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

In the Matter of	)	
Delete, Delete, Delete	)	GN Docket No. 25-133

COMMENTS OF
THE NATIONAL MULTIFAMILY HOUSING COUNCIL,
THE NATIONAL APARTMENT ASSOCIATION,
AND THE REAL ESTATE TECHNOLOGY & TRANSFORMATION CENTER

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SUMMARY

The National Multifamily Housing Council ("NMHC"), the National Apartment Association ("NAA"), and the Real Estate Technology & Transformation Center (RETTC) submit these Comments in response to the Commission's Public Notice dated March 12, 2025, (the "*Notice*"). The apartment industry provides rental homes for 40.3 million Americans from every walk of life, including seniors, teachers, firefighters, healthcare workers, families with children, and many others who enrich our communities. Rental housing owners understand how critical high quality communications services are for their residents.

Every rental community is different, and meeting resident needs requires property owners and managers to be attuned to both resident desires and the options available in the market. Although well-intentioned, government regulation often limits the range of options available to owners, and therefore to residents. NMHC, NAA, and RETTC appreciate this opportunity to inform the Commission of pending proceedings that should be terminated and rules that should be amended or repealed.

The Commission Should Promptly Terminate the Multiple Tenant Environment Proceeding, GN Docket No. 17-142. No further action in the *MTE Proceeding* is required. Over the past eight years, NMHC and NAA, now joined by RETTC, have provided the Commission with thirty sworn declarations, two industry surveys, and numerous other reports and reviews of industry data and practices. There is no further notice of proposed rulemaking pending and just three months ago Chairman Carr removed from the circulation docket a controversial proposal that was introduced under the previous administration.

The Commission has considered the relevant issues and arguments at length; it is clear that broadband subscribers and other consumers of communications services would not benefit

from further regulatory action. In fact, leaving the docket open could have the opposite effect, because as long as property owners believe that the Commission could once again ask for comment at any moment and begin examining the same practices yet again, they will be forced to be cautious in considering new alternatives for getting services to their residents. Leaving the docket open also encourages providers to urge the Commission to reconsider the same proposals even though neither the marketplace nor the issues have changed.

NMHC, NAA, and RETTC therefore respectfully request that the Commission formally close GN Docket No. 17-142 without delay.

The Commission Should Amend the Digital Discrimination Rules To Exclude Property Owners from the Definition of "Covered Entity." The Commission's digital discrimination rules must be amended because they should never have been applied to property owners. The text of § 60506 of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), makes it clear that the only entities covered by the statute are providers of broadband internet access service. The wording of § 60506 gives no indication that Congress meant to expand the Commission's authority into new areas of the economy. 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. The Commission, however, has unlawfully adopted an over-broad definition of "covered entity," which brings within its scope every owner of rental housing in the country. NMHC, NAA and RETTC respectfully request that the Commission amend the 47 C.F.R. § 16.2(d) to narrow that definition and exclude property owners from any possible application of those rules.

The Commission Should Initiate Proceedings to Repeal the Cable Inside Wiring Rules, the Expansion of the OTARD Rule to Leased Premises, and the Bans on Exclusive Access Agreements, Exclusive Revenue Share Agreements, and Graduated Revenue Share Agreements.

The Cable Inside Wiring Rules. These rules were built on the illogical premise that residents of multifamily rental housing have the same interests and are in the same practical position as residents of single-family housing. It makes no sense to build a regulatory scheme around the idea that such residents need or desire to purchase wiring installed within their leased premises. Yet that is what the Commission did. This is why 47 C.F.R. § 76.802(b) is never invoked by renters. Furthermore, the other component of the rules, 47 C.F.R. § 76.804, which governs wiring running from the subscriber's premises to a common junction point, was not authorized by Congress. Congress directed that the Commission adopt rules governing wiring installed within the premises of a subscriber, but rental housing property owners are not cable subscribers. Such owners own and manage property used by cable operators and cable subscribers, but Congress did not mean for the Commission to address wiring installed on the property of a third party. The rules are ineffective, unnecessary, and exceed the Commission's statutory mandate.

The OTARD Rule. 47 C.F.R. § 1.4000 is an excellent example of why the Supreme Court recently overruled *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). Congress directed the Commission to adopt rules that would permit television viewers to receive the programming they wanted to see. Yet today the Commission is being asked to exercise the same authority to grant fixed wireless providers the right to install transmission antennas on essentially any piece of property to which they can get access,

regardless of whether there is a video subscriber at that location or not. Congress never meant for the OTARD rule to apply to leased property, and it certainly never anticipated that the Commission would amend it three times to reach far beyond one-way video signals.

The Exclusivity Bans. The bans on exclusive access agreements, exclusive revenue share agreements, and graduated revenue share agreements are all based on the same faulty foundation. The Commission purported to base the cable exclusive access rule on 47 U.S.C. § 548(b), but the plain meaning of that statute authorizes only the regulation of access to programming by distributors of programming. Nowhere does the statute mention contracts with rental housing building owners, contracts granting cable operators access to private property, or any aspect of the relationship between a rental housing owner and a cable operator. The D.C. Circuit upheld the Commission's rule, but because the court relied on the now-defunct *Chevron* doctrine, the Commission's interpretation of 47 U.S.C. § 548(b) must be re-examined.

The problem with the telecommunications exclusive access ban is different. 47 U.S.C. § 201(b) appears in Title II of the Communications Act, which means that it governs telecommunications service. Because the Commission has no authority over broadband service, the telecommunications exclusivity ban is unlawful. An agreement between a telecommunications carrier and a property owner that prevents the property owner from granting access to a competing broadband provider is not a "charge, practice, classification, or regulation" that pertains to the provider's common carrier service.

The bans on exclusive and graduated revenue sharing agreements entered into by cable or telecommunications providers are all based on the same authority as the exclusive access bans and assume the lawfulness of those rules. Consequently, those bans are invalid for the same reasons discussed above.

NMHC, NAA and RETTC respectfully request that the Commission (i) officially close the MTE Proceeding; (ii) amend 47 C.F.R. § 16.2(d) to make clear that owners of rental property are not "covered entities;" (iii) amend 47 C.F.R. § 1.4000 so that it no longer applies to leased property; and (iv) repeal 47 CFR § 76.802(a)(2); 47 CFR § 76.804; 47 CFR § 76.805; 47 CFR § 64.2500; 47 CFR § 64.2501; and 47 CFR § 76.2000(b).

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COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL, THE NATIONAL APARTMENT ASSOCIATION, AND THE REAL ESTATE TECHNOLOGY & TRANSFORMATION CENTER

Introduction

The National Multifamily Housing Council ("NMHC")[1], the National Apartment Association ("NAA"),[2] and the Real Estate Technology & Transformation Center (RETTC)[3]

[1] Based in Washington, D.C., the National Multifamily Housing Council is where rental housing providers and suppliers come together to help meet America's housing needs by creating inclusive and resilient communities where people build their lives. NMHC advocates for solutions to America's housing challenges, conducts rental-related research and promotes the desirability of rental living. Over one-third of American households rent, and over 21 million U.S. households live in an apartment home (buildings with five or more units).

[2] 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.

[3] The Real Estate Technology & Transformation Center (RETTC), strategically aligned with the National Multifamily Housing Council (NMHC), brings together real estate companies and technology providers to blaze a path forward for digital transformation in America. The Center serves as the preeminent advocacy, resource and networking platform for real estate and tech leaders as they navigate a long-term and complex technology-enabled transformation. This evolution will impact the renters and communities we serve, help address our nation's long-term housing challenges, improve business operations and enhance our ability to drive innovation across the economy.

respectfully submit these Comments in response to the Commission's Public Notice (the "*Notice*").[4]

The rental housing industry provides apartment homes for 40.1 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, NAA, and RETTC serve residents of every "income level, race, ethnicity, color, religion [and] national origin,"[5] and owners of rental housing communities 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.

The rental housing industry has repeatedly demonstrated its desire to work with the commission as a stakeholder in advancing national policy for the deployment of high-quality communications services and facilities that will serve all Americans. NMHC, NAA, and RETTC wish to maintain a productive relationship with the Commission, so that the three associations may continue to give the Commission accurate and useful information as the agency performs its functions.

At the same time, in responding to the *Notice*, NMHC, NAA, and RETTC must emphasize, as they have consistently argued, that the Commission's various interventions in the rental real estate arena have been unnecessary because the rental housing industry is highly competitive and rental housing owners are fully aware of their need to meet the expectations of their residents. NMHC, NAA, and RETTC therefore appreciate the opportunity to inform the

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[4] *In the Matter of Delete, Delete, Delete*, GN Docket No. 25-133, Public Notice (rel. March 12, 2025).

[5] 47 U.S.C. § 1754(b)(1).

Commission of pending proceedings that should be terminated and rules that should be amended or repealed.

I. THE COMMISSION SHOULD PROMPTLY TERMINATE THE MULTIPLE TENANT ENVIRONMENT PROCEEDING, GN DOCKET NO. 17-142

No further action is required in GN Docket No. 17-142, and no purpose would be served by keeping the docket open.[6] In 2024, Chairwoman Rosenworcel announced that she was considering further action in that docket, for the purpose of regulating bulk service agreements. An item was placed on the Commission's agenda for approval on circulation, but the Chairwoman's announcement was met with widespread opposition, primarily because bulk agreements are often the only effective method for delivering high-quality broadband service in a range of environments, in particular low-income properties and senior housing. Chairman Carr has since removed the item from the circulation agenda. NMHC, NAA, and RETTC appreciate Chairman Carr's action, which preserves an effective model for serving many rental housing residents.

As we discuss in Part I(A), the Commission has thoroughly examined issues related to broadband access in multiple tenant environments over the past eight years. Unfortunately, some misguided state legislators have begun similar efforts, without recognizing that residents have access to good quality, affordable broadband service because rental housing owners are able to

[6] The Commission has requested comment in this docket (the "*MTE Proceeding*") three times: (i) *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Inquiry, 32 FCC Rcd 5383 (2017) (the "*2017 NOI*"); (ii) *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Notice of Proposed Rulemaking, 34 FCC Rcd 5702 (2019) (the "*2019 NPRM*"); and (iii) *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Public Notice, 36 FCC Rcd 13,441 (2021) (the "*2021 Public Notice*").

negotiate with communications providers to secure the best possible connectivity. We address this in some detail in Part I(B), but also urge any person interested in pursuing such issues to review the record in GN Docket No. 17-142. The docket should be closed because further regulation is not required.

NMHC, NAA, and RETTC are gratified that, although the Commission did enact some rules affecting the rental housing industry in recent years, for the most part the Commission seems to have considered our arguments and responded in a manner that preserved the successful communications provider-rental housing owner relationship. We also appreciate the desire of the Commission's new leadership to reduce the burden of regulation on the communications industry, and we hope that this desire extends to other stakeholders, including property owners.

A. Over the Course of the Past Eight Years, NMHC and NAA Have Submitted a Large Volume of Information Showing that Owners of Multitenant Rental Properties Respond to the Broadband Needs of their Residents.

On April 4, 2017, the Media Bureau issued a public notice seeking comment on a petition for declaratory ruling filed by the Multifamily Broadband Council.[7] The *MTE Proceeding* was formally opened on June 1, 2017. In the eight years since, NMHC and NAA have participated in seven rounds of comment initiated by the Commission that pertained in some fashion to the use of real property by communications providers.[8] NMHC and NAA were joined by RETTC in

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[7] *Petition for Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91, Public Notice, 32 FCC Rcd 2893 (2017) (the "*2017 Public Notice*").

[8] In addition to the *2017 Public Notice*, the *2017 NOI*, the *2019 NPRM* and the *2021 Public Notice*, these include (i) *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket No. 19-71, Notice of Proposed Rulemaking, 34 FCC Rcd 2695 (2019) (the "*OTARD NPRM"*); (ii) *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, 37 FCC Rcd 4198 (2022); and (iii) *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention*

responding to the now-withdrawn proposal for regulating bulk service agreements. As we had done in a previous series of regulatory efforts a decade earlier, throughout this period the rental housing industry has consistently made every effort to give the Commission thorough, accurate, and timely information about the state of competition for broadband services in the residential multitenant rental market and the typical terms of contractors negotiated between property owners and broadband providers. Since 2017, this effort has produced a very large quantity of factual information.

The associations undertook this extensive effort for three reasons. First, because we were confident that the record would show that the kinds of regulations being proposed would prove to be unnecessary. Second, because we were committed to working in partnership with the Commission to reach results that were truly in the public interest. And third, because we believe that government regulation must be data-driven and evidence-based. No agency should exercise government power in response to mere anecdotes, ungrounded theories, or one-sided allegations of harm.

In response to the *2019 NPRM*, NMHC and NAA conducted a survey of rental housing owners, which asked numerous questions directly relevant to the issues raised in that docket. When the *2021 Public Notice* was released, NMHC and NAA conducted a second survey. This survey resulted in updated information regarding competition in the residential market, as well as information regarding wiring sharing, and the types of costs borne by rental housing owners.

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and Elimination of Digital Discrimination, GN Docket No. 22-69, Notice of Proposed Rulemaking, 2022 FCC Lexis 4169 2022) (the "*Digital Discrimination NPRM*").

Furthermore, our filings in each round were supported by detailed declarations proposed by rental housing owners and respected industry consultants, submitted under penalty of perjury. We have submitted a total of thirty declarations. One critical key finding of this work was that rental housing residents have a choice of at least two providers in 79% of properties owned by the average respondent to our 2021 survey.[9]

There is little doubt that the cable MSOs are currently serving nearly all rental housing communities in the country in some fashion, or that the ILECs are also a strong presence in a large majority of buildings. There is also a large group of smaller competitive broadband providers that serve rental housing residents under agreements with property owners. The record reflects that rental housing owners are expanding competition to include three, four, and sometimes more providers. In fact, the data suggests that the number of properties with more than two providers nearly doubled between 2019 and 2021,[10] and there is every reason to believe that growth will accelerate, as it has for other kinds of communications applications and services. Regulation of contract terms has not been necessary because the free market is working, as competitive broadband providers demonstrate the value of their services and build their reputations.

The last formal action in this docket was taken three years ago, when the Commission issued an order and declaratory ruling.[11] The Commission did not issue a further notice of

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[9] Further Joint Comments of NMHC *et al*., GN Docket No. 17-142, (filed October 20, 2021) ("*MTE 2021 Further Comments*"), at p. 5, n.10; p. 11.

[10] Further Joint Reply Comments of NMHC *et al*., GN Docket No. 17-142, (filed November 19, 2021) ("*MTE 2021 Further Reply*") at p. 10.

[11] *In the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Report and Order and Declaratory Ruling, 37 FCC Rcd 2448 (2022).

proposed rulemaking at that time. In its consideration of the digital discrimination rules required by Section 60506 of the Infrastructure Investment and Jobs Act,[12] however, the Commission asked questions regarding some issues previously raised in the *MTE Proceeding*. The *Digital Discrimination NPRM* asked specifically about four issues;[13] as we explained at the time and restate here, none of those issues requires further examination in the *MTE Proceeding*.

- Conflicts over access to inside wiring. The Commission has already considered this issue several times. It was addressed in the San Francisco Declaratory Ruling,[14] the responses to the *2017 NOI*, the responses to the *2019 NPRM*, and in the responses to the *2021 Public Notice*. The Commission's purpose in considering further regulation of inside wiring was to may promote competition, but the record shows that for many practical and technical reasons forced sharing of wiring is generally undesirable.[15] Nor is there any connection between the use of one set of wiring by one provider and lack of access to broadband. If that were the case, then perhaps the Commission should be looking at requiring providers to share their external fiber infrastructure in the name of promoting competition.

- Insufficient infrastructure for high-speed broadband. The lack of adequate infrastructure in certain communities, or certain areas within a community, is a significant factor in lack of access to broadband. 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 and it is the product of provider economics, not any alleged property owner reluctance to grant access. Although we pointed out this problem in the *MTE Proceeding*, because that docket does not address the issue of subsidies, *the MTE Proceeding* is not the appropriate place to identify ways of overcoming insufficiencies in existing infrastructure. That issue should be addressed in a targeted fashion, aimed at developing a suitable subsidy mechanism.

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[12] 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.

[13] *Digital Discrimination NPRM* at ¶ 84.

[14] *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).

[15] *See, e.g., MTE 2021 Further Reply* at 225-31.

- Lack of economic incentives for providers in low-income communities. The *Digital Discrimination NPRM* correctly noted that NMHC and NAA have argued that providers reasonably evaluate the potential return on investment and the cost of upgrading infrastructure when deciding whether to serve a community.[16] This business decision can lead providers to decide not to 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 unequal access to communications services because providers do not offer residents of the affected communities the same opportunities 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. This issue, too, has been thoroughly examined. NMHC, NAA, and RETTC oppose any regulation of rooftop agreements for the reasons stated in the *Digital Discrimination NOI Reply* and the *MTE Proceeding*.[17] 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.

Further action in the *MTE Proceeding* would not address the true reasons underlying broadband service disparities, nor would it promote broadband deployment. As we have pointed out on numerous occasions, the fundamental reasons that lower-income Americans lack access to adequate broadband service have to do with the practical plans and financial needs of broadband providers, rather than the decisions of rental housing owners. Thus, there is no need for further action by the Commission in any proceeding aimed at access to rental property or the terms of agreements between property owners and providers of communications services.

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[16] *Digital Discrimination NPRM* at ¶ 84, citing Reply Comments of NMHC and NAA, GN Docket No. 22-69, Notice of Inquiry (filed June 30, 2022) (the "*Digital Discrimination NOI Reply"),* at 8-11.

[17] *Digital Discrimination NOI Reply* at 22; Comments of NMHC, *et al*., GN Docket No. 17-142, (filed August 30, 2019) ("*MTE 2019 Comments")*, at 69-70; Reply Comments of NMHC, *et al*., GN Docket No. 17-142, (filed Sep. 30, 2019) at 28; *MTE 2021 Further Reply* at 47-49.

Furthermore, leaving the docket open creates uncertainty. An open docket chills the market and discourages innovation because it implies that the Commission is still considering further action.

For example, just last month WISPA stated in meetings with representatives of Chairman Carr and Commissioners Starks, Simington and Gomez that the Commission "should complete its rulemaking to improve competitive access to multi-tenant environments by eliminating harmful certain [*sic*] exclusive arrangements."[18] Given that the Commission last posed questions and obtained public comment in the docket in 2021, that it has since adopted rules, that it asked whether further action was appropriate in the *Digital Discrimination NPRM*, and that there is no FNPRM pending in the *MTE Proceeding*, it is not at all clear either (i) that there are any further issues to be addressed in the docket, nor (ii) what WISPA means by "completing the rulemaking." Leaving the docket open will merely burden NMHC, NAA, RETTC and rental housing owners with uncertainty about the status of the Commission's thinking about these issues, create confusion about the possibility of imminent action by the Commission, and encourage WISPA in the belief that further action may be near at hand. Accordingly, we respectfully urge the Commission to formally close the docket.

[18] WISPA, Notice of *ex parte* presentation to Danielle Thumann, Senior Counsel to Chairman Carr, and Callie Coker, Legal Counsel to Chairman Carr, GN Docket No. 17-142 (filed March 5, 2025); WISPA, Notice of *ex parte* presentation to David Brodian, Senior Legal Advisor to Commissioner Simington, GN Docket No. 17-142 (filed March 7, 2025); WISPA, Notice of *ex parte* presentation to Edyael Casaperalta, Legal Advisor to Commissioner Gomez, GN Docket No. 17-142 (filed March 7, 2025); and WISPA, Notice of *ex parte* presentation to Flynn Rico-Johnson, Policy Advisor to Commissioner Geoffrey Starks, GN Docket No. 17-142 (filed March 7, 2025) (jointly, the "*WISPA March 2025 ex parte notices")*.

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

The evidence submitted by NMHC, NAA, and RETTC since 2017 has demonstrated the significant problems posed by the policy proposals that the Commission has been considering in the *MTE Proceeding*. The broadband industry has typically advocated measures that might assist a particular segment of that industry in certain narrow respects, while failing to consider the full scope of the economic factors in work in the marketplace. Thus, if they had been adopted, many of those measures would have proven counterproductive.

Another way to put this is that the Commission's focus has been misdirected. 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.[19] Rather than addressing issues related to the incentives of service providers, the Commission's efforts have been directed towards unsubstantiated allegations of misbehavior by property owners.

NMHC, NAA, and RETTC are committed to addressing the critical problem in the broadband market, which is the lack of adequate broadband access and service for renters in the lower-income sector. This is fundamentally a problem of provider economics. Providers either lack infrastructure capable of serving these properties or existing infrastructure is substandard. More needs to be done to deploy or upgrade in those areas. Commission policy should stress

[19] Comments of NMHC and NAA, GN Docket No. 22-69 (filed Feb. 21, 2023) ("*Digital Discrimination NPRM Comments"*), Exhibit A, at ¶¶ 5-6; Exhibit B, at ¶¶ 7-8.

how to fund the upgrading and construction of new facilities in situations in which providers prefer not to invest their own capital.

This should also be the focus of any state legislation in this area. Regrettably, some state lawmakers have recently engaged in the same types of intervention in the residential broadband market that the Commission recently rejected. NMHC, NAA, and RETTC urge state legislators who may be considering the regulation of bulk broadband service agreements to take the record of the *MTE Proceeding* into account. As we note below, bulk agreements are a very important tool for serving particular segments of the residential broadband market.

In the *MTE 2021 Further Reply*, NMHC and NAA provided a back-of-the-envelope analysis of the scope of the underserved population in the United States. We offered this analysis to show that (i) most of the rental housing market has access to good quality broadband service, and (ii) that the lack of access suffered by a substantial number of Americans living in multifamily rental housing is a product of old infrastructure and low average incomes, which make the remaining rental communities unattractive to providers. One effective way of solving this problem can be the use of bulk service agreements. The following are our rough calculations, as we presented them in 2021; some of the figures used are outdated, but the basic problem remains the same.

There are (very roughly) 20 million apartment households in the United States.[20] Between 68% and 80% of apartment properties in the country have two or more providers.[21] Therefore, using round numbers, taking 75% of 20 million means that around 15 million

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

[21] *Digital Discrimination NPRM Comments* at 14-15.

apartment households in the country have access to at least two broadband providers.[22] 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 multitenant rental communities that are served by a single provider.[23]

The record in the *MTE Proceeding* also showed that there are three categories of households living in apartments that probably need some form of assistance if they are to have access to good quality broadband service:[24] (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). The national median income of all apartment residents at the time was less than $30,000 a year.[25] If these properties have any broadband service at all, it is typically low-speed, unreliable DSL delivered over very outdated wiring.[26]

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[22] Using more precise and updated figures, there are roughly 21.7 million apartment households. 2023 American Community Survey, 1-Year Estimates, U.S. Census Bureau, "Tenure by Units in Structure." So, based on our previous survey data, between 14.8 and 17.4 million apartment households in the country have access to at least two broadband providers.

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

[24] *MTE 2021 Further Reply* at 15-25. Using more recent data: (i) 9.0 million residents in HUD-assisted apartments; (ii) 7.1 million with incomes under $20,000 (which in part includes the first group); and (iii) 12.7 million with incomes under $35,000 (which in part includes the first two groups). Picture of Subsidized Households: U.S. Total Extract, December 31, 2024, U.S. Department of Housing and Urban Development.

[25] *Digital Discrimination NPRM Comments* at 15. Today, that figure is roughly $56,000. NMHC tabulations of 2023 American Community Survey public use microdata, U.S. Census Bureau.

[26] *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).

As we 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.[27] 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.

In most rental housing properties, the four factors that underly 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 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 rental housing 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*.[28] 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 that

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[27] *MTE 2021 Further Comments* at 75-79; *MTE 2021 Further Reply* at 15-31.

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

many residents cannot afford devices or subscriptions, and they may rely on subsidies that are not available for the more expensive premium levels of service.[29] This makes it very difficult for providers to meet their usual return-on-investment targets. A bulk agreement, however, can help close the gap for the provider, by assuring a revenue stream that is large enough and runs for long enough to justify the investment in upgrading or installing new facilities in a rental community.

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 (the sole exception, and a notable benefit, are the rates they can negotiate in bulk agreements, which are lower than the provider's standard rate).

If installation or upgrading of inside wiring is needed, the property owner will frequently bear a substantial portion of the cost of the wiring and related facilities.[30] 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.

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[29] *Digital Discrimination NPRM Comments*, Ex. A, 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.").

[30] *MTE 2021 Further Reply* at 34-35; *MTE 2021 Further Comments* at 39-42, 48-54; *MTE 2019 Comments* at 14-16, 57-63.

Rental housing owners frequently underwrite a portion of a provider's costs, and they often negotiate to include performance standards in agreements for the benefit of their renters.[31] In those cases in which owners are compensated by providers, the modest payments help offset the infrastructure expenses incurred by the property owner.[32] In many instances – especially in lower income communities – the owner receives no compensation.

The foregoing assumes that a provider is willing to invest in the facilities needed to deliver adequate broadband service at a property. Often, they are not, especially in smaller rental housing 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.[33]

Historic practices have resulted in a lack of network capacity in the vicinity of many lower-income residential buildings. The solution, however, turns on meeting the financial needs of broadband providers for funding their networks.

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

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

[33] IIJA, § 60102(f).

II. THE COMMISSION SHOULD AMEND THE BROADBAND DISCRIMINATION RULES TO EXCLUDE PROPERTY OWNERS FROM THE DEFINITION OF "COVERED ENTITY."

On November 20, 2024, the Commission released an order[34] adopting the digital discrimination rules. The new rules did not expressly refer to owners of rental housing communities, but it is clear from the definition of "covered entity," at 47 C.F.R. 16.2(d), that rental housing owners are subject to the rules. The *Digital Discrimination Order* itself also makes this clear in its discussion of the scope of the term "covered entity." This decision was not justified by the language of the statute or the record before the Commission. Consequently, NMHC filed a petition for review in the Court of Appeals for the District of Columbia Circuit, and is currently a party in the case that was consolidated before the Court of Appeals for the Eighth Circuit under the name of *Minnesota Telecom Alliance et al., v. FCC*, Case No. 24-1179. In addition, NAA filed a brief in the case as *amicus curiae*. The case remains pending.

Regardless of the outcome of *Minnesota Telecom Alliance*, the Commission erred when it decided to regulate rental housing owners under § 60506. The only entities covered by § 60506 are providers of broadband internet access service. This is clear from the text of the statute. Section 60506 refers to broadband service in six places,[35] and not once does it refer to any type of entity to be regulated other than a service 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

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[34] *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Report and Order and Further Notice of Proposed Rulemaking, 38 FCC Rcd 1140 (2023) (the "*Digital Discrimination Order*").

[35] 47 U.S.C. § 1754(a)(1); 47 U.S.C. § 1754(a)(2); 47 U.S.C. § 1754(a)(3); 47 U.S.C. § 1754(b)(1); 47 U.S.C. § 1754(c)(1); and 47 U.S.C. § 1754(d).

"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 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."[36] 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. Congress meant for the Commission to consider only the actions of service providers when adopting regulations. 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"[37] 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 indicates very strongly that Congress intended to regulate only providers.

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[36] 47 U.S.C. § 1754(a)(2).

[37] *Id.*

In any case, a plain reading of § 60506 indicates that the Commission should not have attempted to reach property owners. Property owners cannot "discriminate," as the term is used in the statute, because they do not control the terms of service. Furthermore, the courts have noted that Congress has not granted the Commission authority to regulate the real estate industry.[38] Therefore, without new authority, the Commission cannot regulate property owners on the theory that they can affect access to broadband services, and the text of § 60506 does not confer any such authority.

Although a central issue in *Minnesota Telecom Alliance* concerns the Commission's decision to adopt disparate impact as the standard for a finding of discrimination, NMHC and NAA would have had no reason to challenge the *Digital Discrimination Order* had Section 60506 and the digital discrimination rules not been applied to rental housing owners. Therefore, regardless of any action the Commission might take in response to a final decision of the Eighth Circuit, the simplest way for the Commission to correct its error would be to amend the definition of covered entity.

NMHC, NAA, and RETTC respectfully request that the Commission amend 47 C.F.R. § 16.2(d) so that it explicitly states that the owners of residential premises are not covered entities.

[38] "[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) ("*BOMA v. FCC*").

III. THE COMMISSION SHOULD INITIATE PROCEEDINGS TO REPEAL EXISTING RULES THAT INTERFERE WITH THE ABILITY OF RENTAL HOUSING OWNERS TO MANAGE THEIR PROPERTY AND ENSURE THAT RESIDENTS HAVE ACCESS TO THE BROADBAND SERVICES THEY NEED.

A. The Cable Inside Wiring Rules Are Incoherent and Outdated.

The 1992 Cable Act added paragraph (i) to Section 624 of the Communications Act. This amendment directed the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber."

Congress enacted Section 624(i) because cable operators had been hindering competition by asserting that they owned wiring that had been installed in subscriber's premises, and then prohibiting its use to deliver the signals of a DBS provider or other competitor. The Commission responded by first adopting a sensible rule that met that goal in the context of single-family installations. Cable operators were prohibited from removing wiring in single family installations, and subscribers who had terminated their cable service were given the opportunity to pay the cable operator for the wiring. This procedure made it easier for people to switch from cable to DBS, which was the primary (if not only) competitor to cable for video service at the time. But then the Commission went further, and proceeded to violate the statute.

Rental housing residents do not own the homes in which they live, just as they do not own electrical wiring, telephone wiring, plumbing, or any other fixtures within their units, especially when it is behind walls. The Commission however, revised its rule to allow apartment residents to purchase wiring within their units, as if they were individual homeowners. This decision defied common sense, especially because many renters move frequently and occupy

their homes for relatively short periods. It is difficult to imagine a realistic scenario in which a renter would want to buy wiring in a place he or she did not own.

The Commission reached this result by deciding that the phrase "the premises of such subscriber" could be interpreted to mean a leased rental housing unit. But the illogical result – expecting that giving renters the right to buy wiring would promote competition – demonstrates that the Commission did not read the statute correctly. By relying on this illogical premise, the Commission created an incoherent and impractical rule. Consequently, 47 C.F.R. § 76.802(b) should be repealed.

At the same time that it amended 47 C.F.R. § 76.802, the Commission adopted 47 C.F.R. § 76.804, which governs cable run wiring; cable home run wiring runs from each subscriber's residence back to a common junction point in the building. This section creates a mechanism for rental housing building owners to acquire wiring installed within their buildings, up to each separate residence. 47 C.F.R. § 76.804 should be repealed for two reasons.

The first reason is that the rule is part of an integrated scheme, and its efficacy depends on the viability of 47 C.F.R. § 76.802. The second is that it was not authorized by Congress. Congress directed that the Commission adopt rules governing wiring installed within the premises of a subscriber, but rental housing property owners are not cable subscribers. Property owners own and manage property used by cable operators and cable subscribers, but Congress did not mean for the Commission to address wiring installed on the property of a third party. Once again, the Commission exceeded its statutory mandate.

This regulation should also be repealed, because, for a variety of reasons discussed in our filings in the MTE docket, cable operators very rarely, if ever, own wiring inside rental housing buildings. This rule has very little practical effect today, 30 years after it was adopted, and its

continued presence in the Code of Federal Regulations merely creates confusion about the rights and obligations of both property owners and cable operators.

B. The Over-the-Air Reception Devices Rule Is a Classic Example of Unlawful Regulatory Bootstrapping.

In the Telecommunications Act of 1996, Congress directed the Commission to adopt rules governing the placement of certain types of antennas,[39] and the Commission adopted the over-the-air reception devices ("OTARD") rule.[40] Although the statute said nothing about agreements between property owners and cable operators, or placement of antennas on leased property or in multiple tenant buildings, the Commission decided to extend its initial OTARD rule to installations on leased property.

In upholding this first expansion of the rule, the Court of Appeals for the District of Columbia deferred to the Commission, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984).[41] As we now know, the court should not have deferred to the agency.[42]

In addition, the Commission later compounded this error by further expanding the scope of the OTARD rule. First, the Commission decided that customer-end antennas used to receive WiFi and broadband services were protected by the rule.[43] Next, in 2004, the OTARD rule was amended again to include fixed wireless hub and relay antennas that also serve one or more

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[39] § 207, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[40] 47 C.F.R § 1.4000.

[41] *BOMA v. FCC,* p. 96.

[42] *Loper Bright Enterprises et al. v. Raimondo, et al.,* 603 U.S. 369, 412-13 (2024).

[43] *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, First Report and Order, 15 FCC Rcd 22,983 (2000), ¶ 97.

customers at the site of the antenna.[44] Hub and relay antennas used "primarily" to transmit signals to multiple customer locations were still excluded.

In 2018, however, the Wireless Internet Service Providers Association (WISPA) asked the FCC to eliminate the exclusion for hub and relay sites used primarily to transmit signals to multiple locations. WISPA argued that the OTARD rule needed to be changed to allow fixed wireless providers to compete more effectively with other broadband delivery technologies. The Commission responded by amending the OTARD rule so that covered equipment did not need to be used "primarily" as hub and relay antennas, as long as the antenna is not used to provide telecommunications services.[45]

And now WISPA is asking the Commission to further amend the OTARD rule so that it covers all hub and relay antennas, even if they are used to provide telecommunications services.[46]

This regulatory bootstrapping began with the initial expansion of the rule to leased properties. The court's ruling upholding that decision was improper, because it applied the *Chevron* doctrine. Consequently, all the subsequent amendments of the OTARD rule were also improper. While the Supreme Court's decision in *Loper Bright* may leave *BOMA v. FCC* and the Commission's subsequent OTARD orders unaltered, WISPA's latest proposal would reopen the question of the scope of Section 207 of the 1996 Act, and the Commission's authority to extend the OTARD rule beyond its plain meaning.

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[44] *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Order on Reconsideration (rel. March 24, 2004), 19 FCC Rcd 5637, 5644 (2004), at ¶ ¶ 16-17.

[45] *Updating the Commission's Rule for Over-the-Air Reception Devices*, WT Docket 19-71, Report and Order, 36 FCC Rcd 537 (2021), at ¶ 9.

[46] *WISPA March 2025 ex parte notices.*

NMHC, NAA, and RETTC respectfully request that the Commission initiate a proceeding to restore the OTARD rule to its original intended scope, so that it applies only to antennas located on premises controlled by the lawful occupant of a single-family residence.

C. The Commission Had No Authority To Adopt the Bans on Exclusive Access Agreements, Exclusive Revenue Share Agreements, or Graduated Revenue Share Agreements.

In 2007, the Commission barred cable operators and telecommunications providers from entering into agreements with property owners that give the service providers the exclusive right to serve the building.[47] In adopting the cable exclusive access ban, the Commission relied on 47 U.S.C. § 548(b); for the telecommunications access ban, the Commission cited 47 U.S.C. § 201(b).

The real estate industry challenged the Commission's authority to adopt the cable rule.[48] The Commission had asserted that the plain meaning of § 548(b) encompasses the regulation of building access agreements, alleging that the statute is a broad grant of authority to regulate any practices that would prevent a video service provider from providing satellite cable programming or satellite broadcast programming to consumers. In reality, however, the plain meaning of 47 U.S.C. § 548(b) authorizes only the regulation of access to programming by distributors of programming. The purpose of the provision was to ensure that competing programmers could obtain access to programming, because Congress had determined that competing providers were being impeded by the cable industry's control over programming. Nowhere does the statute

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[47] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20,235 (2007).

[48] *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

mention contracts with rental housing building owners, contracts granting cable operators access to private property, or any aspect of the relationship between a rental housing owner and a cable operator.

In considering these issues on appeal, the D.C. Circuit upheld the Commission's rule, noting that there was some ambiguity in the statute, but that the Commission "reasonably resolved [the ambiguity] in favor of its interpretation."[49] Because the court thus relied on the now-defunct *Chevron* doctrine, the Commission's interpretation of 47 U.S.C. § 548(b) must be re-examined.

The problem with the telecommunications exclusive access ban is different. Section 201(b) authorized the Commission to regulate "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." This provision appears in Title II of the Communications Act, and the service in question here is not broadband service, but common carrier, or telecommunications service. An agreement between a telecommunications carrier and a property owner that prevents the property owner from granting access to a competing broadband provider is not a "charge, practice, classification, or regulation" that pertains to the provider's common carrier service. Because the Commission has no authority over broadband service, the telecommunications exclusivity ban is unlawful.

Finally, the Commission's more recent actions, the bans on exclusive and graduated revenue sharing agreements entered into by cable or telecommunications providers, all assume

[49] *Id.* at p. 666.

the lawfulness of the existing cable and telecommunications exclusive access bans. The *2022 MTE Order* cites as its authority 47 U.S.C. § 548(b) and 47 U.S.C. § 202(b); consequently, those bans are invalid for the same reasons discussed above.

NMHC, NAA, and RETTC respectfully request that the Commission initiate a proceeding to repeal the following rules: 47 CFR § 64.2500; 47 CFR § 64.2501; and 47 CFR § 76.2000(b).

CONCLUSION

For all the foregoing reasons, the Commission should: (i) officially close the *MTE Proceeding*; (ii) amend the digital discrimination rules to make clear that owners of rental property are not "covered entities" and are not subject to those rules in any way; (iii) amend the OTARD Rule so that it no longer applies to leased property; and (iv) repeal 47 CFR § 76.802(a)(2); 47 CFR § 76.804; 47 CFR § 76.805; 47 CFR § 64.2500; 47 CFR § 64.2501; and 47 CFR § 76.2000(b).

Respectfully submitted,

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