



October 25, 2024

VIA ECFS

Chairwoman Jessica Rosenworcel
Commissioner Brendan Carr
Commissioner Geoffrey Starks
Commissioner Nathan Simington
Commissioner Anna Gomez
Federal Communications Commission
45 L Street NE
Washington, DC 20554

Re: Letter of the Bulk Broadband Alliance, *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142

Dear Chairwoman Rosenworcel and Commissioners Carr, Starks, Simington, and Gomez:

The Bulk Broadband Alliance¹ submits this letter in response to the July 31, 2024 letter from the American Economic Liberties Project *et al.*² (collectively “AELP”) concerning bulk billing arrangements between multiple dwelling units (“MDUs”) and Internet Service Providers (“ISPs”). AELP argues that these arrangements harm MDU residents and urges the Commission to issue a notice of proposed rulemaking (“NPRM”) and ultimately to adopt a rule allowing residents to opt out of such agreements. Our response addresses the following key points:

- First, AELP ignores the significant economic benefits of bulk billing arrangements. Notably, these arrangements typically provide internet and video prices at least 50% lower than promotional

¹ The Bulk Broadband Alliance amplifies the collective voice of stakeholders and educates policymakers about the benefits of bulk billing and the harms regulation would have on the millions of consumers who rely on these arrangements. The organization includes EducationSuperHighway, the Community Associations Institute, the National Multifamily Housing Council, the National Apartment Association, and ACA Connects - America’s Communications Association. For more information about the Bulk Broadband Alliance, see <https://protectbulkbroadband.com/>.

² Letter from American Economic Liberties Project *et al.* to Jessica Rosenworcel, Chairwoman, Federal Communications Commission, WC Docket No. 17-142 (July 31, 2024).

prices for comparable retail packages, and nonrecurring fees (such as installation charges) are generally not charged, unlike under typical retail plans. Furthermore, AELP neglects to recognize that the inherent advantages of the bulk model – increased competition, reduced provider costs, and enhanced consumer bargaining power – directly contribute to these benefits.

- Second, AELP disregards the harm an opt-out requirement would cause, asserting that what consumers derive from bulk billing arrangements will remain available. However, if individual MDU residents were granted a regulatory right to opt out of bulk deals, opt-out rates would exceed AELP’s predictions, leading to an increase in service prices at these MDUs rather than a decrease. AELP’s assumption that consumer inertia will favor new providers of bulk service and result in low opt-out rates ignores the reality that a new provider of bulk services will face competition from one or more displaced incumbent providers with existing infrastructure and customer relationships. These existing relationships will create their own consumer inertia favoring the displaced provider(s). Consequently, there is no reason to believe that the new bulk provider would capture a significantly larger market share than it would under a retail competition model. Providers, anticipating this outcome, would no longer submit the low bids they currently offer when competing for these contracts.
- Third, the Commission does not have statutory authority to regulate bulk billing arrangements. The Commission cannot rely on Title II of the Communications Act because none of the services at issue are subject to that authority. In particular, the Sixth Circuit’s August 1, 2024, decision staying the Commission’s classification of broadband internet access service (“BIAS”) as a telecommunications service deprives the Commission of Title II authority over BIAS providers.³ Additionally, the Commission has steadfastly declined to regulate Voice over Internet Protocol (“VoIP”) services as telecommunications services subject to Title II. Furthermore, the Supreme Court’s recent ruling in *Loper Bright* undermines any claim of authority to regulate cable operators’ MDU billing practices. Without the requisite authority, the Commission cannot regulate bulk billing arrangements.
- Fourth, AELP fails to recognize the difficult administrative challenges of implementing an opt-out regulatory regime. Because the Commission lacks direct regulatory authority over MDUs, enforcing opt-out requirements would involve indirect measures such as requiring ISPs to include opt-out provisions in contracts with MDUs. But the Commission’s lack of direct enforcement power would make dispute resolution indirect, protracted, and legally uncertain. Even if providers could enforce opt-out compliance in some cases, complex challenges would remain, particularly when residents file complaints about inadequate refunds. Resolving such complaints would

³ *In re MCP No. 185*, 2024 WL 3650468 (6th Cir. Aug. 1, 2024) (order granting stay).

require the Commission to engage in intricate cost-based rate regulation calculations, a task it generally lacks authority to perform and wisely prefers to avoid whenever possible.⁴

In sum, AELP's arguments in favor of an opt-out mandate are unsound as a matter of policy and law. We reiterate our request for the Commission to withdraw its proposed NPRM.

Bulk Billing Arrangements Deliver Significant Consumer Benefits through Increased Competition, Reduced Provider Costs, and Enhanced Purchasing Power

Bulk billing arrangements provide three distinct benefits. First, they significantly lower prices for internet and video services. Available evidence indicates that bulk prices are at least 50% lower than promotional prices for comparable retail packages, both for internet only and internet plus video offerings. Also, bulk billing arrangements typically do not include nonrecurring fees such as installation charges, which are common with retail plans. Second, bulk arrangements deliver higher-quality services. They drive fiber investments that enable faster speeds. They generally offer superior customer service and reliability guarantees. And these arrangements often include various digital amenities such as building-wide managed Wi-Fi, which would be unavailable or incur extra fees without a bulk arrangement. Third, bulk arrangements particularly benefit low-income consumers and contribute to closing the digital divide. While significantly lower prices benefit consumers at any income level, they often spell the difference between lower-income consumers having or not having internet service.

Bulk billing arrangements generate these benefits primarily because an MDU is able to promise 100% penetration to the ISP that wins the competitive procurement it organizes to select a bulk provider (i.e., a request for proposal ("RFP") process). This assurance produces these benefits for three reasons. First, an ISP's per-residential unit cost to provide service to an MDU under a bulk billing arrangement is less than the cost to provide the same service under a retail model, and these cost savings are passed on to MDUs in the form of lower prices and higher-quality services. Specifically, a provider is able to spread the fixed costs of installing infrastructure in an MDU across all units instead of the smaller share more likely in a retail environment. Moreover, the provider eliminates the marketing costs and the churn expenses of disconnecting and reconnecting customers as they switch between providers. Second, there is typically more competition for bulk billing arrangements than for retail deals. In any given region, the retail providers that serve an MDU, which usually amount to about 2 wireline providers, will compete for bulk deals at their MDUs,⁵ alongside 2-3 other wireline ISPs near any individual MDU. These include

⁴ While this letter focuses on the primary flaws that undermine AELP's call for an opt-out mandate, the attached Appendix addresses additional allegations of AELP that are erroneous, misleading, and otherwise without merit.

⁵ In addition to using their own facilities to compete directly for bulk deals, many facilities-based retail providers, particularly telecommunication providers, offer their fiber at wholesale rates to resellers. These resellers then use this fiber to offer bulk service to MDUs. As a result, even the facilities of telecommunications providers that do not directly compete for bulk deals are generally available for such deals through resellers.

bulk specialist ISPs, as well as ISPs that provide retail service in nearby areas. Unlike the incumbent retail providers serving the MDU, these additional ISPs generally need to build a last-mile connection to the MDU to serve it. A bulk deal guarantees a high enough participation rate to justify building such a last-mile connection. This extra competition typically results in lower prices and higher-quality services for the MDU. Third, buyers that offer sellers a larger volume of business generally have more bargaining power and are able to negotiate more favorable deals. A bulk deal guarantees the largest possible volume of business at the MDU and thus maximizes consumer-side bargaining power.

An Opt-Out Regulatory Regime Critically Undercuts the Benefits of Bulk Billing Arrangements

While carefully avoiding any explicit acknowledgment of consumer benefits from bulk arrangements, AELP asserts that what consumers derive from them will remain unchanged even with an opt-out option, arguing that opt-out rates will be extremely low, leading to near 100% penetration. They argue that consumer decision-making exhibits inertia, and that so long as residents of MDUs are automatically enrolled in the bulk arrangement unless they opt out, this will generate significantly higher penetration rates compared to a system where residents must opt in. While we agree with behavioral economists who observe the existence of consumer decision-making inertia, and acknowledge that an opt-out arrangement might yield somewhat higher penetration rates than an opt-in arrangement, AELP's assertion that there will be extremely high penetration rates under bulk deals with an opt-out clause overlooks key facts about the market dynamics relating to bulk deals.

In particular, AELP fails to account for the reality that a new provider of bulk service with an opt-out option will face competition from one or more displaced incumbent providers with existing infrastructure and customer relationships. In the case where an MDU switches from retail service to bulk service, the multiple retailers that previously served the MDU but did not win the deal will all be displaced incumbents. In the case where an MDU with bulk service holds a periodic competition to determine a new provider, the previous bulk provider will be the displaced incumbent. Either way, these displaced incumbents will have the same incentive to compete with the new provider that firms in a retail environment have to compete with one another. Furthermore, while the opt-out provision might create inertia that favors the new provider, the fact that residents have existing relationships with the displaced provider(s) will create inertia that favors them. There is no reason to believe that the new bulk provider will be able to capture a significantly larger market share than it would be able to under retail competition. The result will be that the winner of a so-called "bulk deal with an opt out clause" will in reality have won nothing more than the right to be one of the multiple competitors that compete for customers.

If so-called "bulk deals with an opt-out clause" produce penetration rates close to retail levels, then they will inevitably produce prices close to retail levels. First, the unit cost of providing so-called "bulk service with an opt-out clause" will be close to the unit cost of retail service. That is, competitors to a bulk deal will only bid low prices to the extent they anticipate a high penetration rate which will allow them to spread their fixed costs over a large subscriber base. If competitors for so-called "bulk service with an opt-out clause" anticipate normal retail levels of penetration, then they will bid normal retail prices. Second, the additional ISPs that are willing to compete for bulk deals in any region because they

offer significantly higher penetration rates than retail arrangements, will no longer be willing to compete for so-called “bulk deals with an opt-out clause.” Thus, the extra competition will vanish. Third, MDUs offering a “bulk deal with an opt-out clause” will not be able to promise significantly more penetration than the normal retail share of customers, so the extra bargaining power they obtain from being able to offer a deal to serve 100% of their residents will vanish.

In summary, while mandating opt-out provisions in bulk arrangements may appear to promote competition and consumer choice, it would, in reality, have the opposite effect—reducing competition and choice at the key stage where ISPs compete to be the provider of bulk services to an MDU, and critically undercutting the benefits that come from consumers collectively organizing and committing to negotiate beneficial and efficient deals with ISPs.

The Commission Lacks Authority To Regulate Bulk Billing Arrangements

Not only is the Commission confronting overwhelming evidence that bulk billing arrangements are pro-consumer and an opt-out regulatory regime is not, it also faces insurmountable legal obstacles to regulating bulk deals. A federal court recently prevented the Commission’s classification of BIAS as a Title II telecommunications service from taking effect, thereby removing the principal authority the Commission likely contemplated using to regulate bulk billing. Additionally, the Commission cannot identify any other legal basis for its proposed regulation. That is especially so after the Supreme Court’s recent decision in *Loper Bright Enterprises v. Raimondo*, which held that courts may not defer to broad agency interpretations of statutes simply because a statute is ambiguous.⁶

To regulate bulk billing practices for internet, video, and voice services, the Commission requires authority over each of those services. However, the Communications Act does not confer authority to regulate bulk billing practices involving any of them. The Commission historically has asserted authority to oversee the provision of communications services to MDUs under two provisions of the Communications Act: Sections 201(b) and 628(b). Section 201(b) bars “unjust or unreasonable” practices by providers of telecommunications services, and Section 628(b) bars cable operators and certain programming vendors from engaging in “unfair methods of competition or unfair or deceptive acts or practices” that “hinder significantly” or “prevent [an MVPD] from providing satellite cable programming or satellite broadcast programming to subscribers.”⁷ The Commission previously relied on these provisions in imposing restrictions on exclusive access arrangements. But even assuming those prior decisions could be justified in a post-*Chevron* world, they cannot justify a rule permitting MDU residents to opt out of bulk billing arrangements.

First, the Commission cannot regulate BIAS providers’ billing practices under Section 201(b), because they are not “telecommunications carriers,” and it cannot rely on Section 628(b) to regulate such

⁶ 144 S. Ct. 2244, 2273 (2024).

⁷ 47 U.S.C. §§ 201(b), 548(b).

entities because they are not cable operators or programming vendors. When the Commission adopted the *2024 Open Internet Order*, it determined that “reclassification of BIAS as a telecommunications service” would enable it to regulate BIAS providers under Title II.⁸ In particular, subjecting BIAS providers to Title II regulation would require them to comply with Section 201(b), which, in the Commission’s view, provides a basis for regulating such providers, including “BIAS-only providers that serve MTEs.”⁹ Before that decision took effect, however, the U.S. Court of Appeals for the Sixth Circuit granted a stay, finding that the parties challenging the order are likely to succeed because the Commission likely lacks authority to regulate BIAS under Title II.¹⁰ That stay order means that the information-service classification adopted in the *Restoring Internet Freedom Order* remains applicable.¹¹ As a result, the Commission may not regulate BIAS—including to MDUs—under Section 201(b),¹² and the Sixth Circuit left little doubt that the Commission is unlikely to have that authority in the future. Nor is there any alternative statutory provision—i.e., outside Title II—that would justify such regulation of ISPs’ participation in bulk billing arrangements.

Second, the Commission does not have authority to regulate cable operators’ participation in bulk billing arrangements, either. While the Commission once relied on Section 628(b) of the Communications Act to regulate access to MDUs involving cable television services, its authority to impose such restrictions depended entirely on the now-defunct *Chevron* doctrine.¹³ Now that the Supreme Court has clarified that administrative agencies must adopt the *best* reading of a statute—not just a “permissible” one—there is no longer a sound argument that Section 628(b) authorizes regulation of cable operators’ service arrangements within MDUs.¹⁴ Section 628(b) is concerned with ensuring that programming vendors that are not affiliated with a cable operator can compete fairly; the terms of bulk billing arrangements are entirely beyond its ambit.

Third, whereas the Commission was able to assert authority over traditional voice services under Section 201(b), that authority does not extend to VoIP, which invariably represents voice service offerings to MDUs. The Commission has imposed certain discrete requirements on VoIP providers, but it has never classified VoIP as a telecommunications service subject to Title II. Accordingly, Section 201(b) cannot

⁸ *Safeguarding and Securing the Open Internet et al.*, WC Docket No. 23-320 et al., Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, para. 83 (2024).

⁹ *Id.*, para. 326; *see also* 47 C.F.R. § 64.2500.

¹⁰ *In re MCP No. 185*, 2024 WL 3650468, at *3.

¹¹ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018).

¹² *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (holding that the Communications Act does not permit the Commission to regulate information-service providers as common carriers).

¹³ *See NCTA v. FCC*, 567 F.3d 659, 663-66 (D.C. Cir. 2009).

¹⁴ *See Loper Bright*, 144 S. Ct. at 2273.

support regulation of VoIP in MTEs, including bulk billing arrangements, just as it cannot support regulation of BIAS.¹⁵

Because the Commission has no lawful basis to regulate bulk billing arrangements, it should abandon the pending NPRM that proposes restricting them.

The Commission Faces Difficult Administrative Challenges in Implementing an Opt-Out Regulatory Regime

Even if the Commission had the authority to mandate opt-out, AELP fails to acknowledge the administrative challenges, if not the outright impracticability, of regulating bulk deals for two reasons. First, the Commission’s authority is limited to telecommunications and cable providers. It cannot directly regulate property owners, homeowners associations (“HOAs”), condominium owners associations (“COAs”), Public Housing Authorities (“PHAs”), and other entities that own or manage buildings and communities. This would necessitate enforcing opt-out requirements indirectly by requiring ISPs to enter into contracts with MDUs that, in turn, require MDUs to provide an opt-out right to their tenants and also require ISPs to enforce these contractual terms. If a consumer files a complaint with the Commission that, for instance, an MDU is not allowing the resident to opt out of a bulk deal, the Commission would have no direct authority to require the MDU to take any action, nor would it have any authority to levy any sort of penalty on the MDU. There is also a question of whether the Commission would even have any authority to require the MDU to provide it with information or access that would allow it to determine whether a violation of the contract had occurred. Rather, the Commission’s only recourse would be to attempt to require the bulk provider to take legal action against the MDU to enforce the contract. This could necessitate an adjudication between the two parties. At bottom, controlling the behavior of MDUs that are, for instance, reluctant to offer their residents the option to opt-out would be an indirect, protracted, legally uncertain, and practically challenging undertaking.

Second, even assuming providers could enforce some aspects of opt-out compliance, such as when an MDU denies a resident the right to opt out, complex issues would persist. Most notably, if a resident who has opted out of a bulk billing arrangement files a consumer complaint with the Commission about an inadequate refund, determining whether the property owner, HOA, or COA issued the correct amount would be a complex endeavor.¹⁶ Indeed, calculating the precise refund amount owed would necessitate

¹⁵ See, e.g., *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715 (8th Cir. 2018) (holding that VoIP services cannot lawfully be subject to telecommunications-service regulation).

¹⁶ Calculating the amount owed to residents opting out of bulk service is complex. Considerations may include: (i) accounting for initial lump sum payments made by ISPs to MDUs at the time of the contract’s signing; (ii) determining if and how residents should contribute to MDU infrastructure costs covered by the MDU; and (iii) addressing scenarios where the per-subscriber fee increases for remaining bulk subscribers when someone opts out.

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intricate cost-based rate regulation calculations, something the Commission generally lacks authority to undertake and wisely prefers to avoid whenever possible.¹⁷

Conclusion

AELP claims that its opt-out proposal represents an “appropriate middle ground,” yet it offers no supporting evidence or benefit-cost analysis. Moreover, AELP neglects to acknowledge, let alone address, the legal and administrative challenges inherent in regulating bulk billing arrangements. In contrast, we have demonstrated the substantial benefits of bulk billing arrangements for MDU residents and the significant harm an opt-out requirement would cause. An opt-out proposal is far from a middle ground. We respectfully request that the Commission withdraw its proposed NPRM.

This letter is being filed electronically pursuant to Section 1.1206 of the Commission’s rules.¹⁸

Sincerely,

The Bulk Broadband Alliance, including:

- o ACA Connects
- o Community Association Institute
- o EducationSuperHighway
- o National Apartment Association
- o National Multifamily Housing Council

and other member organizations

¹⁷ The Commission has limited authority to regulate cable service rates, has refrained from overseeing many telecommunications service rates, and in the *2024 Open Internet Order*, decided not to regulate broadband rates.

¹⁸ 47 C.F.R. § 1.1206.

Appendix

The foregoing letter rebuts AELP’s core allegations by surveying the significant economic benefits of bulk billing arrangements, the harms that would accompany an opt-out requirement, and the considerable legal and administrative obstacles to bulk billing regulation. AELP, however, makes numerous other claims about the ways in which bulk billing supposedly harms consumers and why immediate Commission action is purportedly warranted. This Appendix responds to those additional assertions. In particular, it explains why AELP’s charges are devoid of evidence and, in some cases, contradict fundamental economic principles.

AELP Allegation:

There is a considerable record of individual consumers complaining about bulk billing practices in the Improving Competitive Broadband Access to Multi-Tenant Environments (GN Docket No. 17-142) proceeding.

Response:

AELP’s claim of a “considerable record” of consumers complaining about bulk billing practices in the *Improving Competitive Broadband Access to Multi-Tenant Environments* (GN Docket No. 17-142) proceeding is not only unsupported but also misleading. While even a single complaint from a consumer should be taken seriously, as it reflects a genuine concern, the actual number of complaints is quite low. Upon reviewing all individual comments filed since the Commission’s 2017 Notice of Inquiry seeking comment on bulk billing arrangements and other MDU matters, we identified only 24 complaints.¹⁹ To put this number in perspective, there are currently about 5.4 million households receiving bulk billing services, and since 2017, the number of unique households who have received these services—both past and present—is likely much higher. AELP’s attempt to frame 24 complaints as a “considerable” record is troubling and raises serious questions about the reliability of AELP’s broader arguments and its commitment to presenting an accurate picture. Indeed, given the millions of individuals served by bulk arrangements since 2017, the fact that there have been only 24 complaints simply confirms the

¹⁹ These complaints comprise all identified public filings (standard or express) from individual consumers since June 1, 2017, when the Commission opened Docket 17-142, which is a little more than three weeks before the Commission adopted its 2017 Notice of Inquiry seeking comment on bulk billing arrangements for the second time. It includes filings where concerns about bulk billing arrangements were raised in Docket No. 17-142, whether or not the term “bulk billing” was used. It also includes filings from other dockets since June 1, 2017, where concerns about bulk billing arrangements were raised using the term “bulk billing.” Filings that raised concerns about limited provider choice, exclusive access agreements, or other provider-MDU/MTE arrangements (e.g., revenue sharing agreements) but did not mention that residents were obligated to purchase services were omitted. Filings from groups claiming to represent consumers were not counted. Filers who submitted more than one filing were counted each time.

overwhelming consumer benefits of bulk billing arrangements. As a coalition of 51 bipartisan mayors from across the country recently explained, the “clear benefits” of bulk billing for “consumers and the competitive marketplace” counsel strongly against “any FCC action to ban, limit, or otherwise regulate bulk billing arrangements.”²⁰

AELP Allegation:

Landlords have a similar incentive to retain savings from bulk billing arrangements as they do with exclusive deals, which led to the Commission banning exclusive agreements in MDUs. Given this, there is no reason to reach a different conclusion regarding bulk billing, as these arrangements also undermine competition and consumer choice.

Response:

The Commission recognizes key distinctions between exclusive deals and bulk billing arrangements. AELP’s argument that they both similarly undermine competition and consumer choice is flawed.

In 2000, the Commission found that “building owners have both the ability and incentive to extract excessive profits from the provision of telecommunications services by unreasonably restricting competitive LECs’ access to their buildings,”²¹ and thus prohibited telecommunications providers from entering into exclusive access agreements. In 2007, the Commission reaffirmed this conclusion when it imposed the same prohibition on cable operators.²²

Despite these prohibitions on exclusive access agreements, when the Commission first addressed bulk billing arrangements in 2010, it concluded that such arrangements, on balance, benefit consumers. The Commission determined that these arrangements should not be prohibited or further restricted. The Commission summarized its conclusion as follows:

“The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband.

²⁰ Letter from 51 Bipartisan Mayors to Jessica Rosenworcel, Chairwoman, Federal Communications Commission, WC Docket No. 17-142 (Aug. 30, 2024) (“Bipartisan Mayors Letter”).

²¹ *Promotion of Competitive Networks in Local Telecommunications Markets et al.*, WT Docket No. 99-217 *et al.*, First Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd. 22983, para. 23 (2000).

²² *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20235 (2007).

Based on the evidence of all of the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.”²³

In its 2017 Notice of Inquiry, the Commission sought further comments on the effects of bulk billing arrangements, specifically requesting comment on its 2010 decision not to prohibit or restrict MVPDs’ bulk billing arrangements. Despite that inquiry, and despite subsequently adopting new rules addressing other MDU issues, the Commission has taken no further action to regulate bulk billing arrangements.

The Commission has plainly determined that bulk deals should be treated differently than exclusive deals—presumably because, as the Commission explained in its 2010 Order, bulk deals “predominantly benefit consumers through reduced rates.” That finding remains—as 11 bipartisan members of Congress put it—“well-founded.”²⁴ In contrast, exclusive deals offer no such advantage, as they permit providers to charge any rate they choose. A bulk arrangement guarantees that the ISP provides services at a negotiated price. While the consumer benefits of exclusive deals without such pricing assurances are unclear, it is evident why bulk deals, with their negotiated prices, terms, and conditions of service, can be advantageous for residents. It makes perfect sense to prohibit practices that lack clear consumer benefits while permitting those that clearly provide such benefits.

AELP Allegation:

Bulk billing arrangements can prevent low-income consumers from taking advantage of government programs that provide subsidies to low-income consumers to purchase internet service, such as the Lifeline program or a potentially revived Affordable Connectivity Program (“ACP”). In addition, they also prevent low-income consumers from taking advantage of various low-income plans that ISPs themselves offer (without any direct government subsidy) to qualifying low-income consumers.

Response:

We will separately consider the cases of the Lifeline Program, the ACP if it were revived (or some other entirely new subsidy program created to replace it), and low-income plans directly offered by ISPs. As we will explain, none of these examples supports AELP’s contention that bulk billing arrangements

²³ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd. 2460, para. 2 (2010) (“MDU Second Report and Order”).

²⁴ Letter from Rep. Darren Soto, Member of Congress, *et al.* to Jessica Rosenworcel, Chairwoman, Federal Communications Commission (April 3, 2024), available at <https://docs.fcc.gov/public/attachments/DOC-402352A1.pdf>; *see also* Letter from Rep. Sheila Cherfilus-McCormick, Member of Congress, to Jessica Rosenworcel, Chairwoman, Federal Communications Commission (May 20, 2024), available at <https://docs.fcc.gov/public/attachments/DOC-403567A1.pdf>.

are harmful to low-income consumers. We will begin, however, by making three general points.

First, programs conditioning qualification on individuals demonstrating that their income is below a certain level tend to reach a relatively small-to-modest share of the eligible population. Many people never become aware of these programs; others are unable to produce documents verifying their income; others find the sign-up process too burdensome or challenging; and others are simply unwilling to submit the relevant documents. Many of these difficulties are also exacerbated due to language and educational barriers. A significant share of the population these programs are intended to reach is composed precisely of people who find it especially difficult to navigate the system successfully in order to obtain the relevant benefits. For example, EducationSuperHighway reports that participation rates for the Lifeline program and the Emergency Broadband Benefit (“EBB”) program (when it was available) were only between 17% and 25%.²⁵ The Institute for Local Self-Reliance reports that 44% of eligible households were enrolled in the ACP at its end.²⁶ And the Pew Charitable Trust reports the following:

Findings from a 2021 survey of households with annual incomes of \$50,000 or less . . . show[] that most respondents were unaware of the free and discounted plans available to them. Further, many survey respondents who were aware of the discount program and its benefits said the program was difficult to use and reported struggling with the sign-up process or being unable to prove their eligibility.²⁷

In contrast, bulk plans automatically provide immediate affordable access to internet service to 100% of the residents of an MDU that has bulk service, without requiring residents to submit any documentation or to have any awareness or knowledge of whether low-income plans are available to them.

²⁵ See EducationSuperHighway, “Bridging the Broadband Affordability Gap: A Historic Opportunity to Close Two-Thirds of the Digital Divide,” page 13, available at https://www.educationsuperhighway.org/wp-content/uploads/No-Home-Left-Offline-Report_EducationSuperHighway2021.pdf. (“EducationSuperHighway Broadband Affordability Gap Report”). Similarly, an affordable housing leader has explained how the ACP’s “time-consuming application process” rendered the program “hard to scale” in affordable housing communities and how bulk billing arrangements can yield critical savings for residents in affordable housing. See Michelle Norris, “Bulk Billing and Access to Broadband Critical to Improving Access to Health Care,” *Affordable Housing Finance* (Aug. 7, 2024) available at https://www.housingfinance.com/policy-legislation/bulk-billing-and-access-to-broadband-critical-to-improving-access-to-health-care_o.

²⁶ See Institute for Local Self-Reliance, ACP Dashboard (last checked October 25, 2024), <https://acpdashboard.com>. The data is current as of April 2024, which was the last month the program provided eligible households with a full month’s discount.

²⁷ See Pew Charitable Trust, “Broadband Challenges and Opportunities in Affordable Rental Housing,” (Apr. 3, 2023) available at <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2023/04/broadband-challenges-and-opportunities-in-affordable-rental-housing> (“Pew Broadband Access Issue Brief”).

Second, and relatedly, low-income programs have thresholds for which financially constrained families may not qualify simply because their income slightly exceeds the threshold. Bulk billing also helps these individuals in ways that tightly limited low-income programs cannot.

Third, bulk billing reduces internet prices for low-income households not because government is providing subsidies funded by tax dollars or ratepayers, but simply because government is allowing markets to operate efficiently. ISPs' per-unit costs of providing service are lower under bulk arrangements, and the competition among providers to win bulk deals results in most of these cost savings being passed on to the buyers of bulk services. No government subsidy of any sort is required to fund the provision of lower-priced bulk services to low-income households. By simply allowing these market arrangements to operate as is—without government regulation—these consumer benefits are ensured. Limited government resources could then be focused on providing additional assistance more effectively to low-income households who need it most, including those not currently in bulk deals and those who could benefit from even lower-priced bulk services.

We will now separately consider each of the three examples mentioned by AELP.

First, consider the Lifeline Program. Under the Lifeline Program, qualifying individuals can receive a subsidy of up to \$9.25 per month to subsidize their purchase of telephone, internet, or bundled services.²⁸ The key point here (which AELP neglects to mention) is that any given household is eligible to receive only one such subsidy, and that the subsidy can be applied to mobile voice and data service. The vast majority of households receiving Lifeline subsidies apply it to their mobile service.²⁹ Furthermore, even if a household was purchasing retail wireline internet service and applying the subsidy to that purchase, the household could still obtain the subsidy even if the MDU switched to a bulk service as long as someone in the household subscribed to mobile data and voice service.

Now, let's consider the now-defunct ACP (or a potential replacement program). The ACP provided qualifying individuals with a subsidy of up to \$30 per month for internet service. Unfortunately, under the applicable rules, low-income households in MDUs that offered bulk service were often unable to apply the subsidy to their bulk service.³⁰ But that reality says little about whether bulk billing arrangements should be regulated. As an initial matter, ACP support has been terminated. And even if the program were renewed, its rules can and should be designed to ensure that residents of MDUs with

²⁸ Consumers living on Tribal lands are eligible for an enhanced discount of up to \$34.25 per month.

²⁹ See EducationSuperHighway Broadband Affordability Gap Report at 13; Pew Broadband Access Issue Brief.

³⁰ The Commission's 2022 ACP Order aimed to include MDU residents receiving broadband service under bulk billing arrangements in the ACP. It sought to address the challenges arising from the direct contractual relationship between MDUs and ISPs. However, administrative hurdles persisted. Despite being informed of these issues multiple times, the Commission chose not to resolve them before the program ended.

bulk billing arrangements can apply the subsidy to their bulk-provided broadband service. The ACP’s shortcomings simply highlight the importance of government designing future subsidy programs that are inclusive and accessible to all. They do not suggest that bulk billing arrangements are somehow harmful to consumers.

Finally, consider the case of low-income plans offered by the ISPs themselves without any government funding. AELP asserts that low-income residents of MDUs that purchase bulk service are denied the opportunity to opt out of this bulk service and instead directly purchase retail service under a low-income plan offered by any ISP that is able to provide retail service in the MDU. In our view, this “denied opportunity” is of limited significance. Not all ISPs offer such plans, and those that do may curtail or modify them at any time. When ISPs do offer low-income plans, they are only available in MDUs where the ISP has actually invested in facilities necessary to provide internet service. Indeed, a chronic problem for many MDUs serving primarily low-income residents is that no ISPs are willing to invest in the within-building infrastructure necessary to offer high-speed internet service. MDUs serving primarily low-income residents often opt for bulk service simply because this is the only way they can induce any ISP to invest in new infrastructure. In addition, our own informal survey of these plans indicates that monthly rates varied between \$10 and \$30, but only the \$30 plans offered service that met the Commission’s own minimum speed standard for broadband of 100/20 Mbps, and none offered higher speeds.³¹ Thus, even when these plans are available, they offer very low speeds—often speeds that do not even meet the Commission’s own standard for adequate minimum speed. In contrast, bulk service typically provides 1 Gbps speed. And it bears noting that the prices ISPs charge for bulk service are actually comparable to, and sometimes even lower than, the prices they charge for their low-income plans.³²

Furthermore, many MDUs housing primarily low-income residents with severe budget constraints use bulk deals to procure “Wi-Fi only” bulk service. In this scenario, each unit lacks a dedicated wired connection, but Wi-Fi is accessible throughout the building, including within each individual unit. It is reported that the typical price that ISPs charge for this service is \$15.³³ While high-speed wireline service is generally preferred in a bulk deal, Wi-Fi only service generally offers speeds that are at least as fast as the speeds offered under low-income plans,³⁴ as well as better service and reliability guarantees than retail

³¹ Our informal survey, conducted in August 2024, examined the retail prices and service performance of nine low-cost internet plans available from six large wireline providers (Xfinity, Spectrum, Optimum, AT&T, Verizon Fios, and Cox), with some providers offering multiple low-income plan options.

³² The average price that ISPs charge MDUs for bulk service is about \$35.

³³ See EducationSuperHighway, “Apartment Wi-Fi: Closing the Digital Divide in Apartment Housing,” page 12, available at <https://www.educationsuperhighway.org/wp-content/uploads/FCC-Bulk-Billing-Meeting.pdf>.

³⁴ Bulk Wi-Fi only service typically offers speeds that meet or exceed the FCC’s 100/20 Mbps definition of broadband, and in many cases residents of MDUs with this service have access to speeds up to 1 Gbps.

wireline service. Thus, bulk deals for Wi-Fi only service offer internet service that is actually cheaper than the lowest-priced 100 Mbps plans ISPs offer under low-income plans and is comparable in price to the cheapest low-income plans that ISPs offer, regardless of any speed. Moreover, given that MDUs where most residents are low-income often have sub-par wireline service available for retail purchase, it is therefore entirely possible that many low-income residents in MDUs that procure Wi-Fi only bulk service are at least as well off, if not better, than if they had to purchase internet service at retail under a low-income plan.

More generally, we believe that it is disingenuous for AELP to argue that bulk deals resulting in significant price reductions for internet service are, on balance, harmful to low-income individuals. It is well understood that affordability is a major barrier to internet adoption and a key contributor to the digital divide.³⁵ And it is clear—including from the abundant record in this proceeding—that the ability of bulk arrangements to provide significantly lower prices is *beneficial* to low-income consumers, who are least able to afford high prices.³⁶

AELP Allegation:

Public housing authorities (PHAs) that enter into bulk deals to provide internet service to residents also deny their residents the opportunity to take advantage of other government subsidy programs or low-income plans offered by ISPs.

³⁵ See, e.g., EducationSuperHighway Broadband Affordability Gap Report at 13 (reporting that 64% of unconnected households are offline because they can't afford to connect to an available internet connection); see also Pew Broadband Access Issue Brief.

³⁶ To that end, the record in this proceeding contains testimonial after testimonial from groups and individuals across the political spectrum regarding the overwhelming benefits of bulk billing for low-income individuals. See, e.g., Bipartisan Mayors Letter (explaining that bulk billing arrangements “are beneficial for all consumers, but especially for vulnerable populations such as seniors on fixed incomes, low-income individuals, and students, who often lack access to reliable high-speed services, and face affordability barriers”); Letter from California Emerging Technology Fund to Jessica Rosenworcel, Chairwoman, Federal Communications Commission, WC Docket No. 17-142 (July 15, 2024) (explaining that “low-income communities and digitally-disadvantaged neighborhoods,” along with “senior communities and workforce housing developments that have existing bulk pricing contracts” which “mak[e] Internet service more economical,” would be negatively impacted by Commission regulation); Letter from Rex Richardson, Mayor of Long Beach, California, to Jessica Rosenworcel, Chairwoman, Federal Communications Commission, WC Docket No. 17-142 (Aug. 2, 2024) (explaining that the “pro-consumer benefits of bulk billing” are “particularly impactful for low-income and other vulnerable communities, as they lower or eliminate adoption barriers that prevent these groups from digitally connecting with their families, neighbors, and vital service providers”).

Response:

Public housing is highly subsidized and PHAs that enter into bulk deals frequently offer their residents this service at no extra charge. It is hard for us to understand how AELP can conclude that providing residents of public housing with free internet service is denying them any opportunities. Consumers are not disadvantaged by getting a free service subsidized by the PHA, and it does not prevent them from purchasing other services if they are available, including through a government support program. Indeed, rather than disadvantaging low-income households, as the Council of Large Public Housing Authorities (“CLPHA”) has noted, “Public housing authorities are crucial to narrowing the digital divide since they house and serve the lowest-income households in our country. Because of bulk billing arrangements, CLPHA members can subsidize the cost of internet or offer affordable rates to residents living in public housing units.”³⁷

AELP Allegation:

Landlords that procure Wi-Fi only bulk service may leave residents of some units with inadequate service since signal strength can vary within the property. Residents of MDUs that purchase Wi-Fi only bulk service should therefore be allowed the option to opt out in case the service to their particular unit is inadequate.

Response:

AELP has not provided evidence that inadequate service within individual units of MDUs that purchase Wi-Fi only bulk service is a significant or pervasive issue. Moreover, bulk billing arrangements typically include guarantees that landlords can enforce to ensure quality and reliability. This includes the right to terminate the contract if service standards are not met. Finally, if a tenant is required to pay for Wi-Fi only bulk service as part of her lease but does not receive it, the tenant has legal recourse. The tenant can pursue remedies under the lease agreement, file a lawsuit against the landlord for breach of contract, or lodge a complaint with relevant consumer protection or housing regulatory agencies for deceptive practices. Throughout this process, tenant rights groups can provide, often at no cost, invaluable support, advice, and representation.

AELP Allegation:

Landlords may not pass along to tenants the savings from bulk deals because they have no obligation to disclose any additional internet/video fees until the final stages of the rental process. This

³⁷ Letter from Sunia Zaterman, Executive Director, Council of Large Public Housing Authorities to Marlene H. Dortch, Secretary, Federal Communications Commission, GN Docket No. 17-142 (May 1, 2024)

lack of upfront transparency hinders tenants' ability to make informed decisions, thereby reducing pressure on landlords to offer more competitive pricing.

Response:

AELP's allegation is not only unsupported by any evidence, but also overlooks an increasingly common practice in the rental industry. Renters know that landlords generally charge mandatory fees for various amenities in addition to internet/video service, such as for swimming pools, fitness centers, and included utility services. Given these widespread practices, it seems unlikely that a substantial number of potential renters are unaware of these fees and fail to consider them when making rental decisions. Moreover, rather than hide the fact that a rental package includes internet service, MDUs frequently *promote* that fact in advertisements or listings designed to attract prospective tenants.

AELP's argument attempts to label bulk deal fees as junk fees, suggesting that these charges are hidden or deceptive and that landlords unfairly retain savings from bulk arrangements, rather than sharing them with renters. However, as previously explained, this perspective is flawed. It's also not widely held, as 51 bipartisan Mayors who, independent of the AELP letter, expressed their disagreement with such a junk fee comparison, informing the Commission that the low fees residents pay for broadband services under bulk billing arrangements are not junk fees and should not be conflated with them.³⁸

Nonetheless, the issue of fee transparency extends far beyond internet and video amenity fees in lease arrangements. It represents a broader consumer protection concern regarding how companies across industries disclose customer fees. Agencies with comprehensive authority to oversee consumer protection matters and direct authority over entities charging such fees—like the Federal Trade Commission and state/local consumer protection authorities—are best equipped to address these issues through enforcement actions or rulemaking. This approach is preferable to a piecemeal strategy handled by an agency with a narrow focus and lacking direct authority over the entities charging these fees, such as the Commission. In bulk billing, the customer billing entities are MDUs, not service providers. Furthermore, as previously discussed, imposing an opt-out regime to address an alleged transparency issue would lead to unintended consequences, such as increased prices for consumers. This underscores the importance of relying on agencies with comprehensive authority to oversee consumer protection matters in order to address fee issues effectively.

AELP Allegation:

HOAs and COAs in resident-owned MDUs cannot be trusted to make decisions about bulk arrangements that fairly represent the views of their residents. In addition, HOA/COAs likely do not have the expertise to make good decisions regarding bulk arrangements. They should therefore be prohibited from agreeing to bulk deals without an opt out option.

³⁸ Bipartisan Mayors Letter at 1.

Response:

The assertion of AELP that HOAs and COAs cannot be trusted to make decisions regarding bulk internet and video service on behalf of their residents is outlandish. HOAs and COAs are generally entrusted to make almost all decisions regarding the MDU on behalf of residents. AELP offers no explanation or argument as to why regulatory oversight is required over this particular decision, but not over any other decision made by HOAs and COAs.³⁹ HOAs and COAs are long-established governance structures authorized to make choices regarding the operations and finances of the MDU on behalf of residents. And HOAs and COAs are already subject to legal requirements concerning their operations and the obligations they owe residents.

AELP's assertion that COA/HOAs do not have the expertise to make decisions over bulk billing arrangements is also uninformed. HOAs and COAs generally hire expert consultants to help them choose the best bulk provider from a number of competing providers. This sort of specialized expert advice would not be available to most individuals making an individual retail decision. Thus, in general, HOAs and COAs may make better-informed decisions regarding the choice of an ISP than do individuals. Furthermore, as discussed, HOAs and COAs are generally authorized to make almost all decisions regarding the MDU on behalf of residents. AELP does not explain why HOAs and COAs supposedly lack the expertise to make decisions regarding bulk billing arrangements, but somehow possess the expertise to make all other decisions residents entrust them to make.

³⁹ Public Knowledge claims that "HOAs Are Not Equipped To Serve as Consumer Representatives," based on a 2023 Rocket Mortgage survey. *See* Nat Purser and Jessica Sneesby, "How the FCC Can Lower Broadband Costs and Increase Consumer Choice for Apartment Residents," Public Knowledge (Aug. 5, 2024) available at <https://publicknowledge.org/how-the-fcc-can-lower-broadband-costs-bulk-billing/>. That same survey, however, found that only 25% of HOA residents were unlikely to buy in an HOA neighborhood again, only 10% of homeowners are considering selling their home because of the HOA, and only 20% found HOA dues to be unreasonable. The survey concluded, "HOAs are still largely viewed as worth their price. Homeowners appreciate the community Wi-Fi, outdoor recreation spaces and more often provided by these associations. Nearly 70% of homeowners consider their HOA dues reasonable given the benefits they receive." *See* Jessica Edmondson, "57% of HOA Residents Don't Like Having An HOA," Rocket Mortgage (Mar. 4, 2024) available at <https://www.rocketmortgage.com/learn/assessing-the-association>. Public Knowledge's claim is even more perplexing because about 25% of the U.S. population live in HOA communities, that percentage is increasing, and the number of HOAs is increasing. *See* "HOA Statistics," iPropertyManagement (last updated Aug. 8, 2024) available at <https://ipropertymanagement.com/research/hoa-statistics>.

AELP Allegation:

In any MDU with a bulk arrangement it is possible that there might be some residents of the MDU who feel that the level of service being provided is either too high or too low and it is possible that some of these individuals might be better off if they were allowed to opt out.

Response:

It is possible, and even likely, that under the Commission’s current policy not to ban or regulate bulk billing arrangements, some residents in MDUs with bulk arrangements may feel that the level of service provided does not perfectly match their preferences. For instance, if a bulk plan offers very high speeds or includes video, a few residents might prefer a cheaper plan with slower speeds or no video. Similarly, though even less common, in cases where a bulk plan offers lower speeds or excludes video, a small number of residents might prefer a more expensive plan with higher speeds or video.⁴⁰ However, the criterion that a government policy or rule should be overturned simply because a few individuals may not be satisfied is an unrealistic and unsustainable standard for governance. No policy can meet the impossible standard of satisfying every individual without exception.

While a few residents may feel that bulk billing does not meet their specific needs, it’s important to recognize that, as we’ve detailed above, the vast majority of consumers covered by bulk deals benefit from them. Indeed, resident-owned MDUs only adopt bulk arrangements if their elected HOA/COA determines that such arrangements are in the best interests of the residents. Similarly, it doesn’t surprise us that a subset of apartment owners find that bulk arrangements allow them to offer the most attractive combination of amenities and rental prices to consumers by securing low-cost internet service and passing the savings on to residents.

Moreover, a wide selection of housing choices is still available for those who prefer not to live at a property where internet and/or video services are included. Bulk billing arrangements are primarily found in larger MDUs (those with 50 or more units), which comprise only about 30% of the nation’s housing stock—around 43.7 million units. Within this subset, only about 13% of housing units have bulk billing arrangements.

The Commission itself recognized that there were a handful of individuals who were negatively impacted by bulk deals when it last fully reviewed them in 2010, observing that “[t]he incidents of consumers being subjected either to prices that they believed were not discounted or to inferior service under certain bulk billing deals are troublesome. Based on a review of the record, however, they appear

⁴⁰ For example, the AELP refers to the problem of “tenants trapped with high-cost or less-capable internet that does not meet their needs.” In footnote 2 of their letter, they provide a specific example of a resident in an MDU complaining about being required to pay for bulk service that includes video.

to be few, isolated, and atypical of bulk billing as a whole.”⁴¹ It nonetheless decided that the public interest was best served by not prohibiting or further restricting bulk billing arrangements. It summarized the rationale for its decision by stating that “it would be a disservice to the public interest if, in order to benefit a few residents, we prohibited bulk billing, because so doing would result in higher MVPD service charges for the vast majority of MDU residents who are content with such arrangements.”⁴²

AELP Allegation:

The best way to determine the effects of bulk billing, whether providers need 100% sign-up, and if allowing opt-out benefits the public, is to proceed with the item and gather public input.

Response:

We support fact-gathering when substantial evidence indicates that a particular activity could cause significant, long-lasting harm or a change in the market materially affects an existing regulation. However, bulk billing arrangements do not meet these thresholds. The record in this proceeding, which has grown significantly since the Chairwoman’s March 5 press release, only reinforces the Commission’s 2010 conclusions regarding the bulk billing marketplace, its benefits to consumers, and the potential harms of regulation. The record in the 2017 Notice of Inquiry validates these conclusions, which are further bolstered by the heightened competition that has emerged since that time among providers serving MDUs with bulk deals.

Initiating a review solely to assess whether past policies have kept pace with technological advancements and market trends comes at a real cost—namely, triggering unnecessary, disruptive instability, and volatility in the market. A pending rulemaking, or even inquiry, could interfere with the formation of highly beneficial bulk billing arrangements, thereby disrupting efforts to provide lower-cost or free services to vulnerable communities. Moreover, the possibility of paying higher fees could create financial anxiety for broadband consumers in bulk billing arrangements, especially those on fixed incomes.

⁴¹ MDU Second Report and Order, para. 27.

⁴² *Id.*, para. 28.