

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of )  
 )  
Wireline Competition Bureau Seeks ) GN Docket No. 18-231  
Comment on the State of Fixed Wireline )  
Competition )  
 )  
To: Wireline Competition Bureau

**COMMENTS OF COMMON CAUSE, PUBLIC KNOWLEDGE, CENTER FOR  
RURAL STRATEGIES, AND THE BENTON FOUNDATION**

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## I. INTRODUCTION & SUMMARY

Common Cause, Public Knowledge, Center for Rural Strategies, and The Benton Foundation submit these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Public Notice seeking comment on the state of fixed wireline competition in the above-captioned proceeding.<sup>1</sup> As the Commission produces the Communications marketplace report in compliance with RAY BAUM’s Act, it should measure fixed and mobile broadband as distinct product markets. As the Commission’s most recent report on broadband deployment acknowledged, mobile services and fixed services have different properties and are generally not effective substitutes for each other.<sup>2</sup> Conflating the two services would therefore distort competition analysis and potentially prevent the Commission or Congress from enacting policies to ensure there is robust broadband competition. The Commission should also separately examine markets of traditional concern and reconsider recent policy changes in order to effectively promote competition. The Communications marketplace report should also take affirmative steps to address the rural and urban digital divide when assessing competition. Finally, the existing evidence makes clear that the current broadband marketplace is not competitive. Certain marketplace practices serve as barriers to competition that the Commission must address.

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<sup>1</sup> *Wireline Competition Bureau Seeks Comment on the State of Fixed Broadband Competition*, GN Docket No. 18-231, Public Notice, DA 18-784 (July 27, 2018).

<sup>2</sup> *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, 33 FCC Rcd 1660 para. 18 (2018) (“2018 Broadband Deployment Report”).

## **II. THE COMMISSION SHOULD MEASURE FIXED AND MOBILE BROADBAND COMPETITION AS DISTINCT PRODUCT MARKETS**

### **A. Fixed and Mobile Broadband are Complementary Products and Conflating The Two Services Would Distort Competition.**

Fixed and mobile broadband connections should be seen as complementary products that the Commission measures separately for the purposes of assessing competition. As the Commission has previously found, “fixed and mobile broadband are often used in conjunction with one another and, as such, are not functional substitutes.”<sup>3</sup> Indeed, the technological characteristics combined with consumer expectations make fixed and mobile services distinct, complementary products. For example, mobile broadband services typically come with data caps where the mobile network operator places a limit on the amount of data a customer can use over their internet connection.<sup>4</sup> Once a customer reaches that limit, the mobile carrier engages in certain actions such as slowing down data speeds or charging overage speeds. This makes it difficult for consumers to continuously use data-intensive applications like video streaming or video conferencing on a mobile connection as compared to a fixed connection where large amounts of data usage are generally permitted. Other key character differences between fixed and mobile broadband include pricing models, variability of speed, and reliability.<sup>5</sup> These

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<sup>3</sup> *Inquiry Concerning the Deployment of Advanced telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2016 Broadband Progress Report, 31 FCC Rcd 669 para. 24 (2016) (“2016 Broadband Report”); *see also* 2018 Broadband Deployment Report at 1660 para. 18 (finding that mobile services are not full substitutes for fixed services).

<sup>4</sup> *See* Data Caps, Public Knowledge, <https://www.publicknowledge.org/issues/data-caps>.

<sup>5</sup> *See* Karl Bode, *Unlimited Wireless No Threat to Fixed ISPs (Yet), Analyst Says*, DSLReports (April 17, 2017), <http://www.dslreports.com/shownews/Unlimited-Wireless-No-Threat-to-Fixed-ISPs-Yet-Analyst-%20Says-139362> (stating that mobile broadband “typically offers lower speeds and weaker reliability than its wireline counterparts”).

characteristics indicate fixed and mobile broadband serve different needs, and surveys of consumer attitudes generally show the same result. Users typically see fixed and mobile as complementary ways to get online and have clear views about which service is suited to which particular task. For example, 63% of respondents to one survey reported themselves as “not likely at all” to cancel home broadband and go mobile-only.<sup>6</sup>

Lumping fixed and mobile broadband technologies together for the purposes of assessing competition, would distort the marketplace and is likely to paint too rosy a picture of the state of broadband availability and deployment. For example, if the Commission determines a consumer has access to two broadband providers (one mobile and one fixed) for the purposes of assessing competition, this would assume the consumer has multiple options for broadband access when in reality they only have access to one fixed provider and one mobile provider. This type of analysis could prevent the Commission or Congress from enacting the policies necessary to ensure that there is robust competition in the broadband marketplace for both fixed and wireless services. This is increasingly important as studies indicate a majority of Americans rely on both fixed and mobile broadband for service while those who are smartphone-only are disproportionately low-income Americans.<sup>7</sup>

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<sup>6</sup> See John Horrigan, *Smartphones and Broadband: Tech users see them as complements and very few would give up their home broadband subscription in favor of their smartphone* (November 2014), at 8,

[https://www.publicknowledge.org/assets/uploads/blog/Smartphones\\_and\\_Broadband.pdf](https://www.publicknowledge.org/assets/uploads/blog/Smartphones_and_Broadband.pdf).

<sup>7</sup> Pew Research Internet Broadband Fact Sheet, <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

## **B. The Communications Marketplace Report is Not a Green Light for the Commission to Conflate Fixed and Mobile Services.**

The Commission is conducting this assessment of the state of fixed wireline competition pursuant to Title IV of RAY BAUM’S Act of 2018, which requires the Commission to publish a “Communications marketplace report.”<sup>8</sup> The Report requires the Commission to look at the state of competition in multiple markets including voice, cable, satellite, broadband, and mobile services.<sup>9</sup> However, the Communications marketplace report is not a green light for the Commission to conflate fixed and mobile services simply because it is assessing competition throughout the entire communications ecosystem. As explained in the prior section, fixed and mobile broadband are complimentary services that should be treated as distinct product markets when assessing competition. Further, the Communications marketplace report does not direct the Commission to treat fixed and mobile broadband as interchangeable services for the purposes of assessing competition. Rather, it requires the Commission to consider all forms of competition including “intermodal competition, facilities-based competition, and competition from new and emergent communications services.”<sup>10</sup> In conducting this assessment, the Commission should recognize the real differences between various technologies including fixed and mobile broadband. This is particularly important when examining new and emerging communications technologies like 5G networks. As explained in the next section, the Commission should not consider emerging 5G technologies as a substitute for fixed broadband. The Commission should also collect as much granular and relevant data as possible to examine competition within sub-markets of fixed and mobile broadband. This will give the Commission, Congress, and relevant

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<sup>8</sup> See 47 U.S.C. § 163(a).

<sup>9</sup> See 47 U.S.C. § 163(b)(1).

<sup>10</sup> See 47 U.S.C. § 163(d)(1).

stakeholders a much more accurate picture of competition within the marketplace and a better understanding what consumers expect from each service.

### **C. The Next Generation of Wireless Service (5G) is Not a Substitute for Fixed Broadband.**

As the Commission examines new and emerging technologies when assessing competition, it should not consider the next generation of wireless service - 5G - as a substitute for fixed broadband. First, it is important to note that 5G networks are still years away from being deployed as fully-realized commercial services.<sup>11</sup> Indeed, the standard for 5G was only completed months ago, and there is still much work to be done in finalizing the specifications and building out the hardware and infrastructure.<sup>12</sup> Second, while 5G networks promise to offer faster speeds, less latency, and greater capacity, they will only be a minor improvement to 4G LTE in some cases.<sup>13</sup> In these instances, the Commission must look at 5G as another wireless service and treat it as a distinct product market from fixed broadband. Finally, 5G has transformed to mean different products over time and potentially different deployment plans. Carriers like AT&T plan on deploying 5G using millimeter wave spectrum.<sup>14</sup> Other carriers may

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<sup>11</sup> Dexter Johnson, *5G Poised For Commercial Rollout by 2020*, IEEE Spectrum (May 2, 2018), <https://spectrum.ieee.org/tech-talk/telecom/wireless/5g-is-meeting-its-targets-for-2020-commercial-rollout>.

<sup>12</sup> See Monica Allevan, *3GPP puts finishing touch on Standalone version of 5G standard*, FierceWireless (June 14, 2018), <https://www.fiercewireless.com/wireless/3gpp-puts-finishing-touch-standalone-version-5g-standard>.

<sup>13</sup> See Dave Burstein, *5G NR ONLY 25% to 50% Faster, Not Truly a New Generation*, Wireless One, <http://wirelessone.news/10-r/1036-5g-nr-only-25-to-50-faster-not-truly-a-new-generation> (April 2018).

<sup>14</sup> See Colin Gibbs, *AT&T quietly acquires FiberTower for 24, 39 GHz spectrum*, FierceWireless (Feb. 1, 2017), <https://www.fiercewireless.com/wireless/at-t-quietly-acquires-fibertower-for-24-39-ghz-spectrum>.

deploy 5G primarily using a combination of mid-band and low-band spectrum.<sup>15</sup> The various deployment plans mean 5G will have a broad range of functionalities across multiple spectrum bands, giving consumers varying degrees of service. These uncertainties add more credence that the Commission should not treat 5G as a substitute for fixed broadband.<sup>16</sup>

#### **D. The Commission Should Examine The Sub-Markets of Mobile and Fixed Broadband.**

The Commission should examine the sub-markets of mobile and fixed broadband, such as mobile virtual network operators (“MVNOs”), satellite, fiber-to-the-home (“FTTH”), as distinct submarkets and examine competition in each. This should include input markets such as data roaming, wholesale, and unbundled network elements (“UNEs”). These markets often serve different parts of the ecosystem and competition within each sub-market is an important element of determining the health of broadband market as a whole.

For example, whether or not satellite should be considered an acceptable substitute/true competitor to fixed broadband can be measured by whether those who have the option to subscribe to wireline services chose satellite in any significant way, or whether consumers only subscribe to satellite if they have no other option. In the case of the MVPD market, for example, we find that customers in urban and suburban areas with the option to subscribe to wireline cable also subscribe in large numbers to DBS providers, indicating that DBS is a competitor for

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<sup>15</sup> Sean Kinney, *FCC Moves to open mid-band spectrum for 5G*, RCR Wireless, <https://www.rcrwireless.com/20180713/policy/fcc-mid-band-spectrum-5g-tag17> (July 13, 2018).

<sup>16</sup> The one exception, obviously, is where “5G” spectrum is used to deploy fixed mobile services. *See, e.g.*, Dan Jones, “Verizon Fixed 5G, A Cable Competitor is Coming!” Light Reading (May 25, 2018), <https://www.lightreading.com/mobile/5g/verizons-fixed-5g-a-cable-alternative-is-coming!/d/d-id/743405>. In such cases, the Commission should follow its usual practice of considering fixed wireless broadband service as a competitor to wireline.



MVPD services. By contrast, at least to date, very few urban or suburban customers subscribe to satellite broadband where a reliable wireline or reliable high-speed wireless provider is available. The bulk of subscribers to satellite services remain in areas where no other option is available.

This argues for looking at competition within the satellite sub-market in addition to excluding it as a competitor in the wireline or mobile market. For those residents of rural areas for whom satellite remains the only option, the level of competition within that market is clearly relevant. The Commission has a responsibility to promote broadband competition so that every American can have a choice of provider, not divide the country into competitive markets and monopoly markets. Furthermore, examining the health of competition within each submarket will permit the Commission to determine whether Americans have a sufficiently robust assortment of providers and technologies from which to choose.

The input market is critical both to the number of competitors available to consumers, but in many cases even if there is a single provider in a market. Rural WISPs and rural cellular carriers, for example, need access to backhaul and spectrum to provide service to their communities at all. In urban areas, the availability of affordable inputs translates directly into more competitively priced and innovative options for consumers. Understanding the health of the broadband marketplace is impossible without understanding the market for the necessary inputs.

### **III. THE COMMISSION SHOULD SEPARATELY EXAMINE CERTAIN MARKETS OF TRADITIONAL CONCERN**

#### **A. The Commission Should Examine the Cost of Broadband to Small Businesses and the Competitive Options Available to Small Businesses and Enterprise Customers.**

Reliable, affordable access to high-speed broadband is essential for the success of small businesses. This is why most small businesses purchase a BDS connection. However, when analyzed in aggregate with mid to large sized businesses, the barriers facing small businesses' connectivity (including competition) gets lost in translation. By resource and capacity, small businesses simply cannot dish out the same amount that a large business can for a steady internet connection-- even when their business depends on it.

Small businesses make up a large part of the American economy, lead in innovation,<sup>17</sup> employ nearly half of the American workforce,<sup>18</sup> and 29 percent owned by minorities.<sup>19</sup> Because small businesses rely on affordable access to the internet and hold such an impactful position in the American economy, the Commission should separately track the competitive broadband options available to them. A successful, comprehensive plan to address competition (or lack thereof) in the broadband market requires the Commission to understand the nuances of the market, including options available to small businesses.

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<sup>17</sup> Jared Hecht, *Are Small Businesses Really the Backbone of the Economy?*, Inc.com, <https://www.inc.com/jared-hecht/are-small-businesses-really-the-backbone-of-the-economy.html> (last visited Aug. 17, 2018).

<sup>18</sup> *Id.*

<sup>19</sup> Michael McManus, *Minority Business Ownership: Data from the 2012 Survey of Business Owners*, Issue Brief, Small Business Association (rel. Sept. 14, 2016), <https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf>

**B. The Commission Must Track the Impact of the Tech Transition to Verify That the Predicted Benefits Occur, or Whether Corrective Action Is Needed.**

From November 2017 through July 2018, the Commission has rolled back and eliminated nearly all of the consumer protection safeguards established through an extensive rulemaking process and the *2016 Tech Transitions Order*.<sup>20</sup> The Tech Transition is an essential movement into the next generation of high-speed broadband and connectivity. However, millions of Americans still rely on the legacy copper network, and should be afforded the decencies of notice and adequate replacement service when their copper network is retired – something not currently available due to the Commission’s recent rollbacks. In its 2017 and 2018 Orders,<sup>21</sup> the Commission justified its drastic move to deregulate with the notion that removing regulatory barriers will lead to more broadband infrastructure deployment, particularly to rural areas that are in most need.

As Public Knowledge has argued time and again, the Commission’s gutting of Section 214 Discontinuance rules will result in a downgrade for American consumers who still rely on the copper network (particularly rural Americans) -- there is no guarantee or incentive that carriers will choose to spend their “saved” dollars to build out new infrastructure. Even prior to the rules, new infrastructure buildout was not a result of a lack of regulation. Rather it was virtually stalled as it is now due to low cost benefit favorability for the carrier’s bottom line. The

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<sup>20</sup> *Technology Transitions, et al.*, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283 (2016).

<sup>21</sup> See *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Report and Order, Declaratory Rulemaking, and Further Notice of Proposed Rulemaking, 32 FCC Rcd 11128 (2017); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Report and Order, FCC 18-74 (adopted June 7, 2018).

same can be said for the state of competition in markets primed for this transition: most rural American consumers and businesses only have one carrier option.<sup>22</sup>

Most importantly, the Commission should track the impact of the 2017 and 2018 Tech Transitions roll backs to verify if the expected benefits are manifesting or if corrective action is necessary. Competition in the marketplace and affordability are essential to ensuring that consumers receive an adequate replacement service when their legacy network is retired. If the Commission's recent policy changes do not spur competition, it would be imperative that the Commission reconsider its Section 214 discontinuance policy to fulfil its statutory mandate.

### **C. The Commission Should Track Developments in The BDS Market to Determine Whether the Predicted Benefits Occur.**

In 2017, after over a decade of examining competition in the Business Data Services (“BDS”) market, the Commission issued the *Business Data Services Order* (“2017 BDS Order”) deregulating and reversing its own precedent of promoting competition per its statutory mandate to do so.<sup>23</sup> Though it was unsupported by the record, the Commission reasoned that deregulation of the BDS market is preferable to competition, and that high profit margins by incumbent ISPs is an attractive market force for new entrants.<sup>24</sup> Despite this flawed notion and philosophy, the Commission still must fulfil its statutory obligation to ensure “just and reasonable rates.”<sup>25</sup> Thus, the Commission should track to what extent its deregulatory approach in the *2017 BDS Order* spurred the benefits which were expected.

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<sup>22</sup> See 2016 Broadband Report at Table 6.

<sup>23</sup> *Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3459 (2017) (“*2017 BDS Order*”).

<sup>24</sup> *Id.* at 3517.

<sup>25</sup> 47 U.S.C. §201(b).

Deregulating the BDS market has detrimental impact on more than just the businesses which rely on it. Affordable connectivity is foundational to so much of 2018 societal activity, and overcharges to access this connectivity is passed onto consumers. Additional costs to consumers take many forms: higher prices for retail goods, higher airline ticket prices, credit card transaction fees, high cell phone bills, and even higher costs for food. In 2016, the Consumer Federation of America has estimated that overcharges and abusive pricing in the BDS market totaled approximately \$20B per year over the past five years and have indirectly cost American consumers \$150B since 2010.<sup>26</sup> Specifically, half of the \$40B in annual BDS charges are *overcharges*-- charges that are passed onto consumers as a result of incumbent LEC market power.<sup>27</sup>

The Commission's move to deregulate and exacerbate this already lucrative profit margin for incumbents was and is bad for consumers. In the least possible effort to remedy the higher costs coming to consumers, the Commission should track the effects of its *2017 BDS Order* as a part of its reporting compliance under the RAY BAUM's Act. The status of competition within the BDS market has been a traditional concern of the Commission for years, and continues to prove itself an integral piece of the overall state of broadband competition. Any report that excludes data on the BDS market post the *2017 BDS Order* would be incomplete and inaccurate.

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<sup>26</sup> Mark Cooper, *Consumer Federation of America, The Special Problem of Special Access: Consumer Overcharges and Telephone Company Excessive Profits*, at 1 (2016).

<sup>27</sup> *Id.* at 1, 5.

**D. The Commission Must Separately Examine Availability and Affordability to Communities of Color, Consumers With Disabilities, and Other Traditionally Marginalized Communities.**

Where broadband is available, consumers cite affordability as the number one barrier to adoption.<sup>28</sup> Competitive broadband markets are the key to closing the digital divide; when incumbents are required to compete with one another for consumer subscription, prices decrease and quality of service increases.<sup>29</sup> This is particularly true for demographics of consumers who are historically underserved. Addressing affordability and competition is the biggest solvent to close the digital divide-- especially for Black and Latino consumers.

The Act does require the Commission to separately report on the status of broadband for rural and low-income veterans and on tribal lands.<sup>30</sup> While this a step in the right direction for the Commission's data reports, other traditionally marginalized groups should also be analyzed separately from the aggregate communications marketplace report. Each traditionally marginalized demographic is not only differentiated from the at-large report but should also be examined individually to address the unique challenges and barriers to affordability, availability, competition and ultimately adoption. In particular, the status of competition, affordability, availability, speeds and service coverage should be individually examined (in addition to what the Act already requires) for communities of color, consumers with disabilities, low income consumers and rural or geographically remote areas.

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<sup>28</sup> Home Broadband 2015, Report, Pew Research Center (rel. Dec. 18, 2015), [http://www.pewinternet.org/2015/12/21/home-broadband-2015/pi-2015-10-21\\_broadband2015-02/](http://www.pewinternet.org/2015/12/21/home-broadband-2015/pi-2015-10-21_broadband2015-02/).

<sup>29</sup> Dan Mahoney and Greg Rafert, *Broadband Competition Helps to Drive Lower Prices and Faster Download Speeds for U.S. Residential Consumers*, Analysis Group (Nov. 2016), [http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/broadband\\_competition\\_report\\_november\\_2016.pdf](http://www.analysisgroup.com/uploadedfiles/content/insights/publishing/broadband_competition_report_november_2016.pdf).

<sup>30</sup> 47 U.S.C. §163.

#### **IV. THE COMMISSION'S EFFORTS TO CLOSE THE RURAL DIGITAL DIVIDE SHOULD ALSO PROMOTE COMPETITION**

##### **A. Municipal Broadband, Smaller Internet Service Providers and Other Varied Technological Solutions Are All a Part Of a Combination Approach Solution and Help Spur Competition.**

The rural digital divide is among the most staggering in the United States; over 31 percent of Americans with a rural zip code lack access to high speed internet at home.<sup>31</sup> For those who are lucky to have access, they often only have one choice in service providers. It is imperative to closing the rural digital divide that the Commission address competition and affordability. Any other approach risks continuing to leave rural Americans behind with more expensive, lower quality service.

Solving the rural digital divide will require a combination of approaches and will not be the same blanket solution for each unique rural community. Bringing high-speed broadband to rural Appalachia will be inherently a different system of solutions than what will be required to do the same for rural Arizonian deserts. Among these strategies, one theme is constant: competition is a necessary goal of truly solving the rural digital divide. As with the urban digital divide, broadband must be affordable in order be consistently adopted by consumers. Competition is one of the strongest tool available to the market to control broadband prices and narrow the digital divide.

Municipal broadband, or broadband provided by citizens as a utility, is an innovative practice that spurs competition while narrowing the digital divide. Cities often delve into providing internet to their citizens as a result of traditional ISPs' reluctance to build out to their location or because the service offered by traditional ISPs in their area is not affordable.

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<sup>31</sup> 2018 Broadband Deployment Report at 1675 para. 50.

Municipal broadband offers a solution to both problems by providing high speed access where incentives are low for ISPs and drives prices down by creating competition in the local broadband market.

Similarly, small ISPs, like WISPs, work in tandem with large ISPs to close the digital divide. Technology neutral solutions are imperative to address the varying traits and types of digital divides. Some successful approaches are a result of a combination of approaches and range in technologies. Wireless, satellite, microwaves, and TV white space solutions have been successful in different areas of the country and should be supported as supplementary efforts to each other.

### **1. Local and state laws that prevent innovation**

The Commission should not support local or state regulations that make an effort to undermine innovative solutions to the digital divide. Any law, regulation or rule that attempts to limit competition, favor incumbent LECs, or disadvantage non-traditional approaches-- including municipal broadband and public-private partnerships-- is counterintuitive to closing the digital divide. Additionally, efforts to create exclusive agreements or unbundling requirements exacerbate affordability and availability problems, and thus should not be supported by the Commission.

State, local and tribal governments can best coordinate efforts to spur competition and close the digital divide by promoting policies that lower barriers to entry and costs for deployment of broadband. Specifically, policies like Dig Once encourage all stakeholders to work together to close the digital divide.



**B. The Commission Should Consider Spectrum Reforms to Enhance Deployment of Rural Fixed Wireless Comparable With Urban Wireline Services.**

The Commission's decade worth of spectrum reforms in the 3.5 GHz band have been promising for the future of rural broadband. The 3.5 GHz band is perfectly poised as a band for innovation and efficient spectrum use and sharing practices. However, the Commission's recent NPRM threatens the viability and potential of the 3.5 GHz band by proposing a spectrum auction to sell large priority access licenses (PALs).<sup>32</sup> This would prevent small carriers from participating in the spectrum auction, who overwhelmingly serve rural areas more than large carriers.

Instead, the Commission should consider spectrum reforms that enhance the deployment of fixed wireless to rural America. For instance, holding an auction to sell smaller licenses based on census tracts to allow a variety of carriers to participate.

**V. THE COMMISSION SHOULD ADDRESS MARKETPLACE PRACTICES THAT PREVENT COMPETITION IN THE FIXED BROADBAND MARKET**

**A. The Existing Evidence Shows that The Broadband Market is Not Competitive and Certain Well-Known Problems Already Exist.**

Even where more than one fixed broadband provider is available, traditional metrics of competition such as market share show that local markets are generally dominated by a single incumbent provider. This is due in part to longtime marketplace barriers that limit competition. For example, the Commission has long-recognized that the use of exclusive agreements between multiple tenant environment ("MTE") owners and communications providers serves as a barrier

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<sup>32</sup> *Promoting Investment in the 3550-3700 MHz Band et al.*, Notice of Proposed Rulemaking and Order Terminating Petitions, 32 FCC Rcd 8071 (2017).

to competition.<sup>33</sup> Unfortunately, anti-competitive arrangements between MTE owners and fixed broadband providers remain problematic.<sup>34</sup> Incumbent broadband providers can also limit competition by leasing capacity to their networks to competitive carriers at discriminatory rates. Further, incumbent providers in the BDS market have also taken advantage of the uncompetitive market by charges exorbitant rates. Finally, the Commission should seek to promote competition in the emerging 5G and internet of things (“IoT”) space before any marketplace barriers arise. The sections below outline the existing marketplace practices that limit competition and how the Commission should address them.

**B. Contracts, Agreements, and Arrangements Between Multiple Tenant Environment Owners and Fixed Broadband Providers That Limit Competition Should Be Prohibited.**

There are a number of steps the Commission can take to prohibit anti-competitive arrangements between MTE owners and fixed broadband providers. First, the Commission should prohibit revenue sharing agreements between broadband 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 competition. Second, the Commission should prohibit all exclusive arrangements between broadband providers and MTE owners. Exclusive arrangements for marketing and wiring have little, if any, benefit. Further, any benefits are likely far outweighed

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<sup>33</sup> See *Improving Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383 paras. 4-9 (2017).

<sup>34</sup> 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-cutwith-internet-providers/>; Broadband Now, *The Broadband Report, Apartment Landlords Are Holding Your Internet Hostage*, July 14, 2016, <http://broadbandnow.com/report/apartmentlandlords-holding-internet-hostage/>.

by the costs stemming from unrealized competition that would otherwise benefit MTE tenants, and reduced broadband investment and deployment by competitive broadband providers in densely occupied MTEs.<sup>35</sup> Exclusive wiring arrangements also deter competitive providers from serving MTEs. The details of who owns the wiring inside an MTE should not have any effect on the ability of MTE occupants to access competitive broadband providers.

### **C. The Commission Must Reinvigorate the Unbundling Rules.**

Incumbent local exchange carriers (“ILECs”) can limit competition in a market by providing competitive carriers access to their networks at cost-prohibitive rates. This makes it difficult for a competitive carrier to enter into local markets and allows the ILEC to maintain its monopoly. The Commission has a number of tools at its disposal to ensure ILECs provide elements of their networks to competitive carriers at nondiscriminatory rates. First, Section 251 of the Telecommunications Act of 1996 requires ILECs to provide UNEs to other telecommunications carriers.<sup>36</sup> Section 251 also established resale as a market-entry vehicle separate from UNE availability. Here, ILECs are required “to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.”<sup>37</sup> Section 271(c)(2)(B) next established a “competitive checklist” for access, interconnection and other threshold requirements that a Bell operating company (“BOC”) must demonstrate before it may offer in-region, interLATA services.<sup>38</sup> Finally section 272(e) requires BOCs authorized to offer interLATA services to fulfill unaffiliated providers’

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<sup>35</sup> See Letter from INCOMPAS to The Honorable Ajit Pai, Chairman, Federal Communications Commission, WT Docket No. 16-138, WC Docket Nos. 16-143, 16-132, 05-25 IB Docket No. 16-131, PS Docket NO. 16-128, RM-10593, at 3-4 (filed Feb. 13, 2017).

<sup>36</sup> 47 U.S.C. § 251(c)(3).

<sup>37</sup> 47 U.S.C. § 51(c)(4)(a).

<sup>38</sup> 47 U.S.C. § 271(c)(2)(B).

telephone exchange service<sup>39</sup> and exchange access<sup>40</sup> requests. These provisions and their associated obligations are some of the primary reasons why competition in the switched voice and business data services market exists in many locations across the United States.

These provisions and their associated obligations are some of the primary reasons why competition in the switched voice and business data services market exists in many locations across the United States. Indeed, in certain areas of the nation, particularly in rural markets, where the need for reliable communications is most acute, sections 251, 271 and 272, along with their associated obligations and implementing regulations, are absolutely necessary to ensure competition exists. The Commission must reject any petitions for forbearance<sup>41</sup> of these provisions and continue to enforce these important laws and regulations for the benefit of competition and consumers.

In addition, the Commission should consider ways to require unbundling of cable and other fiber networks. The 1996 Act focused on ILECs because ILECs were the dominant network. While today's environment is far from competitive, there is no reason for the Commission to limit unbundling obligations to ILECS. This is particularly true in light of the need for ubiquitous fiber to sustain 5G small cell deployment at density levels necessary to provide gigabit throughput. The Commission should consider what statutory tools it has available to ensure competitive access to fiber necessary to sustain both a competitive fixed broadband market and a competitive 5G mobile market.

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<sup>39</sup> 47 U.S.C. § 153(54).

<sup>40</sup> 47 U.S.C. § 153(20).

<sup>41</sup> See Opposition of Public Knowledge *et al*, WC Docket No. 18-141 (filed Aug. 6, 2018).

## VI. CONCLUSION

Common Cause, Public Knowledge, Center for Rural Strategies, and The Benton Foundation support the Commission's effort to further examine the state of competition in the wireline marketplace and encourage the Commission to continue examining wireline and wireless separately, individually analyze how competition affects traditionally marginalized demographics, and address affordability as an imperative effect of competition.

Respectfully submitted,

/s \_\_\_\_\_  
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