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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 8, 64, and 76

[GN Docket No. 17-142; FCC 19-65]

Improving Competitive Broadband Access to Multiple Tenant Environments

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, we seek targeted comment on a variety of issues that may affect the provisioning of broadband to MTEs, including exclusive marketing and wiring arrangements, revenue sharing agreements, and state and local regulations. We also seek comment on our legal authority to address broadband, telecommunications, and video deployment and competition in MTEs. The Commission adopted the NPRM in conjunction with a Declaratory Ruling in GN Docket No. 17-142 and MB Docket 17-91.

DATES: Comments are due on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and reply comments are due on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by GN Docket No. 17-142, by any of the following methods:

- Federal Communications Commission's Web Site: https://www.fcc.gov/ecfs/. Follow the instructions for submitting comments.
- Mail: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this

proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701. U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

- 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 or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

For detailed instructions for submitting comments and additional information on the rulemaking process, see the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Annick Banoun, Competition Policy Division, Wireline Competition Bureau, at (202) 418-1521, annick.banoun@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rulemaking in GN Docket No. 17-142, adopted on July 10, 2019 and released on July

12, 2019. The full text of this document is available at https://docs.fcc.gov/public/attachments/FCC-19-65A1.pdf. The full text is also available for public inspection during regular business hours in the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. To request materials in accessible formats for people with disabilities (e.g. braille, large print, electronic files, audio format, etc.) or to request reasonable accommodations (e.g. accessible format documents, sign language interpreters, CART, etc.), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418–0530 (voice) or (202) 418–0432 (TTY).

Synopsis

I. NOTICE OF PROPOSED RULEMAKING

1. In this Notice of Proposed Rulemaking (NPRM), we continue our efforts to ensure that all Americans have access to high-speed broadband, regardless of the type of housing in which they reside or the level of income they earn, and regardless of where they work. Specifically, we seek comment on ways to facilitate enhanced deployment and greater consumer choice for Americans living and working in MTEs.

2. In this NPRM, we refresh the record in response to the MTE Notice of Inquiry and seek further targeted comment on a variety of issues that may affect the provisioning of broadband to MTEs, including exclusive marketing and wiring arrangements, revenue sharing agreements, and state and local regulations. We believe that the questions we ask here will facilitate the development of a more detailed record to establish effective, clear policy that is carefully tailored to promote broadband deployment to MTEs. We also seek comment on our legal authority to address broadband, telecommunications, and video deployment and competition in MTEs. Specifically, we seek comment on ensuring that any new rules we adopt apply equally to all competitors in the MTE marketplace and do not create regulatory

asymmetry.

A. Revenue Sharing Agreements

3. We seek comment on whether we should require the disclosure or restrict the use of revenue sharing agreements for broadband service. In revenue sharing agreements, the building owner receives consideration from the communications provider in return for giving the provider access to the building and its tenants. 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.

4. We seek comment on what impact revenue sharing agreements have on competition and deployment within MTEs. Some commenters contend that such agreements are a key tool in building owners' ability to build out, maintain, and upgrade their networks, and they also contend that revenue sharing agreements do not raise costs for tenants. They argue that these agreements enable MTE owners to use the consideration they receive from communications providers to offset infrastructure costs associated with providing broadband service to tenants, and that restricting these types of agreements will induce MTE owners to raise rents or cut costs by reducing infrastructure investment. Blue Top Communications, a small cable and broadband provider, claims that, without revenue sharing agreements and other similar agreements granting access to the MTE, it will be unable to compete in the MTE market. We seek comment on these assertions. Do revenue sharing agreements enable competitive broadband providers to offer services in MTEs and, if so, how? For example, what effect do these agreements have on competitive providers' ability to secure financing to deploy facilities? Do revenue sharing agreements affect competition and deployment only if they are exclusive to a

single provider?

5. Conversely, we seek comment on 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. Some commenters argue further that protracted negotiations over these types of agreements can inhibit competition by preventing providers from deploying broadband services on a timely basis. We seek comment on these assertions. In addition, we seek comment on whether revenue sharing agreements are being used to circumvent the ban on exclusive access agreements, as some commenters assert. To the extent that revenue sharing agreements are combined with other contractual provisions, such as exclusive wiring, sale-and-leaseback, bulk billing, and exclusive marketing, what effect does the combination of these arrangements have on competition and deployment within MTEs?

6. Should we require all Internet service providers or only telecommunications carriers and covered MVPDs to disclose the existence of revenue sharing agreements to the public? For purposes of this NPRM, the term "covered MVPDs" mean those MVPDs subject to section 628(b) of the Act: cable operators; common carriers or their affiliates that provide video programming directly to subscribers; and operators of open video systems. Disclosure requirements are less burdensome than outright prohibitions and can promote informed decision-making. What are the costs and benefits of a disclosure requirement here? Would a disclosure requirement, by promoting transparency to prospective and current tenants, increase the likelihood that revenue sharing agreements benefit competition, deployment, and individual subscribers? What impact would a disclosure requirement have on small businesses, and should we consider exempting some small businesses from such a requirement? If we were to require

disclosure of revenue sharing agreements, should we require the disclosure only of agreements that exceed the building's actual costs of allowing service, or all revenue sharing agreements? If we require disclosure, where, when, and how should we require covered providers to provide the disclosure, and how can we ensure that the public is able to associate the disclosure with a particular building? What contents should we require in a disclosure, and should we specify a format? How would such a disclosure requirement interact with First Amendment jurisprudence on compelled corporate speech? Any disclosure requirement we adopt would apply to the Internet service provider (or MVPD or telecommunications carrier) and not the building owner, similar to the Commission's prohibition on covered MVPDs and telecommunications carriers, but not building owners, entering into exclusive access agreements.

7. If we determine that revenue sharing agreements harm competition and deployment and that transparency is an insufficient remedy, should we adopt a rule to restrict or prohibit revenue sharing agreements? To the extent we propose to regulate the practices of communications providers rather than require disclosures to the public, we do not propose to impose such behavioral regulations on entities other than telecommunications carriers and covered MVPDs. For example, we could restrict covered MVPDs and telecommunications carriers from entering into revenue sharing agreements that provide the building owner with a share of revenue beyond the building's actual costs of allowing service. What are the benefits, drawbacks, and estimated costs of this approach? What is the impact of this approach on small businesses? What economic and business justifications, if any, exist for any such revenue sharing agreements that exceed the building's actual costs of allowing service? Would we face practical difficulties in administering such a prohibition? For instance, would covered MVPDs and telecommunications carriers when considering entering a revenue sharing agreement, and the

Commission when considering an enforcement proceeding, be able to determine the building's actual costs of allowing service? If we determine that a rule restricting revenue sharing agreements is necessary, would a different rule be more appropriate?

B. Rooftop Antenna and DAS Facilities Access

8. We seek comment on whether we should act to increase competitive access to rooftop facilities, which are often subject to exclusivity agreements. Wireless communications providers rely on access to building rooftops to establish or improve backhaul for wireless services. We seek comment on the benefits and drawbacks of rooftop exclusivity agreements. How prevalent are such agreements, and what are common terms and conditions of such agreements that could affect broadband deployment? Do such agreements encourage building owners to allow rooftop access to the paying party, thereby promoting broadband, telecommunications, and video services deployment? Are there technical or safety benefits to a service provider, instead of the MTE owner, exercising control over rooftop facilities? As to drawbacks, in their comments, both INCOMPAS and Lumos Networks cite rooftop exclusivity agreements as an example of a common industry practice that reduces competition and deployment in MTEs with little to no consumer benefits. We seek comment on these claims. If we find that rooftop exclusivity agreements harm competition, should we prohibit telecommunications carriers and covered MVPDs from entering into such agreements, including agreements that would have the effect of exclusivity, just as the Commission previously prohibited telecommunications carriers from reaching exclusive access agreements with residential and commercial MTEs and covered MVPDs from reaching exclusive access agreements with residential MTEs?

9. We also seek comment on whether we should take action on access to distributed

antenna systems (DAS) facilities, which are "small antennas typically installed on shared wiring within the MTE" which transmit signals using internal wiring within the building "to a carrier point-of-presence." Wireless providers use DAS facilities within MTEs to "fill gaps in coverage caused by dense walls . . . and provide additional capacity" in areas with dense concentrations of people including stadiums and arenas. According to T-Mobile, if a fixed wireless provider is unable to access a DAS facility, that provider's customer may have little or no indoor cellular coverage. INCOMPAS, Sprint, and T-Mobile allege that building owners enter into private agreements with fixed wireless providers or third party operators for control over the deployment of wireless broadband service via DAS facilities. These commenters claim that fixed wireless providers or third party operators benefit from these arrangements by charging "monopoly rents" or otherwise restricting access to their facilities, to the detriment of competition and ultimately consumers. We seek comment on these assertions. Are such agreements between building owners and fixed wireless providers or third-party operators common practice? If so, are there benefits to this practice, such as encouraging investment in DAS facilities by allowing building owners to recoup their costs of installing such facilities, and such as allowing building owners to control access to their premises? Have any commenters found that these agreements encourage deployment of wireless broadband services? T-Mobile claims that in barring LECs from entering into exclusive access agreements with commercial MTEs, the Commission also prohibited agreements "that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access." Do commenters agree with this argument? Should we take action against agreements that render DAS systems effectively inaccessible to certain providers due to unreasonable limitations or terms? Should we prohibit providers within our jurisdiction from enforcing existing DAS exclusivity agreements, and if so, in what circumstances? Alternatively, would any such action discourage investment in DAS facilities, undermine MTE owners' control over their property, or lead to any other harmful outcomes? Property owners note that DAS deployments are expensive, and contend that owners often have no assurance that carriers will use DAS facilities even if the owner incurs the cost to build them. Are there any steps that the Commission should take to promote efficient use of DAS in MTEs? Should the Commission take any action with respect to wireless providers that would reduce the burden of DAS deployment on building owners? Are there policies the Commission could adopt that would increase incentives for property owners to deploy DAS facilities?

10. We also seek comment on the effect DAS access agreements have on deployment of advanced technology. For example, commenters argue that existing DAS facilities may be incompatible with a new provider's technology or so antiquated that they require replacement, as they are typically designed for the first provider to use them. As a result, T-Mobile claims that "many of the DAS facilities currently in place will be incompatible with . . . 5G wireless technologies once they are available for deployment." We seek comment on these claims. Should we require parties within our jurisdiction who deploy DAS facilities to take into account the compatibility of the systems with potential future provider occupants? Should we encourage or require providers to use DAS facilities that meet certain compatibility or future-proofing requirements? Would any such action reduce the level of investment of DAS facilities or otherwise harm deployment and/or competition? Are there quantifiable benefits and drawbacks to these approaches? What is the impact of these approaches on small businesses? We seek comment on these and other actions that can be taken to promote wireless broadband deployment and competition in and on MTEs.

C. Exclusive Wiring and Marketing Arrangements

11. We seek comment on the effect of sale-and-leaseback arrangements on competition and deployment of broadband, telecommunications service, and video in MTEs. Sale-and-leaseback arrangements occur when a service provider sells its wiring to the MTE owner and then leases back the wiring on an exclusive basis. The record reflects that sale-and-leaseback arrangements often include provisions requiring the provider to maintain the inside wiring and other facilities.

12. Some commenters argue that sale-and-leaseback arrangements violate the Commission's existing cable inside wiring rules, as set out in section 76.802(j). Our rules require a cable provider to "take reasonable steps within [its] control to ensure that an alternative service provider has access to the home wiring at the demarcation point" and to not "prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service." FBA contends that "[if] the incumbent provider transfers legal title to its home wiring to the property owner before a customer terminates service and then leases it back with an exclusivity provision that prevents competitive use, the inside wiring will be unavailable for use by competitors when the customer is ready to change providers." Do sale-and-leaseback arrangements violate our existing cable inside wiring rules? Are sale-and-leaseback arrangements used to evade our exclusive access, cable inside wiring, or any other Commission rules? Regardless of whether they violate our rules currently, should we adopt a new rule prohibiting such arrangements? Alternatively, should we prohibit sale-and-leaseback arrangements in limited circumstances? For instance, should we prohibit these arrangements unless the provider can demonstrate that they are not anti-competitive? What is the impact of these arrangements on small businesses, and how would any restrictions on sale-and-leaseback

arrangements affect small businesses? Can commenters quantify specific costs and benefits of restricting sale-and-leaseback arrangements? Are sale-and-leaseback arrangements beneficial because they give building owners and service providers incentives to deploy facilities?

13. Sale-and-leaseback arrangements are a subset of exclusive wiring arrangements. Under exclusive wiring arrangements, communications providers enter into agreements with MTE owners under which they obtain the exclusive right to use the wiring in the building. In the 2007 Exclusive Service Contracts Order, the Commission drew a distinction between exclusive access agreements, which it prohibited because they completely denied new entrants access to buildings, and exclusive wiring arrangements, "which do not absolutely deny new entrants access to [residential MTEs] and thus do not cause the harms to consumers" caused by exclusive access agreements. We seek comment on whether we should revisit the Commission's decision as to exclusive wiring arrangements. Do the policy considerations around sale-and-leaseback and other exclusive wiring arrangements differ? Is it the case today that exclusive wiring arrangements do not preclude competitive providers' access to buildings? If a building owner will only permit one set of wiring on its premises and enters into an exclusive wiring arrangement, is the effect tantamount to an exclusive access agreement? Do exclusive wiring arrangements take different forms in states and localities that have mandatory access laws? For example, NCTA contends that in states and localities with mandatory access laws, "building owners must allow additional providers to offer service," and the exclusive wiring arrangement will only require the new provider to install its own facilities. Is that a correct statement of fact and the law in areas with mandatory access laws, or can buildings still exclude new entrants? And in states and localities without mandatory access laws, do exclusive wiring arrangements reduce competition? If we were to revisit the Commission's policy about exclusive wiring

arrangements, should we prohibit providers from entering into these arrangements? What are the estimated costs and benefits of this potential action? Would it benefit or burden small entities and if so, how and to what extent?

14. Exclusive Marketing Arrangements. 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. In 2010, the Commission concluded that exclusive marketing arrangements "have no significant effects harmful to [MTE] residents and have some beneficial effects." In declining to regulate such arrangements, the Commission found that exclusive marketing could lead to lower costs to subscribers or partially defray deployment costs borne by buildings, without prohibiting or significantly hindering other providers from entering the building. While we do not revisit that conclusion at this time, we seek comment on whether there are specific circumstances in which exclusive marketing arrangements result in de facto exclusive access. In its comments, FBA asserts that exclusive marketing arrangements "inhibit competition in practice because MTE owners misinterpret the otherwise acceptable terms of the agreement." We seek comment on whether and to what extent there is confusion among tenants and/or building owners regarding the distinction between exclusive access agreements, which are not permitted by the Commission's rules, and exclusive marketing agreements, which are permitted. If such confusion exists, how prevalent is it and what might be done to correct it?

15. Would transparency regarding exclusive marketing arrangements reduce any confusion about the impact of exclusive marketing agreements? Should we require specific disclaimers or other disclosures by carriers and covered MVPDs making clear that there is no

exclusive access agreement and that customers are free to obtain services from alternative providers? If so, when, where, how, and in what circumstances should we require carriers and covered MVPDs to make any such disclosures, and how can we ensure that the public would associate the disclosure with the specific buildings to which they relate? How would such a requirement impact the incentives of providers to enter into exclusive marketing agreements and the potential benefits of such agreements for building owners and tenants? What impact, if any, would a disclosure requirement have on small entities? What are the costs and benefits of a disclosure requirement?

D. Other Contractual Provisions and Practices

16. We seek comment on whether there are other types of contractual provisions and non-contractual practices, other than those already mentioned, that impact the ability of broadband, telecommunications service, and video providers to compete in MTEs. If so, what form do these provisions and/or practices take, and how do they impact competition within MTEs? Are any such practices already prohibited under our existing rules?

E. State and Local Policies and Regulations

17. We seek comment on examples of state or local regulations or other policies that have successfully promoted broadband deployment, competition, and access to MTEs. We also seek comment on examples of state or local government programs that have succeeded in improving competition, deployment, and access to broadband in MTE buildings. For example, in response to the MTE Notice of Inquiry, Montgomery County, Maryland, explained how it had collaborated with private developers in an effort to spur broadband deployment and how it planned to host a summit that convened architects, building engineers, urban planners, and broadband service providers. Similarly, the City of Boston described how the Boston Planning

and Development Agency planned to incorporate broadband competition as an element of its review process for new projects, planned development areas, and institutional master plans. Have such local government programs proved effective?

18. We also seek comment on whether there are state and local regulations, or other state or local requirements, that deter broadband deployment and competition within MTEs because they "prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications service. The Commission has previously concluded that "[i]nfrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service, and our ruling [in the Wireline Infrastructure Third Report and Order that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Act] will promote broadband deployment." Facilities that provide telecommunications service are frequently used for the provision of broadband Internet access service on a commingled basis. What form do any such regulations or legal requirements most often take? Commenters identifying regulations or legal requirements should explain how the provisions in question deter broadband deployment and investment within MTEs, and why they believe the provisions in question violate section 253 of the Act. What should we do to address any such regulations or legal requirements? Sprint argues that state and local governments that own large MTEs should not be able to enter into exclusive access contracts with providers. Do commenters agree, and if so what action—if any—should we take consistent with our authority under section 253? While the Commission clarified in the 2018 Wireless Infrastructure Third Report and Order that its interpretations of sections 253 and 332 applied to government-owned property in the public right-of-way, it did not take a position on whether sections 253 and 332 applied to "government-owned property located

outside the public [right-of-way]," such as the government-owned MTEs that may be at issue in this proceeding.

F. Legal Authority

19. We seek comment on our jurisdiction and statutory authority to address the issues raised in this NPRM. In prohibiting exclusive access agreements, the Commission has previously relied on sections 201(b) and 628 of the Act. We seek comment on our authority pursuant to these statutory provisions to facilitate broadband, telecommunications service, and video deployment and competition within MTEs.

20. In the past, the Commission has found that sections 201(b) and 628 of the Act provide statutory authority to prohibit the execution and enforcement of anti-competitive contractual arrangements granting common carriers exclusive access to commercial and residential MTEs and covered MVPDs exclusive access to residential MTEs. Section 201(b) of the Act expressly authorizes the Commission to regulate all "charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service," to ensure that such practices are "just and reasonable." In the 2008 Competitive Networks Order, the Commission found that a carrier's execution or enforcement of an exclusive access provision within an MTE is an "unreasonable practice," and that the Commission thus has "ample authority" under section 201(b) to prohibit such exclusivity provisions in the provision of telecommunications services. Section 628 makes it unlawful for a covered MVPD "to engage in 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 multichannel video programming distributor from providing . . . programming to subscribers or customers." In the 2007 Exclusive Service Contracts Order, the Commission held that it had "ample authority under Section 628(b) of the

Act to adopt rules prohibiting [covered MVPDs] from executing or enforcing contracts that give them the exclusive right to provide video programming services alone or in combination with other services to [residential MTEs]"—a determination upheld by the D.C. Circuit. The Commission recognized that the business model for competitive entrants was a triple-play bundle of video, broadband, and telephone, and that "[a]n exclusivity clause in a [residential MTE's] agreement with a MVPD denies all these [competitive] benefits to the [MTE's] residents." The Commission's existing rules thus prohibit both the execution and enforcement of any contractual provisions granting common carriers exclusive access to commercial and residential MTEs and covered MVPDs exclusive access to residential MTEs. We seek comment on whether, if we were to act with respect to revenue sharing agreements, rooftop exclusivity clauses, or exclusive wiring, sections 201(b) and 628(b) would provide us authority to do so for telecommunications carriers and covered MVPDs, respectively. Are there other statutory provisions that grant us sufficient authority to act?

21. As stated by prior Commission decisions, we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis. Infrastructure for fixed and mobile telecommunications services frequently is used for the provision of broadband Internet access service, and we believe that any steps we take in this proceeding to promote competition and deployment of telecommunications services within MTEs will simultaneously encourage broadband deployment in MTEs. For instance, DAS facilities provide telecommunications and other services on a commingled basis. We therefore believe that we have authority under sections 201(b) to facilitate broadband competition within MTEs, in cases where broadband services are offered over the same telecommunications facilities, to the same extent that we have authority under that provision to

facilitate competition in the provision of telecommunications services. We seek comment on the foregoing analysis.

22. Congress also provided the Commission authority under section 628 to prohibit "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 multichannel video programming distributor from providing" programming to subscribers or consumers. We seek comment on whether and how we can use this authority to promote competition and deployment of broadband services in MTEs.

23. Disclosure Requirements. To the extent that we impose disclosure requirements, as suggested in the revenue sharing and exclusive marketing discussions, under what basis of legal authority could such requirements apply to ISPs that are not telecommunications carriers under Title II or cable operators under Title VI? We seek comment on whether sections 13 and 257 of the Act, as amended by section 401 of the RAY BAUM'S Act of 2018, provides the Commission with authority to require such disclosures for all Internet service providers, and not just MVPDs and telecommunications carriers. The Commission has previously interpreted section 257 as providing a continuing obligation on the Commission "to identify any new barriers to entry," and that the "statutory duty to 'identify and eliminate'" such barriers "implicitly empower[s] the Commission to require disclosures from third parties who possess the information necessary for the Commission and Congress to find and remedy market entry barriers." Congress replaced the triennial reporting requirement of section 257® with a virtually identical biennial reporting requirement in section 401 of the RAY BAUM'S Act, which continues to require the Commission to report to Congress on "market entry barriers for entrepreneurs and other small businesses in the communications marketplace." Section 401 of

the RAY BAUM'S Act requires the Commission to assess competition and deployment in the communications marketplace, and to determine whether "demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services." Further, the RAY BAUM's Act contains a savings clause, confirming that "[n]othing in this title or the amendments made by this title shall be construed to expand or contract the authority of the Commission."

24. If we were to act only as to covered MVPDs and telecommunications carriers, would sections 201(b) and 628(b) provide us authority to require revenue sharing and exclusive marketing disclosures? The Commission has previously relied on section 201(b) to ensure that telecommunications carriers convey accurate and sufficient information about the services they provide to consumers. Do we have authority under section 201(b) to require carriers to disclose revenue sharing and/or exclusive marketing agreements in order to ensure that carriers' charges and practices that affect MTE residents are just and reasonable? Section 202(a) of the Act makes it unlawful for common carriers to engage in "unjust or unreasonable" discrimination, to give "undue or unreasonable preference or advantage" to any particular person, class, or locality, or to subject any person, class, or locality to "undue or unreasonable prejudice or disadvantage." Does section 202(a) provide additional authority to require these disclosures as to telecommunications carriers? Under section 218, the Commission has broad authority to obtain "full and complete information" from carriers. Does section 218 grant us authority to impose a revenue sharing and/or exclusive marketing disclosure requirement on carriers? Would section 218 allow us to mandate such disclosures be made to the public? Are there other sources of authority on which we could rely? Would disclosure to the public of the existence or terms of revenue sharing and/or exclusive marketing agreements raise any confidentiality concerns?

Would disclosure requirements be consistent with First Amendment jurisprudence?

25. Sections 253 and 332. We seek comment on whether sections 253 or 332 can serve as a basis for the Commission to address state or local regulations with respect to facilities deployment and competition within MTEs. Section 253(a) generally provides that no state or local legal requirements "may prohibit or have the effect of prohibiting" the provision of interstate or intrastate telecommunications services, and provides the Commission with "a rule of preemption" that "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers." Section 332(c)(7)(B) provides that state or local government regulation of the siting of personal wireless service facilities "shall not prohibit or have the effect of prohibiting the provision" of personal wireless services. We seek comment on whether the Commission has authority under sections 253 and/or 332 to restrict or prohibit any of the contractual provisions and/or non-contractual practices listed in this NPRM where a state or local government owns or controls the MTE. Why or why not? Are there other preemptive actions we should take under sections 253 and/or 332 to promote the deployment of next-generation networks and services to MTEs?

26. Other Authority. Finally, we seek comment whether there exist any additional sources of authority on which the Commission may rely to prohibit, restrict, or require disclosure of the types of agreements or arrangements on which this NPRM seeks comment. If so, from where does this authority derive?

II. INITIAL REGULATORY FLEXIBILITY ANALYSIS

27. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of

Proposed Rulemaking. The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the NPRM. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.

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

28. The NPRM seeks to facilitate enhanced deployment and provide greater consumer choice for workers and residents of MTEs. Specifically, the NPRM solicits comments on whether revenue sharing agreements should be disclosed or otherwise regulated, on whether the Commission should preempt state and local regulations that may inhibit broadband deployment and competition within MTEs; on whether the Commission should act to increase competitive access to distributed antenna systems and rooftop facilities; about what effect exclusive wiring and sale-and-leaseback arrangements have on competition and deployment in MTEs; whether exclusive marketing arrangements should be disclosed; and on whether there exist other types of contractual provisions and noncontractual practices that impact the ability of broadband providers to compete in MTEs. The NPRM also asks what impact these proposals would have on small businesses and entities.

B. Legal Basis

29. The NPRM solicits comments about its jurisdiction and statutory authority to address these issues. It specifically asks whether sections 201(b) and 628 of the Communications Act of 1934, as amended, authorize prohibiting revenue sharing agreements. To the extent that the Commission would impose disclosure requirements, the NPRM also

invites comments on whether section 257 of the Act, as amended by section 401 of the RAY BAUM'S Act of 2018, authorizes the Commission to require disclosures from ISPs. The NPRM seeks comment on whether sections 201(b), 202(a), 218, and 628 of the Act would provide authority to impose disclosure requirements on MVPDs and telecommunications carriers. The NPRM also solicits comments on whether sections 253 and 332 of the Act authorize the Commission to address state or local regulations with respect to facilities deployment and competition within MTEs. Additionally, the NPRM seeks comments on whether any additional sources of authority exist on which the Commission may rely to prevent parties from entering into any agreements or arrangements on which it seeks comment.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

30. 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 NPRM seeks comment, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act. 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.

31. 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. First, while there are industry-specific size standards for small businesses that

are used in the regulatory-flexibility analysis, according to data from the SBA's Office of Advocacy, a small business in general is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.2 million businesses.

32. 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 . . . ." Nationwide, as of March 2019, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).

33. 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." U.S. Census Bureau data from the 2012 Census of Governments indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 37,132 general purpose governments (county, municipal, and town or township) with populations of less than 50,000, and 12,184 special purpose governments (independent school districts and special districts) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that a majority these governments have populations of less than 50,000. Based on this data, we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."

34. <u>Multiple Tenant Environment (MTE) Operato–s - Residential</u>. The appropriate U.S. Census category for MTE residential operators is that of Residential Property Managers and

is defined as an industry that "comprises establishments primarily engaged in managing residential real estate for others." The SBA has established a small business size standard for this category of firms having $7.5 million or less in annual receipts. Economic Census data for 2012 show that 25,936 residential property managers operated for that entire year. Of that number, 25,010 had annual receipts of less than $5 million. Thus, under this size standard, the majority of firms in this industry can be considered small.

35. Multiple Tenant Environment (MTE) Operato–s - Nonresidential. The appropriate U.S. Census category for MTE nonresidential operators is that of Nonresidential Property Managers and is defined as an industry that "comprises establishments primarily engaged in managing nonresidential real estate for others." The SBA has established a small business size standard for this category of firms having $7.5 million or less receipts. Economic Census data for 2012 show that 12,828 nonresidential property managers operated for that entire year. Of that number, 12,344 had annual receipts of less than $5 million. Thus, under this size standard, the majority of firms in this industry can be considered small.

36. 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." 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. Census data for 2012 shows that there were 3,117 firms that operated that year and that of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this size standard, the majority of firms in this industry can be considered small.

37. 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. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 shows that 3,117 firms operated for the entire year. Of that total, 3,083 operated with fewer than 1,000 employees. Thus under this category and the associated size standard, the Commission estimates that the majority of local exchange carriers are small entities.

38. 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. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicates that 3,117 firms operated the entire year. Of this total, 3,083 operated with fewer than 1,000 employees. 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, 1,307 Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers. Of this total, an estimated 1,006 have 1,500

or fewer employees. Thus, using the SBA's size standard, the majority of incumbent LECs can be considered small entities.

39. 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 most appropriate NAICS Code category is Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees. 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. Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. 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. Additionally, 72 carriers have reported that they are Other Local Service Providers. Of this total, 70 have 1,500 or fewer employees. 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.

40. 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.

41. Interexchange Carriers (IXCs). Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year. Of that number, 3,083 operated with fewer than 1,000 employees. According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services. Of this total, an estimated 317 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

42. Local Resellers. The SBA has developed a small-business size standard for Telecommunications Resellers that includes Local Resellers. 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. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2012 shows that 1,341 firms provided resale services during that year. Of that number, all operated with fewer than 1,000 employees. Thus, under this category and the

associated 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. Of these, an estimated 211 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of Local Resellers are small entities.

43. Toll Resellers. The Commission has not developed a definition for Toll Resellers. The closest NAICS Code category is Telecommunications Resellers. 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. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry. The SBA has developed a small-business size standard for the category of Telecommunications Resellers. Under that size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 shows that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees. Thus, under this category and the associated 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. Of this total, an estimated 857 have 1,500 or fewer employees. Consequently, the Commission estimates that the majority of toll resellers are small entities.

44. Other Toll Carriers. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The

closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees. Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees. Thus, under this category and the associated small-business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage. Of these, an estimated 279 have 1,500 or fewer employees. Consequently, the Commission estimates that most Other Toll Carriers are small entities.

45. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years. The SBA has approved these small-business size standards.

46. Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite), and under the most appropriate size standard for this category, such a business is small if it has 1,500 or fewer employees. For this industry, U.S. Census Bureau data for 2012 shows that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees and 12 firms had 1000 employees or more. Thus, under this category and the associated size standard, the Commission estimates that a majority of these entities can be considered small.

According to Commission data, 413 carriers reported that they were engaged in wireless telephony. Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees. Therefore, more than half of these entities can be considered small.

47. Cable Companies and Systems (Rate Regulation). The Commission has developed its own small-business size standards for the purpose of cable rate regulation. Under the Commiss'on's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide. Industry data indicates that there are currently 4,600 active cable systems in the United States. Of this total, all but 11 cable operators nationwide are small under the 400,000-subscriber size standard. In addition, under the Commiss'on's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records. Thus, under this standard as well, we estimate that most cable systems are small entities.

48. Cable System Operators (Telecom Act Standard). The Communications Act, 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." There are approximately 52,403,705 cable video subscribers in the United States today. Accordingly, an operator serving fewer than 524,037 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. Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard. The Commission neither requests nor collects information on whether

cable system operators are affiliated with entities whose gross annual revenues exceed $250 million. 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 section 76.901(f) of the Commission's rules. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, 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.

49. All Other Telecommunications. The "All Other Telecommunications" category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. 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. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry. The SBA has developed a small-business size standard for All Other Telecommunications, which consists of all such firms with annual receipts of $ 32.5 million or less. For this category, U.S. Census Bureau data for 2012 shows that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than $25 million and 42 firms had annual receipts of $25 million to $49,999,999. Thus, the Commission estimates that the majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

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

50. The NPRM seeks comments on a number of potential rule changes that would affect reporting, recordkeeping, and other compliance requirements. Specifically, the NPRM seeks comment on potential regulation or disclosure of revenue sharing and exclusive marketing arrangements. If the Commission were to move forward with such a rule, MVPDs and telecommunications carriers, and potentially all ISPs, would have new reporting, recordkeeping, and other compliance requirements with regard to these arrangements.

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

51. 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.

52. In the NPRM, the Commission seeks comment on alternatives to the proposals and on alternative ways of implementing the proposals. Any revisions proposed to the Commission's rules are not expected to result in significant economic impact to small entities. The Commission specifically seeks comment on what effect the proposals will have on small entities and whether the Commission should consider alternative rules or exemptions for small entities.

53. We expect to take into account the economic impact on small entities, as identified in comments filed in response to the NPRM and this IRFA, in reaching our final conclusions and promulgating rules in this proceeding.

54. As discussed in the NPRM, the Commission has initiated this proceeding to solicit comments on various types of actions the Commission is considering to facilitate enhanced broadband deployment and provide greater consumer choice for MTE workers and residents.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

55. None.

III. PROCEDURAL MATTERS

56. Ex Parte Rules. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to

Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

57. Initial Regulatory Flexibility Analysis. Pursuant to the Regulatory Flexibility Act (RFA), the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

58. Paperwork Reduction Act. This document may propose new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it may contain new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.

IV. ORDERING CLAUSES

59. IT IS ORDERED that pursuant to the authority contained in sections 1-4, 201(b), 202, 303(r), 403, 601(4), 601(6), and 628 of the Communications Act of 1934, as amended, 47

U.S.C. §§ 151-54, 201(b), 202, 303(r), 403, 521(4), 521(6), and 548, and section 401 of the RAY BAUM's Act of 2018, 47 U.S.C. § 163, this Notice of Proposed Rulemaking IS ADOPTED.

60. IT IS FURTHER ORDERED that the Notice of Proposed Rulemaking will be EFFECTIVE upon publication in the Federal Register and comments will be due on the dates stated therein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene Dortch,
Secretary.
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