



October 9, 2020

By Electronic Filing

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Improving Competitive Broadband Access to Multiple Tenant Environments, GN Docket No 17-142; Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, GN Docket No. 20-269

Dear Ms. Dortch:

We write primarily to review certain points made previously by the National Multifamily Housing Council (“NMHC”), the National Apartment Association (“NAA”), and the Institute of Real Estate Management (“IREM”) in the Commission’s pending Multiple Tenant Environment (“MTE”) docket¹ in light of recent *ex parte* notices filed by INCOMPAS² and a group of property owners whose buildings are served by competitive providers, including Sonic.³ NMHC, NAA and IREM support these *ex parte* filings because they demonstrate that the free market is delivering competitive broadband services to a broad range of property types – in fact, this is precisely why NMHC, NAA and IREM have argued that the regulations currently being considered by the Commission in the MTE docket are unnecessary. Before addressing the INCOMPAS filings and the Sonic Letter, however, we also would like to note certain observations about the state of

¹ NMHC, NAA and IREM submitted joint comments and reply comments with the following organizations, representing a broad spectrum of the real estate industry: the National Apartment Association, the International Council of Shopping Centers, the Institute of Real Estate Management, NAREIT, the National Real Estate Investors Association, and the Real Estate Roundtable (the “Real Estate Associations”). Comments of the Real Estate Associations, GN Docket No 17-142 (filed August 30, 2019) (the “Real Estate Association Comments”); Reply Comments of the Real Estate Associations, GN Docket No 17-142 (filed September 30, 2019) (the “Real Estate Association Reply Comments”). These filings addressed issues raised in the MTE docket pertaining to residential, commercial and retail properties, but in this letter we address only service to apartment buildings.

² Notice of *ex parte* meeting between INCOMPAS representatives and Wireline Competition Bureau staff, GN Docket No 17-142 (filed July 31, 2020); Notice of *ex parte* meeting between INCOMPAS representatives and Allison Baker and Daniel Kahn, GN Docket No 17-142 (filed Aug, 28, 2020).

³ Letter from property owners to Marlene H. Dortch, GN Docket No 17-142 (filed July 17, 2020) (the “Sonic Letter”).

broadband deployment in the United States recently made by the Information Technology and Innovation Foundation (“ITIF”).

The capacity of the nation’s broadband networks and services has been severely tested during the Covid-19 pandemic. Early on, there were concerns about the ability of the system as a whole to perform and claims that the “Internet was broken.” These concerns were centered on the delivery of broadband services in residential settings. By all accounts, however, although issues remain with respect to improving support for low income Americans and deployment in rural and tribal areas, the system actually has performed very well.

In “*Lessons from the Pandemic*,”⁴ ITIF reviews in detail the remarkable performance of U.S. broadband networks during the pandemic. *Lessons from the Pandemic* notes that, despite increases in peak traffic of 20-30 % during the pandemic, U.S. broadband markets were able to adapt “with virtually no drop in performance.” Furthermore, the Commission’s current “light-touch regulatory approach” also gave network operators the flexibility they needed to meet changes in demand. The result has been that broadband networks in the U.S. have performed better than many of their international peers.⁵

This overall performance confirms the wisdom of nearly a quarter century of Congressional and Commission policy, beginning with the passage of the Telecommunications Act of 1996. This success was built on a foundation of facilities-based competition and reliance on market forces to promote both deployment and competition.

Lessons from the Pandemic also notes that during the Covid-19 crisis home broadband traffic has increased by roughly 20-40 percent. We at NMHC, NAA, and IREM, our members, and our colleagues across the multifamily industry have been dealing with the challenges of

⁴ Doug Brake, *Lessons From the Pandemic: Broadband Policy After COVID-9* (July 13, 2020), <https://itif.org/publications/2020/07/13/lessons-pandemic-broadband-policy-after-covid-19> (last visited Sep. 17, 2020) (“*Lessons from the Pandemic*”).

⁵ Two American Enterprise Institute blog entries also address these issues briefly. One notes that performance during the pandemic “has validated the historical US approach to broadband that values private investment over government regulation.” Matt Au and Brett Swanson, *Lessons from the Pandemic for Broadband and Internet Policy* (Sep. 10, 2020), <https://www.aei.org/technology-and-innovation/lessons-from-the-pandemic-for-broadband-and-internet-policy/> (last visited Sep. 17, 2020). The other observes that “[n]ot only does the US exhibit one of the fastest average broadband networks in the world but it is also one of the most adaptable — capable of maintaining and even increasing performance during times of considerable stress while performance in most other countries has suffered. While there is always room for improvement in challenging local geographies, this is hardly indicative of an industry crying out for increased regulatory intervention to improve performance in a global context.” Bronwyn Howell, *Broadband Speeds: We Don’t Know How Lucky We Are* (Sep. 11, 2020), <https://www.aei.org/technology-and-innovation/broadband-speeds-we-dont-know-how-lucky-we-are/> (last visited Sep. 17, 2020).

ensuring that apartment residents have access to broadband services throughout this challenging period. With roughly a third of Americans living in apartments and many of them working and learning from home for long stretches for the first time, apartment owners and broadband providers stepped up and met the challenge to keep residents connected and in many cases worked to expand access and speed.

One notable example of a partnership that has proved invaluable during the pandemic, and even before, is that of internet service provider Starry, Inc., and Related Companies, one of the largest affordable housing providers in the nation. The collaboration and partnership between Starry and Related is noteworthy in that together they have deployed low-cost, high-speed internet across Related's affordable housing portfolio.⁶ On top of Starry's own efforts to provide free access to its low-cost service during the pandemic, Related also pitched in and agreed to cover the cost of Starry Connect for its residents who currently subscribe to the program.⁷ This type of partnership is a great model for how private stakeholders can help us bridge the digital divide under normal circumstances and in times of crisis.

We are proud of the work our industry has done – both before and during the pandemic – to ensure that apartment residents have access to reliable, affordable, and effective broadband services. We also deeply appreciate the efforts of the network providers who made it possible for our residents to live their lives under these difficult circumstances.

While it is important to point to our connectivity successes during this time, it's also equally important to acknowledge that for many properties and their residents, the picture isn't as rosy. For far too many multifamily firms involved in the development and operation of affordable, rural or low-income properties, finding service providers who are willing to serve such properties can be an enormous challenge. Despite the best efforts of owners, residents of these properties are left with limited service options and limited speed. We cannot emphasize strongly enough that the terms of building access is not the problem here and regulation of the kind proposed in the MTE proceeding will not solve the actual problem. The solution will come from broadband providers that are willing and able to reach underserved sectors of the market rather than merely grabbing the low-hanging fruit in more profitable communities. NMHC,

⁶Related Companies partners with Starry Internet and brings cutting edge broadband service to residential properties, Related Companies and Starry, Inc., Sep. 7, 2018, <https://www.related.com/press-releases/2018-09-07/related-companies-partners-starry-internet-and-brings-cutting-edge> (last visited Oct. 2, 2020).

⁷ Starry to Provide Free Service for Its Subscribers in Public and Affordable Housing Through the End of May, BOSTON REAL ESTATE J., Mar. 18, 2020, <https://bostonrealestatetimes.com/starry-to-provide-free-service-for-its-subscribers-in-public-and-affordable-housing-through-the-end-of-may/> (last visited Oct. 2, 2020).

NAA, and IREM and our members understand that extending infrastructure is expensive, and providers – who are answerable to their shareholders – must be able to justify every foot of construction based on the anticipated return on investment. We understand this because property owners operate under the same kinds of market constraints.

Another problem at the consumer level is that affordability of service remains an obstacle to adoption. Here, again, it is the cost of extending infrastructure and delivering service, rather than the terms of access to a multifamily property, that determine what consumers must pay. Even where owners are successful in luring several service providers to such a property, in far too many cases, low-income Americans are unable to connect.

Solving the stubborn problems of the digital divide and expanding deployment and adoption of broadband is no easy task and cannot be shouldered by any one party. As we saw earlier with Related’s affordable housing portfolio, solutions will require collaboration and partnerships between a variety of stakeholders including policymakers, property owners, and service providers. We are not unsympathetic to the competitive providers. But if there is a place for government regulation it is for policies that will directly promote deployment in rural areas and to affordable and low-income communities. Instead, the competitive broadband providers – with occasional exceptions -- are asking for help to become the third and fourth option in wealthy communities. If the goal is to get competitive, affordable broadband options to every American, the proposals in the MTE proceeding are not the way to do it.

We bring *Lessons From the Pandemic* to your attention not only because of what it says about the robust capabilities of America’s broadband networks, but because it very properly endorses the market-based policies that built those networks. In our comments in the MTE proceeding, as members of the Real Estate Associations, we have emphasized both the role that the apartment industry plays in creating efficient markets for broadband providers to serve, and the cooperative business relationships that broadband providers and apartment owners have developed over time to ensure that apartment residents have access to the services they need. We also have noted that the apartment industry is very diverse, comprising a range of geographic areas and property types; this diversity is important because broadband providers are sometimes unable to extend their networks to particular properties in a cost-effective manner. We opposed and still oppose the proposed regulations because there is no market failure that would justify them.

This brings us to the INCOMPAS *ex parte* notices and the Sonic Letter.

On July 31, 2020, INCOMPAS filed a notice of an *ex parte* meeting with Wireline Competition Bureau (“WCB”) staff. In addition to issues raised in their filings in 2019, INCOMPAS discussed the Sonic Letter, which was signed by ten property owners in San Francisco and Berkeley, California, whose buildings are served by Sonic and possibly other

providers. On August 28, 2020, INCOMPAS filed an identical notice regarding a meeting with Allison Baker of Chairman Pai’s office and Daniel Kahn of the WCB. The Sonic Letter says that the signatories support the Commission’s efforts to promote facilities-based broadband competition, and that they have given access to competitive providers, including providers of fixed wireless and gigabit fiber. The Sonic Letter does not specify how many providers serve the listed properties, nor name any specific providers. The letter says that the commercial tenants and residents of the properties appreciate these efforts, and that owners “stand with tenants who deserve competition for broadband . . . and any FCC decision that reinforces that choice will not harm their business interests.”

We welcome the Sonic Letter and the two INCOMPAS *ex parte* notices because they confirm several points that NMHC, NAA, and IREM and the Real Estate Associations have repeatedly made in the current MTE docket and in earlier proceedings. We have always said that apartment residents benefit from competitive choice and the substantial investments made by owners in infrastructure and seamless connectivity.⁸ We have also noted that different providers have different business plans and can succeed in different situations – the key, however, is that they develop relationships with property owners rather than using government regulation to force access or dictate the terms of access.⁹ Neither the Sonic Letter nor the INCOMPAS notices describe the properties in question, but from our research we surmise that they are small, mixed-use commercial and residential properties, each comprising only a few residences or commercial units. The properties are likely to have been unattractive to competitive providers because once one provider is serving a property with a small number of potential customers, it can be difficult to justify the capital expense for a competitor to extend its network. The Sonic Letter, however, demonstrates that Sonic and the other providers serving those properties have overcome those barriers to deployment -- which have nothing to do with the terms of any agreement between the owners and the providers governing access to a property – and have developed exactly the kind of relationships that NMHC, NAA and IREM have promoted.

Nevertheless, the Sonic Letter and the two INCOMPAS *ex parte* notices are also puzzling. It is striking that the Sonic Letter does not explain how any of the specific measures under consideration in the proceeding would actually benefit the owners who signed the letter. After all, they have obtained access to competitive broadband for their tenants without the benefit of the measures under consideration.¹⁰ Thus, it simply does not follow logically that they

⁸ Real Estate Association Comments at 9-14.

⁹ Real Estate Association Comments at 19, 30.

¹⁰ It appears that six of the properties listed in the Sonic Letter are located in Berkeley, California; the remaining four are in San Francisco. The latter four may have benefited from the San Francisco ordinance addressed in the Commission’s Declaratory Ruling, *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket 17-91 (rel. Jul. 12, 2019), but to our knowledge the City of Berkeley has not adopted a similar requirement.

should support any of the proposed measures as a means of obtaining access. They may support Commission regulation for some other reason, but if that is the case, their letter does not explain their support. Indeed, without a reasoned explanation of how the proposed regulations would in fact benefit those owners or their tenants we fail to see how the signatories could be certain that regulation would not in fact be harmful. Furthermore, even if the proposed regulations would not harm these particular owners, our comments address in detail the types of harm that would very likely follow in other circumstances.

Consequently, the Sonic Letter should not be taken as evidence in favor of any of the proposed regulations, and it certainly does not come close to outweighing the large body of evidence submitted in the comments and reply comments of the Real Estate Associations.

The Sonic Letter and INCOMPAS's reliance on it are especially puzzling because the Sonic Letter supports our position: regulation is not needed because the market is working. We understand that INCOMPAS thinks that its members need government help in its competition with incumbents, but the owners who signed the Sonic Letter would not benefit from further regulation. Indeed, when considered together with the Real Estate Association filings in the docket, the Sonic and INCOMPAS filings demonstrate that the current market is working very well. Different providers, including small, independent broadband providers, using different technologies and following different business plans are serving different sectors of the market on mutually agreeable terms. Those terms have been set by the market, and not by government dictate. This is a sign of the success of American broadband policy, not a market failure that calls out for regulation.

A review of the record in the MTE docket will confirm that access to competitive broadband is the norm in the majority of buildings of all types. There are exceptions, of course, and smaller buildings such as those listed in the Sonic Letter have historically had trouble attracting competitors. In general, however, the record does not show that there is a lack of competition. In fact, our comments state:

- There are at least two broadband providers in roughly 76% of apartment communities, including 80-90% of new construction.¹¹ This level of competition exists along with agreements for exclusive use of wiring, exclusive marketing, non-exclusive marketing, and payment of some form of compensation, in all cases, by both LECs and cable MSOs.¹²
- Currently, only 44% of Americans have access to two wireline broadband providers.¹³ In other words, the level of competition in apartment buildings is much higher than it is in the United States as a whole.

¹¹ Real Estate Association Comments at 65-66.

¹² Real Estate Association Comments at 67.

¹³ Real Estate Association Comments at 22, 66.

- Survey evidence shows that (i) two-provider competition in apartment communities is the norm; (ii) three-provider competition is common; and (iii) a single provider is rare.¹⁴

Despite the success of Commission policy to date and the efforts of both the real estate industry and the broadband industry, there are sectors of the market that have been underserved because the size or locations of properties, or the lower-income population they serve can make them unattractive.¹⁵ Essentially every building in the country has broadband service, but convincing a competitor to enter a property can be difficult in some cases. If there is a problem in the marketplace, that is where it lies. The Sonic Letter owners may have had trouble attracting competitive options because of their small size, locations or other factors. And still, they found an alternative. But this does not mean that regulation is needed in other sectors. In fact, as noted above, regulation clearly was not needed even in their case.

Based on reports from property owners who have dealt with Sonic, NMHC, NAA and IREM understand that, as part of its business model, Sonic prefers not to negotiate detailed agreements with property owners. We assume that Sonic asks owners to sign a very basic document that gives Sonic the right to enter the property and little else. Clearly, this is working for some owners. But the existing regulatory structure, under which owners and providers often enter into more complex agreements, also has been working for other owners and their residents by delivering competitive broadband services to their residents. If Sonic or any other provider wants to follow its current business model and serve that sector of the market, it should do so. We welcome their presence and hope they succeed. On the other hand, if Sonic or a similar company wishes to expand to serve different sectors of the market, then it should be prepared to deal with those property owners in the same way that other providers do, including by entering into access agreements that can handle a variety of important issues such as legal considerations, liability, resident privacy and even service levels, rather than asking for government help.

Furthermore, adopting the specific regulations proposed in the MTE NPRM would be counterproductive. None of the proposed measures would actually encourage deployment and existing mechanisms have already succeeded in extending competition. Nor would it help owners like the signatories of the Sonic Letter, because they are already getting service. As we discussed in detail in a previous presentation, (i) banning or limiting door fees, true revenue sharing, or other compensation paid to owners will discourage residential owners from investing in infrastructure and will simply shift costs onto providers; (ii) banning exclusive use of wiring agreements would not give owners any incentive to grant access to additional providers; and (iii) regulating exclusive marketing also would not give owners any incentive to grant access

¹⁴ Real Estate Association Comments at 11-12, 66.

¹⁵ Real Estate Association Reply Comments at 16.

to additional providers.¹⁶ The proposed regulations may offer benefits to certain providers by supporting their business plans – but this is not the same thing as benefitting consumers. It is important to remember that most existing buildings are already served by two or more providers.

We believe that an unbiased review of the market would support our findings regarding the level of competition inside buildings, especially as compared to the level of broadband competition in the single-family market. We have urged the FCC to investigate this further.¹⁷ The Commission’s annual Broadband Competition Notice of Inquiry proceeding (the “Broadband NOI”) would seem to offer an opportunity to do so accurately and thoroughly. Although it appears that the pending Broadband NOI¹⁸ does not request the necessary information, perhaps it could be amended, or the issue specifically raised and addressed in the next annual iteration of the Broadband NOI. In any event, it should be possible to gather accurate, objective and reasonably complete data about the state of competition from providers, at the necessary level of detail. To adopt new regulations without ascertaining the facts and basing it off of a small sampling of anecdotal claims from a handful of providers who want to work around the market would be unreasonable, especially when those facts can be determined by asking the right questions.

In closing, we wish to emphasize that we disagree with the Sonic Letter and INCOMPAS on one key point: The Commission should not try to pick winners and losers or promote one market sector over another. NMHC, NAA and IREM do not support incumbents over competitors or vice versa – we support the market as the best way to deliver choice and competition and ultimately, high-quality, high-speed and reliable broadband service for our residents. We urge the Commission to do the same.

Sincerely,



Douglas M. Bibby, President
National Multifamily Housing Council



Denise Froemming, CEO & Executive Vice President
Institute of Real Estate Management



Robert Pinnegar, President & CEO
National Apartment Association

¹⁶ Notice of *ex parte* meeting between NMHC representatives and Wireline Competition Bureau staff, GN Docket No 17-142 (filed Nov. 22, 2019).

¹⁷ Real Estate Associations Comments at 22-27, 67.

¹⁸ Notice of Inquiry, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269 (rel. Aug. 19, 2020).