Multifamily Broadband Council

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Multifamily Broadband Council:
Overview of FCC Petitions Concerning Article 52

On February 24, 2017, the Multifamily Broadband Council ("MBC"), representing non-franchised communications companies that provide broadband-related services to multifamily communities and their vendors, filed two related petitions with the Federal Communications Commission ("Commission" or "FCC") asking that it preempt or invalidate Article 52 of the San Francisco Police Code ("Article 52"). Article 52 imposes a relatively extreme form of mandatory access to multiple occupancy buildings, subject only to limited exceptions. It requires an owner of such a building (a "property owner") to permit a second (or third, or fourth, or fifth) communications service provider onto his or her property upon the request of an "occupant," and to permit the additional providers to use the property owner's existing wiring even if another provider is already using it. This mandate applies regardless of whether the property owner has existing contractual arrangements with other communications service providers already serving his or her property, including, for example, an exclusive right to use the property owner's wiring. Nothing in Article 52 requires a provider to install its own wiring.

MBC's two petitions seek relief based on different legal theories. Specifically, one petition (the "Preemption Petition") seeks a declaratory ruling that Article 52 is preempted by federal law because (a) Article 52 conflicts with the Commission's regulatory frameworks governing competitive access to inside wiring in multi-tenant buildings, bulk billing arrangements, and forced network sharing obligations; and (b) Article 52's attempt to regulate inside wiring in multi-tenant buildings intrudes into areas in which federal law and policy have occupied the field. The other petition (the "OTARD Petition") seeks a ruling that the ordinance is barred by the FCC's Over-The-Air-Reception Devices ("OTARD") rule, 47 C.F.R. § 1.4000, as well as an immediate suspension of Article 52 pursuant to that rule. A more detailed summary of each petition (adapted from the Executive Summary in each document) is provided below.

Preemption Petition

MBC seeks a declaratory ruling that Article 52 conflicts with federal law and thus is preempted in its entirety. Specifically, MBC asks the Commission to declare that (1) Article 52 conflicts with the Commission's regulatory frameworks governing competitive access to inside wiring in multi-tenant buildings, bulk billing arrangements, and forced network sharing; and (2) Article 52's attempt to regulate inside wiring in multi-tenant buildings intrudes into areas in which federal law and policy have "occupied the field."

As an initial matter, Article 52 cannot be squared with Commission policies promoting broadband deployment. Chairman Pai has made clear that providing incentives for broadband deployment will remain one of the Commission's highest priorities. The Chairman has also noted that deployment

barriers may take the form of state and local requirements that, even when well-intentioned, can impede investment in new offerings.

Article 52 falls into this category. Though styled as a vehicle for promoting consumer "choice" among communications services, Article 52 in fact offers a de facto sweetheart deal to large, well-financed entities by overriding voluntary, contractual arrangements that are preconditions to the financing required for buildout by small, entrepreneurial start-ups. Typically, such providers must give their lenders indicators of likely success, such as an agreement granting the provider undisturbed use of inside wiring owned by the property owners, or a bulk billing arrangement under which the property owner purchases service and provides it as an amenity for all tenants at a steep discount off of regular retail pricing. Article 52 would effectively nullify such arrangements and afford an undue advantage to larger providers who do not need financing – particularly Google, whose subsidiary Webpass was, not coincidentally, Article 52's primary proponent – and consequently can afford to extend service to a building within Article 52's constraints. Thus, Article 52 tilts the playing field sharply in favor of one class of provider at the expense of the smaller providers that comprise MBC's membership. Ultimately, the result will be less investment in broadband deployment, and less consumer choice.

Article 52 thus is subject to "conflict preemption," under which state or local law is nullified to the extent that it actually conflicts with federal law. Conflict preemption occurs when state or local law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Under long-settled precedent, valid agency regulations issued pursuant to delegated authority have the same preemptive effect as federal statutes. Notably, a state or local law that simply disrupts a balance struck by federal policymakers also conflicts with, and is preempted by, federal law.

Article 52 is inconsistent with federal communications policy in several respects. First, the Commission has established procedures for disposition of an incumbent service provider's home run wiring where a tenant seeks service from an alternative provider. Under this framework, property owners have greater certainty as to their rights to home run wiring upon termination of an incumbent's service. Article 52 upends this federal policy by rejecting and displacing the Commission's policy judgment favoring property owner control over inside wiring. In so doing, Article 52 thus re-balances the considerations underlying the Commission's policies, frustrating federal objectives.

Second, Article 52 stands as an obstacle to the accomplishment and execution of the full purposes and objectives of the Commission's "bulk billing" policies. Article 52 effectively bars bulk-billing arrangements by denying the bulk billing service provider the exclusive right to use designated wiring necessary for the delivery of its services and forcing property owners to accommodate multiple providers, thereby destroying the economic rationale on which such deals are struck and raising prices for tenants. Allowing the City of San Francisco to second-guess the Commission's conclusion that the benefits of bulk billing outweigh its harms would disrupt the expert balancing underlying the federal scheme and subjects the communications network to a patchwork of local standards.

Third, Article 52 effectively imposes a rudimentary and unqualified "unbundling" mandate that starkly contrasts with the balanced federal unbundling requirements in Section 251 of the Communications Act, which are based on the fundamental tenet that network-sharing mandates should only be imposed in extremely limited cases, and only where the benefits of unbundling clearly exceed the harms. Article 52's access mandate flouts federal law and policy regarding the propriety of forced network sharing and specifically contravenes the Commission's deliberate refusal to force facility owners

in multi-tenant buildings to share their fiber loops. For all of these reasons, Article 52 disrupts the Commission's careful balancing of relevant considerations in setting its policies and thus must be preempted.

Article 52's imposition of mandatory wire sharing is also separately invalid under the "field preemption" doctrine, which applies where the federal interest is so dominant that it will be assumed to preclude enforcement of state or local laws on the same subject. The Commission's regulation of cable home wiring and home run wiring, combined with its explicit refusal to mandate sharing of home run wiring, leaves no room for the City to impose its own wire sharing requirements. The Commission's detailed framework leaves no room for state or local regulation of wire sharing in multi-tenant properties. Indeed, the Commission expressly refused to mandate sharing of home run wiring by multiple providers, citing signal interference concerns, which Congress has placed squarely within the Commission's purview. These considerations all demonstrate that the federal interest in the regulation of inside wiring is so dominant that it precludes enforcement of Article 52's wire sharing requirement.

For all of these reasons, the Commission should find that Article 52 is preempted by federal law and policy and is therefore invalid in its entirety.

OTARD Petition

MBC seeks a declaratory ruling that Article 52 of the San Francisco Police Code is barred by the Commission's OTARD rule. Article 52 imposes severe constraints on the ability of competitive, antenna-based service providers to serve multi-tenant buildings and, as such, impairs the installation, maintenance, or use of the antennas covered by the OTARD rule. Per Section 1.4000(a)(4) of the Commission's rules, Article 52 is automatically suspended pending resolution of this petition.

Though styled as a vehicle for promoting consumer "choice" among communications services, Article 52 in fact does the opposite by overriding voluntary, contractual arrangements that are preconditions to the financing required for buildout by small, entrepreneurial start-ups that use antennas covered by the OTARD rule. Typically, providers seeking financing to deploy service to a new multi-tenant building must give their lenders indicators of likely success, such as an agreement granting the provider undisturbed use of inside wiring owned by the property owners or a bulk billing arrangement under which the property owner purchases service and provides it as an amenity for all tenants at a steep discount off of regular retail pricing. Article 52 effectively nullifies such arrangements, providing an undue advantage to larger providers (e.g., Google's subsidiary Webpass, a leading proponent of Article 52) that do not need financing and thus can afford to extend service to a building within Article 52's constraints.

Article 52 satisfies each relevant precondition for invalidation under the OTARD rule. First, the rule applies to the antennas at issue here, i.e., (1) antennas one meter or less in diameter that are used to receive direct broadcast satellite or fixed wireless services (including but not limited to Wi-Fi routers), and (2) antennas used to receive television broadcast signals. MBC members and other independent communications service providers use these antennas for various services.

Second, Article 52 imposes restrictions "on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property."

Thus, for example, the rule would apply where a building owner has arranged for the placement of antennas and other system components, including wiring, so that tenants can receive services through those antennas – a circumstance in which the Commission has held that the tenants stand in the shoes of the building owner and are protected by the OTARD rule. The rule also applies to (1) antennas used by the property owner to provide bulk billing services to his or her tenants; (2) antennas used by the building owner, as a retail customer, as well as by the tenants, for a service employing a mesh or point-to-point architecture; and (3) consumer-used antennas such as Wi-Fi routers and cordless phones within each unit of a multi-tenant building.

Third, Article 52 "impairs the installation, maintenance, or use of" the types of antennas described above. More specifically, insofar as Article 52 effectively prevents antenna-based communications providers from obtaining the financing necessary to compete in the multiple occupancy building market, it "[u]nreasonably delays or prevents" and "[u]nreasonably increases the cost of" installation, maintenance, or use of antennas encompassed by the OTARD rule. In addition, because bulk billing arrangements enable providers to offer service to tenants at a substantial discount, Article 52's de facto nullification of such arrangements will raise the cost of service for those tenants and, at least in some cases, defeat the business case supporting competitive service deployment to a given building.

Article 52's requirement that a property owner permit all comers to use his or her inside wiring will further impair use of the antennas at issue. A requirement that the same wire carry signals from multiple providers will often result in interference and service interruptions. In this situation, the new provider frequently disconnects the line from an existing provider's facilities, leaving tenants (including those with no intention of changing providers) without access to the existing provider's services – and often without access to 911 or other emergency services. All of these problems "[p]reclude[] reception or transmission of an acceptable quality signal," in violation of the OTARD rule.

The Commission should not be fooled by Article 52's purportedly pro-competitive purpose. This provision, pushed by one of the wealthiest players in the communications industry, will exert a very real anticompetitive effect on smaller providers in the multi-tenant space. Any restriction that "might … be a disincentive for potential antenna users" is preempted by the OTARD rule. Because Article 52 "prevent[s]" or "makes worse or damage[s]" "access to competitive services," it "countervails the overarching policies of the OTARD rules … , amounts to an effective denial of competitive access, and is thus an unreasonable impairment of antenna use for the purposes of OTARD." The Commission thus should find that Article 52 violates the OTARD rule, and, in the meantime, suspend any enforcement of Article 52 pending resolution of this Petition.