

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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



REPLY COMMENTS

Matthew M. Polka
President and Chief Executive Officer
ACA Connects – America’s
Communications Association
Seven Parkway Center
Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Brian Hurley
Vice President of Regulatory Affairs
Ross J. Lieberman
Senior Vice President of Government
Affairs
ACA Connects – America’s
Communications Association
2415 39th Place, NW
Washington, DC 20007
(202) 573-6247

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I. INTRODUCTION AND SUMMARY

ACA Connects—America’s Communications Association (“ACA Connects”) hereby submits reply comments in response to the Wireline Competition Bureau’s Public Notice¹ seeking to “refresh the record” on issues pertaining to broadband competition and access in multiple tenant environments (“MTEs”). We respond primarily to comments from other parties that, in our view, paint the MTE marketplace with too broad a brush. ACA Connects members find that this segment of the marketplace is largely competitive and providing consumers with high-quality options for broadband and other communications services, but acknowledge there may be

¹ See *Wireline Competition Bureau Seeks to Refresh Record on Improving Competitive Broadband Access to Multiple Tenant Environments*, Public Notice, GN Docket No. 17-142, DA 21-1114 (2021); see also *Improving Competitive Broadband Access to Multiple Tenant Environments et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, GN Docket No. 17-142, FCC 19-65 (2019) (“NPRM”). All comment citations refer to comments filed in response to the Public Notice, unless otherwise noted.

instances where service providers—or, even more likely, MTE owners—are engaged in practices that are harmful to consumers. As we explained in our initial comments and discuss further below, we are concerned that overly broad Commission restrictions on specific business practices could undermine incentives to invest in MTEs, leaving residents and businesses with fewer and less robust broadband options. To avoid this outcome, the Commission must ensure that any regulatory measures are narrowly tailored to address specific, substantiated problems. We therefore urge the Commission to proceed cautiously, with the possible adoption of limited disclosure requirements as an initial step.

II. THE COMMISSION SHOULD PROCEED WITH CAUTION IN IMPOSING ANY RESTRICTIONS ON BROADBAND SERVICE ARRANGEMENTS IN MTEs

ACA Connects represents small and medium-sized wireline broadband providers that are competing effectively in the MTE marketplace against much larger providers. Their recipe for success is to make the significant capital investments necessary to provide MTE occupants with high-quality, reliable service and to meet demands for low rates, service performance guarantees, and other perks. These expenditures can be substantial, and in many cases, the bulk of the costs—i.e., to wire a building—must be borne prior to enrolling a single tenant as a subscriber. Accordingly, it is common for an ACA Connects member to negotiate a non-exclusive agreement² with an MTE owner

² The Commission should give serious consideration to NCTA's proposal that it extend to all wireline and wireless broadband providers the ban on MTE exclusive access agreements that applies today only to certain MVPDs and telecommunications carriers. See NCTA Comments at 3-4. Subjecting all broadband providers to the same exclusivity ban would promote competitive parity, in furtherance of the Commission's goals in this proceeding.

prior to entering an MTE that mitigates the provider's risk of failing to make a return on its considerable investment.

These agreements often incorporate the types of practices under examination in the Public Notice: exclusive access to wiring, exclusive marketing rights, and revenue sharing. The terms vary, but as a general matter, these agreements are highly favorable to tenants and pro-competitive: Residents and businesses receive high-speed, wireline broadband service from the ACA Connects member on attractive terms, while competing broadband providers remain free to serve the MTE—and often do, using an increasing variety of wireline or wireless technologies.³ Moreover, these MTE service agreements are of limited duration. A provider that fails to live up to its obligations or to meet the expectations of tenants runs the risk of losing the business to a competitor when the contract expires. Hence, providers in these agreements are strongly incentivized to achieve and maintain high standards of service quality.

Other commenters paint a much darker picture. In sweeping terms, they condemn broad categories of practices—including, but not only, those at issue in the Public Notice—as illegitimate tactics or “loopholes” used by dominant providers to

³ With the emergence of 5G, tenants will increasingly have wireless options for broadband service that are marketed as competitive alternatives to fixed broadband. See, e.g., T-Mobile Home Internet, <https://www.t-mobile.com/isp> (last visited Nov. 19, 2021); see also Lumen Comments at 4 (“Lumen generally faces both wireline *and* wireless competition in the residential MTE, as most MTEs are served by at least two wireline providers, and most tenants use cell phones for voice service and possibly broadband service and many subscribe to satellite-based video services.”); NCTA Comments at 10, n.24 (“It bears emphasis that fixed wireless providers are also entering the MTE space, providing further competition and choice.”).

forestall competition in MTEs.⁴ For instance, Next Century Cities asserts that revenue sharing agreements “restrict new market entrants, reduce competition, and limit consumer’s choices on connectivity offerings,” while exclusive wiring arrangements “preclude other competitive providers from being able to access key building technologies and thus create a de facto local monopoly for the agreement holder.”⁵

The reality is more complicated. As we explained in our initial comments, it is not only large incumbents that enter contractual agreements with MTE owners that incorporate exclusive wiring, exclusive marketing and revenue sharing.⁶ Smaller providers do as well. Indeed, as explained in more detail below, the flexibility to enter agreements that include these types of practices has (generally speaking) enabled ACA Connects members to compete effectively against much larger, better capitalized incumbents.

Exclusive Access to Wiring. ACA Connects members often enter into agreements with MTE owners in which they promise to deliver a certain level of service at a certain level of reliability. Indeed, in many cases, the new provider commits to providing service of a higher caliber (i.e., faster speeds, greater reliability) than is currently available in the MTE. Because an MTE’s existing wiring (if any exists) is often

⁴ See, e.g., Joint Comments of Public Knowledge and Consumer Reports at 2-10 (condemning a variety of practices as “loopholes” that create “effective monopolies”); see also INCOMPAS Comments at 5-6; Next Century Cities Comments at 4-9; AARP Comments at 8. In their comments, Public Knowledge and Consumer Reports take aim at “bulk service agreements.” See Joint Comments of Public Knowledge and Consumer Reports at 9. As ACA Connects suggested in its initial comments, bulk service agreements provide MTE tenants with steeply discounted broadband service and often include other desirable perks, such as dedicated customer service support and free Wi-Fi in common areas. See ACA Connects Comments at 4. Any Commission restrictions on such arrangements would likely result in substantial rate increases for tenants without providing any offsetting benefits.

⁵ Next Century Cities Comments at 3-4.

⁶ See generally ACA Connects Comments.

incapable of meeting the provider's contractual service level obligations, a provider often must commit substantial upfront costs to install new wiring throughout the MTE and cover the ongoing costs to maintain the wiring through the length of the agreement. In exchange, the provider typically seeks exclusive access and use of the wiring for the term of the agreement, which enables the provider to ensure that it can maintain the performance and reliability standards that the contract demands and that tenants expect.⁷

Contrary to some commenters' assertions, contractual arrangements of this kind do not impair broadband competition in MTEs.⁸ As an initial matter, such arrangements are often the culmination of an intensely competitive process in which multiple providers bid aggressively for the contract, with the winning provider having prevailed only by agreeing to provide robust, reliable service on highly desirable terms.⁹ In any event, a grant of exclusive access to particular wiring for a specified term does not preclude competitors from bearing the expense of deploying their own wiring. The record suggests that this practice is increasingly common, and in several states, mandatory access laws prohibit MTE owners from denying such entry by competitors.¹⁰

In addition, we urge the Commission to keep in mind that a provider's delivery of robust, reliable services within an MTE is often at odds with use of existing wires or

⁷ Based on state and local laws, the compatibility of a new entrant's service with the type of existing wiring in an MTE and how its run within such MTE, and other factors, a new entrant may be able to share such wiring with an existing provider, but even when such an option is available, a new entrant may choose to run their own wires to ensure an adequate quality of service for tenants.

⁸ See Joint Comments of Public Knowledge and Consumer Reports at 6-7; Starry Comments at 8; INCOMPAS Comments at 16-20.

⁹ See ACA Connects Comments at 3-4.

¹⁰ See, e.g., NPRM, ¶ 41.

sharing of wires with other providers. Competing providers may use incompatible technologies, making it all but impossible to share wires.¹¹ Even where this is not the case, different providers may have “different ways of configuring their facilities” that make it infeasible for them to share wiring without resulting in degradations of service quality.¹² Moreover, as Hotwire has observed, “[i]f service providers are forced to share their wiring, they would not be incentivized to invest in new infrastructure, but simply use existing infrastructure and provide no more than the quality of product that the existing infrastructure is able to support.”¹³ With bandwidth demands increasing, the Commission should be wary of any policy that threatens to deny MTEs the benefits of next-generation network technologies.

We therefore urge the Commission not to prohibit or restrict exclusive wiring arrangements that preserve the rights of competitors to serve the MTE using their own infrastructure. Nor should the Commission unduly interfere with the terms of such agreements. In particular, the Commission should not require a service provider to relinquish any exclusive wiring access rights as soon as the provider has “recouped its investment” in the wiring or some “portion” of that investment.¹⁴ Simply delaying the

¹¹ See, e.g., NCTA Comments at 8-9.

¹² See *id.* at 9 (“A traditional cable operator may use one type of fiber technology, while telcos and other providers may use different, incompatible technologies. In addition, different service providers have different ways of configuring their facilities, and a sharing requirement would result in multiple, back and forth configuration changes that would ultimately, and inevitably, degrade the quality of in-building wiring as providers cut and re-cut wiring as part of the process of deploying their own equipment and services. This would, in turn, dramatically increase the risk of service degradation.”).

¹³ See Hotwire Comments on Notice of Inquiry at 7-8, GN Docket No. 17-142 (filed July 24, 2017).

¹⁴ See WISPA Comments at 15 (“A provider that installs wiring at its own expense, and uses it to serve its customers, may also have an interest in recouping a portion of that cost. This is reasonable. In such cases, the Commission should make clear that exclusivity should last only so long as the incumbent is using the wiring to serve a customer, and no longer than necessary to allow the provider to recoup its

point in time during the life of a contract when a provider must share its wiring with others does not avoid the technical and operational problems with required wire sharing described above. Moreover, the proposed sharing requirement would reduce the profitability of investments in MTE wiring and would interfere with the ability of service providers that make these investments to maintain control of their plant. As such, it would undermine the incentives of ACA Connects members and other smaller providers to spend their limited capital deploying state-of-the-art infrastructure in MTEs. Such a requirement would also be highly intrusive into the finances of service providers and cumbersome to administer and enforce.

Exclusive Marketing Agreements. In its initial comments, ACA Connects explained that its members sometimes enter MTE service agreements that grant the provider exclusive rights to avail itself of specific marketing activities within the MTE (e.g., setting up a display table in the lobby).¹⁵ These limited contractual privileges are particularly beneficial for members that are entering a new service territory or competing against an established incumbent. Exclusive marketing rights can help such providers target their limited advertising dollars effectively and overcome the higher name recognition of the incumbent competitor.¹⁶ Other commenters, including Fiber Broadband Association and NCTA, similarly explain that exclusive marketing rights (like

investment.”); Starry Comments at 8, n.25 (“Starry understands that if a provider installs building wiring at its own expense, and is using it to serve a customer, it may have an interest in recouping a portion of that cost for a short period of time. In such cases, however, Starry has advocated that the Commission make clear that exclusivity lasts only so long as (1) the incumbent is using the wire to serve a customer; and (2) no longer than necessary to allow the provider to recoup the investment.”).

¹⁵ These agreements do not preclude competitors from marketing their services within the MTE by other means.

¹⁶ See NCTA Comments at 13.

other contractually negotiated rights) can enhance incentives to invest in MTEs without impeding competition.¹⁷

Some commenters raise the concern that tenants or building managers may sometimes misconstrue a provider's exclusive marketing rights as an exclusive right to serve the building and that, as a result, tenants may be denied the ability to take advantage of competing broadband options.¹⁸ If the Commission determines that this problem is sufficiently widespread to merit a regulatory response, we suggest that it take the form of a tailored disclosure requirement. Such an approach can ensure that tenants are properly informed of their options, without impinging on the flexibility of service providers and MTE owners to enter contractual agreements that are beneficial for tenants.

Revenue Sharing. ACA Connects members often enter agreements with MTE owners in which the provider agrees to pay a revenue share or "door fee." ACA Connects does not object to this practice as a general matter. However, as we noted in our initial comments, ACA Connects members sometimes encounter demands for revenue sharing and door fees from MTE owners that appear unreasonably excessive. For the smaller providers we represent, these exorbitant requests can undermine the business case to enter an MTE, while serving no purpose other than enrichment of the MTE owner. This is particularly true with respect to "door fees," which often significantly raise the upfront costs of entering an MTE and may disadvantage less capitalized

¹⁷ See Fiber Broadband Association Comments at 7; NCTA Comments at 12-13.

¹⁸ See, e.g., Public Knowledge and Consumer Reports Comments at 8; Starry Comments at 6.

smaller providers, even in circumstances where such fees are assessed equally on all providers serving the MTEs. Other commenters raise similar concerns.¹⁹

Accordingly, as the Commission examines revenue sharing practices, it should aim to identify specific types or characteristics of revenue sharing that have the effect of limiting competition or choice without providing any countervailing benefits. After identifying with particularity such practices, the Commission can then consider appropriate remedies. By taking this cautious approach, the Commission can minimize its chances of disrupting MTE broadband service arrangements that are, on balance, serving the interests of households and businesses.

III. THE COMMISSION SHOULD CONSIDER ADOPTION OF LIMITED DISCLOSURE REQUIREMENTS

In our opening comments, ACA Connects suggested that the Commission pursue limited disclosure requirements for revenue sharing and/or exclusive marketing agreements as an initial regulatory step as the Commission examines the MTE marketplace in more detail. We explained that such disclosures could help tenants stay informed of their broadband options, shed light on workings of the marketplace, and root out particularly harmful practices that may be occurring by MTE owners. Lumen also offered support for limited disclosures, explaining that increased transparency can help tenants better understand the broadband options available to them while preserving

¹⁹ See, e.g., Joint Comments of Zply Fiber and Consolidated Communications at 6-15.

flexibility for service providers and MTE owners to enter agreements that serve the interests of tenants.²⁰

In response to concerns raised by other commenters,²¹ we further clarify that any disclosure requirements should be limited in scope and should not require service providers to communicate directly with tenants. Our proposed approach is that the Commission require service providers entering new contracts to obtain a contractual assurance from the MTE owner that it will disclose the existence of the arrangement (e.g., exclusive marketing and/or revenue sharing) to its tenants.²² This approach is preferable to a requirement that providers to notify tenants individually, which would be unduly burdensome and inefficient because the service provider that has entered the agreement may lack a direct relationship with each tenant.²³

²⁰ See Lumen Comments at 6-7.

²¹ See WISPA Comments at 22 (suggesting that disclosure requirements “would be a burden on even larger incumbent providers”).

²² Disclosure to the Commission could also be required upon request.

²³ Providers also should not be required to disclose any competitively sensitive information. See NCTA Comments at 14, n.35.

IV. CONCLUSION

ACA Connects appreciates the opportunity to participate in this proceeding, and encourages the Commission to take its reply comments into consideration.

Respectfully submitted,



Matthew M. Polka
President and Chief Executive Officer
ACA Connects – America’s
Communications Association
Seven Parkway Center
Suite 755
Pittsburgh, Pennsylvania 15220
(412) 922-8300

Brian Hurley
Vice President of Regulatory Affairs
Ross J. Lieberman
Senior Vice President of Government
Affairs
ACA Connects – America’s
Communications Association
2415 39th Place, NW
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