

**Before the
Federal Communications Commission
Washington, DC 20554**

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

COMMENTS OF PUBLIC KNOWLEDGE

I. INTRODUCTION & SUMMARY

Public Knowledge files these Comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) *Notice of Inquiry* (“*NOI*”) in the above-captioned proceeding.¹ The Commission should move forward expeditiously to improve choice, competition, affordability, service quality, and deployment of broadband internet access services (“BIAS”) to multiple tenant environments (“MTEs”).

The Commission should prohibit exclusive marketing and bulk billing arrangements, revenue sharing agreements, exclusive wiring arrangements, and other contractual provisions and practices that limit the broadband choices available to MTE occupants. Additionally, the Commission should also pre-empt state and local statutes, ordinances, and regulations that inhibit or effectively inhibit BIAS deployment and competition in MTEs. However, the Commission should not pre-empt pro-consumer and pro-competitive state or local rules that promote competition and deployment and protect consumers.

¹ See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, *Notice of Inquiry*, FCC 17-78 (rel. June 23, 2017) (“*NOI*”).

The Commission has clear authority to promulgate rules to promote competition and deployment of BIAS services under Title II and Section 706 of the Communications Act, and authority over cable services under, Title VI of the Communications Act. Further, the Commission should establish a “rocket docket” to ensure rapid enforcement of rules prohibiting actions that hinder BIAS competition, deployment, and choice in MTEs.

II. THE COMMISSION SHOULD PROHIBIT CONTRACTS, AGREEMENTS, AND ARRANGEMENTS BETWEEN MTE OWNERS AND BIAS PROVIDERS THAT LIMIT COMPETITION AND DISCOURAGE DEPLOYMENT.

As the Commission has recognized, BIAS “has become a prerequisite to full and meaningful participation in society.”² Americans rely on BIAS for information critical to their day-to-day lives regarding employment, job training, health care, education, news, public safety and emergency alerts, and government services.³ The BIAS provider choices available to occupants of MTEs should not be limited by the financial incentives of MTE owners. The interests of MTE owners and occupants are not aligned, and the Commission should move quickly to remove barriers to deployment that deny MTE tenants competitive BIAS choices.

The *NOI* details the Commission’s prior actions to prevent MTE owners and BIAS providers from inhibiting competition and deployment by entering into or enforcing exclusive service contracts in multiple dwelling units (“MDUs”).⁴ Unfortunately, anti-competitive

² Lifeline and Link Up Reform and Modernization, *et. al.*, WC Docket Nos. 11-42, 09-197, 10-90, *Third Report and Order, Further Report and Order, and Order on Reconsideration*, 31 FCC Rcd 3962, 3963 ¶ 1 (2016).

³ *See id.* *See also NOI* at 1 ¶ 1; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, 32 FCC Rcd 3266, 3267 ¶ 1 (2017).

⁴ *See NOI* at 2-3 ¶¶ 4-5 (citing Promotion of Competitive Networks in Local Telecommunications Markets, *et. al.*, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, *First Report and Order and Further Notice of Proposed Rulemaking, Fifth Report and Order and Memorandum Opinion and Order, and Fourth Report and Order and Memorandum Opinion and Order*, 15 FCC Rcd 22983, 22985 ¶ 1 (2000); Exclusive Service Contracts for Provision of

arrangements between MTE owners and BIAS providers remain problematic.⁵ To address these issues, the FCC should move quickly to adopt a Notice of Proposed Rulemaking to eliminate additional barriers to deployment, competition, and consumer choice of BIAS providers in MTEs.

First, the Commission should prohibit revenue sharing agreements between BIAS providers and MTE owners. These agreements, regardless of the specifics of how they are structured, their terms, and the frequency of use, create incentives for landlords that are inconsistent with the Commission’s efforts to promote BIAS deployment and competition. As INCOMPAS explained, competitive providers that refuse to participate in revenue sharing “kickback” schemes with MTE owners are denied access to MDUs.⁶ As a consequence, MTE occupants in buildings with revenue sharing agreements have no choice of fixed BIAS provider, eliminating competition and its benefits (e.g., lower prices, better service quality, more responsive customer service, etc.) for those tenants.

Second, the Commission should prohibit all exclusive arrangements between BIAS providers and MTE owners. Exclusive arrangements for marketing and wiring have little, if any, benefit. Further, any benefits are likely far outweighed by the costs stemming from unrealized

Video Services in Multiple Dwelling Units and Other Real Estate Developments, MB Docket No. 07-51, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 20235, 20235 ¶ 1 (2007); Promotion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *Report and Order*, 23 FCC Rcd 5385, 5386 ¶ 5 (2008).

⁵ See e.g. Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, Wired, June 27, 2016, available at <https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers/>; Broadband Now, *The Broadband Report*, Apartment Landlords Are Holding Your Internet Hostage, July 14, 2016, <http://broadbandnow.com/report/apartment-landlords-holding-internet-hostage/> (last visited July 24, 2017).

⁶ Letter from INCOMPAS to The Honorable Ajit Pai, Chairman, Federal Communications Commission, WT Docket No. 16-138, WC Docket No. 16-132, IB Docket No. 16-131, PS Docket No. 16-128; WC Docket No. 05-25; WC Docket No. 16-143, RM-10593, at 3-4 (filed Feb. 13, 2017) (“*INCOMPAS Letter*”).

competition that would otherwise benefit MTE tenants, and reduced broadband investment and deployment by competitive BIAS providers in densely occupied MTEs.⁷ Similarly, while bulk billing arrangements may be efficient, the negative consequences for competition outweigh any benefits.

Exclusive wiring arrangements are a particularly pernicious attempt to subvert the FCC's efforts to promote BIAS competition. Exclusive wiring arrangements deter competitive providers from serving MTEs. The details of who owns the wiring inside a MTE should not have any effect on the ability of MTE occupants to access competitive BIAS. MTE owners and BIAS providers should be required to make inside wiring available to any provider a tenant chooses.

III. THE COMMISSION SHOULD PRE-EMPT STATE AND LOCAL RULES THAT INHIBIT BIAS COMPETITION AND DEPLOYMENT IN MTEs.

To the extent that any state or local laws inhibit MTE access by competitors, the Commission has the authority to preempt them.

Like other federal agencies, the FCC has the authority to preempt when, among other reasons, “there is outright or actual conflict between federal and state law” or “where compliance with both federal and state law is in effect physically impossible.”⁸ In this case, a federal law favoring MTE access would conflict with any state or local laws that limit it.

In addition, whenever the FCC “determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement” that “prohibit[s] or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service,” it is *statutorily required* to preempt such local rules.⁹ This provision gives the FCC authority to permit physical access to MTEs by telecommunications

⁷ See *id.* at 3-5.

⁸ *Louisiana Pub. Serv. Comm'n v. FCC*, 476 US 355, 368-69 (1986).

⁹ 47 U.S.C. § 253.

providers such as telephone and broadband providers, and likely also would include efforts by the FCC that promote access by consumers to Title II services that may be offered online. However, the Commission's ability to use this provision would be limited if it proceeds with its current ill-advised plan to reclassify broadband internet access service as an information service (like a website) instead of as a telecommunications service.¹⁰ The fact that broadband providers would benefit from the FCC removing MTE barriers to entry is further evidence of their telecommunications nature.

The FCC's jurisdiction is generally limited to "interstate and foreign communication by wire or radio" and to such matters as "the facilities of cable operators which relate to [cable] service," and expressly does not extend to intrastate communications.¹¹ But, while MTEs themselves are not interstate, the MTE facilities involved carry interstate communications.¹²

In *Computer & Commc'ns Indus. Ass'n v. FCC*, the Commission preempted the regulation of equipment, even though the equipment was located wholly within a state, because the equipment was "used interchangeably for both interstate and intrastate communication," and state regulation "would interfere with achievement of a federal regulatory goal."¹³ Similarly, here, the Commission has jurisdiction over MTEs to the extent that MTE access involves interstate communication, and the authority to preempt to the extent that MTE access

¹⁰ See Restoring Internet Freedom, WC Docket No. 17-108, *Notice of Proposed Rulemaking*, 32 FCC Rcd 4434, 4441 ¶ 24 (2017) ("*Restoring Internet Freedom NPRM*").

¹¹ 47 U.S.C. § 152.

¹² See In the Matter of Internet Over Cable Declaratory Ruling, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185 ¶ 59 (2002).

¹³ *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982).

“promote[s] competition in the local telecommunications market,”¹⁴ and “increas[es] competition and diversity in the multichannel video programming market,”¹⁵ among other reasons.

IV. THE COMMISSION HAS THE REQUISITE AUTHORITY TO ADDRESS BARRIERS TO COMPETITION, CONSUMER CHOICE, AND DEPLOYMENT IN MTEs.

The DC Circuit has found that Section 628 of the Communications Act¹⁶ grants the Commission “broad and sweeping” authority to promote video competition.¹⁷ As it has in the past, the Commission should use that authority in this instance to promote access to competitive video options by tenants of MTEs. The Commission should recognize that these options include traditional facilities-based MVPDs, Title VI services offered via IP or “over-the-top,”¹⁸ as well as pure over-the-top video services such as DirecTV Now, YouTube and YouTube TV, and Vimeo.

The Commission should also use the clear authority granted to it by Section 706 of the Telecommunications Act of 1996. This provision directs the Commission to adopt “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”¹⁹ As the DC Circuit explained, “section 706 of the Telecommunications Act of 1996 vests it with affirmative authority to enact measures encouraging the deployment of broadband infrastructure.”²⁰ Among other reasons, MTE access promotes the deployment of broadband infrastructure by providing broadband and video

¹⁴ 47 U.S.C. § 1302.

¹⁵ 47 U.S.C. § 548.

¹⁶ 47 U.S.C. § 548

¹⁷ *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F.3d 659, 664 (DC Cir. 2009)

¹⁸ E.g., Comcast’s Stream TV, according to the characterization by Comcast. Jacob Fischler, *Comcast Slams Net Neutrality Complaint Over Stream TV*, Law 360, (March 15, 2016) <https://www.law360.com/articles/771803/comcast-slams-net-neutrality-complaint-over-stream-tv> (last visited July 24, 2017).

¹⁹ 47 U.S.C. § 1302.

²⁰ *Verizon v. FCC*, 740 F.3d 623, 628 (D.C. Cir. 2014).

competitors access to a customer base that might otherwise be cut off to them by restrictive landlord agreements. Thus Section 706 furnishes the Commission with clear authority to promote MTE access.

Title II of the Communications Act likewise provides the Commission with the authority it needs to promote MTE access by telecommunications providers, such as broadband internet access services. Under 47 U.S.C. § 201, restrictive contracts and other measures that restrict competitive access to MTEs are “unjust [and] unreasonable,” and therefore unlawful. Additionally, Section 253 provides the Commission with the authority to eliminate state and local regulations that act as barriers to entry in the telecommunications market. In addition to furnishing authority to preempt, when read in the context of other grants of authority such as Section 706, this provision is evidence of a general Congressional mandate to the FCC to promote telecommunications competition, which includes ensuring that all providers have an equal chance of providing service to MTE occupants.

Further, the Commission's ability to use Title II provisions and Section 706 would be severely limited if it moves forward with the plans outlined in its recent *Notice of Proposed Rulemaking* to overturn the FCC's classification of BIAS as a Title II telecommunications service.”²¹ Unless BIAS providers continue to be classified as telecommunications service providers, the Commission would lack the authority to find that practices by dominant broadband providers that lock out smaller competitors are unjust or unreasonable. Similarly, the Commission could not rely on Section 706 of the Telecommunications Act of 1996 if it determines, contra the DC Circuit, that this provision is merely “hortatory.”²² If the Commission

²¹ See *Restoring Internet Freedom NPRM* at 4441 ¶ 24.

²² See *id.* at 4466 ¶ 101.

is serious about promoting broadband competition and investment, it will not discard the statutory tools it needs to get the job done.

V. THE COMMISSION SHOULD ESTABLISH A PROCEDURE FOR RAPID ENFORCEMENT OF RULES REGARDING COMPETITION AND DEPLOYMENT IN MTEs.

Pursuant to its authority under the Communications Act,²³ the Commission should establish a procedure for the rapid enforcement of rules prohibiting arrangements that inhibit competitive BIAS deployment to MTE tenants. A “rocket docket” would ensure the Commission could rapidly address violations of its rules, which would allow competitive providers to quickly access MTEs, providing substantial benefits to tenants, and discourage MTE owners from engaging in unlawful exclusive arrangements.

Under a “rocket docket,” the Commission would be required to provide notice to MTE owners inhibiting access by competitive BIAS providers and a “show cause” order asking why the Commission should not find the landlord in violation of the FCC’s rules. The FCC would then schedule a hearing to determine whether the landlord has denied BIAS providers entry in violation of the FCC’s rules, with the burden on the MTE owner to show that its refusal to provide entry is consistent with the rules. If the landlord failed to make a *prima facie* case, the Commission would issue an order requiring the landlord provide access, and the order would be enforceable in the local federal district court, pursuant to 47 U.S.C. § 401(b). Additionally, the injured party could request the Commission forward the order for enforcement to the relevant U.S. Attorney’s office under 47 U.S.C. § 401(c).

²³ See 47 U.S.C. §§ 154(i), 201, 208, 544(i), 548.

VI. CONCLUSION

Exclusive marketing and bulk billing arrangements, revenue sharing agreements, exclusive wiring arrangements, and other contractual provisions and practices that limit the broadband choices available to MTE occupants conflict with the Commission's goal of promoting broadband competition, deployment, affordability, and universal service. The Commission should move quickly to prohibit these arrangements.

Respectfully submitted,

/s/ Phillip Berenbroick

Phillip Berenbroick
Senior Policy Counsel

PUBLIC KNOWLEDGE
1818 N St., NW
Suite 410
Washington, D.C. 20036
(202) 861-0020

July 24, 2017