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

In the Matter of: Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	))))))))	MB Docket No. 17-91

COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL

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Summary

The National Multifamily Housing Council ("NMHC") supports the Petition for Preemption ("Petition") of Article 52 of the San Francisco Police Code ("Article 52") filed by the Multifamily Broadband Council ("MBC"). Article 52 is preempted by federal law because it conflicts with the Federal Communication Commission's ("Commission") policies of promoting facilities-based competition and infrastructure investment, including broadband deployment. It also conflicts with the Commission's bulk billing policies by effectively prohibiting such arrangements and their related benefits, and the Commission's inside wiring policies. In addition, Article 52 is preempted under field preemption because the federal interest pertaining to wire sharing is so dominant that is leaves no room for state or local regulation.

Article 52 impedes the Commission's goals of facilities-based competition and infrastructure investment in MDUs by effectively undermining certain contracts between MDU owners and service providers, including those the FCC has found that offer pro-consumer benefits. Article 52 will also slow broadband deployment because providers that can expect to share facilities with a potentially unlimited number of other providers are less likely to make investments in state-of-the-art facilities such as fiber.

Article 52 harms residents by effectively undermining bulk billing arrangements, which provide residents significant savings off retail prices. It also reduces service quality for residents because providers, knowing third-party providers can access their facilities (and at the same time take their customers) at any time, have decreased incentives to invest in facilities upgrades or provide quality maintenance. Article 52 also raises significant technical challenges when multiple providers are required to use the same home run cable.

For all of these reasons, Article 52 should be preempted.

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COMMENTS OF THE NATIONAL MULTIFAMILY HOUSING COUNCIL

Introduction

The National Multifamily Housing Council ("NMHC")[1] hereby submits these comments in response to the April 4, 2017 Public Notice, seeking comment on the Petition for Preemption ("Petition") filed by the Multifamily Broadband Council ("MBC"), and the April 13, 2017 Order extending the comment filing deadline.[2] NMHC asks that the Commission grant the Petition because Article 52 of the San Francisco Police Code ("Article 52")[3] conflicts with federal law, impedes broadband deployment by discouraging facilities-based competition and infrastructure investment in multiple dwelling units ("MDU"),[4] ignores technical problems created by mandating multi-provider access to wiring, will increase prices and reduce service quality for MDU residents and creates market inefficiencies by transferring significant facilities maintenance responsibilities and costs from service providers to MDU owners. Commission action now will also forestall the adoption of similar laws.

I. Background

On December 13, 2016, the San Francisco Board of Supervisors adopted an ordinance that became Article 52, and that took effect on January 22, 2017. Article 52 requires MDU

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[1] Based in Washington, DC, NMHC is a national association that represents the leadership of the $1.3 trillion apartment industry. NMHC members engage in all aspects of the apartment industry, including ownership, development, management and finance, providing apartment homes for the 38.8 million Americans who live in apartments today. 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. More than one-third of American households rent, and 18.7 million U.S. households live in an apartment home (buildings with five or more units).

[2] *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, Public Notice, DA 17-318 (rel. Apr. 4, 2017); *In the Matter of Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-9, Public Notice, DA 17-356 (rel. Apr. 13, 2017).

[3] Article 52 of the San Francisco Police Code, Ordinance No. 250-16 ("Article 52").

[4] An MDU is a centrally managed real estate development, such as an apartment building, condominium building or cooperative, gated community, mobile home park, or garden apartment. *See* 47 C.F.R. § 76.2000(b).

owners to allow communications service providers, at the request of any "occupant"[5] of the MDU, entry onto the property and use of any existing wiring to provide communications services to residents, regardless of existing contractual arrangements between providers and MDU owners.[6] Article 52 also applies regardless of whether wiring is already being used by providers, with the burden on the property owner to show that there are physical or technical limitations preventing the provider from installing new wiring or using existing wiring.[7]

The Petition, which was filed February 24, 2017, seeks a declaratory ruling that Article 52 is "preempted in full by federal law and policy."[8] MBC maintains that Article 52 is preempted by conflict preemption – where a state or local law is "nullified to the extent that it actually conflicts with federal law"[9] – because it conflicts with the Commission's policies pertaining to: (1) competitive access to multi-resident buildings; (2) bulk billing arrangements; and (3) network unbundling mandates.[10] In addition, MBC maintains that Article 52 is preempted by "field preemption," – where "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state [or local] laws on the same subject"[11] – because of the Commission's regulation of cable home wiring and home run wiring, and its explicit refusal to mandate sharing of home run wiring.[12]

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[5] Occupant is defined as "a person occupying a unit in a multiple occupancy building." Article 52 § 5200.

[6] *Id.* § 5203.

[7] *Id.* § 5206(b)(3).

[8] Petition at 1.

[9] *Fidelity Federal Sav. & Loan Ass 'n v. de Ia Cuesta,* 458 U.S. 141, 153 (1982).

[10] Petition at 26.

[11] *Hillsborough Cnty. v. Automated Med. Labs., Inc.,* 471 U.S. 707, 713 (1985) (*quoting Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)).

[12] Petition at 29.

II. Article 52 is preempted by federal law

NMHC agrees with MBC's assessment that Article 52 is preempted by federal law.[13] Specifically, Article 52 conflicts with the Commission's policies of promoting facilities-based competition and infrastructure investment, including broadband deployment.[14] It also conflicts with the Commission's bulk billing policies by effectively prohibiting such arrangements and their related benefits, and the Commission's inside wiring policies.[15] In addition, Article 52 is preempted under field preemption.

The Commission "may preempt inconsistent state regulation so long as it can show that the state regulation negates a valid federal policy."[16] For example, in *NARUC v. FCC*, the D.C. Circuit upheld the Commission's preemption of the authority of state utility commissioners to regulate the installation and maintenance of certain telephone wiring.[17] The Court held that preemption was warranted because it interfered with the Commission's policy of ensuring a competitive market in the telephone and maintenance services at issue.[18]

Similarly, as discussed below, Article 52 negates the Commission's bulk billing policy, which has at its root the goals of promoting competition, increasing infrastructure investment in facilities such as broadband, and lowering costs for consumers. Just as the Commission's goal of ensuring a competitive telephone wiring market was a "valid goal" that warranted preemption in

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[13] Petition at 12.

[14] Broadband Deployment NPRM ¶ 2.

[15] Exclusivity Second Report and Order ¶ 28.

[16] *NARUC v. FCC,* 880 F.2d 422, 431 (D.C. Cir. 1989).

[17] *Id.* at 422.

[18] *Id.* at 431.

NARUC, the Commission's goals with regard to bulk billing arrangements are similarly valid and merit preemption of Article 52.[19]

Article 52 also conflicts with the Commission's inside wiring policies. In its 1997 *Inside Wiring Report and Order*, the Commission established rules to resolve disagreements over ownership and control of home run wiring in MDUs when a resident sought service from a service provider different from his or her incumbent provider.[20] Instead of forcing property owners to allow alternative service providers use of existing wiring or to install new wiring in such circumstances, as Article 52 does, the Commission gave decision making authority to property owners.[21] The Commission explained that property owners have an economic incentive to take the wishes of their residents into account when making decisions concerning service provider access to home run wiring.[22] The Commission further explained that property owners are responsible for common areas of the building, safety, compliance with electrical codes, and must balance the interests of all of their residents.[23] In addition, when the *Inside Wiring Report and Order* was challenged, in part by entities that urged the Commission to give residents, not property owners, the authority to choose different cable service providers, the Commission maintained that property owners are in the best position to be the gatekeepers of which service providers may access their buildings.[24] In the years since the *Inside Wiring Report and Order*, the Commission has not wavered from this policy, and it should not start now.

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[19] *Id.*

[20] *Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket No. 95-184, *et al.*, FCC 97-376 ¶ 49 (1997) ("Inside Wiring Report and Order"); 47 C.F.R. § 76.804(b).

[21] *Id.*

[22] Inside Wiring Report and Order ¶ 61.

[23] *Id.* ¶ 58.

[24] *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, CS Docket No. 95-184, *et al.*, FCC 03-9 ¶ 14 (2003) ("Inside Wiring Second Report and Order"); 47 C.F.R. § 76.804.

Furthermore, Article 52's wire sharing requirement should be preempted under field preemption. The consideration of wire sharing issues by the Commission, and the substantial body of Commission orders and decisions that have been produced as a result, show that the federal interest is "so dominant" with regard to wire sharing, that it occupies the field and does not leave room for state or local regulation.[25] As a result, Article 52 should be preempted.

III. Article 52 discourages facilities-based competition and infrastructure investment

It is a stated goal of the Commission to remove local regulations that discourage facilities-based investment.[26] Indeed, in its April 2017 proposal to accelerate broadband deployment, the Commission stated that it seeks to "remove regulatory barriers to infrastructure investment at the federal, state, and local level."[27] In addition, the mission of the Broadband Deployment Advisory Committee, which was established by Chairman Pai in January 2017, is "to identify regulatory barriers to infrastructure investment and to make recommendations to the Commission on reducing and/or removing them."[28] As discussed below, Article 52 is a barrier to competition and infrastructure investment because it will effectively abrogate existing (and deter future) contractual arrangements between building owners and service providers that form the basis for the availability of communications services in MDUs.

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[25] *Hillsborough Cnty.*, 471 U.S. at 713, *quoting Rice,* 331 U.S. at 230; Inside Wiring Report and Order ¶¶ 49, 148; Inside Wiring Second Report and Order ¶ 14; 47 C.F.R. § 76.804.

[26] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, WC Docket No. 17-84, FCC 17-37 ¶ 2 (rel. Apr. 21, 2017) ("Broadband Deployment NPRM"); Remarks of Ajit Pai, Chairman, FCC (Jan. 24, 2017) ("I believe one of our core priorities going forward should be to close [the digital] divide—to do what's necessary to help the private sector build networks, send signals, and distribute information to American consumers."); *Business Data Services in an Internet Protocol Environment, et al.,* WC Docket No. 16-143, *et al* Report and Order, FCC 17-43 (rel. April 28, 2017) ("2017 Business Data Services Order") ("we are also taking further steps to decrease the costs of deploying our nation's broadband infrastructure.").

[27] Broadband Deployment NPRM ¶ 2.

[28] *Chairman Pai Forms Broadband Deployment Committee*, Statement of Chairman Ajit Pai (Jan. 31, 2017).

As an initial matter, MDU owners, developers and managers have unique relationships with communications service providers that begin prior to building construction. These relationships will vary, including the ultimate ownership of the equipment and wiring.[29] For example, it's common for the building owner to own both the home run wire (which runs to the unit from a telephone closet or other central location) and the home wire (which is the wiring in the unit connected to the home run wire).

In many cases, communications service providers will share the cost of installation, maintain the network and provide packages of broadband (wireless and wired), television, telecommunications and security services in return for access to building infrastructure and the opportunity to market and sell services to the residents. In most buildings, residents may choose from at least two service providers;[30] though generally the technology requires that the resident choose a single provider for all the services to a specific unit. This is important because, for example, a resident may not understand that requesting a competitor's broadband service could leave him or her without television or wireline phone services.

Article 52 impedes facilities-based competition and infrastructure investment in MDUs by effectively undermining certain contracts between MDU owners and service providers. Bulk billing arrangements are one example.[31] Bulk billing arrangements are contracts where an MDU

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[29] For example, it's common for the building owner to own both the home run wire (which runs to the unit from a telephone closet or other central location) and the home wire (which is the wiring in the unit connected to the home run wire). Service providers will usually have exclusive use of the home run wire but non-exclusive use of the home wire.

[30] A recent NMHC survey of building owners found that residents have access to more than one service provider in a substantial percentage of the respondents' properties and a majority of the respondents have two or more service providers in all of their properties in San Francisco. *See also* Declaration of Michael Manelis, Executive Vice President, Property Operations of Equity Residential ¶ 4, attached hereto as Exhibit C ("Manelis Declaration") ("At all of our communities in San Francisco, there are choices of providers of telecom services for our residents.").

[31] *See* Manelis Declaration ¶ 9 ("Article 52 also discourages owners from making significant investments to upgrade or future-proof low voltage infrastructure, since a property owner cannot exercise reasonable control over its future use.").

owner provides internet access, video, or telecommunications services at a significantly discounted "bulk" rate, and allows a service provider exclusive use of designated facilities for delivery of its services. Bulk billing arrangements are prevalent in circumstances such as student housing,[32] where providers may otherwise decline to provide service; or they may be offered as an amenity or convenience. The existence of bulk billing arrangements in a market can result in increased competition, increased investment in facilities such as fiber, and have been found by the FCC to provide "significant pro-consumer effects."[33] Building owners and service providers may also have agreements, for example, granting undisturbed use of the owners inside wiring, or exclusive marketing agreements.

These agreements allow property owners, for example, to tout the availability of state of the art communications services and/or discounted pricing. Property owners also rely on the certainty that they will not be tasked with the significant maintenance responsibilities that come with communications facilities, including diagnosing and fixing wiring problems, and other associated tasks and costs. Some service providers rely on the certainty of knowing that they will have a guaranteed subscriber base for it to make financial sense to provide discounted rates and make the investment to build out and maintain facilities in an MDU.[34] If contractual agreements between property owners and service providers can be circumvented at any time by

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[32] *See* Declaration of Scott P. Casey, Senior Vice President of Strategic Business Development and Chief Technology Officer of Education Realty Trust ("EdR"), one of the country's largest owners, developers and managers of collegiate housing, highlighting the problems that Article 52 causes for student housing, attached hereto as Exhibit D ("Casey Declaration").

[33] *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, Second Report and Order, MB Docket 07-51, FCC 10-35 ¶¶ 2, 19, 17 n.23, 28, (2010) ("Exclusivity Second Report and Order").

[34] Petition at 7.

an unlimited number of third-party providers, they will disappear along with their benefits to residents, property owners and service providers.[35]

By way of example, and as described in more detail in the attached Declaration of Matt Harris, Managing Director of Provident Realty Advisors, Inc. ("Provident"), a real estate and investment firm that has been involved with more than $3 billion worth of projects, developers require contracting flexibility (including the ability to offer exclusive wiring and bulk service arrangements) in order to provide residents a choice of high quality providers of internet, telephony, and video services -- particularly in affordable housing units.[36] According to Mr. Harris, in 2007, Provident was developing a 250-unit mixed income housing project outside New Orleans following Hurricane Katrina. Incumbent providers either could not offer state-of the-art services or would require substantial payments to extend their existing facilities to the project. The best option for residents and the developer was a private cable operator/internet service provider, who required Provident to provide exclusive use of cabling and the exclusive rights to provide video services during the initial term of the agreement. In return, the residents received reasonable service levels, competitive offerings, complimentary common area services, and an initial payment to partially offset the costs of the inside wiring installed by Provident for the service provider's use. According to Mr. Harris, Provident's ability to grant enforceable contract rights that provided adequate investment incentives to the chosen service provider "was essential to obtaining necessary service for residents."[37] He further states that "[i]f Article 52 is not

[35] Since Article 52 has gone into effect, some NMHC members report general confusion about what Article 52 does, and difficulties finalizing new contracts and renewals because of concerns about the possibility of additional providers seeking access and the potential for litigation if competitive service requests cannot be accommodated or because of equipment or service failures while attempting to comply with such requests.

[36] Declaration of Matt Harris, Managing Director of Provident Realty Advisors Inc., attached hereto as Exhibit A ("Harris Declaration").

[37] Harris Declaration ¶ 5.

preempted, the hard task that affordable housing developers face in obtaining quality services for their residents will become even harder."

The effective prohibition of bulk billing agreements particularly harms small service providers, who require such agreements to obtain financing from banks in order to demonstrate that they will generate a reliable revenue stream to repay the loan. Without these agreements, small providers will not be able to obtain financing, and will not be able to compete with providers that do not require financing. As a result, competition will be confined to a small number of large providers.

Article 52 also creates technical problems that will discourage infrastructure investment in MDUs.[38] As discussed in the attached Declaration of Richard Holtz, CEO of InfiniSys, Inc., a design and technology consulting firm serving the MDU industry, service providers not given exclusive use of home run cable will not agree to install the cable at their own expense or reimburse MDU owners for part of the expense.[39] Service providers required to share infrastructure will also limit their responsibility for maintenance, repair, replacement and upgrade of the home run cable. In those limited circumstances where sharing of facilities may be possible, it can also be difficult to determine which party is responsible for performing repairs, resulting in delays and resident dissatisfaction. Alternatively, maintenance responsibility may be shifted to MDU owners who lack the technical capability required for the repairs and upgrades; this will lead to the hiring of third parties to repair the wiring; and ultimately those higher expenses will be reflected in rents.[40]

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[38] Technical limitations are discussed further in Section VI, below.

[39] Declaration of Richard Holtz, CEO, InfiniSys, Inc., attached hereto as Exhibit B.

[40] According to the Manelis Declaration, Equity Residential relies on its telecom partners, who are experts in the field, to evaluate and address problems with wiring; including an expectation that they will handle replacements and upgrades and maintain service standards. Manelis continues, "[w]ithout those obligations for wiring responsibility,

IV. Article 52 will slow broadband deployment

It is a goal of the Commission to promote broadband deployment;[41] and the Commission recognizes that bulk billing arrangements enhance broadband deployment.[42] Indeed, providers that have certainty as to a revenue stream, the number of customers they will serve, and for how long, are more likely to obtain financing for, and invest in, building out expensive, state-of the-art facilities, including fiber.[43] In contrast, providers that can expect to share facilities with a potentially unlimited number of other providers, with no certainty as to how many subscribers they will serve, or how much compensation they will receive for sharing, are less likely to make such investments.[44]

Moreover, Article 52, which was, in part, adopted to address underserved residents, does nothing to encourage broadband access in underserved areas including in low income or mixed income housing. Market logic undoubtedly concludes that competitive providers (many of whom have no legal obligation to provide service to all who request it) will seek opportunities to provide services to residents in high income buildings with maximum revenue opportunities and

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we run a greater risk of service disruption, degradation of quality, and eventual system obsolescence." Manelis Declaration ¶ 6.

[41] Broadband Deployment NPRM ¶ 2 ("This [NPRM] seeks to better enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike."); *Lifeline and Link Up Reform and Modernization, et al.,* WC Docket No. 11-42, *et al.,* Third Report and Order, Dissenting Statement of Commissioner Ajit Pai, FCC 16-38 at 205 (2015) ("Our goal should be increasing broadband adoption—that is, helping Americans without Internet access cross the digital divide.").

[42] Exclusivity Second Report and Order ¶ 2 ("The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband.").

[43] Exclusivity Second Report and Order ¶ 17 n.23.

[44] As Chairman Pai stated, "in the last two decades, the FCC has had much experience with unbundled network elements (UNE)—essentially, a system under which Company A builds something and Company B gets to lease it at government-approved rates. The UNE rabbit hole shows how forcing carriers to offer their networks at regulated rates can wreak havoc. Incumbents naturally invested less. Competitors did too. As a result, real facilities-based competition didn't materialize. A bubble inflated with regulatory arbitrage popped. Conversely, when the FCC exempted next generation fiber facilities from unbundling and sharing requirements after 2003, fiber deployment boomed." 2017 Business Data Services Order, Statement of Chairman Ajit Pai at 186.

ignore affordable housing developments. This redlining, or cherry-picking, will do nothing to reduce the technology gaps among lower or upper income groups, particularly in large, diverse cities such as San Francisco.

V. Article 52 harms residents by raising prices and reducing service quality

As discussed earlier, Article 52 effectively undermines bulk billing arrangements. The Commission has acknowledged that bulk billing arrangements benefit residents through reduced rates on communications services.[45] Indeed, the FCC found that such arrangements provide residents substantial savings off retail prices.[46] Without such arrangements, and without the leverage that comes with negotiating on behalf of many potential customers, residents will be forced to pay significantly higher retail rates. According to Mr. Casey, bulk agreements allow students to get service without a credit check, the service is available on the student's move in date, and "at a much lower price, providing significant benefits for students who are often on a tight budget."[47]

Article 52 also harms residents by threatening to reduce service quality standards. Providers will have a decreased incentive to contractually agree to invest in facilities upgrades or provide quality maintenance if third-party providers can access their wiring and, at the same time, take their customers. As a result, just as residents are forced to pay higher prices for services, they could see the quality of those services decrease. Moreover, the contracts building owners have with service providers include heavily negotiated service level agreements, with stringent installation, repair and service quality metrics. Individual occupants requesting service

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[45] Exclusivity Second Report and Order ¶ 28 ("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.").

[46] Exclusivity Second Report and Order ¶ 19 ("Discounts of 30% from the bulk billing MVPD's retail rates are common, and can be as high as 75%.").

[47] Casey Declaration ¶ 3

from a competitor provider is likely to do no better than standard, off-the-shelf service levels and few remedies for major service failures.[48]

Article 52 also creates problems for service providers in student housing, which typically rents by the bed rather than by the unit, and nearly all of which rely on bulk billing agreements. For example, if one student in a three-bedroom unit requests service and a provider takes the home run wiring under Article 52, this would deprive the student residents of the other two bedrooms of the bulk service for which the property owner contracted. This situation also creates potential wiring conflict risks in which all unit residents find that changing internet service providers results in the loss of video and telephone services.[49]

VI. Technical impact

In addition to the economic and policy concerns with Article 52 described above, there are also technical constraints on having multiple providers sharing home run wiring.[50] As described in the attached Holtz Declaration, current best practices suggest owners install a separate pathway for each service provider from the intermediate distribution frame ("IDF") to the structured wiring panel in each residential unit. It's never recommended that more than one provider use the same home run fiber as it is rare for two providers to have compatible electronic systems or proper cross-connect facilities in the IDF and the main distribution frame ("MDF").[51]

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[48] *See* Manelis Declaration ¶ 5 ("Article 52 does not allow property owners to make a service provider's access to an MDU contingent on its willingness to commit to reasonable competitive standards and clearly defined service level terms, tied to meaningful contract remedies (Including termination))."

[49] *See* Casey Declaration ¶ 5 ("A provider who takes use of a coaxial home run in order to deliver Internet service to a requesting resident will, in many cases, unwittingly disconnect that resident's bulk video service.").

[50] *See* Declaration of Matt Duncan, Director of Ancillary Services and Retail Management for Monogram Residential Trust, a real estate investment trust focused on the acquisition, development and management of rental properties, ¶ 3, attached hereto as Exhibit E ("In our experience, properties where multiple providers attempt to share the same home run wiring face a number of practical and technical challenges, including frequent disconnections ... interference, and improper connectorization and splicing that can necessitate total replacement of a home run.").

[51] *See* Manelis Declaration ¶ 8 ("In our past experience, the sharing of wiring has rarely worked out well for either the property owner or the residents.").

According to Mr. Holtz, when multiple providers are required to use the same home run cable, rather than dedicated cable, the following potential challenges arise:

- Maintaining proper labeling can be difficult.
- A log of changes must be kept at the property.
- Cable must be long enough to be used without splicing.
- Connector incompatibility may occur.
- The IDF room may have space or configuration constraints making it difficult for multiple providers to reach the entry points needed to connect to the necessary home run cable.
- Because most service providers use a single cable to carry voice, video, and data signals, another service provider performing a cross-connect to deliver a requested service may result in the unwanted disconnect of other services the resident wanted to continue to receive.[52]

Moreover, older buildings may not have dedicated MDF and IDF rooms with secure access, power and climate control. At these properties, service providers typically terminate their distribution plant at exterior pedestals or wall mounted lockboxes, where they connect to the inside wiring. According to Mr. Holtz, safe, orderly and secure sharing of home run at such properties presents an insurmountable challenge.[53]

These technical concerns are magnified in certain MDUs such as assisted-living communities where the communications systems may provide direct links to caregivers for residents in distress. Or, as noted earlier, a resident may request a competitor's broadband

[52] Holtz Declaration ¶ 3.

[53] If the competitive provider uses microwave technology, there are separate concerns about limitations on roof top space, the impact on other roof top leaseholders, and potential interference with existing wireless reception; all of which would have an adverse impact on residents and property owners.

service but not understand that will lead to the termination of television and landline phone services. According to the Centers for Disease Controls and Prevention, only 23.5% of Americans 65 and older live in wireless-only households. Thus residents that lose their landline phone service may lose their only access to 911 emergency calling. [54] Taken together, these technical problems may lead to reduced or no service, higher rents and increased resident dissatisfaction.

[54] *Early Release of Estimates From the National Health Interview Survey, July–December 2016* at 6 (rel. May 2017), *available at* https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf.

VII. Conclusion

For the foregoing reasons, NMHC urges the Commission to grant the Petition and preempt Article 52.

Respectfully submitted,

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May 18, 2017

Exhibit A

Declaration of Matt Harris
Managing Director, Provident Realty Advisors, Inc.

DECLARATION

1. I, Matt Harris, am Managing Director of Provident Realty Advisors Inc. ("PRA"), based in Dallas, Texas. PRA is a privately held real estate and investment firm that, since its formation in 1991, has developed or invested in more than $3 billion worth of real estate projects, including over 11,000 units of low-income, mixed-income, and market-rate apartments in Texas and Louisiana.

2. Following Hurricane Katrina, PRA has built or started construction on more than $200 million worth of affordable housing projects in and around New Orleans, Louisiana. Beginning in 2007, PRA developed a 250-unit mixed-income housing property (40% affordable, 60% market rate) known as Lakeside Apartments in Slidell, Louisiana.

3. PRA always seeks to provide residents with a choice of high quality providers of Internet, video, and telephony services. This proved to be a challenge for Lakeside Apartments. The incumbent telecommunications carrier serving Slidell was only able to provide POTS and DSL, not the advanced triple play it offered in some other markets using fiber-to-the-unit or fiber-to-the-node systems. The franchised cable operator serving Slidell was unwilling to extend its outside plant to serve Lakeside Apartments, unless PRA agreed to pay an enormous sum of money, which had not been budgeted for and which would have made developing Lakeside Apartments as an affordable community infeasible.

4. With the incumbent telecommunications carrier and franchised cable operator unable or unwilling to offer necessary services, PRA turned to DirecPath, LLC, a private cable operator and Internet service provider. DirecPath was willing to serve; but due to their capital costs in deploying to a project of modest size, they would only be able to do so if they were given exclusive use of the coaxial cabling designated for their use and the exclusive right to provide video services during the initial term of the agreement. DirecPath told PRA that at some future time, whether in six months or six years, the big incumbents would come calling; and, if forced to split customers three ways, DirecPath would be unable to secure a return on its investment.

5. In early 2008, PRA entered into an agreement with DirecPath to provide service to Lakeside Apartments. Though PRA conceded the exclusive right to use coax and to provide video services, DirecPath agreed to PRA's demands for reasonable service level standards, competitiveness requirements, complimentary common area service accounts (including video, wired Internet, and WiFi), and an initial payment to partially offset the costs of inside wiring installed by PRA for DirecPath's use. PRA's ability to grant enforceable contractual rights to a private cable operator, like DirecPath, was *essential* to obtaining necessary service for residents.

6. As DirecPath had predicted, eventually the incumbents came calling. In August of 2011, the franchised cable operator had extended its outside plant close enough to Lakeside Apartments that it was not only willing, but eager to provide its services. In March of 2016, the incumbent telecommunications carrier reached out to PRA with a desire to install a fiber-to-the-unit system and provide its latest services. PRA's contractual commitments to DirecPath did require delaying agreements with other providers. But, at this very moment, PRA is negotiating

agreements with two providers (including the DirecPath affiliate, GigaMonster) to install fiber-to-the-unit systems delivering gigabit Internet speeds to the residents of Lakeside Apartments.

7. PRA's experience with Lakeside Apartments is not unique. Developers of affordable housing often struggle to obtain quality service for residents. In addition to the risk of deliberate redlining by service providers, projects may be in market areas where incumbents have little (or less advanced) infrastructure, or they may be of a size that makes it hard for a provider to see sufficient potential return on investment. Developers must negotiate shrewdly and avail themselves of every tool in the toolbox that the FCC has allowed, including the ability to offer exclusive wiring arrangements, exclusive video provider rights for private cable operators, and bulk service arrangements.

8. Had the policies of San Francisco's Article 52 been in place in Slidell, Louisiana, the residents of Lakeside Apartments would not have had an endless variety of cutting-edge service providers from which to choose. On the contrary, they would have had *no* video service (unless they had the means and a properly-oriented patio or balcony for placement of a DBS dish). Instead of competitive Internet service, residents would have had *no* Internet service (other than the incumbent telecommunications carrier's sluggish DSL). The inability to enter into an enforceable contract offering a private cable operator adequate investment incentives for deployment would have been catastrophic to this project.

9. If Article 52 is not preempted, the hard task that affordable housing developers face in obtaining quality services for their residents will become even harder.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 11, 2017.

Matt Harris

Exhibit B

Declaration of Richard Holtz
CEO, InfiniSys, Inc.

DECLARATION

1. I, Richard Holtz, am the President and CEO of InfiniSys, Inc. ("InfiniSys"), based in Daytona Beach, Florida. Founded in 1990, InfiniSys is a leading, full service low voltage design and technology consulting firm serving the multifamily industry. InfiniSys has won numerous awards for its innovative technology solutions, including four Consumer Electronic Association "Mark of Excellence" awards in the past twelve years. Mr. Holtz is recognized as an industry expert and has taught structured cabling at national conferences for the last 20 plus years. Broadband Communities has named him one of the top twenty-five industry experts since the designation was established.

2. In low voltage designs for properties that will be served by multiple providers on a subscription basis (i.e., not on a bulk basis), we currently recommend that multifamily property ("MDU") owners install a separate pathway (e.g., a 12mm microduct) for each provider from the intermediate distribution frame ("IDF") to the structured wiring panel in each residential unit. These pathways are intended for placement of fiber to the unit, which has become a de facto standard for properties opening in 2018 or later. We never recommend allowing more than one provider to use the same home run fiber, as it is very rare for two providers to have compatible electronic systems.

3. Allowing more than one provider to access the same home run, at different times, of unshielded twisted pair (e.g., Cat 5, 5e, or 6) data cabling ("UTP") or coaxial video cabling poses a number of technical and practical challenges. We would never recommend this, unless proper physical cross-connect fields are placed at every IDF and the main distribution frame ("MDF") and unit distribution panel ("UDP") with labeling complying with the industry standard, TIA-606B. When multiple providers are allowed to use the same home run cable, rather than using dedicated home runs, the following potential challenges may occur over time:

a. Maintaining proper labeling can be difficult. Labeling must have necessary documentation posted in each MDF, IDF, and UDP. Without proper labeling, residents are more likely to experience service disruptions through mistaken disconnects of home runs serving their units.
b. A log of any changes must be kept physically at the property.
c. Cable must be long enough to be used without splicing. Splicing is not allowed under the TIA standards; if done, splicing will result in interference, signal leakage, or diminished transmission speed, resulting in loss of service quality to residents.
d. Connector incompatibilities may occur between multiple providers. If so, providers may cut the cable and attach a compatible connector. Even if the cable is terminated properly, it will grow shorter every time this is done, until it can no longer be used without splicing. (See 3.c, above.) This will require replacement of the entire home run, which entails considerable expense and disruption (including cutting sheetrock, coordinating access to the resident's unit for work, etc.).
e. Limitations on, or the configuration of, space in the IDF room can make it difficult or impossible to allow additional providers to reach entry points, so that they can connect to the necessary home run cable. Further, there are physical separation requirements between high and low voltage systems (i.e., NEC 800.50 and TIA-569D), which means that only so many electronics can be placed within rooms that share electric and communications systems, as demonstrated on many older properties. And,
f. Because most MSOs and ILECs use a single cable to carry voice, video, and data signals, another provider that performs a cross-connect to deliver a requested service to a resident may cause an unwanted disconnect of other services that the same resident was receiving.

4. Proper physical cross-connect fields are essential if multiple providers are to be given the right to use the same UTP or coax home run. However, in our experience with multifamily properties across the country, we find that it is very rare, indeed, for an MDU to have such cross-connect facilities in the IDFs and MDFs.

5. Many multifamily properties--and most that were built over twenty years ago--do not have dedicated IDF and MDF rooms, with secure access, power, climate control, code-compliant multipoint grounding busbars as required by the National Electric Code Part 250, etc. At these properties, service providers typically terminate their distribution plants at exterior pedestals or wall-mounted lockboxes, where they can make connections to the inside wiring. Safe, orderly, and secure sharing of home runs at such properties will often pose an insurmountable challenge. Multiple lockboxes would be required: one for each physical cross-connect field, as well as one for each provider's incoming demarcation. Additional electrical power would need to be provided. High cost, space constraints, and environmental conditions (i.e., uncontrolled temperature and humidity) make shared access to home runs at such properties infeasible.

6. In our dealings with service providers on behalf of MDU owners, we have found that if providers are not given exclusive use of a dedicated home run cable, they will not agree to install that cable at their own expense or reimburse the MDU owner for a substantial part of the installation expense. Providers are naturally reluctant to pay for infrastructure that can be used by other providers who did not participate in the installation costs. If a provider cannot be given exclusive use of the home run, the MDU owner usually bears the costs of installation.

7. In our dealings with service providers on behalf of MDU owners, we have found that, if providers are not given exclusive use of a dedicated home run cable, they will often limit their responsibility for maintenance, repair, replacement, and upgrade of the home run. Just as providers will not pay to install a home run that another provider may use, they will not agree to replace or upgrade such a home run. Furthermore, providers will typically only agree to maintenance and repair of the nonexclusive home run cabling while they are actively using it to deliver service to a resident, or to the extent that the need for maintenance arose from their own acts. When wiring needs to be repaired or replaced, it can be difficult or even impossible to determine who should be responsible for performing the work and bearing the costs. This can result in:

a. delay in repairs during such fact-finding, prolonging the service impact for affected residents;
b. MDU owners having to perform work for which they generally lack the technical wherewithal;
c. shifting of maintenance and upgrade costs from providers to MDU owners; or
d. home run wiring that, over time, becomes less and less fit for use, due to a series of failures to make necessary repairs.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 12, 2017.

Richard Holtz

Exhibit C

Declaration of Michael Manelis
Executive Vice President, Property Operations, Equity Residential

DECLARATION

1. I, Michael Manelis, am the Executive VP, Property Operations of Equity Residential ("EQR"), based in Chicago, Illinois. EQR is an S&P 500 real estate investment trust focused on the acquisition, development, and management of rental apartments properties in urban and high-density suburban coastal gateway markets. As of March 31, 2017, EQR owns or has investments in 302 properties consisting of 77,498 apartment units, primarily located in Boston, New York, Washington, DC, Seattle, San Francisco, and Southern California.

2. EQR owns and manages 2,440 units in the City of San Francisco and approximately 13,000 units in the overall Bay Area. Further, over the past three years EQR is developing or has newly developed and currently manages nearly 1,500 units in the City of San Francisco.

3. EQR always seeks to provide residents with a choice of high quality providers of Internet, video, and telephony services. This is the case in San Francisco and throughout our portfolio. We generally seek out providers with a proven track record who will provide high-quality, consistent service. We have entered into both marketing and access agreements with our provider partners.

4. At all of our communities in San Francisco, there are choices of providers of telecom services for our residents. When we enter into an agreement with a service provider, we require competiveness commitments, insurance obligations (protecting not only our property, but also our residents), and requirements for service level standards, wiring maintenance, upgrade, and replacement, and complimentary common area service accounts (including video, data, and WiFi).

5. EQR has been able to leverage our agreements with our telecom partners to not only provide competitive service, but more importantly, to help ensure timely response to customer orders, service requests, and any service disruptions. Enforceable contracts are key to this. Article 52 does not allow property owners to make a service provider's access to an MDU contingent on its willingness to commit to reasonable competitiveness standards and clearly defined service level terms, tied to meaningful contract remedies (including termination). This does not benefit multifamily owners or residents.

6. The wiring provisions in our agreements are critical to ensuring quality service to residents. EQR's primary purpose and expertise is to provide residents with a home, not to operate in the telecom arena. We are not a telecom provider, do not have employees with telecom or wiring expertise, and are therefore in no position to diagnose service problems and maintain and upgrade wiring. We rely on our telecom partners, who are experts in the field, to evaluate and address problems with wiring. We expect them to handle any replacements or upgrades that are required in order maintain service competitiveness, as standards and technologies change over time. Without those obligations for wiring responsibility, we run a greater risk of service disruption, degradation of quality, and eventual system obsolescence.

7. The provisions of Article 52 will discourage any of our telecom partners from taking on the maintenance and upgrade responsibilities we typically require, since the wiring may be used by any number of other providers. Except on the rare occasion when we can clearly determine who damaged inside wiring, repair obligations will fall to EQR. Since our employees lack the necessary technical skill for performing such work, we will have to hire third parties. Efforts to determine fault and, failing that, to coordinate with an independent low voltage contractor take time, unnecessarily prolonging the service problems affecting residents. This also shifts maintenance costs from service providers to property owners. As with other operational costs, those expenses will ultimately be reflected in rents.

8. Article 52 requires that property owners allow multiple telecom providers to share wiring. In our past experience, the sharing of wiring has rarely worked out well for either the property owner or the residents. Telecom providers utilize technicians, with varying levels of knowledge and expertise, to install and maintain service using various methods. In scenarios where providers have had to share wiring, we have often observed significant increases in damage to wiring and unwanted disconnections of service (e.g., as a provider takes use of a cable being actively used by another provider).

9. Article 52 also discourages owners from making significant investments to upgrade or future-proof low voltage infrastructure, since a property owner cannot exercise reasonable control over its future use. Additionally, as mentioned previously, if much of the responsibility for maintaining, repairing, and upgrading wiring will now fall to property owners, there is less incentive to add anything beyond the minimum necessary to provide service. If a property owner cannot reasonably control the use of infrastructure for the benefit of residents and the property, these investments can become operational liabilities.

10. If Article 52 is not preempted, our goal of offering quality telecom services and customer service for our residents will become more difficult.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on May 16, 2017.

Michael Manelis

Exhibit D

Declaration of Scott P. Casey
Senior Vice President of Strategic Business Development and Chief Technology Officer,
Education Realty Trust

DECLARATION

1. I, Scott P. Casey, am Senior Vice President of Strategic Business Development and Chief Technology Officer of Education Realty Trust ("EdR"), a publicly traded, self-administered and self-managed real estate investment trust based in Memphis, Tennessee. EdR is one of America's largest owners, developers, and managers of collegiate housing, owning or managing 86 communities with more than 44,000 beds, serving 53 universities in 24 states.

2. EdR has many concerns about the ways in which Article 52 creates investment disincentives for both owners and service providers, shifts costs away from service providers and onto owners and residents, and threatens quality of service and integrity of low-voltage infrastructure in multiple dwelling units, generally. For purposes of this declaration, we would like to highlight some problems that Article 52 causes for student housing communities.

3. EdR, like most owners of collegiate housing, provides services to student residents on a bulk basis. This offers a number of advantages for residents, such as the convenience of having service available immediately upon move-in, avoiding the necessity of credit checks (which, for students with no credit history, can be an impediment to individual subscription), and leveraging bulk purchasing power to get quality service at a much lower price, providing significant benefits for students who are often on a tight budget. Bulk services in collegiate housing often push the technology envelope, allowing residents to receive levels of service that they would be unable to obtain through direct subscription in conventional multifamily housing in the same market area.

4. EdR invests heavily in low-voltage infrastructure for its properties, with an eye towards delivering competitive service. Our service provider partners receive exclusive use of all system components, most of the costs of which are absorbed by EdR. Inside wiring is an essential part of the design and function of the services delivery system. To take it and allow another party to use it, as Article 52 does, strikes at the very heart of EdR's investment-backed expectations in designing and installing the system.

5. Beyond that direct investment disincentive, the taking of inside wiring, as authorized by Article 52, will often substantially interfere with the bulk service provider's delivery of bargained for services. A provider who takes use of a coaxial home run in order to deliver Internet service to a requesting resident will, in many cases, unwittingly disconnect that resident's bulk video service. A provider who takes use of an Ethernet home run in order to deliver Internet service to a requesting resident will, in many cases, deprive the resident of the use of a managed WiFi access point, as part of an enterprise-grade wireless network; and, in some cases, it may also terminate the resident's bulk video service, if the property has an IPTV solution. When Article 52 authorizes the taking of inside wiring that is being actively used by an existing provider to deliver service, it directly conflicts with the model of bulk billing, which the Commission has reviewed and found to have "significant pro-consumer effects" (Second Report and Order, MB Docket No. 07-51; released March 2, 2010).

6. Article 52's interference with the delivery of bulk services is even more egregious in a student housing context. Unlike in conventional housing, which is rented by the unit, collegiate housing typically rents by the *bed*. So if one student "occupant" in a three-bedroom unit requests service and the incoming provider takes the home run to that unit, it would deprive the residents of the *other* two bedrooms of the bulk service for which the property owner contracted. Under Article 52, one resident's "choice" would legally authorize slamming the other residents of the unit with a

new service provider. That is, of course, in addition to the very real risk of wiring conflicts, in which *all* unit residents may find that, after one resident's request for a new ISP, they have lost their bulk video service and managed WiFi.

7. EdR believes that the FCC's rules governing inside wiring, its order on bulk billing arrangements, and its legislative mandate to encourage private broadband investment require that Article 52 be preempted.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on 5/17, 2017.

Scott P. Casey

Exhibit E

Declaration of Matt Duncan
Director of Ancillary Services and Retail Management, Monogram Residential Trust

DECLARATION

1. I, Matt Duncan, am Director of Ancillary Services and Retail Management for Monogram Residential Trust ("Monogram"), based in Plano, Texas. Monogram is a real estate investment trust focused on the acquisition, development, and management of rental apartments properties located in core urban growth markets, primarily in California, Texas, Colorado, Florida, Maryland, and Massachusetts. Monogram owns and manages multiple properties in the City of San Francisco and in the overall Bay Area.

2. In our experience negotiating with communications service providers, Article 52 will discourage telecom providers from taking on the broad maintenance, repair, and upgrade responsibilities we typically require in our telecom provider contracts, as the same wiring may be used by any number of other providers. The wiring provisions in our provider agreements are critical to ensuring quality and continuity of service to residents. Monogram typically grants exclusive use of a dedicated home run wire to each provider in exchange for the provider assuming responsibility for maintenance, repair, replacement, and upgrade of such wiring, since they have the technical expertise that Monogram's on-site employees lack. We also find that providers take much greater care with wiring when they have an investment stake in it.

3. In our experience, properties where multiple providers attempt to share the same home run wiring face a number of practical and technical challenges, including frequent disconnections (whether from inconsistent labeling or the inability for two providers to deliver different services concurrently over the same run), interference, and improper connectorization and splicing that can necessitate total replacement of a home run. At these properties, we have witnessed frequent accidental—and sometimes even intentional—wiring disconnections that have been extremely disruptive to our residents and our management team.

4. We have recently experienced such problems at an apartment community of over 300 units in the Houston market. While we generally prefer each provider to use its own dedicated home run wiring, Monogram acquired this property, which had only one home run of coaxial cabling to each unit. In order to provide an additional choice of service providers for residents, Monogram permitted two providers to have non-exclusive use of that home run. Unfortunately, instead of residents benefitting from the choice of providers, they have suffered due to the providers' inability to coexist in a competitive environment with shared wiring rights. In effect, the home runs have become a battleground between the providers. The incoming provider repeatedly disconnected wiring and splitters that were actively being used by the existing provider, then failed to properly reconnect, leaving residents without service. On multiple occasions, the property team has been alerted that the incoming provider disconnected *all* home runs at an intermediate distribution frame, leaving all residents disconnected, except for its own subscribers. This requires wasteful technician deployments by both providers. It has been a source of constant headaches for our management personnel, who are forced to play "referee" in technical disputes. Above all, it greatly inconveniences and aggravates our residents, who are made pawns in a vicious game between providers.

5. The problems at this Houston-area property arose from only two providers attempting to share wiring. By requiring that property owners allow an unlimited number of providers to access the same home run wiring, Article 52 will produce even greater disruptions for residents and management staff in the City of San Francisco.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed on M. 18, 2017.

Matt Duncan