The phone system and cable system consumed little or no electricity. The cost to AVB was virtually nil. Today, AVB incurs a huge amount of the deployment expenses that used to be absorbed by service providers, including ever-growing monthly electricity expenses to power service providers' electronic equipment.

20. Today, at new construction communities, AVB pays for some or all of the following items: engineering and system design review; trenching for conduit; installation of conduit for the service provider's distribution plant; space in the main communications room ("MDF") for installation of service provider electronics; electricity in the MDF for service provider electronics; conduit from the MDF to each intermediate communications rooms ("IDF(s)"); space in each IDF for installation of service provider electronics; electricity in each IDF for service provider electronics; installation of wiring from IDFs to each unit; installation of a distribution panel in each apartment home to house the service provider's equipment;

electricity inside each distribution panel for service provider's equipment; and wiring from the distribution panel in each unit to the faceplates within each apartment home for service providers use. AVB also pays labor costs for installation of all of these items, labor costs for oversight of the installation of the service provider's facilities and electronics, and for the electricity consumed by service provider's electronics. This is done for every single service provider, whether ILEC, MSO, private cable operator ("PCO"), or ISP. It is not uncommon for AVB to be asked to install, from each IDF to the distribution panel in each unit, a bundle of wiring consisting of twisted-pair wiring, coaxial cable (sometimes multiple runs to accommodate both cable television and satellite), microduct (one for each fiber-based service provider), and an empty conduit (to accommodate wiring for future service providers).

21. Today, at existing construction communities, AVB routinely pays for the following items, particularly when any system upgrades are necessary: engineering and system design review; space in the MDF for installation of service provider electronics; electricity in the MDF for service provider electronics; space in each IDF for installation of service provider electronics; electricity in each IDF for service provider electronics; installation of electric receptacles inside distribution panels inside each apartment home; electricity inside each distribution panel to power the service provider's equipment; labor costs to provide security to accompany the service provider into occupied apartment homes for installation work; labor costs for oversight of installation of the service provider's facilities and electronics; and electricity consumed by service provider's electronics. Beyond these regularly recurring expenditures at existing construction communities, AVB often incurs extraordinary costs to ensure residents receive broadband service. For example, in 2017 at a community in Manhattan, AVB incurred $246,000 in expenses for the cleanup of a prior fiber-to-the-home overbuild due to poor installation aesthetics. The scope of work included moving all open-air fiber drops and placing them in new AVB-purchased raceways. Another example is a community in Massachusetts, where AVB is currently planning to spend up to $375 per apartment home for the placement of new electrical outlets to accommodate a service provider's proposed fiber-to-the-unit overbuild. If AVB does not make this expenditure, residents would go without fiber-based broadband service or the service provider would install unsightly molding following along an aesthetically undesirable and unusual pathway.

22. The latest trend among many service providers is "always active" WiFi service within apartment homes, which requires that the service provider install a live wireless access point ("WAP") in each apartment home to enable prospective subscribers to walk into an apartment home and immediately activate broadband service without the need for a truck roll by the service provider. In order for "always active" to work, the property owner must install a plus-sized distribution panel in each apartment home to continuously house the service provider's WAP, and also install extra electrical capacity because the WAP must remain powered on at all times. In addition to the extra infrastructure expense passed to the property owner, each active WAP in each unit consumes approximately $26 in electricity per year, at the property owner's expense.

23. Finally, various commenters have suggested a requirement for property owners to install certain infrastructure to facilitate broadband deployment. Any such requirement would further increase owner costs which could potentially lead to higher rents or decreased housing production.

Compensation to Property Owners.

24. In light of the significant costs incurred by property owners in furtherance of service providers' deployments, service providers typically pay property owners "door fees" and "revenue share." It is not clear to AVB why service providers' decided to characterize the compensation paid to property owners as "door fees" and "revenue share." What is clear to AVB is that the sums paid by service providers to AVB are a small percentage of the costs incurred by AVB to facilitate installation and operation of the services providers' systems.

25. Numerous commentators have documented the significant disparity between property owners' expenditures for the benefit of service providers versus service providers' payments to property owners. AVB's financial analysis likewise concludes that compensation from service providers comes nowhere close to making AVB whole for its expenditures incurred for the benefit of services providers. In fact, the compensation that AVB receives from service providers continues to trend downward while AVB's expenditures continue to trend upward due to service providers' greater technical demands and AVB's effort to accommodate a growing number of competitive service providers. The electricity expenses associated with "always active" WiFi alone could soon outstrip the total compensation paid by

service providers to AVB at many properties. If, as one party alleged, property owners are involved in a "payola" scheme with service providers, it is among the most ill-conceived payola schemes in modern history.

Marketing Agreements.

26. The Competitive Broadband Access NPRM raises questions about marketing agreements between property owners and service providers. AVB is unaware of any data showing that marketing agreements inhibit competition. AVB enters into marketing agreements with all types of service providers. In a typical marketing agreement, AVB agrees to provide residents with marketing collateral at the time of lease execution and/or move, make available service provider phone numbers and/or on-line ordering options to facilitate the ordering of communications services, and allow the service provider to hold annual marketing events at the community. In return for assisting with the marketing of the service provider's marketed services, service providers typically pay AVB the previously mentioned "revenue share," which is a small percentage of the revenue the service provider generates from the apartment community.

27. The amount of compensation AVB receives routinely falls on the lower end of the revenue share scale offered by the service provider because multiple service providers typically serve AVB communities, and each service provider typically receives non-exclusive marketing rights. Eighty-two percent of AVB's communities have non-exclusive marketing contracts in place. Eighteen percent have an exclusive marketing agreement. Of the 18% of communities with exclusive marketing contracts nearly 93% have at least two service provider options for residents, and the remaining 7% are served by only one service provider (normally due to the lack of a competing provider in the market).

28. All service providers incur costs to market their products or services irrespective of what marketing rights a property owner grants a service provider. Marketing agreements with property owners are one of many marketing channels utilized by service providers. If a service provider does not want to enter into a marketing agreement, the service provider may still serve the community under an access-only agreement while utilizing other marketing channels to advertise its services (e.g., telemarketing, targeted online advertising, direct mail, etc.). Additionally, AVB's on-site staff are not prohibited from

answering resident questions about the availability of communications services from service providers. Consequently, residents can easily learn about the service providers available in their community.

Types of Agreements in AVB's Portfolio.

29. The following table describes the types of marketing agreements and wiring usage rights currently in place at AVB communities. .

Table 1: Types of Agreements in All Apartment Communities Owned or Managed by AVB

	Number of Communities	Percentage of Portfolio	Number of Communities	Percentage of Portfolio
Communities with one broadband provider	14	5%		
Exclusive wiring rights			14	5%
Use of owner wiring			14	5%
Use of provider wiring			0	0%
Exclusive marketing rights			4	1%
Communities with two broadband providers	255	87%		
Exclusive wiring rights			173	59%
Use of owner wiring			164	56%
Use of provider wiring			154	52%
Exclusive marketing rights			48	16%
Communities with more than two broadband providers	25	8%		
Exclusive wiring rights			7	2%
Use of owner wiring			1	.3%
Use of provider wiring			7	2%
Exclusive marketing rights			1	.3%
TOTAL Number of Communities	294	100%		

30. The following table describes the types of marketing agreements and wiring usage arrangements at AVB communities constructed and opened since January 1, 2016.

Table 2: Types of Agreements in Newly Constructed Communities Completed and Opened from 2016 to Present

	Number of Communities	Percentage of Portfolio	Number of Communities	Percentage of Portfolio
Communities with one broadband provider	6*	2%		
Exclusive wiring rights			5	2%
Use of owner wiring			5	2%
Use of provider wiring			0	0%
Exclusive marketing rights			2	.7%
Communities with two broadband providers	22	7%		
Exclusive wiring rights			22	7%
Use of owner wiring			21	7%
Use of provider wiring			19	6%
Exclusive marketing rights			1	.3%
Communities with more than two broadband providers	4	1%		
Exclusive wiring rights			1	.3%
Use of owner wiring			1	.3%
Use of provider wiring			1	.3%
Exclusive marketing rights			0	0%
TOTAL number of properties	32	11%		

* *At time of construction, the ILEC denied service.*

Mandatory Access.

31. AVB owns or manages 138 apartment communities in the following states and cities that have mandatory access statutes: Connecticut, Massachusetts, New Jersey, New York, Rhode Island, District of Columbia, Virginia, and San Francisco. To my knowledge, AVB has never refused entry to a service provider that properly requested access in accordance with an applicable mandatory access statute.

Distributed Antenna Systems

32. In-building cellular coverage represents a growing problem for the multifamily industry. The materials used in energy efficient buildings tend to impede wireless carriers' signals. Cellular carriers are unwilling to pay the cost to install a cellular signal enhancement system at a multifamily community,

including mixed-use communities that include both residential and retail, so the capital and operating costs for the cellular signal enhancement system are borne by the property owner. The primary solution for cellular reception problems is the distributed antenna system ("DAS"), but a DAS is very expensive. The capital cost for a DAS starts in the $300,000 range and can exceed $1,000,000 in some cases. Further, the carriers' boiler plate retransmission agreements that property owners must sign with each individual carrier for most DAS arrangements contain onerous terms (e.g., the carrier may terminate signal use at their option) that could strand the property owner's sizable investment at almost any time. As a result, the negotiation of DAS agreements is challenging, requires expensive legal support, and the DAS agreement can take long periods of time to finalize. Meanwhile, there are other solutions available, such as cellular boost systems and WiFi calling systems, but they are all still very expensive and may not perform as well as a DAS.

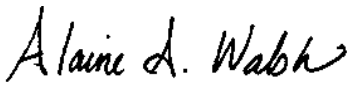
Use of Rooftops.

33. AVB currently has 24 rooftop lease agreements across 19 communities. To my knowledge, AVB has not entered into any rooftop agreements granting any entity the exclusive right to use the rooftop of any AVB community. AVB has granted wireless carriers the exclusive right to use a portion of a rooftop for their equipment, but it is not in AVB's interest to grant a single entity the exclusive right to an entire rooftop because it interferes with AVB's ability to control and operate its community. In some cases, AVB has also allowed direct broadcast satellite providers the non-exclusive right to install satellite reception equipment on the rooftop of a community.

34. AVB rents rooftop space to interested providers and charges rent for the use of the space. Again, these agreements are for a portion of the rooftop space and not for exclusive use of the rooftop. If the FCC were to prohibit such agreements, AVB would be more inclined to dedicate the rooftop space to other uses that can be of value to AVB and its residents (e.g., solar panel installation to reduce energy expense, installation of rooftop units to deliver cooling to the community). Rooftop installations by providers require AVB incur engineering review and legal review costs and can also result in additional costs and risks for AVB, such as leaks due to improper penetration of roof membranes, costly relocations in order to replace roofs or perform other building maintenance, and concerns over interference with previously installed systems, to name a few.

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 September 30, 2019, in Arlington, Virginia.



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