Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	)	GN Docket No. 22-69

COMMENTS OF
THE NATIONAL MULTIFAMILY HOUSING COUNCIL
AND THE NATIONAL APARTMENT ASSOCIATION

Matthew C. Ames
HUBACHER AMES & TAYLOR, P.L.L.C.
4084 University Drive
Suite 101
Fairfax, Virginia 22030
(703) 345-1179
Counsel for:
the National Multifamily Housing Council and
the National Apartment Association

February 21, 2023

SUMMARY

The National Multifamily Housing Council ("NMHC") and the National Apartment Association ("NAA") submit these Reply Comments in response to the comments of other parties filed pursuant to the Notice of Proposed Rulemaking (the "*NPRM*").[1] The apartment industry provides homes for 38.9 million Americans from every walk of life, including seniors, teachers, firefighters, healthcare workers, families with children, and many others who enrich our communities. The members of NMHC and NAA are dedicated to meeting the housing needs of all their residents, including residents of all income levels, races, ethnicities, colors, religions, and national origins.[2] One of those critical needs, for every subset of multifamily resident, is adequate broadband internet access service.

Property Owners Are Stakeholders. NMHC and NAA urge the Commission to acknowledge that owners of multifamily housing – especially owners and managers of low-income housing – are stakeholders whose contributions and participation will be critical to the success of any effort to ensure that all lower income Americans have equal access to broadband service. For the Commission to properly address income discrimination, it must address the level of service in low-income communities, which include many multifamily communities.

---

[1] *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking (rel. Dec. 22, 2022).

[2] NMHC and NAA are strong proponents of Diversity, Equity and Inclusion (DEI) efforts and both engage in education, programming and other initiatives that advance this important work. For example, more than a decade ago, NMHC created a DEI Initiative to highlight best practices, provide resources and leverage strategic alliances to help our members create diverse, equitable and inclusive organizations. NAA does comparable work in advancing the industry's success in this space.

Indeed, in defining the permitted uses of Broadband Equity, Access, and Deployment ("BEAD") Program funding, Congress expressly recognized that improving infrastructure within multifamily buildings is a critical need, thus recognizing the central, positive role of property owners in promoting further deployment.

If broadband service providers are stakeholders, then surely so are the owners and managers of low-income housing. With their intimate knowledge of conditions on their properties and the historical practices of the providers, multifamily property owners offer an important perspective and counterweight to the providers. Furthermore, multifamily owners have a direct interest in ensuring that their residents have access to the services they need. In fact, many owners of affordable and low-income housing have attempted to help their residents apply for subsidies.

The multifamily industry is able and willing to work with the Commission on these issues. Understanding and properly acknowledging the role of the apartment industry can only help the Commission achieve its goals.

The Commission's Rules Should Address Only Broadband Internet Access Service and Providers of Such Service. NMHC and NAA agree with the Commission's proposal to limit the definition of "digital discrimination of access" to broadband Internet access service, because the statute expressly refers to that class of service and no other. In addition, the text of Section 60506 of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (the "IIJA"),[3] makes it clear that the only entities covered by the statute are providers of broadband internet access service.

[3] Section 60506 of the IIJA has been codified at 47 U.S.C. § 1754.

The text of § 60506 gives no indication that Congress meant to expand the Commission's authority into new areas of the economy. Therefore, under the major questions doctrine,[4] the Commission cannot rely on § 60506 in any attempt to regulate the activities of multifamily owners. It is highly unlikely that Congress meant to give the Commission new authority over an entirely unrelated field – especially one as large and central to the American economy as the real estate industry – through silence, implication, or mere ambiguity. Furthermore, property owners have no control over the terms of a provider's service or the cost of infrastructure, and therefore cannot "discriminate" as the term is used in § 60506.

Subsidizing Network Expansion and Upgrades Is the Only Practical Way to Solve the Inequities in the Availability of Broadband Service. The problems with broadband service in low-income and affordable communities stem from the economics of building communications networks. Service providers want to be able to reach their return-on-investment targets, and the reason that low-income communities suffer from a lack of adequate broadband service has to do with the multiple cost factors that affect a provider's return on investment.

Those factors are: (i) the cost of extending a network to pass a particular property; (ii) the cost of installing a new distribution network (wireless or wireline), or (more commonly) upgrading existing wiring in an older building; (iii) the cost of end-user equipment allowing individual residents to make effective use of the broadband capability; and (iv) the recurring cost of subscriptions for every resident.

The four components of the access problem have one thing in common: they are all economic in nature. This is why Congress has adopted a broad range of subsidies. In fact,

[4] *West Virginia v. EPA*, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

subsidies are the only practical solution to the problem of ensuring equal access to broadband service for every American.

Property owners contribute to the deployment of broadband networks in many ways, as explained in detail in the real estate industry's comments in GN Docket 17-142 (the "*MTE Proceeding*"). Apartment owners routinely contribute to the cost of new inside wiring, or the upgrading of existing facilities. On the other hand, housing providers have no control over the cost of extending a network to reach a property, the actual cost of the infrastructure they help fund, the cost of equipment, or the recurring cost of monthly subscriptions. And providers of affordable and low-income housing, where infrastructure investment is so badly needed, rarely have the resources to contribute to the cost of facilities.

For the BEAD Program and other initiatives addressed in the IIJA to succeed, NMHC and NAA believe that the Commission and other agencies should begin by assessing the underlying nature and full scope of the problem. There are approximately 20 million households in the United States living in multiple tenant properties. Between 68% and 80% of those households are served by two providers and very likely have up-to-date broadband service from at least one provider. Any building over 20 years old, however, probably does not have wiring suitable for transmitting adequate broadband service, and 70 percent of U.S. apartment units were built before the year 2000.[5] These older units, furthermore, tend to be more affordable than newer construction. In 2021, the U.S. recorded a median, monthly gross rent of $1,403 for apartment units built 2000 or later, $1,170 for units built from 1980 to 1999, and $1,090 for units built before 1980.[6] Even if broadband service is available in the vicinity, the wiring must be

[5] NMHC tabulations of 2021 American Community Survey microdata.

[6] *Id.*

upgraded. Therefore, the government's efforts, including subsidies, should be concentrated on the five million or so apartment households that are unserved or served by a single provider offering inadequate Internet access, which is frequently no more than low-speed DSL. These households are essentially all in low-income housing. Those residential communities should be specifically identified, and funding directed towards building infrastructure to and within them. Upgrading the wiring in those buildings is essential to solving the overall access problem.

The Proposals in the NPRM Do Not Go Far Enough To Ensure "Equal Access," and Tend To Focus on Matters That Are Unlikely To Solve It. An effective response to "digital discrimination of access" and ensuring "equal access" will require resolution of two particular issues, which in turn could require the Commission to make some hard decisions about the scope of its authority and the future of broadband in this country. The overall goal should be to promote the capability to deliver "comparable service" from at least one provider to every residential unit. To do this effectively, the Commission would need to do three things: (i) define a new standard for "comparable broadband internet access service," which would mean service at an FCC-defined speed that is available everywhere in the provider's service area at the same price; (ii) define "suitable infrastructure" as infrastructure capable of delivering comparable broadband internet access service; and (iii) require providers to deploy or upgrade infrastructure so that it is "suitable," to every community in their service area, including to and within low-income multifamily housing communities. If a service provider does not participate in available subsidy programs or perform the work needed to extend suitable infrastructure at its own expense to and within a low-income community, that failure could be deemed a denial of equal access.

In addition, more work is needed to develop more finely-tuned broadband maps, so that potential subscribers can readily determine which provider or providers deliver "comparable" service, not just to the general area in which they live, but to their street address. Without this information, it will be very difficult for anybody to determine whether there is actual "equal access" or "digital discrimination of access" in a given case.

The Six Best Practices To Prevent Digital Discrimination Proposed by the Communications Equity and Diversity Council Fail to Acknowledge Critical Factors.

Several of the Council's proposals should be revised to acknowledge that multifamily owners are stakeholders. Others should be rejected completely.

- Owners of multifamily properties, to include low-income properties, should be included among the local stakeholders involved when broadband assessments are being made. We note again that Congress specifically allocated funding in the IIJA for infrastructure inside multifamily properties.
- If states and localities are to collaborate with ISPs, community organizations, and consumer advocates to "facilitate equitable broadband deployment," apartment owners should be consulted as well.
- States and localities should not be encouraged to enact mandatory access legislation of any kind. This recommendation should be stricken because mandatory access laws are outdated and counterproductive. A new study conducted by NMHC found no change in single family broadband access in San Francisco between 2016 and 2021. The study even shows a slight (albeit not statistically significant) decrease in multifamily resident access. This suggests that the San Francisco mandatory access ordinance has had no effect on broadband access. This is not surprising, because

mandatory access statutes impose no obligation for a service provider to serve all properties, any particular property, or any specific number or proportion of properties. All they do is allow and reward cherry-picking. The San Francisco ordinance is no different. In reality, providers rarely seek out low-income properties and when they do, they do not need mandatory access statutes to get access.

- Section 60506 does not require that subscribers have service from any particular number of providers, nor does it refer in any way to competition. Introducing competition as a factor in this proceeding would be counterproductive, because granting subsidies to fund duplicative infrastructure could result in some communities being served by multiple providers, while others would still have inadequate service. Such an outcome would violate the statutory mandate of facilitating "equal access."

NMHC and NAA Support All Thirteen Best Practices To Advance Digital Equity for States and Localities. NMHC and NAA support any activities that state and local governments can undertake that will enable low-income residents to obtain access to and take advantage of broadband services. The thirteen best practices identified by the Council and listed in the *NPRM* are all important endeavors. Raising awareness of subsidy programs available to lower income residents for broadband service and devices, as well as education and training in the use of various devices, are especially important. Many owners of low income properties are interested in finding ways to assist residents in this regard.

No Further Action in the *MTE Proceeding* Is Required. Further action in the *MTE Proceeding* will not prevent or eliminate discrimination. The fundamental reasons that lower-income Americans lack access to adequate broadband service are economic in nature, which means that the solution must also be an economic one. The various subsidy programs addressed

in the IIJA are the proper remedy. None of the four issues noted in the *NPRM* merits further consideration in the *MTE Proceeding*.

- The Commission has already considered access to inside wiring several times. In principle, the voluntary sharing of inside wiring may sound as if it would promote competition, but for many practical and technical reasons – addressed in great detail in the *MTE Proceeding* – forced sharing of wiring is undesirable. Nor is there any connection between the use of one set of wiring by one provider and "digital discrimination of access."
- The lack of adequate infrastructure in certain communities, or certain areas within a community, is undoubtedly a factor in digital discrimination of access. That is not an issue for the *MTE Proceeding*, however, because it is the failure of the provider to install a uniform, suitable level of infrastructure that creates the discrimination problem. That problem can only be solved through additional investment by providers.
- Providers in lower income communities often lack the economic incentive to upgrade their facilities or even to enter those communities to offer service in the first place. Inadequate infrastructure can lead to discrimination, because the providers do not offer residents of the affected communities the same opportunities available to subscribers in other areas. This is a provider incentive issue, not a building access issue.
- Exclusive rooftop access agreements also have been thoroughly examined. Short of violating the Fifth Amendment rights of the owners of rooftop space and their existing tenants, there is nothing the Commission can or should do. Furthermore,

there is no connection between rooftop access and discrimination in the terms offered to subscribers.

NMHC and NAA respectfully urge the Commission to: (i) focus its efforts in this proceeding more directly on promoting equal access for residents of lower income apartment communities; (ii) tailor its rules to be consistent with the overall plan for promoting broadband access laid out in the IIJA; (iii) acknowledge that the multifamily industry is a key stakeholder; (iv) work with the apartment industry to expand awareness and educate residents about the opportunities created by the various support programs; and (v) and move to officially close the *MTE Proceeding*.

TABLE OF CONTENTS

Page

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementing the Infrastructure Investment and Jobs Act : Prevention and Elimination of Digital Discrimination	)	GN Docket No. 22-69

COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL AND THE NATIONAL APARTMENT ASSOCIATION

Introduction

The National Multifamily Housing Council ("NMHC")[7] and the National Apartment Association ("NAA")[8] respectfully submit these Comments in response to the Commission's Notice of Proposed Rulemaking (the "*NPRM*").[9]

[7] Based in Washington, D.C., the National Multifamily Housing Council is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, who help create thriving communities by providing apartment homes for 40 million Americans, contributing $3.4 trillion annually to the economy. NMHC advocates on behalf of rental housing, conducts apartment-related research, encourages the exchange of strategic business information and promotes the desirability of apartment living. Over one-third of American households rent, and over 20 million U.S. households live in an apartment home (buildings with five or more units).

[8] The National Apartment Association serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 141 state, local and global affiliates, NAA encompasses over 92,000 members representing more than 11 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity and innovation.

[9] *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking (rel. Dec. 23, 2022).

The apartment industry provides homes for 38.9 million Americans from every walk of life, including seniors, teachers, firefighters, healthcare workers, families with children, and many others who enrich our communities. The members of NHMC and NAA serve residents of every "income level, race, ethnicity, color, religion [and] national origin,"[10] and owners of apartment properties are dedicated to meeting the housing-related needs of all of their residents. One of those critical needs, for every class of multifamily resident, is adequate broadband internet access service. Consequently, NMHC and NAA strongly support the Commission's effort to address every form of discrimination identified by Congress in § 60506 of the Infrastructure Investment and Jobs Act.[11]

In Reply Comments responding to the Notice of Inquiry that initiated this docket,[12] and in filings in the multiple tenant environment proceeding,[13] NMHC and NAA have submitted extensive information showing that as many as 80% of apartment residents have access to broadband service from at least two providers.[14] The vast majority of apartment residents are

---

[10] 47 U.S.C. § 1754(b)(1).

[11] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (the "IIJA"). Section 60506 of the IIJA has been codified at 47 U.S.C. § 1754.

[12] *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Inquiry (rel. Mar. 17, 2022) (the "*NOI*").

[13] *Improving Competitive Broadband Access to Multiple Tenant Environments,* GN Docket No, 17-142 (the "*MTE Proceeding*").

[14] Further Joint Reply Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Nov. 19, 2021) ("*MTE 2021 Further Reply*") at pp. ii, 7, 9-10, 24; Further Joint Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Oct. 20, 2021) ("*MTE 2021 Further Comments*") at pp. ii, viii, ix, 4-5, 10-11, 45, 64; Joint Reply Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Sep. 30, 2019) ("*MTE 2019 Reply*") at pp. 2-3, 10-12, 20. Joint Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Aug. 30, 2019) ("*MTE 2019 Comments*") at pp. ii, 11-12, 20-23, 49. For purposes of these comments, we

neither unserved nor underserved. This is not true, however, in the case of the low-income housing sector. In apartment communities occupied predominantly by lower-income Americans, it is often difficult if not impossible to obtain access to reliable high-speed broadband service. Furthermore, regardless of how the Commission chooses to define "digital discrimination of access," this situation is unlikely to change without the expenditure of substantial capital. Broadband providers have largely neglected this sector of the market because they have concluded that they can earn a higher return on their capital investment dollars by extending and upgrading facilities elsewhere.

Regrettably, many of the issues and questions raised in the *NPRM* strike us as unlikely to lead to much progress towards delivering equal access to Americans of every income level. We recognize that the Commission must first interpret § 60506 and that its rules must be consistent with that interpretation. NMHC and NAA believe that this can be done most effectively by inducing providers to extend or upgrade service to low-income multifamily communities, smaller apartment buildings, and other sectors of the market that are being left behind. By ensuring that every apartment resident has access to adequate broadband service, the Commission would also be going a long way towards eliminating the other forms of discrimination that Congress seeks to prevent.

For this reason, NMHC and NAA urge the Commission to pursue a policy that would do three things: (1) identify areas where there are residential buildings that lack adequate

---

ask that the Commission treat these submissions as incorporated by reference and therefore be considered part of the record of this docket, because they contain extensive information pertaining to the speeds, quality, and other aspects of broadband Internet access service available in apartment communities.

broadband service; (2) direct subsidy funds towards extending broadband facilities to and within such buildings; and (3) direct subsidy funds towards the purchase of equipment and monthly service fees of low-income residents.[15]

I. THE COMMISSION'S AUTHORITY UNDER SECTION 60506 EXTENDS ONLY TO BROADBAND INTERNET ACCESS SERVICE AND TO PROVIDERS OF BROADBAND INTERNET ACCESS SERVICE.

NMHC and NAA agree with the Commission's proposal to limit the definition of "digital discrimination of access" to broadband Internet access service.[16] Section 60506 refers expressly to "broadband internet access service" in five separate places,[17] and the references to speed, capacity, and latency in the definition of equal access further clarify that Congress was concerned with broadband services. Nowhere does the statute refer to any other class of service.

Furthermore, the only entities covered by the statute are providers of broadband internet access service.[18] Here again, the text of the statute makes this clear. As we just noted, § 60506 refers to broadband service in five places, and it does so without once referring to any type of entity to be regulated other than a provider. Section 60506(a)(1) says that it is the policy of the United States that "subscribers" should benefit from "equal access," within the service area of a "provider." This reference to "subscriber" indicates an intent to address the actions of providers, because a person is only a "subscriber" in relation to a provider. In addition, because this is an

---

[15] Reply Comments of NMHC and NAA, GN Docket No. 22-69 (filed June 30, 2022) ("*NOI Reply Comments*"), at 13-15.

[16] *NPRM* at ¶ 26.

[17] 47 U.S.C. §§ 1754(a)(1), (a)(3), (b)-(d).

[18] *NPRM* at ¶ 29.

overall statement of policy, if Congress meant for the Commission to regulate the activities of other kinds of persons, one would expect to see it here.

The key provision of the entire statute is the definition of "equal access."[19] This definition refers to "the equal opportunity to subscribe to an offered service," again using language that describes the relationship between a provider and its customer, and without referring to any other kind of entity. Consequently, this proceeding must be confined to the actions of service providers. Section 60506(b) says that the Commission's rules are to facilitate equal access and § 60506(c) says that Federal policy is to promote equal access. Only a service provider, and not some other class of entity, can "offer" a "service," and only the service provider can assure the comparability of "speeds, capacities, latency, and other quality of service metrics" of the service.

Similarly, § 60506(d) refers to state and local policies that will prevent "broadband internet access service providers" from discriminating. If Congress were concerned with the actions of non-providers, Congress would have encouraged states and localities to prevent them from discriminating as well.

On the whole, therefore, the plain language of § 60506 contains no references to non-providers and very strongly indicates that Congress intended to regulate only providers.

In addition, we note here that the NPRM does not propose a legal analysis that would support applying § 60506 to entities other than providers. Presumably, the Commission might seek to support any final rule that does extend §60506 beyond its plain language by relying on *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U. S. 837 (1984). As described above,

[19] 47 U.S.C. § 1754(a)(2).

however, the plain language of § 60506 states that the new rules are to "facilitate equal access,"[20] and "equal access" is defined as "the equal opportunity to subscribe to an offered service . . . [on] comparable terms. . . ."[21] Consequently, under the first step of the *Chevron* analysis, there is no ambiguity for the Commission to resolve.

Furthermore, any rule that attempts to regulate the activities of owners of real property would violate the major questions doctrine, as most recently enunciated by the Supreme Court in *West Virginia v. EPA*, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022).

The major questions doctrine seeks to protect against "unintentional, oblique or otherwise unlikely" intrusion on "basic questions about self-government, equality, fair notice, federalism and the separation of powers." [22] Cases relying on that doctrine have held that an agency must point to clear congressional authority when it seeks to regulate "a significant portion of the American economy."[23] In *West Virginia v. EPA*, the Supreme Court upheld the EPA's decision to repeal and replace its Clean Power Plan, on the basis that when it adopted the Clean Power Plan the agency had violated the major questions doctrine and extended its regulatory reach into matters Congress had left for itself.[24]

---

[20] 47 U.S.C. § 1754(b)(1).

[21] 47 U.S.C. § 1754(a)(2).

[22] *West Virginia v. EPA*, 142 S. Ct. at 2620 (Gorsuch, J., concurring), citing *NFIB v. OSHA*, 142 S. Ct. 661, 211 L. Ed.2d 48 (Gorsuch, J., concurring) (slip op. at 5).

[23] *West Virginia v. EPA*, 142 S. Ct. at 2621 citing *NFIV v. OSHA*, 595 U.S. at ___, 142 S. Ct. 661, 211 L. Ed. 2d 448 (Gorsuch, J., concurring) (slip op. at 18), quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

[24] *West Virginia v. EPA*, 142 S. Ct. at 2610.

Several specific issues raised in the *NPRM* in turn pose questions under the major questions doctrine. These include:

- Providers are responsible for "entities working on their behalf."[25] This is the usual rule in the case of any principal-agent relationship, and § 60506 offers no reason to alter it here. If a contractor engages in unlawful discrimination in the course of performing its duties to a provider, the provider should be held responsible. If these entities are not already subject to the Commission's authority under the Communications Act, § 60506 grants no new authority over them.

- Section 60506 does not extend to entities "involved in any of the logistical steps needed to provide broadband."[26] Once again, nothing in the plain language indicates any Congressional intent to impose any obligation on any persons other than providers. Furthermore, this phrasing is exceedingly broad. For example, the production of fiber optic cable and other equipment is a "logistical step" necessary "to provide broadband." So is the shipment of such equipment from a manufacturer to a job site. Should the Commission seek to regulate the business practices of Corning or other equipment providers? Or railroads and trucking companies? It might be possible to deploy broadband services more quickly if, for example, manufacturers and shippers were directed to give priority to orders destined for low-income communities. But we think Congress would find such a suggestion surprising.

- For the same reasons, the statute does not extend to "any entity that can affect" an individual's ability to access or afford broadband.[27] The price of service is a fundamental aspect of an individual's ability to afford broadband, and that price is undoubtedly affected by the price of various economic inputs, such as the cost of equipment and the cost of labor. Under this theory, the Commission could bring down the cost of service by regulating the cost of fiber optic cabling. There are many entities that can "affect" access or affordability, but we are confident that Congress did not mean to grant the Commission the authority to oversee such a broad portion of the economy.

[25] *NPRM* at ¶ 29.

[26] *Id.*

[27] *Id.*

Finally, in connection with the immediately preceding point, the NPRM specifically asks about property owners.[28] Of course, property owners cannot "discriminate," as the term is used in § 60506, because they do not control the terms of service. In any event, the courts have noted that Congress has not granted the Commission authority to regulate the real estate industry.[29] Therefore, without new authority, the Commission would not be able to regulate property owners on the theory that they can affect access to broadband services. Does § 60506 confer any such authority? The text of the statute clearly does not do so expressly. It would be highly unlikely for Congress to have meant to give the Commission new authority over an entirely unrelated field – especially one as large and central to the American economy as the real estate industry – through silence, implication, or mere ambiguity. Consequently, as with any other class of non-providers, § 60506 grants the Commission no power over property owners.

II. IN PREVENTING DIGITAL DISCRIMINATION OF ACCESS, THE KEY PROBLEM IS LACK OF ACCESS TO SUITABLE INFRASTRUCTURE.

NMHC and NAA believe that while it is appropriate and important to prohibit discrimination on the grounds listed in the statute, more attention should be placed on the mandate in § 60506 to "facilitate equal access." Without obligating providers to construct infrastructure at their own expense, or to apply for and obtain available subsidies, the existing disparities are unlikely to be corrected.

---

[28] *Id.*

[29] "[T]he Communications Act does not . . . explicitly grant the Commission jurisdiction over the real estate industry, an area that is normally outside the Commission's scope of authority." *Building Owners and Managers Association v. FCC,* 254 F.3d 89, 94 (D.C. Cir. 2001). Any rules adopted in this proceeding can apply only to broadband providers. *See Nat'l Cable & Telcoms. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

A. The *NPRM* Does Not Devote Enough Attention to Ensuring Delivery of Adequate Broadband Service in Low-Income Properties.

Providers should not be permitted to discriminate based on race, ethnicity, color, religion, or national origin, and such practices should be prohibited.[30, 31] The statute is clear about that. But in § 60506, Congress also defined "equal access" to mean "the opportunity to subscribe to an offered service," and the key to solving the problem of lack of access is to ensure access to suitable infrastructure. NMHC and NAA believe the proposals in the *NPRM* do not go far enough to address the root cause of the problem, and tend to focus on matters that are unlikely to solve it. Once the infrastructure is available, the prospect of other forms of discrimination drops significantly.

For example, in today's environment, it is unlikely that a provider would deliberately discriminate on any of the bases listed above. To the extent existing disparities may be traced to past discrimination, that discrimination may have resulted in a lack of infrastructure, but the problem today remains just that: a lack of infrastructure. Only building more infrastructure will correct this. And if today's technical and economic factors are taken into account, as required by § 60506, in many instances there may be no digital discrimination of access under the *NPRM*'s proposed definition.[32]

---

[30] We address "discrimination of access based on income level" in detail in Part III, below.

[31] NMHC and NAA are strong proponents of Diversity, Equity and Inclusion (DEI) efforts and both engage in education, programming and other initiatives that advance this important work. For example, more than a decade ago, NMHC created a DEI Initiative to highlight best practices, provide resources and leverage strategic alliances to help our members create diverse, equitable and inclusive organizations. NAA does comparable work in advancing the industry's success in this space.

[32] *See NPRM* at ¶ 12.

Consequently, we believe that finding ways to promote installation of infrastructure to serve low-income communities should be the focus of the new rules. The Commission can adopt a basic prohibition on discrimination, but the central debate should not be about whether to adopt a disparate impact or a disparate treatment standard, but about what needs to be done to solve the infrastructure problem, combined with efforts to address cost of service, cost of equipment, and education about the value of adoption.

The key questions in the multifamily industry are:

- Under what circumstances would a provider's failure to upgrade existing facilities inside a building be justified?;
- Under what circumstances could a provider refuse to extend service to a new apartment building?; and
- If "comparable service" is already available, must a provider still serve a community?

If the goal is to eliminate discrimination and ensure equal access, a means must be found to fund upgrading and construction of new facilities in situations in which providers prefer not to invest their own capital, consistent with Congressional intent in allowing for technical and economic feasibility.

B. "Equal Access" Means Access to a Defined, Adequate Level of Broadband Service that is Uniform Across a Provider's Service Area.

Section 60506(a)(2) defines "equal access" as "the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions. . . ." It is clear from this definition that Congress intended the Commission's rules to address access to a service, as offered by a specific provider of service. The "equal opportunity to subscribe" is to "an offered service," and the "offered service" across a given area is to be "comparable" in various respects. In other words, Congress intended to require providers to make a uniform level and quality of service

available to all of their subscribers and to prevent providers from treating subscribers within a service area differently, based on the characteristics listed in § 60506(b)(1).

The fundamental problem is that extending broadband networks is expensive, and sometimes providers determine that extending a network to serve an area or upgrading the wiring inside a building will not produce sufficient revenue to cover the cost.[33]

C. Delivery of Adequate Broadband Service in Low-Income Properties Poses Particular Challenges to Broadband Providers and Housing Providers.

As we have discussed in the *MTE Proceeding*, extending broadband networks capable of delivering an adequate level of service to and within low-income residential buildings is a challenge for all of the affected parties because of its complexity.[34] The problem has four components: (i) the cost of extending a network to reach a particular property; (ii) the cost of installing a new distribution network (wireless or wireline), or (more commonly) upgrading existing wiring in an older building; (iii) the cost of end-user equipment allowing individual residents to make effective use of the broadband capability; and (iv) the recurring cost of subscriptions for every resident. These components have one thing in common: they are all economic in nature.

In most apartment properties, the four factors underlying lack of service in low-income environments are either not present, or are substantially ameliorated. On the other hand, the combination of the four creates a very difficult problem for any provider seeking to serve

---

[33] Exhibit A, Declaration of Leonardo Delgado ("Delgado Decl."), at ¶¶ 5-6; Exhibit B, Declaration of Kimberly Grimm ("Grimm Decl."), at ¶¶ 7-8.

[34] *MTE 2021 Further Comments* at75-79; *MTE 2021 Further Reply* at 15-31.

properties with a large proportion of lower-income residents or located at a substantial distance from the provider's distribution network. For example, the high broadband penetration rates in most apartment communities indicate that residents have access to end user equipment and can afford their monthly subscriptions. In addition, the cost of upgrading facilities inside a building can usually be addressed through contractual mechanisms developed by the marketplace, as we explained in the *MTE Proceeding*.[35] The cost of extending the network to the property may still be significant, but if the property owner is contributing to the cost of on-site facilities, and residents can be expected to subscribe in high numbers, the provider can typically justify the investment. The key factor in lower-income environments, however, is clearly that many residents cannot afford devices or subscriptions, and even those that can are unlikely to subscribe to the more expensive premium levels of service, for which subsidies are not available.[36] This makes it very difficult for providers to meet their usual return-on-investment targets.

Housing providers face even greater challenges than service providers, because they have no control over any of the relevant economic factors. They do not own and cannot build or use outside plant. They do not provide and cannot set the price of any of the devices needed by residents or of the broadband service itself (with the exception of negotiated rates charged in bulk agreements, which are lower than the provider's standard rate). If a provider happens to be willing to install or upgrade inside wiring, the property owner will frequently bear a substantial

---

[35] *MTE 2021 Further Comments* at 39-64; *MTE 2019 Comments* at 14-16, 53-67.

[36] Delgado Decl. at ¶ 6 ("Because low income residents are not likely to subscribe to a service provider's more costly advanced services, incumbent providers frequently tell us that the CAPEX required for the needed infrastructure upgrades is simply too expensive to justify the projected ROI the provider expects to earn.").

portion of the cost of the wiring and related facilities.[37] Even if the inside wiring belongs to the property owner, the owner does not control the technical characteristics of the service and therefore must accept the provider's standards and costs, if an upgrade is required. Finally, owners cannot simply demand service from any provider: a provider must be willing to serve and will only do so if its return-on-investment requirements are met.

Not only do apartment owners frequently underwrite a portion of a provider's costs, but owners do not impose significant or undue costs on providers. Property owners often negotiate to include performance standards in agreements, but those standards are for the benefit of subscribers.[38] In those cases in which owners are compensated by providers, the payments are generally modest and help offset the infrastructure expenses incurred by the property owner.[39] In many instances – especially in lower income communities – the owner receives no compensation.

The foregoing assumes that a provider is actually willing to invest in the facilities needed to deliver adequate broadband service at a property. Often, they are not, especially in smaller apartment communities and in affordable and low-income housing. This is why Congress explicitly called for a portion of the funding dedicated to the Broadband Equity, Access, and Deployment ("BEAD") Program to be used for infrastructure subsidies within unserved and underserved low-income residential buildings.[40]

---

[37] *MTE 2021 Further Reply* at 34-35; *MTE 2021 Further Comments* at 39-42, 48-54; *MTE 2019 Comments* at 16, 57-63.

[38] *MTE 2021 Further Comments* at 15-18, 42.

[39] *MTE 2021 Further Reply* at 31-34; *MTE 2021 Further Comments* at 54-59; *MTE 2019 Comments* at 78-84.

[40] IIJA, § 60102(f).

Historic policies may have resulted in a lack of network capacity in the vicinity of many lower-income residential buildings. The solution, however, turns on meeting the needs of broadband providers. Consequently, correcting the historical problem and providing equal access today requires an economic solution.

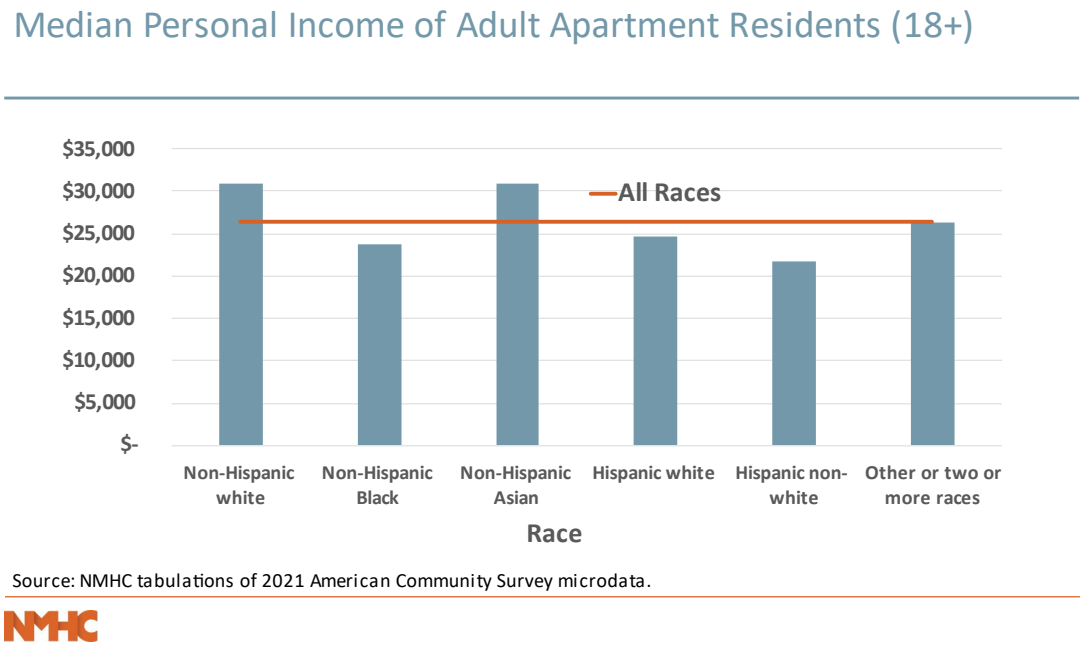
D. The Scope of the Access Problem Needs To Be Defined in Quantitative Terms.

In the *MTE Proceeding*, the Real Estate Associations pointed out that if the affordability problem is to be fully addressed, its scope must be properly defined. This issue is largely outside the scope of this proceeding; in fact, if the BEAD Program and other elements of the IIJA are properly implemented, we believe it will be because the NTIA and the Commission will have properly assessed the scope of the problem and assigned priorities accordingly. Nevertheless, we think it is useful to review this issue briefly here because it may help focus this proceeding on the right concerns. There are two steps in this analysis.

The first question is "How many multifamily communities or households are there in the underserved category of lower-income properties?"

The record in the *MTE Proceeding* shows that there are three categories of households living in apartments that probably need assistance:[41] (i) 2.8 million in HUD-assisted apartments; (ii) 5.2 million with incomes under $20,000 (which include the first group); and (iii) 8.8 million with incomes under $35,000 (which include the first two groups). As the chart on the next page shows, the national median income of all apartment residents is less than $30,000 a year.

[41] *MTE 2021 Further Reply* at 15-25.



There are roughly 20 million apartment households in the United States.[42] As we discuss further below in Part V, between 68% and 80% of apartment properties in the country have two or more providers. Therefore, using round numbers, taking 75% of 20 million means that around 15 million apartment households in the country have access to at least two broadband providers. These two providers will typically be the local franchised cable operator and the ILEC, although the combination of providers can vary and in many cases there will be three or more providers at any given property. In any event, the real estate industry's analysis suggests that there are around 5 million households in residential MTEs that are served by a single provider.[43] This group must include a very large proportion of the 2.8 million in HUD-assisted apartments. If

[42] *MTE 2021 Further Reply* at 24, Exhibit A.

[43] *MTE 2021 Further Reply* at 24-25.

these properties have any broadband service at all, it is typically low-speed, unreliable DSL delivered over very outdated wiring.[44]

NMHC and NAA believe that the Commission, NTIA, and other agencies must first identify the national universe of multifamily households that are unserved or underserved and then concentrate their efforts at promoting deployment and adoption on that universe. In essence, the problem is that around a quarter of apartment residents live in communities that are underserved because of the cost of extending or upgrading infrastructure,[45] because the low incomes of the residents makes it difficult for providers to meet their return-on-investment criteria,[46] or both.

The second step in the analysis is to identify specific areas within local jurisdictions and particular residential housing communities (both public and privately-owned) that are unserved or underserved. Individual property owners and residents who lack adequate broadband service can then ascertain whether such service is available somewhere nearby. And for their part, the Commission, the NTIA, and other agencies can then concentrate their efforts on identifying providers able to extend service at a level defined by the Commission under one of the IIJA's applicable programs. Unfortunately, as we discuss further below, despite the Commission's best efforts, the existing broadband maps are inadequate for this purpose.

---

[44] *MTE 2021 Further Reply* at 17-19 (existing wiring in low-income housing and other underserved apartment communities is typically too old or of a type that will not support high speed broadband service).

[45] Grimm Decl. at ¶¶ 7-8.

[46] Delgado Decl. at ¶ 6.

III. THE ONLY EFFECTIVE WAY TO ADDRESS DISCRIMINATION BASED ON INCOME LEVEL IS TO IDENTIFY LOW-INCOME COMMUNITIES THAT LACK ADEQUATE INFRASTRUCTURE AND PROVIDE SUBSIDIES.

Unlike other forms of discrimination, discrimination based on income level is fundamentally an economic issue. This means that preventing and curing such discrimination requires the expenditure of a provider's private capital, or some form of subsidy, whether indirect and implicit, or direct and explicit. For instance, the government could require each provider to deliver a certain level of service to all customers at the same rate, regardless of location or any other considerations. To do so, the provider would have to charge some customers a rate substantially above cost to ensure that it covered its costs at other locations. This is, of course, the kind of implicit subsidy mechanism that the Telecommunications Act of 1996 sought to eliminate. The alternative is a direct subsidy of the kind to be provided under the BEAD Program, the middle mile program, and the Affordable Connectivity Program.

Accomplishing the goals of the IIJA will require providing subsidies for extending networks to pass rural and other unconnected communities, to pass lower income properties in otherwise well-served areas, upgrading wiring in older buildings, end-user equipment, and subscription costs. In combination, the various subsidy mechanisms will eliminate much of the incentive providers have to distinguish among residential properties based on the income of their residents.

Nevertheless, the Commission must fulfill the Congressional mandate and adopt rules to provide for equal access and to prevent discrimination. Even though other sections of the IIJA will deal with most of the circumstances that might be deemed income discrimination, Congress has directed that the new rules address income discrimination in some fashion.

On the other hand, Congress made no finding in the IIJA to the effect that any present disparities are the consequence of past discrimination. Consequently, it would be unreasonable for the Commission to declare that a provider or any other type of entity is discriminating today in violation of the law, based only on historical circumstances. The rules may take various forms, but they should not impose a disparate impact standard. Instead, they should apply only after a finding of actual, intentional discrimination, as defined in the rule.

In any case, a truly effective policy for preventing "digital discrimination of access" and assuring "equal access" would appear to require resolution of at least two particular issues, which in turn could require the Commission to make some hard decisions about the scope of its authority and the future of broadband in this country.

First, we note that the *NPRM* asks a number of questions about what constitutes "equal access,"[47] but makes no attempt to define what is to be delivered. If the underlying goal of Section 60506 is to ensure that every American has "the equal opportunity to subscribe to an offered service that provides comparable speeds . . . for comparable terms and conditions," then all multifamily residents should be able to obtain "comparable" service from at least one provider. One way to do this could be for the Commission to define "comparable broadband internet access service" at an FCC-defined speed that is available everywhere in the provider's service area at the same price. Otherwise, without a definition of what is to be provided, it would seem very difficult to say that there is a guarantee of equal access. Under this approach, if a service provider failed to participate in available subsidy programs or perform work needed to extend suitable infrastructure (meaning infrastructure capable of delivering "comparable

[47] *NPRM* at ¶ 33.

broadband internet access service") at its own expense to and within a low-income community, that failure could be deemed to constitute digital discrimination of access.

Making funds available for upgrading existing inside wiring is essential to the success of any plan for ensuring equal access. Seventy percent of U.S. apartment units were built before the year 2000,[48] and existing cable in such buildings cannot deliver high-speed broadband services of the speeds and quality required today.[49] Moreover, these older units tend to be more affordable than newer construction. In 2021, the U.S. recorded a median, monthly gross rent of $1,403 for apartment units built 2000 or later, $1,170 for units built from 1980 to 1999 and $1,090 for units built before 1980.[50]

Second, more work needs to be done to improve the broadband maps, so that potential subscribers can readily determine which provider or providers deliver "comparable" service, not just to the general area in which they live, but to their street address. Without this information, it will be very difficult for anybody to determine whether "equal access" or "digital discrimination of access" actually exists in a given case.

The *NPRM* asks whether the Commission should coordinate with other agencies and programs, including the NTIA's BEAD program.[51] The answer is, emphatically, <u>*Yes*</u>. In fact, it is vital that the Commission's broadband maps, the Commission's Affordable Connectivity

---

[48] NMHC tabulations of 2021 American Community Survey microdata ("*Age and Rent Tabulation*").

[49] Declaration of William K. Dowd, attached as Exhibit B to *MTE 2021 Further Reply,* at ¶ 7 ("Dowd Decl.").

[50] *Age and Rent Tabulation.*

[51] *NPRM* at ¶ 85.

Program ("ACP"), and the BEAD program all be coordinated and work together. Otherwise, resources are bound to be misallocated, and key groups will be overlooked.

For example, an article recently appeared in the trade press, alleging that the broadband market was "saturated," based on the claims of a business consultant who stated that his firm had prepared a report based on Commission data.[52] The specific data source was not mentioned, but it appears that the reference was to the latest iteration of the broadband maps.[53] Aside from the need noted earlier to upgrade wireline facilities, there is another problem. In urban and suburban areas all across the country, where we know that NMHC and NAA members are having trouble getting existing facilities upgraded to provide decent broadband service, the Commission's maps show that 100% of addresses can receive service. This 100% figure may be technically correct, if some of those properties fall within the footprint of a fixed wireless provider, but even then it does not mean that the fixed wireless provider will serve the property upon request. It is for this reason that NMHC and NAA support the recommendations of Education Superhighway ("ESH"), the Schools, Health & Libraries Broadband Coalition ("SHLB"), and members of the No Home Left Offline Coalition in calling for improving the accuracy of the broadband maps.[54]

---

[52] J. Lafayette, *New Government Data Shows U.S. Broadband Market Saturated: Analyst*, Multichannel News (Jan. 4, 2023), available at https://www.nexttv.com/news/new-government-data-shows-us-broadband-market-saturated-analyst?mc_cid=e6ec21f67d&mc_eid=7b56ec6425 (last visited Feb. 17, 2023).

[53] The *Multichannel News* article does not identify the source of the data, but we believe the source to be the broadband map because the 93.7% availability level cited in the article is the same as the total percentage for all speeds of wired service given by the Commission at its broadband map webpage. The article is available at: https://broadbandmap.fcc.gov/area-summary/fixed?zoom=4&br=r&speed=0_0&tech=1_2_3, (last visited Feb. 17, 2023).

[54] Exhibit C, Letter from ESH and SHLB to Chairwoman Jessica Rosenworcel ("ESH/SHLB Letter").

As much as the Commission has focused on access to buildings as presenting a barrier to the deployment of service, the fact remains that aside from those cable operators that are subject to universal service requirements in particular franchises (which is by no means the rule), no broadband provider in the United States has any legal obligation to serve every address upon request. In addition, several other trade press articles suggest that broadband providers are gaming the challenge process.[55] If this is true, the Commission must act promptly to correct it, as it appears the Commission has begun to do.[56] The work of the FCC to update the nation's broadband maps is commendable, but it is clear that significantly more work must be done to prevent inaccuracies and misrepresentations by providers which will distort and, in some cases, prevent, critical federal broadband infrastructure resources from reaching the communities that need them most. NMHC and NAA join ESH and SHLB in calling for the Commission to "shift the burden of proof for unconnected consumers to the ISPs by pausing the current challenge process and creating a new challenge process that automatically designates MDUs, which fit the

---

[55] *See, e.g.,* J. Brodkin, *ISP admits lying to FCC about size of network to block funding to rivals*, Ars Technica (Feb. 2, 2023), available at https://arstechnica.com/tech-policy/2023/02/cable-company-tries-to-block-grants-to-rivals-by-lying-about-coverage-area/amp/, (last visited Feb. 17, 2023); J. Engebretson, *T-Mobile, Verizon Reportedly Exaggerating FCC Broadband Map Data: We Dig Into the Details*, Telecompetitor (Feb. 13, 2023), available at https://www.telecompetitor.com/t-mobile-verizon-reportedly-exaggerating-fcc-broadband-map-data-we-dig-into-the-details/?mc_cid=071580346f&mc_eid=7b56ec6425 (last visited Feb. 17, 2023).

[56] T. Shields and S. Moritz, *FCC Is Investigating Broadband Providers Over Coverage Claims Bloomberg Government* (Feb. 16, 2023) available at https://bloomberg.com/news/articles/2023-02-16/fcc-is-investigating-broadband-providers-over-coverage-claimshttps://www.bloomberg.com/news/articles/2023-02-16/fcc-is-investigating-broadband-providers-over-coverage-claims (last visited Feb. 21, 2023).

above criteria, as unconnected and establish a process in which ISPs are required to submit challenges."[57]

As we noted above, making sure that all the relevant programs work hand in glove is also critical. Congress specifically allocated funding for wiring inside buildings in the IIJA. These funds could go a long way towards promoting equal access and preventing discrimination, but if the broadband maps do not fully and fairly identify apartment communities that would benefit from such funding, the goals of Congress will not be met.

If § 60506 or other statutes do not grant the necessary authority for the Commission to define comparable broadband service, or to fully address the problems with the development and use of the broadband maps, then lower-income Americans will continue to suffer from lower quality and unreliable broadband internet access for the foreseeable future.

IV. FURTHER ACTION UNDER THE *MTE PROCEEDING* IS NOT REQUIRED, NOR WOULD IT HAVE ANY SIGNIFICANT EFFECT ON THE DISCRIMINATION ISSUES POSED BY THIS PROCEEDING.

The *NPRM* asks whether further action is required in the *MTE Proceeding* to address digital discrimination.[58] Congress, however, has directed the Commission to address digital discrimination within the context of this proceeding. The NPRM's question thus raises two questions: Why is that Congressional directive not sufficient? And if a different proceeding was not aimed at "digital discrimination," but at some other perceived problem, how likely is it that action in that docket will address digital discrimination? It is simply not logical to bifurcate the problem of digital discrimination, given the Congressional mandate. If it is within the mandate,

[57] ESH/SHLB Letter at 3.

[58] *NPRM* at ¶ 84.

an issue should be addressed in this proceeding; addressing the issue elsewhere immediately raises the question of whether it actually falls outside the scope of "digital discrimination," because otherwise there would be no need to address it in the other proceeding.

In any case, the *NPRM* asks specifically about four issues raised by other parties. None of those issues requires further examination in the *MTE Proceeding*, as we will explain here.

- Conflicts over access to inside wiring.[59] The Commission has already considered this issue several times. It was addressed in the San Francisco Declaratory Ruling,[60] the responses to the Notice of Inquiry in the *MTE Proceeding*, the responses to the Notice of Proposed Rulemaking in the *MTE Proceeding*, and in the responses to the Public Notice seeing to refresh the record in the *MTE Proceeding*. In principle, the sharing of inside wiring may promote competition in certain situations. That has always been the premise of the Commission's activities in that area, although the record shows that for many practical and technical reasons forced sharing of wiring is generally undesirable. [61] But competition and discrimination are not the same thing. Nor is there any connection between the use of one set of wiring by one provider and "digital discrimination of access." If that were the case, then perhaps the Commission should be looking at requiring providers to share their external infrastructure in the name of preventing discrimination.

- Insufficient infrastructure for high-speed broadband.[62] The lack of adequate infrastructure in certain communities, or certain areas within a community, is undoubtedly a factor in digital discrimination of access. That is not an issue for the *MTE Proceeding*, however, because it is the failure of the provider to provide a uniform, suitable level of infrastructure that creates the discrimination problem. That problem can only be solved through additional investment, using either the respective provider's own capital, or through subsidies large enough to overcome the capital or operating deficits that discourage upgrading of the facilities. This is almost entirely a problem only in lower income communities. Although we pointed out this problem in the *MTE Proceeding*, because that docket does not address the issue of subsidies, it is not the appropriate place to identify ways of overcoming insufficiencies in existing

[59] *NPRM* at ¶ 84, n. 322.

[60] *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council,* Declaratory Ruling, 34 FCC Rcd 5702, 5724-5759 (2019).

[61] *See, e.g., MTE 2021 Further Reply* at 20-33.

[62] *NPRM* at ¶ 84, n. 324.

infrastructure. That issue should be addressed in a targeted fashion, aimed at developing a suitable subsidy mechanism.

- Lack of economic incentives for providers in low-income communities.[63] The *NPRM* correctly notes that NMHC and NAA have argued that providers in lower income communities lack the incentive to upgrade their facilities or even to enter those communities to offer service in the first place. In practical terms, this is the same issue as the immediately preceding one. The lack of infrastructure can lead to discrimination, in that the providers do not offer residents of the affected communities the same opportunities to subscribers that are available to residents of other areas. Again, this is not an issue for the *MTE Proceeding*, because it is a provider incentive issue, not a building access issue.

- Exclusive rooftop access agreements.[64] This issue, too, has been thoroughly examined. NMHC and NAA oppose any regulation of rooftop agreements for the reasons stated in the *NOI Reply Comments* and the *MTE Proceeding*.[65] Limited rooftop access is an unavoidable consequence of a particular business model. Short of violating the Fifth Amendment rights of the owners of rooftop space and their existing tenants, there is nothing the Commission can do. Furthermore, there is no connection between rooftop access and discrimination in the terms offered to subscribers.

Finally, further action in the *MTE Proceeding* will not prevent or eliminate any kind of discrimination. As we have discussed, the fundamental reasons that lower-income Americans lack access to adequate broadband service are economic in nature, which means that the solution is also an economic one. The various subsidy programs addressed in the IIJA are the proper remedy.

---

[63] *NPRM* at ¶ 84, n. 325.

[64] *NPRM* at ¶ 84, n. 326.

[65] *NOI Reply Comments* at 22; *MTE 2019 Comments* at 69-70; *MTE 2019 Reply* at 28; *MTE 2021 Further Reply* at 47-49.

V. PROPERTY OWNERS ARE STAKEHOLDERS: WHEN RECOMMENDING MODEL POLICIES AND BEST PRACTICES FOR STATES AND LOCALITIES, NMHC AND NAA URGE THE COMMISSION TO BEAR IN MIND THAT MULTIFAMILY OWNERS HAVE A STRONG INTEREST IN ENSURING THAT THEIR RESIDENTS HAVE ACCESS TO HIGH QUALITY BROADBAND SERVICES.

The NPRM proposes to adopt guidelines for states and localities in the form of the best practices identified by the Communications Equity and Diversity Council (the "Council").[66] These include six "Model Policies and Best Practices To Prevent Digital Discrimination by ISPs" and thirteen "Best Practices To Advance Digital Equity for States and Localities."[67] NMHC and NAA support most of these recommendations, but several should be revised because they fail to acknowledge the role of property owners. In addition, we strongly oppose any recommendation to adopt or expand any form of mandatory access legislation.

A. If State and Local Governments Wish To Prevent Digital Discrimination by ISPs, They Should Consider Adopting Policies that Require ISPs To Respond to Apartment Owners' Requests for Service.

Providers often fail to meet owner requests for service or for upgrades of existing facilities at multifamily properties. The primary reason for this, as discussed above, has to do with the return-on-investment requirements of broadband service providers and their investors.[68] This is why subsidies must be directed towards infrastructure construction in low-income

---

[66] *NPRM* at ¶ 93; *Report of the Communications Equity and Diversity Council Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity*, attached to the *NPRM* as Appendix B (the "*Council Report*"). Page numbers cited below are those in the *NPRM*, rather than those in the *Council Report* as first issued.

[67] *Id*. at ¶¶ 94-95.

[68] NMHC and NAA have also addressed this point in detail in earlier filings. See. e.g., *MTE 2021 Further Reply* at 18-20; *MTE 2021 Further Comments* at 75-79.

multifamily environments,[69] and why Congress directed that BEAD funding be used for that purpose.[70] As we have repeatedly pointed out to the Commission, property owners are well aware of how important reliable communications services are to their residents, to include broadband service, among others. This is why it is not at all unusual for a property owner to contact a service provider to request either competitive service from that provider, or to request that the quality of existing service be improved.

For example, Converged Services, Inc., is a consulting firm that oversees broadband services for more than 200,000 apartment units in 46 states, plus the District of Columbia. Many of these units are in low-income communities. One of CSI's primary tasks is to identify providers willing to extend high-quality broadband service to these communities. The CEO of CSI, Leonardo Delgado, reports that "[t]he communities that face the stiffest resistance to new infrastructure investments are definitely those communities with low income residents. In our experience, the predominant reason that providers tell us that they are not interested in making infrastructure investments at certain communities is the provider's concern about its potential return on investment ("ROI").[71] Mr. Delgado adds:

> [A]t many of our clients' low income residential MTEs, a signficant reason why residents often complain about poor quality broadband service is due to the outdated nature of the existing broadband infrastructure where no major upgrades have been performed since the original infrastructure was installed. Many low income buildings are wired with outdated distribution plant, obsolete electronics, and old copper telephone wiring and/or coaxial cable and **no new fiber facilities** have been installed. This outdated infrastructure is often a component of the provider's network and is simply incapable of delivering the type of broadband services that are available in buildings where new fiber lines and updated electronics have been installed. . . . In our experience, these incumbent providers have

---

[69] *NOI Reply Comments* at 13-16.

[70] IIJA, § 60102(f).

[71] Declaration of Leonardo Delgado, attached as Exhibit A ("Delgado Decl."), at ¶ 5.

> very little incentive to make any capital investment ("CAPEX") in the infrastructure at low income properties. Because low income residents are not likely to subscribe to a service provider's more costly advanced services, incumbent providers frequently tell us that the CAPEX required for the needed infrastructure upgrades is simply too expensive to justify the projected ROI the provider expects to earn.[72]

The same kinds of problems arise in a related sector of the apartment market. Continental Properties Company ("Continental") is the largest developer of garden-style suburban apartments in the United States, and in 2021 was listed by NMHC as the tenth largest developer of apartment homes in the country. Although Continental does not own or manage low-income housing *per se*, Kimberly Grimm, Executive Vice President of Development for Continental states that 42% of the company's occupied units qualify at 80% of HUD's Area Median Income. Ms. Grimm also reports that:

> At various times when we have contacted providers regarding serving a property they have given a number of reasons for not doing so, including: (i) a lack of distribution infrastructure near the property; (ii) the project would not meet internal return on investment criteria costs; or (iii) the property is too small. . . . For example, it is not unusual for Verizon and AT&T to refuse to upgrade their existing copper facilities inside a property to fiber, even though their network already passes the community. Residents therefore cannot receive higher speed broadband service from that provider. They may have access to DSL, but not to higher-speed services, and even the DSL service may be unreliable.[73]

This information reinforces the concerns we raised in the *MTE Proceeding* about the problems many owners have experienced when seeking to obtain or improve broadband service, especially at low-income properties or in smaller buildings. In that proceeding we discussed the same issues. For example, William Dowd, Chairman and CEO of GigaMonster, a competitive ISP stated:

> One of the issues GigaMonster runs into in serving older low-income housing is the combination of the cost of wiring upgrades and rate structures. For example, most low-

[72] *Id.* at ¶ 6.

[73] Grimm Decl. at ¶¶ 6-7.

> income housing was built 20+ years ago. In these properties, we find older cable types that cannot be used for what is classified by the FCC as high-speed broadband. Cables such as RG59, Cat3 and older versions of Cat5 (Cat5E is only 20 years old as a cable type), will not carry the speeds and quality required today, especially for video streaming. . . .[74]
>
> To further illustrate the financial challenges in providing broadband to underserved communities, low-income garden-style communities with older cable types, require substantial capital investment to install the new cables capable of providing high speed broadband. This generally costs in excess of $1,200 per residential unit to overbuild the network infrastructure due to fiber trenching and fishing cables from the attics down through the walls of each residential unit. As such, the capital required for a 280-unit garden community is approximately $336,000. . . .[75]
>
> There are millions of multifamily residential units throughout the US, especially in underserved communities, where the existing cable is inadequate to serve high speed Internet . . . .[76]

In addition, Andrew Smith, President of Ancillary Service Management, LLC, stated:

> [O]ther properties get hindered with lower broadband speeds because providers are simply unwilling to make an investment to "build out" facilities or extend their networks to certain multi-family communities that really need better broadband service. This trend has continued. A recent example: I contacted Comcast about potentially deploying broadband service to an 80-unit Manufactured Housing Community located in Maryland where residents are not satisfied with the speeds currently provided by a small, private operator. Comcast refused the request, stating with specificity that the cost to deploy service to the community was just too high and that Comcast "would never make payback."[77]

The reluctance of providers to upgrade facilities is not limited to smaller owners seeking service at low-income properties. In the *MTE Proceeding*, three of the largest apartment owners in the country described their experience.

---

[74] Dowd Decl., at ¶ 7.

[75] *Id.* at ¶ 8.

[76] *Id*. at ¶ 9.

[77] Declaration of Andrew Smith, attached as Exhibit E to *MTE 2021 Further Comments,* at ¶ 10.

At the time, in November 2021, Essex Property Trust, Inc., was the 12th largest apartment owner and the 24th largest apartment manager in the United States; Linda Wu, at the time Vice President of Asset Management for Essex, stated:

> Essex has been working with AT&T on potential upgrades to bring fiber facilities to some of our existing communities that are currently served by AT&T's outdated copper technology that delivers slow Internet access speeds. Unfortunately, these discussions have been ongoing for a number of years and have not come to fruition. To date, AT&T has not yet completed a fiber upgrade at any of our existing copper properties despite having completed site assessments at 68 communities comprised of 17,061 units. Essex has been given a variety of reasons for why this has happened but the most obvious reason is that AT&T simply hit the brakes on its fiber overbuild program a few years ago, apparently for financial reasons. As a result, residents in our copper-served communities have not benefited from AT&T's fiber broadband service.[78]

Equity Residential was then the second largest apartment owner and the tenth largest apartment manager in the United States. Charlie Walker, Assistant Vice President – IT for Equity Residential, stated:

> It is very rare for a property not to be served by the cable operator, and in most cases we are able to obtain service from the telephone company. But it is not unusual for Verizon or AT&T to refuse to extend broadband service to a building or refuse to upgrade their existing copper facilities to fiber so that higher speed broadband service is available to the residents.[79]

Also in November 2021, Avalon Bay Communities, Inc., was the fourth largest apartment owner and the 13th largest apartment manager in the United States. Alaine Walsh, Senior Vice President, Operations & Investment Services for AvalonBay, stated:

> Sometimes an ILEC has refused to extend fiberbased broadband service to a new construction community, and ILECs have routinely refused to upgrade legacy copper facilities to fiber, leaving those communities with low-speed Internet services that may or may not meet the minimal FCC definition of "broadband service." Historically, ILECs have declined to deploy fiber based broadband service at over 50 AVB communities containing more than 13,000 apartment homes in five states, citing various discretionary justifications,

[78] Declaration of Linda Wu, attached as Exhibit G to *MTE 2021 Further Comments,* at ¶ 12.

[79] Declaration of Charlie Walker, attached as Exhibit C to *MTE 2021 Further Reply,* at ¶ 16.

> including a lack of available funding in the ILEC's budget, the ILEC lacking a video franchise in the market area of the community, or the ILEC's unwillingness to deploy fiber unless AVB incurs all of the ILEC's costs for deployment. . . .[80]
>
> There have been many instances where AVB requested broadband service proposals from an ISP and the ISP ultimately declined to serve for a host of reasons, including failure of the proposed deployment to meet the ISP's internal rate-of-return requirements, a lack of fiber or line-of-sight transport options, or the community residing outside the ISP's current footprint.[81]

Not only is it highly significant that these companies have had trouble convincing certain providers to install the infrastructure needed to deliver high-quality broadband service in their communities, it is important to note that these are among the largest apartment owners and managers in the United States and that few of the properties in question would have been low-income or workforce housing. If owners of Class A apartment buildings, with large asset portfolios, have trouble convincing providers to upgrade their facilities, there can be no doubt that the problem is much greater in low-income housing, for smaller owners, and for smaller properties.

We believe that if the Commission properly defines "comparable service" and centers the new rules on the need to subsidize facility construction, this problem and many of the concerns regarding digital equity and income discrimination will be resolved. Nevertheless, properly directed state and local action to supplement that approach would be helpful. For example, states and localities could enact legislation requiring service providers to respond to requests for service or inquiries from property owners within a specified amount of time. They could also require providers to apply for any infrastructure funding available under state or local programs

---

[80] Declaration of Alaine Walsh, attached as Exhibit C to *MTE 2021 Further Comments,* at ¶ 4.

[81] *Id.* at¶ 5.

as a condition of permitting or the grant of other rights or benefits. If funding is not available, providers could be required to explain why they cannot build the requested comparable facilities without such funding. One can envision a range of state or local requirements that could induce providers to ensure that their infrastructure delivers a uniform level of high-quality service.

Without such a process, or a similar one overseen by the Commission itself, many low-income multifamily residents are likely to remain without adequate broadband service. The measures proposed by the Council and discussed further below will fall short if broadband service providers do not have concrete obligations and face no consequences when they fail to meet them.

B. The Six Best Practices To Prevent Digital Discrimination Fail To Acknowledge that Multifamily Building Owners and Managers Are Local Stakeholders.

The Communications Equity and Diversity Council recommends that equity assessments be made in partnership with ISPs, the community, and other local stakeholders. The Council itself based its recommendations on information from a range of interests, including broadband service providers, academic experts, programmers, trade associations, local governments, and numerous public advocacy groups. Regrettably, the Commission did not include any representatives of the apartment industry in the membership of the Council. Nor did the Council interview any such individuals.[82] The Council's recommendations are therefore incomplete and, in some respects, seriously flawed.

---

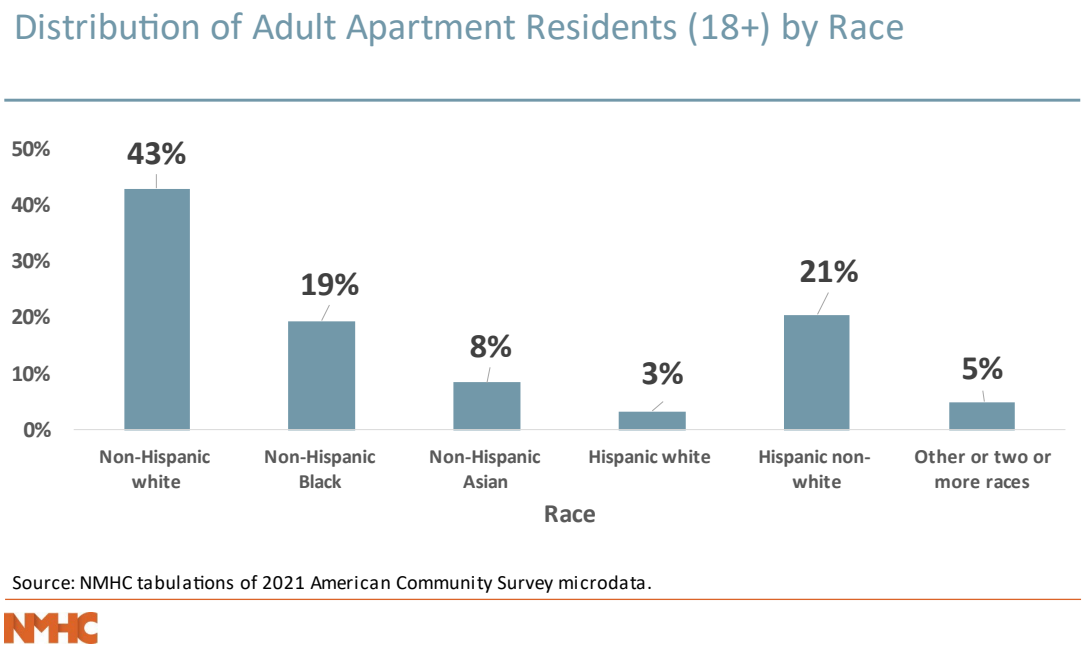
[82] This is not the first omission of this kind by the Commission. When the Broadband Deployment Advisory Committee (the "BDAC") adopted its Model State Code in 2018, the membership of the BDAC included not a single representative of the real estate industry, even though access to buildings was an item of discussion. The Model State Code recommended that

As we have shown, the single greatest barrier to deployment of comparable broadband services in low-income communities is the reluctance – if not the recalcitrance – of service providers. Broadband providers are clearly important stakeholders, but if convincing them to serve low-income residents were a simple matter, many of the Council's recommendations would not be needed. On the other hand, with their intimate knowledge of conditions on their properties and the historical practices of the providers and their own strong incentive to provide their residents with critical services, multifamily property owners offer an important counterweight to the providers.

Going forward, we urge the Commission to acknowledge that owners of multifamily housing – especially owners and managers of low-income housing – are stakeholders whose contributions and participation are critical to success. For the Commission to properly address income discrimination, it must address the level of service in low-income communities, which of course include many multifamily communities. Furthermore, many residents of low-income housing are also members of ethnic or racial minorities who may also be the targets of other forms of discrimination. To illustrate this, the chart on the next page presents the racial distribution of adult apartment dwellers.

---

the states adopt legislation requiring property owners to install neutral host fiber networks at their own expense, even though there was no evidence that such a policy would solve any known problem. Nor did the BDAC undertake any kind of study to determine actual conditions inside commercial office, retail, or residential properties anywhere in the country. National Multifamily Housing Council and National Apartment Association, *ex parte* Letter to Chairman Ajit Pai and BDAC Chair Elizabeth Bowles, GN Docket 17-142 (filed June 26, 2018). The Chairman did appoint an NMHC official to a BDAC working group after this issue was drawn to his attention, but by then the Model Code had been released.



If state and local governments wish their policies to succeed, they would be well-advised to consider the views of the owners of the apartments occupied by the individuals and families the policies are intended to help. In fact, NMHC and NAA would welcome the opportunity to work with government authorities at all levels, if it would help ensure the availability of comparable service to all multifamily residents on reasonable terms.

With this in mind, NMHC and NAA urge the Commission to modify five of the Council's proposed model policies and best practices as follows:

Policy No. 1: Owners of multifamily properties, to include low-income properties, should be included among the local stakeholders involved when broadband assessments are being made. Once again – and we cannot say this enough – property owners are frequently engaged in efforts to extend broadband service in ways consistent with the Commission's goals. Multifamily owners are well aware of the concerns and needs of residents and providers, as well

as the technical and financial issues associated with extending service. Owners thus have valuable knowledge and experience that should not be ignored at the local level.

Policy No. 2: NMHC and NAA strongly oppose this recommendation, which we address separately below in Part V(C).

Policy No. 3: If states and localities are to collaborate with ISPs, community organizations, and consumer advocates to "facilitate equitable broadband deployment," surely apartment owners should be consulted as well. If property owners are not involved early on in such discussions, it will be more difficult for them to contribute in helpful ways. As just noted, property owners have considerable relevant expertise, because they know and understand the needs of their residents, the practical problems that can arise when extending or upgrading infrastructure, and the kinds of objections often thrown up by reluctant service providers.

Policy No. 4: Property owners may have less to contribute in the realm of access to the public rights-of-way, but if a broad range of stakeholders is to be consulted, as suggested by the *NPRM*'s description of the recommendation, then perhaps they should be involved.

Policy No. 5: The omission of apartment owners from this recommendation is especially striking. The Council proposes that regular meetings of stakeholders be convened, "including community anchor institutions, public interest groups, community advocates, labor organizations, and faith-based institutions, to evaluate areas and households unserved or underserved with competitive and quality broadband options." If there is any group of entities or individuals who already know a great deal about this topic in any community, it is the apartment industry.

Policy No. 6: The Council recommends that states and localities explore the role of competition and choice in activities including education, telehealth, civic engagement,

employment, and other activities. While NMHC and NAA have no objection in principle to such activities, we fail to see the relevance of "competition and choice" to the subject of this proceeding. Consequently, we think it is inappropriate to include this recommendation.

To be clear, the apartment industry not only strongly supports competition and choice, but actively works to leverage competition in the market to deliver high-speed, affordable, and reliable service to residents. Our filings in the *MTE Proceeding* make this very clear. Nevertheless, the purpose of § 60506 is to promote equal access and prevent discrimination; any actions that might limit access should therefore not be promoted by the Commission in this proceeding. Congress adopted § 60506 because it was concerned about discrimination resulting in a lack of access to service, not competition. Consequently, the statute does not require that subscribers have access to service from any particular number of providers. The fundamental goal of the IIJA is "to ensure that all people of the United States benefit from equal access to broadband Internet access service." If "equal access" meant access to the same number of providers, then the Commission's rules – as well as any state or local requirement adopted at the Commission's recommendation -- would have to ensure that residents of rural areas and other high-cost regions have access to the many multiples of providers available in the densest and best-served areas. This is clearly not feasible, and nothing in the text of § 60506 suggests that Congress had that in mind. What is required is access to an adequate level of broadband for all, from at least one provider.

In fact, given the very large amount of money needed to fund network construction to reach every unserved and underserved person in the country, without an express requirement to deliver competition, rather than merely service, the Commission must assume that a single provider is sufficient. It is highly unlikely that Congress meant to authorize the construction of

duplicate networks without expressly saying so, precisely because it is so important to ensure that every household gets adequate service. Thus, to urge states and localities to promote competition in every context is actually contrary to the intent of Congress.

For instance, as discussed in the *MTE Proceeding*, NMHC and NAA data indicate that as many as 80% of apartment communities in the United States are served by at least two providers.[83] It is also not uncommon for apartment properties to have three or even more providers on site. Although the Commission has rejected our 80% figure without analysis,[84] the Commission has not determined an alternative figure. NMHC and NAA are confident that, were the Commission to investigate this issue in detail, as we have proposed, it would find that our fundamental conclusion is correct. In fact, a survey conducted for the Fiber Broadband Association in 2021 found that 68% of apartment residents have a choice of providers.[85]

In addition, state and local action to promote competition and choice may simply not be required, because the Commission's efforts to promote competition and broadband deployment using other technologies will also play a role. The roll-out of 5G service, for example, may advance competition and expand options for low-income residents without the need for costly wiring infrastructure to be installed throughout thousands of older buildings across the country.

Where competition and choice are lacking is in low-income and smaller properties deemed unworthy of investment by providers because of their perceived lack of profitability.

---

[83] *MTE 2021 Further Reply* at 5-6, n.14, 7; *MTE 2021 Further Comments* at 10-14.

[84] *Improving Competitive Broadband Access to Multiple Tenant Environments,* GN Docket No, 17-142, Report and Order and Declaratory Ruling (rel. February 15, 2022) at ¶ 12.

[85] *What Residents Want!*, survey conducted by RVA LLC, on behalf of the Fiber Broadband Association (Sep. 2021) ("*FBA Survey*") at p. 30. The *FBA Survey* is attached as Exhibit B to the *NOI Reply Comments*.

Furthermore, the critical problem in that sector at this point is actually that many properties are unserved or underserved. A focus on competition would lead to duplicative service at some locations and inadequate service at the rest. To accomplish the goals of Congress, it would therefore be wiser for states and localities to concentrate on assuring that every one of those residents has access to reliable broadband service from one suitable provider, as opposed to setting arbitrary competition targets that providers may be unable or unwilling to meet.

C. NMHC and NAA Strongly Oppose Any Recommendation that Suggests that States and Localities Adopt Mandatory Access Legislation, Because Owners Are Well Aware of the Advantages of Resident Choice and Competition in Multifamily Properties.

The Council's proposed Policy No. 2 states: "Facilitate greater awareness and information sharing among multi-dwelling unit owners regarding tenant choice and competition considering broadband service agreements." As a preliminary observation, NMHC and NAA note that if apartment owners are treated as stakeholders and included in the broadband equity assessments process and other activities recommended by the Council, any necessary increase in such awareness will surely follow. We seriously doubt that property owners need to be informed about the benefits of resident choice and competition because the delivery of reliable broadband service is so central to their business, but NMHC and NAA and our members would be very happy to work with state and local government on ways to promote deployment and adoption of broadband.

In any case, we object strenuously to this recommendation, because it appears to be intended to urge states and localities to adopt or expand mandatory access legislation.[86] As we have noted repeatedly, mandatory access statutes are unconstitutional and outmoded.[87] While we appreciate that the *NPRM* does not propose that the Commission adopt any form of mandatory access, by urging states and localities to do so, the Commission is still promoting a flawed policy.

Furthermore, mandatory access statutes simply do not accomplish their stated goals. The Commission's *Mandatory Access Report*,[88] released in 2019, suggested that there was a modestly higher broadband penetration rate in states with mandatory access statutes, when compared to other states. The *Report* itself, however, stated that "[t]his effect is not necessarily a causal one; it only reflects a positive association existent in the data . . . ."[89] In other words, the

---

[86] While the *NPRM* does not use the term "mandatory access," that seems to be what is meant by the following passage:

> States and localities should consider laws or policies that are designed to eliminate these unintended consequences and ensure expanded access to MTEs. For example, some States, such as Illinois, New Jersey, and Nevada require MTE owners to give competing providers access to their properties. Additionally, localities, like San Francisco, California, have adopted policies that discourage property owners from unreasonably interfering with residents' ability to obtain service, which may be another tool to promote the availability and deployment of broadband to MTEs.

Council Report at 97.

[87] *MTE 2019 Comments* at 75-77; *MTE 2019 Reply* at 26-27; *MTE 2021 Further Comments* at 72-74; *MTE 2021 Further Reply* at 39-41.

[88] S. Kauffman and O. Carare, *An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments*, Federal Communications Commission, Office of Economics and Analytics (July 2019), (the "*Mandatory Access Report*").

[89] *Id*. at 9.

Mandatory Access Report did not find that mandatory access laws actually cause higher broadband penetration.

In response, NMHC prepared an analysis of the *Mandatory Access Report*, which confirms that the relationship found by the *Mandatory Access Report* between mandatory access laws and non-MTE households "must stem from other compositional differences between states with and without mandatory access laws that were not explicitly controlled for in [the FCC's] model."[90] Furthermore, the difference in broadband penetration found by the Commission's study was small by any measure. And again, given that essentially every MTE in the non-mandatory access states is served by at least one broadband provider, it is impossible to attribute much significance to mandatory access in those states that do have statutes.

Despite its flaws, various parties have continued to cite the *Mandatory Access Report*.[91] The *NPRM* also refers favorably to the San Francisco mandatory access ordinance, even though the Commission has done no analysis of the effects of that ordinance.[92] Consequently, NMHC has prepared a second report to examine the effects of the San Francisco law, five years after its adoption.[93]

---

[90] National Multifamily Housing Council, *Critique and Analysis of Mandatory Access Laws and Broadband Use in Residential Multi-Tenant Environments* (Aug. 2019), at 1.

[91] Comments of INCOMPAS, GN Docket No. 17-142 (filed June 30, 2022), at 25; Comments of Public Knowledge, GN Docket No. 17-142 (filed June 30, 2022), at 16.

[92] Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity, Communications Equity and Diversity Council Recommendations, attached to the NPRM as Appendix B, at n. 63.

[93] Exhibit D, National Multifamily Housing Council, *Impact of San Francisco Mandatory Access Law,* (Feb. 2023) the "*San Francisco Access Study*").

Using microdata from the 2017 American Community Survey, the *San Francisco Access Study* compared the proportion of San Francisco apartment households that reported having access to broadband Internet access service in 2016, to the proportion that reported having access to broadband service in 2021. The *Study* also examined the share of single family households in San Francisco over the same period.

The new NMHC study found no change in single family broadband access in San Francisco between 2016 and 2021. The *Study* shows a slight – but not statistically significant -- decrease in multifamily resident access. This suggests that the San Francisco ordinance has had no effect on broadband access. We note also that even if the new *Study* had shown a slight increase in access, it might not have been statistically significant. The *San Francisco Access Study* also found that lower-income households, younger households, those with Black, Asian, or Hispanic householders, or householders without a college degree, were less likely to have Internet access in San Francisco.

One might therefore ask – why did the San Francisco ordinance not have the desired result? The answer is quite simple. Mandatory access statutes impose no obligation to serve all properties, any particular property, or any specific number or proportion of properties. Providers are thus free to cherry-pick, and they do. They do not have unlimited capital or the management resources to seek access to every building, so they choose the ones that will earn them the greatest return on their investment. This means that, in practice, providers rarely seek out low-income properties and rarely rely on mandatory access statutes to get access to such properties. Instead, competitive providers typically seek access to luxury and upper middle income properties, which may already host two, three, or more providers. The result is more competition

in some buildings, but not access to more properties, and certainly not more infrastructure installed to serve the lower end of the market.

A franchised cable operator, under the anti-redlining provision of the Cable Act and its build-out obligations under a local franchise, might seek to serve such properties, and might benefit from a mandatory access statute inasmuch as the statute prevents the owner from negotiating for compensation for the right of entry. But without such obligations – which are external to the mandatory access statute or the terms of any deal between the affected property owner and the provider – cable operators are not compelled to serve anywhere, and noncable broadband providers are subject to no obligations at all.

In other words, extending the scope of mandatory access statutes will do nothing to prevent discrimination on the basis of income, or any other factor.

We therefore urge the Commission to do three things. First, the Commission should cease referring favorably, in any context, to either the 2018 report or the San Francisco law. Second, the Commission's Office of Economics and Analytics should conduct its own comprehensive study of the scope of access to and competition inside buildings before the Commission raises this issue again. And third, the Commission should not include Proposed Policy No. 2 in any recommendations to the states and local governments.

Finally, we also object to this proposal because, while singling out property owners, the *NPRM* never notes that the fundamental problem underlying lack of broadband deployment in low-income environments is the need of providers to meet their return-on-investment requirements. The *NPRM* does address the promotion of subsidy programs,[94] and as discussed

[94] *NPRM* at ¶ 85.

above it does ask whether the lack of economic incentives for providers and insufficient infrastructure should be addressed in the *MTE Proceeding*.[95] The basic economic problem is not only clear, but the entire point of the broadband provisions of the IIJA, yet the *NPRM* barely acknowledges this reality. Why else did Congress set aside $40 billion for the BEAD program, including funding of deployment of infrastructure within multifamily buildings, with priority to be given to residential buildings that have "a substantial share of unserved households," or are in locations "in which the percentage of individuals with a household income that is at or below 150 percent of the poverty line . . . is higher than the national percentage . . . ."?[96] Congress understands that subsidies are needed to overcome the reluctance of providers to extend or upgrade their networks to deliver adequate broadband services. The Commission will never be able to ensure that all Americans have access to nondiscriminatory, adequate service if it does not recognize and clearly state the underlying economic incentives.

D. NMHC and NAA Support All Thirteen Best Practices To Advance Digital Equity for States and Localities.

NMHC and NAA support any activities that state and local governments can undertake that will make it easier for low-income residents to obtain access to and take advantage of broadband services. The thirteen best practices identified by the Council and listed in the *NPRM* are all important endeavors. We wish to address three issues in some detail because owners and operators of low-income residential properties desire to promote broadband deployment in their communities, and one of the barriers to further deployment is low adoption by residents. If

---

[95] *NPRM* at ¶ 84.

[96] IIJA, § 60102(f).

adoption rates remain low, broadband service providers may remain reluctant to invest their own capital in deployment, even if a large proportion of the cost of deployment is covered by subsidy programs.

1. NMHC and NAA strongly support "raising awareness about and streamlining the application process for government benefit programs such as the Affordable Connectivity Program."

Owners of low-income multifamily properties want their communities to be as attractive to prospective residents as possible, for at least three reasons. First, reducing resident turnover is a significant concern all across the multifamily industry: empty units mean lower revenue to support property operations. In 2020, the most recent year for which data is available, there was a historically low rate of resident turnover due to shelter-in-place orders and record high renewal rates. But even under those conditions, almost half (46.9%) of total apartment units experienced renter turnover over a 12-month period.[97]

Because lower income residents are particularly sensitive to increases in housing and related costs, affordable broadband rates can help with both attracting and keeping residents at a property. Second, apartment owners understand that penetration rates are critical for providers. If residents are unable or unwilling to pay for the service in sufficient numbers, prospective providers will not agree to serve, and incumbents will not agree to upgrade their facilities. And third, apartment owners simply want residents to be satisfied and happy customers. Satisfied residents are the best advertising an owner can have and a strong indication that building management is doing a good job.

[97] 2021 NAA Survey of Income and Expenses in Rental Apartment Communities.

For these reasons, owners are very interested in promoting the ACP and any other subsidy mechanism that will boost subscription rates at their properties. Mr. Delgado, of CSI, describes how his firm has worked with a property owner to improve access to the ACP at that owner's 70 properties, most of which are low-income communities:

> Our solution, which to our knowledge has not been accomplished before, was to work directly with service providers chosen by the client to negotiate new service contracts at the clients' properties that include specific provisions pertaining to the ACP. Our client hired legal counsel to draft and negotiate the ACP provisions with the service providers' legal teams. These contractual provisions require the service providers to do the following: (i) market the availability of the ACP to residents of the property, (ii) assist residents in registering for the ACP, and (iii) train the property's on-site staff in assisting residents to register for the ACP. The marketing and promotion of the ACP program includes on-site events, individual resident meetings, and on-site sessions with the property's staff for education and awareness of the ACP program. We have encountered a number of obstacles, including a reluctance by some providers to do any marketing that differs from their standard practices of promoting and marketing their more profitable service offerings. However, to date, we have been successful in helping our clients enter contracts with these ACP provisions at more than 20 of their low income properties with a number of major service providers . . . .[98]

Mr. Delgado also notes that CSI's clients have lost opportunities for improved broadband service when providers have been unable to qualify as ACP providers, and that the ACP application process is a significant barrier for many non-English speakers.[99]

Much more could be done. NMHC and NAA believe that a partnership with the Commission, broadband providers, and other government agencies could be very fruitful. We are very interested in working with the Commission to develop and distribute informational materials about the ACP and other programs so that apartment residents will have easy access to accurate instructions about how to apply. We would be interested in other opportunities, as well.

---

[98] Delgado Decl. at ¶ 9.

[99] *Id.* at ¶¶ 10-11.

Well-designed and targeted programs and materials could lead to substantial improvements in the quality of broadband access and awareness of subsidies in many low-income communities. Existing Commission resources describing the program, while well-intentioned, do not adequately represent the role of multifamily property owners, or target renters specifically. NMHC staff has raised this issue with Commission staff and has extended an offer to assist in developing materials in the future, to facilitate programming at industry conferences, and to look for additional areas of partnership with the Commission.

An additional area for the Commission to prioritize to boost enrollment in the ACP, as advocated for by the housing community and in comments filed with the Commission by Stewards for Affordable Housing for the Future ("SAHF"),[100] is coordination with the US Department of Housing and Urban Development ("HUD") on data sharing that would facilitate automatic eligibility and enrollment of residents of all federally-assisted housing, not just those residing in traditional public housing, such as those assisted under Project Based Section 8 Rental Assistance, Section 202 Housing for the elderly, or those who hold portable Section 8 Housing Choice Vouchers and live in privately-run housing communities. As SAHF rightly points out, many residents have declined to enroll in ACP and other subsidy programs due to the cumbersome eligibility process and lack of automatic eligibility. In addition to expanding enrollment in the ACP, the SAHF makes an important point that is worthy of support from the commission—that automatic eligibility for these populations could help affordable housing

[100] Comments of SAHF, *Affordable Connectivity Program Emergency Broadband Benefit Program*, WC Docket No. 21-450 (filed Dec. 8, 2021).

providers leverage the ACP to gain stronger service provisions for residents, such as higher speeds and additional equipment.

Leonardo Delgado makes a similar proposal. He suggests that all affordable housing residents should automatically qualify for the ACP, based on the fact that they have qualified for affordable housing. Residents of Section 8 or Low-Income Housing Tax credit properties must meet certain qualifications, which are similar but different from those for the ACP. Requiring them to go through a second qualification process imposes a hurdle that some proportion of residents will not attempt to cross, despite the benefit offered by the ACP. If the Commission's rules were to make any resident automatically eligible, more people would have access to the Internet, and the long-term certainty of the subsidy funding would ease the burden on service providers, making them more willing to serve many more low-income communities.[101]

2. NMHC and NAA support efforts to promote digital literacy.

Apartment managers can assist in informing the public about digital literacy efforts by making materials available in leasing offices and common areas. They may also be able to make space available for training sessions on site, as well as informing their residents about the time and place of such sessions. There is a great deal that apartment owners can do on a voluntary basis if the effort can be coordinated with other stakeholders, such as equipment vendors, service providers, HUD, local housing authorities, the Commission, and other government agencies. The key to such efforts is communication, and individual leasing offices are in frequent contact with residents about a broad range of matters.

[101] Delgado Decl. at ¶ 12

3. NMHC and NAA support increased access to devices to access the internet.

As noted in the Communications and Equity Diversity Council report,[102] a major impediment to broader deployment of broadband services is that many residents of lower income properties do not own broadband-capable devices, other than smartphones. This can significantly reduce demand for service, resulting in lower penetration, and making it more difficult for providers to justify investment in or near an apartment community. This aspect of the problem emphasizes the need for subsidies, whether through the ACP, state programs, or other mechanisms.

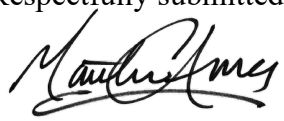
NMHC and NAA are prepared to work with the Commission and other organizations to promote increased access to devices.

[102] *Council Report* at 103.

CONCLUSION

For all the foregoing reasons, the Commission should: (i) focus its efforts in this proceeding more directly on promoting equal access for residents of lower income apartment communities; (ii) tailor its rules to be consistent with the overall plan for promoting broadband access laid out in the IIJA; (iii) acknowledge that the multifamily industry is a key stakeholder; (iv) work with the industry to expand awareness and educate residents about the opportunities created by the various support programs; and (v) and move to officially close the *MTE Proceeding*.

Respectfully submitted,



Matthew C. Ames
HUBACHER AMES & TAYLOR, P.L.L.C.
4084 University Drive
Suite 101
Fairfax, Virginia 22030
(703) 345-1179

Counsel for:
the National Multifamily Housing Council and
the National Apartment Association

February 21, 2023

EXHIBIT A
Declaration of Leonardo Delgado

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C.

In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	GN Docket No. 22-69

DECLARATION OF LEONARDO DELGADO IN SUPPORT OF COMMENTS OF NMHC AND NAA

I, Leonardo Delgado, declare as follows:

1. I submit this declaration in support of the Comments of NMHC and NAA in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter.

2. I currently serve as Founder and CEO of Converged Services, Inc. ("CSI"). CSI is a nationwide and independent full-service technology consulting firm with over 25 years of experience. We partner with owners, developers, and managers of multi-tenant properties (each an "MTE" as defined by the FCC) to procure broadband, video, voice, and wireless services for our clients' properties. In this role, we work to negotiate access agreements and other contractual arrangements at our clients' properties with a variety of broadband service providers.

The service providers who deploy services at our client's properties include franchised cable multiple system operators (each, an "MSO"), incumbent local exchange carriers (each, an "ILEC"), and independent broadband service providers including wireless providers (each, an "ISP").

3. I founded CSI in 1997 and have served as its CEO since then. I have been actively involved in the telecommunications and broadband industry for more than 40 years. Prior to forming CSI, I served as general and regional manager for some of the largest cable television systems in the United States and overseas. I also previously owned several small private cable systems, which allowed me to acquire significant experience and expertise in the economics and technology of broadband, cable, voice, and other telecommunications systems. In my current role at CSI, I am responsible for negotiating agreements with service providers for our clients' properties, identifying and curating relationships with new service providers, and reviewing existing agreements for our clients.

4. CSI currently oversees broadband services for more than 200,000 apartment units at properties owned or managed by our clients. These properties have a wide variety of sizes, characteristics, and tenant demographics, and are located in 46 states plus the District of Columbia. A number of our clients own low income communities that face unique challenges in securing quality broadband services at prices their residents can afford.

5. One of our primary tasks is to find providers that will offer reasonably priced broadband service to the residents of the communities we represent. While we are largely successful in being able to bring reliable, high-quality broadband service to the residents of our clients' communities, we often find that providers are simply not interested in making the needed infrastructure investments in certain communities. The communities that face the stiffest

resistance to new infrastructure investments are definitely those communities with low income residents. In our experience, the predominant reason that providers tell us that they are not interested in making infrastructure investments at certain communities is the provider's concern about its potential return on investment ("ROI").

6. In CSI's experience, at many of our clients' low income residential MTEs a significant reason why residents often complain about poor quality broadband service is due to the outdated nature of the existing broadband infrastructure where no major upgrades have been performed since the original infrastructure was installed. Many low income buildings are wired with outdated distribution plant, obsolete electronics, and old copper telephone wiring and/or coaxial cable - and **no new fiber facilities** have been installed. This outdated infrastructure is often a component of the provider's network and is simply incapable of delivering the type of broadband services that are available in buildings where new fiber lines and updated electronics have been installed. This outdated infrastructure creates a major problem for residents of these low income buildings who often complain of broadband services with slow speeds, streaming difficulties, and bottleneck/latency issues. This in turn creates a real dilemma for the property owner. While some of these low income properties struggle to get any broadband services at all, in a majority of cases these properties are served by only one service provider – often the ILEC or MSO in the geographic area. In our experience, these incumbent providers have very little incentive to make any capital investment ("CAPEX") in the infrastructure at low income properties. Because low income residents are not likely to subscribe to a service provider's more costly advanced services, incumbent providers frequently tell us that the CAPEX required for the needed infrastructure upgrades is simply too expensive to justify the projected ROI the provider expects to earn. These incumbent providers will continue to service these properties,

but they have no economic incentive to improve their services. Even if we could find an alternative provider to offer better, more affordable broadband services, many of our clients' properties are in mandatory access states where removing an incumbent provider and replacing that incumbent with a better provider is simply not possible due to the inherent nature of mandatory access laws that tie the property owner's hands and stifle broadband opportunities.

7. The presence of these incumbent providers make it far less likely that any new entrant will make the investment necessary to provide higher quality broadband service for residents of low income properties. We often are told that the CAPEX needed to "buildout" to a certain property is simply too high for any provider who is not already serving the property. Those potential new providers will point out that the incumbent provider's ongoing presence at the property will certainly diminish their anticipated ROI. This imbalance between the CAPEX and the projected ROI works to maintain the status quo at many low income properties that receive poor broadband services.

8. Many providers we approach at low income properties will tell us that the solution to improving their ROI is for the property owner to enter a long-term bulk contract where the owner pays for the broadband service that its residents receive. While bulk agreements are indeed useful arrangements to bring high quality broadband services to many properties, they are just not very attractive to many of our clients who own and manage low income properties due to the costs involved. Low income properties typically operate under very tight budgets because rental income is limited and the margins at these properties are not nearly the same as the margins at market rate properties. There simply is not sufficient cash flow for many low income property owners to cover the costs of a 5 to 10 year bulk service commitment. As an example, one of our clients has a portfolio of low income buildings in New

York where we tried to arrange for an infrastructure investment to improve the quality of broadband services, but we were told by the provider that the high CAPEX would require the client to enter a bulk agreement. When told that our client could just not afford the costs of a bulk arrangement, the provider said the resulting lack of ROI would not justify service deployment at these properties because the provider believed it would not be able to recoup its CAPEX. Our client's properties have still not been upgraded, and the broadband service currently available to residents remains poor.

9. CSI is heavily involved with helping residents of our clients' low income properties subscribe to broadband service by registering for available subsidy programs such as the Affordable Connectivity Program (ACP). We are also aggressively working directly with broadband providers in this effort to assist eligible MTE residents to sign up for ACP. In representing our clients who are affordable housing owners and managers, our goal is to get as many of their residents as possible connected to broadband service and to find solutions to provide affordable devices so residents can get connected. One of our large clients owns a portfolio of mostly low income buildings (70 properties, 12,000 total units). This client started an ACP initiative last year to try to get as many of their eligible residents signed up to ACP as soon as possible, and CSI was retained to help with this effort. We are making progress and have overcome some obstacles - but there is still a long way to go. Our solution, which to our knowledge has not been accomplished before, was to work directly with service providers chosen by the client and negotiate new service contracts with those providers at the clients' properties that include specific provisions pertaining to the ACP. Our client hired legal counsel to draft and negotiate the ACP provisions with the service providers' legal teams. These contractual provisions require the service providers to do the following: (i) market the

availability of the ACP to residents of the property, (ii) assist residents in registering for the ACP, and (iii) train the property's on-site staff in assisting residents to register for the ACP. The marketing and promotion of the ACP program includes on-site events, individual resident meetings, and on-site sessions with the property's staff for education and awareness of the ACP program. We have encountered a number of obstacles, including a reluctance by some providers to do any marketing that differs from their standard practices of promoting and marketing their more profitable service offerings. However, to date, we have been successful in helping our clients enter contracts with these ACP provisions at more than 20 of their low income properties with a number of major service providers, including Verizon, Charter, and Cox Communications. We are still working with a number of other providers and hope to implement this program at 100% of this client's properties before the end of the year.

10. While we are proud of what we have accomplished so far, we still have a number of obstacles to overcome in our ACP efforts. There is no guarantee that we will ultimately be successful in getting 100% of eligible residents registered for ACP. One problem is that not all service providers participate in ACP. Our experience has shown that some service providers face issues when taking the steps to qualify as an ACP service provider. This was the case for a privately owned service provider we were working with at a client's property in Lumberton, NJ. Unlike some of the other potential ISPs we talked to, this privately owned provider had the desire to bring reliable high-speed internet to an affordable housing community with fiber technology. They offered competitive pricing for residents for high speed Internet service. However, the provider was unable to successfully navigate the process of becoming a qualified ACP provider. Without the ACP backing, this provider was unable to offer the attractive fiber solution to our client's property.

11. Another difficulty we have encountered is that many residents who would qualify for ACP face a language barrier. With the new ACP provisions we have negotiated, even some of the service provider's grass roots efforts to explain the benefits and registration process for ACP are not effective for certain residents. We have found that service providers do have ACP information and materials that are useful for residents who speak one of the more common languages, such as Spanish. However, as was the case at two of our clients' properties in Brooklyn, NY, and Connecticut, residents who spoke languages such as Russian, Bengali and Mandarin Chinese were often frustrated and sometimes just gave up on the ACP registration process. Since it is not a reasonable expectation for these service providers to account for all languages, the result is a clear lapse in opportunity due to the language barrier.

12. One of the most impactful changes the FCC can make is to authorize all residents who live in affordable housing to automatically qualify for the ACP. Most of the properties owned by our client who is hoping to register all residents for the ACP are already certified as Section 8 or Low-Income Housing Tax Credit ("LIHTC") properties. Residents have already provided proof and gone through a qualification regimen in order to reside at these properties in the first place. However, similar if not the same type of process is required for these same individuals to qualify for the ACP, which creates yet another obstacle to getting low income residents connected. If an entire building could qualify for ACP rather than residents doing it on an individual basis, the FCC could eliminate redundancy and pave the way for more low income MTE residents to get connected more quickly and with fewer burdens. This would also streamline the ACP process and allow for one single subsidy payment to a service provider that covered an entire building rather than hundreds of individual payments for each resident. We think that this building-wide qualification would help ease the burden on service providers and

help provide an incentive for providers to look for other opportunities at low income properties that are often elusive, such as (i) offering enhanced communications services that will allow for telehealth services, telecommuting, and remote schooling, and (ii) creating managed networks that the building owner can use for the benefit of its low income residents to implement things such as smart home technology, leak detection, and access controls for public safety purposes

13. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 18th day of February 2023, at Fort Lauderdale, Florida.

Leonardo J. Delgado

Leonardo Delgado

Signature: Leonardo J. Delgado
Leonardo J. Delgado (Feb 18, 2023 14:12 EST)

Email: ldelgado@convergedservicesinc.com

Declaration (Leonardo Delgado - CSI) Digital Discrimination Proceeding (Final for Signature 2-18-2023)

Final Audit Report 2023-02-18

Created:	2023-02-18
By:	Sarah Wattick (swattick@convergedservicesinc.com)
Status:	Signed
Transaction ID:	CBJCHBCAABAAz0Fy6rVBT_DHOZUZO-cF4wilkL-ZC5kq

"Declaration (Leonardo Delgado - CSI) Digital Discrimination Proceeding (Final for Signature 2-18-2023)" History

Document created by Sarah Wattick (swattick@convergedservicesinc.com)
2023-02-18 - 7:09:58 PM GMT- IP address: 67.165.49.169

Document emailed to ldelgado@convergedservicesinc.com for signature
2023-02-18 - 7:10:39 PM GMT

Email viewed by ldelgado@convergedservicesinc.com
2023-02-18 - 7:11:10 PM GMT- IP address: 73.85.209.163

Signer ldelgado@convergedservicesinc.com entered name at signing as Leonardo J. Delgado
2023-02-18 - 7:11:59 PM GMT- IP address: 73.85.209.163

Document e-signed by Leonardo J. Delgado (ldelgado@convergedservicesinc.com)
Signature Date: 2023-02-18 - 7:12:01 PM GMT - Time Source: server- IP address: 73.85.209.163

Agreement completed.
2023-02-18 - 7:12:01 PM GMT

EXHIBIT B
Declaration of Kimberly Grimm

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	GN Docket No. 22-69

DECLARATION OF KIMBERLY GRIMM IN SUPPORT OF COMMENTS OF NMHC AND NAA

I, Kimberly Grimm, declare as follows:

1. I submit this declaration in support of the Comments of the Real Estate Associations in response to the Commission's Notice of Proposed Rulemaking dated December 22, 2022, in the above-captioned matter.

2. I currently serve as Executive Vice President of Development for Continental Properties Company, Inc. ("Continental"). Continental is a national developer, owner, and operator of high-quality apartment homes across the United States. In 2021, we were listed as the tenth largest developer of apartment homes by the National Multifamily Housing Council ("NMHC") and based on reported information, we are the largest garden style, suburban apartment developer in the United States. We typically commence construction on approximately 3,000 new apartment homes per year. We have developed over 32,800 apartmenthomes in 19 states and are currently managing approximately 20,550 apartment homes in 7 states with 3,250 apartment homes in 7 states under construction. 42% of our occupied homes qualify at 80% of HUD's Area Median Income ("AMI"). I have served as

Executive Vice President of Development since 2017. I have previously served in comparable positions since 2006 at Continental, and I have over 30 years of experience in real estate with over 20 years of experience specifically in the multifamily industry. In my position at Continental, I am responsible for development and construction of new multifamily communities which includes leadership of project sourcing, entitlement/permitting of projects, and construction activities. I am an Officer of the company where I assist with strategic planning for the company and I am a member of Continental's Investment Committee which determines where Continental will place its capital and resources along with the approval of projects for development. I also participate in NMHC's Workforce Housing Committee and NMHC's Design/Development Committee.

3. Continental currently owns a total of 80 communities, comprising 20,550 apartment homes located in 7 states. Of the apartment homes we own and manage, 42% of those homes qualify at 80% of HUD's AMI. In Wisconsin and Minneapolis, 88% and 82% of our occupied homes qualify at HUD's 80% AMI.

4. Continental develops property in several markets across the United States such as Memphis, Grand Rapids, Michigan, many markets in Florida, Atlanta metro, Phoenix metro, Minneapolis metro, Dallas metro, Denver metro along with Chicago metro to name a few of the markets in which we develop.

5. For example, our Authentix product is targeted specifically to the residents with an income level which qualifies at HUD's 80% to 100% AMI. The communities consist of two and three story residential buildings which are developed at a lower cost structure so that the resident's rent can be lowered as well. The community size is 240 to 288 homes.

6. Most broadband providers are limited to geographic areas and often will require

buildout to our projects, if they are willing to extend that far, as we typically build in suburban areas. These buildouts are costly and require a large time commitment that often far exceeds our typical schedule, requiring us to work with non-traditional providers that have access to many different internet providers. At various times when we have contacted providers regarding serving a property they have given a number of reasons for not doing so, including: (i) a lack of distribution infrastructure near the property; (ii) the project would not meet internal return on investment criteria costs; or (iii) the property is too small.

7. For example, it is not unusual for Verizon and AT&T to refuse to upgrade their existing copper facilities inside a property to fiber, even though their network already passes the community. Residents therefore cannot receive higher speed broadband service from that provider. They may have access to DSL, but not to higher-speed services, and even the DSL service may be unreliable. All of our properties have a minimum of coax infrastructure, but there has been no effort by the current ISPs (Internet Service Provider) to improve the infrastructure to fiber. Three examples of this are two of our Spectrum properties in Bradenton, FL. Another property that is in need of an infrastructure upgrade is a community in Johnstown, CO which is served by TDS. While the coax infrastructure provides faster speeds than DSL, these networks are heavily geared towards download speeds and not upload speeds, which limits the quality of service our residents receive, making things like working from home, gaming, smart home features, and multiple users on one service less than ideal.

8. The newer competitive ISPs typically have limited service areas. Thus, for some of our properties, there are no competitive ISPs available to provide broadband service. Furthermore, even within their service areas, ISPs often will only serve selected properties

that they determine can meet their internal rate-of-return requirements. Many of our properties are in suburban areas that have no infrastructure to the site and ISPs, when willing, are often requiring too long of a lead to time to reach our site construction needs. We have many cases where delays were incurred because there was no competition, and we had no leverage. Our build out of a community in Sun Prairie, WI is a good example. This site could only be serviced by Spectrum and the build process and service delivery, of a substandard product, left us at the mercy of Spectrum's internal scheduling. Residents moved in without WiFi service and did not have WiFi service for months. We did not charge them for this service and purchased hot spots for each home so that they had something which was less reliable and was an added cost to us.

9. As mentioned earlier, our typical sites are suburban and typically require significant build out times even in major metro areas. We have built sites in Colorado (Centurylink) and Minnesota (Spectrum) that required extended install times because of limited competition and poor management by the carriers. These are just a few examples of what we run into on a regular basis with at least 50% of our sites.

10. I declare under penalty of perjury that the facts stated herein are true and correct to the best of my knowledge and belief.

This declaration was executed on the 20th day of February, 2023, at Menomonee Falls, Wisconsin.

Kimberly Grimm
Executive Vice President of Development
Continental Properties Company, Inc.

EXHIBIT C

Letter from Education Superhighway and Schools, Health and Libraries Broadband Coalition to Chairwoman Jessica Rosenworcel

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street NE
Washington, D.C. 20554

Dear Chairwoman Rosenworcel:

We, the undersigned organizations, write to express our concerns about the undercount of unconnected households and community anchor institutions (CAIs) in the National Broadband Map (Map) recently released by the Federal Communications Commission (FCC). We recognize that mapping the availability of broadband across the country on an address by address basis is a huge undertaking and that the Commission has been working diligently to meet the Congressional mandate. Nonetheless, we request that the FCC take all appropriate actions to swiftly address these deficiencies and ensure that all unconnected and under-connected entities are accounted for, before the Map is made available to the National Telecommunications and Information Administration (NTIA) for Broadband Equity, Access, and Deployment (BEAD) and Digital Equity (DE) determination of state allocations.

Nationwide, 20-25% of unconnected households reside in public and multifamily housing.[1] These are the lowest income and most digitally disconnected households in America. The Infrastructure Investment and Jobs Act (IIJA) included a transformational $65 billion investment in broadband infrastructure, the largest ever proposed by Congress, intended to connect ALL households to affordable, reliable, broadband internet services. The coronavirus pandemic has further shed light on the longstanding importance of an affordable, high-speed broadband connection for Americans trying to pursue an education, work remotely, access healthcare, or stay connected to loved ones. Just as rural electrification did in the 1930s, these broadband investments will help connect every American to the infrastructure that powers modern life, and help ensure that communities across the nation are able to fully engage in the 21st century economy.

With regard to the provision of service in multifamily residential housing, the Broadband Data Collection (BDC) process created by the FCC, pursuant to the Broadband Deployment Accuracy and Technological Availability (DATA) Act, suffers from some of the same inaccuracies and lack of granularity as the Form 477 data it was tasked with replacing. The BDC as it exists today does not require a provider to demonstrate availability of broadband services to all of the housing units in a multifamily residential building. Rather, a multifamily building will be deemed served as long as one unit in the building is capable of receiving service. For example, the FCC National Broadband Maps do not take into account

[1] *No Home Left Offline: Bridging the Broadband Affordability Gap*, EducationSuperHighway, 3, (2021) https://www.educationsuperhighway.org/wp-content/uploads/No-Home-Left-Offline-Report_EducationSuperHighway2021.pdf

circumstances in which a portion of the building is served, such as the business office or commercial space, but the residents are unserved or underserved, a situation often seen in low-income housing where ISPs have neglected installing or upgrading residential broadband wiring.

Under the current FCC National Broadband Map Challenge Process, the burden of proof is placed on millions of households living in multifamily residential buildings to challenge the accuracy of data building by building, and or benevolent third party entities to mount a bulk challenge on their behalf. It is naive and unfair to assume that millions of unserved households located in high-poverty areas will be able to mount a successful broadband availability challenge, especially in the limited amount of time that the FCC has allotted to submit challenges that can be taken into consideration by NTIA in the BEAD and DE allocation process.

Similarly, we are concerned that the proposed map will not identify the broadband available to community anchor institutions (CAIs). The Broadband Serviceable Location (BSL) Fabric (Fabric), which is intended to identify the individual locations that broadband providers serve, generally treats CAIs as not "broadband serviceable locations". In other words, while broadband providers have to report information on homes and businesses, they do not have to report on the broadband availability to CAIs.[2] This conflicts with the FCC's Third Report and Order in the mapping proceeding, issued in January 2021, which states that "to the extent such acquisitions of broadband capacity [by community anchor institutions] fall into the category of 'mass market,' then providers must report such data." We understand that there are thousands of libraries, health clinics, houses of worship, and other CAIs across the country that *do* purchase mass market services and they should be included in both the Fabric and the final version of the Map. Relying on the challenge process alone is unlikely to adequately map and address the broadband needs of CAIs. The Commission's Map challenge process is set up to allow parties to challenge a location or the availability of services at a location, but it does not identify how CAIs can challenge the designation of an anchor institution as not "broadband serviceable" (to change its BSL flag to "True"). [3] Additionally, the inclusion of CAIs in the Map is necessary to comply with Congressional intent, since the IIJA specifically states that anchor institutions that do not have gigabit connectivity are "unserved" and are thus eligible for broadband deployment under the BEAD program. The BEAD NOFO further states that "NTIA underscores its strong preference that Eligible Entities also ensure deployment of gigabit connections to community anchor institutions such as libraries and community centers that lack such connectivity."[4]

[2] For instance, the BDC's Frequently Asked Questions may be incorrect when it states that "The Commission has decided that because community anchor institutions generally subscribe to non-mass-market, enterprise-grade services, they would not be identified as BSLs [broadband serviceable locations] in the initial version of the Fabric." We are not aware that the Commission has made this "decision".
[3] *See* https://broadbandmap.fcc.gov/about.
[4] U.S. Department of Commerce, National Telecommunications and Information Administration (NTIA), *Broadband Equity, Access and Deployment (BEAD) Program, Notice of Funding Opportunity (NOFO),* 2022, pg. 7, Washington, DC: Government Printing Office.

We recommend the FCC pause the current challenge process for MDUs and develop a challenge process, to be included in BEAD and DE allocations, specifically for MDUs deemed a priority for broadband by Congress[5] and NTIA[6], including:

1) locations in which the percentage of individuals with a household income that is at or below 150 percent of the poverty line applicable to a family of the size involved (as determined under section 673(2) of the Community Services Block Grant Act) is higher than the national percentage of such individuals or;
2) Locations that have a substantial share of unserved households.

Given the correlation between income and the digital divide, it is reasonable to assume that multifamily buildings within high-poverty census tracts do not have access to reliable, affordable, high-speed broadband due to ISPs having either not fully wired or maintained the wiring to the units in the buildings.

To ensure all MDUs are accurately designated, we request that the FCC shift the burden of proof from unconnected consumers to the ISPs, by pausing the current challenge process and creating a new challenge process that automatically designates MDUs, which fit the above criteria, as unconnected and establish a process in which ISPs are required to submit challenges. Data required should include an accurate unit count, highest available speeds, unit by unit connectivity status (incl. type of wiring and usability status), total actual capacity currently provisioned to the building accounting for both infrastructure type and premise equipment and hardware, and artifacts proving that ALL units within a building have the infrastructure necessary to simultaneously qualify as connected (100/20Mbps) or under-connected (25/3Mbps), as defined by the IIJA. If an ISP does not submit a successful challenge within 30 days of the initial unconnected designation, including providing sufficient evidence and artifacts, those locations shall retain an unserved designation on the FCC National Broadband Maps.

To ensure all CAIs are accurately designated and are able to take advantage of funding, we request that the FCC also shift the burden of proof from CAIs to ISPs. The default should be that all anchor institutions are designated ("flagged") as broadband serviceable locations unless an ISP can show otherwise. This process would be consistent with the FCC's previous finding that anchor institutions will be included in the map to the extent they purchase "mass market" services.

We urge the Commission to address both of these shortcomings before the National Broadband Map is finalized and released to NTIA for BEAD/DE allocation determinations. We applaud the Commission for releasing the first draft of the FCC National Broadband Maps, which marks a critical first step in closing the digital divide and broadband affordability gap. EducationSuperHighway, SHLB, and the undersigned organizations look forward to continuing to partner with the Commission to ensure that no one is left offline.

Thank you for your attention on this important matter.

Sincerely,

---

[5] H.R. 3684 - 117th Congress (2021-2022): Infrastructure Investment and Jobs Act. Congress.gov, Library of Congress, 15 November 2021, https://www.congress.gov/bill/117th-congress/house-bill/3684

[6] *BEAD NOFO* at 41.

Evan Marwell
Founder & CEO
EducationSuperHighway
evan@educationsuperhighway.org

John Windhausen, Jr.
Executive Director,
Schools, Health & Libraries Broadband (SHLB) Coalition
jwindhausen@shlb.org

All4Ed
American Library Association
Arizona State University
Association for Rural & Small Libraries (ARSL)
Benton Institute for Broadband & Society
California State Library
California Telehealth Network
Capital Area District Libraries
Castleberry Independent School District
Channelford Associates, Inc.
Chiefs for Change
COSLA - Chief Officers of State Library Agencies
Colorado Education Broadband Coalition
Colorado Hospital Association Broadband Services
Common Sense Media
Connect Waukegan
Connected Nation
Council of Chief State School Officers
Council on Affordable and Rural Housing
Digital Equity Institute
Downey City Library
EdTechnologyFunds, Inc.
Educational Professional Services and Educational Consulting Associates
EveryoneOn
Federal Funding Group
Fresno Coalition for Digital Inclusion
Fresno Housing
Fresno Unified School District
Friends & Foundation of Albany Public Library
Funds for Learning
Geeks Without Frontiers
Hennepin County, Minnesota
IBSA, Inc.

Kansas City Public Library
Kansas Office of Broadband Development
Kenosha Public Library
Ladera Education Institute
Lancaster-Lebanon Intermediate Unit 13
LeadingAge
Libraries of Middlesex Automation Consortium
Lit Communities
Local Initiatives Support Corporation (LISC)
Los Angeles County Economic Development Corporation (LAEDC)
Los Angeles County Library
Los Angeles County, Office of Education
Los Angeles County, Internal Services Department
Los Angeles Public Library
Maine State Library
Manufactured Housing Institute
Milwaukee Public Library
Minnesota State Library Services
Mobile Citizen, a Voqal project
Modesto City Schools Information and Educational Technology Services
Mohuman
Multicultural Media, Telecom and Internet Council
National Affordable Housing Management Association (NAHMA)
National Apartment Association
National Association of Federally Impacted Schools
National Association of Housing Cooperatives
National Collaborative for Digital Equity
National Council of Teachers of English
National Leased Housing Association
National Digital Inclusion Alliance
National Multifamily Housing Council
Nebraska Library Commission
New America's Open Technology Institute
New York Library Association
North Carolina Independent Colleges and Universities
NorthWest Colorado Broadband
NTEN
OCA-Asian Pacific American Advocates
OCHIN, Inc.
Petrichor Broadband LLC
POLAHS (Port of Los Angeles High School)
Positron Access Solutions Corp.
Public Advocacy for Kids (PAK)
Public Health Innovators, LLC

Pullman Public Schools
Redbud Telecom Consulting
Rhode Island Office of Library & Information Services
San Diego County Library
Seattle Information Technology Digital Equity Office, City of Seattle
Shreve Memorial Library
SmartWAVE Technologies
South Carolina State Library
Southern Ohio Health Care Network
Southern Oregon Education Service District
State Library of Iowa
Steamboat Springs School District
Sun Corridor Network
Telconnections, Inc.
Texas State Library and Archives Commission
The Undivided Project
The STEM Alliance
Urban Libraries Council
UNITE-LA
US-Ignite
Utah Education and Telehealth Network
Utah State Library Division
Val Verde Unified School District
Virginia Society for Technology in Education
Volunteers of America National Service
Voqal
VST Services, LP
Washington State Library
Westchester Library System
Westside Elementary School
Ysleta Independent School District

CC:
Commissioner Brendan Carr, Federal Communications Commission
Commissioner Geoffrey Starks, Federal Communications Commission
Commissioner Nathan Simington, Federal Communications Commission
Administrator Alan Davidson, National Telecommunications and Information Administration

EXHIBIT D

Impact of San Francisco Mandatory Access Law

NATIONAL MULTIFAMILY HOUSING COUNCIL

Impact of San Francisco Mandatory Access Law

A 2019 analysis conducted by NMHC found no observable relationship between the presence of state mandatory access laws (MALs) and an MTE household's likelihood of having broadband Internet access.

- The analysis, which utilized the 2017 American Community Survey microdata, controlled for other factors likely to affect Internet access, such as a householder's age, race, income, and educational attainment.
- NMHC found that lower-income households, Black and Hispanic householders, and householders without a High School or college degree were less likely to have broadband Internet access.

However, a more direct way to estimate the impact of a mandatory access law is to measure Internet access rates both before and after such a law is implemented. The city of San Francisco – whose own mandatory access law for MTE units took effect in January of 2017 – provides us with a unique natural experiment.

In 2016, prior to the law taking effect, 89.3% of apartment households reported having broadband Internet access in San Francisco. This share actually decreased to 86.8% of apartment households in 2021, although this change was not statistically significant.

The share of single-family households in San Francisco with broadband Internet access – which we wouldn't expect to be impacted by the 2017 law – remained unchanged at 90.1% from 2016 to 2021. To control for the influence of other potentially confounding variables on broadband access, we ran a simple logit model shown on the following page:

Broadband Internet Service in Household - San Francisco City		
	Coefficient	Standard Error
2021 (relative to 2016)	0.022	0.131
2021*MTE	-0.067	0.188
MTE	-0.261	0.141*
log(Household Income)	0.311	0.037***
Age	-0.018	0.003***
Completed High School	0.157	0.157
Completed College	0.462	0.109***
Asian	-0.249	0.111**
Black	-0.480	0.197**
Hispanic	-0.584	0.149***
Constant	-0.505	0.501
Number of Observations	5,279	
Pseudo R	0.0823	
Notes: Logit model. The dependent variable is equal to 1 if the household reported to have broadband Internet access. *significant at 10%; **significant at 5%; ***significant at 1%.		

The results from our model suggest that lower-income households, younger households, households with householders who are Black, Asian or Hispanic, and households with householders without a college degree were less likely to have broadband Internet access in San Francisco.

More importantly, our results show no evidence that San Francisco's 2017 mandatory access law had any effect on broadband Internet access. Apartment households in the city – relative to their non-MTE counterparts – appear no more or less likely to have had broadband Internet access in 2021 compared to 2016.

Chris Bruen, Senior Director of Research, National Multifamily Housing Council

February, 2023