

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

REPORT AND ORDER AND DECLARATORY RULING

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By the Commission: Chairwoman Rosenworcel and Commissioners Carr and Starks issuing separate statements.

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## I. INTRODUCTION

1. Millions of people work and live in multiple tenant environments (MTEs),<sup>1</sup> with a third of Americans residing in apartments, condominiums, or other multiunit buildings.<sup>2</sup> And MTEs disproportionately serve residents in lower-income and marginalized communities.<sup>3</sup> Access to high-quality, affordable communications service—including broadband Internet access service—has become essential to all Americans, including those living and working in MTEs.<sup>4</sup> The COVID-19 pandemic has brought into sharp focus the critical importance of these communications services as never before. Increasingly we rely on telework, remote learning, telehealth and other online applications to meet our personal and professional needs—all of which require access to broadband Internet access service or other high-quality, affordable communications services.<sup>5</sup> Despite the importance of these services, the millions of people across the nation living and working in MTEs face obstacles to obtaining the benefits of competitive choice of fixed broadband, voice, and video services.

2. To ensure competitive choice of communications services for those living and working in MTEs, and to address practices that undermine longstanding rules promoting competition in MTEs, we take three specific actions. First, we adopt new rules prohibiting providers from entering into certain

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<sup>1</sup> By MTEs, we specifically mean “commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, or cooperatives that are occupied by multiple entities.” *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383, 5383-5384, para. 2 (2017) (*2017 MTE NOI*). The term MTE, as we use it here, encompasses everything within the scope of two other terms the Commission has used in the past—multiple dwelling unit and multiunit premises. When referring to residential MTEs, past Commission rules and actions have sometimes used the term multiple dwelling unit, or MDU. *See, e.g.*, 47 CFR § 76.800(a) (defining an MDU for purposes of the cable inside wiring rules as a “multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative)”); *Exclusive Service Contracts for Provision of 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, para. 1 (2007) (*2007 Exclusive Service Contracts Order*), *aff’d*, *National Cable & Telecommun. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009). In this Report and Order and Declaratory Ruling, we use the term “residential MTE” coterminously with “MDU.”

<sup>2</sup> *See* FCC, *An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments* at 1 (2019), <https://docs.fcc.gov/public/attachments/DOC-358298A1.pdf>.

<sup>3</sup> *See* Access Now Reply, GN Docket No. 17-142, at 7-8 (rec. Nov. 18, 2021) (Access Now 2021 Reply); *see also* Wireless Internet Service Providers Association Comments, GN Docket No. 17-142, at 12 (rec. Oct. 20, 2021) (WISPA 2021 Comments) (“Almost nine million low-income households—27 percent of all households—live in MTEs.”); Letter from Cheryl A. Leanza, Policy Advisor, United Church of Christ Media Justice Ministry, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 1 (filed Jan. 20, 2022) (referencing the “high representation of people of color and low-income people as renters, particularly in multi-tenant housing”); U.S. Census Bureau, *2019 American Housing Survey* (2020), <https://www.census.gov/programs-surveys/ahs.html> (reflecting that 34 percent of residential MTE residents have income below 150 percent of the poverty line, compared to 22 percent of U.S. households generally).

<sup>4</sup> *See* *Improving Competitive Broadband Access to Multiple Tenant Environments et al.*, GN Docket No. 17-142 et al., Notice of Proposed Rulemaking, 34 FCC Rcd 5702, 5703, para. 2 (2019) (*2019 MTE NPRM*) (“Consumers increasingly rely on broadband Internet access services for employment and educational opportunities, access to healthcare services, civic and social engagement, and entertainment.”); *see also* *2017 MTE NOI*, 32 FCC Rcd at 5383, para. 1 (“High-speed Internet access is an increasingly important gateway to jobs, health care, education, and information, allowing innovators and entrepreneurs to create businesses and revolutionize entire industries.”).

<sup>5</sup> *See* National Multifamily Housing Council et al. Comments, GN Docket No. 17-142, at 3 (rec. Oct. 20, 2021) (Real Estate Associations 2021 Comments); Wireless Infrastructure Association Comments, GN Docket No. 17-142, at 2 (rec. Oct. 20, 2021) (Wireless Infrastructure Association 2021 Comments); WISPA 2021 Comments at 7; *see also* Letter from Major L. Clark III, Deputy Chief Counsel, and Jamie Belcore Saloom, Assistant Chief Counsel, Office of Advocacy, U.S. Small Business Administration, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 1-2 (SBA Jan. 2022 *Ex Parte*).

types of revenue sharing agreements that are used to evade our existing rules. Second, we adopt new rules requiring providers to disclose the existence of exclusive marketing arrangements in simple, easy-to-understand language. Third, we clarify that existing Commission rules regarding cable inside wiring prohibit so-called “sale-and-leaseback” arrangements which effectively deny access to alternative providers. In taking these actions today, we promote tenant choice and competition in the provision of communications services to the benefit of those who live and work in MTEs.

## II. BACKGROUND

3. Over the last 30 years, recognizing the need to promote competition in emerging technologies, Congress and the Commission have demonstrated a strong commitment to promoting access to telecommunications, cable, and broadband services in MTEs. In 1992, Congress passed the Cable Television Consumer Protection and Competition Act (1992 Cable Act) to, among other things, promote competition in cable communications.<sup>6</sup> And in the Telecommunications Act of 1996 (the Act), Congress directed the Commission to promote competition between telecommunications carriers,<sup>7</sup> as well as prohibit certain unfair practices by covered multichannel video programming distributors (MVPDs).<sup>8</sup> Following this congressional direction, and acknowledging the millions of Americans that live and work in MTEs, the Commission adopted rules prohibiting telecommunications carriers and covered MVPDs from entering into certain exclusionary agreements in MTEs and governing the disposition of cable inside wiring in residential MTEs.

4. *Prohibitions on Exclusive Access Agreements.* The Commission has long prohibited agreements between providers of certain communications services and MTE owners that grant the provider exclusive access and rights to provide service to the MTE. In two orders adopted in 2000 and 2008, respectively, the Commission prohibited telecommunications carriers from entering into or enforcing exclusivity contracts with MTE owners in both commercial and residential MTEs.<sup>9</sup> And in 2007, the Commission prohibited certain MVPDs from entering into or enforcing exclusivity contracts

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<sup>6</sup> Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-260, First Order on Reconsideration and Further Notice of Proposed Rulemaking, 11 FCC Rcd 4561, 4570, para. 17 (1996) (*1996 Inside Wiring Order on Reconsideration*) (“[T]he purpose of Section 16(d) [of the 1992 Cable Act] is to promote consumer choice and competition by permitting subscribers to avoid the disruption of having their home wiring removed upon voluntary termination, and to subsequently utilize that wiring for an alternative video programming service.”).

<sup>7</sup> 47 U.S.C. §§ 251-255, 257-260.

<sup>8</sup> 47 U.S.C. § 548(b). An MVPD is defined as “a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.” 47 U.S.C. § 522(13); *see also* 47 CFR 76.800(c) (incorporating this definition by reference).

<sup>9</sup> *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 in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 22985, para. 1 (2000) (*2000 Competitive Networks Order*); *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order, 23 FCC Rcd 5385, 5386, para. 5 (2008) (*2008 Competitive Networks Order*); *see also* 47 CFR § 64.2500. The Commission’s rules prohibiting carriers from entering into exclusive access agreements to provide telecommunications services to customers in MTEs employ the term “multiunit premises” to refer to commercial or residential premises occupied by multiple entities. *See* 47 CFR § 64.2501 (defining a “multiunit premises” as “any contiguous area under common ownership or control that contains two or more distinct units”).

with residential MTE owners.<sup>10</sup> The Commission concluded that exclusive access contracts harm competition and “discourage the deployment of broadband facilities to American consumers” by impeding entry of competitive providers.<sup>11</sup> And it highlighted that “[b]y far the greatest harm that exclusivity clauses cause residents of [residential MTEs] is that they deny those residents another choice of MVPD service and thus deny them the benefits of increased competition.”<sup>12</sup> Noting the “inextricabl[e] link” between “broadband deployment and entry into the MVPD business,” the Commission determined that deployment of the former would be hampered by impediments to the latter.<sup>13</sup> While the Commission has prohibited exclusivity contracts that explicitly prohibit entrance by competitors, in 2010 it declined to prohibit MVPDs from entering into exclusive marketing arrangements because it could not “conclude, based on the record, that they hinder significantly or prevent other MVPDs from providing service to [residential MTE] residents.”<sup>14</sup>

5. *Cable Inside Wiring.* Separately, pursuant to specific congressional direction,<sup>15</sup> in 1993 the Commission promulgated inside wiring rules to facilitate competitive access to unused cable wiring, including in residential MTEs.<sup>16</sup> In a series of Orders in the decade to follow, the Commission refined and expanded on those rules.<sup>17</sup> These cable inside wiring rules govern the disposition of cable wiring owned by an MVPD after a subscriber (including one living in a residential MTE), or a residential MTE owner, terminates service.<sup>18</sup> They apply to both cable home wiring, which is the wiring inside an MTE

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<sup>10</sup> See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20236, para. 1 (2007) (*2007 Exclusive Service Contracts Order*), affirmed, *National Cable & Telecommun. Ass’n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (applying the prohibition to cable operators and other MVPDs that are subject to section 628 of the Act, 47 U.S.C. § 548). The Commission defined the scope of this rule to include “a multiple dwelling unit building (such as an apartment building, condominium building or cooperative) and any other centrally managed residential real estate development (such as a gated community, mobile home park, or garden apartment).” 47 CFR § 76.2000(b); see also *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20238, para. 7. The Fourth Circuit Court of Appeals has applied this prohibition on exclusive access to a homeowners’ association. *Lansdowne on the Potomac Homeowners Ass’n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013).

<sup>11</sup> See *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20243-44, para. 16 (concluding that exclusive access agreements have “the effect of significantly hindering or preventing new MVPDs” from entering MTEs and constitutes an “unfair method of competition or an unfair act or practice proscribed by Section 628(b)”).

<sup>12</sup> *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20244, para. 17.

<sup>13</sup> *Id.* at 20245-46, para. 20 (internal citations omitted).

<sup>14</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd 2460, 2462, para 3 (2010) (*2010 Exclusive Service Contracts Order*). The Commission defined an exclusive marketing arrangement as one between a residential MTE owner and an MVPD “that gives the MVPD, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to residents in the [residential MTE].” *Id.* at 2471, para. 30.

<sup>15</sup> 47 U.S.C. § 544(i) (“Within 120 days after October 5, 1992, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.”).

<sup>16</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435 (1993) (*1993 Inside Wiring Order*).

<sup>17</sup> *Telecommunications Services Inside Wiring et al.*, CS Docket No. 95-184, MM Docket No. 92-260, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342 (2003) (*2003 Inside Wiring Order*); *Telecommunications Services Inside Wiring et al.*, CS Docket No. 95-184, MM Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997) (*1997 Inside Wiring Order*); *1996 Inside Wiring Order on Reconsideration*, 11 FCC Rcd 4561.

<sup>18</sup> 47 CFR § 76.802(l) (“The provisions of § 76.802 shall apply to all MVPDs in the same manner that they apply to cable operators.”).

resident's unit,<sup>19</sup> and home run wiring, which is the dedicated wiring that runs from a common space (such as a telecommunications closet) to an MTE resident's unit.<sup>20</sup> Generally speaking, the rules require MVPDs, after termination of service, to either remove the wiring; abandon and not disable the wiring; or sell it to another party such as the subscriber, residential MTE owner, or an alternative provider.<sup>21</sup> The Commission's stated objective with these rules is to "foster opportunities for [MVPDs] to provide service in" residential MTEs by governing the disposition of wiring after the MTE owner or tenant terminates service.<sup>22</sup> The rules are designed to promote competitive choice by "enabl[ing] subscribers to subscribe to services offered by an alternative MVPD without incurring additional installation costs or experiencing disruption in programming."<sup>23</sup>

6. *Recent Developments.* In 2017, the Commission released a Notice of Inquiry with the goal of "promoting competition and easing deployment of broadband services within MTEs."<sup>24</sup> The *2017 MTE NOI* sought comment on the state of broadband competition within MTEs,<sup>25</sup> ways to facilitate greater consumer choice and enhance broadband deployment in MTEs,<sup>26</sup> and a variety of specific practices that may impede competition in MTEs. Among those specific practices, it sought comment on (1) revenue sharing agreements, whereby a provider compensates an MTE owner with a portion of the provider's revenue generated from the building's subscribers;<sup>27</sup> (2) exclusive wiring arrangements, in which an MTE owner agrees to make wiring within its control available to a provider on an exclusive basis,<sup>28</sup> and related sale-and-leaseback arrangements, in which a provider sells wiring it owns to an MTE owner and then leases that wiring back on an exclusive basis;<sup>29</sup> and (3) exclusive marketing arrangements, including whether to revisit the 2010 decision not to take action regarding MVPD exclusive marketing arrangements.<sup>30</sup>

7. In 2019, the Commission released a Notice of Proposed Rulemaking that again sought comment about these practices and others that could have the effect of dampening competition or deployment.<sup>31</sup> The Commission raised various proposals, including whether providers should be required to disclose the existence of contractual provisions like revenue sharing agreements or exclusive marketing

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<sup>19</sup> 47 CFR § 76.802; *see also* 47 CFR § 76.5(l) (defining cable home wiring as the "internal wiring contained within the premises of a subscriber which begins at the demarcation point").

<sup>20</sup> 47 CFR § 76.804; *see also* 47 CFR § 76.800(d) (defining home run wiring as the "wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop").

<sup>21</sup> 47 CFR § 76.800 *et seq.*

<sup>22</sup> *2003 Inside Wiring Order*, 18 FCC Rcd at 1343, para. 1.

<sup>23</sup> *Id.* at 1373, para. 80 (citing *1993 Inside Wiring Order*, 8 FCC Rcd at 1435, para. 2); *see also 1996 Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4565-66, para. 8 ("Our [inside wiring] rules promote the goals of [Communications Act Section 624(i)], which are to protect customers from unnecessary disruption and expense caused by the removal of home wiring and to allow subscribers to use the wiring for an alternative multichannel video programming delivery system.").

<sup>24</sup> *2017 MTE NOI*, 32 FCC Rcd at 5387, para. 10.

<sup>25</sup> *Id.* at 5387-88, para. 11.

<sup>26</sup> *Id.* at 5383-84, para. 2.

<sup>27</sup> *Id.* at 5389, para. 14.

<sup>28</sup> *Id.* at 5389, para. 15.

<sup>29</sup> *2017 MTE NOI*, 32 FCC Rcd at 5389, para. 15.

<sup>30</sup> *Id.* at 5388, para. 13.

<sup>31</sup> *2019 MTE NPRM*, 34 FCC Rcd at 5711-20, paras. 16-31.

arrangements.<sup>32</sup> It additionally sought comment on the Commission's authority to target different kinds of entities, including telecommunications providers, MVPDs, and broadband-only providers.<sup>33</sup>

8. On July 9, 2021, President Biden released an executive order encouraging the Commission to examine issues previously raised in this proceeding.<sup>34</sup> In September 2021, the Wireline Competition Bureau issued a Public Notice seeking to refresh the record on the issues raised in the *2019 MTE NPRM* and on developments that may have occurred in the intervening two years.<sup>35</sup> The *2021 MTE Public Notice* specifically sought comment on revenue sharing agreements; exclusive wiring arrangements, including sale-and-leaseback arrangements; and exclusive marketing arrangements.<sup>36</sup>

### III. REPORT AND ORDER

9. In light of the evidence in the record, we take steps to promote competitive choice in MTEs and target three specific practices that frustrate competition, impede deployment by competitive providers, and reduce choice for Americans living and working in MTEs. In the Report and Order, we adopt new rules prohibiting practices which undermine the Commission's longstanding prohibition on exclusive access contracts. We prohibit telecommunications carriers and MVPDs from entering into exclusive and graduated revenue sharing agreements. And we require that telecommunications carriers and MVPDs include disclaimers on marketing materials distributed to MTE tenants that inform tenants of the existence of an exclusive marketing arrangement. In the attached Declaratory Ruling, we clarify that our cable inside wiring rules prohibit sale-and-leaseback arrangements between MVPDs and residential MTE owners, because they effectively deny access to alternative providers. Through these actions, we halt practices that serve as an end run around our rules intended to foster competition, and we promote all the benefits that competition entails by addressing practices which limit consumer choice.<sup>37</sup>

#### A. Need for Action

10. We act today to promote consumer choice and address practices that undermine our pro-competitive rules against exclusive access contracts. Twenty years ago, the Commission first prohibited exclusive access contracts between telecommunications carriers and commercial MTE owners.<sup>38</sup> In the eight years to follow, it expanded that prohibition to cover different types of providers and MTE owners.<sup>39</sup> It took these steps to promote competition and broadband deployment, consistent with Congress's policies and goals.<sup>40</sup> The Commission last explored MTE exclusivity in 2010 when it

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<sup>32</sup> *Id.* at 5712-13, 5718-19, paras. 19-20, 28.

<sup>33</sup> *Id.* at 5720-21, paras. 32-35.

<sup>34</sup> Executive Order 14036 § 5(l), 86 Fed. Reg. 36987, Promoting Competition in the American Economy (July 9, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

<sup>35</sup> *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Public Notice, DA 21-1114 (*2021 MTE Public Notice*).

<sup>36</sup> *2021 MTE Public Notice*.

<sup>37</sup> While we take these specific steps in this Report and Order, we do not address other issues raised in this record, including but not limited to exclusive wiring arrangements, bulk billing, and rooftop antenna and DAS facilities access.

<sup>38</sup> See *2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1.

<sup>39</sup> See *2008 Competitive Networks Order*, 23 FCC Rcd at 5385, para. 1; *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20235-36, para. 1.

<sup>40</sup> *2008 Competitive Networks Order*, 23 FCC Rcd at 5386, para. 2 (“[T]he prohibition we adopt herein will not only materially advance the 1996 Act’s goals of enhancing competition, but also the goal of broadband deployment.”); *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1 (“This prohibition will materially advance the Act’s goals of enhancing competition and broadband deployment.”).

declined to prohibit two practices by MVPDs in residential MTEs—bulk billing and exclusive marketing arrangements—on the basis that the record before it did not demonstrate that these practices “hinder significantly or prevent other MVPDs from providing service to [residential MTE] residents.”<sup>41</sup> The Commission stated at the time that it “may review marketplace conditions again, however, if future events show that any of these practices is having new and significant anti-competitive effects.”<sup>42</sup>

11. The record before us demonstrates that new practices have emerged that negatively impact competition, contrary to the goals of our rules against exclusive access contracts. The practices we address in this Report and Order—exclusive and graduated revenue sharing and exclusive marketing arrangements—reduce the opportunities for competitive providers to offer service to MTE tenants. Many commenters, including small competitive providers, advocacy groups, and MTE residents, document challenges in providing and obtaining services due to the obstacles these practices, alone or in combination with others, pose for access.<sup>43</sup> Despite our prohibition on exclusive access agreements, the use of some of these practices has had the same practical effect of barring competitive entry to MTEs.<sup>44</sup> Further, as many commenters state, the COVID-19 pandemic has underscored the critical role that broadband plays in MTE tenants’ lives.<sup>45</sup> As other commenters highlight, the practices identified in the *2021 MTE Public Notice* may limit an MTE resident’s ability to enroll in the Emergency Broadband Benefit Program with the participating provider of their choice.<sup>46</sup> And the United States Small Business

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<sup>41</sup> *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2462, para. 3.

<sup>42</sup> *Id.* at 2463, para. 9.

<sup>43</sup> *See, e.g.*, Boston Housing Authority Comments, GN Docket No. 17-142, at 2 (rec. Oct. 19, 2021); City of Boston, Massachusetts Comments, GN Docket No. 17-142, at 2-3 (rec. Oct. 20, 2021) (City of Boston 2021 Comments); City of Longmont, Colorado Comments, GN Docket No. 17-142, at 4-5 (rec. Oct. 20, 2021) (City of Longmont 2021 Comments); Consolidated Communications and Zply Fiber Comments, GN Docket 17-142, at i-ii, 3, 6-7, 11 (rec. Oct. 20, 2021) (Consolidated Communications and Zply Fiber 2021 Comments); INCOMPAS Comments, GN Docket No. 17-142, at 4-5 (rec. Oct. 20, 2021) (INCOMPAS 2021 Comments); Lumen Comments, GN Docket No. 17-142, at 2, 4 (rec. Oct. 20, 2021) (Lumen 2021 Comments); National League of Cities Comments, GN Docket No. 17-142, at 1-2 (rec. Oct. 20, 2021) (National League of Cities 2021 Comments); Next Century Cities Comments, GN Docket No. 17-142, at 4-6 (rec. Oct. 20, 2021) (Next Century Cities 2021 Comments); Public Knowledge, Consumer Reports Comments, GN Docket No. 17-142, at 4-6 (rec. Oct. 20, 2021) (Public Knowledge and Consumer Reports 2021 Comments); Richard Hohm Comments, GN Docket No. 17-142 (rec. Sept. 14, 2021); Starry Comments, GN Docket No. 17-142, at 2-4 (rec. Oct. 20, 2021) (Starry 2021 Comments); Stewards of Affordable Housing for the Future Comments, GN Docket No. 17-142, at 1-2 (rec. Oct. 20, 2021) (SAHF 2021 Comments); WISPA 2021 Comments at 14; Miles Nordin Comments, GN Docket No. 17-142 (rec. Dec. 26, 2019).

<sup>44</sup> *See* Starry Comments, GN Docket No. 17-142, at 6 (rec. Aug. 30, 2019) (Starry 2019 Comments) (“Once the Commission prohibited exclusive access agreements, incumbents came to rely on combinations of revenue share, exclusive marketing, exclusive wiring, and flat out scare tactics to try to prevent successful competition in MTEs.”); *see also* Public Knowledge and Consumer Reports 2021 Comments at 5 (“Despite the Commission’s 2008 ban of exclusive agreements in MTEs . . . loopholes create localized monopolies that fail to meet consumer needs in many apartment, condo, and commercial buildings.”).

<sup>45</sup> *See, e.g.*, AARP Comments, GN Docket No. 17-142, at 1 (rec. Oct. 20, 2021) (AARP 2021 Comments); INCOMPAS 2021 Comments at 9; National League of Cities 2021 Comments at 1-2; Starry 2021 Comments at 2-3; T-Mobile Comments, GN Docket No. 17-142, at 4 (rec. Oct. 20, 2021); U.S. Chamber of Commerce Comments, GN Docket No. 17-142, at 1 (rec. Oct. 21, 2021); Wireless Infrastructure Association 2021 Comments at 2; WISPA 2021 Comments at iii-iv, 12-13; AT&T Reply, GN Docket No. 17-142, at 1 (rec. Nov. 19, 2021) (AT&T 2021 Reply).

<sup>46</sup> *See* Access Now 2021 Reply at 8-9; Bay Area Legal Services Comments, GN Docket No. 17-142, at 1 (rec. Oct. 7, 2021) (Bay Area Legal Services 2021 Comments); City of Longmont 2021 Comments at 5-6; Next Century Cities 2021 Comments at 9; EducationSuperHighway Reply, GN Docket No. 17-142, at 3 (rec. Nov. 15, 2021).

Administration Office of Advocacy identified the importance of competition in MTEs to small businesses in America.<sup>47</sup>

12. We disagree with those commenters who claim that the market for broadband service in MTEs make actions like those we take today are unnecessary.<sup>48</sup> The Real Estate Associations highlight internal survey data that they say demonstrates that competition is strong; claim these numbers compare favorably to the Commission’s own data regarding Americans’ access to broadband generally, including in single-family homes; and argue that action to promote competition in MTEs is consequently unnecessary.<sup>49</sup> We disagree that these statistics, which other commenters rely on,<sup>50</sup> are reason to delay action. First, the experiences of numerous commenters strongly indicate otherwise. Second, the survey information provided by the Real Estate Associations is largely conclusory and provided without the underlying data that would enable the Commission to assess its reliability or general applicability—for example, whether all or just some units in a building have access to the alternative providers present.<sup>51</sup> Third, even taken at face value, the figures provided by the Real Estate Associations comparing broadband deployment in MTEs to that in other forms of housing do not compare favorably given that one would expect broadband deployment to be significantly higher in MTEs due to their density.<sup>52</sup> Finally, we reject the Real Estate Associations’ assertion that unless competition in MTEs is *worse* than it is elsewhere in the U.S., the Commission cannot act.<sup>53</sup> We take these steps today to target anti-competitive practices in MTEs pursuant to the Commission’s longstanding goal of promoting competition in these buildings.

## B. Scope of Rules

13. The rules we adopt in this Report and Order address practices that have emerged that undermine the goals of our rules prohibiting exclusive access contracts. We thus apply these obligations only to those entities and in those contexts where our exclusive access contract prohibitions already apply. To that end, our rules addressing certain types of revenue sharing agreements and exclusive marketing

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<sup>47</sup> SBA Jan. 2022 *Ex Parte* at 2 (“Many, if not most, small businesses operate in MTEs and would benefit from more affordable and reliable broadband choices.”).

<sup>48</sup> See NCTA – The Internet & Television Association Comments, GN Docket No. 17-142, at 10 (rec. Oct. 20, 2021) (NCTA 2021 Comments); Real Estate Associations 2021 Comments at 10-14; Wireless Infrastructure Association 2021 Comments at 7.

<sup>49</sup> Real Estate Associations 2021 Comments at 10-14.

<sup>50</sup> See NCTA – The Internet & Television Association Reply, GN Docket No. 17-142, at 2-3 (rec. Nov. 19, 2021).

<sup>51</sup> See ADTRAN Reply, GN Docket No. 17-142, at 5-6 (rec. Nov. 19, 2021) (ADTRAN 2021 Reply).

<sup>52</sup> See Steven Kauffman and Octavian Carare, Federal Communications Commission Office of Economics & Analytics, OEA Staff Working Paper 49: An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments at 2 (2019), <https://docs.fcc.gov/public/attachments/DOC-358298A1.pdf> (“The higher household density of MTEs may be associated with lower costs of provisioning broadband service, which may contribute to an increased supply of broadband in MTEs relative to non-MTEs.”); see also ADTRAN 2021 Reply. at 4-5 (“[B]roadband deployment would be expected to be significantly higher in MTEs due to the much greater density than for single family housing . . . if the availability of multiple broadband service providers in MTEs is only slightly higher than the nation at large, that would not prove that these exclusive agreements do not inhibit entry.”); Fiber Broadband Association Comments, GN Docket No. 17-142, at 4 (rec. July 24, 2017) (observing that “because MTEs represent dense concentrations of potential customers, fiber build decisions frequently target passing MTEs”). The record reflects that exclusivity practices in an MTE can have ripple effects in the community around it, including for non-MTEs, as providers demonstrate hesitancy to make capital investments in markets where they may be denied entry to MTEs. See Consolidated Communications and Ziplly Fiber 2021 Comments at 13-14. Our actions today will promote competition and deployment in urban areas generally, as they reduce barriers to new entrants.

<sup>53</sup> See Real Estate Associations 2021 Comments at 14.

arrangements apply to communications services provided by (1) telecommunications carriers in both commercial and residential MTEs, and (2) MVPDs subject to section 628(b) in residential MTEs.<sup>54</sup>

14. We decline to alter the scope of these rules at this time. Commenters argue we should subject broadband-only providers to our rules governing MTE access, citing the potential benefits of doing so and the potential harms that could result from regulatory asymmetry if we did not.<sup>55</sup> Relatedly, some commenters argue we should consider differences between residential and commercial MTEs in assessing the types of practices we address today.<sup>56</sup> However, our actions in this Report and Order reflect an incremental approach to the problems identified.<sup>57</sup> In tackling these issues in our *Exclusive Service Contracts* and *Competitive Networks Orders*, we did not extend our decisions to broadband-only providers, and we applied rules differently to commercial and residential MTEs.<sup>58</sup> Today's action builds on those previous determinations and so we adopt the approach taken in those prior orders. We proceed incrementally, and will continue to monitor competition in MTEs to determine whether we should alter the scope of our rules to cover other providers or differently distinguish between commercial and residential MTEs in response to any new information that comes to light. Even though we decline to alter the scope of our rules at this time to the full extent some commenters advocate, we believe that our actions today will reap substantial benefits for consumers by promoting choice in MTEs.

15. To that end, we limit our rules regarding certain revenue sharing agreements and exclusive marketing arrangements to telecommunications carriers and covered MVPDs, and the specific MTE contexts described. References to “providers,” “MTEs,” and “MTE owners” in this Report and Order should be read to apply only to these entities and in these contexts. We further underscore that, when we refer to revenue sharing agreements and exclusive marketing arrangements, we do not refer only to standalone contracts but also clauses in contracts that include other terms. Where a revenue sharing agreement or exclusive marketing arrangement is part of a larger contract, the remainder of that contract is unaffected by these rules.

### C. Prohibition of Certain Revenue Sharing Agreements

16. To promote broadband competition and deployment in MTEs, we adopt rules prohibiting providers from entering into or enforcing two types of revenue sharing agreements with MTE owners that are particularly harmful and which amount to de facto exclusive access agreements. First, we prohibit providers from entering into exclusive revenue sharing agreements with an MTE owner.<sup>59</sup> Second, we

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<sup>54</sup> MVPDs covered by section 628(b) include a “cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor.” 47 U.S.C. § 548(b). *See also* 47 U.S.C. § 548(g) (extending such provisions to common carriers or their affiliates that provide video services).

<sup>55</sup> *Cities of Boston et al. Reply*, GN Docket No. 17-142, at 11 (rec. Nov. 19, 2021); INCOMPAS 2021 Comments at 25-26; NCTA 2021 Comments at 3-5, 11.

<sup>56</sup> *See, e.g., Real Estate Associations 2021 Comments* at 18-19; *Public Knowledge and Consumer Reports 2021 Comments* at 20; *National Multifamily Housing Council et al. Reply*, GN Docket No. 17-142, at 20 (rec. Sept. 30, 2019) (*Real Estate Associations 2019 Reply*); *see also Lumen 2021 Comments* at 3-4.

<sup>57</sup> *See 2019 MTE NPRM*, 34 FCC Rcd at 5725, para. 44 (the Commission “may proceed incrementally, and we do so here while preserving the opportunity to go further with the benefit of a more developed record”) (citing *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007), *SEC v. Cheney Corp.*, 332 U.S. 194, 202-03 (1947)).

<sup>58</sup> *See 2008 Competitive Networks Order*, 23 FCC Rcd at 5386, para. 5 (adopting exclusive access prohibition on telecommunications carriers in residential MTEs); *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1 (adopting exclusive access prohibition on covered MVPDs in residential MTEs); *2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1 (adopting exclusive access prohibition on telecommunications carriers in commercial MTEs).

<sup>59</sup> In an exclusive revenue sharing agreement, a provider pays an MTE owner in exchange for access to the MTE and prohibits the MTE owner from agreeing to a similar agreement with other providers.

prohibit providers from entering into graduated revenue sharing agreements with an MTE owner.<sup>60</sup> In the *2019 MTE NPRM*, the Commission sought comment on whether it should restrict provider use of revenue sharing agreements.<sup>61</sup> Upon review of the record, we now take this incremental step and adopt targeted rules addressing two specific types of agreements that we find by their structure and effect to be anti-competitive.

17. In the *2019 MTE NPRM*, the Commission defined a revenue sharing agreement as an agreement whereby “the building owner receives consideration from the communications provider in return for giving the provider access to the building and its tenants.”<sup>62</sup> The Commission further explained that this “consideration can take many forms, ranging from a *pro rata* share of the revenue generated from tenants’ subscription service fees, to a one-time payment calculated on a per-unit basis (sometimes called a door fee), to provider contributions to building infrastructure, such as WiFi service for common areas.”<sup>63</sup> The Commission acknowledged explanations from MTE owners that they enter into these agreements because they “enable MTE owners to use the consideration they receive from communications providers to offset infrastructure costs associated with providing broadband service to tenants.”<sup>64</sup> And it similarly acknowledged concerns from competitive providers and others that they “reduce incentives for [MTE] owners to grant access to competitive providers when any subscriber gained by such a provider means reduced income to the building owner.”<sup>65</sup>

18. In light of the record developed since the Commission first sought comment on revenue sharing agreements in 2017, we prohibit providers from entering into or enforcing two particularly problematic types of revenue sharing agreements—exclusive and graduated—that undermine tenant choice and competition in MTEs and are at odds with our long-existing bans on exclusive access. We will continue to monitor the impact of revenue sharing agreements on competition in MTEs, including those not specifically covered by the prohibitions we adopt today. We disagree with commenters that argue we should not act because the payments at issue are not significant enough to drive MTE owner behavior,<sup>66</sup> and because revenue sharing is passed through from MTE owners to their tenants.<sup>67</sup> The record contains substantial evidence of the anti-competitive effects of these agreements on prospective competitors and tenant choice. Regardless of the motivation of MTE owners, the practices we address concern provider agreements with third parties that limit their competitors’ ability to provide service. Further, no commenter effectively supports the argument that prohibitions of these two types of revenue sharing agreements undermine an MTE owner’s incentive for deploying communications infrastructure,<sup>68</sup> especially in light of the importance of communications service to attracting tenants.<sup>69</sup> And as we explain

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<sup>60</sup> In a graduated revenue sharing agreement, a provider pays an MTE owner a greater percentage of revenue as its penetration in the building increases. We describe below the essential elements of a graduated revenue sharing agreement.

<sup>61</sup> *2019 MTE NPRM*, 34 FCC Rcd at 5711-13, paras. 16-20.

<sup>62</sup> *Id.* at 5711, para. 16.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5711-12, para. 17.

<sup>65</sup> *Id.* at 5712, para. 18.

<sup>66</sup> See Independent Internet Service Providers Reply, GN Docket No. 17-142, at 10 (rec. Nov. 19, 2021) (Independent ISPs 2021 Reply); National Multifamily Housing Council et al. Comments, GN Docket No. 17-142, at 78-79 (rec. Aug. 30, 2019) (Real Estate Associations 2019 Comments); NCTA – The Internet & Television Association Comments, GN Docket No. 17-142, at 8 (rec. Aug. 30, 2019) (NCTA 2019 Comments).

<sup>67</sup> See NCTA 2021 Comments at 11.

<sup>68</sup> See Real Estate Associations 2019 Comment at 82-83.

<sup>69</sup> See WISPA 2021 Comments at 24 (noting that in a “competitive market for MTEs, owners/managers will readily invest in broadband infrastructure and services, even without excess payments from providers”); Wireless Internet

below, no commenter effectively rebuts the argument that these two types of revenue sharing agreements impede the ability of competitive providers to provide service in the MTEs where present, and thus impede those tenants' choice of providers.

19. We adopt this approach over alternatives suggested in the record. We find this targeted prohibition is preferable to a disclosure requirement,<sup>70</sup> in light of commenters who argue that simply informing tenants or competitors about anti-competitive revenue sharing agreements may not address their anti-competitive effects.<sup>71</sup> And we decline to style this rule as a rebuttable presumption and allow a provider to show an agreement is related to MTE owner costs and therefore permitted;<sup>72</sup> our decision today turns on the anti-competitive nature of the types of agreements identified.

### 1. Exclusive Revenue Sharing Agreements

20. We prohibit a provider from entering into or enforcing an exclusive revenue sharing agreement with an MTE owner.<sup>73</sup> In an exclusive revenue sharing agreement, the communications provider offers the MTE owner consideration in return for the provider obtaining access to the building and its tenants, and prohibits the MTE owner from accepting similar consideration from any other provider. Thus, an exclusive revenue sharing agreement allows a communications provider to prevent other providers from sharing payments with the MTE owner.

21. We find that exclusive revenue sharing agreements are anti-competitive and amount to de facto exclusive access agreements. We agree with Starry that “exclusive revenue shar[ing] serves no legitimate purpose other than to inhibit new entry in an MTE . . . .”<sup>74</sup> Similar to the graduated revenue sharing agreements discussed below, the structure of an exclusive revenue sharing agreement financially disincentivizes the MTE owner from allowing competing providers access to the building and its tenants. When an exclusive revenue sharing agreement is in place, a new provider is unable to provide compensation to the MTE owner akin to that offered by the incumbent. Because each subscriber that switches from the incumbent to a competitive provider decreases the compensation the MTE owner receives, the owner has an incentive to block alternative providers' access to the building. As INCOMPAS explains, these agreements effectively “eliminate consumer choice while simultaneously

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Service Providers Association Reply, GN Docket No. 17-142, at 16 (rec. Nov. 19, 2021) (WISPA 2021 Reply) (stating that “broadband infrastructure is now as fundamental to living in an MTE as drywall and plumbing”); Fiber Broadband Association Comments, GN Docket No. 17-142, MB Docket No. 17-91, at 2 (rec. Aug. 30, 2019) (Fiber Broadband Association 2019 Comments) (arguing that service from broadband providers allows MTE owners to attract tenants and increase the value of their buildings).

<sup>70</sup> See, e.g., INCOMPAS Comments, GN Docket No. 17-142, MB Docket No. 17-91, at 13 (rec. Aug. 30, 2019) (INCOMPAS 2019 Comments).

<sup>71</sup> See, e.g., Public Knowledge and Consumer Reports 2021 Comments at 8; Wireless Internet Service Providers Association Comments, GN Docket No. 17-142, at 15 (rec. Aug. 30, 2019) (WISPA 2019 Comments); Common Networks Comments, GN Docket No. 17-142, at 7 (rec. Aug. 30, 2019) (Common Networks 2019 Comments). By contrast, we find that disclosure is appropriate in the context of exclusive marketing arrangements because the record convinces us their primary anti-competitive impacts stems from tenant confusion, which we believe can be addressed via disclosure. See *infra* Sec. IV.D.

<sup>72</sup> CenturyLink Comments, GN Docket No. 17-142, MB Docket No. 17-91, at 15 (rec. Aug. 30, 2019) (CenturyLink 2019 Comments).

<sup>73</sup> Starry 2021 Comments at 7 (referring to exclusive revenue sharing agreements as “insidious economic tools used by incumbents to disincentivize property owners and managers from allowing a new competitive provider into the building . . . [e]ven if a competitive provider can make the building owner whole through a competing revenue share structure, the building owner is contractually prohibited from entering into such an agreement”).

<sup>74</sup> Starry 2019 Comments at 8-9; see also Starry 2021 Comments at 7-8.

benefiting the property owner and their preferred provider.”<sup>75</sup> No commenter expresses support for these agreements. Accordingly, we prohibit providers from entering into or enforcing exclusive revenue sharing agreements.<sup>76</sup>

22. We find that the competitive benefits of our prohibition on exclusive revenue sharing agreements, in the form of increased subscriber choice and more competitive pricing and service, substantially outweigh the minimal compliance costs associated with this rule.

## 2. Graduated Revenue Sharing Agreements

23. We also prohibit providers from entering into or enforcing graduated revenue sharing agreements with MTE owners. In a graduated revenue sharing agreement, sometimes known as “tiered” or “success-based” agreements,<sup>77</sup> a provider pays an MTE owner a greater percentage of revenue as its penetration in the building increases.<sup>78</sup> Under such an agreement, as a provider serves more tenants in an MTE, the MTE owner receives a greater level of compensation for each tenant.<sup>79</sup> Therefore, the more tenants in an MTE that a provider furnishes service to, the more compensation the MTE owner receives on a *pro rata* basis.<sup>80</sup>

24. We find that graduated revenue sharing agreements are anti-competitive and amount to de facto exclusive access agreements.<sup>81</sup> We agree with INCOMPAS that, because graduated revenue sharing agreements “discourage competitive entry to MTEs and . . . circumvent the prohibition on exclusive access agreements,” we should “ban graduated revenue sharing agreements.”<sup>82</sup> As the Small Business Administration Office of Advocacy explains, these types of agreements “provide an MTE owner

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<sup>75</sup> INCOMPAS 2021 Comments at 13 (arguing exclusive revenue sharing agreements “should therefore be restricted”).

<sup>76</sup> See AARP 2021 Comments at 8 (arguing that we should prohibit exclusive revenue sharing agreements); Next Century Cities 2021 Comments at 7-9 (arguing we should restrict exclusive revenue sharing agreements because they “hinder the Commission’s procompetitive goals”); Public Knowledge and New America’s Open Technology Institute Comments, GN Docket No. 17-142, MB Docket No. 17-91, at 10 (rec. Aug. 30, 2019) (Public Knowledge and New America’s Open Technology Institute 2019 Comments) (“the Commission should forbid *exclusive* revenue-sharing agreements”).

<sup>77</sup> See Starry 2021 Comments at 7; Starry 2019 Comments at 7-8.

<sup>78</sup> See INCOMPAS 2021 Comments at 11 n.23.

<sup>79</sup> In one example, a provider offered a five percent revenue share when it served 51-55 percent of the building with video service; a seven percent revenue share when it served 56-60 percent; an eight percent revenue share when it served 61-65 percent; a nine percent revenue share when it served 66-71 percent of the building, and a ten percent revenue share when it served greater than 72 percent of the building. See Susan Crawford, *The New Payola: Deals Landlords Cut with Internet Providers*, Wired (June 6, 2016), <https://www.wired.com/2016/06/the-new-payola-deals-landlords-cut-with-internet-providers> (including a chart depiction of how graduated revenue sharing agreements are structured).

<sup>80</sup> See Starry 2019 Comments at 8.

<sup>81</sup> WISPA 2019 Comments at 11-12 (explaining that “MTE owners/managers often use revenue sharing agreements with escalation clauses . . . as the basis for prohibiting access to competitive providers, in essence serving as de facto exclusive access agreements . . . the Commission should prohibit escalation clauses”); see also Letter from Harold Feld, Senior Vice President, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 1 (filed Jan. 19, 2022) (Public Knowledge 2022 *Ex Parte*) (“[R]evenue sharing and incentive agreements that provide incentives to block other providers, such as providing a greater share of revenues or higher commissions that increases as the percentage of units served by the provider increase, have the same effect as an exclusive contract.”); WISPA 2021 Comments at 23-25; WISPA 2021 Reply at 14-17.

<sup>82</sup> INCOMPAS 2019 Comments at 13; see also INCOMPAS 2021 Comments at 11 (“Revenue sharing agreements, and in particular graduated revenue sharing agreements, continue to represent the single biggest barrier to competitive providers’ access to MTEs.”).

with an incentive to exclude competitors so that they can achieve maximum returns under the agreement.”<sup>83</sup> We agree with Starry that this type of structure is “specifically designed to (1) incentivize the building to help the incumbent provider maximize the number of subscribers in the building; and (2) act as an economic penalty if the building allows in a new entrant.”<sup>84</sup> The record convinces us they do “not serve any other legitimate purpose—the revenue share increase is not associated with any increased cost for the provider or the building.”<sup>85</sup> Accordingly, we prohibit providers from entering into or enforcing graduated revenue sharing agreements.

25. We disagree with the few commenters who express support for graduated revenue sharing agreements. Honest Networks claims that they are a “powerful inducement for MTE owners to work with [competitive providers],” because the agreements enable providers to “demonstrate value for MTE owners.”<sup>86</sup> But Honest Networks does not address the argument that these agreements discourage competitive entry once at least one provider is in the building. Like those who argue that revenue sharing agreements generally can ensure return on investment,<sup>87</sup> we understand Honest Networks’ claim to be that it relies on the exclusivity provided by a graduated revenue sharing agreement to compete and that this exclusivity can benefit competitive providers. We agree with the City of San Francisco, which argues that the fact “[t]hat some market participants might benefit from barriers to entry imposed on potential competitors is not a compelling reason to allow for them.”<sup>88</sup> And contrary to Honest Networks’ claim

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<sup>83</sup> SBA Jan. 2022 *Ex Parte* at 4; *see also* Fiber Broadband Association Comments, GN Docket No. 17-142, at 4-5 (rec. Oct. 20, 2021) (Fiber Broadband Association 2021 Comments) (arguing that “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”); Public Knowledge and Consumer Reports 2021 Comments at 8-9; Fiber Broadband Association Reply, GN Docket No. 17-142, at 6 (rec. Nov. 19, 2021) (Fiber Broadband Association 2021 Reply) (graduated revenue sharing agreements “could incentivize MTE owners to block other service providers from serving tenants to protect the high revenue stream received from the incumbent service provider”). Although Commission rules prohibit providers from entering into exclusive access agreements, even where a building owner and provider do not have an exclusive access agreement, a competitor will be unable to serve the building if the MTE owner unilaterally elects to exclude other providers in order to profit from a graduated revenue sharing arrangement.

<sup>84</sup> Starry 2021 Comments at 7-8; *see also* Starry 2019 Comments at 8 (explaining that “as the new entrant wins subscribers from the incumbent – even if the new entrant agrees to the same tiered revenue share – the revenue share from the new entrant will be lower per subscriber than the revenue share from the incumbent”); Verizon Reply, GN Docket No. 17-142, at 4-5 (rec. Sept. 30, 2019) (Verizon 2019 Reply) (arguing that, under certain revenue sharing agreements, an MTE owner “may be incentivized to exclude other providers from a building, especially where . . . a provider’s marginal revenue share payment to the MTE owner increases as the provider’s penetration in the building increases”); City of Longmont 2021 Comments at 4-5; Common Networks 2019 Comments at 5-6.

<sup>85</sup> Starry 2019 Comments at 8.

<sup>86</sup> *See* Honest Networks, LLC Comments, GN Docket No. 17-142, at 1 (rec. Oct. 20, 2021) (Honest Networks 2021 Comments).

<sup>87</sup> *See* M/C Partners et al. Comments, GN Docket No. 17-142, at 4-5 (rec. Oct. 20, 2021) (M/C Partners et al. 2021 Comments); ACA Connects Reply, GN Docket No. 17-142, at 4 (rec. Nov. 19, 2021).

<sup>88</sup> City and County of San Francisco Comments, GN Docket No. 17-142, at 3 (rec. Aug. 30, 2019) (City of San Francisco 2019 Comments); *see also* City of Boston 2021 Comments at 1 (“Competitive broadband access in MTEs is not fostered by guaranteeing providers monopoly environments . . . .”); Starry Reply, GN Docket No. 17-142, MB Docket No. 17-91, at 5 (rec. Sept. 30, 2019). The Multifamily Broadband Council provided several examples other than graduated revenue sharing agreements of strategies small independent providers use to distinguish themselves from their larger competitors, including offering tight response deadlines, access to top decision-makers within the company, limitations on customer hold-times, maintenance of detailed customer service records, network neutrality commitments, and service guarantees during peak usage hours. *See* Multifamily Broadband Council Comments, GN Docket No. 17-142, at 5-6 (rec. Aug. 28, 2019) (MBC 2019 Comments); *see also* SBA Jan. 2022 *Ex Parte* at 3-4 (arguing that where necessary the Commission should consider alternative means of encouraging deployment in MTEs that do not guarantee providers monopoly environments).

that graduated revenue sharing agreements are good for competitive providers, INCOMPAS provides examples of competitive providers that were prevented from offering service to one or more MTEs due to graduated revenue sharing agreements.<sup>89</sup>

26. The record indicates that the benefits of our new rule substantially outweigh its costs. By our action today, we remove MTE owners' disincentive to permit service by competing providers, and subscribers will benefit from increased choice as a result of entrance by competing providers, as well as more competitive pricing and service. By contrast, no commenter in the record indicates that this prohibition will be costly.

### 3. Prohibition of Enforcing Existing Graduated or Exclusive Revenue Sharing Agreements

27. Our prohibition on graduated and exclusive revenue sharing agreements applies both to agreements entered into after the effective date of these rules and those already in existence when these rules become effective. The rules we adopt thus prohibit providers from (1) executing new graduated or exclusive revenue sharing agreements, and (2) enforcing existing graduated or exclusive revenue sharing agreements on a going forward basis. Applying this prohibition to future enforcement of existing agreements will promote competitive entry to MTEs where these agreements are already in effect—to the benefit of MTE tenants—and is consistent with the Commission's approach when it prohibited exclusive access agreements in residential MTEs.<sup>90</sup>

28. When the Commission prohibited exclusive access agreements in residential MTEs—for both telecommunications carriers and covered MVPDs—it applied that prohibition to agreements already in effect. In the *2008 Competitive Networks Order*, it found that “leav[ing] existing exclusivity contracts in effect would allow the competitive harms we have identified to continue for some time, even years,” and that it was “in the public interest to prohibit such contracts from being enforced.”<sup>91</sup> The Commission further concluded that “immediately prohibiting the enforcement of such provisions is more appropriate than phasing them out or waiting until contracts expire and are replaced by contracts without exclusivity provisions . . . [because] such approaches would only serve to further delay the entry of competition to customers in the buildings at issue.”<sup>92</sup> In the *2007 Exclusive Service Contracts Order*, the Commission

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<sup>89</sup> See INCOMPAS 2019 Comments at 9-10. As we have explained, in the *2019 MTE NPRM*, the Commission defined a revenue sharing agreement as an agreement in which a provider compensates an MTE owner *in exchange for access to a building and its tenants*. *2019 MTE NPRM*, 34 FCC Rcd at 5711, para. 16. This definition hinges on the MTE owner's provision of building access in exchange for payment, but graduated payments discourage MTE owners from allowing competitive entry in the manner we have described regardless of what they are in exchange for. We therefore extend this prohibition to include graduated compensation that is in exchange for anything between an MTE owner and covered provider that relates to providing communications service to tenants. We do so to eliminate the ability of providers to easily circumvent this prohibition: a provider could simply provide graduated payment in exchange for a practice such as exclusive marketing and achieve the same anti-competitive effects. See Consolidated Communications and Ziplly Broadband 2021 Comments at 6 (explaining “there is generally a great deal of overlap in the use of” different types of exclusivity agreements); INCOMPAS 2019 Comments at 12; see also Letter from Louis Peraertz, Vice President of Policy, Wireless Internet Service Providers Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 2 (filed Feb. 1, 2022) (“[W]here there are multiple exclusive agreements . . . related to an MTE, each compounds the anti-competitive impact on small providers.”). To this end, we disagree with those that argue we should condition our ban on graduated revenue sharing agreements to ones used as a condition of access, see Lumen 2021 Comments at 5, Verizon 2019 Reply at 4-5, because this limitation would allow providers to easily evade our prohibition.

<sup>90</sup> See *2008 Competitive Networks Order*, 23 FCC Rcd at 5390-91, para. 13 (prohibiting enforcement of existing exclusive access contracts between telecommunications carriers and residential MTE owners); *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20252, para. 35 (doing same for existing exclusive access contracts between covered MVPDs and residential MTE owners).

<sup>91</sup> *2008 Competitive Networks Order*, 23 FCC Rcd at 5390-91, para. 13.

<sup>92</sup> *Id.* at 5390, para. 13.

similarly reasoned that both existing and new exclusivity clauses had the “same competition- and broadband-detering effect that harms consumers.”<sup>93</sup> Because a prohibition that did not cover the exclusivity agreements currently in effect would “allow the vast majority of the harms caused by such clauses to continue for years . . . [or] indefinitely in the cases of exclusivity clauses that last perpetually or contemplate automatic renewal,” it found that it was “strongly in the public interest to prohibit such clauses from being enforced.”<sup>94</sup> In both orders, the Commission found that affected parties were on notice that the Commission could adopt such a prohibition because “the validity of exclusivity provisions . . . ha[d] been subject to question for some time.”<sup>95</sup>

29. On review, the United States Court of Appeals for the D.C. Circuit upheld the Commission’s prohibition enforcing existing exclusive access contracts adopted in the *2007 Exclusive Service Contracts Order*.<sup>96</sup> The Court found that the Commission’s rule was not retroactive, because it had “impaired the future value of past bargains but ha[d] not rendered past actions illegal or otherwise sanctionable.”<sup>97</sup> It further concluded the Commission satisfied its obligation to balance the effect of “upsetting prior expectations or existing investments against the benefits of applying their rules to those preexisting interests.”<sup>98</sup>

30. We undertake that same balancing and find that the benefits of the prohibition we adopt today on enforcing existing graduated and exclusive revenue sharing agreements substantially outweigh the costs. The record reflects that these types of revenue sharing agreements already exist and already cause the anti-competitive harms we have identified.<sup>99</sup> To leave existing contracts unaddressed would allow these harms to continue for a period of years or even indefinitely. Indeed, the record reflects that these agreements may last perpetually.<sup>100</sup> Prohibiting existing contracts from being enforced will serve the public interest by preventing such anti-competitive conduct from being grandfathered in indefinitely, and by allowing tenants of impacted MTEs to realize the benefits of competition and consumer choice.<sup>101</sup>

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<sup>93</sup> *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20252, para. 35.

<sup>94</sup> *Id.*

<sup>95</sup> *2008 Competitive Networks Order*, 23 FCC Rcd at 5391, para. 13 (“[C]arriers have been on notice for more than seven years that the Commission might prohibit their entering, and enforcement of, such provisions.”); *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20252, para. 36 (“Our prohibition of the enforcement of existing exclusivity clauses does not disturb the legitimate expectations of investors in [residential MTEs] and the video service providers affected by this Order. The lawfulness of exclusivity clauses has been under our active scrutiny for a decade, making the parties to them aware that such clauses may be prohibited.”).

<sup>96</sup> *NCTA v. FCC*, 567 F.3d 659, 670-71 (D.C. Cir. 2009).

<sup>97</sup> *Id.* at 670 (stating that “[w]e have thus repeatedly made clear that an agency order that only ‘upsets expectations based on prior law is not retroactive’”) (quoting *Mobile Relay Associates v. FCC*, 457 F.3d 1, 11 (D.C. Cir. 2006)).

<sup>98</sup> *Id.*

<sup>99</sup> See, e.g., Fiber Broadband Association 2021 Comments at 4; INCOMPAS 2021 Comments at 11, 13; Next Century Cities 2021 Comments at 7-9; Public Knowledge and Consumer Reports 2021 Comments at 7-8; WISPA 2021 Comments at 23-25; Common Networks 2019 Comments at 5; Public Knowledge and New America’s Open Technology Institute 2019 Comments at 10; Starry 2019 Comments at 8; Uniti Fiber Comments, GN Docket No. 17-142, at 8-9 (rec. Aug. 30, 2019) (Uniti Fiber 2019 Comments).

<sup>100</sup> See WISPA 2019 Comments at 7 (“Many revenue sharing provisions are subject to perpetual renewal.”).

<sup>101</sup> See Letter from Christopher L. Shipley, Attorney & Policy Advisor, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 2 (filed Feb. 7, 2022) (INCOMPAS Feb. 2022 *Ex Parte*) (“The participants also suggested that the Commission apply any prohibitions to graduated revenue sharing and other exclusive arrangements to pre-existing agreements, in addition to future agreements, between providers and building owners.”).

31. We find that our prohibition does not disturb legitimate expectations of MTE and provider investors affected by this rule.<sup>102</sup> First, the anti-competitive structure of the two types of revenue sharing agreements we prohibit today conflict with the Commission’s long-existing rules designed to promote broadband deployment and competition in MTEs. Second, this rule does not prevent providers from offering service to those MTE tenants who wish to continue to subscribe to their service.<sup>103</sup> Third, the lawfulness of revenue sharing agreements has been under the Commission’s scrutiny for nearly five years. In the *2017 MTE NOI*, the Commission sought “comment on how to best address revenue sharing agreements”;<sup>104</sup> in the *2019 MTE NPRM* it asked whether it should “restrict the use of revenue sharing agreements”;<sup>105</sup> and in 2021 the Wireline Competition Bureau refreshed the record and asked if the Commission should “restrict the use of revenue sharing agreements” and “address specific types of revenue sharing agreements.”<sup>106</sup> Finally, the record gives us no reason to uniquely differentiate between commercial and residential MTEs for purposes of this rule, and accordingly we apply the prohibition on enforcing existing, covered revenue-sharing contracts to all MTE contexts covered by this Report and Order.<sup>107</sup>

32. *Compliance Dates.* For existing contracts with exclusive and graduated revenue sharing agreements, compliance with the prohibition on enforcing such agreements will be required 180 days after publication of this Report and Order in the *Federal Register*. We direct the Wireline Competition Bureau to release a Public Notice announcing the compliance date of the rules for existing contracts. We agree with Altice that adopting a delayed compliance date for existing contracts “would allow time for providers to conduct the extensive contract renegotiations that would be required if existing graduated revenue sharing provisions are rendered void by the Commission’s decision.”<sup>108</sup> While Altice suggests the need for a one-year transition period for providers to comply with the new prohibition on enforcing existing graduated and exclusive revenue sharing arrangements,<sup>109</sup> we find that 180 days strikes the right balance between giving providers sufficient time to bring their existing arrangements into compliance and ensuring that MTE tenants promptly benefit from the rules we adopt today.<sup>110</sup> For new contracts, the prohibition on entering into exclusive and graduated revenue sharing arrangements will take effect 30

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<sup>102</sup> See Letter of Matthew C. Ames, Counsel to the National Multifamily Housing Council, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 3 (filed Feb. 8, 2022).

<sup>103</sup> See *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20252-53, para. 37.

<sup>104</sup> *2017 MTE NOI*, 32 FCC Rcd at 5389, para. 14.

<sup>105</sup> *2019 MTE NPRM*, 34 FCC Rcd at 5711-13, paras. 16-20 (specifically asking “whether revenue sharing agreements reduce incentives for building owners to grant access to competitive providers when any subscriber gained by such a provider means reduced income to the building owner”).

<sup>106</sup> *2021 MTE Public Notice* at 3-4.

<sup>107</sup> Our analysis is not changed by record claims that existing revenue sharing agreements—particularly graduated revenue sharing agreements—are numerous. Letter from Cristina Chou, Vice President, Federal Affairs, Altice, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 1 (filed Feb. 2, 2022) (Altice Feb. 2, 2022 *Ex Parte* Letter). We find that this only underscores the importance of reaching these existing agreements to protect MTE tenants from their harmful effects.

<sup>108</sup> Altice Feb. 2, 2022 *Ex Parte* at 1; see also Letter from Rachael Bender, Vice President and Associate General Counsel, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 1 (filed Feb. 1, 2022) (Verizon Feb. 1, 2022 *Ex Parte* Letter) (encouraging the Commission “to allow ample time for providers to bring existing agreements, if covered, into compliance with any new rules related to graduated and exclusive revenue sharing agreements and the disclosure of exclusive marketing agreements”).

<sup>109</sup> Altice Feb. 2, 2022 *Ex Parte* Letter at 1.

<sup>110</sup> See Letter from Christopher L. Shipley, Attorney & Policy Advisor, INCOMPAS, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, at 2 (filed Feb. 7, 2022) (INCOMPAS Feb. 2022 *Ex Parte*) (“We also encouraged the Commission to reject proposals that would give incumbents over six months to make the necessary changes to their current contracts to accommodate any new prohibitions promulgated under the proposed *Order*.”).

days after publication of this Report and Order in the *Federal Register* and will bar such arrangements in new contracts from that point forward.

#### D. Required Disclosure of Exclusive Marketing Arrangements

33. We require providers to disclose the existence of exclusive marketing arrangements that they have with MTE owners. Such disclosure must be included on all written marketing material directed at tenants or prospective tenants of an MTE subject to the arrangement and must explain in clear, conspicuous, legible, and visible language that the provider has the right to exclusively market its communications services to tenants in the MTE, that such a right does not suggest that the provider is the only entity that can provide communications services to tenants in the MTE, and that service from an alternative provider may be available. We sought comment on whether to require this type of disclosure in the *2019 MTE NPRM* because of the potential for exclusive marketing arrangements to be used to impede MTE entrance by competitive providers, frustrating the goals and intent of our exclusive access prohibition.<sup>111</sup> The record reflects that the nature of exclusive marketing arrangements has changed since the Commission last addressed them in 2010, and we find that this limited disclosure requirement will alleviate tenant confusion identified in the record, prevent the evasion of our exclusive access rules, and, in turn, promote competition in MTEs.

34. As the Commission explained in the *2019 MTE NPRM*, an exclusive marketing arrangement is “an arrangement, either written or in practice, between an MTE owner and a service provider that gives the service provider, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to tenants of the MTE.”<sup>112</sup> As Consolidated Communications and Zply Fiber explain, exclusive marketing arrangements “give only one broadband provider the right to send sales representatives into an MTE or distribute marketing materials, such as door hangers, in the property.”<sup>113</sup> They further state that “[u]nder exclusive marketing arrangements, MTE owners will often identify that single company as the ‘preferred’ provider and steer tenants toward that provider’s service.”<sup>114</sup>

35. The record reflects that tenants in MTEs with exclusive marketing arrangements are confused about the availability of competitive service in the MTE and that this confusion dampens competition.<sup>115</sup> Honest Networks states that “exclusive marketing arrangements create confusion and lower choice for tenants,”<sup>116</sup> and Consolidated Communications and Zply Fiber explain that they do so by “creating confusion as to whether it is even possible to obtain service from another company.”<sup>117</sup> Crown Castle asserts that “exclusive marketing arrangements between a MTE and a common carrier providing service directly to tenants often confuses MTE tenants . . . [who] may believe the carriers’

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<sup>111</sup> *2019 MTE NPRM*, 34 FCC Rcd at 5718-19, paras. 27-28.

<sup>112</sup> *Id.* at 5718, para. 27.

<sup>113</sup> Consolidated Communications and Zply Fiber 2021 Comments at i; *accord* City of Longmont 2021 Comments at 3 (“Exclusive marketing [arrangements] allow a single [provider] to prohibit competitors from marketing their service in an MTE and effectively capture an entire market share.”). Other stakeholders describe new developments in exclusive marketing arrangements since the Commission last considered them in 2010. *See* WISPA 2021 Comments at 21; *see also* INCOMPAS 2021 Comments at 20; Common Networks 2019 Comments at 9.

<sup>114</sup> Consolidated Communications and Zply Fiber 2021 Comments at i; *see also id.* at 7.

<sup>115</sup> *See* Consolidated Communications and Zply Fiber 2021 Comments at 10; Honest Networks 2021 Comments at 3-4; WISPA 2021 Reply at 11-12; Crown Castle Comments, GN Docket No. 17-142, MB Docket No. 17-91, at 15 (rec. Aug. 30, 2019) (Crown Castle 2019 Comments).

<sup>116</sup> Honest Networks 2021 Comments at 3; *id.* at 3-4 (“If a single provider has exclusive marketing, the tenant is highly likely to perceive this provider as the only option for service, or this option along with a larger alternative incumbent . . . [t]he perceived choice for cable & internet providers is lower than the reality.”).

<sup>117</sup> Consolidated Communications and Zply Fiber 2021 Comments at 10; *see also* INCOMPAS 2021 Comments at 21.

exclusive marketing [arrangement] with the MTE means that a carrier has an exclusive right to provide services within the building.”<sup>118</sup> This confusion has the cascading effect of artificially limiting competition for communications services for MTE tenants because when tenants lack awareness of competitive options, their choice is narrowed to the entity with the exclusive arrangement.<sup>119</sup> Some commenters contend that even MTE owners and their agents are confused about the specific nature of an exclusive marketing arrangement, believing it to be an exclusive access agreement fully barring competition in the MTE.<sup>120</sup> Competitive providers explain that in MTEs with exclusive marketing arrangements they achieve lower penetration and less revenue,<sup>121</sup> and that, consequently, competition in these MTEs is dampened and tenants cannot realize the benefits of competitive choice.<sup>122</sup>

36. We are persuaded by this record to adopt a disclosure requirement to alleviate confusion and, in turn, promote competition.<sup>123</sup> In 2010, the Commission determined that the record at the time did not “support prohibiting or regulating exclusive marketing arrangements in order to protect competition or consumers.”<sup>124</sup> The Commission found that, at the time, “[t]he balance of consumer harms and

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<sup>118</sup> Crown Castle 2019 Comments at 15.

<sup>119</sup> See WISPA 2021 Reply at 11 (stating that “exclusive marketing [arrangements] are anti-competitive and harm consumers” and that “they create confusion for tenants when information about a tenant’s options for service are purposefully withheld or not readily available”); see also Consolidated Communications and Zply Fiber 2021 Comments at 10; Honest Networks 2021 Comments at 3-4.

<sup>120</sup> See Consolidated Communications and Zply Fiber 2021 Comments at 10 (stating that “in some cases, we have found that even employees representing MTE owners appear to believe that an exclusive marketing [arrangement] precludes them for allowing other broadband providers to provide service to the MTE’s residents”); see also INCOMPAS 2021 Comments at 21 (stating that “many building owners have an assumption that their [exclusive marketing arrangement] also applies to access, and they keep competitive providers from offering service in the building”); Public Knowledge 2022 *Ex Parte* at 1; Access Now 2021 Reply at 4; Crown Castle 2019 Comments at 15. Other commenters dispute this claim. See, e.g., RealtyCom Partners, LLC Comments, GN Docket No. 17-142, at 2 (rec. Aug. 30, 2019) (RealtyCom 2019 Comments).

<sup>121</sup> See Honest Networks 2021 Comments at 3 (“[I]n properties where Honest has been serving apartment residents for more than 18 months, average subscription level . . . is 29% for properties where we have non-exclusive marketing rights and 8% for the property where an incumbent provider has exclusive marketing rights.”); see also Consolidated Communications and Zply Fiber 2021 Comments at 11 (stating that in MTEs where it has exclusive marketing arrangements and/or revenue sharing agreements, “Consolidated has a penetration rate that is about ten times its penetration rate in MTEs where it provides service but has not acceded to MTE owners’ attempts to extract payments.”); *id.* (“[E]ven in MTEs in which Consolidated is offering a technologically superior service to the cable operator that is benefitting from an exclusive marketing [arrangement] (e.g., symmetrical fiber broadband versus asymmetrical coaxial cable broadband), its penetration in these buildings is generally quite low (e.g., barely above 10%).”); Starry 2019 Comments at 9 (“In buildings with exclusive marketing [arrangements], we are likely to gain less share than in buildings in which we can actively market in the building.”).

<sup>122</sup> See Consolidated Communications and Zply Fiber 2021 Comments at ii (exclusive marketing arrangements “deny MTE residents the benefits that come from competition, leaving them with fewer service options, higher prices, and lower service quality”); see also Honest Networks 2021 Comments at 4 (“Given the . . . disincentive for a competitive provider to install service in a building where an incumbent provider has an exclusive marketing [arrangement], competition in these buildings will be lower. Based on 3rd party research, we believe less choice in MTEs leads to higher prices for consumers . . . .”); Access Now 2021 Reply at 3-4.

<sup>123</sup> See, e.g., Lumen 2021 Comments at 10 (arguing in favor of disclosure of exclusive marketing arrangements “particularly to affected MTE tenants”); Fiber Broadband Association 2019 Comments at 8-9 (recommending that the Commission encourage providers to disclose exclusive marketing arrangements); INCOMPAS 2019 Comments at 18 (advocating that we require exclusive marketing arrangements be made transparent to MTE tenants); see also New America Open Technology Institute Comments, GN Docket No.17-142, at 5-6 (rec. Nov. 4, 2021) (Open Technology Institute 2021 Comments) (supporting disclosure of restrictive practices in MTEs).

<sup>124</sup> 2010 *Exclusive Service Contracts Order*, 25 FCC Red at 2473, para. 36.

benefits for marketing exclusivity is thus significantly pro-consumer.”<sup>125</sup> However, over a decade later, the evidence in the record paints a different picture. Based on the record now before us, we agree with commenters such as INCOMPAS and ACA Connects that a disclosure requirement for exclusive marketing arrangements will help level the playing field by increasing transparency for consumers about provider options and reducing confusion among MTE tenants about the availability of competitive communications services in an MTE, thus promoting competition for such services in the MTE.<sup>126</sup> Indeed, we find that when an exclusive marketing arrangement causes tenant confusion it can lead to de facto exclusive access—frustrating the goals of our exclusive access prohibition—by impeding entrance by third parties.<sup>127</sup> The disclosure requirement we adopt addresses this issue at its source by alleviating this confusion. And we agree with Lumen that tenants “deserve to know when this is occurring.”<sup>128</sup>

37. We disagree with commenters who assert that a disclosure requirement would not be beneficial because it would not provide tenants with useful information<sup>129</sup> or because tenants see advertisements for competitors elsewhere.<sup>130</sup> We find that, based on the compelling evidence in the current record, when only one company has the ability to market its communications services to MTE tenants, tenants often are not aware that other providers can serve the MTE or are given incorrect information that effectively limits their choice of providers—thus negatively impacting competition.<sup>131</sup> We further disagree with commenters who assert that exclusive marketing arrangements do not preclude competition and so action is unnecessary;<sup>132</sup> we find more persuasive the detailed record evidence of de facto exclusivity faced by competitive providers confronting an exclusive marketing arrangement in an MTE.<sup>133</sup> While some commenters argue we should prohibit exclusive marketing arrangements entirely,<sup>134</sup>

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<sup>125</sup> *Id.* at 2473, para. 37.

<sup>126</sup> INCOMPAS 2021 Comments at 22 (“A disclosure requirement would level the playing field.”); ACA Connects Comments, GN Docket No. 17-142, at 7-8 (rec. Oct. 20, 2021) (ACA Connects 2021 Comments) (stating that an appropriately-tailored disclosure requirement “would help ensure that MTE tenants are adequately informed of contractual agreements that have an impact on the broadband service options that are available to them”); *see also* Lumen 2021 Comments at 10; Open Technology Institute 2021 Comments at 5; Crown Castle 2019 Comments at 15.

<sup>127</sup> *See* Fiber Broadband Association 2019 Comments at 8 (exclusive marketing arrangements “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 customers . . . [t]he Commission can help address this concern by encouraging providers to disclose such arrangements”); *see also* City of Longmont 2021 Comments at 3 (exclusive marketing arrangements “have the same practical effect as outright exclusivity agreements because consumers who are unaware of competitive service offerings are highly unlikely to choose a competitive service provider”).

<sup>128</sup> Lumen 2021 Comments at 6.

<sup>129</sup> *See* Orlando Telephone Co., Inc. d/b/a Summit Broadband Comments GN Docket No. 17-142, at 4 (rec. Oct. 19, 2021) (Summit Broadband 2021 Comments); Real Estate Associations 2021 Comments at 67; WISPA 2021 Comments at 22; *see also* INCOMPAS Feb. 2022 *Ex Parte* at 2 (arguing without explanation that a disclosure requirement could “lead to additional confusion for landlords and tenants”).

<sup>130</sup> Real Estate Associations 2019 Comments at 73.

<sup>131</sup> *See* INCOMPAS 2021 Comments at 21 (stating that exclusive marketing arrangements have “the effect of limiting consumer awareness of other broadband services, and inhibits the tenant’s understanding of his, her, or their service alternatives”); *see also* City of Boston 2021 Comments at 7-8; Public Knowledge and Consumer Reports 2021 Comments at 10.

<sup>132</sup> *See, e.g.*, RealtyCom 2019 Comments at 4-6.

<sup>133</sup> *See* Consolidated Communications and Zply Fiber 2021 Comments at 10; Honest Networks 2021 Comments at 3; INCOMPAS 2021 Comments at 21; Crown Castle 2019 Comments at 15; Starry 2019 Comments at 9; *see also* Access Now 2021 Reply at 3-4; New York State Department of Public Service Reply, GN Docket No. 17-142, at 2 (rec. Nov. 19, 2021).

<sup>134</sup> *See, e.g.*, INCOMPAS Feb. 2022 *Ex Parte* at 2.

in this Report and Order we take this incremental step in light of record developments since the Commission last considered exclusive marketing arrangements in 2010,<sup>135</sup> and we will continue to monitor the impact of exclusive marketing arrangements on competition in MTEs.

38. We require that the disclosure meet the following three requirements: It must (1) be included on all written marketing material from the provider directed at tenants or prospective tenants of the affected MTE; (2) identify the existence of the exclusive marketing arrangement and include a plain-language description of the arrangement and what it means; and (3) be made in a manner that it is clear, conspicuous, and legible.<sup>136</sup> The term “written marketing material” includes electronic or print material. Written marketing material is “directed at” a tenant or prospective tenant of an MTE if it (1) contains specific mention of the MTE; (2) is provided directly to the tenant or prospective tenant because of its relationship (or prospective relationship) to the MTE, regardless of the means by which it is provided (including, but not limited to, being sent via email, regular mail, mailbox insert, or door hanger); or (3) given to a third party, including the MTE owner, with the understanding it will be directed at tenants or prospective tenants of the MTE.<sup>137</sup> It does not, however, include general-purpose marketing material that incidentally reaches tenants or prospective tenants of the MTE (e.g., general area media or online advertising, website promotions). We disagree that this disclosure needs to be made to other parties such as competitors or the Commission, as some commenters suggest,<sup>138</sup> because these commenters do not explain how a broader disclosure would resolve confusion on the part of MTE tenants (and prospective tenants).

39. In terms of the language of the disclosure, we require the provider to disclose that it has the right to exclusively market its communications services to tenants in the MTE, that such a right does not mean that the provider is the only entity that can provide such services to tenants in the MTE, and that service from an alternative provider may be available.<sup>139</sup> The latter disclosure is vital because this requirement is intended to alleviate the confusion caused to MTE tenants by the existence of an exclusive marketing arrangement and whether such an arrangement precludes competitive providers in the MTE.<sup>140</sup>

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<sup>135</sup> See, e.g., WISPA 2021 Reply at 12 (stating that “exclusive marketing [arrangements] have been expanded in unreasonable ways not initially contemplated a decade ago”).

<sup>136</sup> See Lumen 2021 Comments at 6-7 (stating that “this disclosure should be made to current and prospective tenants in the MTE, noting the existence of the preferred provider agreement and providing a plain English description of its terms”); CenturyLink 2019 Comments at 16.

<sup>137</sup> See Lumen 2021 Comments at 7 (“This disclosure should be required in any marketing materials the service provider supplies to the property owner, tenants, or prospective tenants.”).

<sup>138</sup> Fiber Broadband Association 2021 Reply at 6 (arguing that we should require “an incumbent service provider in the MTE to disclose to the Commission and to the requesting service provider the existence and terms of . . . exclusive agreements concerning . . . marketing”); see also CenturyLink 2019 Comments at 16-17 (arguing that the “preferred provider also should be required to make a . . . disclosure to competing providers seeking access to the MTE to provide service”).

<sup>139</sup> See Fiber Broadband Association 2019 Reply at 7 (arguing that tenants need to know “only that an agreement exists that allows only one provider to market to MTE residents within the MTE and that the agreement itself does not prohibit the tenant from seeking information and obtaining service from another provider”); Starry 2019 Comments at 12 (arguing that any required disclosure, among other things, describe the impact on the MTE tenant). The wording we expect for this requirement differs slightly from the wording proposed by INCOMPAS that would have providers notify MTE tenants that they “may select the broadband provider of their choice.” INCOMPAS 2021 Comments at 21. We believe that the INCOMPAS wording is overly broad, and instead require only communication that service from another provider may be available. *Accord* National Multifamily Housing Council et al. Reply, GN Docket No. 17-142, at 43 (rec. Nov. 19, 2021) (Real Estate Associations 2021 Reply) (“[I]t would not be accurate to require providers to suggest that residents can get service from any provider . . .”).

<sup>140</sup> See INCOMPAS 2021 Comments at 21; cf. INCOMPAS Feb. 2022 *Ex Parte* at 2 (“[T]he Commission must be prepared to educate the public that exclusive marketing is not a competition prohibition and that consumers and businesses retain the ability to choose their service provider.”).

To this end, we agree with commenters who argue that the disclosure need not include the business terms and conditions of the arrangements because they are not necessary to counteract any confusion and, in turn, promote competition.<sup>141</sup>

40. In terms of the disclosure being clear, conspicuous, and legible, we require that the disclosure be in plain language, easy to read, and as visible as any other business or legal terms in the marketing material being directed to the MTE tenants. We find that a disclosure is clear, conspicuous, and legible, and therefore is effectively communicated, “when it is displayed in a manner that is readily noticeable, readable . . . and understandable to the audience to whom it is disseminated.”<sup>142</sup> While we do not specify the precise fashion or formatting in which the required disclosure must be made, indicia of effective disclosures include “us[ing] clear and unambiguous language, avoid[ing] small type, plac[ing] any qualifying information close to the claim being qualified, and avoid[ing] making inconsistent statements or using distracting elements that could undercut or contradict the disclosure.”<sup>143</sup> With regard to formatting, a simple typeface, legible font size, and ample white space would also be indicia of an effective disclosure.<sup>144</sup>

41. This obligation applies to all exclusive marketing arrangements—both those that are already in place and those that are agreed to after the effective date of these rules. For new arrangements, we will enforce compliance with the disclosure requirement after the Office of Management and Budget completes its review of the new requirement pursuant to the Paperwork Reduction Act. To the extent a provider is operating under an exclusive marketing arrangement that is already in place, its disclosure obligation extends to marketing material produced after the compliance date applicable to existing marketing arrangements. We will not enforce compliance with the disclosure requirement for existing exclusive marketing arrangements until the later of (1) the Office of Management and Budget completing its review of the new requirements pursuant to the Paperwork Reduction Act, or (2) 180 days after publication of this Report and Order in the *Federal Register*.<sup>145</sup> To promote compliance, we direct the Wireline Competition Bureau to announce by Public Notice the compliance dates for new and existing exclusive marketing arrangements.

42. We find that the costs to providers for implementing this disclosure requirement will be outweighed by the benefits to consumers and MTEs of having accurate knowledge of exclusive marketing

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<sup>141</sup> See NCTA 2021 Comments at 14 n.35 (“Precise terms and conditions are competitively sensitive and are not necessary to counteract any confusion.”); Real Estate Associations 2021 Reply at 44 (“The Real Estate Associations believe that disclosure of contract terms is unlikely to benefit apartment residents or office or retail tenants.”); Verizon Reply, GN Docket No. 17-142, at 7 (rec. Nov. 19, 2021) (Verizon 2021 Reply) (arguing that “MTE owners would likely review the agreements that providers have reached with other MTE owners, and then insist on receiving the same, or more favorable, terms”).

<sup>142</sup> See *Joint FCC/FTC Policy Statement for Advertising of Dial-Around and Other Long-Distance Services to Consumers*, File No. 00-EB-TCD-1(PS), Policy Statement, 15 FCC Rcd 8654, 8663, para. 22 (2000) (*FCC/FTC Policy Statement*).

<sup>143</sup> *Id.* at 8662-63, para. 21 (stating that the FTC has used the term “‘clear and conspicuous’ to describe a general performance standard flexible enough to take into account both the consumer’s right to accurate information necessary to make an informed purchase decision and the many ways that creative advertisers can effectively convey that information. Because the FTC considers the disclosure in the context of all of the elements of the ad, the focus is not on the wording of the specific disclosure in isolation, but rather on the overall or ‘net’ impression that the entire advertisement—including the disclosure—conveys to reasonable consumers.”).

<sup>144</sup> See *FCC Consumer Advisory Committee Recommendation on Broadband Consumer Disclosures*, 2015 WL 6694021, at 5 (Mar. 12, 2015).

<sup>145</sup> We adopt a delayed compliance date for the disclosure requirement for existing exclusive marketing arrangements in order to give providers adequate time to bring their marketing materials into compliance with our new rules and to meet existing expectations regarding their production. See, e.g., Verizon Feb. 1, 2022 *Ex Parte* Letter at 1 (encouraging the Commission “to allow ample time for providers to bring existing agreements, if covered, into compliance with any new rules related to . . . the disclosure of exclusive marketing agreements”).

arrangements and the corresponding impact of such arrangements.<sup>146</sup> We believe complying with the written disclosure requirement should present minimal cost, given that the provider simply needs to include a brief, legible disclosure on marketing material it is otherwise planning to design, print (where appropriate), and send to tenants and prospective tenants of an MTE where it has an exclusive marketing arrangement. We do not believe a more onerous disclosure requirement—such as an affirmative, recurring disclosure<sup>147</sup>—is necessary to achieve this end. Rather, we find these minimal requirements for disclosure will alleviate confusion by making MTE tenants aware of the existence of an exclusive marketing arrangement and helping them understand that it does not preclude competition for individual customers in an MTE.<sup>148</sup>

### E. Legal Authority

43. We conclude that sections 201(b) and 628(b) of the Act provide us with authority for the rules we adopt today. We find authority over telecommunications carriers under section 201(b), which provides that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.”<sup>149</sup> Further, it provides that “[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”<sup>150</sup> We find that the revenue sharing agreements identified above and a provider’s failure to disclose exclusive marketing arrangements fall under our explicit statutory authority to address “unreasonable practice[s].” Section 201(b) served as the basis for the Commission’s prohibition on exclusive access contracts between telecommunications carriers and MTE owners.<sup>151</sup> The conduct we address today serves to undermine that prohibition by enabling telecommunications carriers to restrict access by alternative providers to MTEs; accordingly, we find authority under section 201(b) to prohibit certain revenue sharing agreements and to require limited disclosure of exclusive marketing arrangements by telecommunications carriers.

44. We find authority over covered MVPDs under section 628(b), which makes unlawful “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any [MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”<sup>152</sup> This is the same statutory provision that provided ample authority for the Commission’s prohibition on exclusive access contracts between covered MVPDs and residential MTE owners—there, the Commission found that “the use of an exclusivity clause by a cable operator to ‘lock up’ a [residential MTE] owner is an unfair method of competition or unfair act or practice because it can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings.”<sup>153</sup> We

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<sup>146</sup> See NCTA 2021 Comments at 14; WISPA 2021 Comments at 22; Verizon 2021 Reply at 7.

<sup>147</sup> See INCOMPAS 2021 Comments at 21 (suggesting we require providers to send these notices to MTE tenants prior to signing or renewing a lease with the MTE owner).

<sup>148</sup> See ACA Connects 2021 Comments at 8 (stating that “‘sunlight is the best disinfectant’: disclosure requirements could help root out practices (including those of landlords and property managers) that may be harmful to tenants”). And, to the extent MTE owners and their agents are confused by exclusive marketing arrangements, these disclosures should alleviate that confusion because they are likely to see the marketing material.

<sup>149</sup> 47 U.S.C. § 201(b).

<sup>150</sup> *Id.*

<sup>151</sup> 2008 *Competitive Networks Order*, 23 FCC Rcd at 5391, paras. 14-15; 2000 *Competitive Networks Order*, 15 FCC Rcd at 23000, para. 35.

<sup>152</sup> 47 U.S.C. § 548(b).

<sup>153</sup> 2007 *Exclusive Service Contracts Order*, 22 FCC Rcd at 20255, para. 43; *NCTA v. FCC*, 567 F.3d 659, 661 (holding that “the Commission acted well within the bounds” of section 628(b) in prohibiting MTE exclusive access agreements).

conclude that the same reasoning applies here. We find that the practices discussed above—the identified revenue sharing agreements and failure to disclose exclusive marketing arrangements—are “unfair methods of competition” that significantly hinder and in some cases prevent competing MVPDs from serving MTEs.<sup>154</sup> As detailed above, graduated revenue sharing and exclusive revenue sharing agreements amount to de facto exclusive access agreements—effectively preventing competitors, including those providing satellite cable and broadcast programming, from serving MTE tenants—by incentivizing MTE owners to favor one provider to the exclusion of others. Exclusive marketing arrangements lacking appropriate disclaimers to tenants significantly hinder and, in some cases, prevent competing providers from gaining access to MTEs where MTE tenants, and even MTE owners and their agents, erroneously believe the agreements preclude competitive access, and from competing for business in MTEs when they gain access. This confusion leads tenants to believe they have no choice in providers and prevents competing providers who have access to the building from advertising their service, resulting in de facto exclusive access.

45. We disagree with the Real Estate Associations that our actions today effectively regulate MTE owners rather than providers, and consequently that we lack authority to take them.<sup>155</sup> The rules we adopt today address practices by telecommunications carriers and covered MVPDs that serve as an impediment to competition for the services they offer in MTEs. The fact that these practices involve agreements with a third party does not eliminate our ability to address them. The U.S. Court of Appeals for the D.C. Circuit rejected just such an argument when it upheld the Commission’s MVPD exclusive access regulations.<sup>156</sup> As T-Mobile explains, “[t]he Commission’s authority is not diminished” even where our actions “may also affect property owners.”<sup>157</sup> We agree that “the Commission has the power to prevent carriers from restricting other carriers from deploying equipment and serving customers through participation in restrictive transactions” and that “[t]he Commission routinely adopts rules based on its clear regulatory authority that may have an impact on unregulated parties.”<sup>158</sup> Indeed, the Commission has previously found we possess “ample authority to prohibit exclusivity provisions in agreements for the provision of telecommunications service to . . . MTEs.”<sup>159</sup> This authority extends to “contractual or other arrangements between common carriers and other entities, even those entities that are generally not subject to Commission regulation.”<sup>160</sup> We therefore conclude that our actions today are authorized pursuant to sections 201(b) and 628(b).

46. We also disagree with the Real Estate Associations’ argument that a disclosure requirement of the type mandated in this Report and Order may violate the First Amendment.<sup>161</sup> As an

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<sup>154</sup> *Id.*

<sup>155</sup> Real Estate Associations 2019 Comments at 42-44; *see also* Real Estate Associations 2021 Comments at 80-81. We also reject the Real Estate Associations’ argument that regulation of revenue sharing agreements is tantamount to “utility-style regulation” of payments to landlords. Real Estate Associations 2021 Comments at 48-49. As we explain above, our prohibition on graduated and exclusive revenue sharing agreements stems from the exclusionary, anti-competitive effects these practices have, and we do not herein regulate the amount of payment MTE owners may receive.

<sup>156</sup> *NCTA v. FCC*, 567 F.3d at 667 (“We decline to put issues relating to [MTE residents’] cable service outside the Commission’s authority simply because those issues also matter to their landlords.”).

<sup>157</sup> T-Mobile Reply, GN Docket No. 17-142, at 15 (rec. Sept. 30, 2019) (T-Mobile 2019 Reply).

<sup>158</sup> *Id.* at 15 (referring to our rules prohibiting exclusive access contracts); *see also Bldg. Owners & Managers Ass’n Int’l v. FCC*, 254 F.3d 89, 96 (D.C. Cir. 2001) (where the Commission has regulatory authority to address building owner restrictions on renters, “it may assert jurisdiction over a party that directly furnishes those restrictions, and, in so doing, the Commission may alter property rights created under state law”).

<sup>159</sup> 2008 *Competitive Networks Order*, 23 FCC Rcd at 5391, para. 14.

<sup>160</sup> *Id.* at 5391, para. 15.

<sup>161</sup> Real Estate Associations 2021 Comments at 81.

initial matter, inasmuch as the Real Estate Associations argue that the disclosure requirement would violate the First Amendment rights of MTE owners, we do not today place any disclosure obligations on MTE owners. To the extent they argue this requirement violates the First Amendment rights of service providers, we find that this requirement does not unconstitutionally burden commercial speech. The Supreme Court has explained that the commercial speaker's "constitutionally protected interest in *not* providing any particular factual information . . . is minimal."<sup>162</sup> The Court explained further that disclosure requirements are consistent with the First Amendment provided they are "reasonably related to the [government's] interest in preventing deception of consumers."<sup>163</sup> Here, through a purely factual statement, the disclosure requirement will address the deception created by exclusive marketing arrangements that competitive communications services are unavailable. Thus, the disclosure requirement is "reasonably related to the [governmental] interest" of alleviating tenant confusion about their competitive communications options and thus allowing them to enjoy the benefits of competition for services in MTEs. This finding is consistent with past Commission decisions regarding pro-consumer disclosure requirements on entities under our jurisdiction.<sup>164</sup> And while we do not, in this Report and Order, rely on the authority recently provided by Congress to address digital discrimination,<sup>165</sup> we will explore the use of that authority if we determine further action is needed to address discrimination and promote access to broadband internet access service in MTEs.<sup>166</sup>

#### IV. DECLARATORY RULING

##### A. Section 76.802(j) Prohibits Sale-and-Leaseback Arrangements

47. We clarify that section 76.802(j) of the Commission's rules prohibits sale-and-leaseback arrangements.<sup>167</sup> Our clarification is intended to facilitate competitive entry in MTEs, a goal of the 1992 Cable Act that has motivated the Commission's cable inside wiring rules for nearly three decades.<sup>168</sup>

48. The Commission adopted section 76.802(j) in 1996 as part of a comprehensive new regulatory scheme to ensure that consumers are informed of their inside wiring rights when they contact

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<sup>162</sup> *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (emphasis in original); *see also id.* at 652 n.14 ("First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed.").

<sup>163</sup> *Id.* at 651.

<sup>164</sup> *See, e.g., Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming")*, CG Docket No. 11-116 et al., Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4481-83, paras. 127-132 (2012) (applying the *Zauderer* standard to affirm the required carrier disclosure of purely factual, non-controversial information related to charges on consumer telephone bills); *see also Technology Transitions*, WC Docket No. 05-25, GN Docket No. 13-5, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372, 9392, para. 33 (2015) (holding that "the government has an interest sufficient to compel incumbent LECs to provide necessary technical information to interconnecting entities to enable those entities to accommodate planned copper retirements without disruption of service to their customers"); *Policies and Rules Concerning Interstate 900 Telecommunications Services*, CC Docket No. 91-65, Report and Order, 6 FCC Rcd 6166, 6168, paras. 8, 12 (1991) ("The preamble is designed to prevent deception and confusion by providing the consumer 'purely factual and uncontroversial information about the terms under which (the) services will be available,' thereby enabling the consumer to make an informed purchasing decision.").

<sup>165</sup> Infrastructure Investment and Jobs Act, Pub. L. No. 117-578, § 60506 (2021).

<sup>166</sup> *See Public Knowledge 2022 Ex Parte* at 2.

<sup>167</sup> 47 CFR § 76.802(j).

<sup>168</sup> *See 1993 Inside Wiring Order*, 8 FCC Rcd at 1435, para. 19; *see also 1996 Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4570, para. 17 (observing that "the purpose of Section 16(d) [of the 1992 Cable Act] is to promote consumer choice and competition").

their provider to terminate service.<sup>169</sup> The Commission stated that the new regulatory framework would further the purposes of section 624(i) of the Communications Act, to ensure consumer choice with respect to “any cable installed by the cable operator within the premises of . . . the subscriber” in the event that the subscriber terminates service from that cable operator.<sup>170</sup> The Commission’s purpose was to ensure that subscribers “can quickly and easily use the wiring to connect to an alternative video programming service,” that “switching services will not be an onerous process,” and that “service will not be disrupted.”<sup>171</sup>

49. In section 76.802(j), the Commission proscribed behaviors that would frustrate the inside wiring regulatory framework and delineated provider duties necessary to ensure that the goals of the framework are realized. Specifically, the Commission (1) prohibited providers from using “any ownership interests” 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”; (2) required incumbent providers to “take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point”; and (3) required incumbent and alternative providers to cooperate with each other when the customer switched providers by taking steps to “to minimize the potential for signal leakage [in accordance with Commission regulations], theft of service and unnecessary disruption of the consumer’s premises.”<sup>172</sup> There is no indication in the *1996 Inside Wiring Order on Reconsideration* that the Commission anticipated a situation in which an incumbent provider would sell its inside wiring to the MTE owner and lease it back. It is clear, however, that the Commission was concerned with practices that would make it more difficult for alternative providers to access home wiring so they can replace incumbent providers, as well as with practices by an incumbent provider that could cause disruption to the subscriber by requiring an alternative provider to install new equipment inside the subscriber’s premises or otherwise on the subscriber’s side of the demarcation point.

50. As noted above, the Commission used broad, general language when it required incumbent providers (i.e., cable operators already providing service in a particular location) to “take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point.” In explaining this requirement in the adopting order, the Commission noted, as an example, that the incumbent should give the alternative provider access to the lockbox, if necessary, so the alternative provider can connect to the home wiring.<sup>173</sup> Additionally, when it prohibited providers from using their “ownership interest in property” on the subscriber’s side of the demarcation point, the Commission was addressing concerns that alternative providers might have to install new equipment on the subscriber’s side of the demarcation point, causing additional expense and disruption.<sup>174</sup> The Commission concluded that this prohibition would address concerns that misuse of a provider’s ownership of property on the subscriber’s side of the demarcation point could frustrate the purposes of the cable home wiring rules and section 624(i) of the Act.<sup>175</sup>

51. In the *2019 MTE NPRM*, the Commission sought comment on whether sale-and-leaseback arrangements contravene the longstanding requirements on incumbent providers to “take reasonable steps within their control to ensure that an alternative service provider has access to the home

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<sup>169</sup> *1996 Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4572-73, 4575, 4581-82, paras. 20, 24, 37-39 & Appx B.

<sup>170</sup> 47 U.S.C. § 544(i).

<sup>171</sup> *1996 Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4575, para. 24.

<sup>172</sup> 47 CFR § 76.802(j).

<sup>173</sup> *1996 Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4572-73, para. 20.

<sup>174</sup> *Id.* at 4581-82, paras. 37-39.

<sup>175</sup> *Id.* at 4582, para. 39.

wiring at the demarcation point” and to not use 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 alternate service.”<sup>176</sup> After review of the record, we clarify that this rule prohibits sale-and-leaseback arrangements, as defined below, which thwart our cable inside wiring rules and the pro-competitive policy goals underlying them.

52. A sale-and-leaseback arrangement is an arrangement whereby an incumbent provider conveys its inside wiring—typically both home and home run wiring—to a residential MTE owner and then leases it back on an exclusive basis.<sup>177</sup> As the Fiber Broadband Association points out, this practice, if permitted, would deprive existing subscribers of the opportunity under section 76.802(a)(2) “to purchase the [cable home] wiring at the replacement cost and use that wiring to receive an alternative service.”<sup>178</sup> INCOMPAS states that these arrangements would defeat the purpose of the rules, “which were created to promote competition and consumer choice.”<sup>179</sup> The City of San Francisco agrees that such practices are “antithetical to the Commission’s regulation[s].”<sup>180</sup> AARP describes sale-and-leaseback arrangements as “[e]xclusionary behavior that should be banned.”<sup>181</sup> And Verizon argues that sale-and-leaseback arrangements are inconsistent with the goal of the rules of “facilitat[ing] competitive access to unused cable wiring.”<sup>182</sup>

53. Other commenters defend sale-and-leaseback arrangements as beneficial. NCTA claims that MVPDs agree to sale-and-leaseback arrangements because they “provide a measure of certainty that service providers will have the opportunity to recover their investments.”<sup>183</sup> The Real Estate Associations similarly argue that sale-and-leaseback arrangements can be useful because they “have the very important

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<sup>176</sup> 47 CFR § 76.802(j). The “demarcation point” is where home run wiring becomes cable home wiring, and its location is at or about twelve inches outside of the unit (or closest practicable point thereto outside the unit). 47 CFR § 76.5(mm)(2), (3). *See also Telecommunications Servs. Inside Wiring Customer Premises Equip. et al.*, CS Docket No. 95-184 et al., Report and Order and Declaratory Ruling, 22 FCC Rcd. 10640, 10642, para. 5 (2007).

<sup>177</sup> *See 2019 MTE NPRM*, 34 FCC Rcd at 5716, para. 24 (further explaining that “sale-and-leaseback arrangements often include provisions requiring the provider to maintain the inside wiring and other facilities”). For purposes of this Declaratory Ruling, these types of arrangements do not include circumstances in which an MTE owner acquires the cable home wiring pursuant to section 76.802(a)(2) after the subscriber declines to purchase the wiring following their choice to terminate service, or contracts for the installation of new inside wiring and related facilities in which the MTE owner (or affiliate(s)) will have the sole ownership interest. 47 CFR § 76.802(a)(2).

<sup>178</sup> *See Fiber Broadband Association 2021 Comments* at 5 (“[I]f a provider sells its wiring to an MTE owner and leases it back before a subscriber terminates services, the subscriber will lose the opportunity under Section [76.802(a)(2)] of the Commission’s rules to purchase the wiring at the replacement cost and use that wiring to receive an alternative service.”).

<sup>179</sup> INCOMPAS Comments at 16; *see also Public Knowledge 2022 Ex Parte* at 1; ADTRAN 2019 Comments at 8; WISPA 2019 Comments at 18.

<sup>180</sup> City of San Francisco 2019 Comments at 6-7.

<sup>181</sup> AARP 2021 Comments at 8; *see also City of Longmont 2021 Comments* at 5 (arguing that the definition of sale-and-leaseback “in and of itself demonstrates the anti-competitive nature of such arrangements” and that these agreements often lead to what is tantamount to an exclusive access contract); Starry 2021 Comments at 8 (describing sale-and-leaseback arrangements as “anti-competitive provisions”).

<sup>182</sup> Verizon 2021 Reply at 7; Fiber Broadband Association 2019 Comments at 6 (sale-and-leaseback arrangements “can be anticompetitive”).

<sup>183</sup> NCTA 2019 Comments at 4-5.

practical effect of putting [MVPDs] in the same position as the [telecommunications carriers],” who are not subject to the Commission’s cable inside wiring rules.<sup>184</sup>

54. The record reflects that sale-and-leaseback arrangements take inside wiring out of the hands of incumbent providers, while allowing the incumbent providers to maintain existing subscriber relationships, in furtherance of a practice that is inconsistent with the requirements of the Commission’s cable inside wiring rules.<sup>185</sup> Specifically, such action by an incumbent provider contravenes two provisions of 76.802(j) designed to ensure an MTE subscriber’s ability to benefit from section 76.802(a)(2) of the cable inside wiring rules.<sup>186</sup> Accordingly, we reach our decision based on two separate and independent bases. First, an incumbent provider’s participation in a sale-and-leaseback arrangement violates its obligation to take reasonable steps within its control to ensure that an alternative service provider has access to the home wiring at the demarcation point following a subscriber’s voluntary termination of service.<sup>187</sup> Second, such arrangements contravene the prohibition on providers from using any ownership interests they may have in property located on the subscriber’s side of the demarcation point to interfere with a subscriber’s right to use its home wiring to receive an alternative service following the subscriber’s voluntary termination of service.<sup>188</sup>

55. By participating in such arrangements, an incumbent provider fails to meet the affirmative duty to take “reasonable steps within [its] control to ensure that an alternative service provider has access to home wiring at the demarcation point” following a voluntary termination of service.<sup>189</sup> By selling its cable home wiring to the MTE owner and then leasing back the wiring on an exclusive basis—thereby removing it from the cable inside wiring scheme while retaining the subscriber relationship—the incumbent provider actively precludes an alternative provider from accessing the cable home wiring at the demarcation point following a voluntary termination of service in the manner established by the Commission’s cable inside wiring rules.<sup>190</sup> By transferring ownership of the home wiring to the MTE owner while the wiring still remains “within [the incumbent provider’s] control”<sup>191</sup> and then leasing back the wiring on an exclusive basis, the incumbent provider falls well short of its affirmative obligation to ensure an alternative provider can access the cable home wiring at the demarcation point following a voluntary termination of service, not unlike how an incumbent cable operator may preclude access to home wiring by making its lockbox physically inaccessible.<sup>192</sup> Thus, based on its text, history, and purpose, we clarify that section 76.802(j) prohibits sale-and-leaseback arrangements that deny existing

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<sup>184</sup> Real Estate Associations 2019 Comments at 37. We observe, however, that the Commission has promulgated rules regarding access and control to inside wiring in the telecommunications context. See 47 CFR §§ 51.319, 68.213; 2019 MTE NPRM, 34 FCC Rcd at 5705, para. 5 & n.20.

<sup>185</sup> See Fiber Broadband Association 2019 Comments at 7 (explaining further that “[u]nder these circumstances, the MTE owner can inhibit the subscriber from choosing an alternative provider, which is the circumstance the rules were meant to prevent”).

<sup>186</sup> See 1996 *Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4570-75, para. 17-24 (adopting additional provisions regarding the voluntary termination of service by an existing subscriber).

<sup>187</sup> See 47 CFR § 76.802(a)(2), (j).

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* § 76.802(a)(2).

<sup>191</sup> *Id.* § 76.802(j).

<sup>192</sup> See 1996 *Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4573, para. 20 (identifying “prompt access” to the lockbox “where the placement of the lockbox impedes access to the demarcation point” as an example of a practice required by this provision).

subscribers the opportunity to exercise their rights under section 76.802(a)(2), a conclusion supported by the record.<sup>193</sup>

56. In addition, sale-and-leaseback arrangements contravene section 76.802(j)'s prohibition on "using any ownership interests . . . in property located on the subscriber's side of the demarcation point, such as molding or conduit, 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."<sup>194</sup> Under a sale-and-leaseback arrangement, an incumbent provider uses its ownership interest in the cable home wiring located on the subscriber's side of the demarcation point to sell it and lease it back on an exclusive basis. In so doing, it prevents the subscriber from taking advantage of the cable inside wiring rules—that were applicable to the subscriber prior to the sale of the inside wiring—to obtain alternative service from a competing provider following a voluntary termination of service.<sup>195</sup> When it adopted this rule, the Commission recognized that ownership interests in property on the subscriber's side of the demarcation point might be misused to "frustrate the purposes of our cable home wiring rules and . . . the 1992 Cable Act" of eliminating barriers to tenants' choice of service provider.<sup>196</sup> Although the rule specifically references "molding or conduit" as examples of covered property, in adopting this rule, the Commission did not limit its scope to property simply "relating to the cable home wiring," but included "*any* ownership interest in property located on the subscriber's side of the demarcation point," generally.<sup>197</sup> We thus clarify that an incumbent provider's use of its ownership interest in the cable home wiring itself in the context of a sale-and-leaseback to frustrate a subscriber's ability to benefit from section 76.802(a)(2) of the cable inside wiring rules contravenes this prohibition.

57. This determination will promote competitive choice in residential MTEs by preventing incumbent providers from engaging in a practice that violates our cable inside wiring rules. These rules help ensure that MTE tenants have the opportunity to subscribe to an alternative provider following a voluntary termination of service, which promotes competition and all associated benefits, including lower prices and improved service quality, as well as encourage broadband deployment.<sup>198</sup> We disagree with NCTA's bare assertion that sale-and-leaseback arrangements should be permitted because they give providers "certainty" regarding their investment by ensuring the opportunity to "provid[e] service to the MTE's residents and tenants."<sup>199</sup> NCTA does not explain exactly how the arrangements operate to do so, and the only explanation in the record is that the arrangement transfers ownership of the cable inside wiring to the MTE owner, an entity that is not subject to our rules regarding the disposition of cable inside wiring. Even assuming that sale-and-leaseback arrangements provide certain investment security, they do so at the expense of alternative providers' ability to compete and allowing tenants the competitive choice offered by our cable inside wiring rules. In any event, as explained above, sale-and-leaseback arrangements are inconsistent with our rules, preventing subscribers from availing themselves of our cable inside wiring rules following a voluntary termination of service and impeding competitors' ability to provide service. Lacking the choice safeguarded by our cable inside wiring rules, MTE subscribers potentially face higher prices, lower service quality, and fewer options for services best suited to their

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<sup>193</sup> See INCOMPAS 2021 Comments at 16; Verizon 2021 Reply at 7; WISPA 2021 Comments at 16; ADTRAN 2019 Comments at 8; Fiber Broadband Association 2019 Comments at 6.

<sup>194</sup> 47 CFR § 76.802(a)(2), (j).

<sup>195</sup> *Id.* § 76.802(a)(2).

<sup>196</sup> *1996 Inside Wiring Order on Reconsideration*, 11 FCC Rcd at 4582, para. 39.

<sup>197</sup> *Id.* (emphasis added).

<sup>198</sup> See *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20244-46, paras. 17-20.

<sup>199</sup> NCTA 2019 Comment at 4-5; see also Summit Broadband 2021 Comments at 1-2.

needs, options which our rules were designed to ensure that the incumbents would not take steps to eliminate.<sup>200</sup>

58. To the extent sale-and-leaseback arrangements are uncommon, as the Real Estate Associations allege, we disagree that our clarification today is therefore unnecessary.<sup>201</sup> The prevalence of a practice has no bearing on its consistency with our rules. We also reject the Fiber Broadband Association’s suggestion that such agreements should be prohibited except when “a service provider and MTE owner can prove that they do not harm competition.”<sup>202</sup> Our objective in this Declaratory Ruling is to provide clarity regarding prohibited practices in order to foster competitive entry as set forth in section 76.802(a)(2). A case-by-case competition analysis has no bearing on whether sale-and-leaseback agreements violate section 76.802(j). Instead, we find that the ability to seek a waiver provides adequate relief.<sup>203</sup>

59. We underscore that this determination applies to arrangements whereby an MVPD conveys its inside wiring to a residential MTE owner before the subscriber terminates service and then leases it back on an exclusive basis.<sup>204</sup> Although the Commission and stakeholders have referred to this practice as “sale-and-leaseback,” we agree with WISPA that any form of conveyance violates section 76.802(j) of our rules in this context.<sup>205</sup> Therefore, this determination extends to all instances where an incumbent MVPD conveys its inside wiring in a residential MTE—whether or not for monetary consideration—to the MTE owner before the subscriber terminates service and then leases it back on an exclusive basis.

60. To avoid issues that are made much more difficult by the passage of time—for example, determining the historical ownership of the wiring—that would tie up Commission resources without commensurate gain, and to address any potential hardships from prior application of this determination, we will focus our scrutiny on sale-and-leaseback arrangements entered into after the Commission began examining this practice in the 2017 *MTE NOI*.<sup>206</sup> As a practical matter, we will forego focusing on arrangements made prior to this time.

## V. PROCEDURAL MATTERS

61. *Final Regulatory Flexibility Analysis.* Pursuant to the Regulatory Flexibility Act of 1980 (RFA), as amended,<sup>207</sup> the Commission’s Final Regulatory Flexibility Analysis is set forth in Appendix B. The Commission’s Consumer and Governmental Affairs Bureau, Reference Information Center, will send

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<sup>200</sup> See 2007 *Exclusive Service Contracts Order*, 22 FCC Rcd at 20244-47, paras. 17-22.

<sup>201</sup> Real Estate Associations 2021 Comments at 65; see also Real Estate Associations 2019 Comments at 74; Fiber Broadband Association 2021 Comments at 4-5 (explaining that FBA understands that “sale-and-leaseback arrangements are not commonly used” but is still concerned about their use to evade Commission rules); WISPA 2019 Reply at 22 (arguing that “[i]f in fact sale-and-leaseback agreements are ‘very rare,’ then prohibiting them should have very little impact on the industry and, in any event, will prohibit those few contracts that act as a bar to competitive access”).

<sup>202</sup> Fiber Broadband Association 2021 Comments at 5.

<sup>203</sup> See 47 CFR § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

<sup>204</sup> See *supra* para. 51. This clarification does not require the sharing of in-use wiring. Cf. MBC 2019 Comments at 10-11.

<sup>205</sup> See WISPA 2021 Reply at 6-7; see also Real Estate Associations 2021 Comments at 64 (claiming that, often “[t]here is no sale, nominal or otherwise,” and no money transfers from one party to the other).

<sup>206</sup> 2017 *MTE NOI*, 32 FCC Rcd at 5389, para. 15.

<sup>207</sup> See 5 U.S.C. § 603.

a copy of this Report and Order and Declaratory Ruling, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>208</sup>

62. *Paperwork Reduction Act.* This document contains new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, we previously sought comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.<sup>209</sup>

63. *Congressional Review Act.* The Commission has determined, and the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, concurs, that this rule is “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2). The Commission will send a copy of this Report and Order and Declaratory Ruling to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

64. *People with Disabilities.* To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice).

65. *Contact Person.* For further information, please contact Benjamin (Jesse) Goodwin, Competition Policy Division, Wireline Competition Bureau, at (202) 418-0958 or [Benjamin.Goodwin@fcc.gov](mailto:Benjamin.Goodwin@fcc.gov).

## VI. ORDERING CLAUSES

66. IT IS ORDERED that pursuant to the authority contained in sections 1-4, 201(b), 303(r), 601(4), 601(6), 624(i), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201(b), 303(r), 521(4), 521(6), 544(i), and 548, and sections 1.4(b)(1) and 1.103(a) of the Commission’s rules, 47 CFR §§ 1.4(b)(1), 1.103(a), this Report and Order IS ADOPTED.

67. IT IS FURTHER ORDERED that pursuant to the authority contained in sections 1-4, 303(r), 601(4), 601(6), and 624(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 303(r), 521(4), 521(6), and 544(i), and sections 1.2, 76.5, 76.800 *et seq.*, and 76.802 of the Commission’s rules, 47 CFR §§ 1.2, 76.5, 76.800 *et seq.*, and 76.802, this Declaratory Ruling IS ADOPTED.

68. IT IS FURTHER ORDERED that Parts 64 and 76 of the Commission’s rules ARE AMENDED as set forth in Appendix A and such amendments SHALL BE EFFECTIVE 30 days after publication in the *Federal Register*, except that compliance with sections 64.2500(c)(2)(ii) and (d)(2) and 76.2000(b)(2)(ii) and (c)(2) of the Commission’s rules, 47 CFR §§ 64.2500(c)(2)(ii), (d)(2), 76.2000(b)(2)(ii), (c)(2), will not be required until 180 days after publication in the *Federal Register*; compliance with sections 64.2500(e) and 76.2000(d) of the Commission’s rules, 47 CFR §§ 64.2500(e), 76.2000(d), will not be required until the Office of Management and Budget completes any review that the Wireline Competition Bureau determines is required under the Paperwork Reduction Act; and compliance with sections 64.2500(e)(2)(ii) and 76.2000(d)(2)(ii) of the Commission’s rules, 47 CFR §§ 64.2500(e)(2)(ii), 76.2000(d)(2)(ii), will not be required until the later of [[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]] or the date that the Office of Management and Budget completes its review of the requirements in paragraph (e) pursuant to the Paperwork Reduction Act. The Commission directs the Wireline Competition Bureau to announce compliance dates

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<sup>208</sup> See 5 U.S.C. § 603(a).

<sup>209</sup> See 44 U.S.C. § 3506(c)(4).

for sections 64.2500(e) and 76.2000(d) by subsequent Public Notice and to cause 47 CFR §§ 64.2500(e) and 76.2000(d) to be revised accordingly.

69. IT IS FURTHER ORDERED that the Declaratory Ruling and the obligations set forth therein SHALL BE EFFECTIVE on the same day that the amendments to Parts 64 and 76 of the Commission’s rules become effective.

70. IT IS FURTHER ORDERED that, pursuant to 47 CFR § 1.4(b)(1), the period for filing petitions for reconsideration or petitions for judicial review with respect to all aspects of this Report and Order and Declaratory Ruling will commence on the date that a summary of this Report and Order and Declaratory Ruling is published in the Federal Register.

71. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order and Declaratory Ruling to Congress and to the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

72. IT IS FURTHER ORDERED that the Commission’s Consumer & Governmental Affairs Bureau, Reference Information Center SHALL SEND a copy of this Report and Order and Declaratory Ruling, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Final Rules

The Federal Communications Commission amends parts 64 and 76 of Title 47 of the Code of Federal Regulations as follows:

**PART 64 – MISCELLANEOUS RULES RELATING TO COMMON CARRIERS**

1. Amend § 64.2500 by changing the title of the section and adding subsections (c)-(f) as follows:

**§ 64.2500 Prohibited agreements and required disclosures.**

\* \* \* \* \*

(c) No common carrier shall enter into or enforce any contract regarding the provision of communications service in a multiunit premise, written or oral, in which it gives the multiunit premise owner compensation on a graduated basis.

- (1) For purposes of this rule, a “graduated basis” means that the compensation a common carrier pays to a multiunit premise owner for each tenant served increases as the total number of tenants served by the common carrier in the multiunit premise increases.

(2) *Compliance Dates.*

(i) *Compliance date for new contracts.* After [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no common carrier shall enter into any contract regarding the provision of communications service in a multiunit premise, written or oral, in which it gives the multiunit premise owner compensation on a graduated basis.

(ii) *Compliance date for existing contracts.* After [[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no common carrier shall enforce any contract regarding the provision of communications service in a multiunit premise, written or oral, in existence as of [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], in which it gives the multiunit premise owner compensation on a graduated basis.

(d) No common carrier shall enter into or enforce any contract regarding the provision of communications service in a multiunit premise, written or oral, in which it receives the exclusive right to provide the multiunit premise owner compensation in return for access to the multiunit premise and its tenants.

(1) *Compliance date for new contracts.* After [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no common carrier shall enter into any contract, written or oral, in which it receives the exclusive right to provide the multiunit premise owner compensation in return for access to the multiunit premise and its tenants.

(2) *Compliance date for existing contracts.* After [[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no common carrier shall enforce any contract regarding the provision of communications service in a multiunit premise written or oral, in existence as of [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], in which it receives the exclusive right to provide the multiunit premise owner compensation in return for access to the multiunit premise and its tenants.

(e) A common carrier shall disclose the existence of any contract regarding the provision of communications service in a multiunit premise, written or oral, in which it receives the exclusive right to market its service to tenants of a multiunit premise.

(1) Such disclosure must:

(i) Be included on all written marketing material, whether electronic or in print, that is directed at tenants or prospective tenants of the affected multiunit premise;

(ii) Identify the existence of the contract and include a plain-language description of the arrangement, including that the provider has the right to exclusively market its communications services to tenants in the multiunit premise, that such a right does not mean that the provider is the only entity that can provide such services to tenants in the multiunit premise, and that service from an alternative provider may be available; and

(iii) Be made in a manner that it is clear, conspicuous, and legible.

(2) *Compliance dates.*

(i) *Compliance date for new contracts.* Paragraph (e) of this section may contain an information-collection and/or recordkeeping requirement. Compliance with paragraph (e) will not be required for new contracts until this paragraph (f) is removed or contains a compliance date for new contracts, which will not occur until after the Office of Management and Budget completes review of such requirements pursuant to the Paperwork Reduction Act or until after the Wireline Competition Bureau determines that review is not required.

(ii) *Compliance date for existing contracts.* For contracts in existence as of the compliance date for new contracts, compliance with paragraph (e) will not be required until the later of [[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]] or the date that the Office of Management and Budget completes any review of the requirements in paragraph (e) pursuant to the Paperwork Reduction Act.

## **PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

2. Amend § 76.2000 as follows to add subsections (b)-(e) and renumber (b) as (f) as follows:

### **§ 76.2000 Exclusive access to multiple dwelling units generally.**

\* \* \* \* \*

(b) No cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall enter into or enforce any contract regarding the provision of communications service in a MDU, written or oral, in which it gives the MDU owner compensation on a graduated basis.

(1) For purposes of this rule, a “graduated basis” means that the compensation a cable operator or other provider of MVPD service subject to 47 U.S.C. 548 pays to a MDU owner for each tenant served increases as the total number of tenants served by the cable operator or other provider of MVPD service subject to 47 U.S.C. 548 in the MDU increases.

(2) *Compliance Dates.*

(i) *Compliance date for new contracts.* After [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall enter into any contract regarding the provision of communications service in a MDU, written or oral, in which it gives the MDU owner compensation on a graduated basis.

(ii) *Compliance date for existing contracts.* After [[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall enforce any contract regarding the provision of communications service in an MDU, written or oral, in existence as of [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], in which it gives the MDU owner compensation on a graduated basis.

(c) No cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall enter into or enforce any contract regarding the provision of communications service in a MDU, written or oral, in which it receives the exclusive right to provide the MDU owner compensation in return for access to the MDU and its tenants.

(1) *Compliance date for new contracts.* After [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall enter into any contract, written or oral, in which it receives the exclusive right to provide the MDU owner compensation in return for access to the MDU and its tenants.

(2) *Compliance date for existing contracts.* After [[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], no cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall enforce any contract regarding the provision of communications service in a MDU, written or oral, in existence as of [[INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]], in which it receives the exclusive right to provide the MDU owner compensation in return for access to the MDU and its tenants.

(d) A cable operator or other provider of MVPD service subject to 47 U.S.C. 548 shall disclose the existence of any contract regarding the provision of communications service in a MDU, written or oral, in which it receives the exclusive right to market its service to tenants of a MDU.

(1) Such disclosure must:

(i) Be included on all written marketing material, whether electronic or in print, that is directed at tenants or prospective tenants of the affected MDU;

(ii) Identify the existence of the contract and include a plain-language description of the arrangement, including that the provider has the right to exclusively market its communications services to tenants in the MDU, that such a right does not mean that the provider is the only entity that can provide such services to tenants in the MDU, and that service from an alternative provider may be available; and

(iii) Be made in a manner that it is clear, conspicuous, and legible.

(2) *Compliance dates.*

(i) *Compliance date for new contracts:* Paragraph (d) of this section may contain an information-collection and/or recordkeeping requirement. Compliance with paragraph (d) will not be required until this paragraph (e) is removed or contains a compliance date, for new contracts, which will occur after the Office of Management and Budget completes its review of such requirements pursuant to the Paperwork Reduction Act or until after the Wireline Competition Bureau determines that review is not required.

(ii) *Compliance date for existing contracts.* For contracts in existence as of the compliance date for new contracts, compliance with the paragraph (d) will not be required until the later of [[INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]] or the date that the Office of Management and Budget completes any review of the requirements in paragraph (d) pursuant to the Paperwork Reduction Act.

**APPENDIX B****Final Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended,<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *2019 Improving Competitive Broadband Access to Multiple Tenant Environments Notice of Proposed Rulemaking (Notice)*.<sup>2</sup> The Commission sought written public comments on the proposals in the *Notice*, including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the Rules**

2. This Report and Order takes action to promote competition in multiple tenant environments (MTEs) by addressing two practices that impede competition for communications service in MTEs. First, this Report and Order adopts rules prohibiting providers from entering into two types of revenue sharing agreements which discourage competition and have no connection to costs borne by MTE owners: exclusive and graduated revenue sharing agreements.<sup>4</sup> Second, it adopts rules requiring providers to disclose the existence of exclusive marketing arrangements in simple, easy-to-understand language.<sup>5</sup> Both of these practices undercut the goals of the Commission's longstanding rules prohibiting exclusive access contracts in MTEs, and by adopting these rules we promote competition and tenant choice in MTEs.

**B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA**

3. There were no comments filed that specifically addressed the proposed rules and policies presented in the IRFA.

**C. Response to Comments by the Chief Counsel for Advocacy of the SBA**

4. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.<sup>6</sup> On January 20, 2022, the Chief Counsel filed an *ex parte* letter discussing the proposed rules. The Report and Order addresses these comments and adopts the rules favored by the Chief Counsel.<sup>7</sup>

**D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply**

5. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the Notice seeks comment, if adopted.<sup>8</sup> The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *Improving Competitive Broadband Access to Multiple Tenant Environments et al.*, GN Docket No. 17-142 et al., Notice of Proposed Rulemaking, 34 FCC 5702 (2019).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> See *supra* paras. 16-32.

<sup>5</sup> See *supra* paras. 33-42.

<sup>6</sup> 5 U.S.C. § 604(a)(3).

<sup>7</sup> See *supra* paras. 24-25.

<sup>8</sup> See 5 U.S.C. § 603(b)(3).

jurisdiction.”<sup>9</sup> In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.<sup>10</sup> A “small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>11</sup>

6. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.<sup>12</sup> First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration’s (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees.<sup>13</sup> These types of small businesses represent 99.9% of all businesses in the United States, which translates to 32.5 million businesses.<sup>14</sup>

7. Next, the type of small entity described as a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>15</sup> The Internal Revenue Service (IRS) uses a revenue benchmark of \$50,000 or less to delineate its annual electronic filing requirements for small exempt organizations.<sup>16</sup> Nationwide, for tax year 2018, there were approximately 571,709 small exempt organizations in the U.S. reporting revenues of \$50,000 or less according to the registration and tax data for exempt organizations available from the IRS.<sup>17</sup>

8. Finally, the small entity described as a “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>18</sup> U.S. Census Bureau data from the 2017 Census

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<sup>9</sup> See 5 U.S.C. § 601(6).

<sup>10</sup> 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>11</sup> See 15 U.S.C. § 632.

<sup>12</sup> See 5 U.S.C. § 601(3)-(6).

<sup>13</sup> See SBA, Office of Advocacy, Frequently Asked Questions, “What is a small business?,” <https://cdn.advocacy.sba.gov/wp-content/uploads/2021/11/03093005/Small-Business-FAQ-2021.pdf>. (Nov 2021).

<sup>14</sup> *Id.*

<sup>15</sup> 5 U.S.C. § 601(4).

<sup>16</sup> The IRS benchmark is similar to the population of less than 50,000 benchmark in 5 U.S.C § 601(5) that is used to define a small governmental jurisdiction. Therefore, the IRS benchmark has been used to estimate the number small organizations in this small entity description. See Annual Electronic Filing Requirement for Small Exempt Organizations — Form 990-N (e-Postcard), “Who must file,” <https://www.irs.gov/charities-non-profits/annual-electronic-filing-requirement-for-small-exempt-organizations-form-990-n-e-postcard>. We note that the IRS data does not provide information on whether a small exempt organization is independently owned and operated or dominant in its field.

<sup>17</sup> See Exempt Organizations Business Master File Extract (EO BMF), “CSV Files by Region,” <https://www.irs.gov/charities-non-profits/exempt-organizations-business-master-file-extract-eo-bmf>. The IRS Exempt Organization Business Master File (EO BMF) Extract provides information on all registered tax-exempt/non-profit organizations. The data utilized for purposes of this description was extracted from the IRS EO BMF data for Region 1-Northeast Area (76,886), Region 2-Mid-Atlantic and Great Lakes Areas (221,121), and Region 3-Gulf Coast and Pacific Coast Areas (273,702) which includes the continental U.S., Alaska, and Hawaii. This data does not include information for Puerto Rico.

<sup>18</sup> 5 U.S.C. § 601(5).

of Governments<sup>19</sup> indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.<sup>20</sup> Of this number there were 36,931 general purpose governments (county<sup>21</sup>, municipal and town or township<sup>22</sup>) with populations of less than 50,000 and 12,040 special purpose governments - independent school districts<sup>23</sup> with enrollment populations of less than 50,000.<sup>24</sup> Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of “small governmental jurisdictions.”<sup>25</sup>

## 1. Wireline Carriers

9. *Wired Telecommunications Carriers.* The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>26</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>27</sup> U.S. Census Bureau data for 2012 show that there were 3,117 firms

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<sup>19</sup> See 13 U.S.C. § 161. The Census of Governments survey is conducted every five (5) years compiling data for years ending with “2” and “7”. See also Census of Governments, <https://www.census.gov/programs-surveys/cog/about.html>.

<sup>20</sup> See U.S. Census Bureau, 2017 Census of Governments – Organization Table 2. Local Governments by Type and State: 2017 [CG1700ORG02], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. Local governmental jurisdictions are made up of general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts). See also Table 2. CG1700ORG02 Table Notes\_Local Governments by Type and State\_2017.

<sup>21</sup> See *id.* at Table 5. County Governments by Population-Size Group and State: 2017 [CG1700ORG05]. <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 2,105 county governments with populations less than 50,000. This category does not include subcounty (municipal and township) governments.

<sup>22</sup> See *id.* at Table 6. Subcounty General-Purpose Governments by Population-Size Group and State: 2017 [CG1700ORG06], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 18,729 municipal and 16,097 town and township governments with populations less than 50,000.

<sup>23</sup> See *id.* at Table 10. Elementary and Secondary School Systems by Enrollment-Size Group and State: 2017 [CG1700ORG10], <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html>. There were 12,040 independent school districts with enrollment populations less than 50,000. See also Table 4. Special-Purpose Local Governments by State Census Years 1942 to 2017 [CG1700ORG04], CG1700ORG04 Table Notes\_Special Purpose Local Governments by State\_Census Years 1942 to 2017.

<sup>24</sup> While the special purpose governments category also includes local special district governments, the 2017 Census of Governments data does not provide data aggregated based on population size for the special purpose governments category. Therefore, only data from independent school districts is included in the special purpose governments category.

<sup>25</sup> This total is derived from the sum of the number of general purpose governments (county, municipal and town or township) with populations of less than 50,000 (36,931) and the number of special purpose governments - independent school districts with enrollment populations of less than 50,000 (12,040), from the 2017 Census of Governments - Organizations Tables 5, 6, and 10.

<sup>26</sup> See U.S. Census Bureau, 2017 NAICS Definition, “517311 Wired Telecommunications Carriers,” <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>27</sup> See 13 CFR § 120.201, NAICS Code 517311 (previously 517110).

that operated that year.<sup>28</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>29</sup> Thus, under this size standard, the majority of firms in this industry can be considered small.

10. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers.<sup>30</sup> Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>31</sup> U.S. Census Bureau data for 2012 show that there were 3,117 firms that operated for the entire year.<sup>32</sup> Of that total, 3,083 operated with fewer than 1,000 employees.<sup>33</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

11. *Incumbent LECs*. Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers.<sup>34</sup> Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>35</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated the entire year.<sup>36</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>37</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, one thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.<sup>38</sup> Of this total, an estimated 1,006 have 1,500 or fewer employees.<sup>39</sup> Thus, using the SBA's size standard the majority of incumbent LECs can be considered small entities.

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<sup>28</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*. NAICS Code 517110. [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012\\_EC1251SSSZ5&hidePreview=false](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012_EC1251SSSZ5&hidePreview=false).

<sup>29</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>30</sup> See U.S. Census Bureau, *2017 NAICS Definition, NAICS Code 517311 "Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>31</sup> See 13 CFR § 120.201, NAICS Code 517311 (previously 517110).

<sup>32</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* NAICS Code 517110. [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012\\_EC1251SSSZ5&hidePreview=false](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012_EC1251SSSZ5&hidePreview=false).

<sup>33</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>34</sup> See U.S. Census Bureau, *2017 NAICS Definition, NAICS Code 517311 "Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>35</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>36</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012\\_EC1251SSSZ5&hidePreview=false](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012_EC1251SSSZ5&hidePreview=false).

<sup>37</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>38</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>39</sup> *Id.*

12. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers.<sup>40</sup> Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>41</sup> U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year.<sup>42</sup> Of that number, 3,083 operated with fewer than 1,000 employees.<sup>43</sup> Based on these data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers, are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>44</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.<sup>45</sup> In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>46</sup> Also, 72 carriers have reported that they are Other Local Service Providers.<sup>47</sup> Of this total, 70 have 1,500 or fewer employees.<sup>48</sup> Consequently, based on internally researched FCC data, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.<sup>49</sup>

13. *Interexchange Carriers (IXCs).* Neither the Commission nor the SBA has developed a small business size standard specifically for Interexchange Carriers. The closest applicable NAICS Code category is Wired Telecommunications Carriers.<sup>50</sup> The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>51</sup> U.S. Census Bureau data for 2012 indicate

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<sup>40</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>41</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

<sup>42</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>43</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>44</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.” The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

<sup>50</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517311 Wired Telecommunications Carriers,"* <https://www.census.gov/naics/?input=517311&year=2017&details=517311>.

<sup>51</sup> See 13 CFR § 121.201, NAICS Code 517311 (previously 517110).

that 3,117 firms operated for the entire year.<sup>52</sup> Of that number, 3,083 operated with fewer than 1,000 employees.<sup>53</sup> According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>54</sup> Of this total, an estimated 317 have 1,500 or fewer employees.<sup>55</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

14. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>56</sup> As of 2019, there were approximately 48,646,056 basic cable video subscribers in the United States.<sup>57</sup> Accordingly, an operator serving fewer than 486,460 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>58</sup> Based on available data, we find that all but five cable operators are small entities under this size standard.<sup>59</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>60</sup> Therefore we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under *the* definition in the Communications Act.

## 2. Wireless Carriers

15. *Wireless Telecommunications Carriers (except Satellite)*. This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>61</sup> The appropriate size standard under SBA rules is that such a business is small

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<sup>52</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517110, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517110&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>53</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>54</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*). [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>55</sup> *Id.*

<sup>56</sup> 47 U.S.C. § 543(m)(2); see also 47 CFR § 76.901(e).

<sup>57</sup> S&P Global Market Intelligence, *U.S. Cable Subscriber Highlights, Basic Subscribers(actual) 2019, U.S. Cable MSO Industry Total*; see also *U.S. Multichannel Industry Benchmarks, U.S. Cable Industry Benchmarks, Basic Subscribers 2019Y*, <https://platform.marketintelligence.spglobal.com>.

<sup>58</sup> 47 CFR § 76.901(e).

<sup>59</sup> S&P Global Market Intelligence, *Top Cable MSOs as of 12/2019*, <https://platform.marketintelligence.spglobal.com>. The five cable operators all had more than 486,460 basic cable subscribers.

<sup>60</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 CFR § 76.909(b).

<sup>61</sup> U.S. Census Bureau, *2017 NAICS Definitions*, “517312 Wireless Telecommunications Carriers (Except Satellite),” <https://www.census.gov/naics/?input=517312&year=2017&details=517312>.

if it has 1,500 or fewer employees.<sup>62</sup> For this industry, U.S. Census Bureau data for 2012 show that there were 967 firms that operated for the entire year.<sup>63</sup> Of this total, 955 firms employed fewer than 1,000 employees and 12 firms employed 1000 employees or more.<sup>64</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities.

16. The Commission's own data—available in its Universal Licensing System—indicate that, as of August 31, 2018 there are 265 Cellular licensees that will be affected by our actions.<sup>65</sup> The Commission does not know how many of these licensees are small, as the Commission does not collect that information for these types of entities. Similarly, according to internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.<sup>66</sup> Of this total, an estimated 261 have 1,500 or fewer employees, and 152 have more than 1,500 employees.<sup>67</sup> Thus, using available data, we estimate that the majority of wireless firms can be considered small.

17. *Satellite Telecommunications.* This category comprises firms “primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.”<sup>68</sup> Satellite telecommunications service providers include satellite and earth station operators. The category has a small business size standard of \$35 million or less in average annual receipts, under SBA rules.<sup>69</sup> For this category, U.S. Census Bureau data for 2012 show that there were a total of 333 firms that operated for the entire year.<sup>70</sup> Of this total, 299 firms had annual receipts of less than \$25 million.<sup>71</sup> Consequently, we estimate that the majority of satellite telecommunications providers are small entities.

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<sup>62</sup> 13 CFR § 121.201, NAICS Code 517312 (previously 517210).

<sup>63</sup> U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, *Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517210. [https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012\\_EC1251SSSZ5&hidePreview=false&vintage=2012](https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517210&tid=ECNSIZE2012_EC1251SSSZ5&hidePreview=false&vintage=2012).

<sup>64</sup> *Id.* The available U.S. Census Bureau data do not provide a more precise estimate of the number of firms that meet the SBA size standard.”

<sup>65</sup> See Federal Communications Commission, *Universal Licensing System*, <http://wireless.fcc.gov/uls>. For the purposes of this FRFA, consistent with Commission practice for wireless services, the Commission estimates the number of licensees based on the number of unique FCC Registration Numbers.

<sup>66</sup> See Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, Trends in Telephone Service at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-301823A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf).

<sup>67</sup> See *id.*

<sup>68</sup> U.S. Census Bureau, *2017 NAICS Definitions*, “517410 Satellite Telecommunications,” <https://www.census.gov/naics/?input=517410&year=2017&details=517410>.

<sup>69</sup> 13 CFR § 121.201, NAICS code 517410.

<sup>70</sup> U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517410, [https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517410&tid=ECNSIZE2012\\_EC1251SSSZ4&hidePreview=false&vintage=2012](https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517410&tid=ECNSIZE2012_EC1251SSSZ4&hidePreview=false&vintage=2012).

<sup>71</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard..

### 3. Resellers

18. *Local Resellers.* The SBA has not developed a small business size standard specifically for Local Resellers. The SBA category of Telecommunications Resellers is the closest NAICS code category for local resellers.<sup>72</sup> The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households.<sup>73</sup> Establishments in this industry resell telecommunications.<sup>74</sup> They do not operate transmission facilities and infrastructure.<sup>75</sup> Mobile virtual network operators (MVNOs) are included in this industry.<sup>76</sup> Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees.<sup>77</sup> U.S. Census Bureau data from 2012 show that 1,341 firms provided resale services for the entire year.<sup>78</sup> Of that number, all of the firms operated with fewer than 1,000 employees.<sup>79</sup> Thus, under this category and the associated SBA small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.<sup>80</sup> Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.<sup>81</sup> Consequently, the Commission estimates that the majority of local resellers are small entities.

19. *Toll Resellers.* The closest NAICS Code category is Telecommunications Resellers.<sup>82</sup> The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households.<sup>83</sup> Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure.<sup>84</sup> MVNOs are included in this industry.<sup>85</sup> The SBA small business size standard for Telecommunications Resellers classifies a business as small if it has 1,500 or fewer employees.<sup>86</sup> 2012 U.S. Census Bureau

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<sup>72</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517911 Telecommunications Resellers,"* <https://www.census.gov/naics/?input=517911&year=2017&details=517911>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See 13 CFR § 121.201, NAICS Code 517911.

<sup>78</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517911, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517911&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>79</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA's size standard.

<sup>80</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>81</sup> See *id.*

<sup>82</sup> See U.S. Census Bureau, *2017 NAICS Definition, "517911 Telecommunications Resellers,"* <https://www.census.gov/naics/?input=517911&year=2017&details=517911>.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> See 13 CFR § 121.201, NAICS Code 517911.

data show that 1,341 firms provided resale services for the entire year.<sup>87</sup> Of that number, 1,341 operated with fewer than 1,000 employees.<sup>88</sup> Thus, under this category and the associated SBA small business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.<sup>89</sup> Of this total, an estimated 857 have 1,500 or fewer employees.<sup>90</sup> Consequently, the Commission estimates that the majority of toll resellers are small entities.

20. *Prepaid Calling Card Providers.* The most appropriate NAICS code-based category for defining prepaid calling card providers is Telecommunications Resellers.<sup>91</sup> This industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual networks operators (MVNOs) are included in this industry.<sup>92</sup> Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.<sup>93</sup> U.S. Census Bureau data for 2012 show that 1,341 firms provided resale services during that year.<sup>94</sup> Of that number, 1,341 operated with fewer than 1,000 employees.<sup>95</sup> Thus, under this category and the associated small business size standard, the majority of these prepaid calling card providers can be considered small entities. According to the Commission's Form 499 Filer Database, 86 active companies reported that they were engaged in the provision of prepaid calling cards.<sup>96</sup> The Commission does not have data regarding how many of these companies have 1,500 or fewer employees, however, the Commission estimates that the majority of the 86 active prepaid calling card providers that may be affected by these rules are likely small entities.

#### 4. Other Entities

21. *All Other Telecommunications.* The "All Other Telecommunications" category is comprised of establishments primarily engaged in providing specialized telecommunications services,

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<sup>87</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517911, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517911&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>88</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA's size standard.

<sup>89</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>90</sup> See *id.*

<sup>91</sup> See U.S. Census Bureau, *2017 NAICS Definition*, "517911 Telecommunications Resellers," <https://www.census.gov/naics/?input=517911&year=2017&details=517911>.

<sup>92</sup> *Id.*

<sup>93</sup> See 13 CFR § 121.201, NAICS Code 517911.

<sup>94</sup> See U.S. Census Bureau, *2012 Economic Census of the United States*, Table ID: EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms for the U.S.: 2012*, NAICS Code 517911, <https://data.census.gov/cedsci/table?text=EC1251SSSZ5&n=517911&tid=ECNSIZE2012.EC1251SSSZ5&hidePreview=false>.

<sup>95</sup> *Id.* The available U.S. Census Bureau data does not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>96</sup> See Federal Communications Commission, *FCC Form 499 Filer Database*, <http://apps.fcc.gov/cgb/form499/499a.cfm> (last visited July 10, 2020).

such as satellite tracking, communications telemetry, and radar station operation.<sup>97</sup> This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.<sup>98</sup> Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.<sup>99</sup> The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with annual receipts of \$35 million or less.<sup>100</sup> For this category, U.S. Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year.<sup>101</sup> Of those firms, a total of 1,400 had annual receipts less than \$25 million and 15 firms had annual receipts of \$25 million to \$49,999,999.<sup>102</sup> Thus, the Commission estimates that the majority of “All Other Telecommunications” firms potentially affected by our action can be considered small.

**E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities**

22. This Report and Order adopts new rules requiring telecommunications carriers and covered MVPDs to include a disclosure on all written marketing material directed at tenants or prospective tenants of an MTE subject to an exclusive marketing arrangement that explains in plain language that the provider has the right to exclusively market its communication services to tenants in the MTE.<sup>103</sup> Some telecommunications carriers and covered MVPDs required to make these disclosures may be small.

**F. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

23. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.<sup>104</sup>

24. The Report and Order declined to adopt potentially more onerous disclosure requirements on providers, such as an affirmative annual disclosure to MTE residents or disclosure to third parties such as competitive providers and the Commission.<sup>105</sup> The Commission found that this more limited disclosure requirement adequately addressed record concerns regarding exclusive marketing arrangements while

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<sup>97</sup> See U.S. Census Bureau, *2017 NAICS Definitions*, “517919 All Other Telecommunications,” <https://www.census.gov/naics/?input=517919&year=2017&details=517919>.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See 13 CFR § 121.201, NAICS Code 517919.

<sup>101</sup> U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ4, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States: 2012*, NAICS Code 517919, <https://data.census.gov/cedsci/table?text=EC1251SSSZ4&n=517919&tid=ECNSIZE2012.EC1251SSSZ4&hidePreview=false>.

<sup>102</sup> *Id.* The available U.S. Census Bureau data do not provide a more precise estimate of the number of firms that meet the SBA size standard.

<sup>103</sup> See *supra* paras. 33-42.

<sup>104</sup> 5 U.S.C. § 603(c)(1)-(4).

<sup>105</sup> See *supra* para. 42.

minimizing the burden on affected providers.<sup>106</sup> This determination will minimize the burden of the disclosure requirement on small providers. The Commission further adopted these rules to promote competition in MTEs, including competition by small providers.<sup>107</sup>

#### **G. Report to Congress**

25. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.<sup>108</sup> In addition, the Commission will send a copy of the Report and Order, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the *Federal Register*.<sup>109</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> *See supra* para. 2.

<sup>108</sup> *See* 5 U.S.C. § 801(a)(1)(A).

<sup>109</sup> *See* 5 U.S.C. § 604(b).

**STATEMENT OF  
CHAIRWOMAN JESSICA ROSENWORCEL**

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, Report and Order and Declaratory Ruling, GN Docket No. 17-142 (February 15, 2022).

One in three people in this country live in an apartment, condominium, public housing, mobile home park, or other multi-tenant environment. I know I've been among them, having lived in more than a handful of apartments at different points in my life. In too many of these places, broadband choice can be especially hard to find. There's often only one provider, and that means those who live there can wind up paying higher prices for lower quality service.

That's especially perverse because multi-family buildings are denser than single-family housing, which should make them less costly to serve. For this reason, the multi-family market should be at the leading edge of competition, but too often, that's just not the case. One reason why is that there are a complex web of agreements between incumbent service providers and landlords that keep out competitors and undermine choice.

The Federal Communications Commission has long banned internet service providers from entering into sweetheart deals with landlords that guarantee they are the only provider in the building. But the record in this proceeding has made it clear that our existing rules are not doing enough and that we can do more to pry open to the door for providers who want to offer competitive service in apartment buildings.

That's why we take three steps today.

First, we crack down on revenue sharing agreements that can be used to get around our existing rules banning exclusive access. Specifically, we ban exclusive revenue sharing agreements, where the provider agrees with the building that only it and no other provider can give the building owner a cut of the revenue from the building. We also ban graduated revenue sharing agreements, which increase the percentage of revenue that the broadband provider directs to the landlord as the number of tenants served by the provider go up.

Second, we require broadband providers to disclose to tenants in plain language if they have an exclusive marketing agreement with the landlord, so tenants know that they may have additional choices for service.

Finally, we clarify that sale-and-leaseback arrangements violate our existing rules that regulate cable wiring inside buildings. Since the 1990s, we have had rules that allow buildings and tenants to exercise choice about how to use the wiring in the building when they are switching cable providers, but some companies have circumvented these rules by selling the wiring to the building and leasing it back on an exclusive basis. We put an end to that practice today.

These three actions are important steps that will increase competition. I want to thank all of my colleagues for thoughtfully contributing to this effort to improve consumer choice as well as the staff of the agency who worked on this decision.

**STATEMENT OF  
COMMISSIONER BRENDAN CARR**

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, Report and Order and Declaratory Ruling, GN Docket No. 17-142 (February 15, 2022).

Americans love getting more choice and seeing stronger competition for their broadband dollars. And these outcomes are furthered by the FCC's work to bridge the digital divide. In some cases, that means adopting policies that enable providers to pull thousands of miles of fiber over the vast the distances that stretch across rural America. In others, that means policies that allow providers to cover the last few feet to a consumer's home. The latter presents unique challenges when it comes to serving consumers that live in apartments and condos or what we refer to here as "multi-tenant environments" (MTEs). That is why I am pleased to support today's MTE decision.

With our vote today, the FCC acts to ensure competitive choice for those living and working in MTEs. We do so by adopting new rules prohibiting providers from entering into certain types of revenue sharing agreements that could otherwise be used to evade our existing consumer protections. We do so by adopting new rules requiring providers to disclose the existence of exclusive marketing arrangements in simple, easy-to-understand language. And we do so by clarifying the Commission's existing prohibitions on "sale-and-leaseback" arrangements, which can effectively deny access to alternative providers. These are important actions that align with Commission precedents as well as the iron laws of economics.

I want to express my thanks to Chairwoman Rosenworcel for her decision to bring this item forward for a vote. It has my support.

**STATEMENT OF  
COMMISSIONER GEOFFREY STARKS**

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, Report and Order and Declaratory Ruling, GN Docket No. 17-142 (February 15, 2022).

Every American should have access to high-quality, affordable modern communications services—including the one-third who live in multi-unit buildings. For too long, millions of Americans living and working in multi-tenant environments have faced barriers to obtaining the best communications services and prices. Today’s decision will remove some of those obstacles by prohibiting certain types of revenue sharing agreements, requiring plain-language disclosure of exclusive marketing arrangements, and prohibiting the sale-and-leaseback of buildings’ inside wiring. I am pleased to support today’s item, and I look forward to continuing to work with my colleagues to remove other barriers to competition in multi-tenant environments.