Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

In the Matter of

Improving Competitive Broadband Access to Multiple Tenant Environments

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

GN Docket No. 17-142

MB Docket No. 17-91

COMMENTS OF THE FIBER BROADBAND ASSOCIATION

Lisa R. Youngers
President and CEO
Fiber Broadband Association
Suite 800
2025 M Street NW
Washington, DC 20036
Telephone: (202) 367-1236

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The Fiber Broadband Association (“FBA”)\(^1\) hereby submits these comments in response
to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed
Rulemaking (“NPRM”) in the above-captioned proceeding seeking comment to refresh the
record developed in response to the multiple tenant environment (“MTE”) Notice of Inquiry
(“NOI”)\(^2\) and garner “further targeted comment on a variety of issues that may affect the
provisioning of broadband to MTEs,” so that it can “establish effective, clear policy that is
carefully tailored to promote broadband deployment to MTEs.”\(^3\)

\(^1\) FBA is a not for profit trade association with more than 250 members, including
telecommunications, computing, networking, system integration, engineering, and
content-provider companies, as well as traditional service providers, utilities, and
municipalities. Its mission is to accelerate deployment of all-fiber access networks by
demonstrating how fiber-enabled applications and solutions create value for service
providers and their customers, promote economic development, and enhance quality of
life. A complete list of FBA members can be found on the organization’s website:
https://www.fiberbroadband.org/.

\(^2\) Improving Competitive Broadband Access to Multiple Tenant Environments; Notice of

\(^3\) Improving Competitive Broadband Access to Multiple Tenant Environments; Petition for
Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily
Broadband Council, GN Docket No. 17-142, MB Docket No. 17-91, Notice of Proposed
In its 2017 NOI Comments, FBA conveyed to the Commission that “the millions of Americans that live and work in MTEs”4 were eager to access fiber and other advanced, high-performance communications networks.5 That is truer today than it was then. A 2018 FBA survey, conducted by market research firm RVA, LLC,6 and following up on the 2016 survey previously cited by FBA,7 shows that MTE residents continue to rank fast and reliable broadband as the single most important amenity, increasing to 86% in 2018 from 81% in 2016.8 Additionally, in 2018, just as in 2016, survey respondents indicated that having a choice of multiple broadband providers in the MTE is also highly important.9 MTE residents continue to spend more time online per day (about 5.7 hours for renters and 5.2 hours for unit owners, up from 5.1 hours combined in 2016) than single family home residents (about 5.1 hours, up from 4.8 hours in 2016).10 The 2016 study further showed that MTE owners reap the benefits of fiber broadband in their MTEs, as it reduces tenant churn and increases sales value perception.11 This is buttressed by a 2015 FBA study showing that fiber deployed in residential and commercial properties can increase the value of the properties by 3.1 percent.12

4  Id. at ¶ 2.
5  FBA NOI Comments at 3.
6  Appendix A: Study Of MDU Owners And Renters, RVA, LLC (2018) (“2018 Study”)
8  2016 Study at 9; 2018 Study at 2-3.
9  2016 Study at 9; 2018 Study at 3.
10 2016 Study at 8; see 2018 Study at 6-7.
11 2016 Study at 15.
12 Study Shows Home Values Up 3.1% with Access to Fiber, Fiber to the Home Council (June 29, 2015), https://www.fiberbroadband.org/blog/study-shows-home-values-up-3.1-with-access-to-fiber.
FBA explained in its 2017 NOI Comments and Reply Comments that demand for fast broadband among MTE residents and the large concentration of customers in MTEs motivates FBA service provider members to deploy all-fiber networks to these MTEs, but that deployment barriers remained. This is still true today. FBA explained that, to facilitate the deployment of fiber and other advanced communications infrastructure to customers in MTEs, the Commission (1) should not interfere with State and local mandatory access laws that promote competition in broadband deployment in MTEs; (2) should continue to allow broadband providers to enter into marketing and bulk-billing arrangements with MTE owners; (3) should prohibit sale-and-leaseback arrangements within MTEs except where providers can show they are not anticompetitive; and (4) should permit cost-based and non-discriminatory revenue sharing agreements.\(^\text{13}\)

Given the continued existence of deployment barriers, FBA commends the Commission for reviving its efforts “to accelerate the deployment of next-generation networks and services within MTEs”\(^\text{14}\) and urges it to act expeditiously in doing so. To achieve that outcome, the Commission should: (1) require service providers to disclose revenue-sharing agreements and permit service providers to enter into such agreements only when they are cost-based and non-discriminatory; (2) prohibit sale-and-leaseback arrangements for inside wire between providers and MTE owners, unless the parties can show they are not anticompetitive; (3) encourage disclosure of exclusive marketing arrangements to address potential concerns about their effect on competition; and (4) not interfere with the jurisdiction of State and local governments to

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\(^{13}\) See FBA Reply Comments.

\(^{14}\) NPRM at ¶ 2.
adopt mandatory access laws that promote deployment and enhance competition. These provisions mirror those that FBA provided in 2017. We discuss them in greater detail below.

I. **REVENUE SHARING AGREEMENTS SHOULD BE DISCLOSED AND ONLY PRESUMED TO BE IN THE PUBLIC INTEREST IF THEY ARE COST-BASED AND NON-DISCRIMINATORY**

In the experience of FBA members, they are seeing fewer revenue sharing agreements between service providers and MTE owners related to access to and the deployment of inside wire in MTEs, which may indicate that such agreements are not needed to promote broadband deployment. As discussed above, fiber and other advanced communications networks deployed in MTEs increase MTE property values and the positive perception of those MTEs, thereby allowing MTE owners to attract tenants at a higher value. However, revenue sharing agreements still are present at times and in certain instances may be anticompetitive.

Accordingly, to the extent revenue sharing agreements are used, the Commission should require that providers disclose the existence and terms of revenue sharing agreements to the Commission upon request. In addition, revenue sharing agreements should only be presumed to be consistent with the public interest if they are cost-based and non-discriminatory. Cost-based agreements reflect the reasonable and direct costs incurred by an MTE owner in connection with a provider’s access to and use of the MTE, including by the installation of inside wire. In its NOI Reply Comments, FBA recognized that MTE owners may incur costs related to the installation and maintenance of facilities for communications services by service providers.\footnote{FBA NOI Reply Comments at 6.}

Revenue sharing agreements can allow MTE owners to recover these costs in the instances where that is needed to incentivize owners to allow providers to extend their networks into their property. For these agreements to be non-discriminatory, MTE owners cannot extract greater
fees from one provider over another provider if the actual costs associated with the provider’s access and use of the MTE are not greater. This ensures providers can compete on equal footing and prevents MTE owners from extracting excessive rents. These provisions would not prohibit in-kind arrangements, such as when a provider contributes to building infrastructure or provides WiFi service in common areas, so long as the entirety of the arrangement does not exceed actual costs.16

Above-cost revenue sharing agreements harm deployment and consumers because they create a perverse financial incentive for MTE owners to either exclude access to competing service providers when it would reduce the owner’s share or upcharge those service providers if they want to deploy within the MTE to maximize profits. As a result, above-cost revenue sharing will either depress deployment, and thus competition, or cause additional costs to be passed on to consumers, raising their expenses and destroying the competitive benefit that the revenue sharing arrangement was supposedly meant to achieve. Thus, revenue sharing agreements in the form of pro rata fees based solely on a service provider’s revenue generated from MTE resident subscription fees should be presumed impermissible.17

16 The Commission recently recognized that in-kind contributions can be attributable in such a manner. See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, Third Report and Order, FCC 19-80, ¶ 21, n. 100 (rel. Aug. 2, 2019) (noting that assessments do not lose their purpose when in-kind contributions are counted).

17 NPRM at ¶ 16.
II. SALE-AND-LEASEBACK ARRANGEMENTS OF INSIDE WIRE SHOULD BE PRESUMPTIVELY PROHIBITED, UNLESS SHOWN NOT TO BE ANTICOMPETITIVE

As FBA stated in its NOI Comments, providers should maintain their ability to control use of inside wiring they install and continue to own because such control ensures providers can receive a sufficient return on their investment in deploying facilities within MTEs.18

According to FBA members, sale-and-leaseback arrangements of inside wire between providers and MTE owners are rarely used in the market, but to the extent they are, they can be anticompetitive and allow for circumvention of the Commission’s rules proscribing exclusive access agreements. Section 76.802(a)(2) of the Commission’s rules states in part that:

Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: it gives the subscriber the opportunity to purchase the wiring at the replacement cost; the subscriber declines, and neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided reasonable advance notice to the incumbent provider that it would purchase the cable home wiring.19

Section 76.802(j) further states that:

Cable operators are prohibited from using any ownership interests they may have in property located on the subscriber’s side of the demarcation point . . . to prevent, impede, or in any way interfere with, a subscriber’s right to use his or her home wiring to receive an alternative service. In addition, incumbent cable operators must take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point.20

These rules are designed to facilitate consumer choice and competition among providers.21

18 FBA NOI Comments at 11-12.
19 47 CFR § 76.802(a)(2). “MDU” means multiple dwelling unit building, which is a term the Commission has sometimes used to refer to MTEs. NPRM at n.2.
20 47 CFR § 76.802(j).
21 Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of
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 rules giving the subscriber the opportunity to purchase the wiring upon termination are never triggered. Under these circumstances, the MTE owner can inhibit the subscriber from choosing an alternative provider, which is the circumstance the rules were meant to prevent. 22 Since the Commission does not have jurisdiction over MTE owners, it cannot prohibit them “from using any ownership interests they may have . . . to prevent, impede, or in any way interfere with, a subscriber’s right to use his or her home wiring to receive an alternative service,” 23 as it has done for incumbent providers. Yet, the lessee provider still gets the benefit of what effectively is an exclusive access agreement, which comes at the expense of competition. Since sale-and-leaseback arrangements have the indicia of being anticompetitive and can be used to evade the Commission’s rules against exclusive access agreements, they should be presumptively prohibited unless the provider and MTE owner can demonstrate they are not anticompetitive.

III. EXCLUSIVE MARKETING ARRANGEMENTS ARE NOT INHERENTLY ANTICOMPETITIVE; THE COMMISSION SHOULD ENCOURAGE DISCLOSURES OF SUCH AGREEMENTS

FBA appreciates that the Commission has decided not to revisit its 2010 conclusion that “exclusive marketing [can] lead to lower costs to subscribers or partially defray deployment costs borne by buildings, without prohibiting or significantly hindering other providers from entering the building.” 24 As FBA made clear in its NOI Comments, these arrangements do

22 See id. at 3717-18, ¶¶ 121-122.
23 47 CFR § 76.802(j).
24 NPRM at ¶ 27.
indeed facilitate deployment of fiber to and inside MTEs, as well as the provision of advanced communications services to tenants,\textsuperscript{25} thus they should be permitted unless there is evidence an agreement is anticompetitive.

The FCC seeks comment “on whether there are specific circumstances in which exclusive marketing arrangements result in \textit{de facto} exclusive access,”\textsuperscript{26} which would be anticompetitive. The Commission premises its query on an assertion it attributes to FBA “that exclusive marketing arrangements ‘inhibit competition in practice because MTE owners misinterpret the otherwise acceptable terms of the agreement’.”\textsuperscript{27} FBA did not make such an assertion and instead made that statement in its NOI Reply Comment to characterize the arguments of other commenters as making that assertion.\textsuperscript{28} Nevertheless, while FBA generally supports exclusive marketing arrangements and does not believe they are inherently anticompetitive, they could be viewed as exclusive access arrangements if they prohibit other providers from, for instance, distributing information to tenants or going on the premises to market to prospective tenant customers.

The Commission can help address this concern by encouraging providers to disclose such agreements. Additionally, FBA stands by its proposal that the Commission clarify that exclusive marketing arrangements “may not prohibit MTE owners from providing information about other service providers upon request of a tenant or responding to inquiries by tenants or would-be

\textsuperscript{25} FBA NOI Comments at 9.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} See FBA NOI Reply Comment at 4 (“Indeed, the most prevalent “harm” that these commenters proffer in support of their positions, particularly with regard to exclusive marketing arrangements, is that they inhibit competition in practice because MTE owners misinterpret the otherwise acceptable terms of the agreement.”) (emphasis added).
tenants about the ability of other providers to provide service in the MTE.”

The Commission also should examine exclusive marketing arrangements where there is evidence that the arrangement is anticompetitive or otherwise violates the Communications Act.

IV. STATE AND LOCAL MANDATORY ACCESS LAWS PROMOTE DEPLOYMENT AND ENHANCE COMPETITION

The Commission is “seek[ing] comment on examples of state or local regulations or other policies that have successfully promoted broadband deployment, competition, and access to MTEs.” As FBA detailed in its NOI Comments, State and local mandatory access laws are derived from their authority over property rights and address local deployment issues where access to MTEs are limited by MTE owners thereby harming competition. The laws generally provide: (1) the right for service providers to install facilities in MTEs either unconditionally or upon request for services from a provider of a tenant’s choosing; (2) “reasonable” or “just” compensation to the property owner for the access and reasonable restrictions on how a provider can access the property; and (3) indemnity to the landlord for damages caused by

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29 Id. at 5.

30 These instances should be rare because, as FBA noted in its NOI Reply Comments, at n.14, these arrangements are subject to scrutiny under State laws that protect the rights of residents of homeowners’ and condominium associations and of other MTEs to obtain services of their choice from providers of their choice.


33 See N.Y. Pub. Serv. Law § 228 (1)(a)(1) (Consol., 2017) (requiring “the installation of cable television facilities [to] conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants”); see also Wis. Stat. § 66.0421(3) (2017) (requiring a “video service provider [to] install facilities to provide video service in a safe and orderly manner and in a manner designed to minimize adverse effects to the aesthetics of the multiunit dwelling or condominium”).
installation and provision of service.\textsuperscript{34} These laws promote competition of cable and telecommunications services in MTEs. Eighteen States, the District of Columbia, and numerous municipalities have passed mandatory access laws,\textsuperscript{35} and the Commission has twice declined to pre-empt these laws, giving deference to states.\textsuperscript{36} The Commission should not frustrate its longstanding policy of acknowledging the jurisdiction of State and local governments to adopt mandatory access laws where State and local lawmakers perceive they are needed.

**CONCLUSION**

For the reasons set forth above, the Commission should: (1) require service providers to disclose revenue-sharing agreements and presume service providers can enter into such agreements when they are cost-based and non-discriminatory; (2) prohibit sale-and-leaseback arrangements for inside wire between providers and MTE owners, unless the parties can show they are not anticompetitive; (3) encourage disclosure of exclusive marketing arrangements to help address potential concerns about their effect on competition and view such arrangements as potentially anticompetitive if they prohibit other providers from, for instance, distributing


\textsuperscript{36} FBA NOI Comments at 7-8.
information to tenants or going on the premises to market to prospective tenant customers; and
(4) not interfere with the jurisdiction of State and local governments to adopt mandatory access
laws that promote deployment and enhance competition.

Respectfully Submitted,

Lisa R. Youngers
President and CEO
Fiber Broadband Association
Suite 800
2025 M Street NW
Washington, DC 20036
Telephone: (202) 367-1236

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Appendix A
Study Of MDU Owners And Renters
Survey Data From 2018
Great Broadband Is the Most Important Amenity For MDU Owners

Amenity Somewhat Or Very Important

- Very high speed/reliable broadband: 86%
- Washer/Dryer in unit: 85%
- Balcony or patio: 73%
- Covered parking: 69%
- Cable television: 67%
- Reasonable commuting time: 66%
- Security monitoring for complex: 57%
- Choice of multiple broadband providers: 54%
- Alarm system in unit: 48%
- Outdoor recreation on grounds: 41%
- Workout facilities: 36%
- Pool: 36%
- Fireplace: 20%
- Maker space/Office space in building: 16%
Importance Of Amenities For MDU Renters

*Amenity Somewhat Or Very Important*

- Very high speed/ reliable broadband: 86%
- Washer/ Dryer in unit: 80%
- Reasonable commuting time: 72%
- Balcony or patio: 64%
- Choice of multiple broadband providers: 58%
- Security monitoring for complex: 55%
- Covered parking: 54%
- Cable television: 51%
- Alarm system in unit: 44%
- Outdoor recreation on grounds: 39%
- Workout facilities: 38%
- Pool: 35%
- Maker space/ Office space in building: 19%
- Fireplace: 17%
Great Broadband Is the Most Important Amenity For Single Family Owners

*Amenity Somewhat Or Very Important*

- Laundry room: 91%
- Very high speed/ reliable broadband: 89%
- Great room: 84%
- Energy star windows: 81%
- 2-3 car garage: 75%
- Bathroom linen closet: 74%
- Front porch: 69%
- Central island in kitchen: 6%
- Programmable thermostat: 64%
- Granite countertop in kitchen: 62%
- Nine foot ceiling on first floor: 49%
- Media room: 35%
Dissatisfaction With Broadband Versus Dissatisfaction With Home

**Apartments**

- Fiber
- Cable
- DSL

**Condominiums**

- Fiber
- Cable
- DSL

Unsatisfied with broadband vs. Unsatisfied with home
Why Broadband Is Important To MDU Owners

Sometimes work from home:
- 19% sometimes work from home
- 58% do not work from home

Home based business:
- 8% operate a home-based business
- 47% do not operate a home-based business

Percent of TV from streaming:
- 15% stream their TV
- 34% do not stream their TV

Second screen used watching TV:
- 21% use a second screen
- 32% do not use a second screen

4K TVs in home:
- 25% have 4K TVs
- 32% do not have 4K TVs

Online activity by age:
- Age 18-34: 6 hrs daily online at home
- Age 35-54: 5.1 hrs daily online at home
- Age 55+: 4.5 hrs daily online at home
Why Broadband Is Important To MDU Renters

- **Sometimes work from home**
  - Age 18-34: 40%
  - Age 35-54: 46%
  - Age 55+: 37%

- **Home based business**
  - Age 18-34: 16%
  - Age 35-54: 11%
  - Age 55+: 10%

- **Percent of TV from streaming**
  - Age 18-34: 24%
  - Age 35-54: 32%
  - Age 55+: 29%

- **Second screen used watching TV**
  - Age 18-34: 22%
  - Age 35-54: 32%
  - Age 55+: 29%

- **4K TVs in home**
  - Age 18-34: 0%
  - Age 35-54: 20%
  - Age 55+: 20%

- **Daily online at home by age**
  - Age 18-34: 6.5 hrs
  - Age 35-54: 5.7 hrs
  - Age 55+: 5.0 hrs
Why Broadband Is Important To Single Family Owners

- Sometimes work from home: 58% (55%)
- Home based business: 38% (25%)
- Percent of TV from streaming: 48%
- Second screen used watching TV: 37%
- 4K TVs in home: 45%

Age breakdown:
- Age 18-34: 6.1 hrs daily online at home
- Age 35-54: 5.0 hrs daily online at home
- Age 55+: 4.3 hrs daily online at home
Reported Fiber Broadband Availability By Apartment Characteristics

- Overall: 30%
- Garden Style: 28%
- Mid Rise: 29%
- High Rise: 32%
- Low cost/subsidized: 29%
- Medium price range: 32%
- Luxury: 25%
- Senior: 31%
- 0-5 years old: 39%
- 6-20 years old: 31%
- 21+ years old: 30%
- 50 or less units: 27%
- 51-100 units: 33%
- 101-250 units: 27%
- 251-500 units: 42%
- Over 500 units: 47%
Study Of MDU Owners And Renters
Survey Data From 2018