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November 9, 2023

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
45 L St. NE
Washington, DC 20554

Re: Notice of Ex Parte Meeting in Re: Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69

Dear Ms. Dortch:

On November 7, 2023, Kevin Donnelly, Vice President, Government Affairs, Technology and Strategic Initiatives, of the National Multifamily Housing Council (“NMHC”), Julianne Goodfellow, Vice President, Government Affairs, of NMHC, Nicole Upano, Associate Vice President, Housing Policy and Regulatory Affairs, of the National Apartment Association (“NAA”), Michael Pryor, Brownstein Hyatt Farber Schreck, LLP, and the undersigned, met with Benjamin Arden, Legal Advisor to Commissioner Brendan Carr. We also met separately with Bradford Berry, Lisa Edwards, Heather Hendrickson, Connor Ferraro, Aurelie Mathieu, Jesse Goodwin, and Jodie May of the Wireline Competition Bureau; Joseph Riter, Senior Manager, Public Policy, of NAA joined this meeting in place of Ms. Upano. On November 8, 2023, Mr. Donnelly, Ms. Goodfellow, Mr. Riter, Mr. Pryor, and the undersigned met with Carmen Scurato, Legal Advisor to Chairwoman Jessica Rosenworcel and Special Advisors to the Chairwoman D’wana Terry and Sanford Williams. We also met separately (without Mr. Riter) with Marco Peraza, Legal Advisor to Commissioner Simington and Michael Sweeney, Policy Advisor to Commissioner Simington. All of the meetings were conducted by videoconference. The purpose of the meetings was to discuss the Draft Report and Order and Further Notice of Proposed Rulemaking on digital discrimination. NMHC and NAA support the goals to eliminate or prevent digital discrimination but, as set forth below, the Draft Order errs by including property owners as covered entities and seeking to hold them liable for broadband providers’ alleged discriminatory deployment choices.¹

¹ *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Draft Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69, FCC-CIR2311-01.*

The NMHC and NAA Make Every Effort to Provide Access to Broadband Services

Owners and operators of apartment properties are keenly aware of and sensitive to the needs and expectations of their residents. Robust broadband service is at the top of the list. Indeed, in many rental properties, the quality, reliability, and pricing of broadband service is often better than in nearby single-family areas. The record in this docket and in the MTE docket provides ample evidence of NMHC and NAA members' efforts to provide access to broadband service. Lack of broadband access occurs primarily in low-income or rural areas that lack robust broadband options. Although property owners have no control over the area-wide deployment decisions of broadband providers, NMHC and NAA have made recommendations intended to improve broadband access in such areas.²

A key area of concern, particularly in low-income areas, is affordability. NMHC and NAA are thus strong proponents of the Affordable Connectivity Program. NMHC has been working with Commission staff and with its members to disseminate information on the ACP to apartment residents. NMHC and NAA members have no interest in preventing their residents from accessing available broadband services and support the overall goals of equal access. The Draft Order, however, overreaches in expanding the Commission's jurisdiction to include property owners as 'covered entities' that would become subject to Commission enforcement action and potentially unconstitutional takings as a remedy for purported discrimination.

Section 60506 Does Not Grant Authority Over Property Owners.

The Draft Order broadly defines covered entities to include, among others, any entity that has a "business arrangement[]" with a broadband provider, and any entity that "provide[s], facilitate[s], and affect[s] consumer access to broadband internet service."³ Nothing in section 60506 confers such sweeping jurisdiction over non-communications entities. In particular, section 60506 does not confer jurisdiction over property owners.

The Commission has never asserted that it has jurisdiction to compel a property owner to provide access to communications within a property, nor does the Communications Act confer such authority.⁴ To the contrary, Commission rulings designed to facilitate competitive access to buildings or properties have placed restrictions on telecommunications carriers or cable companies rather than on building owners themselves.⁵ By bringing owners of real property within their scope, the new rules substantially expand the Commission's jurisdiction, but without Congressional authorization. Such an

² Comments of NMHC and NAA, GN Docket No. 22-69 (filed Feb. 21, 2023) ("*NMHC/NAA Comments*"), at pp. 14-22, 25-31; Further Joint Reply Comments of NMHC, NAA, *et al.*, GN Docket No. 17-142 (filed Nov. 19, 2021) ("*MTE Further Reply*"), at pp. 15-25; Further Joint Comments of NMHC, NAA, *et al.*, GN Docket No. 17-142 (filed Oct. 20, 2021) at pp. 75-79.

³ Draft Order, para. 85.

⁴ *Building Owners and Managers Ass'n v. FCC*, 254 F.3d 89, 94 (D.C. Cir. 2001) ("The 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."); *Ill. Citizens Comm. For Broad. v. FCC*, 467 F.2d 1397 (7th Cir. 1972). *See, e.g.*, Free Press Comments at 19-20 (noting that the Commission does not have authority to regulate the decisions made solely by building owners regarding deployment of broadband.)

⁵ *See, e.g., Improving Broadband Access to Multiple Tenant Environments*, Report and Order and Declaratory Ruling, GN Docket 17-142 (rel. Feb. 15, 2022).

attempt to bring a substantial and important sector of the economy⁶ within the Commission's ambit in the face of obvious statutory silence invites a challenge under the "major questions" doctrine.

The plain language of section 60506 forecloses the Draft Order's proposed expansive view of covered entities. As NMHC and NAA noted in their comments, section 60506 never refers to any type of entity to be regulated other than a provider, and the definition of "equal access" describes the relationship between a provider and its subscriber.⁷ Although the Draft Order asserts that the use of the word "access" is sufficient to bring property owners within its scope, and goes on to suggest that "equal access" includes access to a property by multiple providers,⁸ this reading cannot be correct. Congress would not have used the word "access" to mean "physical access to real property" without using much clearer language, because such a directive could result in *per se* physical takings of property, in violation of the Takings Clause of the Fifth Amendment.⁹

Moreover, "equal access" refers to lack of comparability of broadband service "in a given area," which the Draft Order interprets in a way that excludes specific properties.¹⁰ That the scope of Section 60506 is limited to redressing lack of equal access to a geographic area, not individual buildings or properties, is further confirmed by subsection (c), which prohibits deployment discrimination by income level or predominant race or ethnicity "of an area." What constitutes an "area" for this purpose can be determined by reference to subsection (1), which identifies areas as "the service area of the provider." In sum, nothing in Section 60506 remotely indicates that owners of real property are covered entities.

That Congress could not have intended to include apartment property owners within the ambit of section 60506 is further confirmed when considering that economic feasibility must be taken into account. The Draft Order at paragraph 71 suggests that economic feasibility would be assessed in a manner approaching rate of return ratemaking. The Commission has no expertise in assessing the economic viability of broadband deployment in the rental real estate market. Finally, consideration of remedies also belies Congressional intent to confer jurisdiction over apartment owners. If owners can be held responsible for "discrimination" arising from a lack of "access," the logical remedy would be to mandate entry by a broadband provider. Such mandated physical occupation would constitute an unconstitutional taking under the *Loretto* case because the statutory scheme does not contemplate a

⁶ The operation of the country's apartment homes contributes \$175.2B to the economy each year (including \$58.0B in property taxes), creating 341,000 jobs. <https://weareapartments.org/data/> (Nov. 8, 2023).

⁷ *NMHC/NAA Comments* at pp. 4-6; Reply Comments of NMHC and NAA, GN Docket No. 22-69 (filed March 20, 2023) at pp. 4-7.

⁸ Draft Order at para. 87.

⁹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

¹⁰ Draft Order at para. 158 (identifying geographic areas as ranging from the Nation as a whole down to individual census blocks, service areas of providers such as a cable company franchise or a LEC license areas, or assessing factors such as the five factors recommended by the National Digital Inclusion Alliance, none of which remotely suggest that an individual building would constitute an area within which comparability of access would be assessed.)

mechanism for compensation.¹¹ Of course, this also presumes that there is a suitable provider ready and willing to enter.

As support for its expansive definition of covered entities, the Draft Order cites to the Supreme Court's decision in *Ambassador, Inc. v. U.S.*, 325 U.S. 317 (1945) and section 411(a) of the Communications Act, which is a joinder provision that enables the Commission to include certain non-carriers as parties to an enforcement action. Neither supports the Draft Order's assertion of jurisdiction to enforce non-discrimination rules directly on property owners. The *Ambassador* decision simply upheld a telecommunications carrier's right to impose certain restrictions in its tariffs on subscribers' use of carrier's services. In that case, hotels were subscribers of telecommunications services and the tariff precluded them from assessing certain telecommunications charges on their guests. The Draft Order's reliance on Section 411(a) is at odds with the Order's statement that Section 60506 is not incorporated into the Communications Act.¹²

The Draft Order also asserts that "numerous commenters" support including non-providers as covered entities. To the contrary, support for an expansive definition of covered entities in the record is extremely limited and in most instances lacks any analysis. Most of the "numerous parties" cited by the Draft Order, which are listed in note 263, provide little, if any support for the proposition and some take the opposite position.¹³

The Proposed Rules Fail to Provide Fair Notice and Are Unconstitutionally Vague.

A cardinal rule of administrative law is that "regulated entities" must be given fair notice that they are subject to administrative sanctions.¹⁴ The Draft Order implicates the fair notice doctrine because it imposes administrative sanctions, including forfeitures, on covered entities. The Draft Order's definition of covered entities is so broad and boundless that "any type of entity" that could in any way prevent, impede, delay or burden access to broadband services with respect to protected classes would fall within the Commission's enforcement cross-hairs.¹⁵ These could include any level of government, any entity that owns or operates properties, any entity that provides Wi-Fi access to its customers, or any that owns or operates a right-of-way through which broadband facilities may need to run.¹⁶ The

¹¹ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). See also *Knick v. Township of Scott, Penn.*, ___ U.S. ___, 139 S.Ct. 2162 (2019) ("A property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it.").

¹² Draft Order at para. 124 (stating "Congress's decision not to incorporate section 60506 into the Communications Act . . ."). The Draft Order nowhere describes the Commission's reasoning in determining that section 60506 is not incorporated into the Act.

¹³ See, e.g., Free Press Comments at 19-20 (noting the Commission's authority does not extend to building owners); Local Governments Comments at 19 (noting that apart from owners of broadband infrastructure, "Section 60506 does *not* grant the Commission authority to apply the rules to other entities or service"); TURN Reply Comments at 2-4 (covered entities should include companies that deploy or maintain broadband equipment infrastructure or offer subscriptions); Benefit Data Trust Comments at 6-7 (listing "policies and practices of Commission staff, Commission grant recipients, ISPs, ISP vendors, and state and local government" but not property owners; also describing scope of protected persons, not scope of covered entities).

¹⁴ See, e.g., *General Elec. Co. v. U.S. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995).

¹⁵ Draft Order at para. 86.

¹⁶ Draft Order at para. 87 (citing examples listed by the Lawyers' Committee for Civil Rights Under the Law, which includes building owners or café owners that offer Wi-Fi services).

Draft Order refuses to refine its overly broad definition of covered entities in any way and seems to overtly obscure the possible scope of the its rules.¹⁷ The Draft Order’s proposed definition of covered entities is virtually boundless and fails to provide companies fair notice that they may be subject to the Commission’s regulations.

The Proposed Rules, even assuming they apply to property owners, are so vague that it becomes virtually impossible to ascertain in advance what conduct could trigger liability. A vague rule denies due process.¹⁸ The Draft Order does not meet the requirements for defeating a vagueness challenge as laid out in *USTA v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). There are no bright line rules in this case; there are no factors offered to guide application of the Proposed Rules; and the Draft Order does not describe how the Proposed Rules might be applied to property owners.

Although it seems likely that owners of apartment properties, and perhaps other types of real estate, would be considered “covered entities” under the Proposed Rules, neither the Rules nor the Draft Order offer any guidance for apartment owners that will help them as they enter into arrangements with broadband providers or take other steps regarding broadband service in their properties.

The Draft Order and the Proposed Rules are especially difficult for owners to comprehend in light of the facts of the marketplace, as described in NHMC and NAA’s comments.¹⁹ There are approximately 20 million households in the United States living in multiple tenant properties. Between 68% and 80% of those households are served by two providers and very likely have up-to-date broadband service from at least one provider. Any building over 20 years old, however, probably does not have wiring suitable for transmitting adequate broadband service, and 70 percent of U.S. apartment units were built before the year 2000.²⁰ These older units, furthermore, tend to be more affordable than newer construction. This means that many low-income Americans are often concentrated in older properties with inadequate wiring.

Providers bear the expense of upgrading the necessary facilities. Providers must extend adequate infrastructure to pass each individual apartment building, and they must upgrade the inside wiring at each property. Property owners are sometimes able to help with this expense, but in low-income properties the economics of a project can preclude financial assistance.²¹ In any case, paying for infrastructure to be used by a service provider is not the responsibility of the property owner, unless required by a contract with the provider.

¹⁷ Draft Order at para. 87.

¹⁸ *Timpinaro v. SEC*, 2 F.3d 453 (D.C. Cir. 1993).

¹⁹ *NMHC/NAA Comments*, pp. iv, 15; *MTE Further Reply*, pp. 24-25; Exhibit A.

²⁰ NMHC tabulations of 2021 American Community Survey microdata, cited in *NMHC/NAA Comments* at p. 19, n. 5.

²¹ This is why the hypothetical example of a property owner who owns two buildings in the same geographic area, one that offers good quality broadband service and one that does not, ultimately misstates the problem. Property owners have absolutely no incentive to deny residents broadband services, any more than they do electricity or water, or, for that matter, telephone service. The question is who is going to bear the cost of installing and maintaining infrastructure.

Affordability is also a problem, which owners can attempt to mitigate by informing residents of programs like the ACP – but ultimately the cause of poor-quality broadband in low-income areas is a lack of investment in facilities owned or controlled by the providers.²²

The Draft Order does not address these facts; it also does not explain how the Proposed Rules would solve these problems, or precisely what problem, beyond the one inapt example in ¶ 87, the Rules might solve, if applied to apartment owners.

The Proposed Enforcement Mechanisms Raise Substantial Legal and Practical Problems, Including Potential Violations of Due Process Rights.

The Draft Order proposes to expand the scope of the existing informal complaint process and to amend 47 C.F.R. § 1.80 to encompass violations of Section 60506. As applied to property owners, both procedures raise concerns that counsel against the proposed approach.

The informal complaint process will be very burdensome for property owners, because they will have to train local staff in how to handle communications from the Enforcement Bureau and dedicate management and legal resources to responding.²³ Informal complaints are easy to file on the Commission's website, but the typical resident will know very little of the information needed for Commission staff to refer the complaint to appropriate party. Residents will know the names of their broadband provider, the apartment property, and the on-site property manager, but probably will not know who owns the property or how ownership can be contacted. We can anticipate that there will be delays, confusion, and additional burden for both Commission staff and apartment owners. The burden will be especially significant for small, local property owners who operate the kinds of older, lower income properties that are likely to suffer from poor broadband service.

We are also concerned that the informal complaint process will be used to identify matters to be pursued under the formal enforcement process. What will be the standards for selecting those matters? Without defined standards, the discretion inherent in case-by-case enforcement creates the possibility for arbitrary enforcement. Should it proceed with an investigation and enforcement based on the claims in an informal complaint, the Commission becomes the complainant, the prosecutor, the judge, and the jury. Without verification of the initial information the risk of error is high. The formal process offers some procedural protections, but since the intention seems to be to cull the informal complaints to identify matters to be pursued by the Enforcement Bureau, the selected matters may be tainted by the initial inaccuracy. Written submissions or a subsequent hearing may not be enough to overcome the flaws in the original complaint.

The Draft Order includes property owners and other entities that are not now subject to the Commission's forfeiture process. The Draft Order states that Section 60506 is not part of the Communications Act, which would ordinarily exclude property owners from Commission enforcement actions. This raises once again the jurisdictional issue discussed above and the major questions

²² We note here that this is a complicated issue that NMHC and NAA addressed at great length in comments in this docket and in the MTE proceeding.

²³ Proposed Rule 47 C.F.R. § 1.717 states that informal complaints will be referred to carriers and does not mention property owners, but we have to assume that other covered entities might be involved in the complaint process in some fashion, otherwise they would not need to be covered.

doctrine.²⁴ It is unlikely that Congress intended for the Commission to impose monetary penalties on the real estate industry without clear language to that effect.

Finally, the Commission's proposed enforcement practices would not give covered entities fair notice of the Commission's interpretation of its rules and relevant statutes. While the Commission would issue written decisions to explain its actions when it deems enforcement warranted, there is no parallel procedure for explaining when a complaint does not warrant action or which practices are deemed permissible. This imbalance means that covered entities are never sure whether they can proceed safely.

The Commission Should Confirm It Is Not Imposing Open Access Obligations.

For the reasons set forth above, Section 60506 does not extend the Commission's jurisdiction over property owners. Should the Commission nevertheless determine to include property owners as "covered entities" that Commission should confirm that Section 60506 is not a mechanism to facilitate competitive access unrelated to discrimination.

Section 60506 tasks the Commission with preventing or eliminating digital discrimination of access based on set a defined characteristics such as race, religion or income. Some comments, including those quoted by the Draft Order, suggest that the Commission use this authority to impose open access obligations directly on property owners. In other words, they would convert section 60506 from facilitating equal access to mandating competitive open access. They claim, for example, that the barred discrimination may occur, and a enforcement action may lie, if a property owner denies a resident's request to provide access to a specific provider even though one or more providers already serve the property.²⁵ If one or more providers already serve the property, however, there would appear to be no basis for a red-lining claim, at least to the extent that the terms and conditions of that access are comparable to the offerings available to other subscribers in the area. The Commission has a long-running proceeding to address *competitive access* to MTEs. It should continue to resolve issues of competitive access in that proceeding and not create a back door for open access obligations in the guise of remedying digital discrimination.

In light of some ambiguity around this issue, NMHC and NAA suggest revising the language of paragraph 87 of the Draft Order as follows:

²⁴ In addition, recent scholarship suggests that imposing monetary forfeitures without the full range of protections granted to criminal defendants violates due process. P. HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (U. of Chi. Press 2014), pp. 228-231. "Indeed, because administrative forfeitures are criminal penalties imposed in extralegal proceedings, they are unconstitutional on many grounds. They fail to provide criminal proceedings, courts, real judges, juries, or the due process of law. Moreover, being imposed without judicial proceedings, and without compensation, they are unlawful takings." *Id.* at p. 230, n. b. This view remains to be tested in court, but it is especially apposite in the case of an entity, such as a property owner, that is not under regular Commission supervision or has not been granted a license or other benefit by the Commission.

²⁵ See Draft Order at para. 87 ("[T]he Lawyers' Committee for Civil Rights Under the Law provides several examples of how entities may impact consumer access based on protected characteristics, including a landlord restricting broadband options with a building even if multiple providers are available."). One interpretation of that comment is that a resident may assert a discrimination claim if its preferred broadband provider is not in the building even though broadband service is otherwise available.

87. We disagree with arguments that our authority under 60506(b) extends only to providers of broadband internet access service because “only a service provider, and not some other class of entity, can ‘offer’ a ‘service.’” As explained below, we believe the definition of “equal access” in section 60506(a), which applies both to section 60506(b)’s mandate that we facilitate equal access and that we prevent digital discrimination of *access*, focuses on consumers’ opportunity to receive and effectively utilize an offered service. Conduct by entities other than broadband providers might impede equal access to broadband internet access service on the bases specified in the statute. For example, the Lawyers’ Committee for Civil Rights Under Law provides several examples of how entities may impact consumer access based on protected characteristics, including a landlord restricting broadband options within a building even if multiple providers are available. While we reach no conclusion whether this, or other specific examples in the record would be covered by our rules, we are persuaded that there could be situations – now or in the future – in which non-providers could impede equal access to broadband internet access service based on the listed characteristics. We clarify, however, that section 60506 does not mandate competitive access to a building. The statute bars discrimination on the basis of the listed categories (income level, race, ethnicity, color, religion, or national origin). This Order therefore does not encompass demands by competitive providers to obtain access to buildings, or by tenants seeking to be served by a specific provider. Such claims would not be cognizable under the complaint process outlined in this Order. Moreover, while we are not explicitly tasked with regulating entities outside the communications industry, section 60506 does require us to facilitate equal access to broadband by “preventing” and identifying steps necessary to “eliminate” digital discrimination of access. Thus, to the extent that entities outside the communications industry provide services that facilitate and affect consumer access to broadband, they may be in violation of our rules if their policies and practices impede equal access to broadband internet access service as specified in the rules.²⁷⁰ To the extent that such entities have policies or practices that differentially impact consumers’ access to broadband internet access service, we will consider, among other things, the closeness of the relationship between that entity’s policies and practices and the provision of broadband service.

Please let us know if we can be of any assistance regarding this matter.

Very truly yours,

HUBACHER AMES & TAYLOR, P.L.L.C.



Matthew C. Ames

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