

December 4, 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

Dear Chairman Pai and Chair Bowles:

The undersigned organizations,¹ representing an array of real estate industry sectors, share your goals for advancing broadband deployment across our nation. In fact, the real estate industry and our customers rely on high-quality broadband to power their businesses and their lives. We write today, however, to express our shared concerns regarding the proposed Model State Code (the “MSC”) that will be considered at the meeting of the Broadband Deployment Advisory Committee (BDAC) on December 6 and 7.

We understand the need to remove unnecessary regulatory barriers that slow or hinder broadband deployment and appreciate the work of the BDAC and the efforts of the Federal Communications Commission (FCC) to speed deployment. The MSC, however, is problematic 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 commercial and multifamily residential buildings. Further, Article 8 would mandate construction of broadband facilities in new and renovated buildings at the property owner’s expense.

Collectively, we have many concerns with the MSC. Below is a brief summary of some of the areas the real estate industry finds most problematic:

- 1) Article 8 of the MSC fails to acknowledge that the market for communications services in the commercial and multifamily rental sectors is based on competition and negotiation. With few exceptions, the market is functioning as intended and consumers are well served. Existing federal regulations that govern communications services for commercial properties and rental apartment communities recognize the

¹ We are nationally-recognized trade associations involved in most aspects of the real estate industry. Our members consist of residential and commercial property owners, managers, and developers, investors, brokers, Realtors, and lenders.

importance of negotiating agreements between property owners and service providers to foster market competition, higher service standards and competitive prices. There is no reason for this to change.

- 2) Article 8 goes beyond the BDAC's charge as 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.
- 3) Article 8 is not informed by key stakeholder input from the real estate industry. Currently, the BDAC does not have critical information about the existing market-based system for broadband deployment within commercial and multifamily rental properties. 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 regime without having heard from the industry that would bear the brunt of the regulation; this suggests that more work is needed.
- 4) There are a wide range of practical and technical problems with the proposal as drafted. For example, Section 3 of Article 8 would obligate building owners to install Network Access Points ("NAPs") and conduit in all newly constructed and renovated buildings.² This mandate 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, so the MSC would lead to installation of expensive facilities that may not be used. Secondly, NAP equipment is often very expensive and technology continues to change rapidly. Forcing an owner to spend money up front, without a commitment to serve the property from a provider, will waste scarce capital if no provider ultimately decides to serve the property. Even if a provider decides to serve it later, the original mandated facilities may not be up-to-date. Additionally, it is not uncommon for different providers to 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.
- 5) Article 8 of the MSC is essentially a proposal for nationwide mandatory access to private property, which to date the Commission has declined to adopt despite periodic pressure from the communications industry. While the MSC may circumvent the limits on the FCC's authority over property owners by handing the issue to the states, the takings clause of the Fifth Amendment still restricts the power

² Other provisions of the MSC raise similar concerns, which we do not address here in the interest of space.

of the states to grant third parties the right to occupy private property. Adopting the MSC in its current form would result in costly regulation and litigation at the state level without any assurance of actually spurring broadband deployment.

As a heavily regulated industry, our groups appreciate that the FCC is dedicated to a “light-touch” regulatory environment based on the understanding that government should not intervene where the market is currently working. The MSC, as drafted, would run counter to this principle. Consequently, we respectfully ask that the BDAC reject the MSC in its present form at its December meeting. We also urge the FCC to reject any BDAC recommendation that would call for the Commission to support the MSC or any proposal similar to Article 8.

Sincerely,

Building Owners and Managers Association International

Institute of Real Estate Management

International Council of Shopping Centers

National Apartment Association

Nareit

National Multifamily Housing Council

The Real Estate Roundtable