

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

In the Matter of)

Implementing the Infrastructure Investment and)
Jobs Act: Prevention and Elimination of)
Digital Discrimination)

GN Docket No. 22-69

**REPLY COMMENTS OF
THE NATIONAL MULTIFAMILY HOUSING COUNCIL
AND THE NATIONAL APARTMENT ASSOCIATION**

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April 20, 2023

SUMMARY

The National Multifamily Housing Council (“NMHC”) and the National Apartment Association (“NAA”) submit these Reply Comments in response to the comments of other parties filed pursuant to the Notice of Proposed Rulemaking (the “NPRM”).¹

The Commission’s Authority Under Section 60506 Extends Only to Broadband Service Providers. The City of Philadelphia, *et al.*, argue that the Commission’s new rules should not apply to entities that do not deploy networks, or to entities that have no control over providers’ actions. This is a logical and correct interpretation of the text of § 60506. Of the more than 50 remaining commenters, only three call for the Commission to extend its reach beyond service providers to include property owners: the American Library Association (“ALA”), Free Press, and Lawyers’ Committee for Civil Rights (“LCCR”). None offers a satisfactory legal basis for its position.

ALA merely asserts, without explanation, that “all entities involved in the ecosystem of providing internet access” should be included. Because the text of § 60506 clearly does not grant the Commission’s expressed authority to regulate property owners, Free Press and LCCR are forced to rely on distorted readings of the statute.

Furthermore, no party has explained how the major questions doctrine would permit such regulation. Congress would not have given the Commission new authority over an entirely unrelated field – especially one as large and central to the American economy as the real estate industry – through silence, implication, or mere ambiguity. Therefore, under the rule of *West*

¹ *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking (rel. Dec. 22, 2022).

Virginia v. EPA, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022), the Commission cannot rely on § 60506 in any attempt to regulate the activities of multifamily owners.

The Record Shows that Many Low-Income Communities Are Served by Legacy Copper Networks Incapable of Delivering Modern Broadband Services. AT&T's comments acknowledge that the company has not completed replacing copper networks with fiber optic infrastructure because of a range of factors. The comments of the California Public Utilities Commission and the Connecticut Office of State Broadband identify large areas within the service territories of AT&T, Comcast, and Lumen where high-speed broadband is not available. This information confirms well-known facts about the lack of adequate broadband service in low-income communities around the country.

NMHC and NAA have previously shown that buildings built before the year 2000 are rarely served by inside wiring capable of delivering high-speed broadband service. We have also shown that lower income Americans tend to live in older buildings, many built before 1980. And we have shown that when apartment owners request that infrastructure be upgraded so that their residents can subscribe to good quality service, providers often refuse. The Commission will not be able to assure Congress that all Americans have "equal access" until all of this wiring is upgraded.

Subsidizing Network Expansion and Upgrades Is the Only Practical Way to Solve the Inequities in the Availability of Broadband Service. The poor broadband service in many low-income and affordable communities stems from the economics of building communications networks. Service providers want to be able to reach their return-on-investment targets, and low-income communities suffer from a lack of adequate broadband service because they are less attractive investments than buildings serving more affluent residents.

In other words, the access problem is an economic problem. Property owners often contribute to the deployment of broadband networks in many ways, such as by covering some or all of the cost of new inside wiring. But providers of affordable and low-income housing, where infrastructure investment is so badly needed, rarely have the resources to contribute to the cost of facilities. This is why subsidies are the only practical solution to the problem of ensuring equal access to broadband service for every American, and it is why Congress has adopted a broad range of subsidies.

The government's efforts, including subsidies, should be concentrated on the five million or so apartment households that are unserved, or served by a single provider offering inadequate Internet access, which is frequently no more than low-speed DSL. These households are essentially all in low-income housing. Those residential communities should be specifically identified, and funding directed towards building infrastructure to and within them. Upgrading the wiring in those buildings is essential to solving the overall access problem.

The California Emerging Technology Fund ("CETF") makes an interesting proposal in this regard. CETF recommends that the Commission establish a process that would allow broadband providers to compete to build infrastructure serving rural, remote, and high-poverty urban neighborhoods. Those providers who agree to participate would be given priority for subsidies. In return for this financial support, the chosen providers would be required to connect all low-income residents in their service areas and to dedicate resources towards improving digital proficiency. This proposal requires further discussion. Many details would need to be worked out, and NMHC and NAA cannot say at this point that we would ultimately support it. But it is a creative idea that attempts to squarely address the fundamental problem: Creating

incentives for providers to serve low-income areas, and giving them the necessary financial support.

Commenters Are Unable To Support Claims that Owners of Multifamily Housing Are a Significant Impediment to the Deployment of Broadband Services. AT&T and Verizon make broad, unsubstantiated statements about the role of property owners. Immediately after acknowledging that it must replace its existing copper-based DSL service in most metropolitan areas, AT&T pivots and claims building owners are responsible for its failure to upgrade its facilities. Verizon, on the other hand, touts its Fios deployment without mentioning its need to replace its legacy network. Both companies claim that multifamily properties in their service territories are unable to receive adequate broadband service because property owners have “likely” not allowed the provider to upgrade its facilities. These statements are incorrect, misleading, and unsupported by the record.

Neither company puts forward any quantitative information to support its claim, nor do they submit concrete examples. Thus, all they have to offer is supposition. In truth, owners of low income apartment properties need and want good quality service for their residents, which makes it very hard to believe that the word “likely” is in any way accurate in this context. The fact is that both companies need to make substantial investments to replace their copper networks, and there are many factors that affect decisions about where to make those investments. Presumably, all of the legacy telephone carriers are in a similar position. Their copper networks include inside plant, and the income profile of building residents is a critical factor – perhaps the critical factor – in making investment decisions.

Verizon also fails to acknowledge that, as a cable operator in communities in six states that have adopted mandatory access statutes (Delaware, Massachusetts, New Jersey, New York,

Pennsylvania, and Rhode Island), it has the right to demand access to any multifamily property in a community in which it has a franchise. In other words, Verizon could install Fios in any of those buildings merely by complying with the statutory procedures, which are typically not at all onerous. This is true even in the District of Columbia, where Verizon obtained a waiver of the regulations implementing the mandatory access provision of the District of Columbia Code. Even with the waiver, Verizon has the right to enter any building in which a resident has requested service, and the owner is unable to object. Thus, for Verizon to claim that it has “likely” not installed Fios in buildings in the District of Columbia because of apartment owner opposition is highly misleading.

NMHC and NAA Agree with those Commenters Who Stress the Need to Promote Adoption. AT&T, Benefits Data Trust, Information and Innovation Technology Foundation, NCTA, R Street Institute, and others state that, in addition to addressing infrastructure deployment, it will be essential to provide education, training, and access to devices in low-income areas. NMHC and NAA entirely agree with these parties.

Property Owners Are Stakeholders. NMHC and NAA are keenly interested in finding ways to deliver affordable, first-class broadband service to low-income apartment communities and in promoting adoption among apartment residents. The assistance of on-site property management could be enormously helpful in addressing these problems. We therefore again respectfully ask that the Commission acknowledge that owners of multifamily housing – especially owners and managers of low-income housing – are stakeholders in this process. The contributions and participation of our members will be critical to the success of any effort to ensure that all lower income Americans have equal access to broadband service. The multifamily industry is able and willing to work with the Commission on these issues.

Understanding and properly acknowledging the role of the apartment industry can only help the Commission achieve its goals.

No Further Action in the *MTE Proceeding* Is Required. WISPA, TechFreedom, and the Public Interest Advocates urge the Commission to take further steps in the *MTE Proceeding*. None of the three articulates a sound reason for doing so. The Commission has already examined WISPA's concerns in detail, TechFreedom does not even explain what it thinks the Commission should do in that docket, and the Public Interest Advocates offer no evidence that broadband providers actually have trouble obtaining access to mixed-use developments.

NMHC and NAA respectfully urge the Commission to: (i) focus its efforts in this proceeding more directly on promoting equal access for residents of lower income apartment communities, primarily through supporting infrastructure construction; (ii) acknowledge that the multifamily industry is a key stakeholder, willing and able to work with the Commission to educate residents about the opportunities created by the various support programs; and (iii) move to officially close the *MTE Proceeding*.

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	1
INTRODUCTION.....	1
I. THE COMMISSION’S AUTHORITY UNDER SECTION 60506 EXTENDS ONLY TO BROADBAND SERVICE PROVIDERS.	4
II. THE RECORD SHOWS THAT MANY LOW-INCOME COMMUNITIES ARE SERVED BY LEGACY COPPER NETWORKS INCAPABLE OF DELIVERING MODERN BROADBAND SERVICES.	7
III. THIS PROCEEDING WILL NOT ACCOMPLISH THE GOAL OF “EQUAL ACCESS” UNLESS MULTIFAMILY OWNERS AND MANAGERS ARE TREATED AS STAKEHOLDERS, AND STEPS ARE TAKEN TO ENSURE THAT INFRASTRUCTURE INSIDE LOWER-INCOME MULTIFAMILY PROPERTIES IS UPGRADED.	9
IV. COMMENTERS ARE UNABLE TO SUPPORT CLAIMS THAT OWNERS OF MULTIFAMILY HOUSING ARE A SIGNIFICANT IMPEDIMENT TO THE DEPLOYMENT OF BROADBAND SERVICES.	13
V. NMHC AND NAA AGREE WITH THOSE COMMENTERS WHO STRESS THE NEED TO PROMOTE ADOPTION, AND WE REITERATE OUR OFFER TO WORK WITH THE COMMISSION ON THIS ISSUE.	23
VI. FURTHER ACTION UNDER THE MTE DOCKET IS NOT REQUIRED.	24
CONCLUSION	27

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Introduction

The National Multifamily Housing Council (“NMHC”)² and the National Apartment Association (“NAA”)³ respectfully submit these Reply Comments in response to the comments of other parties filed pursuant to the Notice of Proposed Rulemaking (the “NPRM”).⁴

² Based in Washington, D.C., the National Multifamily Housing Council is a national nonprofit association that represents the leadership of the apartment industry. Our members engage in all aspects of the apartment industry, including ownership, development, management and finance, who help create thriving communities by providing apartment homes for 40 million Americans, contributing \$3.4 trillion annually to the economy. 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. Over one-third of American households rent, and over 20 million U.S. households live in an apartment home (buildings with five or more units).

³ The National Apartment Association serves as the leading voice and preeminent resource through advocacy, education, and collaboration on behalf of the rental housing industry. As a federation of 141 state, local and global affiliates, NAA encompasses over 92,000 members representing more than 11 million apartment homes globally. NAA believes that rental housing is a valuable partner in every community that emphasizes integrity, accountability, collaboration, community responsibility, inclusivity and innovation.

⁴ *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking (rel. Dec. 23, 2022).

The apartment industry provides homes for 38.9 million Americans⁵ from every walk of life, including seniors, teachers, firefighters, healthcare workers, families with children, and many others who enrich our communities. Fast, reliable broadband internet access service is a critical need for every multifamily resident, but many low-income Americans live in apartment communities that broadband providers have elected not to serve. Approximately 43% of adults with incomes below \$30,000 per year do not have high-speed internet at home,⁶ and the same proportion of apartment-dwellers (43%) have annual incomes under \$35,000.⁷ Consequently, NMHC and NAA strongly support the Commission’s effort to address every form of discrimination identified by Congress in § 60506 of the Infrastructure Investment and Jobs Act.⁸

In Reply Comments responding to the Notice of Inquiry that initiated this docket,⁹ and in filings in the multiple tenant environment proceeding,¹⁰ NMHC and NAA have submitted

⁵ 2021 American Community Survey, 1-Year Estimates, U.S. Census Bureau, “Total Population in Occupied Housing Units by Tenure by Units in Structure,” <https://data.census.gov/table?q=B25033:+TOTAL+POPULATION+IN+OCCUPIED+HOUSING+UNITS+BY+TENURE+BY+UNITS+IN+STRUCTURE&tid=ACSDT1Y2021.B25033> (last visited April 20, 2023).

⁶ A. Read and K. Wert, *5 Facts About Affordable Rental Housing that Matter for Broadband*, The Pew Charitable Trusts (March 2, 2023), <https://www.pewtrusts.org/en/research-and-analysis/articles/2023/03/02/5-facts-about-affordable-rental-housing-that-matter-for-broadband> (last visited Mar. 23, 2023).

⁷ NMHC Quick Facts Data Download, Household Incomes, <https://www.nmhc.org/research-insight/quick-facts-figures/quick-facts-resident-demographics/household-incomes/> (last visited Mar. 23, 2023). This amounts to a total of roughly 7.8 million households as of 2021. *Id.*

⁸ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (the “IIJA”). Section 60506 of the IIJA has been codified at 47 U.S.C. § 1754.

⁹ *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Inquiry (rel. Mar. 17, 2022) (the “NOI”).

¹⁰ *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142 (the “MTE Proceeding”).

extensive information showing that as many as 80% of apartment residents have access to broadband service from at least two providers.¹¹ The vast majority of apartment residents are neither unserved nor underserved. This is not true, however, in the case of the low-income housing sector. In apartment communities, smaller rental homes, and other property types occupied predominantly by lower-income Americans, it is often difficult if not impossible to obtain access to reliable high-speed broadband service. Furthermore, regardless of how the Commission chooses to define “digital discrimination of access,” this situation is unlikely to change without substantial new investment. Broadband providers have largely neglected this sector of the market because they have concluded that they can earn a higher return on their capital investment dollars by extending and upgrading facilities elsewhere.

NMHC and NAA believe that providers must be given the incentives and the resources to extend or upgrade service to low-income multifamily communities, smaller apartment buildings, and other sectors of the market that are being left behind. By ensuring that every apartment resident has access to adequate broadband service, the Commission would also be going a long way towards eliminating the other forms of discrimination that Congress seeks to prevent. On the other hand, further regulation of building access and transactions between property owners

¹¹ Further Joint Reply Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Nov. 19, 2021) (“*MTE 2021 Further Reply*”) at pp. ii, 7, 9-10, 24; Further Joint Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Oct. 20, 2021) (“*MTE 2021 Further Comments*”) at pp. ii, viii, ix, 4-5, 10-11, 45, 64, 66; Joint Reply Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Sep. 30, 2019) (“*MTE 2019 Reply*”) at pp. 2-3, 10-12, 20. Joint Comments of the Real Estate Associations, GN Docket No. 17-142 (filed Aug. 30, 2019) (“*MTE 2019 Comments*”) at pp. ii, 11-12, 20-23, 49. For purposes of these comments, we ask that the Commission treat these submissions as incorporated by reference and therefore be considered part of the record of this docket, because they contain extensive information pertaining to the speeds, quality, and other aspects of broadband Internet access service available in apartment communities.

and broadband providers would distort incentives and discourage property owners from investing their own capital to supplement that of the communications industry.¹²

I. THE COMMISSION’S AUTHORITY UNDER SECTION 60506 EXTENDS ONLY TO BROADBAND SERVICE PROVIDERS.

Most parties have quite properly focused their comments on the substance of the anticipated rules, without addressing whether they should apply to non-providers. This is a rational approach, because there is nothing in the plain language of Section 60506 that suggests that Congress meant for the Commission to regulate an entity merely because it could conceivably affect some aspect of broadband service.¹³ In other words, most commenters have implicitly assumed that the proposed rules would apply only to broadband providers.

The City of Philadelphia, *et al.*, articulate NMHC and NAA’s position very well when they say that the new rules should not apply to entities that do not deploy networks.¹⁴

Philadelphia adds that the new rules should not include local governments because they have

¹² *MTE 2021 Further Comments* at 60-61.

¹³ Comments of NMHC and NAA, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*NMHC/NAA Comments*”), at 4-6; Reply Comments of NMHC and NAA, GN Docket No. 22-69 (filed June 30, 2022) (the “*NOI Reply*”) at 7-8.

¹⁴ Comments of the City of Philadelphia, Pennsylvania, *et al.*, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*Philadelphia Comments*”) at 19. In addition, the California Public Utilities Commission (“CPUC”) states that the rules should apply only to broadband providers. Comments of the People of the State of California and the California Public Utilities Commission, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*CPUC Comments*”), at 13. The CPUC adds, however, that the Commission should retain flexibility for the future. We disagree with this latter point because the text of the statute does not permit application beyond providers.

little or no authority over providers' actions.¹⁵ We have made exactly this point with respect to property owners.¹⁶

Out of more than 50 commenters, only three call for the Commission to extend its reach beyond service providers to include property owners: the American Library Association (“ALA”), Free Press, and Lawyers’ Committee for Civil Rights (“LCCR”).¹⁷ None offers a satisfactory legal basis for its position.

ALA merely asserts, without explanation, that “all entities involved in the ecosystem of providing internet access” should be included.¹⁸ Free Press’s argument is somewhat unclear, but it seems to be saying that the text of Section 60506(c) authorizes expanding the scope of the rule beyond retail service providers.¹⁹ The first problem with this interpretation is that the directive to adopt rules and the scope of those rules is stated in Section 60506(b). Section 60506(c), on the other hand, refers to “Federal policies.” Agencies can only adopt policies within the scope of their already-stated authority. Thus, Section 60506(c) must be read as subordinate to Section

¹⁵ *Philadelphia Comments* at 20.

¹⁶ *NMHC/NAA Comments* at 7-8.

¹⁷ The California Public Utilities Commission recommends that the Commission regulate only broadband providers, while leaving open the possibility of applying the statute to other entities in the future. Comments of the People of the State of California and the California Public Utilities Commission, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*CPUC Comments*”), at 13. Public Knowledge, *et al.* (the “*Public Interest Advocates*”), do not argue that property owners should be subject to the digital discrimination rules. Comments of Public Knowledge, Benton Institute for Broadband and Society, and Electronic Privacy Information Center, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*Public Interest Advocates Comments*”). Instead, as discussed in Part VI below, they urge the Commission to take further action in the *MTE Proceeding*. *Id.* at 72.

¹⁸ Comments of the American Library Association, GN Docket No. 22-69 (filed Feb. 21, 2023), at 3.

¹⁹ Comments of Free Press, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*Free Press Comments*”), at 19-20.

60506(b). LCCR argues that, because Section 60506(d) is the only subsection of the statute that expressly refers to broadband service providers, the remainder of the statute can be read to include other entities.²⁰ The problem with this interpretation is that it completely ignores all the other words in Section 60506 that indicate that Congress was concerned with the actions of service providers. The core of Section 60506 is the definition of “equal access,” which is concerned with “the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms.”²¹ These are the kinds of things that only network operators can control, which is why Philadelphia’s position is correct and LCCR’s is not.

Furthermore, none of the parties advocating an expansive scope for the types of entities to be regulated have addressed the major questions doctrine. Lincoln Network points out that, as a result of *West Virginia v. EPA*, 142 S. Ct. 2587, 213 L. Ed. 2d 896 (2022), an agency cannot assume that it has the power to regulate entities that are not already clearly under its jurisdiction without conducting a major questions analysis.²² The *NPRM* does not do this, and neither do the commenters advocating regulation of property owners. NMHC and NAA, however, have done that analysis. Property owners are not currently subject to the Commission’s authority; the text of Section 60506 does not expressly refer to property owners; and any effort to extend the statute

²⁰ Comments of the Lawyers’ Committee for Civil Rights, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*LCCR Comments*”) at 31.

²¹ 47 U.S.C. § 1754(a)(2).

²² Comments of Lincoln Network, GN Docket No. 22-69 (filed Feb. 21, 2023), at 7-9.

to cover property owners would be an attempt to regulate “a significant portion of the American economy.”²³

Therefore, whatever else the Commission does, it cannot and should not extend its new rules to the real estate industry.

II. THE RECORD SHOWS THAT MANY LOW-INCOME COMMUNITIES ARE SERVED BY LEGACY COPPER NETWORKS INCAPABLE OF DELIVERING MODERN BROADBAND SERVICES.

NMHC and NAA first noted that many low-income communities are unable to receive acceptable broadband service because of the need to replace or upgrade their inside wiring in the *MTE Proceeding*.²⁴ Quoting the former CEO of GigaMonster, we noted there that “[i]n some instances, in older communities, which tend to be in underserved communities, the cable is too old or of a type incapable of delivering high speed Internet services.”²⁵ In our opening comments in this proceeding, we stated:

For example, it is not unusual for Verizon and AT&T to refuse to upgrade their existing copper facilities inside a property to fiber, even though their network already passes the community. Residents therefore cannot receive higher speed broadband service from that provider. They may have access to DSL, but not to higher-speed services, and even the DSL service may be unreliable.²⁶

²³ *West Virginia v. EPA*, 142 S. Ct. at 2621 (Gorsuch, J., concurring), quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

²⁴ *MTE 2021 Further Comments* at 75-76; *MTE 2021 Further Reply* at 18-19.

²⁵ *MTE 2021 Further Reply* at 19; see also *NOI Reply* at 12.

²⁶ *NMHC/NAA Comments* at 27.

We therefore strongly agree with the various parties who have acknowledged these facts in their comments.²⁷ In particular, we commend AT&T for its discussion of the problems associated with upgrading copper networks and the company's need to meet return on investment targets.²⁸

This is a nationwide issue. The California Public Utilities Commission has submitted maps showing large gaps in AT&T and Comcast's broadband coverage in Los Angeles and Oakland, respectively.²⁹ The Connecticut Office of State Broadband cites studies that have found providers have not invested sufficiently in fiber deployment in low-income communities across the national footprints of both AT&T and Lumen.³⁰

It is also a problem for businesses at the very local level. For example, the Japanese American Citizens League points out that the five city blocks in the heart of San Francisco that constitute the historic Japantown section of the City are served primarily by copper plant, even though nearby areas can obtain Gigabit-speed fiber-based service.³¹

If the private sector is unable to meet the critical needs of the public because of financial constraints, another solution must be found. In any case, it is clear that (i) low-income

²⁷ See, e.g., Comments of AT&T, GN Docket No. 22-69 (filed Feb. 21, 2023) ("*AT&T Comments*"), at 10-12; *CPUC Comments* at Appendix A; Comments of the Connecticut Office of State Broadband, GN Docket No. 22-69 (filed Feb. 21, 2023) ("*Connecticut Comments*"), at 2-3; Comments of Electronic Frontier Foundation *et al.*, GN Docket No. 22-69 (filed Feb. 21, 2023), at 34 (many internet users only have access to high-speed cable or "legacy access to copper-based DSL"); *Free Press Comments* at 37-38; Comments of Japanese American Citizens League, GN Docket No. 22-69 (filed Feb. 21, 2023) ("*JACL Comments*"), at 1-2.

²⁸ *AT&T Comments* at 5, 12-13.

²⁹ *CPUC Comments*, Appendix A, at 15-17.

³⁰ *Connecticut Comments* at 2-3.

³¹ *JACL Comments* at 1-2.

communities are not being adequately served today; and (ii) as the apartment industry has long argued, the reasons for this lack of broadband service are grounded in the economics of the communications industry.

III. THIS PROCEEDING WILL NOT ACCOMPLISH THE GOAL OF “EQUAL ACCESS” UNLESS MULTIFAMILY OWNERS AND MANAGERS ARE TREATED AS STAKEHOLDERS, AND STEPS ARE TAKEN TO ENSURE THAT INFRASTRUCTURE INSIDE LOWER-INCOME MULTIFAMILY PROPERTIES IS UPGRADED.

In Part II above, NMHC and NAA noted that other commenters agree with our long-standing assessment of the need for upgrading infrastructure serving low-income multifamily residents. As we argued in our opening comments, solving this problem will require subsidies.³² Those subsidies need to be directed towards construction of infrastructure to reach every multifamily property in the United States, in rural areas, inner cities, and everywhere in between where it does not already exist. But subsidies also need to be directed towards facilities capable of delivering high-speed, reliable broadband to every residence within each of those buildings. The *NPRM* does not address the need for subsidies, but it does ask whether the Commission’s efforts to end digital discrimination should be coordinated with other agencies. The focus of the *NPRM* presumably explains why other commenters have not addressed this issue, but this is unfortunate.

Many commenters have endorsed the two sets of recommendations for state and local action issued by the Communications Equity and Diversity Council; many others have not addressed them. As we noted in our opening comments, however, a number of those

³² *NMHC/NAA* Comments at 17-22.

recommendations should be revised because they do not properly account for the critical role property owners and managers play in ensuring the delivery of broadband services to their residents.³³ For example, while NMHC and NAA support the recommendation that communities conduct broadband equity assessments, we noted that the Council did not suggest including property owners in those assessments. We therefore proposed that the recommendation be revised to add owners to the list of stakeholders.³⁴ Likewise, although there is ample evidence that property owners are already keenly aware of the importance of resident choice and competition, if owners are included in the assessment process, there will be no doubt about that fact. The same applies to the recommendation for convening meetings of stakeholders.

Nor has any commenter noted that apartment owners serving low-income communities often request facility upgrades so that their residents can obtain access to adequate broadband services, and have no recourse if a provider refuses.³⁵

Three commenters, however, have made related points which we would like to address.

First, TechFreedom argues that the NPRM is misdirected and the Commission's current approach will not close the digital divide.³⁶ While we do not endorse TechFreedom's specific analysis, we do agree with the conclusion, for the reasons stated above.

³³ *NMHC/NAA Comments* at 33-37.

³⁴ *NMHC/NAA Comments* at 32.

³⁵ NMHC and NAA also urge the Commission to bear in mind that the low-income housing industry is subject to many legal and policy constraints that can affect broadband deployment. For example, in the MTE Proceeding we addressed certain rules and policies adopted by the U.S. Department of Housing and Urban Development. *MTE 2021 Further Reply* at 15-22; *MTE 2021 Further Comments* at 6, 76-77.

³⁶ Comments of TechFreedom, GN Docket No. 22-69 (filed Feb. 21, 2023) ("*TechFreedom Comments*"), at 6.

Second, the California Emerging Technology Fund (“CETF”) makes an interesting proposal that merits further consideration. CETF recommends that the Commission establish a process that would allow broadband providers to compete to build infrastructure serving rural, remote, and high-poverty urban neighborhoods. Those providers who agree to participate would be given priority for subsidies. In return for this financial support, the chosen providers would be required to connect all low-income residents in their service areas and to dedicate resources towards improving digital proficiency. Those providers who choose not to participate would face liability for failure to deliver high-speed service, digital literacy training, and affordable devices in their service areas.³⁷

The CETF proposal requires further discussion. Many details would need to be worked out, and NMHC and NAA cannot say at this point that we would ultimately support it. But it is a creative idea that attempts to squarely address the fundamental problem: Creating incentives for providers to serve low-income areas, and giving them the necessary financial support. This is the kind of approach that would deliver equal access and ultimately eliminate any discrimination in the market for broadband services.

Third, Free Press argues that Section 60506 authorized the Commission to promote fiber over-building.³⁸ In principle, NMHC and NAA support overbuilding to and within multifamily properties. As we have advised the Commission, as many as 80 percent of all apartment

³⁷ Comments of California Emerging Technology Fund, GN Docket No. 22-69 (filed Feb. 21, 2023), at 5.

³⁸ *Free Press Comments* at 32-33.

properties in the country already benefit from competition.³⁹ Most of the multifamily communities that are unserved or underserved, however, are home to lower-income Americans, and NMHC and NAA have been urging the Commission to adopt policies that would address this important issue.

Nevertheless, a policy that promotes overbuilding before every community has access to at least one high-speed service risks leaving some people behind – and perhaps many people. The free market is providing competition to higher-earning individuals, but we must still ensure that funding is available and has been allocated to build infrastructure that will serve every American. Characterizing competition as a policy priority without first ensuring equal access to high-quality, high-speed broadband service for all Americans would further exacerbate digital discrimination instead of promoting it.

NMHC and NAA and the apartment industry support policies that will deliver high-speed broadband everywhere that it is still needed. Working together, relying on free market negotiations and long-established practices, the multifamily industry and the communications industry have made it possible for the vast majority of multifamily residents to obtain high-speed and reliable broadband service. We understand the financial realities that have prevented broadband providers from serving the entire potential market. This is why we support subsidies to close the gap, and why we have offered to work with providers and the Commission to reach that goal.

³⁹ *NMHC/NAA Comments* at 36; *MTE 2021 Further Comments* at 10-14.

IV. COMMENTERS ARE UNABLE TO SUPPORT CLAIMS THAT OWNERS OF MULTIFAMILY HOUSING ARE A SIGNIFICANT IMPEDIMENT TO THE DEPLOYMENT OF BROADBAND SERVICES.

This is an important proceeding. Congress has directed the Commission to promote equal access so that all Americans can obtain the benefits of broadband service. Owners of low-income properties share that goal, because what is good for their residents is good for them. Some commenters, however, have made broad, unsubstantiated statements about the role of property owners in the provision of broadband service.⁴⁰ These statements are incorrect and unsupported by the record. NMHC and NAA therefore strongly urge the Commission to reject these allegations.

For example, Verizon asserts that the ability of property owners to withhold access rights is one of the factors that “account for areas within Verizon’s wireline footprint where the Fios network is not deployed.”⁴¹ Attempting to support this statement, Verizon cites and attaches as Appendix A to its comments a Verizon press release titled “*The Facts on Verizon’s Broadband Deployment.*” That press release includes the following statement:

So, when a customer can only get DSL in an area where Fios is generally available, **the reason usually is that property owners have not allowed us to connect** our Fios networks to their buildings (or to traverse their property to reach other buildings). This refusal by property owners significantly factors into availability of Fios service in apartment buildings, condominiums, and other places where multiple families live. In cities, building owner or manager refusals happen more often than we would like, and frequently enough that they create measurable numbers of addresses where Fios service is not available. Approximately three quarters of the Washington D.C. addresses that The Markup identified as “slow” are in these types of buildings and **property owner refusal is likely the reason Fios is not available.** [emphasis added]

⁴⁰ *AT&T Comments* at 13, 26; *LCCR Comments* at 31; Comments of Verizon, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*Verizon Comments*”), at 9.

⁴¹ *Verizon Comments* at 9.

This is a deeply disingenuous and misleading statement. There is no evidence that owners typically, usually, or, to use Verizon's word, are "likely" to simply reject any request for access from Verizon for the purpose of providing improved broadband service. In general, apartment owners have the right to prevent physical attachments to their properties without their consent, and sometimes elect to exercise that right. And sometimes owners have reasonable concerns about a provider's proposed agreement or its activities on the premises that need to be addressed. Superior connectivity is important to apartment owners because it is important to residents. Verizon's service is in demand and multifamily owners are far more likely than not to respond to the desires and needs of their residents.

There are two problems with Verizon's statement. First, Verizon surely knows which multifamily buildings within its wireline footprint it currently serves with Fios, and which it does not, and if the company does not have fiber infrastructure at a property, it knows why not. And yet, Verizon says that if it is providing only slow DSL in certain buildings in Washington, D.C., "property owner refusal is likely the reason" ⁴² Why does Verizon say "likely"? Verizon could easily provide the actual number or percentage of apartment buildings, but instead of being fully transparent, Verizon relies on vague language to incorrectly place responsibility onto the multifamily industry.

This is a particular concern because Verizon includes this misleading and unsubstantiated information in a formal filing with the Commission. Making such baseless statements in a rulemaking proceeding goes beyond public perception to the distortion of facts in the official record.

⁴² *Verizon Comments*, Appendix A, p. 2.

The second way in which Verizon is being disingenuous and misleading is that if Verizon had wanted to install Fios infrastructure in every apartment building in Washington, D.C., it could have done so under District of Columbia law, but Verizon seems not to have pursued that right. Washington, D.C., has adopted a cable mandatory access statute. Although the issues in this proceeding concern broadband internet access service, Verizon holds a cable television franchise in Washington, D.C., and Verizon delivers cable services over its Fios broadband network. Consequently, Verizon has the rights granted by the District's statute.

That statute, D.C. Code § 34.1261.01, reads as follows:

- (a)** No landlord of a residential property shall:
 - (1)** Interfere with the installation, operation, upgrade, or maintenance of cable television facilities upon a property or premises, except that a landlord may require that:
 - (A)** The installation of cable television facilities conform to those reasonable conditions and architectural controls set forth by the landlord as necessary to protect the safety, functioning, and appearance of the property or premises, and the convenience and well-being of tenants;
 - (B)** The cable operator or the tenant or both bear the entire cost of the installation, operation, upgrade, maintenance, or removal of the facilities; or
 - (C)** The cable operator agrees to indemnify the landlord for any damages caused by the installation, operation, upgrade, maintenance, or removal of the facilities.
 - (2)** Demand or accept payment from any tenant or cable operator, in any form, in exchange for permitting access to a property or premises or for permitting cable television service or facilities on or within a property or premises except as provided in rules and procedures established by the [DC Office of Cable Television] allowing for adequate compensation.
 - (3)** Discriminate in rental charges or otherwise between tenants who receive cable television service and those who do not.
- (b)** Rental agreements and leases executed before October 22, 1983, may be enforced notwithstanding this section.
- (c)** No cable operator shall enter into any agreement with the landlord, owners, lessees, or persons controlling or managing a building or do or permit any act that would have the effect, directly or indirectly, of diminishing, infringing upon, or interfering with the rights of any tenant or other occupant of the building to choose a cable service, Satellite Master Antenna Television, Direct Broadcast Satellite, any other video transmission system, or use or avail himself or herself to master or individual antenna equipment.

(d) In addition to any other lawful remedy available to a tenant, a person aggrieved by an act of a cable operator or a landlord in violation of this section may bring a civil action in the Superior Court and the court may award damages, punitive damages, reasonable attorneys' fees, and other litigation costs reasonably incurred.

The law in the District of Columbia is crystal clear. If a cable operator desires to install its facilities in a building for the purpose of providing cable service, it may do so.

The District has also adopted regulations implementing the statute.⁴³ Among other things, the regulations provide the following: (i) if any apartment resident requests cable service from a particular provider, the provider is obligated to provide it;⁴⁴ (ii) the operator is then required to notify the building owner of its intent to install facilities in the building;⁴⁵ (iii) if the owner fails to respond to the notice within 15 days, the operator is to apply for authority to install facilities from the District office that oversees cable regulation;⁴⁶ and (iv) after delivery of a second notice, the District regulatory agency may authorize installation over the owner's objections.⁴⁷ These particular procedures, however, do not apply to Verizon. Shortly before Verizon's franchise agreement was signed in 2008, the District of Columbia Council adopted an act titled "To grant a cable television franchise to Verizon Washington DC Inc., subject to certain exemptions from law, and approve a cable television system franchise agreement between the District of Columbia and Verizon Washington, DC Inc."⁴⁸ This legislation exempts

⁴³ D.C. Mun. Regs tit. 15 §§ 15-3000 – 3099.

⁴⁴ D.C. Mun. Regs tit. § 15-3000.2.

⁴⁵ D.C. Mun. Regs tit. § 15-3003.1.

⁴⁶ D.C. Mun. Regs tit. § 15-3005.1.

⁴⁷ D.C. Mun. Regs tit. §§ 15-3005.1(h); 3005.2, 3005.3

⁴⁸ Approval of the Verizon Washington, DC Inc. Cable Television System Franchise Act of 2008 (the "Exemption Act"), https://oct.dc.gov/sites/default/files/dc/sites/office%20of%20cable%20television/publication/attachments/DC_Law_No_L17_0950_re_Verizon.pdf (last visited March 28, 2023).

Verizon from numerous provisions of District of Columbia law, including the mandatory access regulations,⁴⁹ but not the statute.

There can be little doubt that Verizon requested the waivers in the Exemption Act. If the District of Columbia government believed that the mandatory access regulations were contrary to public policy, the District’s Office of Cable Television, Film, Music and Entertainment could have simply repealed any offending provisions. Furthermore, Comcast and Astound Broadband (“Astound”) both hold franchises to serve the District. The statute and the regulations apply to Astound;⁵⁰ the statute also applies to Comcast, as do the regulations, to the extent they do not conflict with the terms of Comcast’s franchise agreement.⁵¹ This demonstrates that the District of Columbia government still sees value in retaining the regulations.

Why would a service provider seek an exemption from regulations designed to implement D.C. Code § 34.1261.01, which requires apartment owners to permit the installation of facilities? The answer appears to depend on each provider’s business strategy. As a smaller

⁴⁹ Section 4(b) of the Exemption Act states that D.C. Mun. Regs. Tit. 15, § 3000.2 does not apply to the franchise. Section 6(a) of the Exemption Act gives the Office of Cable Television authority to grant exemptions of various provisions, including all of Chapter 30 of Title 15 of the municipal regulations other than subsection 3000.2. Although we have not seen a finding of the Office of Cable Television granting the exemption in accordance with Section 6(a), that seems to have been Verizon’s desire and the intention of both parties.

⁵⁰ Approval of the Starpower Communications Open Video System Franchise Act of 2018, <https://code.dccouncil.gov/us/dc/council/laws/22-231> (last visited March 28, 2023). Astound is now the parent company of Starpower Communications LLC (“Starpower”), which holds an open video system franchise. Starpower has the benefit of D.C. Code § 34.1261.01 because D.C. Code § 34-1251.04 states that, unless otherwise provided, Subchapter II of Chapter 12 of Title 34 of the District of Columbia Code, which includes D.C. Code § 34.1261.01, applies to open video systems as well as cable operators.

⁵¹ Approval of the Comcast of the District, LLC Cable Television System Franchise Act of 2018, <https://code.dccouncil.gov/us/dc/council/laws/22-230> (last visited March 28, 2023).

competitor, Astound depends on mandatory access to expand its market share, and the universal service provision of D.C. Mun. Regs. Tit. 15, § 3000.2 is clearly beneficial.⁵² As a large incumbent that is already serving most buildings in the District, the universal service provision is of little benefit to Comcast, but might be useful on occasion. For Verizon, however, a universal service obligation would force the company to install Fios in buildings already served by DSL. Even if Verizon plans to upgrade the facilities in those buildings at some point (bearing in mind that the franchise was granted in 2008), the District regulation could have resulted in considerable expense and disruption to its construction plans. Hence the exemption.

In fact, this is why NMHC and NAA have opposed mandatory access proposals in this proceeding and in the *MTE Proceeding*.⁵³ As we stated in our opening comments:

Mandatory access statutes impose no obligation to serve all properties, any particular property, or any specific number or proportion of properties. Providers are thus free to cherry-pick, and they do. They do not have unlimited capital or the management resources to seek access to every building, so they choose the ones that will earn them the greatest return on their investment. This means that, in practice, providers rarely seek out low-income properties and rarely rely on mandatory access statutes to get access to such properties. Instead, competitive providers typically seek access to luxury and upper middle income properties, which may already host two, three, or more providers. The result is more competition in some buildings, but not access to more properties, and certainly not more infrastructure installed to serve the lower end of the market.⁵⁴

Verizon's actions in the District of Columbia prove this point. The company has the legal right to enter every apartment building in the District of Columbia once a resident requests

⁵² This section states “[s]ubject to the provisions of this chapter, a cable television operator shall be obligated to provide a cable television service to any tenant within the operator’s franchise territory requesting it.”

⁵³ *NMHC/NAA Comments* at vi-vii,37-42; *NOI Reply* at 21-23; *MTE 2021 Further Reply* at 39-41; *MTE 2021 Further Comments* at 68-74; *MTE 2019 Reply* at 26; *MTE 2019 Comments* at 75-77.

⁵⁴ *NMHC/NAA Comments* at 40-41.

service, but Verizon does not want the corresponding obligation to serve. Furthermore, obtaining an exemption is one thing; telling the Commission that Verizon’s failure to serve buildings in the District is the fault of apartment owners when Verizon had mandatory access rights is another thing entirely.

This is not the only instance in which Verizon has attempted to shift blame to property owners.⁵⁵ The State of New York also has a mandatory access statute, and Verizon holds a cable television franchise in the City of New York, just as it does in the District of Columbia.⁵⁶

⁵⁵ J. Brodtkin, *1 million NYC homes can’t get Verizon Fios, so the city just sued Verizon*, Ars Technica (March 13, 2017), <https://arstechnica.com/tech-policy/2017/03/nyc-sues-verizon-alleges-failure-to-complete-citywide-fiber-rollout/> (last visited March 29, 2023) (“*City Sues Verizon*”); S. Crawford, *Bad Internet in the Big City*, Wired (Feb. 28, 2018) <https://www.wired.com/story/new-york-city-verizon-internet/> (last visited March 29, 2023) (“*Bad Internet*”).

⁵⁶ It is our understanding that Fios is available in eight states (Delaware, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Rhode Island, and Virginia), as well as the District of Columbia. Of those eight states, six have mandatory access laws similar to those in the District of Columbia. Furthermore, none of these states imposes universal service obligations on cable operators, and with the exceptions of New Jersey and Rhode Island, all of these states grant cable franchises at the local level. Two conclusions follow from this: First, Verizon cannot credibly assert that building access is a problem in any of the mandatory access states; and second, Verizon is not required to serve any multifamily building it does not want to serve, unless its negotiated local franchise agreement requires some form of universal service within the franchise area. But even there Verizon can and does protect itself. For example, as recently as July 2022, Verizon entered into a franchise agreement with Henrico County, Virginia. That agreement contains the following provision:

[T]he Franchisee shall offer Cable Service to all residential households in the Service Area and may make Cable Service available to businesses in the Service Area, except: . . . (F) in areas, developments, buildings or other residential dwelling units where (i) the Franchisee is unable to provide Cable Service without the use or construction of non-standard facilities, or (ii) where connecting new Cable Service is not commercially reasonable, including, but not limited to, circumstances where Franchisee cannot access such areas, developments, buildings or other residential dwelling units by using Franchisee’s existing network pathways and which would thus require the construction of new trunk, feeder, or distribution lines . . . and (H) in areas, developments, buildings or

Under that franchise, Verizon was obligated to pass all households with its network by June 30, 2014. In 2015, the City found that at least a quarter of the city's residential blocks had no FiOS service.⁵⁷ Verizon's fiber-to-the-premises network was capable of serving roughly two-thirds of the 3.1 million households in the City, but approximately one million households were not able to subscribe to Verizon's fiber-based services.⁵⁸ Verizon argued, among other things, that property owners had not granted access to their buildings; in many cases, however, Verizon wanted access for the purpose of crossing the property to serve an adjacent building. .⁵⁹ In

other residential dwelling units that are not habitable or have not been constructed as of the Effective Date.

In other words, Verizon very recently negotiated a franchise that relieves the company of any obligation to install its facilities in any building where new construction would be required. In light of this position, Verizon's attempt to blame property owners for lack of access to Fios should be given no credence.

⁵⁷ Department of Information Technology and Telecommunications, City of New York, Final Audit Report – Verizon New York (June 16, 2015) (“*Audit Report*”), at p. 11, attached as Exhibit 6 to Plaintiff's Notice of Motion for Summary Judgment, *City of New York v. Verizon New York, Inc. and Verizon Communications Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct., County of New York) (filed July 19, 2017); *see also Bad Internet*.

⁵⁸ *City Sues Verizon*.

⁵⁹ Complaint, *City of New York v. Verizon New York, Inc. and Verizon Communications Inc.*, Index No. 450660/2017 (N.Y. Sup. Ct., County of New York) (filed March 13, 2017) at ¶¶ 23-28, 38-41; *see also Bad Internet, City Sues Verizon*. Verizon asserted, among other defenses, that it was unable to meet its original obligations to the City because some property owners were uncooperative when the company requested access, either to upgrade facilities in the building, or to obtain permission to cross the owner's property to reach another building. The first instance raises several points. First, as noted above, Verizon had been able to reach roughly two-thirds of the 3.1 million households in the City. In other words, most property owners had granted access. Second, building access was not the only reason for Verizon's noncompliance. Third, the record does not disclose how many of the unserved addresses were in rental apartment buildings. And fourth, Verizon had mandatory access rights and should have been able to obtain access under New York's statutory procedures. Therefore, either Verizon chose not to exercise its rights, or perhaps mandatory access is not the simple solution to increased connectivity. Finally, with

2017, the City sued the company for failure to comply with its build-out obligations under the cable franchise.⁶⁰ In 2020, the lawsuit was settled, and Verizon agreed to build out its Fios network to serve an additional 500,000 households in the City.⁶¹

Regrettably, Verizon’s response in these two cases is not unusual. Communications providers often find it convenient to misstate the role of property owners. We urge the Commission not to be swayed by such unsupported assertions in addressing the important questions presented in this proceeding. NMHC and NAA have repeatedly submitted concrete evidence demonstrating the apartment industry’s support for broadband deployment only to see it rejected in favor of purely anecdotal claims.⁶²

Verizon is not alone in this instance. AT&T offers a hypothetical scenario in which property owners “would likely restrict competitive access.”⁶³ As we asked earlier of Verizon – what does “likely” mean here? Is AT&T saying that owners of low-income properties deny the company access when it wants to upgrade its facilities more than half the time? We find that very hard to believe. In any case, such a bald statement, unsupported by any actual evidence, is not an adequate basis for policymaking. This is why the Commission needs to develop a data-

respect to the company’s desire to obtain access by crossing from one property to another, property owners had no obligation to allow such access.

⁶⁰ *City Sues Verizon*.

⁶¹ *Mayor De Blasio Holds Verizon Accountable to Connect Half a Million New York City Households to Broadband* (Nov. 24, 2020), <https://www.nyc.gov/office-of-the-mayor/news/807-20/mayor-de-blasio-holds-verizon-accountable-connect-half-million-new-york-city-households-to> (last visited March 29, 2023).

⁶² *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142, Report and Order and Declaratory Ruling (rel. Feb. 15, 2022) at ¶ 12 (rejecting NMHC and NAA survey data and sworn statements in favor of unsworn provider anecdotes).

⁶³ *AT&T Comments* at 13, 26.

driven policy, based on its own careful and deliberate fact-finding, in which providers are required to submit complete and accurate information on how many buildings they do and do not serve and on what terms. This is why we have requested that the Commission take further steps to improve the broadband maps.⁶⁴

NMHC and NAA are the only parties that have made an effort to provide the Commission with sound evidence on this question. We acknowledge the complexity of the situation for both owners and providers and have tried to address both sides of the issue. AT&T and Verizon, however, would have the Commission believe that they would willingly serve every low-income multifamily community within their respective service areas. Not only is this incorrect, but they do not even acknowledge that they often turn down requests for service from multifamily owners.

Finally, in light of this discussion, NMHC and NAA urge the Commission to be wary of creating a broad safe harbor from its rules, as proposed by several parties,⁶⁵ that would allow a provider to claim that it could not extend service to a particular low-income community because the property owner refused to grant access. While such an exemption may be reasonable in principle, providers are already reluctant to extend service in such situations and are inclined to make unsupported claims, as we have seen. Any claim of protection under such a safe harbor must be subjected to rigorous testing by the Commission.

⁶⁴ *NMHC/NAA Comments* at 19-22.

⁶⁵ *Comments of NCTA, GN Docket No. 22-69* (filed Feb. 21, 2023) (“*NCTA Comments*”) at 29; *TechFreedom Comments* at 43; *Verizon Comments* at 8.

V. NMHC AND NAA AGREE WITH THOSE COMMENTERS WHO STRESS THE NEED TO PROMOTE ADOPTION, AND WE REITERATE OUR OFFER TO WORK WITH THE COMMISSION ON THIS ISSUE.

In the *NOI Reply Comments* and the *NPRM Comments*, NMHC and NAA have stressed the need for further investment in infrastructure to and within low-income multifamily buildings. As we discuss above, this is a major problem. But we also agree with those commenters who emphasize that low adoption rates are also a factor.⁶⁶ In fact, adoption is a more complex problem because raising adoption rates requires communicating with millions of individual consumers across the country. It may also require providing many of those individuals or households with new devices. For example, the R Street Institute notes that over half of ACP recipients prefer applying the ACP benefit to wireless rather than to wireline service.⁶⁷ Wireline broadband service is of little value to a person who owns a smartphone but no other devices.

NMHC and NAA are prepared to work with the Commission and with providers to assist in raising awareness of the benefits of broadband adoption and the various programs available to help lower income residents. On-site apartment managers are in a unique position in this regard. They are available every day to residents who need information, and they can make information available in a number of ways. But we also want to be sure that they are distributing accurate

⁶⁶ See, e.g., *AT&T Comments* at 10 (higher per-unit cost, insufficient demand, low adoption rates are all problems); Comments of Benefits Data Trust, GN Docket No. 22-69 (filed Feb. 21, 2023), at 3 (ISPs should be required to disclose ACP rights to customers); Comments of Information and Innovation Technology Foundation, GN Docket No. 22-69 (filed Feb. 21, 2023), at 6 (adoption is the problem); *NCTA Comments* at 34 (FCC should not conflate availability with low adoption resulting from lack of interest); Comments of R Street Institute, GN Docket No. 22-69 (filed Feb. 21, 2023) (“*R Street Comments*”), at 4 (adoption is a major barrier); Comments of T-Mobile, GN Docket No. 22-69 (filed Feb. 21, 2023), at 23-25.

⁶⁷ *R Street Institute Comments* at 4; Comments of CTIA, GN Docket No. 22-69 (filed Feb. 21, 2023), at 7.

and complete information. NMHC and NAA would welcome the opportunity to discuss voluntary efforts that apartment owners could take to assist with this issue, and what Commission staff could do to support such efforts.

VI. FURTHER ACTION UNDER THE MTE DOCKET IS NOT REQUIRED.

The *NPRM* asks whether the Commission should take further steps in other proceedings to address digital discrimination, including the *MTE Proceeding*.⁶⁸ Three commenters, WISPA, TechFreedom, and the Public Interest Advocates state that the Commission should do so.⁶⁹ None of these parties has explained why the Commission should dedicate any more resources to that matter.

WISPA once again urges the Commission to regulate rooftop agreements and to recommend that states and localities amend or adopt mandatory access laws to accommodate wireless providers, but WISPA has nothing new to say on either topic. Not only have these issues been thoroughly addressed in the MTE docket, but action is unnecessary for the reasons we have stated in this docket⁷⁰ and in the *MTE Proceeding*.⁷¹ To summarize, (i) regulation of rooftop agreements would interfere with a thriving real estate market and raise Constitutional

⁶⁸ *NPRM* at ¶ 84.

⁶⁹ *TechFreedom Comments* at 47-48; *Comments of WISPA*, GN Docket No. 22-69 (filed Feb. 21, 2023), at 25-29; *Public Interest Advocate Comments* at 72.

⁷⁰ *NOI Reply* at v, 21-23; *NMHC/NAA Comments* at 24.

⁷¹ *NMHC/NAA Comments* at viii, 24; *NOI Reply* at v, 21-22; *MTE 2021 Further Reply* at 47-49; *MTE 2019 Reply* at 27-29; *MTE 2019 Comments* at 69-70.

concerns;⁷² and (ii) mandatory access statutes do not actually promote increased deployment to unserved and underserved residential properties.⁷³

Unlike WISPA, TechFreedom did not participate in the *MTE Proceeding*.

TechFreedom's primary concern in the current proceeding seems to be that it believes that regulations of the sort proposed in the *NPRM* misread the statute and are "doomed" to failure.⁷⁴

To strengthen its argument, TechFreedom asserts that the Commission could achieve its goals through actions in other proceedings, including the *MTE Proceeding*.⁷⁵ But TechFreedom never explains how further regulation of access to multifamily buildings would actually make a difference, nor does it suggest what the Commission should do. Furthermore, because TechFreedom did not participate in that proceeding and, as far as we can tell, has no knowledge either of the issues it addressed nor the intricacies of delivering broadband service in apartment buildings, its suggestion should carry no weight. TechFreedom's reference to the *MTE Proceeding* is no more than a rhetorical device to buttress its argument against action in this docket.

The position of the Public Interest Advocates is not entirely clear.⁷⁶ They seem to be asking the Commission to extend its February 2022 Order in the *MTE Proceeding* to mixed use developments. The rules adopted in that order apply to communications providers serving

⁷² *NMHC/NAA Comments* at 24; *NOI Reply* at 21-22; *MTE 2021 Further Reply* at 47-49;

⁷³ *NMHC/NAA Comments* at 37-42; *NOI Reply* at 22-23; *MTE Further Reply* at 39-41; *MTE Further Comments* at 68-74.

⁷⁴ *TechFreedom Comments* at 31.

⁷⁵ *TechFreedom Comments* at 47-48.

⁷⁶ *Comments of the Public Interest Advocates*, ("*Public Interest Advocate Comments*"), GN Docket No. 22-69 (filed Feb. 21, 2023), at 72.

“multi-unit premises” and to cable operators and other multichannel video programming providers serving multiple dwelling units. The Public Interest Advocates offer no argument other than to say that it is sometimes hard to determine whether a mixed use development is residential or commercial.⁷⁷ We fail to see a problem or a gap here.

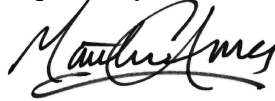
It is clear from the record that only a handful of parties believe further action in the *MTE Proceeding* is required, and they offer no sound reasons for returning to those issues. NMHC and NAA again urge the Commission to close that proceeding formally.

⁷⁷ *Public Interest Advocate Comments* at 72-73.

CONCLUSION

For all the foregoing reasons, the Commission should: (i) focus its efforts in this proceeding more directly on promoting equal access for residents of lower income apartment communities, primarily through supporting infrastructure construction; (ii) acknowledge that the multifamily industry is a key stakeholder, willing and able to work with the Commission to educate residents about the opportunities created by the various support programs; and (iii) move to officially close the *MTE Proceeding*.

Respectfully submitted,



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April 20, 2023