



July 26, 2018

The Honorable Ajit Pai  
Chairman  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Ms. Elizabeth Bowles  
Chair  
Broadband Deployment Advisory Committee  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Re: *Accelerating Broadband Deployment*, GN Docket No. 17-83; *Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91; *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142.

Dear Chairman Pai and Chair Bowles:

For more than 20 years, the National Multifamily Housing Council (NMHC) and the National Apartment Association (NAA) have partnered on behalf of America's apartment industry. Drawing on the knowledge and policy expertise of staff in Washington, D.C., as well as the advocacy power of more than 160 NAA state and local affiliated associations, NAA and NMHC provide a single voice for developers, owners and operators of multifamily rental housing. One-third of all Americans rent their housing, and 39 million of them live in an apartment home.

We have participated in numerous proceedings before the Federal Communications Commission (the "FCC"), most recently by filing comments in the pending *Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code*, MB Docket No. 17-91, and the related Notice of Inquiry in *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142.

NMHC and NAA welcome the FCC's focus on broadband deployment and appreciate the work the Broadband Deployment Advisory Committee ("BDAC") has done to identify regulatory barriers to infrastructure investment. Nevertheless, we have serious concerns regarding the proposed Model State Code (the "MSC") recently drafted by the BDAC in its current form. Specifically, Article 8 of the MSC would grant all providers of communications services the right to access and install facilities in multifamily residential buildings. Further, Article 8 would mandate construction of broadband facilities in new and renovated buildings at the property owner's expense.

Our concerns begin with the fact that Article 8 goes beyond the BDAC's charge defined by the Commission. According to Section 3 of the BDAC's Charter, its mission is "reducing and/or removing regulatory barriers to infrastructure investment." Article 8 does nothing to remove or reduce regulatory barriers. Further, it would regulate or even replace existing contracts negotiated between property owners and broadband service providers.

Moreover, Article 8 is not informed by key stakeholder input. Neither the BDAC nor the FCC have critical information about the existing market-based system for broadband deployment within apartment buildings. Neither the rental apartment industry nor the broader real estate industry is represented on the BDAC. Consequently, the FCC is being asked to promote a state regulatory scheme without having heard from the industry that would bear the brunt of the regulation, which suggests that more work is needed.

We appreciate that the FCC is dedicated to a "light-touch" regulatory environment and understands very well that government should not intervene where the market is working. We agree with Chairman Pai that even where there is a demonstrated market failure, the FCC should seek less intrusive options where it can.<sup>1</sup> As further discussed below, the multifamily broadband market is working effectively now, and Article 8 will raise numerous practical and legal problems. Consequently, we respectfully ask that the BDAC rescind its approval of the MSC in its present form and urge the FCC to reject the proposal.

### **How the Market Works Today**

Agreements on infrastructure deployment are currently made by property owners and communications providers operating in a free market that encourages competition and benefits consumers. The rental apartment industry has a long history of promoting the growth of communications services. Because apartment properties are densely populated, they offer attractive markets to telephone companies, cable and satellite video providers, and now to broadband providers. Every time a new apartment property is built, the market for communications services expands. Furthermore, broadband service is critical to apartment residents, which means that our members actively seek communications providers that meet their residents' expectations. The rental apartment industry works every day to promote the growth of the broadband industry. In fact, most apartment building residents have access to at least two broadband providers, whereas only 38% of all Americans have such access.<sup>2</sup>

Service providers must weigh the cost of extending service against the potential return on that investment for each apartment building. Such factors as the size, location, and age of the

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<sup>1</sup> Ajit Pai, *Why I'm trying To Change How the FCC Regulates the Internet*, LOS ANGELES TIMES, April 26, 2017, [la-oe-pai-fcc-internet-regulation-20170426-story.html](http://la-oe-pai-fcc-internet-regulation-20170426-story.html) (last visited Jul 25, 2018).

<sup>2</sup> Comments of NMHC, *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, at p. 3; Comments of Hubacher & Ames, *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, at pp. 3-4.

building, as well as resident characteristics that drive demand, are important considerations. Providers must also consider whether investing in an alternative property or in an entirely different locality would yield a greater profit. For their part, property owners are fully aware that a building without access to communications services will attract and retain few residents. In other words, the return on the property owners' investment and the value of the property hinge on the availability of communication services.

Article 8 seeks to impose government regulation even though service providers and property owners effectively negotiate access to buildings. In the past, negotiation didn't happen because neither party had any choice: Universal service obligations required the provider to build, and residents demanded service. Today, however, service providers can pick and choose where to serve and there is pressure on property owners to offer a choice of advanced services.

If a provider is willing to serve, the question becomes who will pay for what. Historically, cable operators could pay the full cost of the infrastructure, charge monopoly rates, and share some of that revenue with property owners. Those days are gone. Providers today might pay for marketing rights or the right to use existing wiring but they rarely, if ever, pay for mere access. In fact, in many instances, apartment owners are now paying to extend the provider's networks.

For example, many apartment firms have chosen to construct distributed antenna systems in their buildings at their own expense so that their residents can receive the benefits of advanced wireless services from the providers of their choice. Apartment developers may also choose to pay for and install state-of-the-art wiring capable of serving multiple providers at the time of construction. Whether the owner or the provider pays for the infrastructure depends on whether that entity believes it is a sensible allocation of capital. The MSC, however, would replace effective market mechanisms that benefit consumers and encourage broadband competition without evidence of market failure or consideration of the practical implications with input from the apartment industry.

### **The Practical Problems with Article 8**

Section 3 of Article 8, which would obligate building owners to install Network Access Points ("NAPs") and conduit in all newly constructed and renovated buildings, illustrates some of the practical problems posed by regulation:<sup>3</sup>

1. The mandate to install equipment is based on the false assumption that property owners forestall competition. Such a mandate might be a logical policy choice if every provider were obligated to serve every potential customer. Broadband providers, however, do not actually want to serve the entire market. Providers want to sell the most lucrative services to the most lucrative market segments, yet the MSC would require installation of expensive facilities that may not be used.

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<sup>3</sup> Other provisions of the MSC raise similar concerns, which we do not address here in the interest of space.

2. NAP equipment is often very expensive. Owners should not be required to install equipment without an agreement from a provider to serve a building and make the additional necessary investment on their end. Without an agreement between the provider and the owner, an investment by the owner goes to waste. Not only could those funds be put to more immediate use, but the mandated facilities may not be up-to-date if a provider only decides to build later as technology continues to change rapidly.
3. Different providers use different NAPs with different technical characteristics. This is one reason why such equipment is typically installed by each provider at its own expense once the provider has already decided to serve a building. Until a property owner knows which providers are willing to serve a building, the owner can only guess at what technology will be required. The MSC would direct new state bureaucracies to develop and enforce a uniform standard in each state, contradicting the FCC's dedication to reducing regulatory barriers.
4. Apartment developers already routinely install conduit at their own expense in new construction for use by communications providers. The MSC says nothing about how much space must be provided, again leaving this to the states to standardize. Disputes resolved by individual states will lead to inconsistent technical standards. State administrative relief, as provided by the MSC, will undoubtedly yield different results even among states that have adopted identical MSC language. In other words, the BDAC is proposing to replace a functioning market-based system with a multiplicity of new and uncertain state regulatory regimes, which will create considerable practical and economic inefficiency.
5. These additional costs would come at a time when the rental apartment industry is under increasing pressure to meet booming demand across the country and address the significant housing affordability challenges faced by American families. The real estate industry — particularly apartment owners and developers — must balance a wide array of concerns for project viability, of which regulatory costs and compliance at the federal, state, and local levels are a key factor. This proposed mandate could increase costs and impact multifamily housing development a time when our industry, along with policy makers at all levels of government, is striving tirelessly to make housing more affordable — from development to construction and ultimately to the level of rent residents pay.

### **Legal Concerns Raised by Article 8**

The MSC also raises legal questions:

1. The widespread enactment of Article 8 by state legislatures would create a vast new implicit subsidy mechanism, under which the states would shift significant network construction costs from providers to property owners. Such a mechanism would

arguably violate a basic purpose of the Telecommunications Act of 1996 (the “1996 Act”), which specifically replaced the old implicit subsidy scheme used to fund universal service. Consequently, such an effort at the state level would be preempted by Section 254 of the Communications Act, which lays out how universal service is to be achieved and funded. The states do not have the authority to adopt universal service mechanisms of their own that do not comply with Section 254, and nowhere did Congress suggest that property owners can be forced to bear the costs of network expansion.

2. We also question whether the states have the authority to promote competition for interstate services in a manner so remote from anything that that was anticipated by Congress in the 1996 Act. Even if the authority exists, the BDAC has assessed neither the state of competition inside rental apartment buildings nor the likelihood of competition in various sectors of the market. In fact, there is ample competition at the higher end of the market because that is where providers choose to compete. Property owners shouldn’t be held responsible for any presumed lack of competition at other market points where providers are not competing. Even if Article 8 of the MSC could be justified on the theory that it would lower the cost of entry to competitors in all sectors of the apartment market, no analysis of the overall cost of the proposal has been done. For example, the costs of subsidizing the communications industry would certainly lead to an increase in project development costs, which suggests that future apartment residents could then face increased rents.
3. Article 8 amounts to a proposal for nationwide mandatory access to private property, which the Commission has declined to date despite periodic pressure from the communications industry. While the MSC may circumvent the limits on the Commission’s authority over property owners by handing the issue to the states, the takings clause of the Fifth Amendment still restricts the power of the states to grant third parties the right to occupy private property. Here again, the BDAC and the FCC would be promoting regulation and inevitable litigation at the state level without any justification, much less assurance, that their intervention would promote a sound policy.

### **The BDAC’s Mission Does Not Include Regulating Access to Privately-Held Buildings**

As emphasized earlier, we respectfully assert that Article 8 of the MSC falls outside the BDAC’s Charter. Section 3 of the Charter states:

“The mission of the Committee is to make recommendations to the Commission on how to accelerate the deployment of high-speed Internet access, or “broadband,” by reducing and/or removing regulatory barriers to infrastructure investment. This Committee is intended to provide an effective means for stakeholders with interests in this area to exchange ideas and develop recommendations to the Commission on broadband

deployment, which will in turn enhance the Commission's ability to carry out its statutory responsibility to encourage broadband deployment to all Americans.

Issues to be considered by the Committee may include, but are not limited to, drafting for the Commission's consideration a model code covering local franchising, zoning, permitting, and rights-of-way regulations; recommending further reforms of the Commission's pole attachment rules; identifying unreasonable regulatory barriers to broadband deployment; and recommending further reform within the scope of the Commission's authority (to include, but not limited to, sections 253 and 332(c)(7) of the Communications Act and section 6409 of the Spectrum Act)."

As the rental apartment industry is a "stakeholder" within the intent of Section 3, we welcome the opportunity to participate directly in the BDAC's work before that work is completed, as have communications services providers, local governments, equipment manufacturers, and others. When the FCC issued its original call for nominations to the BDAC in 2017, we put forward the name of a potential member.<sup>4</sup> Although neither our proposed member nor any other representative of the real estate industry was appointed to the BDAC, we reasoned that it was because the stated mission of the BDAC (as quoted above) did not include mandating access to private property.

Now, however, the BDAC and the FCC appear to be on the cusp of recommending that the states adopt comprehensive regulation of the \$1.3 trillion apartment industry responsible for housing more than 18 million Americans, without seeking the views of that industry. We urge the BDAC to reconsider its support for the MSC in its current form. We also urge the FCC to reject any BDAC recommendation that would call for the Commission to support the MSC or a proposal similar to Article 8.

Sincerely,



Cindy V. Chetti  
Senior Vice President of Government Affairs  
National Multifamily Housing Council



Gregory S. Brown  
Senior Vice President of Government Affairs  
National Apartment Association

<sup>4</sup> See attached letter from Betsy Feigin Befus to Mr. Brian Hurley and Mr. Paul D'Ari dated February 15, 2017.



Brian Hurley, Designated Federal Officer for the Broadband Deployment Advisory Committee  
Paul D' Ari, Deputy Designated Federal Officer for the Broadband Deployment Advisory Committee  
Federal Communications Commission  
445 12<sup>th</sup> St., SW  
Washington, DC 20554

February 15, 2017

Dear Mr. Hurley and Mr. D' Ari,

The National Multifamily Housing Council (NMHC) applauds the Federal Communications Commission's (FCC) initiative to establish the Broadband Deployment Advisory Committee (BDAC) to develop recommendations to accelerate broadband deployment. We wish to nominate Betsy Feigin Befus to serve as a member of the BDAC representing NMHC. Ms. Feigin Befus is NMHC's General Counsel and policy expert on telecommunications issues impacting the rental apartment industry. Her membership in the BDAC would bring an important perspective to the Committee which may not be otherwise represented.

For more than 10 years, Ms. Feigin Befus has advised apartment owners on a range of policy and business issues related to the deployment, use and control of wiring, equipment and infrastructure that delivers telecommunications services to apartment buildings—or "multiple dwelling units" (MDUs). She has also worked with competitive and legacy broadband providers representing the interests of apartment property owners and encouraging service to apartment properties. Ms. Feigin Befus would bring knowledge of federal policy relevant to MDUs, network design and construction, access and points of entry, and the relationship between apartment owners and local governments.

NMHC's participation in the BDAC would be an asset to advancing the Committee's mission to address barriers to broadband deployment. The apartment industry is a major component of the built environment and works closely with broadband providers that deploy and maintain service to apartment buildings. Owners of apartment properties, or MDUs, are important stakeholders in physical infrastructure and equipment as well as the delivery of broadband to help bridge the digital divide for apartment residents. Apartment residents increasingly want more, better, and faster telecommunications services, making reliable, competitively priced telecommunications services a priority for apartment companies. Inadequate, unreliable service significantly impacts residents and may involve costly technical solutions. Ms. Feigin Befus and NMHC would provide key insights from an integral perspective to the Committee's comprehensive consideration of strategies to accelerate broadband deployment.

Based in Washington, DC, NMHC is a national association representing the leadership of the trillion-dollar rental apartment industry. NMHC member companies engage in all aspects of the industry including development, ownership, management and finance to provide homes for the 38 million Americans who live in apartments today. 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.

Thank you for your consideration of this nomination to the Committee.



Betsy Feigin Befus



Date

### Nominee Information

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### Authorization for Nomination

I, Cindy V. Chetti, NMHC's Senior Vice President of Government Affairs with responsibility for implementing strategy for all legislative and regulatory issues of interest to NMHC, authorize the nomination of Betsy Feigin Befus, an employee of the organization, to serve as our representative on the FCC's BDAC.



Cindy V. Chetti  
Senior Vice President of Government Affairs  
National Multifamily Housing Council



Date