

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

In the Matter of:)	
)	
)	
2018 Biennial Review of)	WC Docket No. 18-378
Telecommunications Regulations)	
)	

COMMENTS OF COMMUNITY ASSOCIATIONS INSTITUTE

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on behalf of

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Summary

Community Associations Institute recommends the Wireline Bureau not seek additional rules or policies concerning exclusive marketing, bulk billing, revenue sharing, and exclusive wiring agreements concerning broadband Internet access service (BIAS) or other lawful agreements between a multiple dwelling unit buildings (MDU) and multichannel video programming distributors (MVPD).

Community Associations Institute recommends the Wireline Bureau take no action to limit or otherwise chill a community association's opportunity to engage in meaningful negotiations with entities subject to the Commission's jurisdiction concerning access to rights of way that cross community association common elements.

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Community Associations Institute¹ submits these comments in response to the Federal Communications Commission’s (FCC or Commission) request for comments pursuant to the statutory biennial review of certain Commission regulations. These comments are in reply to the request of the Wireline Bureau in the above referenced docket.²

I. Background on Community Associations

Community associations are commonly known as condominium associations, homeowner associations, and housing cooperatives. Generally organized as private non-profit organizations, community associations operate pursuant to various state statutes and certain conventional real estate practices. Housing units and lots in the community are subject to a declaration of covenants (covenants, conditions, and restrictions or CC&Rs), that are enforced by

¹ Based in Falls Church, VA, CAI is the only national organization dedicated to fostering competent, well-governed community associations (homeowner associations, condominium associations, and housing cooperatives) that are home to approximately one in every five American households. For more than 40 years, CAI has been the leader in providing education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI’s more than 40,000 members include community association volunteer leaders, professional managers, community management firms and other professionals and companies that provide products and services to associations.

² *2018 Biennial Review of Telecommunications Regulations*, DA 18-1260 (rel. Dec. 17, 2018)

a Board of Directors (Trustees or Managers in some states) comprised of homeowner volunteers elected by owners in the community.

In purchasing a lot or unit in a community association, owners agree to be bound by the association's CC&Rs and bylaws. Community associations are by law required to disclose association covenants to consumers purchasing a home, unit, or lot prior to the consumer closing on a purchase contract.³ Consumers understand community association covenants are legally binding contractual obligations that govern the use of land and establish rights and responsibilities of the association and property owners.⁴ According to national research, 90 percent of community association homeowners assert that association covenants protect and improve the value of their homes, often a household's largest asset.⁵

The value of housing units in community associations is estimated at \$5.88 trillion. In 2017, association homeowners paid \$90 billion in association assessments to fund maintenance and operation of community infrastructure. To further support community infrastructure and services, homeowners have set aside \$25 billion in reserves for the repair, replacement, and enhancement of association assets such as roofs, streets, and elevators as well as to ensure community compliance with state and federal land use and environmental requirements.⁶

³ See [Uniform Common Interest Ownership Act \(2008\)](#) Section 4-103. Public Offering Statement; General Provision.; Section 4-108. Purchaser's Right To Cancel.; Section 4-109. Resales of Units. Twelve states have adopted a version of the Uniform Common Interest Ownership Act while most states have adopted statutes based on the Uniform Act.

⁴ See, e.g., *Mathis v. Mathis* (1948), 402 Ill. 66, holding in a conveyance of a real estate interest containing a covenant, "the covenant runs with the land and is binding upon subsequent owners." See additionally, *Rosteck v. Old Willow Falls Condominium Assn.*, 899 F.2d 694, "But the condominium declaration is a contract..."

⁵ *2018 Homeowner Satisfaction Survey*, Zogby Analytics for the Foundation for Community Association Research (June 2018). Available at https://foundation.caionline.org/wp-content/uploads/2018/06/HOMEsweetHOA_2018.pdf

⁶ Foundation for Community Association Research: Statistical Review for 2017 (Summary). Available at <https://foundation.caionline.org/wp-content/uploads/2018/06/2017StatsReview.pdf>

II. Contract Restrictions Affecting MDUs (47 CFR 68, et. seq.)

The Commission has taken several actions to end the practice of exclusive communications service contracts with MDUs. In 2000 the Commission adopted an order to facilitate competition between common carriers within MDUs.⁷ The Commission further regulated exclusive contracts between MDUs and MVPDs in 2007, extending to such contracts prohibitions on exclusivity terms.⁸ In 2010, the Commission reviewed contract terms between MVPDs and MDUs that permitted bulk billing and provided for exclusive marketing agreements.⁹ The Commission opted against restricting bulk billing and exclusive marketing contracts, noting such arrangements benefit consumers.¹⁰

On June 1, 2017, the Commission released a Notice of Inquiry announcing a review of the 2010 Exclusive Contracts order and seeking additional information concerning common terms included in MDU contracts for BIAS.¹¹ The Commission sought information concerning state and local regulatory barriers; exclusive marketing and bulk billing arrangements; revenue sharing agreements; exclusive wiring agreements; and other matters.¹²

A. Barriers to Competition Based in State & Local Requirements

CAI supports the growth of competition in the telecommunications and video programming marketplace among telephone, cable, satellite, television broadcast, wireless, fiber optics and other providers so community association residents have access to advanced,

⁷ See Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, FCC Rcd 22983, 22985 (2000) (*2000 Competitive Networks Order*)

⁸ See *2007 Exclusive Contracts Order*, 22 FCC Rcd at 20236 (2007 Exclusive Contracts Order)

⁹ See *Second Report and Order*, 25 FCC Rcd 2460 (2010) (2010 Exclusive Contracts Order)

¹⁰ 2010 Exclusive Contracts Order, ¶¶ 2, 28, 37.

¹¹ See *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142 (2017 Competition Notice of Inquiry)

¹² 2017 Competition Notice of Inquiry, ¶¶ 11, 12, 13, 14, 15.

innovative services. In general, the greatest barriers to a competitive telecommunications and video programming marketplace are based in local government regulations that increase the costs of infrastructure development and are in effect designed to prevent additional entrants in the market for wireline-based telecommunications services.

B. Bulk Billing and Exclusive Marketing Arrangements

In the context of the community association homeownership model, CAI generally opposes federal or state initiatives that limit an owner-controlled community association's ability to enter into telecommunications or video programming contracts. CAI supports the right of community associations to enter into commercially reasonable telecommunications, digital and video programming contracts with bulk billing and exclusive marketing arrangements if the associations' owner-elected representatives prudently determine that they are in the best interest of the association. Such agreements must allow the association to determine the disposition of any wiring and other equipment installed on the commonly-owned property by the provider and permit an individual owner to contract with any other provider at that owner's sole expense.

CAI does not believe it appropriate for the Commission to reach into community association contracts to regulate the terms of contracts that have no bearing on the actual provision of telecommunications and video programming services. CAI would oppose Commission actions that would restrict exclusive marketing and bulk billing contracts that are currently permissible under law and benefit consumers as confirmed by the Commission in the 2010 Exclusive Contracts Order.

C. Exclusive BIAS Wiring Agreements and Developer to Owner Control

Community associations and association homeowners place a high emphasis on the protection of common property. CAI opposes proposals contrary to the Fifth Amendment of the

U.S. Constitution that prevent a community association from reasonably managing and operating its common property. A necessary part of managing and operating common property is the ability of an association to regulate and control the installation of telecommunications infrastructure for the benefit of all owners and residents.

As a matter of course, CAI generally opposes the practice of entering contracts that bind owners regarding telecommunications' installations prior to the association transitioning from developer/builder control to homeowners. This is in acknowledgement that the short-term interests of a developer/builder may not align with the long-term interests of homeowners. Notwithstanding this, CAI does recognize the cost of initial developer-contracted installations of telecommunications wiring or other capital assets may be economically beneficial but should be amortized over a commercially reasonable time frame.

Any Commission actions that seek to regulate the terms telecommunications contracts that include exclusive wiring arrangements for BIAS must be carefully studied and evaluated on terms of association governance and consumer benefit. CAI opposes governmental regulation that would require community associations to permit telecommunications providers, video programming providers or individual association residents to install equipment or wiring on common property without prior association approval and control.

CAI urges caution on any Commission action to terminate exclusive wiring contracts for BIAS and impose a mandate that associations allow or provide access to common property for wiring installations by numerous parties. It is not clear the Commission has such authority or that the benefits of such an action outweigh the costs to association homeowners of doing so. The Commission should avoid actions that will transfer to community associations an unfair cost burden in the promotion of a competitive marketplace.

III. Wireline Broadband Infrastructure Development (47 CFR Part 1, 51, 63, 76)

CAI supports the reasonable expansion of BIAS through installation of both wireless and wireline transmission devices including cell towers, mono poles and other transmission equipment. CAI further supports installation of such infrastructure through placement on an association's common property or structures such as buildings, water towers, fire towers, etc., that will provide wireless telephonic and Wi-Fi service to property owners and residents, provided the association retains its constitutionally-protected common property rights.

Any telecommunications infrastructure development on common property must take into consideration the community's Architectural/Design Review Committee guidelines. It is the experience of CAI members that such installations may be controversial, and the Commission must protect proven processes that promote community education and input prior to embarking upon such installations. CAI also supports the use of appropriate techniques approved by community associations to help blend these installations into the surrounding community.

CAI has previously commented to the Commission concerning the importance of communication with associations on telecommunications infrastructure improvements or build-outs on public rights of way or easements on commonly-owned property as well as on commonly-owned property not subject to an easement or other public use restriction. Community associations have a duty of care to protect and control common property to the benefit of all owners. Any Commission action that reduces requirements or incentives for telecommunications providers to consult with community associations on wireline infrastructure development should be avoided.

Community association residents want access to state of the art, modern telecommunication services. Indeed, this is why many associations work on behalf of residents

and homeowners to secure such services. Access to BIAS and other telecommunications services need not come at the expense of community association common property rights.

The Commission should improve its regulations to expand access to BIAS, but in a manner that respects common property rights and provides prior notice and opportunity for meaningful collaboration on infrastructure development on public rights of way or easements on common property. CAI would oppose further regulation limiting an association's right to negotiate the placement of communications infrastructure on common property not subject to a public use restriction or easement.

IV. Conclusion

Based on the foregoing commentary, CAI urges the Commission to refrain from limiting the use of exclusive marketing and bulk billing contracts by MDUs and further urges the Commission refrain from regulatory actions that will limit or otherwise chill community association common property rights.

Respectfully submitted,

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January 30, 2019