

November 29, 2023

The Honorable Bob Latta
Chairman
Subcommittee on Communications & Technology
House Committee on Energy and Commerce
2322 Rayburn House Office Building,
Washington, DC 20515

The Honorable Doris Matsui
Ranking Member
Subcommittee on Communications & Technology
House Committee on Energy and Commerce
2311 Rayburn House Office Building,
Washington, DC 20515

Dear Chairman Latta and Ranking Member Matsui:

The National Multifamily Housing Council (NMHC)¹ and the National Apartment Association (NAA)² welcome the House Energy and Commerce Subcommittee on Communications and Technology's hearing on the recent actions by the Federal Communications Commission (FCC) related to the regulation of broadband services. We write to highlight the FCC's recent order regarding "equal access" to broadband services and its overreach in asserting jurisdiction over property owners and operators.

The FCC recently released a final rule on digital discrimination to implement section 60506 of the Infrastructure Investment and Jobs Act (IIJA), which establishes national policy that broadband "subscribers should benefit from equal access to broadband internet access within the service area" of a broadband provider. Although NMHC and NAA supports the overall goals of Section 60506, we believe that FCC has overreached in its definition of 'covered entities.'

In the guise of implementing this section, the FCC deems property owners "covered entities" and therefore subject to the full range of FCC enforcement actions. The FCC's wholesale expansion of

¹ Based in Washington, D.C., NMHC 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.

² The NAA 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 and local affiliates, NAA encompasses over 93,000 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

authority over entire industries that previously had never been subject to its jurisdiction is both unlawful and, particular as to building owners, unnecessary.

NMHC and NAA Members Work Tirelessly to Provide Access to Broadband Services

Owners and operators of apartment properties are keenly aware of and sensitive to the needs and expectations of their residents. Robust broadband service is at the top of the list. Indeed, in many rental properties, the quality, reliability, speed and pricing of broadband service is often better than in nearby single-family areas. Yet, despite this success, NMHC and NAA have repeatedly pointed out where problems do exist in the multifamily broadband market, is in smaller, lower-income multifamily communities, where broadband providers have made the economic decision not to upgrade or serve a community because of its lack of profitability. NMHC and NAA have also long-called for greater public investment in the building out and upgrading of broadband infrastructure in order to improve broadband access and adoption in these communities, which is why we have been so supportive of ensuring the success of the historic Broadband Equity, Access, and Deployment Program (BEAD). As part of BEAD, Congress rightly deemed low-income multifamily properties eligible recipients of the funding and thereby acknowledged that these properties need public support to incent providers to deploy or upgrade infrastructure.

Another key area of concern, particularly in low-income multifamily communities, is broadband affordability. NMHC and NAA are thus strong proponents of the Affordable Connectivity Program (ACP) given that affordability of service is a significant barrier to adoption for many low-income renters.

The FCC Order's Coverage Is Unlawfully Broad

The Commission's digital discrimination order applies not only to broadband providers, but to any entity that "provide[s], facilitate[s], and affect[s] consumer access to broadband internet service," including building owners. As noted in the dissenting statement of Commissioner Carr, the order "sweeps entire industries within the FCC's jurisdiction for the first time in the agency's 90-year history . . . Landlords are now covered, construction crews are now covered, unions are now covered, marketing agencies are now covered, banks are now covered, the government itself is now covered – all newly subject to these FCC rules and liable under them for both acts and omissions." Commissioner Carr correctly observes that "Congress never authorized the FCC to regulate all of these industries."

That observation is particularly apt for owners and operators of multifamily properties. Section 60506 never refers to any type of entity to be regulated other than a broadband provider, and the statute's definition of "equal access" describes the relationship between a broadband provider and its subscriber. The statute further defines equal access to mean comparability of broadband service between different geographic areas, not within or between different buildings.³ Moreover, Congress would not have used the word "access" to mean "physical access to real property"

³ Section 60506(a)(2) defines equal access as "the equal opportunity to subscribe to an offered [broadband] service that provides comparable speeds, capacities, latency, and other quality of service metrics *in a given area*, for comparable terms and conditions."

without using much clearer language, because such a directive could result in *per se* physical takings of property, in violation of the Takings Clause of the Fifth Amendment. Commissioner Carr's dissent notes that the FCC could require broadband providers to "build out Internet infrastructure without any compensation." Commissioner Carr is correct in his dissent.

The FCC's Order Fails to Provide Fair Notice and Is Unconstitutionally Vague

Regulators must draft their rules and orders to give entities fair notice of what is required of them. The order fails this cardinal rule. The definition of covered entities is virtually boundless and fails to provide companies with fair notice that they may be subject to the Commission's regulations. Nor does the order offer any guidance for multifamily owners that will help them avoid liability as they partner with broadband providers or take other steps regarding broadband service in their properties. The statute requires equal access to broadband, but only if technically and economically feasible. But the Order provides no guidance on how those critical factors would be assessed for property owners.

Conclusion

On behalf of the multifamily industry and the nearly 40 million Americans we serve, we appreciate the Subcommittee's efforts to explore issues surrounding regulatory overreach by the FCC in its digital discrimination rulemaking. NMHC and NAA stand ready to assist Congress, the FCC and all policymakers in advancing policies that support robust connectivity at all multifamily properties.

Thank you for your attention to these concerns.

Sincerely,



Sharon Wilson Géo
President
National Multifamily Housing Council



Robert Pinnegar
President & CEO
National Apartment Association