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

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

COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL

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Summary

The National Multifamily Housing Council hereby recommends that the Commission not propose rules that would disrupt existing or future contractual arrangements between apartment building owners and broadband Internet access service providers. Exclusive marketing, bulk billing, revenue sharing, and exclusive wiring agreements promote the availability of state of the art, affordable broadband Internet access services and encourage ongoing investment. The Commission also lacks the legal authority to regulate such contracts. Moreover, most apartment residents already have access to two or more service providers. The market is working; and the Commission should refrain from regulation when no problem exists.

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The National Multifamily Housing Council ("NMHC")[1] hereby submits these comments in response to the Federal Communication Commission's ("Commission") Notice of Inquiry ("NOI") in the above referenced docket.[2] The Commission does not need new rules or policies to address a problem that does not exist. Most apartment residents already have access to two or more service providers. Accordingly, the Commission should refrain from proposing rules that would limit or prohibit exclusive marketing, bulk billing, revenue sharing, and exclusive wiring agreements. Prohibiting or limiting such agreements would be counter-productive, likely resulting in increased rates and reduced service quality for residents, slowed broadband deployment and decreased competition. The Commission also lacks the legal authority to

[1] Based in Washington, DC, NMHC is a national association that represents the leadership of the $1.3 trillion apartment industry. NMHC members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for the 38.8 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. More than one-third of American households rent, and 18.7 million U.S. households live in an apartment home (buildings with five or more units).

[2] *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, FCC 17-78 (rel. June 23, 2017) ("NOI").

regulate such contracts; which will be exacerbated if broadband Internet access service ("BIAS") is reclassified as an information service under Title I of the Communications Act.

I. Background

On June 23, 2017, the Commission released the NOI, which sought comment on a variety of issues regarding competitive broadband services within multitenant environments ("MTEs").[3] Among other things, the NOI asks whether regulation of exclusive marketing, bulk billing, revenue sharing, and exclusive wiring agreements would promote broadband expansion and competition in MTEs, and whether the Commission has the legal authority to regulate such contracts.[4] Regarding exclusive marketing and bulk billing agreements, the NOI asks whether any circumstances have changed since the *2010 Exclusive Service Contracts Order,* where the Commission chose not to regulate such agreements.[5] Regarding revenue sharing and exclusive wiring agreements, the NOI seeks comment on how such agreements are affecting broadband competition within MTEs.[6] The Commission also seeks comment on the potential impact of its proposed reclassification of BIAS as an information service on its authority to address competition within MTEs.[7]

II. MTE Residents Have Competitive Choices for Broadband Access

The Commission should not pursue new rules or policies to address a problem that does not exist. Indeed, residents of apartment buildings generally have more choice among BIAS

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[3] NOI ¶ 10.

[4] Id. at ¶¶ 2, 17-21.

[5] Id. at ¶ 13. In that order, the Commission concluded that bulk billing agreements "enhanc[e] deployment of broadband," and that both bulk billing and exclusive marketing agreements are "significantly pro-consumer." *Second Report and Order*, 25 FCC Rcd 2460 (2010) (*2010 Exclusive Service Contracts Order*) ¶¶ 2, 28, 37.

[6] NOI ¶ 14-15.

[7] NOI ¶ 21.

providers than Americans overall. Most apartment building residents have access to two or more BIAS providers.[8] In contrast, 38% of Americans overall have access to two or more BIAS providers.[9] As a result, it would be counterintuitive to pursue regulations impacting a segment of the market, MTEs, that is ahead of the market overall in terms of BIAS provider competition.

III. Regulating Exclusive Marketing, Bulk Billing, Revenue Sharing, and Exclusive Wiring Agreements Would Slow Broadband Deployment and Harm Consumers

Regulating exclusive marketing, bulk billing, revenue sharing, and exclusive wiring arrangements would slow broadband deployment and decrease competition among service providers in MTEs, as well as increase prices and reduce service quality for MTE residents. It is clear from the record[10] that led to the *2010 Exclusive Service Contracts Order*[11] that exclusive marketing and bulk billing agreements allow MTE owners to offer state-of-the-art communications services to residents at reduced costs, and there is no evidence that circumstances have changed. Revenue sharing and exclusive wiring agreements offer analogous benefits.

As discussed in NMHC's comments[12] in response to the *MBC Preemption Petition*,[13] MTE owners, developers and managers have unique relationships with communications service

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[8] 2017 NMHC survey of apartment building owners.

[9] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, et al.*, 2016 Broadband Progress Report, FCC 16-6 ¶ 86 & Table 6 (rel. Jan. 29, 2016).

[10] *See e.g.* Comments of NMHC, *et al*., MB Docket No. 17-51 (filed Feb. 6, 2008) ("NMHC 2008 Comments").

[11] 2010 Exclusive Service Contracts Order ¶¶ 28, 37.

[12] Comments of NMHC, MB Docket No. 17-91, at 5-15 (filed May 18, 2017) ("NMHC Preemption Petition Comments").

[13] *See* Petition of the Multifamily Broadband Council ("MBC") Seeking Preemption of Article 52 of the San Francisco Police Code, MB Docket No. 17-91 (filed Feb. 24, 2017) ("MBC

providers that begin prior to building construction. These relationships will vary, including the ultimate ownership of the equipment and wiring.[14] In many cases, communications service providers will share the cost of installation, maintain the network and provide packages of broadband (wireless and wired), television, telecommunications and security services in return for access to building infrastructure and the opportunity to market and sell services to the residents. Property owners also rely on the certainty that they will not be tasked with the significant maintenance responsibilities that come with communications facilities, including diagnosing and fixing wiring problems.

Prohibiting or regulating exclusive marketing, bulk billing, revenue sharing, and exclusive wiring agreements would slow broadband deployment. Indeed, service providers and building owners that have certainty as to heavily-negotiated terms included in these agreements, such as marketing exclusivity, number of customers, access to wiring, and revenue sharing, are more likely to obtain financing for, and invest in, building out expensive, state-of-the-art facilities, including fiber.[15] In contrast, providers that have no certainty as to a potential return on investment are less likely to make such investments.[16]

Preemption Petition") (asking the Commission to preempt a San Francisco, CA ordinance requiring MTE owners, upon request, to permit use of existing wiring by communications services providers, regardless of existing contractual arrangements).

[14] For example, it's common for the building owner to own both the home run wire (which runs to the unit from a telephone closet or other central location) and the home wire (which is the wiring in the unit connected to the home run wire). Service providers will usually have exclusive use of the home run wire but non-exclusive use of the home wire.

[15] Exclusivity Second Report and Order ¶ 17 n.23.

[16] As Chairman Pai stated, "in the last two decades, the FCC has had much experience with unbundled network elements (UNE)—essentially, a system under which Company A builds something and Company B gets to lease it at government-approved rates. The UNE rabbit hole shows how forcing carriers to offer their networks at regulated rates can wreak havoc. Incumbents naturally invested less. Competitors did too. As a result, real facilities-based competition didn't materialize. A bubble inflated with regulatory arbitrage popped. Conversely,

Prohibiting these agreements would particularly harm the competitiveness of small service providers, who rely on the certainty of knowing that they will have a guaranteed subscriber base to support the financial justification to provide discounted rates and make the investment to build out and maintain facilities in a MTE.[17] Small providers also require such agreements to obtain financing from investors in order to demonstrate that there will be a reliable revenue stream to repay the loan. Without these agreements, small providers may have difficulty obtaining financing, and will not be able to compete with providers that do not require financing. As a result, competition will be confined to a small number of large providers.

MTE owners require flexibility to enter into agreements that promote ongoing maintenance and investment in new technology and communications infrastructure. Without the ability of property owners to enter into agreements that place maintenance responsibility on service providers, such responsibilities will be shifted to MTE owners who lack the technical expertise required for repairs and upgrades. This will lead to hiring third parties to maintain wiring, and those increased expenses for property owners will be passed on to residents in the form of higher rent at a time when housing affordability challenges are common across the country. Further, service providers will be less likely to make long terms investments in new technology and infrastructure if they may be replaced in the short term.

Moreover, prohibiting such agreements would adversely impact broadband deployment in underserved areas, including housing that serves lower or mixed-income residents. Without the prospects of financial certainty that comes with these agreements, service providers will

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when the FCC exempted next generation fiber facilities from unbundling and sharing requirements after 2003, fiber deployment boomed." *Business Data Services in an Internet Protocol Environment*, *et al.,* WC Docket No. 16-143, *et al* Report and Order, FCC 17-43, Statement of Chairman Ajit Pai at 186 (rel. April 28, 2017).

[17] MBC Petition at 7.

ignore such MTEs, and focus on opportunities to provide services to buildings with higher income residents for maximum revenue. This redlining, or cherry-picking, will do nothing to reduce the technology gaps among underserved groups.

For example, NMHC's comments in response to the *MBC Preemption Petition* were supported by the Declaration of Matt Harris, Managing Director of Provident Realty Advisors, Inc. ("Provident"), a real estate and investment firm that has been involved with more than $3 billion worth of projects. Mr. Harris explained that developers require contracting flexibility (including the ability to offer exclusive wiring, bulk billing, and other agreements) in order to provide residents a choice of high quality providers of Internet, telephony, and video services – particularly in affordable housing units.[18] According to Mr. Harris, in 2007, Provident was developing Lakeside Apartments, a 250-unit mixed income housing project outside New Orleans following Hurricane Katrina. Incumbent providers either could not offer state-of-the-art services or would require substantial payments to extend their existing facilities to the project. The best option for residents and the developer was a private cable operator/Internet access service provider, who required Provident to provide exclusive use of cabling and the exclusive rights to provide video services during the initial term of the agreement. In return, the residents received customary service levels, competitive offerings, complimentary common area services, and an initial payment to partially offset the costs of the inside wiring installed by Provident for the service provider's use.

According to Mr. Harris, the "experience with Lakeside Apartments is not unique. Developers of affordable housing often struggle to obtain quality service for residents. In addition to the risk of deliberate redlining by service providers, projects may be in market areas

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[18] NMHC Preemption Petition Comments, Exhibit A ("Harris Declaration").

where incumbents have little (or less advanced) infrastructure or they may be of a size that makes it difficult for a provider to see sufficient potential return on investment. Developers must negotiate shrewdly and avail themselves of every tool in the toolbox that the FCC has allowed, including the ability to offer exclusive wiring arrangements, exclusive video provider rights for private cable operators, and bulk service arrangements."[19]

IV. The Commission Lacks Authority to Regulate Exclusive Marketing, Bulk Billing, Revenue Sharing, and Exclusive Wiring Agreements

A. Exclusive marketing agreements

As discussed in NMHC's 2008 comments, the Commission lacks the legal authority to regulate exclusive marketing agreements.[20] While those arguments will not be restated in full here, they remain valid today. In short, Section 628 of the Communications Act, which makes it unlawful for certain entities to engage in unfair methods of competition or unfair or deceptive practices to limit video competition, does not apply to exclusive marketing agreements because they are not "unfair" or "deceptive," and do not "prevent" or "hinder significantly" the distribution of programming.[21]

In 2007, when the Commission banned contract clauses that gave cable operators the exclusive right to provide video programming services (alone or in combination with other services) in MDUs, it stated that "the use of an exclusivity clause by a cable operator to 'lock up' a MDU owner is an unfair method of competition or unfair act or practice because it can be used to impede the entry of competitors into the market and foreclose competition . . . such an exclusivity clause prevents other MVPDs from providing service to the consumers who live in

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[19] Harris Declaration ¶ 7.

[20] *See* NMHC 2008 Comments at 20-22.

[21] *See* 47 U.S.C. 548(b).

the MDU."[22] Exclusive marketing agreements in no way "lock up" an apartment building, its owner, or its residents.[23] Also, while exclusive marketing agreements may allow preferential advertising, such as the placement of brochures in welcome packs for new residents, competing providers may advertise via numerous other methods, including mail, the Internet, television, radio, billboards, etc.

In addition, as discussed in the 2008 comments of the National Association of Home Builders, banning exclusive marketing agreements would violate MTE owners' right to free speech under the First Amendment.[24] Specifically, restricting an MTE owner from using its private property to effectuate an endorsement of a particular service provider through an exclusive marketing contract is an unconstitutional abridgement of protected commercial speech. MTE owners cannot legally be required to endorse all service providers equally.

The test for whether a government restriction on commercial speech violates the First Amendment is explained in *Central Hudson*, where the Supreme Court struck down a regulation of the New York Public Service Commission which completely banned promotional advertising by an electric utility.[25] First, the commercial speech must concern lawful activity and not be misleading, as is the case here.[26] Next, if this threshold is met, the speech may only be restricted if the government proves that: (1) it has a substantial interest in regulating the speech; (2) the regulation directly advances that interest; and (3) the regulation is no more extensive than

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[22] *Report and Order and Further Notice of Proposed Rulemaking,* 22 FCC Rcd 20235, 20235, para. 1 (2007) ("2007 Exclusive Service Contracts Order"), ¶ 43.

[23] 2010 Exclusive Service Contracts Order, ¶ 36.

[24] Comments of the National Association of Home Builders, MB Docket No. 17-51 (filed Feb. 6, 2008).

[25] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 562-64, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980).

[26] *Id.*

necessary to serve the interest.[27] A ban on exclusive marketing agreements would fail this test because it would not directly advance the interests of promoting broadband competition and deployment. In contrast, as discussed above, such a ban would harm competition, especially among small providers. It would also harm broadband deployment, especially in underserved communities.

B. Bulk billing agreements

NMHC's 2008 comments explaining why the Commission lacks the legal authority to regulate bulk billing agreements also remain valid.[28] Section 628 does not apply to bulk billing agreements for the same reasons discussed above in connection with exclusive marketing agreements. Indeed, bulk billing agreements do not "lock up" apartment building owners or limit residents to one provider. Instead, competing providers are free to offer and provide services to residents. Moreover, such agreements, which the Commission found in 2010 significantly reduce service costs for residents, continue to benefit consumers.[29] As a result, they can hardly be seen as "unfair" or "deceptive."

In addition, Congress specifically amended the Act in 1996 to permit cable operators to offer bulk rates in apartment buildings. After finding that the original version of Section 623(d) significantly limited the ability of cable operators to offer bulk discounts in MDUs, Congress specifically excluded "bulk discounts" from the amended subsection.[30] The Commission cannot

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[27] *Id.*

[28] NMHC 2008 Comments at 25-28.

[29] 2010 Exclusive Service Contracts Order ¶ 19 ("Discounts of 30% from the bulk billing MVPD's retail rates are common, and can be as high as 75%."); NMHC Preemption Petition Comments at 6-12.

[30] 47 U.S.C. 543(d). The only limitation placed on cable operators was that they may not offer bulk discounts that are "predatory." *Id.*

now impose restrictions on the use of bulk billing agreements when Congress has expressly recognized their value.

C. Revenue sharing and exclusive wiring agreements

For the reasons stated above regarding exclusive marketing and bulk billing agreements, Section 628 does not apply to revenue sharing and exclusive wiring agreements. They do not "lock up" apartment building owners. In contrast, as described above in the statement from Matt Harris, these agreements are useful tools that MTE owners can leverage to obtain state-of-the-art infrastructure and services for residents at competitive prices.

Revenue sharing agreements represent a small percentage of the costs of the installation and maintenance of the wiring and equipment needed to provide state-of-art communications services. The service provider may provide compensation to the MTE owner to offset the overall communications infrastructure construction costs associated with serving a property. Like bulk and exclusive marketing agreements, revenue sharing agreements can provide amenities to residents, including lower cost services.

In addition, inside wiring owned by MTE owners is not subject to Commission jurisdiction. MTE owners are in the business of leasing space. When an MTE owner and a service provider enter into an exclusive wiring agreement, the provider is allowed to occupy space in the building. Limitations on the terms of such agreements for the use of space in a building would be a regulation of the MTE owner's business, not a regulation of the service provider, and would be beyond the Commission's jurisdiction.[31] As a result, exclusive wiring

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[31] *Building Owners and Managers Ass'n Int'l v. FCC*, 254 F.3d 39 (D.C. Cir. 2001).

contracts involving inside wiring owned by MTE owners fall outside of the Commission's jurisdiction.[32]

D. Reclassification of broadband?

The Commission has proposed to reclassify BIAS as an information service. Doing so would remove any doubt about its lack of authority to prescribe regulations concerning the provision of BIAS within MTEs.[33] Indeed, if BIAS no longer falls under Title II, it would be hard for the Commission to point to any authority that would allow it to regulate contracts between BIAS providers and MTEs.

Specifically, Section 628 would no longer provide a valid argument because it is not applicable to BIAS providers, and instead focuses on cable operators, satellite programming vendors, and satellite broadcast programming vendors.[34] Section 628(j) specifies that "[a]ny provision that applies to a cable operator under this section shall apply to a common carrier . . ."[35] However, because BIAS would no longer have common carrier status under Title II, the argument that this language applied to BIAS would ring hollow. Section 201(b) would also not be a valid argument because it applies only to Title II common carriers.

Some may argue that Section 706 would provide the Commission with sufficient authority. However, the irony in such an argument would be acute considering the Restoring

[32] As discussed in the 2007 comments of the Real Access Alliance, A prohibition on exclusive wiring agreements would also conflict with the Fifth Amendment. Specifically, if wiring is owned by the property owner, the property owner cannot be forced to allow shared use of the wiring without effecting a taking. Comments of the Real Access Alliance, MB Docket No. 07-51, at 21 (filed Jul. 2, 2007) ("2007 Real Access Alliance Comments").

[33] See Statement of Commissioner Michael O'Reilly, NOI at page 14.

[34] 47 U.S.C. 548(b).

[35] 47 U.S.C. 548(j).

Internet Freedom NPRM takes the position that Section 706 is not a grant of authority.[36] Specifically, the NPRM states that "[t]he text of these [Section 706] provisions also appears more naturally read as hortatory, particularly given the lack of any express grant of rulemaking authority, authority to prescribe or proscribe the conduct of any party, or to enforce compliance."[37] The NPRM also recognizes that reclassification would place a "light-touch regulatory framework" on BIAS.[38]

The Commission has already concluded on several occasions that Section 706 is not an independent grant of authority.[39] Section 706 envisions regular inquiries by the Commission into the deployment of advanced telecommunications capability, and directs the Commission to improve the pace of deployment by various means, but the statute does not add to the Commission's powers. Furthermore, Section 706 pertains only to telecommunications, and does not apply to cable services or information services."[40]

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[36] Restoring Internet Freedom NPRM ¶ 101.

[37] *Id.*

[38] *Id.* ¶ 24.

[39] *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* Memorandum Opinion and Order, and Notice of Proposed Rulemaking, CC Docket No. 98-147, 13 FCC Rcd 24012, 24044-8 (F.C.C. 1998).

[40] 2007 Real Access Alliance Comments at 39.

V. Conclusion

For the foregoing reasons, NMHC urges the Commission to refrain from pursuing rules that would prohibit or limit exclusive marketing, bulk billing, revenue sharing, and exclusive wiring agreements.

Respectfully submitted,

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