Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code	DA 17-318 MB Docket No. 17-91

OPENING COMMENTS OF THE CITY AND COUNTY OF SAN FRANCISCO

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TABLE OF CONTENTS

I. EXECUTIVE SUMMARY 1

II. FACTUAL BACKGROUND 3

A. San Francisco Adopted Article 52 to Enable Occupants of Multiple Occupancy Buildings to Have a Choice of Communications Providers 3

B. Article 52 Establishes a Collaborative Process Requiring the Property Owner's Permission to Inspect a Property or Provide Service 6

C. Mandatory Access Statutes Have Been Around for a Long Time 7

D. MBC's Petition 8

III. THE COMMISSION SHOULD DISMISS MBC'S CLAIM THAT FEDERAL LAW AND POLICY ..... PREEMPT ARTICLE 52 10

A. The Appropriate Legal Standards for a Federal Preemption Claim 10

B. Preemption Cannot Be Based Solely on Broad Policy Statements or Federal Agency Inaction 12

C. MBC Has Not Demonstrated a Conflict between Article 52 and Any Federal Law or Commission Regulation, Order or Decision 13

1. There is No Conflict Related to Bulk-Billing Arrangements 14

2. There is No Conflict Related to Article 52's Mandatory Access Provision 18

3. There is No Conflict Related to the Disposition of Cable Home Wiring or Home Run Wiring 21

4. There is No Conflict Related to Telecommunications Inside Wiring 23

D. The FCC's Regulation of Cable Home Wiring and Home Run Wiring Are Not a Basis for Field Preemption 24

V. CONCLUSION 27

I. EXECUTIVE SUMMARY

The City and County of San Francisco ("City" or "San Francisco") enacted Article 52 of the San Francisco Public Works Code ("Article 52"), which is entitled "Occupant's Right to Choose a Communications Services Provider", in order to enable persons living or working in multiple occupancy buildings in San Francisco to choose among communications providers. For too many years, despite efforts by the Federal Communications Commission ("FCC" or "Commission") and the California Public Utilities Commission, occupants of residential or commercial buildings had no choice other than the single provider chosen by the property owner. Property owners would routinely deny access to other providers offering competitive services, even when those providers were responding to requests for service from occupants.

In its Petition for Preemption ("Petition"), the Multifamily Broadband Council ("MBC") claims that federal law, as construed by this Commission, preempts Article 52 "in full."[1] According to MBC, Article 52 would not promote competition. Rather, MBC claims that Article 52 would benefit only one potential competitor (Google Fiber), would harm MBC's members and other providers, and would result in "less investment in broadband deployment, and less consumer choice."[2] Among other things, MBC claims that Article 52 conflicts with Commission policy by "effectively den[ying] tenants the benefit of bulk billing arrangements."[3] In particular, MBC's concern is that its members that rely on bulk-billing arrangements will not be able to secure the financing they need to serve new buildings, because lenders purportedly require proof that there will be a secure revenue stream.[4]

The Commission should dismiss the Petition in its entirety because MBC has not shown that there is a sufficient legal basis for the Commission to find that federal law preempts Article 52. In particular, nothing in the Communications Act, or in any Commission regulation, order,

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[1] Petition at 1.
[2] Petition at ii.
[3] Petition at 4.
[4] Petition at 6-7.

or decision supports a finding that federal law preempts a state or local law just because it could potentially affect bulk-billing arrangements.

Nor should the Commission's priority be to protect the business model favored by MBC's members. In dismissing a second petition MBC filed with the Commission, in which MBC alleged that Article 52 violates the Commission's Over-the-Air Reception Devices rule ("OTARD Rule"), the Commission's Media Bureau found that "the OTARD Rule exists to enable consumers to use the services of their choosing free from undue restrictions imposed by property owners or governmental authorities, *and not to protect the ability of any particular service provider to secure financing by excluding others*."[5]

Likewise, the Commission regulations, orders, and decisions at issue in this proceeding were intended to foster competition among providers to the benefit of tenants in multiple-dwelling units ("MDUs"). The Commission did not intend its regulations, orders, and decisions to be used protect the right of MBC's members to use their bulk-billing arrangements to stifle competition in the MDUs they serve to the detriment of the tenants in those buildings. San Francisco will show that Article 52 complements the Commission's regulations, orders, and decisions by furthering competition. There is no merit to MBC's claim that federal law preempts Article 52.

[5] DA 17-421, Letter from Media Bureau dated May 4, 2017, at 3 (emphasis added). The Media Bureau dismissed MBC's petition because it found that MBC had "not established, as a threshold matter, that Article 52 impairs an antenna user's ability to install, maintain, or use a covered antenna under the OTARD Rule." (*Id*.)

II. FACTUAL BACKGROUND

A. San Francisco Adopted Article 52 to Enable Occupants of Multiple Occupancy Buildings to Have a Choice of Communications Providers

Efforts by this Commission[6] and the California Public Utilities Commission[7] to enhance competition among providers of communications services in MDUs have not been successful, at least in San Francisco. Local communications providers—including video providers and telecommunications carriers—have found ways to obtain exclusive access to MDUs without violating federal or state law.[8]

As a result, the Board of Supervisors determined that it was necessary to adopt a local law requiring owners of "multiple-occupancy buildings"[9] to allow for competition.[10] As reported in the press:

> In an urban setting like San Francisco, eliminating the ability for landlords and ISPs to lock tenants into a take-it-or-leave-it scenario will create choice for a huge swath of people: "The reality in San Francisco is that tens of thousands of residents have been denied access to different internet service providers," said Mark Farrell of the San Francisco Board of Supervisors. "I fundamentally believe competition is a good thing that will ultimately drive prices down and improve internet access across all of San Francisco."[11]

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[6] See *In the Matter of Exclusive Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20235 (2007), review denied and decision affirmed, *Nat'l Cable & Tel. Assn. v. F.C.C.*, 567 F.3d 659 (D.C. Cir. 2009) ("*2007 Exclusivity Order*"), adopting 47 C.F.R. § 76.2000; *see* pp. 14-17, *infra*.

[7] *See* Decision 98-10-058, *Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service*, 82 CPUC 2d 510, 1998 WL 1109255, at *71 (Cal. P.U.C. Oct. 22, 1998); *see* p. 24, *infra*.

[8] *See* pp. 5-6, *infra*.

[9] San Francisco uses the term "multiple-occupancy building" in Article 52 because its provisions apply both to residential and commercial properties. S.F. Police Code § 5200.

[10] *See* Community Networks, *San Francisco Passes Ordinance: Tenants Have ISP Choice At Last* (Dec. 20, 2016) (available at https://muninetworks.org/content/san-francisco-passes-ordinance-tenants-have-isp-choice-last).

[11] *Id*.

Article 52's title makes its purpose clear: "Occupant's Right to Choose a Communications Services Provider."[12] The Legislative Digest to Article 52 further shows the reasons the Board of Supervisors chose to act:

> Many occupants of residential and commercial multiple occupancy buildings are unable to choose between service providers because in some such buildings property owners allow only one provider to install the facilities and equipment necessary to provide services to occupants.
>
> State and federal regulatory agencies have adopted policies that promote competition among service providers, believing that this competition will benefit all consumers by incentivizing lower costs and better service. As the Federal Communications Commission ("FCC") has noted, "contractual agreements granting . . . exclusivity to cable operators harm competition and broadband deployment and . . . any benefits to consumers are outweighed by the harms of such [agreements]." (Citation.)[13]
>
> In 1998, the California Public Utilities Commission ("CPUC") prohibited telecommunications carriers from "entering into any type of arrangement with private property owners that has the effect of restricting the access of other [telecommunications] carriers to the owners' properties or discriminating against the facilities of other carriers." (Citation).

Article 52 supports these goals by prohibiting a "property owner"[14] from interfering with the right of an occupant[15] of a "multiple occupancy building"[16] to choose a "communications services provider."[17] Under Article 52, a property owner "interferes with the occupant's choice of communications services provider" by "refusing to allow a

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[12] S.F. Police Code art. 52; *see also* S.F. Police Code § 5201 ("No Interference by Property Owner"); and S.F. Police Code § 5202 ("No Discrimination by Property Owner Against Occupant").

[13] A copy of the Legislative Digest is available at https://sfgov.legistar.com/View.ashx?M=F&ID=4737900&GUID=802633DB-E0BC-4499-B95A-D86B7253FABD

[14] S.F. Police Code § 5200 defines "property owner" as "a person that owns a multiple occupancy building or controls or manages a multiple occupancy building on behalf of other persons."

[15] S.F. Police Code § 5200 defines "occupant" as a person "occupying a unit in a multiple occupancy building."

[16] S.F. Police Code § 5200 defines "multiple occupancy building" to include both residential and commercial properties. It also includes rental properties and cooperatively owned properties.

[17] S.F. Police Code § 5200 defines "communications services provider" as a person authorized by the California Public Utilities Commission to provide video or telecommunications services or is a "telephone corporation" as that term is defined in state law.

communications services provider to install the facilities and equipment necessary to provide communications services or use any existing wiring[18] to provide communications services."[19]

Existing mandatory access statutes all require competitive providers to install their own facilities.[20] Article 52 expanded the mandatory access provision by requiring property owners to allow communications providers to access their existing wiring to provide service. San Francisco did this to address two specific concerns.

The first is that cable providers and telecommunications carriers had found ways to circumvent the prohibition on exclusive access agreements established by this Commission and the California Public Utilities Commission "by deeding ownership to their inside wires to the building owner, and then getting an exclusive license back from the owner to use those wires."[21] As Carl Kandutsch, a member of MBC's Board of Directors, has written:

> [E]ven after the [2007] Exclusivity Order became effective, owners and providers can in practice establish exclusive arrangements, and the financial benefits associated with exclusivity, by erecting contractual barriers to competitive entry. *The most common method of conferring de facto exclusivity on a chosen provider is by specifying in the right of entry agreement that the existing inside wiring is owned by the property owner (regardless of who paid for and installed the wiring), but exclusive use of that wiring is granted to the provider*.[22]

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[18] S.F. Police Code § 5200 (emphasis added) defines "existing wiring" as "both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(ll) respectively, except that those terms as used herein shall apply only to the home run wiring or cable home wiring *owned by a property owner*."

[19] S.F. Police Code § 5201(b).

[20] *See* http://www.imcc-online.org/blog/mandatory-access (stating that existing mandatory access statutes do "not say or imply that the cable operator has a legal right to access or utilize any wiring or other infrastructure that belongs to the MDU owner"); pp, xx, *infra*.

[21] Susan Crawford, *Dear Landlord: Don't Rip Me Off When it Comes To Internet Access* (Jun 27, 2016) (available at https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9).

[22] Carl Kandutsch*, Are the FCC's Inside Wiring Rules Still Relevant? Part I: Home Run Wiring Rules* (Jan. 2011) (available at http://www.kandutsch.com/articles/are-the-fccs-inside-wiring-rules-still-relevant-part-i-home-run-wiring-rules (emphasis added)).

The second is that the cost of replicating existing wiring can impose a barrier to entry for many competitive carriers. The City hoped to eliminate that barrier by allowing a new provider to use that existing wiring where it was feasible to do so.

B. Article 52 Establishes a Collaborative Process Requiring the Property Owner's Permission to Inspect a Property or Provide Service

In order to facilitate competition, Article 52 establishes a process for a communications services provider to seek access from a property owner.[23] There are three lynchpins to that process. First, the communications services provider must be "authorized to provide communications services" in San Francisco and must have "received a request from one or more occupants" of the property.[24] Second, the communications provider must obtain the consent of the property owner to inspect the property or provide services.[25] Third, the communications provider must agree to pay "just and reasonable compensation" for accessing the property to provide services.[26]

A communications services provider can begin the process by sending a notice to a property owner requesting access to the property for an inspection. Among other things, the notice must identify: (i) the communications services to be offered; (ii) the facilities and equipment the "provider anticipates installing on the property"; (iii) the space generally needed to serve the property; and (iv) the expected electrical demand.[27] The provider must also agree to comply with the property owner's "reasonable" health and safety conditions and to indemnify the property owner.[28]

If a provider wishes to provide service, it must send the property owner a notice of intent to provide service.[29] That notice must contain detailed information concerning how the

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[23] *See* S.F. Police Code §§ 5204-5207.
[24] S.F. Police Code §§ 5204(c)(1)(B), 5205(b)(1)(B).
[25] S.F. Police Code §§ 5204(c)(4), 5205(b)(4).
[26] S.F. Police Code § 5208.
[27] S.F. Police Code § 5204(c)(2).
[28] S.F. Police Code § 5204(c)(1).
[29] S.F. Police Code § 5205.

provider intends to serve the property.[30] The property owner may refuse the request for a number of reasons including: (i) "physical limitations" prevent the provider from installing its own facilities or using the existing wiring to provide service; (ii) granting access to the property would "have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property"; (iii) the provider will not agree to comply with the property owner's "reasonable" health and safety conditions; or (iv) the provider and the property owner cannot reach agreement on just and reasonable compensation.[31]

C. Mandatory Access Statutes Have Been Around for a Long Time

San Francisco did not break new ground by requiring property owners to allow new communications providers to obtain access to their properties to provide services to occupants. Such mandatory access statutes have been around for quite some time.[32]

For example, since 1995 New York State has barred a property owner from "interfer[ing] with the installation of cable television facilities upon his property or premise."[33] Since 2002, the District of Columbia Code has provided that a residential landlord may not "[i]nterfere with the installation, operation, upgrade, or maintenance of cable television facilities upon a property or premises."[34] In 2003, the Delaware Legislature declared that "a tenant in a multiple dwelling unit shall have the freedom and right to select the provider of cable television,

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[30] S.F. Police Code § 5205(b)(2) (provider must include its "plans and specifications for any work to be performed and facilities and equipment and be installed on the property").
[31] S.F. Police Code §§ 5206(b).
[32] *See* http://www.imcc-online.org/blog/mandatory-access (identifying 19 states with mandatory access laws).
[33] N.Y.Pub.Serv.Law § 228.
[34] D.C.Stat. § 34-1261.01; *see also* Ct.Gen.Stat. § 16-333a; Fla.Stat. § 718.1232; 55 Ill.Comp.Stat. 5/5-1096; Me.Rev.Stat. tit. 14, § 6041(c)(1); Mass.Gen.L. ch. 166A § 22; Minn.Stat. § 238.23; Nev.Rev.Stat. § 711.255; N.J.Stat. 48:5A-49; 68 Pa.St. § 250.503-B; Wis.St. § 66.0421; and W.Va.Code § 24D-2-3.

telephone, telecommunications or information service to their living unit, without any restraints, limitations or conditions imposed by a landlord."[35]

As discussed below, the Commission has never found that federal law preempts these mandatory access statutes.[36] Furthermore, San Francisco is not aware of any court that has invalidated a mandatory access statute, except to the extent the statute does not provide for just and reasonable compensation.[37] In upholding the validity of New Jersey's mandatory access statute, the court made clear that its purpose was to make sure a tenant's choice of communications provider would not be encumbered by the property owner:

> The real point of [N.J.Stat. 48:5A-49] was to prevent landlords from exacting an excessive price from tenants who want to receive or from cable companies who want to provide cable services. Realistically, few landlords would have a reason flatly to prohibit access. The danger was that owners might charge unfairly for it. The two recent amendments to § 49 merely extend its protection to mobile home residents and condominium unit owners and cooperative shareholders. The point, however, is the same, i.e., to bar the entity controlling access from improperly exacting tribute.[38]

Likewise, San Francisco's mandatory access statute, by requiring property owners to allow competitive providers access to their properties, will enable San Francisco's tenants to obtain access to the highest quality communications services at competitive prices.

D. MBC's Petition

MBC claims in its Petition that federal law preempts Article 52. According to MBC, that preemption takes two forms. First, MBC's claims that Article 52 conflicts with the

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[35] 26 Del.C. § 601.
[36] *See* pp. 19-21, *infra*.
[37] *See*, *e.g.*, *Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Assocs., Ltd*, 493 So.2d 417 (Supreme Ct. 1986); and *NYT Cable TV v. Homestead at Mansfield, Inc.*, 111 N.J. 21, 543 A.2d 10 (Supreme Ct. 1988).)
[38] *Princeton Cablevision, Inc. v. Union Valley Corp.*, 195 N.J. Super. 257, 266, 478 A.2d 1234 (Superior Ct. 1983).

"Commission's 'bulk billing' polices."[39] According to MBC, Article 52's provisions "effectively bar bulk billing arrangements by denying the bulk billing service provider the exclusive right to use designated wiring for the delivery of 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."[40]

Even if that statement were factually correct—which it is not—MBC's preemption claim would still fail.[41] MBC has not identified any Commission regulation, order, or decision that establishes a bulk-billing policy on which MBC can base a preemption claim.

Second, MBC claims there is a conflict between Article 52 and the FCC's regulation of cable inside wiring, telecommunications inside wiring, and unbundled network elements ("UNEs").[42] The City will show there are no such conflicts for a number of reasons, particularly because Article 52 expressly limits its applicability to wiring owned by a property owner. Article 52 does not impose any obligation to share existing wiring owned by a cable television provider or telecommunications provider, nor does it allow a communications provider to access any UNEs owned by a telecommunications provider. [43]

Finally, MBC claims that the Commission has "occupied the field" with respect to inside wiring so that any local regulation would be preempted.[44] However, there is no evidence that

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[39] Petition at 21.
[40] Petition at 23.
[41] It is not correct for two reasons. First, Article 52 does not require property owners to allow access to existing wiring owned by the provider. MBC's members can continue to insist on exclusive use of existing wire that they own. Second, Article 52 allows a property owner to deny access to existing wiring owned by the property owner where it is not feasible or would adversely affect existing services. *See* pp. 6-7, *supra*.
[42] *See* Petition at 14-21; 26-29.
[43] In these comments, San Francisco does not separately address MBC's claim that Article 52 conflicts with the Commission's "'Network Unbundling' Mandates"(*see* Petition at 26-29) for the simple reason that nothing in Article 52 in any way touches upon the Commission's regulations, orders, or decisions requiring incumbent local exchange carriers to unbundling their facilities. Existing wiring owned by property owners is not a UNE.
[44] *See* Petition at 29-31.

Congress intended to allow the Commission to occupy any such field, or that the Commission has ever exercised any authority it might have to do so.[45]

III. THE COMMISSION SHOULD DISMISS MBC'S CLAIM THAT FEDERAL LAW AND POLICY PREEMPT ARTICLE 52

A. The Appropriate Legal Standards for a Federal Preemption Claim

The Supremacy Clause of the United States Constitution provides that federal law is "the supreme Law of the Land."[46] It is a "fundamental principal of the Constitution that Congress has the power to preempt state law."[47] In any preemption analysis, a court must assume that "the historic police powers of the States" are not "superseded" by federal law "unless that was the clear and manifest purpose of Congress."[48] That is particularly true here, because state and local governments have well-recognized authority under their police power to regulate the landlord-tenant relationship.[49]

Nonetheless, state law will give way to federal law in a number of instances.[50] The most common form of preemption is conflict preemption. "Conflict preemption is implicit preemption of state law that occurs where there is an actual conflict between state and federal

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[45] *See* pp. 24-26, *infra*.
[46] Art. VI, cl. 2.
[47] *See Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372 (2000).
[48] *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947); see *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).
[49] See *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 425 (1982) (approving determination by New York's highest court that New York's mandatory access law was within its police power); *Birkenfeld v. City of Berkeley*, 17 Cal.3d 129, 146 (Supreme Ct. 1976) (cities may use their "police power to impose reasonable regulations upon private property rights to serve the larger public good").
[50] See generally, *English v. General Electric Co*., 496 U.S. 72, 79 (1990). The Commission will conduct a similar preemption analysis when presented with a claim that Commission rules preempt state or local laws. See *In the Matter of Implementation of Section 621(A)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection And Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101, 5156–5150, ¶¶ 125–131 (2007), petition for review denied by, *Alliance for Community Media v. F.C.C.*, 529 F.3d 763 (6th Cir. 2008).

law."[51] Conflict preemption arises either when "compliance with both federal and state regulations is a physical impossibility ... or when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[52]

Conflict preemption can stem from agency actions only where Congress has authorized the agency to preempt state and local laws and the agency has taken specific action to do so.[53] "When Congress charges an agency with balancing competing objectives, it intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize those objectives. Allowing a state law to impose a different standard [impermissibly] permits a re-balancing of those objectives."[54]

A second, and less common, form of preemption is field preemption. State and local governments are precluded from regulating conduct in a field that "Congress, acting within its proper authority, has determined must be regulated by its exclusive governance."[55] The intent to displace state and local law altogether can only be inferred from a framework of regulation "so pervasive . . . that Congress left no room for the States to supplement it" or where there is a "federal interest . . . so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[56]

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[51] *McClellan v. I-Flow Corp.*, 776 F.3d 1035, 1039 (9th Cir. 2015) (internal quotation marks and citation omitted).
[52] *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985) (citations omitted).
[53] *City of New York v. F.C.C.*, 486 U.S. 57, 64 (1988).
[54] *Farina v. Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010).
[55] *Arizona v. U.S.*, 567 U.S. 387, 132 S. Ct. 2492, 2501 (2012).
[56] *Rice, supra*, 331 U.S. at 230; see *English*, *supra*, 496 U.S. at 79.

B. Preemption Cannot Be Based Solely on Broad Policy Statements or Federal Agency Inaction

It is well settled that conflict preemption cannot be based on "general expressions of 'national policy'". [57] "There is no federal preemption in vacuo, without a constitutional text or a federal statute to assert it."[58] As the Supreme Court has explained:

> We are presented with the decidedly untypical claim that federal pre-emption exists despite not only the absence of a statutory provision specifically announcing it, but the absence of any extant federal regulatory program with which the state regulation might conflict and which might therefore be thought to imply pre-emption.[59]

As the Supreme Court further found, "unenacted approvals, beliefs, and desires are not law. Without a text that can, in light of those statements, plausibly be interpreted as *prescribing* federal pre-emption it is impossible to find that a free market was mandated by federal law."[60]

Federal agency actions can also provide a basis for a preemption claim.[61] Such a claim, however, must be based on specific agency regulations, orders, or decisions.[62] An agency's decision "*not* to regulate" cannot by itself be the basis for a preemption claim.[63] In many cases, the courts have considered and rejected preemption claims that were not based on federal laws, or appropriate agency regulations, orders, or decisions, but rather on purported federal "policies" or agency "inaction".

A good example is *Guschke v. City of Oklahoma City* in which the court rejected a claim of an amateur radio operator seeking to preempt a local zoning law limiting the height of radio

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[57] *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981).
[58] *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp*., 485 U.S. 495, 503 (1988).
[59] *Id*. at 500.
[60] *Id*. at 501 (emphasis in original).
[61] *Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta*, 458 U.S. 141, 153–154 (1982).
[62] *General Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990); see *New York v. F.C.C.,* 486 U.S. 57 (1988) (agency regulations authorized by statute); *Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co*., 450 U.S. 311 (1981) (agency decisions).
[63] *Fellner v. Tri-Union Seafoods*, L.L.C., 539 F.3d 237, 246 (3d Cir. 2008).

towers.[64] Plaintiff based his preemption claim on the "federal encouragement of amateur radio" combined with the Commission's broad regulation of "radio and telecommunications."[65] In finding for the defendant, the court held: "General statements of legislative or regulatory intent to encourage the use and development of amateur radios are insufficient to imply intent to preempt state laws which inhibit amateur radio development."[66]

Another example is *Sprietsma v. Mercury Marine* in which a plaintiff in a personal injury action claimed that an outboard motor was unreasonably dangerous because it did not have a propeller guard.[67] As a defense to that claim, the defendant argued that the Coast Guard's decision *not* to regulate propeller guards preempted the plaintiff's personal injury claim.[68] In rejecting that defense, the Supreme Court held: "We first consider, and reject, respondent's reliance on the Coast Guard's decision not to adopt a regulation requiring propeller guards on motorboats. *It is quite wrong to view that decision as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation*."[69] As the Supreme Court further found, "history teaches us that a Coast Guard decision not to regulate a particular aspect of boating safety is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standard."[70]

C. MBC Has Not Demonstrated a Conflict between Article 52 and Any Federal Law or Commission Regulation, Order or Decision

MBC claims that Article 52 "is in conflict with federal law and policy" because it "contradicts the Commission's policy choices and balancing with respect to access to the inside wiring in multi-tenant buildings, flouts the Commission's considered conclusions regarding the

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[64] *Guschke v. City of Oklahoma City*, 763 F.2d 379, 381–382 (10th Cir. 1985).
[65] *Id*. at 384.
[66] *Id*.; see also *Commonwealth Edison Co*., *supra*, 453 U.S. at 633–636 (General statements supporting the development of coal usage are insufficient to preempt state regulations that inhibit coal consumption).
[67] *Sprietsma v. Mercury Marine*, 537 U.S. 51, 54–55 (2002).
[68] *Id*. at 64.
[69] *Id*. at 65 (emphasis added).
[70] *Id*. at 65.

propriety and utility of bulk billing arrangements, and disrupts the careful balances reflected in the agency's network sharing mandates."[71] MBC, which has the burden of proving preemption,[72] cannot meet that burden because MBC cannot identify a single federal law or FCC regulation, order, or decision that conflicts with any of the requirements of Article 52—let alone the entirety of the law as MBC suggests.

1. There is No Conflict Related to Bulk-Billing Arrangements

In a number of decisions implementing the Cable Television Consumer Protection & Competition Act of 1992[73] (the "Cable Act of 1992") the Commission has discussed bulk-billing arrangements used by multichannel video programming distributors ("MVPDs")[74], but has chosen not to regulate them. The first instance was in 2007 when the Commission exercised its authority under Section 628 of the Cable Act of 1992 to adopt a regulation: (i) prohibiting the enforcement of agreements between MVPDs and MDU owners that granted the MVPDs exclusive rights to serve their properties; and (ii) barring MVPDs from entering into new agreements that provided them with such exclusive rights. [75] The Commission made clear that the purpose of those regulations was to increase competition in MDUs, because the Commission found that such exclusive access agreements "cause significant harm to competition and consumers." [76] As the Commission stated:

> Such exclusivity clauses inhibit competition in these markets and slow the deployment of broadband facilities. In doing so, exclusivity clauses deny MDU residents the benefits of increased competition, including lower prices and the availability of more channels with more diverse content, as well as access to alternative providers of broadband facilities and the triple play of communications services their facilities support. These harms to consumers are traceable to the incumbent cable operators'

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[71] Petition at 14.
[72] *Silkwood v. Kerr–McGee Corp.,* 464 U.S. 238, 255 (1984).
[73] Pub.L. No. 102–385, 106 Stat. 1460 (1992).
[74] A "multichannel video programming distributor" of "MVPD" is defined as a "cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13).
[75] *2007 Exclusivity Order*, *supra*, 22 FCC Rcd. at 20235; adopting 47 C.F.R. § 76.2000.
[76] *Id*. at 20248–20249, ¶ 26.

> practice, increased recently, of using exclusivity clauses, sometimes in fine print and without adequate notice to MDU owners, to forestall competition, particularly when new competitors are about to enter the market. We do not wish to deny MDU residents these benefits based on incumbents' alleged need to be shielded from additional competition, or to subject them to something resembling the exclusive franchises of an earlier era.[77]

Notably, the Commission declined at that time to preempt bulk-billing agreements despite claims that they were anti-competitive.[78] Rather, the Commission decided to open a second proceeding to determine whether bulk-billing arrangements "have the same practical effect as exclusive arrangements in the most customers would be dissuaded from switching video providers."[79]

Three years later the Commission specifically addressed its concerns about bulk-billing arrangements but again declined to take any specific action.[80] While MBC characterizes this Commission's actions in 2010 as establishing "'bulk billing' policies'",[81] that is not what happened. All the Commission said at that time was that it would not "prohibit any MVPD from using bulk billing arrangements."[82] Thus, MBC's argument that the Commission has "expressly endorsed the use of such arrangements"[83] is simply erroneous. The Commission's decision not to exercise its authority to prohibit bulk-billing arrangements does not establish a policy, let alone a lawful basis for the Commission to find that there is a conflict between federal law—as

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[77] *Id*.
[78] *Id*. at 20265, ¶ 65.
[79] *Id*.
[80] *In the Matter of Exclusive Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Second Report and Order, 25 FCC Rcd. 2460 (2010) ("*2010 Exclusivity Order*").
[81] Petition at 21.
[82] *2010 Exclusivity Order*, 25 FCC Rcd. at 2461, ¶ 2.
[83] Petition at 21-22.

set forth in existing Commission regulations, orders, or decisions—and Article 52.[84] Ignoring well-settled law, MBC seeks to rely on Commission inaction to find preemption.[85]

MBC also fails to mention that the Commission's refusal to prohibit bulk-billing arrangements was based in part on its finding that such arrangements "do not hinder significantly, much less prevent, a second video service provider from serving residents in the MDU."[86] Thus, while the Commission saw the need to prohibit exclusive access agreements, because they did deny tenants a choice of providers, the Commission did not view bulk-billing arrangements in the same light. As the Commission stated:

> *A key consideration for us is that bulk billing, unlike building exclusivity, does not hinder significantly the entry into an MDU by a second MVPD and does not prevent consumers from choosing the new entrant*. Indeed, many commenters indicate that second MVPD providers wire MDUs for video service even in the presence of bulk billing arrangements and that many consumers choose to subscribe to those second video services. . . . Bulk billing, accordingly, does not have nearly the harmful entry-barring or-hindering effect on consumers that exists in the case of building exclusivity.[87]

That finding directly negates MBC's argument here that the Commission should preempt Article 52 in order to continue to protect its members' revenue streams under bulk-billing arrangements. San Francisco's ordinance furthers the Commission's goal of ensuring that even those tenants that are required to obtain service under bulk-billing arrangements have the option to choose another provider. Federal law protects those tenants—not MBC's members. Absent Article 52, those tenants would not have that choice, because property owners could continue to exclude competitive providers.

MBC's argument that preservation of its bulk-billing arrangements is necessary for its members to obtain the financing they need to deploy their networks is also not a lawful basis

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[84] Whether the Commission has the authority to regulate bulk-billing arrangements in a manner that would preempt Article 52 is not the question here. MBC's claim is that the Commission has already done so.
[85] *See* pp. 12-14, *supra*.
[86] *2010 Exclusivity Order*, 25 FCC Rcd. at 2461, ¶ 2.
[87] *Id.* at 2470, ¶ 26 (emphasis added; footnotes omitted).

for finding preemption. According to MBC, "financial institutions generally require them to submit evidence that the investment will pay off - evidence such as a bulk billing arrangement."[88] The Commission, however, is not "an economic guarantor of competing communication technologies which may offer similar services to subscribers."[89] The Commission should not act to protect one competitor's business model to the detriment of consumers. The Commission should act to "encourage direct competition" among different types of providers.[90]

The Media Bureau made a similar finding when it dismissed MBC's OTARD petition challenging Article 52, because the OTARD rules were intended to provide consumer choice "*not to protect ability of any particular service provider to secure financing provided by others*."[91] In any event, as the Commission noted when it prohibited exclusive access agreements, because "[n]othing in the rule precludes MVPDs from utilizing the wires they own to provide services to MDUs or requires them to jettison capitalized investments" the Commission's rule will likely "have minimal adverse economic impact on affected MVPDs."[92] Because nothing in Article 52 prohibits MBC's members from enforcing their bulk-billing agreements, or using the existing wiring to provide service, Article 52 is likely to have "minimal adverse economic impact on MBC's members."

Because MBC has not met its burden of proving that there is a conflict between Article 52 and any Commission, regulation, order, decision, or policy related to bulk billing arrangements, the Commission should dismiss that aspect of the MBC's Petition that seeks to preempt Article 52's facilities sharing provision on the basis of such a conflict.

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[88] Petition at 23.
[89] *ESCOM*, *supra*, 95 F.C.C.2d at 1232-33, ¶ 20.
[90] *Id.*
[91] DA 17-421, Letter from Media Bureau dated May 4, 2017, at 3 (emphasis added).
[92] *2007 Exclusivity Order*, *supra*, 22 FCC Rcd. at 20262, ¶ 57.

2. There is No Conflict Related to Article 52's Mandatory Access Provision

At least with regard to that aspect of Article 52 that is similar to state mandatory access statutes, the United States Court of Appeal for the Second Circuit has already found that nothing in the Federal Communications Act, in general, or the Cable Communications Policy Act of 1984, in particular, preempts such laws.[93]

AMSAT Cable Ltd. v. Cablevision of Connecticut L.P. concerned Connecticut's mandatory access statute.[94] A satellite master antenna television ("SMATV") provider challenged a cable television provider's threat to use the law to gain access to a property the provider had been serving pursuant to an exclusive agreement with the property owner.[95] In rejecting a claim of conflict preemption, the court held:

> Plaintiffs' first preemption argument is based upon the fact that Congress considered and rejected including a cable access provision as part of the Cable Act. This legislative decision is not, in itself, sufficient to give rise to a presumption that Congress intended to preempt states from enacting and enforcing their own similar provisions. Moreover, Congress was well aware of the existence of cable access provisions in several states when it enacted the Cable Act and chose not expressly to preempt or otherwise limit the scope of those provisions. . . . And [Conn.Gen.Stat.] § 16–333a neither conflicts with any provision of the Cable Act nor falls within any of the statute's express preemption provisions.[96]

This decision makes clear that there is no conflict between federal law and Article 52's mandatory access provision.[97] In addition, as discussed below, MBC has not identified a single Commission regulation, order, or decision that conflicts with Article 52's mandatory access provision—but, instead attempts to rely on vague policy contained in Commission decisions to prove preemption. Article 52, however, is consistent with federal policy embodied in the Cable Communications Policy Act of 1984, which is "to insure that the public receives the widest

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[93] *AMSAT Cable Ltd. v. Cablevision of Conn. L.P*, 6 F.3d 867 (2d Cir. 1993).
[94] *Id*. at 875–876; *see* Conn.Gen.Stat. § 16-333.
[95] *AMSAT Cable*, *supra*, 6 F.3d at 869–870.
[96] *Id*.
[97] See *Cable Investments, Inc. v. Woolley*, 867 F.2d 151, 155–159 (3d Cir. 1989) (finding that nothing in the Cable Communications Policy Act established a federal right for cable providers to obtain access to private property to provide service)

possible diversity of information services and sources, in a manner which is responsive to the needs and interests of the local communities."[98]

MBC's argument that Commission policy preempts Article 52's mandatory access provision must also fail. The Second Circuit in *AMSAT Cable* rejected plaintiff's preemption claim based on the Commission's decision in *Earth Satellite Communications Inc*. [99] ("*ESCOM*").[100] In *ESCOM*, the Commission preempted a number of state laws involving certification and registration of SMATV providers.[101] In so doing, the Commission found that these state laws "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the Commission."[102] Notably, the Commission recognized the validity of mandatory access statutes, like the one in New York State, which by virtue of "state regulatory fiat" provided franchised cable operators with access to MDUs. The Commission found that SMATV providers could at least "co-exist" and have the opportunity to compete for subscribers" with cable operators.[103]

As a result, the Second Circuit rejected the claim that in *ESCOM* the Commission preempted mandatory access laws:

> Plaintiffs' argument based on ESCOM fails not only because the FCC decision did not indicate a policy to preclude states from enacting cable access statutes, but—as Magistrate Judge Margolis recognized and the FCC states in its amicus brief—also because that decision was premised upon the existence of statutes like the one at issue here. ESCOM implicitly recognized that cable access laws were permissible, so long as they provided SMATV broadcasters with an opportunity to compete with franchised cable operators and did not interfere with interstate and federally controlled communications systems. (Citation).[104]

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[98] *Rollins Cablevue, Inc. v. Saienni Ent.*, 633 F. Supp. 1315, 1318 (D. Del. 1986).
[99] *In the Matter of Earth Satellite Communications Inc*., 95 F.C.C.2d 1223 (1983), aff'd sub nom., *New York State Commission on Cable Television v. F.C.C.*, 749 F.2d 804 (D.C. Cir. 1984).
[100] *AMSAT Cable*, *supra*, 6 F.3d at 875–876.
[101] *ESCOM*, *supra*, 95 F.C.C.2d at 1232–1235, ¶¶ 19-21.
[102] *Id*. at 1234, ¶ 21.
[103] *Id*. at 1233, ¶ 20.
[104] *AMSAT Cable*, *supra*, 6 F.3d at 876.

The court was also persuaded by the fact that the Commission had filed a brief in which it "expressly disavowed any intention to preempt cable access laws."[105]

In fact, since *ESCOM* the Commission has more explicitly refused to preempt mandatory access statutes. In 1997, in declining to preempt state mandatory access statutes under the Cable Act of 1992, the Commission found:

> We believe that the record in this proceeding does not support the preemption of state mandatory access laws at this time. While commenters opposing state mandatory access laws argue that these laws act as a barrier to entry, the record also indicates that property owners deny access for reasons unrelated to the state laws, including property damage, aesthetic considerations and space limitations.[106]

In 2003, the Commission again "declined" to preempt such laws due to the "possibility" that absent such laws some MDUs would have no cable service whatsoever—let alone access to multiple providers.[107] As the Commission held: "States and local jurisdictions are well-positioned to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws."[108] Finally, in 2007 the Commission found that the question of whether property owners could deny access to MDUs to competitive providers was best left to state law.[109] The Commission refrained from issuing any order that would "require MDU owners to provide access to all MVPDs," while noting that same states had allowed for such access.[110] The Commission instead affirmed its prior holding that the rights of property owners should be determined under "relevant state law."[111]

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[105] *Id*.
[106] *In the Matter of Telecommunications Services Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd. 3659, 3748, ¶ 189 ("*1997 Inside Wiring Order II*").
[107] *In the Matter of Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd. 1342, 1358, ¶ 39 (2003) ("*2003 Inside Wiring Order*").
[108] *Id*.
[109] *2007 Exclusivity Order*, *supra*, 22 FCC Rcd. at 20253, ¶ 37.
[110] *Id.* at 20253, ¶ 37, 20263, ¶ 60.
[111] *Id*. at 20253, ¶ 37.

Clearly, the Commission has recognized that state and local laws akin to Article 52 complement—rather than conflict with—the Commission's policy to ensure that residents of MDUs can choose among various the providers serving their community. Consistent with general preemption principles, the Commission has let stand those state and local regulations that concern the rights and obligations of tenants and property owners, as does Article 52, even though those regulations touch on the Commission's authority to regulate MVPDs and the services they provide.

There is no basis for MBC's claim that Article 52 is preempted "in full." At the very least, the Commission must deny MBC's preemption claim with respect to mandatory access aspect of Article 52.

3. There is No Conflict Related to the Disposition of Cable Home Wiring or Home Run Wiring

In the Cable Act of 1992, Congress directed the Commission to "prescribe rules concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator with the premises of such subscriber."[112] Pursuant to that authority, the Commission in a number of decisions[113] has adopted regulations concerning the disposition of "cable home wiring"[114] and "home run wiring"[115] owned by an MVPD.[116]

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[112] 47 U.S.C. § 544(i).

[113] See *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd. 1435 (1993) ("*1993 Inside Wiring Order*); *In the Matter of Telecommunications Services Inside Wiring*, Further Notice of Proposed Rulemaking, 12 F.C.C. Rcd. 13592 (1997) ("*1997 Inside Wiring Order I*"); *1997 Inside Wiring Order II*, *supra*, 13 FCC Rcd at 3659; and *2003 Inside Wiring Order*, *supra*, 18 FCC Rcd. at 1342.

[114] 47 C.F.R. § 76.5(ll). "Cable home wiring" is the "internal wiring contained within the premises of a subscriber which begins at the demarcation point." This is in essence the wiring within a home or apartment.

[115] 47 C.F.R. 76.800(d). "Home run wiring" is the "wiring running from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber." This is in essence the wiring from the MVPD's facilities entering an MDU to the cable home wiring.

[116] Article 52 defines "existing wiring" to include both cable home wiring and home run wiring, to the extent they are owned by a property owner. S.F. Police Code § 5200.

The Commission's regulations require that, upon termination of service by a subscriber, an MVPD must notify the subscriber of its right to purchase the cable home wiring.[117] The regulations also provide that, once an MVPD no longer has a "legally enforceable right to remain on the premises" of an MDU, the MVPD must give the MDU owner the opportunity to purchase the home run wiring.[118]

The Commission adopted these regulations on the belief that "fostering competitive choice in MDUs" required it to put both cable home wiring and home run wiring in the hands of the property owner.[119] As the Commission stated:

> The evidence in this proceeding leads us to conclude that more is needed to foster the ability of subscribers who live in MDUs to choose among competing service providers. Based on the record evidence, we believe that one of the primary competitive problems in MDUs is the difficulty for some service providers to obtain access to the property for the purpose of running additional home run wires to subscribers' units. The record indicates that MDU property owners often object to the installation of multiple home run wires in the hallways of their properties, for reasons including aesthetics, space limitations, the avoidance of disruption and inconvenience, and the potential for property damage.[120]

The Commission believed that MDU owner control over cable home wiring and home run wiring would lead to competition. The Commission had faith that "market forces" would compel MDU owners in competitive real estate markets to take their tenants' desires into account" otherwise tenants would simply move to another MDU.[121]

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[117] *See* 47 C.F.R. § 76.802.
[118] *See* 47 C.F.R. § 76.804.
[119] *1997 Inside Wiring Order I*, *supra*, 12 F.C.C. Rcd. at 13625, ¶ 73.
[120] *Id*. at 13604, ¶ 25; see also *1997 Inside Wiring Order II*, *supra*, 13 FCC Rcd. at 3678, ¶¶ 35-37, 3689, ¶ 59.
[121] *1997 Inside Wiring Order II*, *supra*, 13 FCC Rcd. at 3690, ¶ 51. In San Francisco, like many large cities, moving for this reason alone would not be a viable option. In San Francisco, the vacancy rate in 2016 was a shockingly low 0.3 percent and the average rent for a one-bedroom apartment in 2017 was $3,364. See *http://www.realtytrac.com/news/foreclosure-trends/u-s-q1-2016-u-s-residential-property-vacancy-analysis/;* and *https://www.rentjungle.com/average-rent-in-san-francisco-rent-trends/*.

During the course of its proceedings, some commenters asked the Commission to adopt a proposal requiring the incumbent MVPDs to allow competitors to share their home run wiring.[122] The Commission declined to adopt this proposal because the evidence in the record suggested that there were "significant unresolved technical problems with it."[123]

Article 52 does not conflict with the Commission's regulations concerning cable home wiring and home run wiring because it does not require MVPDs to allow access to such wiring that they own. It only applies to such wiring owned by the property owner. Article 52 complements the Commission's regulations by supporting the Commission's policy to foster competition among providers in MDUs by requiring property owners to make wiring they own available for sharing. Article 52 also recognizes the Commission's concern about such sharing by allowing property owners to refuse a request to share existing wiring when it is not technically feasible. Article 52 addresses that concern by allowing that determination to be made on a building-by-building basis and then only with the consent of the property owner.

The Commission should deny MBC's claim that the Commission's regulation of cable inside wiring preempts Article 52.

4. There is No Conflict Related to Telecommunications Inside Wiring

MBC seems to argue that the Commission's regulation of "telecommunications inside wiring" somehow preempts Article 52, but MBC admits that Article 52 defines "existing wiring" as "home run wiring" and "cable home wiring."[124] This definition does not include telecommunications inside wiring.

In any event, MBC has not identified any federal law, or Commission regulation, order, or decision related to telecommunications inside wiring that even arguably conflicts with Article 52. The only Commission regulation MBC cites is 47 C.F.R. § 68.105(d), which concerns where a telecommunications provider serving a multiunit premise may place its "demarcation point."

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[122] *2003 Inside Wiring Order*, *supra*, 18 FCC Rcd. at 1377, ¶ 88.
[123] *Id*.
[124] Petition at 20.

Understandably, MBC makes no effort to explain how this regulation could somehow preempt Article 52.

Furthermore, Article 52 is consistent with state law. Since 1992, the California Public Utilities Commission ("CPUC") has required telecommunications carriers "to transfer ownership and responsibility for certain telephone cable and inside wire to property owners."[125] Since 1998, the CPUC has barred telecommunications carriers from "entering into any type of arrangement with private property owners which has the effect of restricting the access of other carriers to the owners' properties or discriminating against the facilities of other carriers."[126]

For these reasons, there is simply no merit to MBC's claim that the Commission's regulation of telecommunications inside wiring preempts Article 52.

D. The FCC's Regulation of Cable Home Wiring and Home Run Wiring Are Not a Basis for Field Preemption

MBC's final claim is that "Article 52's imposition of mandatory wire sharing is also separately invalid under the 'field preemption' doctrine."[127] Under this doctrine, Congress impliedly preempts state law when "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the states to supplement it."[128] "The question whether the regulation of an entire field has been reserved by the Federal Government is, essentially, a question of ascertaining the intent underlying the federal scheme."[129] That Congress enacts a statute affecting an industry does not in itself reflect an intent to eliminate all state laws related to that industry.[130]

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[125] Decision 98-10-058, *supra*, 82 CPUC 2d 510, 1998 WL 1109255, at *72.
[126] *Id*.
[127] Petition at 29.
[128] *Rice*, *supra*, 331 U.S. at 230.
[129] *Hillsborough Cnty., supra*, 471 U.S. at 714.
[130] *Id.*

With respect to agency regulations, the courts will look to whether the agency evidenced a desire to occupy a field completely.[131] Preemption will not be "inferred . . . simply because the agency's regulations are comprehensive."[132] That is especially true when even comprehensive federal regulations "appear to contemplate some concurrent state regulation."[133]

The courts have consistently found that the FCC's regulation of a particular issue is insufficient to establish field preemption.[134] For example, despite the Commission's comprehensive regulation over wireless telecommunications, the courts have found that "neither Congress nor the FCC has evinced an intent to occupy the entire field." [135] Another court refused to find that the Commission had preempted all state-law regulation of long-distance contracts.[136] The court found instead that the Commission's detariffing orders "explicitly contemplate a role for state law in the deregulated long-distance market." [137]

That is in part because the Communications Act contains a "savings clause," which provides that "[n]othing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[138] The presence of such a savings clause "is fundamentally incompatible with

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[131] *R.J. Reynolds Tobacco Co. v. Durham Cnty*., 479 U.S. 130, 149 (1986).
[132] *Id*.
[133] *Id*.
[134] *Farina v. Nokia Inc*., 625 F.3d 97, 121 (3d Cir. 2010); see also *Pinney v. Nokia, Inc*., 402 F.3d 430, 459 (4th Cir. 2005).
[135] San Francisco could only find one instance in which the courts have found that the FCC has evinced an intent to occupy the field, and that is with respect to radio frequency interference. See *Southwestern Bell Wireless Inc. v. Johnson Cnty. Bd. of Cnty. Commissioners*, 199 F.3d 1185 (10th Cir. 1999).
[136] *In re Universal Service Fund Telephone Billing Practice Litigation*, 619 F.3d 1188, 1196 (10th Cir. 2010).
[137] *Id*.
[138] 47 U.S.C. § 414; *Farina*, *supra*, 625 F.3d at 121.

complete field preemption; if Congress intended to preempt the entire field . . . there would be nothing . . . to 'save,' and the provision would be mere surplusage."[139]

These general principles provide a firm basis for the Commission to reject MBC's field preemption claim. First, the United States Court of Appeals for the District of Columbia Circuit found that Congress did not intend to "preempt the field of consumer protection in the cable industry."[140] Second, as noted above, the Commission has repeatedly found that state mandatory access statutes, rather than unlawfully invading a field the FCC has completely occupied, play an important role in protecting consumers. Finally, the Commission has never indicated that it has the authority to regulate existing wiring owned by MDU owners. The Commission's regulations all concern the wiring owned by MVPDs. Even had the Commission intended to occupy *that* field, Article 52's regulation of existing wiring owned by property owners regulates in a *separate and distinct* field.

The Commission should dismiss MBC's field preemption claim because MBC has not met its burden of proving that the Commission has occupied any field that Article 52 regulates.

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[139] *In re NOS Commc'ns*, 495 F.3d 1052, 1058 (9th Cir. 2007).

[140] *Time Warner Ent. Co., L.P. v. F.C.C.*, 56 F.3d 151, 194 (D.C. Cir. 1995) (internal quotation marks omitted).

V. CONCLUSION

Based on the foregoing, the City and County of San Francisco asks the Commission to dismiss the petition of the Multifamily Broadband Council to preempt Article 52 of the San Francisco Police Code. Rather than conflicting with federal law, as set forth in various Commission regulations, orders, and decision, Article 52 supports the Commission's policy to ensure that all consumers have access to high-quality broadband services at competitive prices.

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Respectfully submitted,

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