

WILKINSON) BARKER) KNAUER) LLP

1800 M STREET, NW
SUITE 800N
WASHINGTON, DC 20036
TEL 202.783.4141
FAX 202.783.5851
WWW.WBKLaw.COM

July 24, 2017

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: *Improving Competitive Broadband Access to Multiple Tenant
Environments*, GN Docket No. 17-142

Dear Ms. Dortch:

The Multifamily Broadband Council (“MBC”) submits this letter in response to the Notice of Inquiry (“NOI”) in the above-referenced docket. The NOI seeks comment on issues pertinent to broadband competition and deployment in multiple tenant environments. Some of these issues have been addressed in a concurrent proceeding in which MBC seeks a declaratory ruling that a mandatory access ordinance contained within the San Francisco Police Code is preempted by federal law and policy and therefore is invalid in its entirety.¹ To ensure that the Commission has the benefit of MBC’s views, MBC encloses its preemption petition and reply comments from MB Docket No. 17-91 and asks that they be included in the record developed in response to the NOI. Please contact the undersigned with any questions.

Respectfully submitted,

/s/ Bryan N. Tramont

Bryan N. Tramont

Russell P. Hanser

Brian W. Murray

WILKINSON BARKER KNAUER, LLP

*Attorneys for the Multifamily
Broadband Council*

Enclosures

¹ Public Notice, *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, DA 17-318 (rel. Apr. 4, 2017).

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

Petition of the Multifamily Broadband Council)
Seeking Preemption of Article 52 of the San) __ Docket No. 17-____
Francisco Police Code)
)

PETITION FOR PREEMPTION

Bryan N. Tramont
Russell P. Hanser
Brian W. Murray
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
(202) 783-4141

*Attorneys for the Multifamily
Broadband Council*

February 24, 2017

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
INTRODUCTION AND BACKGROUND	2
DISCUSSION	12
I. ARTICLE 52 CONFLICTS WITH FEDERAL LAW AND POLICY AND IS THEREFORE PREEMPTED.	12
A. Article 52 Conflicts With Federal Law and Policy Regarding Competitive Access to Multi-Tenant Buildings.	14
B. Article 52 Conflicts With Federal Law and Policy Regarding Bulk Billing Arrangements.	21
C. Article 52 Conflicts With Federal Law and Policy Regarding “Network Unbundling” Mandates.	26
II. FEDERAL LAW OCCUPIES THE FIELD WITH RESPECT TO INSIDE WIRING.....	29
CONCLUSION	32

EXECUTIVE SUMMARY

The Multifamily Broadband Council (“MBC”), representing non-franchised communications companies that provide broadband-related services to multifamily communities and their vendors, hereby seeks a declaratory ruling that Article 52 of the San Francisco Police Code conflicts with federal law and thus is preempted in its entirety. Specifically, MBC asks the Commission to declare that (1) Article 52 conflicts with the Commission’s regulatory frameworks governing competitive access to inside wiring in multi-tenant buildings, bulk billing arrangements, and forced network sharing; and (2) Article 52’s attempt to regulate inside wiring in multi-tenant buildings intrudes into areas in which federal law and policy have “occupied the field.”

Subject only to limited exceptions, Article 52 imposes a relatively extreme form of mandatory access: It requires an owner of a multiple occupancy building (a “property owner”) to permit a second (or third, or fourth, or fifth) communications service provider onto his or her property upon the request of an “occupant,” and to permit the additional providers to use the property owner’s existing wiring even if another provider is already using it. This mandate applies regardless of whether the property owner has existing contractual arrangements with other communications service providers already serving his or her property, including, for example, an exclusive right to use the property owner’s wiring. Nothing in Article 52 requires a provider to install its own wiring.

As an initial matter, Article 52 cannot be squared with Commission policies promoting broadband deployment. Chairman Pai has made clear that providing incentives for broadband deployment will remain one of the Commission’s highest priorities. The Chairman has also noted that deployment barriers may take the form of state and local requirements that, even when well-intentioned, can impede investment in new offerings.

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

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

Notably, a state or local law that simply disrupts a balance struck by federal policymakers also conflicts with, and is preempted by, federal law.

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

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

Third, Article 52 effectively imposes a rudimentary and unqualified "unbundling" mandate that starkly contrasts with the balanced federal unbundling requirements in Section 251 of the Communications Act, which are based on the fundamental tenet that network-sharing mandates should only be imposed in extremely limited cases, and only where the benefits of unbundling clearly exceed the harms. Article 52's access mandate flouts federal law and policy regarding the propriety of forced network sharing and specifically contravenes the Commission's deliberate refusal to force facility owners in multi-tenant buildings to share their fiber loops. For all of these reasons, Article 52 disrupts the Commission's careful balancing of relevant considerations in setting its policies and thus must be preempted.

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

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

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

Petition of the Multifamily Broadband Council)	
Seeking Preemption of Article 52 of the San)	___ Docket No. 17-___
Francisco Police Code)	
)	

PETITION FOR PREEMPTION

The Multifamily Broadband Council (“MBC”)¹ hereby seeks a Declaratory Ruling that Article 52 of the San Francisco Police Code (“Article 52”)² is preempted in full by federal law and policy. Spearheaded by Google and its affiliate Webpass, Article 52 privileges large, well-

¹ MBC is the voice for non-franchised communications companies that provide broadband-related services to multifamily communities, and their vendors. MBC is a technology-agnostic organization. Its members deliver several technologies to multifamily communities such as wireless, cable modem, DSL, Active Ethernet and Fiber-to-the-Home. MBC members range from larger and more well-established companies to small providers and new entrants. Many MBC members are start-ups and disruptors that have been around for less than a decade. These include GigaMonster (four years), Blue Top Communications (seven years), and Satel (nine years). See GigaMonster, *The Company*, <https://www.gigamonster.net/aboutus> (last visited Feb. 22, 2017); Blue Top Communications, *About Us*, http://www.bluetopsolutions.com/index.php?option=com_content&view=article&id=51&Itemid=59 (last visited Feb. 22, 2017); Satel, <http://satelsf.com/> (last visited Feb. 22, 2017). Other, more established MBC members serve a highly focused geographic area with a variety of MDU-facing connectivity solutions, such as ENCO Electronics (Alabama, Georgia, and Florida), and Consolidated Smart Broadband Services (California, Arizona, and Texas). ENCO, *Property Wide Wi-Fi*, <https://www.encoelectronics.com/property-wide-wifi/> (last visited Feb. 21, 2017); Consolidated Smart Broadband Services, *About Us*, <https://www.consolidatedsmart.com/about-us> (last visited Feb. 21, 2017). In contrast, other MBC members provide MDU solutions over a much larger footprint, such as Elauwit Networks (thirty states) and Access Media 3 (thirty-five states). See Elauwit Networks, *What We Do*, <http://elauwit.com/our-services/> (last visited Feb. 22, 2017) (detailing Elauwit’s focus on student housing, condominiums and apartments, adult care and medical facilities, and hospitality providers); Access Media 3, <http://www.accessmedia3.com/index.php/corporate/> (last visited Feb. 22, 2017).

² Article 52 of the San Francisco Police Code, Ordinance No. 250-16, attached hereto as Exhibit A.

financed market actors such as Google itself at the expense of small network providers such as MBC's members, which it will leave unable to obtain the financing needed to deploy networks to multi-tenant buildings. It also will undercut the bulk billing arrangements on which small entrepreneurial providers rely to provide service, and raise the prospect of interference on shared inside wiring. Article 52 is, in other words, a sweetheart deal for Google that, under the guise of promoting competition, helps preclude Google's rivals from meaningful participation in the affected markets. As detailed below, Article 52 conflicts with the federal frameworks governing competitive access to inside wiring in multi-tenant buildings, bulk billing arrangements, and forced network-sharing obligations. Moreover, Article 52's effort to regulate inside wiring in multi-tenant buildings intrudes into areas in which the federal government has "occupied the field." For these reasons, the Commission should declare that Article 52 is preempted and invalid in its entirety.³

INTRODUCTION AND BACKGROUND

1. Article 52 Introduced An Imbalanced Regime That Harms Building Owners and Tenants.

The San Francisco Board of Supervisors adopted the ordinance that is now Article 52 on December 13, 2016. The ordinance was signed into law on December 22, and it took effect thirty days thereafter, on January 21, 2017.

Article 52 is a mandatory access ordinance: Subject only to limited exceptions, it requires an owner of a multiple occupancy building (a "property owner") to allow a second (or third, or fourth, or fifth) communications service provider onto his or her property upon the

³ In addition to this petition, MBC concurrently is filing a separate petition seeking a declaratory ruling that Article 52 is barred by the Commission's Over-The-Air Reception Devices ("OTARD") rule, 47 C.F.R. § 1.4000.

request of an “occupant” – which, as broadly defined, can ostensibly be anyone in the unit, regardless of his or her contractual relationship with the property owner⁴ – and to allow the additional providers to use the property owner’s existing wiring even if another provider is already using it.⁵ This mandate applies regardless of whether the property owner has existing contractual arrangements with one or more communications providers currently serving the property (*e.g.*, a right of exclusive use of designated wiring owned by the property owner).⁶ The ordinance imposes no limit on the number of providers that must be allowed onto a property – no matter how many providers are present, the property owner bears the burden of demonstrating that the property cannot accommodate another provider.⁷ Nothing in the ordinance requires a provider to install its own wiring.

Importantly, Article 52 does not expressly regulate how multiple providers on the same property behave towards each other. For example, it does not contemplate the unfortunately

⁴ An “occupant” is defined simply as “a person occupying a unit in a multiple occupancy building.” Article 52 § 5200. While this petition generally uses the term “tenant” to refer to the user of communications services to ensure consistency with applicable Commission precedent, it should not be forgotten that Article 52 permits a broader category of individuals to invoke its protections.

⁵ *See id.* § 5201(a) (“No property owner shall interfere with the right of an occupant to obtain communications services from the communications service provider of the occupant’s choice.”); *id.* § 5201(b) (“A property owner interferes with the occupant’s choice of communications services provider by, among other things, refusing to allow a communications services provider to install the facilities and equipment necessary to provide communications services or use any existing wiring to provide communications services.”). “Existing wiring,” in this context, refers to the property owner’s home run wiring and cable home wiring, as those terms are defined in Sections 76.800(d) and 76.5(II) of the Commission’s rules, respectively (47 C.F.R. §§ 76.800(d), 76.5(II)). Article 52 § 5200.

⁶ *Id.* § 5203.

⁷ *Id.* § 5206(b)(3) (access may be denied where “[t]he property owner can show that physical limitations at the property prohibit the communications services provider from installing the facilities and equipment in existing space that are necessary to provide communications services and/or from using existing wiring to provide such services”).

common practice among some providers of simply disconnecting inside wiring connecting a tenant to another service provider and reattaching that wiring to their own equipment – an approach that helps the new entering provider serve the tenant (*e.g.*, with video service) but interrupts services the tenant still wants from the preexisting provider (*e.g.*, Internet access service). Likewise, Article 52 does not address what happens where sharing of existing wiring causes interference, thereby implicitly authorizing such interference and the attendant impairment of reception devices. These scenarios, of course, deny tenants access to their provider of choice, irrespective of the ordinance’s stated purposes.

Moreover, Article 52 effectively denies tenants the benefit of bulk billing arrangements – *i.e.*, where one provider serves every resident of a multi-tenant property, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the provider individually – despite a Commission finding that such arrangements are beneficial.⁸ As the Commission has recognized, bulk billing arrangements allow the provider to offer reduced prices to customers by spreading fixed costs among many subscribers using common facilities. Such discounts therefore rely on the provider’s ability to serve all or almost all of the tenants on a property. Article 52, however, forces property owners to accommodate multiple providers, destroying the basis for bulk discounts and thus raising prices for residents.

Finally, whereas Article 52 gives providers and “occupants” enforcement rights against a property owner who denies a provider access to his or her property, it does not afford them any recourse where a new provider blocks or interferes with service from competing service

⁸ See *Exclusive Service Contracts for Provision on Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, 2461 ¶ 2 (2010) (“*Exclusivity Second Report and Order*”).

providers.⁹ In contrast, property owners that fail to comply with the ordinance may be subject to civil action and extensive penalties,¹⁰ including civil damages, injunctive relief, and an award of attorney's fees.¹¹

2. Article 52 Impedes Broadband Competition By Discouraging Small Providers From Deploying to and Serving MDUs.

This Commission has time and again made clear the central importance of promoting incentives for broadband deployment. As Chairman Pai recently said:

One of the most significant things that I've seen during my time here is that there is a digital divide in this country – between those who can use from cutting-edge communications services and those who do not. I believe one of our core priorities going forward should be to close that divide – to do what's necessary to help the private sector build networks, send signals, and distribute information to American consumers, regardless of race, gender, religion, sexual orientation, or anything else. We must work to bring the benefits of the digital age to all Americans.¹²

This goal is not partisan: As Commissioner Clyburn has said, “[b]roadband is how we communicate,” and “[w]ithout it, millions of families are on the wrong side of the opportunity divide.”¹³ Commissioner O’Rielly has emphasized that “[t]he surest way to continue the current trajectory of progress is to remove barriers to entry for new technologies or deployment. The

⁹ Article 52 § 5211.

¹⁰ *Id.* §§ 5212-5213.

¹¹ *Id.* §§ 5209-5213.

¹² Ajit Pai, Chairman, FCC, Remarks before the FCC (Jan. 24, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0124/DOC-343184A1.pdf.

¹³ Marguerite Reardon, *Why Everyone Deserves Broadband No Matter How Little They Make* (Q&A), CNET (Mar. 31, 2016, 5:00 AM), <https://www.cnet.com/news/why-everyone-deserves-broadband-no-matter-how-much-they-make-q-a/> (quoting FCC Commissioner Mignon Clyburn).

Chairman has noted that low-income neighborhoods face particular barriers,¹⁴ and

Commissioner Clyburn has observed that even dense urban areas can pose deep challenges.¹⁵

As Chairman Pai has also noted, deployment barriers can take the form of state and local requirements that, even when well-intentioned, can impede investment in new offerings. Where that happens, the Commission can and should preempt state or local law. “[T]he FCC must aggressively use its legal authority to make sure that local governments don’t stand in the way of broadband deployment. ... It’s time for us to fully use [our legal authority] to preempt barriers to broadband deployment.”¹⁶

Article 52 is precisely the type of local mandate that warrants preemption for the sake of promoting deployment. Though styled as a vehicle for promoting consumer “choice” among communications services, the ordinance is better understood based on what it actually does: offer a *de facto* sweetheart deal to large, well-financed entities by (among other things) effectively preventing smaller competitors from securing financing. Specifically, Article 52’s overriding of voluntary contractual arrangements – which serve as preconditions to the financing required for buildout by small, entrepreneurial start-ups (like MBC’s members) that otherwise lack the resources for such investment¹⁷ – subjugates competitors who must secure financing to large entities that are able to cross-subsidize their *own* buildout using non-broadband revenue

¹⁴ See Ajit Pai, Commissioner, FCC, Remarks at the Brandery: A Digital Empowerment Agenda (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf.

¹⁵ See Cecilia Kang, *The Challenges of Closing the Digital Divide*, N.Y. Times (June 7, 2016), https://www.nytimes.com/2016/06/09/technology/the-challenges-of-closing-the-digital-divide.html?_r=0 (quoting FCC Commissioner Mignon Clyburn).

¹⁶ Ajit Pai, Commissioner, FCC, Remarks at CCA’s 2016 Annual Convention (Sept. 21, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341365A1.pdf.

¹⁷ Article 52 § 5203 (Article 52’s prohibitions apply to any property owner that is party to an agreement “that purports to grant [a] communications service provider exclusive access to a multiple occupancy building and/or the existing wiring to provide services”).

streams, such as Google.¹⁸ In short, Article 52 deters deployment by smaller providers, impeding rather than facilitating broadband competition.¹⁹

When a smaller competitor such as one of MBC's members wins a bid to serve a building, it must secure a loan or line of credit from a bank or other lender in order to finance construction of a single distribution system. This, in turn, requires the provider to demonstrate to the lending institution that it can successfully serve enough customers to generate a reliable revenue stream. Typically, providers must submit indicators of likely success, such as an agreement granting the provider undisturbed use of inside wiring owned by the property owners or a bulk billing arrangement under which the property owner purchases service and provides it as an amenity for all occupants at a steep discount off of regular retail pricing.²⁰ Article 52, however, would effectively nullify such arrangements, with harmful consequences for residents and for the small, entrepreneurial start-ups whose innovation should be heralded, not punished.²¹

¹⁸ *Alphabet*, Fortune, <http://beta.fortune.com/fortune500/alphabet-36> (last visited Feb. 22, 2017) (noting that Google's parent company, Alphabet, is one of the 50 largest corporations among the Fortune 500, with its core business generating more than \$20 billion in revenue in the first quarter of 2016 alone).

¹⁹ The anticompetitive threat of Article 52 is aggravated by San Francisco's plans to deploy its own broadband service throughout the city. *See, e.g.*, Joshua Sabatini, *SF begins crunching numbers on citywide internet access*, San Francisco Examiner (Oct. 24, 2016), <http://www.sfexaminer.com/sf-begins-crunching-numbers-citywide-internet-access/>. Article 52 thus will handicap smaller providers by giving the City itself and Google/Webpass a tool to commandeer property owners' inside wiring.

²⁰ Declaration of Dan Terheggen, Multifamily Broadband Council ("Terheggen Decl.") ¶ 8, attached hereto as Exhibit B; Declaration of Richard N. Hylen ("Hylen Decl.") ¶ 5, attached hereto as Exhibit C.

²¹ *See, e.g.*, *Protecting and Promoting the Open Internet*, 30 FCC Rcd 5601, 5930 (2015) ("Open Internet Order"), Dissenting Statement of Commissioner Ajit Pai; News Release, FCC, *Statement of Commissioners Ajit Pai and Michael O'Rielly On Protecting Small Businesses from Needless Regulation* (Dec. 16, 2016) ("FCC Small Business Release"); *Remarks of FCC Commissioner Ajit Pai on the Need for a Digital Empowerment Agenda at Think Big Partners*,

But Article 52 would not have the same effect on larger, well-financed entities. Large providers, such as Google/Webpass, do not need financing and thus can afford to extend service to a building within Article 52's constraints.

Article 52's harms do not stop there. Article 52's elimination of bulk billing arrangements will impede the provision of high-quality service at significantly lower prices to customers – often customers in shared living environments like retirement and nursing homes, student housing, and low- and fixed-income developments. Giving multiple competitors shared access to home run wiring, moreover, inevitably will result in unnecessary aggravation for customers and wasteful deployments by providers. Because it upsets the competitive landscape in these ways, the ordinance's primary beneficiaries are not consumers but the City's preferred providers – Google/Webpass and companies like it – while its victims include property owners, smaller providers, and the tenants of multi-unit dwellings.²²

3. Article 52 Was Championed By Google To Benefit Itself, Not Consumers.

That Google would be Article 52's primary beneficiary is no accident, because Google was its primary proponent. Through its wholly owned subsidiary Webpass,²³ Google was a vocal advocate both in front of city officials and in the press in favor of a deal that elevated its interests at the expense of its less-well-heeled competitors. Months before Article 52 was

Kansas City, MO (Oct. 11, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341689A1.pdf (“Pai Digital Empowerment Remarks”).

²² Article 52 also threatens to tilt the competitive playing field in another way. Under § 5200, its provisions may be exercised only by communications service providers with a “Utility Conditions Permit from the City under Administrative Code Section 11.9,” which many MBC members and other small providers do not yet have. Thus, a small provider attempting to equalize its position *vis-à-vis* Google/Webpass or the City's own broadband service by exercising Article 52 rights might not be able to do so.

²³ Webpass, *Google Fiber Agrees to Acquire Webpass* (June 22, 2016), <https://webpass.net/blog/google-fiber-agrees-to-acquire-webpass>.

introduced to the San Francisco Board of Supervisors, Webpass launched a petition calling for a variety of policies that would benefit it and Google, including an “ordinance [that] would also require landlords to give any Internet company approved for a city franchise the access to provide service to tenants who request their Internet service[.]”²⁴ Charles Barr, President of Webpass, addressed the San Francisco Planning Commission to seek support for this proposed ordinance, and later spoke on record to the San Francisco Budget & Finance Committee in support of Article 52’s adoption.²⁵ And Google was featured in media accounts that pushed this same message, including one particularly inflammatory article by Susan Crawford, Co-Director of Harvard University’s Berkman Klein Center – of which Google is a sponsor.²⁶

Google’s active involvement in Article 52’s passage followed a familiar blueprint, in which the company, employing the rubric of customer choice and competition, lobbies for regulatory regimes that advantage it while disadvantaging its business rivals. In Nashville, Tennessee, Google was the primary proponent of one such ordinance,²⁷ dubbed by local press the “Google Fiber ‘One Touch’ Plan.”²⁸ Local news outlets announced that, “Google Fiber [had]

²⁴ Webpass Blog, *Webpass Advocates For Better Internet In San Francisco* (Apr. 7, 2016), <https://webpass.net/blog/webpass-advocates-for-better-internet-in-san-francisco> (last visited Feb. 22, 2017); see also Change.org, *San Francisco needs better Internet*, <https://www.change.org/p/edwin-lee-san-francisco-needs-better-internet>.

²⁵ City and County of San Francisco, *Meeting Minutes – Budget and Finance Committee*, at 7 (Nov. 30, 2016).

²⁶ Susan Crawford, *Dear Landlord: Don’t Rip Me Off When it Comes to Internet Access*, Backchannel (June 27, 2016), <https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9#.sdenu64hg> (citing an interview with Charles Barr in advocating for forced access in MDUs); see also Berkman Klein Center for Internet & Society at Harvard University, *Funding & Support Policies*, <https://cyber.harvard.edu/about/support> (listing Google among current supporters).

²⁷ NASHVILLE, TEN., Ordinance No. BL2016-343.

²⁸ Jay Garrison & Jamie McGee, *Nashville Gives Final Approval of Google Fiber “One Touch” Plan*, *The Tennessean* (Sept. 20, 2016, 10:35 PM),

scored a major victory ... netting final Metro Council approval of a proposal known as One Touch Make Ready that the company has made the focal point” of its lobbying.²⁹ Among other things, the ordinance allows one company to perform work on another company’s network, even where that work would cause, or reasonably could be expected to cause, a customer outage or other problems. Google responded to the item’s passage with a *literal* love letter to the city,³⁰ but Nashville’s consumers could be forgiven for being “just not that into” Google: The policy, which has given rise to both legal and safety issues and undermined contracts with labor unions, was adopted subject to an ultimatum under which Google threatened to forego any deployment if not given its way.³¹

Similarly, Google’s lobbying in Tempe, Arizona led to the creation of an entirely new “non-cable” “video service provider” classification for regulated entities including Google Fiber, but excluding others.³² Here, too, Google succeeded in baking in advantages for its own business model amidst empty and misleading rhetoric regarding consumer benefit. As cable

<http://www.tennessean.com/story/news/2016/09/20/nashville-gives-final-approval-google-fiber-one-touch-plan/90739526/>.

²⁹ *Id.*; see also Jamie McGee & Joey Garrison, *Google Fiber: Nashville Rollout Slowed by Pole Dispute*, The Tennessean (Aug. 2, 2016, 12:09 PM), <http://www.tennessean.com/story/money/2016/08/01/google-fiber-nashville-rollout-slowed-pole-dispute/87923310/> (stating that “Nashville’s most high-powered lobbyists are prepared to fight over the ordinance” and that “Google is represented by an army of Metro lobbyists led by Tom Ingram’s The Ingram Group and DVL Seigenthaler public relations firm”).

³⁰ Chris Levendos, *To Nashville, with love*, Google Fiber Blog (Sept. 1, 2016), <https://fiber.googleblog.com/2016/09/to-nashville-with-love.html>.

³¹ Eric Snyder, *Google Fiber May Walk Away if Metro Council Doesn’t Act, Rep Says*, Business J. (Aug. 16, 2016, 4:36 PM), <http://www.bizjournals.com/nashville/news/2016/08/16/google-fiber-may-walk-away-if-metro-council-doesn.html>.

³² Tempe, Ariz., Ordinance No. O2014.74.

operator Cox described in a subsequent lawsuit,³³ by bestowing on Google a new regulatory classification, the city effectively exempted Google from complying with customer service and other requirements intended to benefit consumers. Meanwhile, the city waived requirements relating to the deployment of new infrastructure for Google, but not for its competitors – in particular, an undergrounding requirement – meaning that other providers were prevented from deploying facilities on their long-existing aerial plant to support gigabit-speed broadband services.³⁴

In short, the Commission should not be fooled into believing that Article 52 is a pro-consumer measure. It in fact tilts the playing field sharply in favor of one class of providers – and one provider in particular – and away from many others, including the small, non-incumbent providers that make up MBC’s membership. As detailed below, it does so in ways that expressly contradict federal law and policy, including the overriding objective of closing the digital divide once and for all. It intrudes into areas that are properly excluded from state and local regulation in their entirety.³⁵ The Commission therefore should find that Article 52 is preempted.

³³ Daniel Langhorne, *Cox Sues Tempe Over Regulations That Aid Google Fiber*, Law360 (Sept. 15, 2015, 10:51 PM).

³⁴ *Cox Communications Arizona, LLC v. City of Tempe*, Complaint ¶ 60, 2:15-cv-01829-JJT (D. Ariz. filed Sept. 14, 2015).

³⁵ Article 52 cannot be saved by Section 5218, which states that “[n]othing in [the measure] shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.” Article 52 § 5218. As described herein, Article 52 is irredeemably inconsistent with federal law and policy. It simply cannot be read to avoid such conflict.

DISCUSSION

I. ARTICLE 52 CONFLICTS WITH FEDERAL LAW AND POLICY AND IS THEREFORE PREEMPTED.

The Constitution’s Supremacy Clause that federal laws “shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the contrary notwithstanding.”³⁶ This clause “provides Congress with the power to pre-empt state law.”³⁷ Preemptive authority is not, however, limited to Congress. Where a federal statute preempts or even implicitly *permits* preemption of state law, a federal agency charged with implementing that statute is also empowered to preempt or local state power.³⁸ Thus, “[w]here Congress has delegated the authority to regulate a particular field to an administrative agency, the agency’s regulations issued pursuant to that authority have no less preemptive effect than federal statutes, assuming those regulations are a valid exercise of the agency’s delegated authority.”³⁹

For several reasons discussed below, Article 52 is subject to the species of preemption known as “conflict preemption,” under which state or local law “is nullified to the extent that it actually conflicts with federal law.”⁴⁰ As relevant here, conflict preemption occurs “when ... state [or local] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴¹

³⁶ U.S. Const. art. VI. Because municipalities and localities are creations of, and derive their powers from, the states, federal law also preempts their requirements. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

³⁷ *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986).

³⁸ *See, e.g., id.* at 374; *Fidelity Federal Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less preemptive effect than federal statutes.”).

³⁹ *Farina v. Nokia, Inc.*, 625 F.3d 97, 115 (3rd Cir. 2010) (“*Farina*”), *quoting Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 243 (3rd Cir. 2008).

⁴⁰ *Fidelity Federal Sav. & Loan Ass’n*, 458 U.S. at 153.

⁴¹ *Id.*, *quoting Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

Notably, a state or local law need not require that which federal law expressly prohibits (or vice versa) in order to be invalidated. Rather, a state or local requirement that disrupts a balance struck by federal policymakers also conflicts with, and is preempted by, federal law. Thus, for example, the Supreme Court in 2000 struck a tort-law judgment that effectively required car manufacturers to install airbags when the Department of Transportation had permitted the phase-in of airbags (or other “passive restraints”) over time.⁴² While the federal policy had not *forbidden* the manufacturer from installing airbags, a state tort-law requirement would, the court held, frustrate the federal preference for flexibility, and was thus invalid under the conflict preemption doctrine.⁴³ Or, as the Third Circuit put it more recently in a case involving this Commission, “regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption.”⁴⁴ In such cases, the court held, allowing a state or local requirement “to impose a different standard permits a re-balancing of those considerations.”⁴⁵ Thus, the court held that the Commission’s cellular telephone radio frequency (“RF”) emission standards preempted state law claims that the emission of RF radiation resulting from the operation of cell phones without the use of headsets is unsafe and violates Pennsylvania law. The court explained that allowing such state claims would disrupt the Commission’s balancing of relevant objectives in the setting of its

⁴² *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000).

⁴³ *Id.* at 881.

⁴⁴ *Farina*, 625 F.3d at 123.

⁴⁵ *Id.*

RF radiation standards and thereby “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴⁶

As explained in more detail below, Article 52 is inconsistent with federal communications policy in several respects. It contradicts the Commission’s policy choices and balancing with respect to competitive access to the inside wiring in multi-tenant buildings, flouts the Commission’s considered conclusions regarding the propriety and utility of bulk billing arrangements, and disrupts the careful balances reflected in the agency’s network-sharing mandates. For these reasons, Article 52 is in conflict with federal law and policy, and must be preempted.

A. Article 52 Conflicts With Federal Law and Policy Regarding Competitive Access to Multi-Tenant Buildings.

Article 52 effectively forces owners of multi-tenant buildings to “allow” any “communications services provider to install the facilities and equipment necessary to provide communications services” and allow providers to “use any existing wiring” belonging to the owner “to provide communications services,” all upon the request of any “occupant” of a unit.⁴⁷ These provisions conflict with the Commission’s longstanding competitive access framework with regard to multi-tenant buildings in several respects, and should be deemed preempted.

Cable Inside Wiring. In the Cable Consumer Protection and Competition Act of 1992 (the “1992 Cable Act”), Congress recognized that consumer access to cable home wiring was essential for minimizing disruption of service and promoting competition among providers of

⁴⁶ *Id.* at 134, quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

⁴⁷ Article 52 §§ 5201(b), 5202, *See also id.* § 5200 (definition of “Existing wiring”).

multichannel video service.⁴⁸ It thus adopted Section 16(d) (codified at 47 U.S.C. § 544(i)), directing the Commission to “prescribe rules concerning the disposition, after a subscriber terminates service, of any cable installed by the cable operator within the premises of such subscriber.”⁴⁹ The Commission adopted those rules in 1993.⁵⁰

Four years later, the Commission found that “more is needed to foster the ability of subscribers who live in MDUs to choose among competing service providers,”⁵¹ and that “disagreement over ownership and control of the home run wire substantially tempers competition.”⁵² The Commission thus proposed, among other things, to establish procedures for disposition of an incumbent service provider’s home run wiring where a tenant seeks service from an alternative provider (assuming that the property owner permits multiple providers to compete for subscribers on a unit-by-unit basis). Specifically, the Commission proposed to

⁴⁸ As noted above, Article 52 defines “existing wiring” as including “cable home wiring” and “home run wiring,” as those terms are defined in the Commission’s rules. Section 76.5(II) of the Commission’s rules defines “cable home wiring” as “[t]he internal wiring contained within the premises of a subscriber which begins at the demarcation point.” 47 C.F.R. § 76.5(II). The demarcation point is the point located “twelve inches outside of where the cable wire enters the subscriber’s dwelling unit.” *Id.* § 76.5(mm)(2). Section 76.800(d) defines “home run wiring” as “[t]he wiring from the demarcation point to the point at which the MVPD’s [multichannel video programming distributor’s] wiring becomes devoted to an individual subscriber or individual loop.” *Id.* § 76.800(d). Home run wiring typically runs from a common feeder line or riser cable to the cable home wiring demarcation point.

⁴⁹ 47 U.S.C. § 544(i). *See also Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring*, Notice of Proposed Rulemaking, 7 FCC Rcd 7349, 7349 ¶ 2 (1992) (“Congress indicated its desire both to protect terminating subscribers from unnecessary disruption and expense caused by removal of internal wiring and to foster multichannel service competition.”) (footnotes omitted).

⁵⁰ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435 (1993). *See also* 47 C.F.R. § 76.802.

⁵¹ *Telecommunications Services – Inside Wiring*, Further Notice of Proposed Rulemaking, 12 FCC Rcd 13592, 13604 ¶ 25 (1997).

⁵² *Id.* at 13607 ¶ 31.

require that the incumbent make a uniform election to either remove its home run wiring, abandon its home run wiring, or sell its home run wiring to the property owner whenever a tenant wished to switch video service providers.⁵³ This framework was meant to promote competition by providing *property owners* with greater certainty as to their rights to home run wiring upon termination of an incumbent video provider's service.⁵⁴ The Commission did *not* propose to require that the incumbent provider share its home run wiring with alternative providers, nor did it propose to require the property owner to permit such sharing upon purchasing the wiring from the incumbent provider.

The Commission subsequently issued a *Report and Order* in which it adopted the proposal described above.⁵⁵ In so doing, the Commission observed that the property owner, not the alternative service provider, was the better candidate to purchase the wiring, since “the property owner is responsible for common areas of a building, ... maintaining the aesthetics of the building and balancing the concerns of all residents. Moreover, vesting ownership of the home run wiring in the MDU owner ... will reduce further transaction costs since the [wiring disposition] procedures will not have to be repeated.”⁵⁶ The Commission believed that “market forces will compel [property] owners in competitive real estate markets to take their tenants’

⁵³ *Id.* at 13610-11 ¶ 39. The Commission also proposed to require an incumbent to make a similar “remove, abandon or sell” election when a property owner terminates the incumbent’s service for an entire building. *Id.* at 13609-10 ¶¶ 35-38.

⁵⁴ *Id.* at 13608 ¶ 33 (“In today’s marketplace, alternative video service providers have no timely and reliable way of ascertaining whether they will be able to use the existing home run wiring upon a change in service. ... MDU owners are similarly unsure of their legal rights.”).

⁵⁵ *Telecommunications Services – Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3685-86 ¶ 49 (1997) (“*Inside Wiring Report and Order*”). See also 47 C.F.R. § 76.804(b).

⁵⁶ *Id.* at 3689 ¶ 58.

desires into account.”⁵⁷ It cited a variety of statutes as its basis for asserting jurisdiction over home run wiring, including Sections 4(i) and 303(r) of the Communications Act.⁵⁸

Finally, on reconsideration of the *Report and Order*, some parties urged the Commission to reverse course and adopt a policy similar to Article 52, *i.e.*, one that would “give subscribers – rather than landlords or condominium associations – a right to choose among MVPDs.”⁵⁹ The Commission declined to do so:

In the *Report and Order*, the Commission addressed comments from at least six parties contending that MDU owners do not act in the best interest of residents and therefore should not have the authority to choose among service providers. The Commission concluded that many MDU owners are tenant-based condominium associations and cooperative boards that cannot be presumed to be non-representative of their tenants’ interests. In promulgating the home run wiring rules, the Commission sought to advance competition in the MDU market, and thereby to ensure that tenants in MDUs are offered a diverse choice among providers of video services. The Commission had to determine, from among a range of possible alternatives, the method by which that result could be achieved, in a way that is legal, fair to all interested parties, and efficient. The record contains no evidence that the decisions MDU owners make with regard to video providers are depriving their tenants of diverse sources of information.⁶⁰

⁵⁷ *Id.* at 3690 ¶ 61.

⁵⁸ *Id.* at 3699-3707 ¶¶ 81-96. In the same *Report and Order*, the Commission also adopted rules permitting sharing of an incumbent provider’s molding by multiple MVPDs; adopted procedures for disposition of cable home wiring where a property owner terminates an MVPD’s service for an entire building; required cable operators to allow a property owner to purchase loop-through home wiring where the owner elects to switch to a new service provider; and, subject to certain conditions, required cable operators to permit consumers to provide or to install their own cable home wiring inside their dwelling unit. *Id.* at 3662-63 ¶ 2.

⁵⁹ *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1348-49 ¶ 13 (2003) (“*Inside Wiring Second Report and Order*”).

⁶⁰ *Id.* at 1348-49 ¶ 14.

To be sure, the Commission took additional steps in later decisions to align the interests of subscribers and property holders where circumstances warranted adjustments to the Commission’s competitive access framework. For instance, in 2007 the Commission prohibited the enforcement of certain existing exclusivity clauses and the execution of new ones by incumbent cable providers.⁶¹ But while these measures have supplemented the Commission’s inside wiring rules, the Commission has *never* departed from its decision to give property owners the discretion to decide whether to permit access to alternative providers. To the contrary, the Commission’s rules in this area are founded on the proposition that a property owner is best positioned to select service providers for the property’s residents, and therefore are designed to shift control of wiring to the property owner and away from incumbent providers. This approach has benefitted property owners, providers, and consumers alike by establishing and preserving incentives that promote deployment of facilities and competitive choice.

Article 52 upends this federal policy. Indeed, one of the ordinance’s animating purposes is to reject and displace the Commission’s policy judgment favoring property owner control over inside wiring. By taking wiring owned by property owners and granting access to any and all

⁶¹ See *Exclusive Service 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) (“*Exclusivity FNPRM*”). Notably, although the Commission’s rules prohibit many exclusive contracts for provision of video and telecommunications services to multi-tenant properties, see 47 C.F.R. §§ 76.2000, 64.2500, the Commission has chosen *not* to apply its ban on exclusive video agreements to private cable operators. *Exclusivity FNPRM*, 22 FCC Rcd at 20251. In this respect, Section 5203 of Article 52 cannot be squared with the Commission’s rules on exclusive video contracts in multi-tenant properties. Specifically, Section 5203 provides that Article 52’s requirements apply to any property owner that is party to an agreement “that purports to grant [a] communications service provider exclusive access to a multiple occupancy building and/or the existing wiring to provide services.” Article 52 § 5203. Yet, because Section 5203 applies to all exclusive contracts in multitenant properties, it vitiates any exclusive contract for video services that a property owner may have with a private cable operator. This outcome creates an irreconcilable conflict with the Commission’s decision to permit such contracts, and as such, demands preemption.

competitors, Article 52 *penalizes* property owners that have relied on Commission rules meant to empower them. That is, Article 52 places severe constraints on a property owner’s ability to bargain for the optimal mix of communications services on behalf of his or her tenants, potentially resulting in circumstances in which no provider – or, at least, no provider reliant on traditional financing tools – will be able to provide service. Article 52 also affords property owners and “occupants” no recourse for the variety of scenarios in which they may experience harm – for instance, where a new provider blocks or interferes with service from competing service providers, or where the property owner must incur greater maintenance costs as a result of shared access to wiring.⁶² This lack of remedy is more problematic because these various costs are ultimately borne by building tenants, whether through higher rents or less advanced service options due to the disincentives of upgrades.

Moreover, owners who must relinquish control over their wiring will have little incentive to own that wiring in the first place. Hence, rather than subject themselves to the burdens of Article 52, they may simply turn their wiring over to the incumbent provider (in which case

⁶² Rather, Article 52 authorizes the City Attorney and private parties to institute civil enforcement proceedings for injunctive and monetary relief against property owners that have allegedly violated Article 52. Article 52 §§ 5210, 5211. Article 52 further authorizes the award of attorneys’ fees and costs to any party obtaining relief under these enforcement provisions, as well as civil penalties of up to \$500 per day as long as any violation continues in any proceeding brought by the City Attorney. *Id.* §§ 5212, 5213. Moreover, civil litigation proceedings may very well be required in order to determine the amount of “just and reasonable compensation” that must be paid by communications service providers to property owners. *Id.* § 5206(b)(6) (providing that a property owner may refuse access then the owner and communications service provider have not reached agreement on the amount of just and reasonable compensation owed to the property owner); *id.* § 5211(a) (providing that a communications service provider or occupant of a multiple occupancy building may institute a civil proceeding where the property owner has refused to allow the communications service provider to provide service). These enforcement measures empower prospective competitors – whether Google or the City itself (which, as noted, is poised to offer its own municipal broadband service) – to coerce building owners into complying with their demands for entry and access by invoking the mere threat of legal action.

Article 52's wire sharing requirement would not apply). Of course, returning the wiring to the incumbent undermines the core rationale of the Commission's inside wiring regime. Otherwise, a property owner's only option is to incur the disruptions and inconvenience associated with permitting all comers to use his or her wiring, in the process destroying smaller providers' incentives or ability to deploy service at all. Again, this outcome cannot be reconciled with what the Commission's inside wiring rules were designed to achieve.

Telecommunications Inside Wiring. Article 52 applies to "existing wiring," which is defined as home run wiring and cable home wiring under the Commission's cable inside wiring rules.⁶³ However, the ordinance is silent when it comes to inside wiring connected to the public switched telephone network ("PSTN"). Critically, this inside wiring is governed by a separate set of Commission rules that allow property owners to elect demarcation points and facilitate the relocation of those demarcation points to the minimum point of entry ("MPOE").⁶⁴ Complicating matters further, triple play services (*i.e.*, voice, video, and Internet access service) are typically distributed over a single wire today due to technological convergence. Accordingly, in many cases a property owner may not know whether a particular run of cabling qualifies as "existing wiring" under Article 52, which injects uncertainty and confusion into the marketplace. To avoid the private causes of action or civil fines authorized by Article 52, property owners may be compelled to treat *all* wiring they own as "existing wiring" for purposes of the ordinance.⁶⁵ Thus, property owners with telecommunications inside wiring subject to

⁶³ See Article 52 § 5200.

⁶⁴ See 47 C.F.R. § 68.105(d).

⁶⁵ In a similar vein, many property owners install extra runs of cabling for future uses of their choice (*e.g.*, by an independent provider, such as one of MBC's members). As is the case with inside wiring connected to the PSTN, Article 52 provides no clarity as to whether such cabling should be construed as "existing wiring." The knowledge that such cabling could be taken for

Part 68 face the same set of penalties and disincentives as those with cable inside wiring, contrary to federal policy.

* * * * *

In sum, Article 52 conflicts with the balanced regime the Commission put in place for access to inside wiring for multi-tenant properties and “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of” federal policy.⁶⁶ Where, as here, an agency “use[s] its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives,” a local requirement such as Article 52 would have the City “re-balanc[e] ... those considerations,” frustrating federal objectives.⁶⁷ Article 52 is therefore preempted.

B. Article 52 Conflicts With Federal Law and Policy Regarding Bulk Billing Arrangements.

Article 52 also “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of”⁶⁸ the Commission’s “bulk billing” policies. These policies govern situations in which an MDU owner procures communications service for the entire building at a flat, low “bulk billing” fee, and then provisions discounted service to the tenants. Service to tenants under a bulk billing arrangement is usually provided as an amenity under the lease agreement, either as part of the rent or for a small additional fee.⁶⁹ The Commission has

the private use of a provider *not* of the owner’s choosing creates a substantial disincentive for making this investment in the first place. The result is another competitive hurdle for smaller providers wishing to gain the wiring rights necessary to secure financing to serve a multi-tenant property.

⁶⁶ *Fidelity Federal Sav. & Loan Ass’n*, 458 U.S. at 153.

⁶⁷ *Farina*, 625 F.3d at 123.

⁶⁸ *Id.* at 122, quoting *Fellner*, 539 F.3d at 251.

⁶⁹ Terheggen Decl. ¶ 8.

expressly endorsed the use of such arrangements, finding that they “predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband.”⁷⁰ In holding that “the benefits of bulk billing outweigh its harms,”⁷¹ the Commission specifically noted the record evidence of the need for bulk billing arrangements in securing and maintaining financing.⁷² Further, “[i]n the large majority of cases, bulk billing appears to lower prices, increase the volume and variety of programming, encourage high quality and innovation, and bring video, voice, and data services to [multi-tenant building] residents.”⁷³ As the Commission has recognized, bulk billing arrangements allow the provider to offer reduced prices to customers by spreading fixed costs among many subscribers using common facilities.

Bulk billing arrangements are especially significant for the provision of high-quality affordable video and broadband services to customers in shared living environments like retirement and nursing homes, student housing, and low- and fixed-income developments. Without bulk billing, a service provider has little incentive to invest in a shared living or lower-income multi-tenant building.⁷⁴ Bulk billing thus “can make ... services available to some [multi-tenant building] residents who otherwise would not be able to afford them.”⁷⁵

Article 52, however, directly and substantially contradicts the federal policy favoring bulk billing arrangements. It forces owners of multi-tenant buildings to “allow” any

⁷⁰ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461 ¶ 2.

⁷¹ *Id.* at 2470 ¶ 26.

⁷² *Id.* at 2465-66 ¶ 17.

⁷³ *Id.* at 2463 ¶ 9.

⁷⁴ *Id.* at 2468-69 ¶ 24.

⁷⁵ *Id.* at 2466 ¶ 18.

“communications services provider to install the facilities and equipment necessary to provide communications services” and to “use any existing wiring” belonging to the owner “to provide communications services.”⁷⁶ These provisions effectively bar bulk-billing arrangements by denying the bulk billing service provider the exclusive right to use designated wiring necessary for the delivery of its services and forcing property owners to accommodate multiple providers, thereby destroying the economic rationale on which such deals are struck and raising prices for tenants.⁷⁷ Bulk billing discounts rely on the provider’s ability to serve all or almost all of the tenants in a building. Property owners are obligated to pay the bulk service provider for service to each unit, whether that unit receives service from the bulk provider or another carrier.⁷⁸ Having to pay for services that residents are not receiving disrupts the investment-backed expectations behind the arrangement, deterring owners from entering into such arrangements.

Without the ability to secure bulk billing arrangements, smaller independent service providers also will be unable to obtain third-party financing. As discussed above, MBC members and other small providers typically must secure financing in order to deploy their networks to a building, and financial institutions generally require them to submit evidence that the investment will pay off – evidence such as a bulk billing arrangement. Article 52 would invalidate such arrangements, harming residents and small providers alike.⁷⁹

Even putting aside the problem of financing, requirements rendering bulk billing arrangements infeasible will raise the cost of service for residents of multi-tenant buildings, as

⁷⁶ Article 52 § 5201(b). *See also id.* § 5200 (definition of “Existing wiring”).

⁷⁷ Terheggen Decl. ¶¶ 4, 8-12; Hylen Decl. ¶¶ 5-7.

⁷⁸ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461-62, 2464-65, 2466-67 ¶¶ 2, 6, 11-14, 19.

⁷⁹ *See, e.g., Open Internet Order*, 30 FCC Rcd at 5930, Dissenting Statement of Commissioner Ajit Pai; FCC Small Business Release; Pai Digital Empowerment Remarks.

the Commission has found. Depriving tenants of bulk billing rates will force them to choose among much higher priced individual service arrangements, increasing their costs and driving some out of the market altogether. As the Commission noted, “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 ... service charges for the vast majority of [multi-tenant building] residents who are content with such arrangements.”⁸⁰ The resulting lower adoption rates will make it even less likely that a service provider would be able to secure the necessary financing to extend service to a building for which a bulk billing arrangement is not possible.⁸¹

Article 52 thus “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of” the Commission’s bulk billing policy.⁸² The ordinance “interfere[s] with the Commission’s achievement of its valid goal of” permitting bulk billing arrangements and thus “necessarily thwart[s] or impede[s] the operation of a free [multi-tenant building] market.”⁸³ “The FCC may preempt inconsistent state regulation so long as it can show,” as is the case with Article 52, “that the state regulation negates a valid federal policy.”⁸⁴

Moreover, Article 52 cannot be saved by claims that it simply requires more than federal law requires, and does not expressly “conflict” with a federal obligation. Again, where an agency “use[s] its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives,” a state or local law that effectuates “a re-balancing of

⁸⁰ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2471 ¶ 28.

⁸¹ Terheggen Decl. ¶¶ 4, 8-12; Hylen Decl. ¶¶ 5-7.

⁸² *Farina*, 625 F.3d at 122, quoting *Fellner*, 539 F.3d at 251.

⁸³ *NARUC v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989) (affirming Commission’s preemption of state regulation of inside wiring to the extent necessary to maintain a free market in the installation and maintenance of inside wiring).

⁸⁴ *Id.* at 431.

those considerations” is in conflict with federal policy, and thus is preempted.⁸⁵ In choosing to permit bulk billing, the Commission explicitly balanced considerations arising under Section 628(b) of the Communications Act,⁸⁶ which prohibits cable operators from engaging in unfair practices that have the purpose or effect of hindering or preventing their competitors from providing video programming to consumers.⁸⁷ It held, repeatedly, “that determining whether challenged conduct is unfair [under Section 628(b)] requires balancing the anticompetitive harms of the challenged conduct against the procompetitive benefits.”⁸⁸ “Allowing” the City of San Francisco, via Article 52, “to ... second-guess the FCC’s conclusion”⁸⁹ that “the benefits of bulk billing outweigh its harms”⁹⁰ “would disrupt the expert balancing underlying the federal scheme.”⁹¹ Moreover, as in *Farina*, “[s]ubjecting the [communications network] to a patchwork of [local] standards would disrupt ... [regulatory] uniformity and place additional burdens on industry and the network itself,” which “would hinder the accomplishment of the full objectives behind” the Commission’s permission of bulk billing.⁹² Article 52 accordingly conflicts directly with the Commission’s bulk billing policy and should be preempted.

⁸⁵ *Farina*, 625 F.3d at 123.

⁸⁶ 47 U.S.C. § 548(b).

⁸⁷ See *Exclusivity FNPRM*, 22 FCC Rcd at 20237, 20265 ¶¶ 4, 64-65 (requesting comment on whether bulk billing contracts violate Section 628(b)).

⁸⁸ *Revisions of the Commission’s Program Access Rules*, Report and Order, 27 FCC Rcd 12605, 12656 ¶ 77 (2012) (internal quotations omitted) (subsequent history omitted). See also, e.g., *Protecting and Promoting the Open Internet*, Notice of Proposed Rulemaking, 29 FCC Rcd 5561, 5605 ¶ 125 n.254 (2014) (subsequent history omitted); *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, Memorandum Opinion and Order, 26 FCC Rcd 15849, 15853 ¶ 8 (2011).

⁸⁹ *Farina*, 625 F.3d at 126.

⁹⁰ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2470 ¶ 26.

⁹¹ *Farina*, 625 F.3d at 126.

⁹² *Id.*

C. Article 52 Conflicts With Federal Law and Policy Regarding “Network Unbundling” Mandates.

Article 52 is, in effect, a rudimentary and unqualified “unbundling” mandate. As described above, it compels property owners to permit any communications service provider to use their existing facilities, simply upon the request of a resident, with a vague promise of “just and reasonable” compensation in return. But in stark contrast to federal unbundling requirements, Article 52 affords no opportunity to show that this shared access is actually necessary or appropriate to promote consumer choice and competition. Rather, it employs an ironclad presumption – untested by any meaningful fact-finding in the lead up to adopting Article 52 – that network sharing is always justifiable and required. In so doing, Article 52 clashes with the fundamental tenet of federal communications policy that network-sharing mandates discourage investment and should only be imposed where Congress has conducted data-driven analysis and determined that those disincentives and other costs are outweighed by market-based necessities.

Congress, the Commission, and the courts have recognized and adhered to this bipartisan precept for over two decades in numerous contexts, and thus have proceeded extremely carefully in requiring network owners to make their facilities available to competitors. Most notably, in enacting Section 251’s unbundled network element (“UNE”) regime in 1996, Congress made clear that incumbent local exchange carriers (“ILECs”) could only be required to unbundle a network element upon a finding that a competitor would be “impair[ed]” without such access⁹³ – a crucial limiting concept that is notably absent from Article 52.

⁹³ 47 U.S.C. § 251(d)(2)(B).

The Commission’s decisions implementing Section 251 (shaped, as discussed below, by input from the federal courts) reflect an underlying wariness about unbundling, which the Commission long ago proclaimed “one of the most intrusive forms of economic regulation – and one of the most difficult to administer.”⁹⁴ The agency has been particularly hesitant to require unbundling of the sort of advanced, packet-based, fiber-based technologies that Article 52 presumably intended to target.⁹⁵ As the Commission found in a unanimously approved section of the *Triennial Review Order*, mandatory unbundling of next-generation network elements “would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities.”⁹⁶ In contrast, it determined that refraining from unbundling ILECs’ next-generation network facilities and equipment would “promote innovation in infrastructure” consistent with the goals underlying the Telecommunications Act of 1996.⁹⁷ Notably, in those instances in which the Commission failed to weigh the investment disincentives associated with unbundling, the courts required it to go back to the drawing board, emphasizing that network-sharing mandates encumber investment and must be employed only sparingly. For example, the D.C. Circuit observed that “mandatory unbundling comes at a cost, including disincentives to research and development by both ILECs

⁹⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17071 ¶ 141 (2003) (“*Triennial Review Order*”) (subsequent history omitted).

⁹⁵ See, e.g., Ordinance No. 250-16, Sec. 1(a) (finding that San Franciscans expect their communications services “to meet modern standards”).

⁹⁶ *Triennial Review Order* at 17149 ¶ 288. See also *id.* at 17150 ¶ 290 (“[B]y prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks.”).

⁹⁷ *Id.* at 17153 ¶ 295.

and CLECs and the tangled management inherent in shared use of a common resource,” and the Supreme Court has “plainly recognized that unbundling is not an unqualified good.”⁹⁸

Critically for present purposes, the Commission cited the harms associated with forced network sharing in its decision not to require unbundling of fiber loops serving predominantly residential MDUs. It concluded that “[i]t would be inconsistent with the Commission’s goal of promoting broadband deployment to the mass market to deny this substantial segment of the population the benefits of broadband by retaining the regulatory disincentives associated with unbundling.”⁹⁹

In sum, Article 52’s access mandate flouts federal law and policy regarding the propriety of forced network sharing. In the place of federal repudiation of such unbundling requirements except where absolutely necessary and mandated by Congress, Article 52 dispenses with all nuance and simply proclaims that the sharing of facilities is always warranted, notwithstanding any facts to the contrary, simply because a single “occupant” in a unit might prefer it. Indeed, in stark contrast to the sort of rigorous inquiry undertaken by the Commission in the unbundling context, the City here appears to have conducted no meaningful fact-finding regarding the MDU environment or the competitive landscape, relying instead on select anecdotes. As empowering as the resulting regime may seem to an individual consumer, it defeats the careful balancing undertaken by Congress, the Commission, and the federal courts, and specifically contravenes

⁹⁸ *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002), *citing AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388-89 (1999). *See also id.* at 427 (“Each unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities.”), *citing Iowa Utils. Bd.*, 525 U.S. at 428-29 (Breyer, J., concurring in part and dissenting in part).

⁹⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856, 15859-60 ¶ 7 (2004).

the Commission's deliberate refusal to force facility owners in MDUs to share their fiber loops. For the reasons discussed above, it therefore must be preempted.

II. FEDERAL LAW OCCUPIES THE FIELD WITH RESPECT TO INSIDE WIRING.

Article 52's imposition of mandatory wire sharing is also separately invalid under the "field preemption" doctrine. Specifically, the Commission's regulation of cable home wiring and home run wiring, combined with its explicit refusal to mandate sharing of home run wiring, leaves no room for the City to impose its own wire sharing requirements.

Field preemption applies 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."¹⁰⁰ As noted above, federal regulations preempt state and local laws in the same manner as congressional statutes.¹⁰¹ Further, "although the term 'field preemption' suggests a broad scope, the scope of a field deemed preempted by federal law may be narrowly defined."¹⁰²

Article 52 purports to regulate in a field occupied by federal law and policy. Under Section 5201(b), a property owner is deemed to have interfered with an occupant's choice of

¹⁰⁰ *Hillsborough Cnty.*, 471 U.S. at 713, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

¹⁰¹ See *Farina*, 625 F.3d at 115, quoting *Fellner*, 539 F.3d at 243. See also *Petition of Cingular Wireless, L.L.C. for a Declaratory Ruling that Provisions of the Anne Arundel County Zoning Ordinance are Preempted as Impermissible Regulation of Radio Frequency Interference Reserved Exclusively to the Federal Communications Commission*, Memorandum Opinion and Order, 18 FCC Rcd 13126, 13132 ¶ 12 (WTB 2003) ("Under field preemption, Congressional legislation and an agency's regulations and decisions determine whether and to what extent federal law preempts state or local regulation. Preemption may result not only from action taken by Congress; a federal agency acting within the scope of its Congressionally delegated authority may also preempt State regulation. It is well settled that federal regulations have the same preemptive force as federal statutes.").

¹⁰² *Farina*, 625 F.3d at 121 n.25, quoting *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999).

communications service provider where, *inter alia*, he or she refuses to allow that provider to use the property owner's "existing wiring" to provide communications services.¹⁰³ As discussed above, however, the Commission has already adopted a comprehensive regulatory scheme for cable home wiring and home run wiring, including rules governing the disposition of that wiring where a subscriber residing in a multi-tenant property seeks to switch video service providers.

The Commission's detailed framework leaves no room for state or local regulation of wire sharing in multi-tenant properties. Indeed, during its inside wiring proceedings the Commission was asked to mandate sharing of home run wiring by multiple providers *but refused to do so*, citing interference concerns:

We are not prepared at this time to adopt DIRECTV's proposal that we could promote competition and consumer choice by having competing service providers share a single home run wire. The record reflects varied and contradictory perspectives that we cannot yet resolve. Several commenters have argued that transmitting competing services over a single wire is technically and/or practically infeasible. DIRECTV acknowledges that its proposal has limitations, since only service providers that use different parts of the spectrum technically can share a single wire. We do believe, however, that the technical, practical and economic feasibility of multiple services sharing a single wire deserves further exploration. We will therefore seek comment on DIRECTV's proposal in the *Second Further Notice*.¹⁰⁴

After seeking further comment as promised, the Commission still refused to adopt DIRECTV's proposal:

In the *Second Further Notice*, we solicited comments on whether we should adopt a proposal from DirecTV to give MDU owners the right to require that incumbent MVPDs allow competitors to share their home run wiring. Most of the comments we received on this issue agree that there are or may be significant unresolved technical problems with the DirecTV proposal, notwithstanding its

¹⁰³ Article 52 § 5201(b).

¹⁰⁴ *Inside Wiring Report and Order*, 13 FCC Rcd at 3729 ¶ 148.

merits from a public policy perspective. Most of the technical objections to the DirecTV proposal relate to the possibility of interference when amplified signals are transmitted on a single wire and the possible lack of bandwidth capacity in existing cable plant. We are unable to resolve this issue based on the record before us. Accordingly, we decline to adopt DirecTV's line-sharing proposal at this time.¹⁰⁵

These decisions reflect that the sharing of inside wiring is a matter of federal, not state or local, concern, and that the Commission has occupied the field. Where the Commission sought to preserve state law, it did so explicitly.¹⁰⁶ It did not do so here, which suggests that it did not intend to allow states or municipalities to ignore the Commission's findings and adopt their own wire sharing requirements for multi-tenant properties. This, of course, only makes sense, for the additional reason that any interference caused by sharing of inside wiring will bear directly on the quality of signals delivered to subscribers, and Congress has placed signal quality issues squarely within the Commission's purview.¹⁰⁷ Given the Commission's well-established expertise and the need for uniform regulation where interference is concerned, it would make little sense to permit the City or any other municipality to stand in the Commission's shoes and determine when the forced sharing of wiring in multi-tenant properties is appropriate. Indeed, the fact that the Commission has considered the matter twice and refused to permit wire sharing

¹⁰⁵ *Inside Wiring Second Report and Order*, 18 FCC Rcd 1342 at 1377 ¶ 88. The Commission was not asked to consider whether to permit sharing of cable home wiring, although the interference issue would likely be dispositive there as well.

¹⁰⁶ *See Inside Wiring Report and Order*, 13 FCC Rcd at 3693 ¶ 69 (“[T]he procedural mechanisms we are adopting [for disposition of home run wiring] will apply only where the incumbent provider no longer has an enforceable legal right to maintain its home run wiring on the premises against the will of the MDU owner. ... We also reiterate that we are not preempting any rights the incumbent provider may have under state law.”).

¹⁰⁷ 47 U.S.C. § 544(e) (“[T]he Commission shall prescribe regulations which establish minimum technical standards relating to cable systems’ technical operations and signal quality. The Commission shall update such standards periodically to reflect improvements in technology.”). *See also Inside Wiring Report and Order*, 13 FCC Rcd at 3772 ¶ 245; 47 C.F.R. § 76.605.

counsels strongly against allowing local governments to do the opposite, particularly given the potential impact that interference would have on consumers and the quality of video services they are paying for. These considerations all demonstrate that “the federal interest” in the regulation of inside wiring “is so dominant” that it “preclude[s] enforcement of” Article 52’s wire sharing requirement.¹⁰⁸

CONCLUSION

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

Respectfully submitted,

/s/ Bryan N. Tramont
Bryan N. Tramont
Russell P. Hanser
Brian W. Murray
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
(202) 783-4141

*Attorneys for the Multifamily
Broadband Council*

February 24, 2017

¹⁰⁸ *Hillsborough Cnty.*, 471 U.S. at 713, *quoting Rice*, 331 U.S. at 230.

EXHIBIT A

**ARTICLE 52 OF THE
SAN FRANCISCO POLICE CODE**

San Francisco Police Code

ARTICLE 52: OCCUPANT'S RIGHT TO CHOOSE A COMMUNICATIONS SERVICES PROVIDER

- Sec. 5200. Definitions.
- Sec. 5201. No Interference by Property Owner.
- Sec. 5202. No Discrimination by Property Owner Against Occupant.
- Sec. 5203. Applicability.
- Sec. 5204. Request to Inspect a Multiple Occupancy Building.
- Sec. 5205. Notice of Intent to Provide Service.
- Sec. 5206. Permitted Refusal of Access.
- Sec. 5207. Permitted Limitations on Access.
- Sec. 5208. Just and Reasonable Compensation.
- Sec. 5209. Notice of Violation.
- Sec. 5210. Enforcement by the City Attorney.
- Sec. 5211. Enforcement by Communications Services Providers and Occupants.
- Sec. 5212. Attorneys' Fees and Costs.
- Sec. 5213. Civil Penalties.
- Sec. 5214. Statute of Limitations.
- Sec. 5215. Extensions of Time.
- Sec. 5216. Undertaking for General Welfare.
- Sec. 5217. Severability.
- Sec. 5218. No Conflict with Federal or State Law.

***Editor's Note:**

Ord. 250-16, which added Sections 5200 through 5218, set forth this Article heading but did not mark it as an addition to the Code. The heading is therefore unofficial, but has been included as an aid to the user.

SEC. 5200. DEFINITIONS.

For purposes of this Article 52:

“City” means the City and County of San Francisco.

“Communications services” means: (a) video service as that term is defined in California Public Utilities Code § 5830(s); (b) telecommunications services certificated by the California Public Utilities Commission under California Public Utilities Code § 1001; or (c) services provided by a telephone corporation as that term is defined in California Public Utilities Code § 234. Nothing in this definition is intended to limit the types of services that a communications services provider accessing a multiple occupancy building pursuant to this Article 52 may provide to occupants.

“Communications services provider” means a person that: (a) has obtained a franchise to provide video service from the California Public Utilities Commission under California Public Utilities Code § 5840; (b) has obtained a certificate of public convenience and necessity from the California Public Utilities Commission under California Public Utilities Code § 1001 to provide telecommunications services; or (c) is a telephone corporation as that term is defined in California Public Utilities Code § 234. In addition, a communications services provider must have obtained a Utility Conditions Permit from the City under Administrative Code Section 11.9.

“Existing wiring” means 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(l) 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.

“Just and reasonable compensation” means the “fair market value” of the impact on the multiple occupancy building as that term is defined in California Code of Civil Procedure § 1263.320.

“Multiple occupancy building” means: (a) an apartment building, apartment complex, or any other group of residential units located upon a single premises or lot, provided that such multiple dwelling unit contains at least four separate units; and (b) a multi-tenant building used for business purposes that has separate units occupied by at least four different persons. Hotels, guesthouses, and motels, consisting primarily of guest rooms and/or transient accommodations, are not multiple occupancy buildings. Multiple occupancy buildings include properties that are rented to tenants, owned and occupied by individual owners, or occupied by shareholders/tenants of a cooperative.

“Occupant” means a person occupying a unit in a multiple occupancy building.

“Person” means any natural person or an entity including but not limited to a corporation or partnership.

“Property owner” means a person that owns a multiple occupancy building or controls or manages a multiple occupancy building on behalf of other persons.

“Request for service” means an expression of interest from an occupant received by a communications service provider either by mail, telephone or electronic mail. A contact between an occupant and a communications services provider through a sign-up list contained on the provider’s website will be deemed a request for service once the communications services provider confirms the request either by telephone or electronic mail.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5201. NO INTERFERENCE BY PROPERTY OWNER.

(a) No property owner shall interfere with the right of an occupant to obtain communications services from the communications services provider of the occupant’s choice.

(b) A property owner interferes with the occupant’s choice of communications services provider by, among other things, refusing to allow a communications services provider to install the facilities and equipment necessary to provide communications services or use any existing wiring to provide communications services as required by this Article 52.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5202. NO DISCRIMINATION BY PROPERTY OWNER AGAINST OCCUPANT.

No property owner shall discriminate in any manner against an occupant on account of the occupant’s requesting or obtaining communications services from the communications services provider of the occupant’s choice.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5203. APPLICABILITY.

All property owners as defined in Section 5200 are covered by this Article 52. A property owner that, as of the effective date of this Article, has an agreement with a communication services provider that purports to grant the communications services provider exclusive access to a multiple occupancy building and/or the existing wiring to provide services is not exempt from the requirements of this Article.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5204. REQUEST TO INSPECT A MULTIPLE OCCUPANCY BUILDING.

(a) Prior to issuing a notice of intent to provide service under Section 5205 of this Article 52, a communications services provider shall inspect a multiple occupancy building to determine the feasibility of providing services to one or more occupants.

(b) A communications services provider shall request in writing that the property owner allow it to inspect the property for the purpose of providing service. Such request shall be sent to the property owner by registered mail at least 14 days before the proposed date for the inspection. The request may be sent by electronic mail instead, but the 14-day period shall not commence until the communications services provider is able to confirm that the property owner actually received the electronic mail communication.

(c) A request for an inspection shall include, but need not be limited to, the following:

(1) A statement that the communications services provider: (A) is authorized to provide communications services in the City; (B) has received a request for service from one or more occupants; (C) when inspecting the property, will conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants; and (D) will indemnify, defend, and hold harmless the property owner for any damage caused by the inspection.

(2) A description of: (A) the communications services to be offered to occupants; (B) the facilities and equipment the communications services provider anticipates installing on the property; (C) the square footage generally required for the provider's facilities and equipment; and (D) the estimated electrical demand of the provider's facilities and equipment.

(3) The date and time the communications services provider proposes to inspect the property.

(4) A statement that the property owner has until three days before the proposed inspection date to notify the communications services provider in writing either that:

(A) The property owner will not allow the communications services provider to provide services on the property. In this case, the property owner shall set forth the reasons for its refusal and whether any of those reasons are permitted by Section 5206 of this Article 52; or

(B) The property owner will allow the communications services provider to inspect the property. In this case, the property owner shall identify any reasonable conditions that the communications services provider must follow during the inspection in order to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants.

(5) A reference to and a copy of this Article 52.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5205. NOTICE OF INTENT TO PROVIDE SERVICE.

(a) A communications services provider that intends to provide communications services to one or more occupants shall send a notice of intent to the property owner at least 30 days before the proposed installation date. The notice of intent shall be sent by registered mail or electronic mail. If the notice of intent is sent by electronic mail, the 30-day period shall not commence until the communications service provider is able to confirm that the property owner actually received the electronic mail communication.

(b) A notice of intent to provide communications services shall include, but need not be limited to, the following information:

(1) A statement that the communications services provider: (A) is authorized to provide communications services in the City; (B) has received a request for service from one or more occupants, including the unit number of each such occupant; (C) when installing, operating, maintaining or removing its facilities and equipment from the property, will conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants; (D) will pay the property owner just and reasonable compensation for its use of the property, and the proposed amount of such just and reasonable compensation to be paid as required by Article 52 of the Police Code; and (E) will indemnify, defend, and hold harmless the property owner for any damage caused by the installation, operation, maintenance, or removal of its facilities from the property.

(2) (A) A description of the communications services to be offered to occupants; and (B) a full set of the communications services provider's detailed plans and specifications for any work to be performed and facilities and equipment to be installed in or on the property, including any required utility connections and the electrical demand of any facilities and equipment to be installed.

(3) The dates and times the communications services provider proposes to start and complete the installation.

(4) A statement that the property owner has until five days before the proposed installation start date to notify the communications services provider in writing either that:

(A) The property owner will not allow the communications services provider to provide services on the property. In this case, the property owner shall set forth the reasons for its refusal and whether any of those reasons are permitted by Section 5206 of this Article 52; or

(B) The property owner will allow the communications services provider to provide services on the property, but disagrees with the amount of the just and reasonable compensation the communications services provider has proposed. In this case, the property owner shall state the amount of just and reasonable compensation the property owner will require; and, in either the case of (A) or (B), the property owner shall state:

(C) Such reasonable conditions the communications services provider must follow during the installation to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants.

(5) A reference to and a copy of this Article 52.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5206. PERMITTED REFUSAL OF ACCESS.

(a) Nothing in this Article 52 shall be construed to require a property owner to allow a communications services provider to access its property to inspect the property where the communications services provider has failed or refused to agree to the property owner's request that the provider comply with any conditions on accessing the property contained in a notice pursuant to Section 5207 of this Article.

(b) Nothing in this Article 52 shall be construed to require a property owner to allow a communications services provider to access its property to install the facilities and equipment that are necessary to offer

services to occupants where:

- (1) The communications services provider is not authorized to provide communications services in the City;
- (2) The communications services provider cannot verify that one or more occupants of the multiple occupancy building have made a request for services;
- (3) The property owner can show that physical limitations at the property prohibit the communications services provider from installing the facilities and equipment in existing space that are necessary to provide communications services and/or from using existing wiring to provide such services;
- (4) The communications services provider has not agreed to the property owner's request that the provider comply with any conditions on accessing the property contained in a notice from the property owner issued pursuant to Section 5207 of this Article 52;
- (5) The communications services provider's proposed installation of facilities and equipment in or on the property would: (A) have a significant, adverse effect on any historically or architecturally significant elements of the property; (B) disturb any existing asbestos or lead-paint in or on the property; (C) have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property; (D) cause undue damage to the property; or (E) impair the use of the property for the continued provision of any existing essential services; or
- (6) The property owner and communications services provider have not reached an agreement concerning any just and reasonable compensation to the property owner for allowing the communications services provider to install, operate, and maintain facilities and equipment on its property as required by Section 5208 of this Article 52.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5207. PERMITTED LIMITATIONS ON ACCESS.

- (a) A property owner that grants a communications services provider access to its property to inspect the property may require the communications services provider to conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants during the inspection.
- (b) A property owner that grants a communications services provider access to its property to install facilities and equipment on the property to be used to offer communications services to occupants may require the communications services provider, when installing, operating, maintaining, or removing its facilities and equipment from the property to:
 - (1) Conform to such reasonable conditions as the property owner deems necessary to protect the safety, functioning, and appearance of the property and the convenience and well-being of the occupants;
 - (2) Provide a certificate of insurance evidencing coverages generally required by the property owner for contractors performing comparable work at the property;
 - (3) Demonstrate that any contractors installing facilities and equipment on the property are licensed;
 - (4) Obtain any permits that might be required to install facilities and equipment on the property;
 - (5) Accept responsibility for the cost: (A) to install any electrical facilities needed to serve the facilities and equipment installed by the provider; and (B) of any electricity to be used by those facilities and equipment;
 - (6) Allow the property owner to inspect the communication services provider's installation and construction of any facilities and equipment for compliance with the San Francisco Building Code and generally acceptable construction standards; and

(7) Remove its facilities and equipment and restore any area of the property occupied by the communications services provider to its prior condition when: (A) those facilities and equipment are no longer being used to provide communications services to any occupant; or (B) any access agreement between the property owner and the communication services provider has expired or been terminated.

(c) A property owner that has received an inspection request under Section 5204(a) of this Article 52 or an installation notice under Section 5205(b) of this Article shall notify the communications services provider in writing at least five days before the inspection or installation of any conditions authorized under subsections (a) or (b) that the communications services provider must comply with while inspecting the property or installing facilities or equipment on the property.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5208. JUST AND REASONABLE COMPENSATION.

A property owner is entitled to just and reasonable compensation from a communications services provider that obtains access to a multiple occupancy building from a property owner pursuant to this Article 52 to provide communications services to occupants.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5209. NOTICE OF VIOLATION.

(a) A communications services provider or occupant that believes that a property owner has failed to comply with the requirements of this Article 52 shall notify the property owner in writing that: (1) the property owner is in violation of this Article; and (2) unless the property owner agrees to come into compliance with this Article within 10 days the communications services provider or occupant may take action against the property owner pursuant to Section 5211 of this Article.

(b) The notice required by subsection (a) shall: (1) describe the manner in which the property owner is in violation of this Article 52; and (2) identify any actions the property owner is required to take to come into compliance with this Article.

(c) No communications services provider or occupant may enforce the requirements of this Article 52, as permitted under Section 5211, unless and until the communications services provider or occupant has complied with subsection (a).

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5210. ENFORCEMENT BY THE CITY ATTORNEY.

The City Attorney may institute a civil proceeding in the San Francisco Superior Court on behalf of the City for injunctive and monetary relief, including civil penalties as specified more fully in Section 5213 of this Article 52, to enforce this Article against a property owner that has violated this Article.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5211. ENFORCEMENT BY COMMUNICATIONS SERVICES PROVIDERS AND OCCUPANTS.

(a) A communications services provider or occupant of a multiple occupancy building where the property owner has refused to allow the communications services provider to provide service may institute a civil proceeding to enforce this Article 52 in San Francisco Superior Court against such property owner for injunctive and monetary relief.

(b) Prior to filing a civil proceeding in accordance with subsection (a), the communications services provider or occupant shall: (1) comply with the notice requirements contained in Section 5209 of this Article 52, and (2) notify the City Attorney in writing of its intent to proceed against a property owner.

(c) Subject to subsection (d), a communications services provider or occupant that has complied with subsection (b) may commence such a proceeding 30 days after notice was sent to the City Attorney.

(d) If the City Attorney institutes a civil proceeding against the property owner before or during the 30-day notice period, then no communications services provider or occupant may file a proceeding under subsection (a). If the City Attorney institutes a civil proceeding after the 30-day notice period has elapsed, any communications services provider or occupant that provides the notice required under subsection (b) may file a separate civil proceeding.

(e) The City Attorney shall notify any person submitting a notice under subsection (b) that the City Attorney has instituted a civil proceeding or decided not to institute a civil proceeding.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5212. ATTORNEYS' FEES AND COSTS.

(a) A court may award reasonable attorneys' fees and costs to the City if it obtains injunctive relief under Section 5210 of this Article 52 or to any person who obtains injunctive and monetary relief under Section 5211 of this Article.

(b) If a court finds that any action brought under this Article 52 is frivolous, the court may award the property owner reasonable attorneys' fees and costs.

(c) If a proceeding brought against a property owner under this Article 52 concerns a multiple occupancy building that contains fewer than 25,000 square feet of space available for occupants to rent or own, the attorneys' fees and costs recoverable against the property owner pursuant to subsection (a), or recoverable against a person commencing the action pursuant to subsection (b), shall be limited to \$5,000.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5213. CIVIL PENALTIES.

(a) Any property owner that violates this Article 52 may be liable for a civil penalty not to exceed \$500 for each day such violation is committed or continues. Such penalty shall be assessed and recovered in a civil action brought in the name of the people of the City by the City Attorney.

(b) In assessing the amount of a civil penalty, a court may consider any of the relevant circumstances, including, but not limited to, the following:

(1) The number of occupants affected by the violation;

(2) The number of communications services providers affected by the violation;

(3) Whether the property owner has violated this Article 52 at other properties;

(4) The amount of revenues the property owner receives from any existing communications services providers serving the property;

(5) Whether the property owner has a legitimate reason for refusing access to its property by the communications services provider; and

(6) The net assets and liabilities of the property owner, whether corporate or individual.

(c) Any civil penalty under subsection (a) will start to accrue following the completion of the notice required by Section 5209 of this Article 52.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5214. STATUTE OF LIMITATIONS.

(a) Any court proceeding by a communications services provider or occupant to enforce this Article 52 against a property owner must be brought within 180 days of the communications services provider or occupant completing the notice requirements contained in Sections 5209 and 5211 of this Article.

(b) The City Attorney may institute a court proceeding to enforce this Article 52 within 180 days of the City Attorney receiving written notice that a property owner has violated this Article.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5215. EXTENSIONS OF TIME.

Any of the deadlines set forth in Sections 5204, 5205, 5207, or 5209 of this Article 52 may be extended by agreement between a communications services provider or occupant and property owner, as applicable.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5216. UNDERTAKING FOR GENERAL WELFARE.

In enacting or implementing this Article 52, the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5217. SEVERABILITY.

If any section, subsection, sentence, clause, phrase, or word of this Article 52, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The Board of Supervisors hereby declares that it would have passed this Article, and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional, without regard to whether any other portion of this Article or application thereof would be subsequently declared invalid or unconstitutional.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

SEC. 5218. NO CONFLICT WITH FEDERAL OR STATE LAW.

Nothing in this Article 52 shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal or state law.

(Added by Ord. [250-16](#), File No. 161110, App. 12/22/2016, Eff. 1/21/2017)

EXHIBIT B

**DECLARATION OF
DAN TERHEGGEN
MULTIFAMILY BROADBAND COUNCIL**

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

Petition of the Multifamily Broadband Council)	
Seeking Preemption of Article 52 of the San)	__ Docket No. 17-__
Francisco Police Code)	
)	
Petition of the Multifamily Broadband Council)	__ Docket No. 17-__
Seeking Declaratory Ruling That Article 52 of the)	
San Francisco Police Code is Precluded by the)	
Commission's OTARD Rule)	

DECLARATION OF DAN TERHEGGEN

1. My name is Dan Terheggen. My business address is 620 W. Street, Gardena, CA 90248.

I serve on the Board of Directors and am the elected Board President of Multifamily Broadband Council (MBC). I conduct leadership initiatives on behalf of our nonprofit trade association, including running board meetings, establishing committees and approving standard operations and activities. I work closely with the Board and Executive Director to accomplish our organization's objectives, which revolve around protecting the business of small, independent broadband operators working within the MDU/multi-tenant environment. I am also the CEO and partner of Consolidated Smart Systems, an MBC Member Company.

2. The purpose of my declaration is to describe how MBC Member Companies and similar small providers provide their antenna-based services and access wiring in multi-tenant environments.

3. The FCC's Over-the-Air Reception Devices, or "OTARD," rule covers a wide variety of antennas used by MBC Members to provide competitive communications services.

These include:

- Antennas that are one meter or less in diameter that are used to receive or transmit direct broadcast satellite service or fixed wireless signals via satellite;
 - Antennas that are one meter or less in diameter or diagonal measurement and that are used to receive video programming services via multipoint distribution services or to receive or transmit fixed wireless signals other than via satellite; and
 - Antennas that are used to receive television broadcast signals.¹
4. MBC Member Companies and other independent communications service providers use all of these categories of antennas to provide various services to residents of multi-tenant buildings. For example, Member Companies use satellite antennas to deliver video or fixed wireless services within multi-unit dwellings, and use antennas for site-wide Wi-Fi broadband Internet access services. They also provide routers for individual tenants' cable modem or other broadband services, which tenants often distribute through their residences using Wi-Fi routers. Tenants also purchase phone services, which, in some cases, are linked to cordless telephones. Some service providers also use antennas to receive television broadcast signals, which are then distributed to building residents.
5. These antennas are also used in a number of different configurations in providing MBC Member Companies' services. In the typical situation, the building owner has arranged for the placement of an antenna on the roof or another common area, along with other system components, including wiring, so that tenants can purchase and receive services from communications providers through the antenna. This type of arrangement accounts for most of MBC Member Company services.
6. In other cases, a building owner contracts with the service provider, paying a flat discounted "bulk billing" fee, then provisions service to its tenants as an amenity under

¹ 47 C.F.R. § 1.4000(a)(1)(i)-(iii).

the standard lease agreement for all occupants, either at no extra charge or at a steep discount off of regular retail pricing. In that scenario, the building owner is the customer/user, and the antenna is on the roof or common area. Bulk billing services in multi-tenant environments account for a significant portion of MBC Members' services, particularly in low-income and other affordable housing, smaller buildings, and housing catering to student and senior populations.

7. In some cases, a building owner and the tenants are all end user customers of a communications service provider employing a mesh or point-to-point architecture, using an antenna on the roof or another common area of the building. Some Member Company services are delivered in this configuration. A large portion of Member Company services, including some of the service configurations described in paragraphs 5 and 6, are also provided in situations where tenants use antennas in their individual units, such as Wi-Fi routers and cordless phones.
8. Without the ability to secure the exclusive right to use designated wiring necessary for the delivery of the provider's services, smaller, independent providers, such as MBC's Member Companies, will not be able to demonstrate a likely revenue stream sufficient to obtain the third-party financing necessary to extend service to a building under any of the scenarios discussed above.² Typically, MBC Member Companies and similar small providers are required to submit indicators of likely success –for example, agreements granting our Members undisturbed use of the property owners' inside wiring –in order

² I emphasize that arrangements providing for exclusive access to the inside wiring owned by the building are not equivalent to or tantamount to an exclusive service agreement. In the former situation, competitors may, and do, duplicate the inside wiring needed to provide their services to building tenants.

to receive third-party financing for buildout. That third-party financing is a necessity for companies of the typical size of our Members to extend services to multi-tenant buildings. Thus, without exclusive use of inside wiring in multi-tenant buildings, these entities will be unable to obtain financing, and will be denied the opportunity to serve many buildings for whose business they could otherwise compete.

9. Under Article 52, MBC's Members will also be unable to enter into bulk billing arrangements. The savings from bulk billing arrangements are available only if the service provider is able to serve all of the tenants in the building. Without the exclusive right to use designated wiring in the building, it would not be practical for a service provider to enter into a bulk billing arrangement. Moreover, property owners are obligated to pay the bulk service provider for service to each unit, whether that unit receives service from the bulk provider or another carrier. Having to pay for services that residents are not receiving disrupts the investment-backed expectations behind the arrangement, deterring owners from entering into such arrangements.
10. The inability to secure a bulk billing arrangement also undermines a building owner's opportunity to obtain the third-party financing necessary for buildout. Without the predictable revenue stream generated by a bulk billing arrangement, it will be difficult to justify the financing required to deploy the necessary facilities. Thus, the inability to secure a bulk billing arrangement can lead to a decision not to extend service to a building.
11. The preclusion of bulk billing arrangements will raise the cost of service for residents of multi-tenant buildings. As noted above, such arrangements enable service providers to offer service to all of the tenants in a building at a tremendous discount. If a building

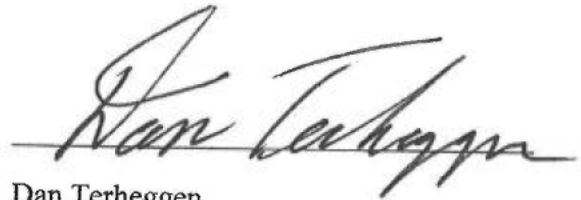
owner is not able to offer a bulk billing arrangement to its tenants, they will ultimately have to purchase communications services on an individual basis at a significantly higher cost. Those higher service costs to tenants will drive down adoption rates among tenants, diminishing even further – and, in some cases, eliminating – the business case supporting competitive service deployment to a given building.

12. Impeding competition from MBC Members and other independent providers by preventing them from securing necessary third-party financing and bulk billing arrangements will risk raising the cost of service for residents of all multi-tenant buildings, as such competitors are forced out of the market and can no longer act to drive overall prices down.
13. Forcing a building owner to grant any new service provider access to the owner's inside wiring, whether home run wiring or cable home wiring, which MBC Member Companies are already using, will result in interference and service cut-offs. Typically, when a resident in a multi-tenant building chooses a new provider for a service – *e.g.*, Internet service – but wants to keep the existing provider's cable TV and telephone services, if the new provider is able to utilize the existing wiring, the same wire may have to carry two signals from two different providers, often resulting in interference and service interruptions.
14. Frequently, in this situation, the new provider connecting its service to the resident disconnects the line from the existing provider's equipment and services, resulting in disconnected video and voice services in this example. When the existing provider reconnects its services in response to the resident's complaint, the new provider's Internet service is disconnected, leading to an endless cycle of customer aggravation. In the case

of disconnected cordless telephone service, the resident has no access to 911 during the disruption. Furthermore, when the existing service is provided under a bulk billing arrangement, such service disruption problems add to the substantial burdens already imposed on bulk billing arrangements where the exclusive right to use designated wiring is denied.

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

Executed on: February 23, 2017

A handwritten signature in cursive script, appearing to read "Dan Terheggen", written over a horizontal line.

Dan Terheggen
Multifamily Broadband Council
Board President

EXHIBIT C

DECLARATION OF RICHARD N. HYLEN

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

Petition of the Multifamily Broadband Council)	
Seeking Preemption of Article 52 of the San)	___ Docket No. 17-___
Francisco Police Code)	
)	___ Docket No. 17-___
Petition of the Multifamily Broadband Council)	
Seeking Declaratory Ruling That Article 52 of the)	
San Francisco Police Code is Precluded by the)	
Commission's OTARD Rule)	

DECLARATION OF RICHARD N. HYLEN

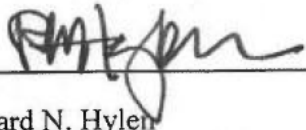
1. My name is Richard N. Hylen.
2. My business address is 330 Townsend Street, Suite 135, San Francisco, CA 94107. I am employed by Satel, Inc. as President and CEO.
3. The purpose of my declaration is to describe aspects of how my company and similar small providers access wiring in multi-tenant environments.
4. Bulk billing services in multi-tenant environments account for a significant portion of Satel services. This is particularly true in low-income and other affordable housing, in smaller buildings, and in housing for senior and student populations.
5. Typically, Satel and other similar small providers are required to submit indicators of likely success – for example, agreements granting undisturbed use of the property owners' inside wiring, or a bulk billing arrangement under which the property owner purchases our service as an amenity for all occupants at a steep discount off of regular retail pricing – in order to receive third-party financing for buildout. That third-party financing is a necessity to extend services to the kind of buildings described above.
6. Losing the ability to secure such use of a building's inside wiring, or to enter into bulk billing arrangements, will directly and negatively impact Satel's ability to demonstrate a

likely revenue stream sufficient to obtain that necessary financing. Losing that use and/or bulk billing as a business model will deny Satel the opportunity to serve many buildings for whose business it would otherwise compete.

7. Impeding bulk billing arrangements will potentially risk raising the cost of service for residents of multi-tenant buildings, as competitors such as Satel's are forced out of the market and can no longer act to drive overall prices down across it. Satel and providers like it rely on such arrangements to be able to offer service to all of the tenants in a building at a tremendous discount. Under such arrangements, the building owner pays a flat fee to Satel and includes the services as part of the standard lease agreement or for a small additional fee. The savings passed along under such arrangements are only available if Satel can secure the predictable revenue that comes from serving *all* the tenants of a building. Taking away that predictable revenue would increase costs, and risk in some instances making it financially unfeasible to support deployment.
8. Forcing a building owner to grant any new service provider access to the owner's inside wiring, whether home run wiring or cable home wiring, which Satel is already using will result in interference and service cut-offs.

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

Executed on: February 23, 2017


Richard N. Hylen

CERTIFICATE OF SERVICE

I hereby certify that, on this 24 day of February, 2017, a copy of the foregoing Petition for Preemption was sent, via first-class U.S. mail, to the following:

Dennis Herrera
City Attorney of San Francisco
Office of the City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
415.554.4700

Office of the Controller
City Hall, Room 316
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102
415.554.7500

/s/
Blake Zanardi

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

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

REPLY COMMENTS

Bryan N. Tramont
Russell P. Hanser
Brian W. Murray
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
(202) 783-4141

*Attorneys for the Multifamily
Broadband Council*

June 9, 2017

TABLE OF CONTENTS

EXECUTIVE SUMMARY	ii
DISCUSSION	2
I. THE FACTUAL RECORD CONCLUSIVELY DEMONSTRATES THE HARMS ASSOCIATED WITH ARTICLE 52.	2
II. UNABLE TO MARSHAL FACTS TO REBUT MBC’S PETITION, OPPONENTS INSTEAD RELY ON MISTAKEN CHARACTERIZATIONS OF ARTICLE 52 AND THE LAW OF PREEMPTION.....	7
A. Article 52 Is a “First-in-the-Nation” Law That Is Materially Different From Other Mandatory Access Provisions.....	8
B. The Policy Arguments Offered By Article 52’s Supporters Are Misleading and Irrelevant.	13
C. Opponents Mischaracterize the Law Governing Preemption.	16
III. ARTICLE 52 IS PREEMPTED BY FEDERAL LAW.....	23
A. Article 52 Conflicts with Federal Law and Policy Regarding Competitive Access to Multi-Tenant Buildings.	23
B. Article 52 Conflicts with Federal Law and Policy Regarding Bulk Billing Arrangements.	29
C. Article 52 Conflicts with Federal Law and Policy Regarding Network Unbundling Mandates.	34
D. Federal Law Occupies the Field With Respect to Inside Wiring.....	37
CONCLUSION	40

EXECUTIVE SUMMARY

A single fact shines through the record amassed in this docket: Article 52 of the San Francisco Police Code will harm competition, MDU residents, and building owners in San Francisco. Nearly a dozen small, competitive service providers filed comments supporting MBC's Petition, corroborating the business realities that MBC described and explaining the market distortions Article 52 would cause. Article 52 would strip such providers of the ability to secure financing for broadband deployment, eviscerating competition in the MDU marketplace. Property owners and management companies concur, explaining that Article 52's mandates are both impractical and harmful to consumers. Associations representing family housing units and service providers also agree, showing that Article 52 disempowers consumers by eliminating the benefits that building owners could negotiate with service providers in the pre-Article 52 environment. Even Article 52's champions concede that, as written, the ordinance would result in the "significant degradation" of service. These facts demonstrate that Article 52 undercuts federal policy goals and must be preempted.

Instead of contesting the ordinance's harms, supporters of Article 52 try to divert attention by mischaracterizing what the ordinance says and does – though they cannot seem to agree with one another on these topics. Opponents first argue that Article 52 is merely another in a long line of local or state mandatory access rules. This, of course, provides no help, because the relevant question is not whether Article 52 breaks new ground, but whether it conflicts with federal law. Any ordinance that mirrored Article 52 would be preempted. But the Petition's opponents ultimately undermine their case for Article 52's ordinariness by simultaneously touting the numerous differences that make it unique, including the unprecedented mandate that competing service providers be allowed to "use any existing wiring" in an MDU, which the City and County of San Francisco ("the City") contends makes Article 52 a "first-in-the-nation law." The Fiber Broadband Association ("FBA") and CALTEL try to conjure limits on Article 52's scope to mitigate conflict with federal policy, but their imagined boundaries have no basis in the ordinance's text, and their points are contradicted by the author of the ordinance, the City. CALTEL and the FBA likewise insist that Article 52's scope is limited to coaxial cable, but this claim similarly ignores the text of provision and the ordinance's broad goals. Opponents' *post-hoc* effort to limit Article 52 to facilities that are "idle" or disconnected, or that "lie fallow," meets a similar fate, as there is no support for any such reading in Article 52 itself. In short, Article 52 does not resemble traditional local and state mandatory access provisions.

Article 52's supporters insist that the provision is necessary to promote broadband competition in MDUs in San Francisco. Even if they were correct, their argument would be beside the point, because local officials are not permitted to take actions that conflict with federal law, regardless of whether they believe they have a compelling reason for doing so. In any case, Article 52 is *not* a victory for competition or for small providers. Rather, Article 52 expressly excludes many small providers from its reach. There is evidence, moreover, that the City adopted Article 52 specifically to facilitate its *own* deployment plans at the expense of smaller providers. MBC noted in its Petition that the anti-competitive threat of Article 52 is aggravated by the City's apparent desire to offer a municipal broadband service, and the City does not deny this objective. Ultimately, the ordinance tilts the playing field against property owners and small service providers, to the detriment of consumers and competition. That outcome contravenes the Commission's policy goals and conflicts with specific areas of federal law and policy.

Opponents of the Petition also rely on a bevy of erroneous conceptions regarding the law of preemption itself. They argue that there can be no conflict preemption because the Commission has not expressly prohibited that which Article 52 requires. As the Supreme Court has made clear, however, conflict preemption applies not only “when compliance with both federal and state regulations is a physical impossibility,” but also “when state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” In particular, a state or local requirement that disrupts a balance struck by federal policy-makers conflicts with, and is preempted by, federal law. The City cites various cases meant to counter this simple point, but none of its precedents rebut the case for preemption here. Indeed, the City *admits* that Article 52 was meant to supplant the balance struck by federal law and policy, arguing that the provision was enacted because “[e]fforts by this Commission and the California Public Utilities Commission to enhance competition among providers of communications services in MDUs have not been successful.” This is not a permissible objective.

Article 52’s proponents also place excessive focus on the stated *purpose* of Article 52 rather than on the provision’s actual effects. What matters is not whether the requirement under consideration *aims* to conflict with federal policy, but whether it will, *in fact*, have the practical effect of frustrating federal goals. As MBC and others have shown, Article 52 will diminish competition in the MDU marketplace, particularly by smaller providers that require financing to fund network build-out, and also will undercut, not promote, the Commission’s broader pro-deployment, pro-competition objectives.

There is no merit to arguments that Article 52 cannot be preempted by federal law because the Commission has not directly regulated property owners in the building-access context. In the D.C. Circuit’s words, “federal law may preempt state [or local] law even if the conflict between the two is not facially apparent – as when, for example, the federal and state laws govern different subject matters.” The appropriate focus is not on whether federal and local laws regulate the same entities, but whether the local requirements impair or frustrate the federal scheme. Nor should any weight be afforded to claims that there can be no preemption here because the Commission has not previously held that “wire sharing pursuant to a state or local law or ordinance would contradict federal policy.” The Supreme Court has underscored that there need be no specific, formal agency statement identifying a conflict in order for a decision-maker to conclude that preemption is warranted.

The Petition’s opponents have no real response to MBC’s specific preemption claims, either. First, Article 52 conflicts with the Commission’s longstanding competitive access framework with regard to multi-tenant buildings, which provides property owners with certainty as to their rights to home run wiring upon termination of an incumbent’s service. This approach has benefitted property owners, providers, and consumers alike, but Article 52 seeks to displace the Commission’s policy in favor of the City’s. The ordinance thus re-balances the considerations underlying the Commission’s policies, frustrating federal objectives. The City’s effort to save the ordinance from preemption falls flat: Contrary to its claims, Article 52 does not support the Commission’s objectives. Instead, it places severe constraints on a property owner’s ability to bargain for the optimal mix of communications services on behalf of his or her tenants – a point confirmed by multiple commenters. Nor can proponents save the ordinance by inventing limitations that appear nowhere in the provision’s text, or by pretending that the Commission has banned exclusive video contracts in MDUs when it affirmatively has chosen *not*

to do so. Finally, the fact that Article 52 regulates wiring owned by *property owners* is irrelevant: The Commission is authorized (and indeed required) to preempt local laws that frustrate federal objectives that fall within its purview, and regulation of exclusive wiring contracts, and the rights of property owners and service providers to inside wiring generally, are unquestionably matters within the Commission's jurisdiction.

Second, Article 52 conflicts with federal law and policy regarding bulk billing arrangements. The Commission affirmatively has endorsed the use of such arrangements, finding that they "predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband." Article 52 effectively bars such arrangements by destroying the economic rationale on which bulk billing deals are struck and raising prices for tenants. The ordinance would leave smaller independent service providers unable to obtain the necessary third-party financing. Article 52 thus negates a valid federal policy, attempting to "re-balance" the considerations that led the Commission to allow bulk-billing arrangements in the first place. The City's effort to liken the current scenario to cases in which the federal government had failed to adopt *any* formal policy (and in which there was, accordingly, no preemption) falters – unlike the cases the City cites, this matter involves a Commission order reflecting a careful balancing of competing concerns, and a formal finding that "the benefits of bulk billing outweigh its harms." The City's suggestion that nothing in Article 52 prohibits MBC's members from enforcing their bulk-billing agreements or using the existing wiring to provide service is simply inapt, because federal law preempts not only state or local law that *expressly prohibits* that which federal law expressly allows, but also state or local requirements that undermine federal policy objectives, or have the "practical effect" of conflicting with federal law.

Third, Article 52 conflicts with federal law and policy regarding network-sharing mandates. The ordinance compels property owners to allow any communications service provider to use their inside wire, without any showing that this shared access is necessary or appropriate to promote consumer choice and competition. The Commission has found that mandatory sharing of next-generation network facilities blunts the deployment of advanced telecommunications infrastructure and deters network investment. Opponents focusing on the specific scope of Section 251(c)(3) miss the point: Federal policy looks upon network-sharing mandates with great skepticism, whether the facilities are owned by ILECs or other parties. In particular, such requirements conflict with Section 706's mandate to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." Section 706's scope and its role in assessing network-sharing obligations are not limited to ILEC facilities or even common carrier services, as decisions such as the *Cable Modem Order* make clear.

Fourth, federal law occupies the field with respect to inside wiring. As the City acknowledges, Article 52 compels the sharing of inside wires. The Commission's comprehensive regulation of cable home wiring and home run wiring leaves no room for the City to impose its own wire sharing requirements. Indeed, the Commission has twice expressly refused to mandate sharing of home run wiring by multiple providers, citing signal interference concerns that Congress has placed squarely within the Commission's purview. Again, Article 52's defenders fail to rebut the governing precedent. Contrary to their claims, Article 52 repeatedly makes clear that its broad wire-sharing mandate is not limited to "existing wiring."

Nor is it true, as the FBA suggests, that only one provider can use existing wiring at a time under the provision. Where a subscriber switches providers for only part of the bundle, Article 52 calls for sharing of the relevant wires. Finally, the City is wrong to claim that Article 52, which regulates property owners, addresses a different “field” than that regulated by the Commission. The Commission’s decisions reflect that the sharing of inside wiring is a matter of federal, not state or local, concern, irrespective of which party the sovereign tries to regulate.

For the reasons discussed herein and in MBC’s Petition, the Commission should find that Article 52 is preempted by federal law and policy and is therefore invalid.

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

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

REPLY COMMENTS

The Multifamily Broadband Council (“MBC”)¹ hereby replies to the opening comments filed in response to MBC’s Petition seeking a declaratory ruling that Article 52 of the San Francisco Police Code² is preempted by federal law and policy and therefore is invalid in its entirety. The opening comments overwhelmingly corroborate the problems associated with Article 52 as set forth in MBC’s Petition. Nearly two dozen parties submitted comments describing the various harms that will befall consumers, property owners, and competition generally if the City of San Francisco (“the City”) is allowed to enforce Article 52. These diverse commenters include representatives of large and small communications providers serving customers in multi-dwelling units (“MDUs”) and of owners and managers of MDUs. Many of these parties do business in San Francisco. As such, they have specific knowledge of the communications marketplace for MDUs there and a strong interest in protecting their customers and tenants from Article 52’s significant flaws. Indeed, one of these parties reports that it has put on hold all plans to launch service at new San Francisco locations pending the resolution of

¹ MBC is the voice for non-franchised communications companies that provide broadband-related services to multifamily communities, and their vendors. MBC is a technology-agnostic organization. Its members deliver several technologies to multifamily communities such as wireless, cable modem, DSL, Active Ethernet, and Fiber-to-the-Home.

² Article 52 of the San Francisco Police Code, Ordinance No. 250-16 (“Article 52”).

this proceeding.³ As discussed below, the handful of parties that strive to defend Article 52 are unable to rebut this extensive evidence or mount an effective legal case against preemption.

Accordingly, the Commission should grant MBC's Petition.⁴

DISCUSSION

I. THE FACTUAL RECORD CONCLUSIVELY DEMONSTRATES THE HARMS ASSOCIATED WITH ARTICLE 52.

Amidst opponents' paeans to Article 52's asserted purpose of promoting consumer choice, a single fact shines through the record: Article 52 will cause real harms to competition, to MDU residents (particularly those on the wrong side of the digital divide), and to building owners in San Francisco.

This stark truth stems in part from the critical role small providers have to play in closing the digital divide. As Chairman Pai rightly explained in connection with the recent *Restoring Internet Freedom NPRM*, "small ISPs" are "the very companies that are critical to injecting competition into the broadband marketplace" and to "closing the digital divide by building out in low-income rural and urban areas."⁵ Thus, it is especially telling that nearly a dozen small, competitive service providers – companies that compete against larger incumbents and in the process allow market forces to drive deployment to MDUs – have filed in support of MBC's

³ See *infra* n.12 and associated text.

⁴ The Commission's recent draft Notice of Inquiry concerning competitive access issues does not and need not impact its consideration of MBC's Petition. See *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, GN Docket No. 17-142, FCC-CIRC1706-05 (draft). Apart from the fact that a Notice of Inquiry cannot directly result in any conclusive Commission resolution of these issues, deferring action on the Petition will needlessly perpetuate the various harms associated with Article 52. Moreover, the Commission can grant the Petition without curtailing its consideration of industrywide issues in any Notice of Inquiry it may later adopt.

⁵ *Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60, WC Docket No. 17-108, at 60 (rel. May 23, 2017) (Statement of Chairman Ajit Pai).

Petition.⁶ These small providers corroborate the business realities described in MBC’s Petition, explaining the distortion Article 52 would cause – namely, by “overriding voluntary, contractual arrangements that are preconditions to the financing required for buildouts in multi-family buildings,”⁷ nullifying arrangements negotiated by small providers (and precluding future arrangements),⁸ and thereby blocking those small providers from the market. Small competitive providers “depend[] on property owner investments in cabling infrastructure” and cannot “self-fund their network buildouts through cash flows generated from complementary revenue streams.”⁹ As their comments show, Article 52 would strip these providers of the ability to “demonstrate to [their] investors that [they] can successfully serve enough customers to generate a reliable revenue stream.”¹⁰ As a result, such companies’ ability to “secure financing to construct ... distribution system[s] in the community” would evaporate.¹¹

It is no surprise – but should be quite concerning – that small provider Data Stream has “put all plans on hold to launch properties in San Francisco pending the outcome of this

⁶ Comments of Blue Top Communications, MB Docket No. 17-91 (filed May 19, 2017); Comments of Consolidated Smart Systems, LLC, MB Docket No. 17-91 (filed May 15, 2017) (“Consolidated Comments”); Comments of Data Stream, Inc., MB Docket No. 17-91 (filed May 12, 2017) (“Data Stream Comments”); Comments of DIRECPATH, LLC, MB Docket No. 17-91 (filed May 18, 2017) (“DIRECPATH Comments”); Comments of DIRECT PLUS, LLC, MB Docket No. 17-91 (filed May 17, 2017); Comments of Elauwit Networks, LLC, MB Docket No. 17-91 (filed May 18, 2017) (“Elauwit Comments”); Comments of GigaMonster, LLC, MB Docket No. 17-91 (filed May 18, 2017) (“GigaMonster Comments”); Comments of Privatel Inc., MB Docket No. 17-91 (filed May 17, 2017); Comments of Satel, Inc., MB Docket No. 17-91 (filed May 11, 2017); Comments of Spot On Networks, LLC, MB Docket No. 17-91 (filed May 12, 2017); Comments of Vicidiem, Inc., MB Docket No. 17-91 (filed May 17, 2017).

⁷ Consolidated Comments at 2-3.

⁸ See Data Stream Comments at 3.

⁹ Elauwit Comments at 2.

¹⁰ *Id.*

¹¹ GigaMonster Comments at 2.

petition.”¹² At a time when parties and policy-makers agree on the fundamental necessity of providing broadband access to all and on the special role played by smaller entities in filling the gaps left by their larger rivals, regulations pushing small broadband providers from the market can only be understood as harmful to federal objectives.

Support for MBC’s Petition is not limited to service providers themselves. Several property owners and management companies – entities that do not ordinarily engage with this level of interest in a Commission proceeding – have been compelled to speak out against Article 52’s harms from their distinct perspective.¹³ They describe how Article 52’s mandates are both impractical (due to issues including the limited space for competitors’ facilities in MDUs¹⁴ and the technical incompatibility of competing systems¹⁵) and harmful to consumers (because they increase the likelihood of interference,¹⁶ decrease the likelihood of provider entry¹⁷ and upgrades,¹⁸ and remove landlords from their important role as insurers of quality control¹⁹).

¹² Data Stream Comments at 3.

¹³ *See, e.g.*, Comments of Alliance Residential, LLC, MB Docket No. 17-91 (filed May 12, 2017); Comments of AvalonBay Communities, Inc., MB Docket No. 17-91 (filed May 18, 2017) (“AvalonBay Comments”); Comments of Camden Property Trust, MB Docket No. 17-91 (filed May 18, 2017) (“Camden Comments”); Comments of Holland Partner Group, LLC, MB Docket No. 17-91 (filed May 16, 2017) (“Holland Comments”); Comments of Prometheus Real Estate Group, Inc., MB Docket No. 17-91 (filed May 18, 2017) (“Prometheus Comments”).

¹⁴ *See, e.g.*, AvalonBay Comments at 2; Holland Comments at 3; Prometheus Comments at 3.

¹⁵ *See, e.g.*, Camden Comments at 6 (noting technical incompatibility issues across technology generations, and that under Article 52, providers are less likely to agree to “technology refresh obligations” mitigating such concerns).

¹⁶ Camden Comments at 5-6; Holland Comments at 3.

¹⁷ AvalonBay Comments at 2; Holland Comments at 4.

¹⁸ AvalonBay Comments at 2; Camden Comments at 6.

¹⁹ AvalonBay Comments at 3; Holland Comments at 2-3.

Similarly, associations representing family housing units²⁰ and service providers²¹ reinforce the record evidence demonstrating the very real harms stemming from Article 52. Again, these comments show that Article 52 actually *disempowers* consumers by “eliminat[ing] the consumer benefits that result when the building owner negotiates the terms and conditions of building access ... on behalf of the tenants” – that is, Article 52 unnecessarily strips tenants of a mechanism to achieve advantageous negotiating scale.²² The associations bolster the overwhelming evidence that Article 52 will cause technical problems that impede the quality of service.²³ Notably, even Article 52’s champions concede that, as written, the ordinance’s broad mandate would lead to scenarios resulting in the “significant degradation” of service.²⁴

These diverse factual attestations to the harmful consequences of Article 52 underscore that, despite being styled as a vehicle for promoting consumer “choice” among communications services, the ordinance is less concerned with helping MDU residents and more about forcing small providers out of the market entirely in favor of the larger entities that shepherded it into law – including Google and the City itself, as discussed in MBC’s Petition.²⁵

²⁰ Comments of the National Apartment Association, MB Docket No. 17-91 (filed May 17, 2017) (“NAA Comments”); Comments of the National Multifamily Housing Council, MB Docket No. 17-91 (filed May 18, 2017) (“NMHC Comments”).

²¹ Comments of NCTA – The Internet & Television Association, MB Docket No. 17-91 (filed May 18, 2017) (“NCTA Comments”).

²² *See, e.g.*, NAA Comments at 2.

²³ *See, e.g.*, NCTA Comments at 4; NMHC Comments at 12-14.

²⁴ Comments of California Association of Competitive Telecommunications Companies (“CALTEL”), MB Docket No. 17-91, at 3 (filed May 18, 2017) (“CALTEL Comments”) (“[T]here is no technically-feasible means for two providers to share coaxial inside wire without incurring significant degradation of both their services.”). CALTEL proceeds to argue that, because of these technical problems, a “reasonable reading” of Article 52 is that it does not require wire sharing – despite its plain text compelling exactly that. *Id.*; *see also infra* Section II.B.

²⁵ Multifamily Broadband Council Petition Preemption, MB Docket No. 17-91, at 7 & n.19 (filed Feb. 24, 2017) (“MBC Pet.”).

A final negative consequence of Article 52 has taken on particular significance in light of recent Commission initiatives: namely, the ordinance’s deleterious effect on facilities-based investment, deployment, and competition. Indeed, as the City’s comments confirm, Article 52 was specifically designed to spare competing service providers the trouble of building out their own facilities and thereby facilitate their entry into MDUs by riding on the backs of companies that already have undertaken that investment.²⁶ In its concurrent *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, *Accelerating Broadband Deployment*, and *Removing Barriers to Wireline Broadband* dockets, the Commission has specifically sought to *promote* infrastructure investment, teeing up the use of the agency’s “authority to preempt any unnecessary regulatory roadblocks” to facilities-based competition and deployment.²⁷ Those inquiries are consistent with the Commission’s longstanding commitment to promoting deployment.²⁸ As Commissioner O’Rielly observed in

²⁶ See, e.g., Opening Comments of the City of San Francisco, MB Docket No. 17-91, at 6 (filed May 18, 2017) (“San Francisco Comments”) (“[T]he 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.”).

²⁷ Ajit Pai, Chairman, Federal Communications Commission, *Infrastructure Month at the FCC* (Mar. 30, 2017), <https://www.fcc.gov/news-events/blog/2017/03/30/infrastructure-month-fcc>.

²⁸ See, e.g., *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking and Notice of Inquiry, 32 FCC Rcd 3330 (2017); *id.* at 3388 (Statement of Commissioner O’Rielly) (“The Commission cannot continuously hear accounts of deployment hurdles and sit idly by. If this generates the need for preemption, I have no hesitation to use authority provided by Congress[.]”); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3267 ¶ 1 (2017) (“propos[ing] and seek[ing] comment on a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment”); *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd 13994 (2009); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, Report and Order*, 29 FCC Rcd 12865 (2014), *aff’d*, *Montgomery Cty. v. FCC*, 811 F.3d 121 (4th Cir. 2015).

March, “[p]reemption will be the mechanism to push localities to make the right decision.”²⁹

And as the Chairman laid out in discussing his “Digital Empowerment Agenda,” the Commission has broad power to eliminate barriers to infrastructure deployment, and “[i]t is time ... to fully use that authority to preempt needless municipal barriers.”³⁰

In short, Article 52 is the very sort of municipal barrier to infrastructure investment and facilities deployment that the Commission has targeted elsewhere. It is at least as pernicious as other local roadblocks, given its disproportionate impact on low-income consumers living in multi-tenant environments, ranging from apartment buildings to student housing to elder-care facilities. The Commission should preempt Article 52 and signal its commitment to fostering, rather than discouraging, facilities-based deployment and competition.

II. UNABLE TO MARSHAL FACTS TO REBUT MBC’S PETITION, OPPONENTS INSTEAD RELY ON MISTAKEN CHARACTERIZATIONS OF ARTICLE 52 AND THE LAW OF PREEMPTION.

In sharp contrast to the factual record developed by MBC and supporters of the Petition, opponents fail almost entirely to present factual evidence regarding Article 52’s real-world consequences. Instead, they rely on deeply flawed presumptions regarding the ordinance itself and its relationship to other “building access” mandates, as well as a series of misconceptions regarding the law of preemption. MBC addresses these errors here, and then turns to arguments concerning its specific preemption requests.

²⁹ Brendan Bordelon, *O’Reilly Hints at FCC Push to Pre-empt Local Laws on 5G Deployment This Year*, Morning Consult (Mar. 7, 2017), <https://morningconsult.com/2017/03/07/orielly-hints-fcc-push-pre-empt-local-laws-5g-deployment/>.

³⁰ Ajit Pai, Commissioner, Federal Communications Commission, Remarks at The Brandery: “A Digital Empowerment Agenda,” Cincinnati, Ohio, at 7 (Sept. 13, 2016).

A. Article 52 Is a “First-in-the-Nation” Law That Is Materially Different From Other Mandatory Access Provisions.

Instead of contesting the ordinance’s harms in any meaningful way, supporters of Article 52 try to divert attention from them by mischaracterizing what the ordinance says and does. Critically for present purposes, Article 52’s author and its third-party supporters are fundamentally at odds on these subjects – as described below, their comments reflect widely divergent views about some of the ordinance’s critical requirements. The fact that Article 52’s champions cannot even agree among themselves about what it requires highlights the need for preemption.

For reasons known to them alone, opponents of the Petition seem to believe that Article 52 must survive review if it is merely another in a long line of local or state mandatory access rules, no different from the others. This, of course, is false: The question is not whether Article 52 breaks new ground, but whether it conflicts with federal law. Even if it were true that many prior ordinances mirrored the one at issue here, the fact that those were not challenged does nothing to immunize Article 52 (or those other ordinances) from preemption. And, to be clear, any ordinance that did mirror Article 52 would be preempted by federal law, for the same reasons laid out in the Petition, in the supporting comments filed by third parties, and herein.

In any event, however, the Petition’s opponents ultimately undermine their case for Article 52’s ordinariness by simultaneously touting the differences that make it so unique.³¹ Foremost among these is the unprecedented mandate that competing service providers be

³¹ Compare, e.g., Comments of the Fiber Broadband Association, MB Docket No. 17-91, at 2 (filed May 18, 2017) (“FBA Comments”) (claiming that Article 52 “is modeled on numerous other state and local mandatory access laws, some of which have been in place for decades”), with *id.* at 8 (“Article 52 [r]epresents a [n]ew [m]andatory [a]ccess [a]pproach.”).

allowed to “use any existing wiring” in an MDU.³² Despite claiming that it “did not break new ground,”³³ the City prides itself on describing how revolutionary Article 52 is. It explains that, while “[e]xisting mandatory access statutes *all* require competitive providers to install their own facilities,” Article 52 “expanded” the traditional scope of mandatory access “by requiring property owners to allow communications providers to access their *existing wiring* to provide service,” in order to spare competitors “the cost of replicating existing wiring.”³⁴ This expansion clearly distinguishes Article 52 from prior access mandates: As City Supervisor Mark Farrell (the ordinance’s chief architect) boasted: “From our understanding and all the research we did, this is a first-in-the-nation law that we just passed.”³⁵

Some of Article 52’s supporters try to minimize the harms that result from this “first-in-the-nation” law by conjuring limits on its scope that are so attenuated from the ordinance’s text and purpose that not even the City recognizes them. First, the City’s opening comments expressly disavow the claim by the Fiber Broadband Association (“FBA”) and CALTEL that Article 52 “does *not require* mandatory sharing of wires”³⁶ – which is the basis of their argument against field preemption, as discussed below.³⁷ Indeed, the City says exactly the opposite, emphasizing that “Article 52 ... require[s] property owners to make wiring they own available

³² Article 52 §§ 5201(b), 5202; *see also* NCTA Comments at 2 (“Article 52’s obligation to provide third-party access to wiring installed and maintained by other providers is novel[.]”).

³³ San Francisco Comments at 7.

³⁴ *Id.* at 5-6 (emphasis added).

³⁵ Dominic Fracassa, *New ordinance gives SF apartment dwellers more Internet options*, SAN FRANCISCO CHRONICLE (Dec. 24, 2016), <http://www.sfchronicle.com/business/article/New-ordinance-gives-SF-apartment-dwellers-more-10816442.php>.

³⁶ FBA Comments at 3 (emphasis in original); *see also* CALTEL Comments at 14. In fact, as noted, above, CALTEL states that wire sharing is not possible for technical reasons. *See* CALTEL Comments at 14.

³⁷ *See infra* Section III.D.

for sharing.”³⁸ The City’s view is consistent with Article 52’s text, which unconditionally compels the use of “existing wiring” and even clarifies that a property owner with an agreement granting another provider exclusive access to “existing wiring” is not exempt from the ordinance’s reach.³⁹ Needless to say, a scenario in which a property owner allows two providers to utilize “existing wiring” necessarily would result in them sharing the same wiring.

CALTEL and the FBA go further out on their limb by arguing that the only “existing wiring” implicated by Article 52 is coaxial cable.⁴⁰ That claim also ignores the text of Article 52 (which, as noted, applies to “*any* existing wiring”), the Commission rules cited in the definition of that term (which do not single out coaxial cable or, for that matter, any other technology), and the ordinance’s broad goal of maximizing access in a technology-neutral manner. As the Commission is well aware, service in MDUs today is provided by a range of technologies, including coax, fiber, and twisted pairs,⁴¹ and Article 52 does not insulate any of these platforms from involuntary use or sharing. In fact, CALTEL’s and the FBA’s narrow readings of Article 52 must come as a surprise to one of their leading members, Google, whose fiber-based service would not utilize coax. It may also be a surprise to Sonic Telecom, a CALTEL member who, CALTEL notes, supported Article 52 but also relies only on fiber (and not coax) to provide service.⁴² It defies reason to believe that these companies would have championed an access ordinance that would be of no use to them.

³⁸ San Francisco Comments at 23 (emphasis added).

³⁹ Article 52, § 5203.

⁴⁰ CALTEL Comments at 3; FBA Comments at 22. Even if the ordinance were limited to idle coaxial cable (and it is not), that would not negate the harms enumerated above, and thus would not rescue Article 52 from preemption.

⁴¹ See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568 (2017).

⁴² CALTEL Comments at 6, 8.

Finally, CALTEL’s and the FBA’s claims that existing wiring must be made available “only if [it] is idle,”⁴³ supports a service that is being disconnected,⁴⁴ or “otherwise lie[s] fallow,”⁴⁵ are even more dubious. The absence of such purported limitations from both the text of Article 52 and the City’s defense of the provision clearly demonstrate that they are inventions devised by CALTEL and the FBA in a rearguard effort to render an unlawful ordinance more palatable than it is.

The fact that Article 52’s supporters cannot agree on what it requires or when it applies should alarm the Commission and signal the very sort of ambiguity and uncertainty that is likely to deter investment. Of course, as the author of the ordinance, the City’s reading deserves particular weight – and the City’s more aggressive view of the ordinance’s reach only strengthens the legal case for preemption as described below.

Disparate interpretations of Article 52 take on added significance in light of Article 52’s other troubling innovation: a series of draconian enforcement remedies available only to competing service providers as a cudgel against property owners who guess incorrectly as to the ordinance’s requirements. As MBC has described, Article 52 exposes property owners (but no one else) to civil penalties as well as the prospect of litigation by the City Attorney, a communications service provider, and/or a building occupant, any of whom can seek civil damages, attorney’s fees, and costs.⁴⁶ Given the City’s express goal of minimizing providers’ costs, there is every reason to expect that the enforcement process will be tilted heavily in their favor. Meanwhile, property owners have no recourse in the event of a dispute with a

⁴³ *Id.* at 3.

⁴⁴ *Id.*

⁴⁵ FBA Comments at 24.

⁴⁶ *See* MBC Pet. at 19 & n.62 (citing Article 52 §§ 5209-5213).

communications service provider. This asymmetric enforcement regime renders meaningless the so-called “protections” for property owners touted by Article 52’s supporters,⁴⁷ since property owners invoke them at their own peril. Tellingly, opponents of preemption barely mention, let alone attempt to justify, the inclusion of these anti-property owner remedies in the ordinance.

These defining features of Article 52 remove it entirely from the tradition of local and state mandatory access provisions on which its proponents rely, and put it into a category unto itself. The extent to which Article 52 stands alone is evidenced by a comparison with one statute on which the FBA misleadingly claims Article 52 was “modeled.”⁴⁸ Section 16-333a of the Connecticut General Statutes allows for the installation of new wiring, but not the sharing of existing wiring.⁴⁹ The Connecticut statute provides for civil penalties against any party that violates it⁵⁰ and, unlike Article 52, does not create any right of action against a property owner or authorize damages and costs. This imbalance is exacerbated by how the two laws address compensation for property owners. While the Connecticut statute contemplates procedures for determining and awarding compensation with regulatory oversight – including an appeal process⁵¹ – Article 52 allows the new service provider to propose what it will pay the property owner, who may make a counter-offer but without any regulatory backstop and with the threat of litigation in the event of a dispute.⁵² Given how dramatically Article 52 stacks the deck against

⁴⁷ FBA Comments at 2, 6.

⁴⁸ *Id.* at 2 (citing Conn. Gen. Stat. § 16-333a).

⁴⁹ Conn. Gen. Stat. § 16-333a(a).

⁵⁰ Under Article 52, only property owners face civil penalties.

⁵¹ Conn. Gen. Stat. §§ 16-333a(e), (g).

⁵² Article 52 §§ 5205(b)(4)(B), 5208(b).

property owners as compared to the mandatory access laws that preceded it, the notion that the ordinance reflects the further evolution of the concept simply is not plausible.⁵³

In short, Article 52 is neither representative of nor consistent with existing mandatory access statutes, and it is the antithesis of any “model code” for promoting competition in MDUs going forward.⁵⁴ Before Article 52’s imbalanced “first-in-the-nation”⁵⁵ approach is replicated in other jurisdictions – and there are already signs that this propagation is underway⁵⁶ – the Commission should preempt it and thereby preserve and promote federal policy goals favoring deployment.

B. The Policy Arguments Offered By Article 52’s Supporters Are Misleading and Irrelevant.

Article 52’s supporters also try to distract from the ordinance’s significant flaws by insisting that it is necessary to promote broadband competition in MDUs in San Francisco.⁵⁷ Even if they were correct – and there is much evidence showing that they are not⁵⁸ – the

⁵³ FBA Comments at 2.

⁵⁴ CALTEL Comments at 13-14.

⁵⁵ Fracassa, *supra*.

⁵⁶ For instance, recent media accounts note Google’s efforts to enter the MDU marketplace in San Diego, in a manner that hearkens back to its initial overtures in San Francisco. *See* Mike Freeman, *Can Webpass provide alternative to cable, telecom high-speed internet?*, SAN DIEGO UNION-TRIBUNE, May 15, 2017. As MBC has described, Google’s active involvement in Article 52’s passage followed a familiar blueprint, in which the company, employing the rubric of customer choice and competition, lobbies for regulatory regimes that advantage it while disadvantaging its business rivals. MBC Pet. at 9-11.

⁵⁷ CALTEL Comments at 12-13; San Francisco Comments at 3-4; Comments of Engine Advocacy, MB Docket No. 17-91, at 1 (filed May 17, 2018) (“Engine Comments”); Comments of the Institute for Local Self-Reliance, Public Knowledge, and Next Century Cities, MB Docket No. 17-91, at 2 (filed May 18, 2017) (“ILSR Comments”).

⁵⁸ The record in this docket thus far, combined with previous Commission findings, casts great doubt on claims that Article 52 is necessary to promote competition in MDUs in San Francisco. *See, e.g.*, NAA Comments at 11-13 (citing survey results of NAA members owning or operating apartment buildings in San Francisco, which show robust competition in MDUs); Engine Comments at 2 (stating that “the San Francisco area is home to a relatively large number of competitive providers”); FCC, *List of Counties Where Lower Speed TDM-Based Business Data Services Are Deemed Competitive, Non-Competitive, or Grandfathered*, May 15, 2017, at 2 http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/

argument is beside the point. Local officials are not permitted to take actions that conflict with federal law, regardless of whether they believe they have a compelling reason for doing so. Thus, the Commission need not address, let alone decide, the extent of broadband competition as a general matter, in San Francisco in particular, or in MDUs located there.

Further, portrayals of Article 52 as a victory for small providers should be met with considerable skepticism.⁵⁹ First, one of the city supervisors observed that Article 52 picked “winners and losers,” and specifically named Google as the main winner.⁶⁰ No commenter is able to rebut Google’s essential role in the process that led to Article 52 – if anything, they reinforce Google’s centrality through frequent cites to the testimony of Charles Barr, founder of Google subsidiary Webpass.⁶¹ Notwithstanding CALTEL’s indignation at not being sufficiently recognized for its role in the ordinance’s adoption,⁶² local press accounts have widely credited Google with leading that charge.⁶³ It can be no coincidence that Google joined CALTEL in January 2017, just as Article 52 became effective.⁶⁴

db0515/DOC-344863A1.pdf (listing the County of San Francisco on list of competitive counties for purposes of the Commission’s business data services rules); *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission’s Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, Third Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 11857, 11865 ¶ 20 (2000) (referring to “highly competitive local markets like San Francisco”).

⁵⁹ See, e.g., ILSR Comments at 3.

⁶⁰ SFGovtv, City and County of San Francisco, *Board of Supervisors – Regulatory Meeting* (Dec. 6, 2016), http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=26700 (Statement of Supervisor Aaron Peskin, beginning at 24:10).

⁶¹ See, e.g., FBA Comments at 9-10; ILSR Comments at 3 n.7. Google committed to acquire Webpass in June 2016 and actually acquired it four months later, all while the record for Article 52 was being developed.

⁶² CALTEL Comments at 2.

⁶³ MBC Pet. at 8-9.

⁶⁴ CALTEL, Member Companies, <http://www.caltel.org/members2.html> (last visited June 8, 2017).

In addition, Article 52 is not available to all communications providers. Rather, it includes an eligibility criterion – possession of a “Utility Conditions Permit from the City under Administrative Code Section 11.9” – that many small providers (including some MBC members) do not have.⁶⁵ This is just another way in which Article 52 favors larger providers over small ones. Although CALTEL claims that Article 52 already has benefitted one of its members, Sonic Telecom,⁶⁶ that argument is both specious – the ordinance only became effective on January 22, 2017, so there has hardly been any time to test its effectiveness – and irrelevant, since any such success could not rescue the ordinance from preemption if it conflicts with federal law.⁶⁷ Of course, Sonic Telecom’s apparent ability to enter MDUs without sharing wire – a focus of CALTEL’s comments – cannot save Article 52 from preemption, as other future providers may well take a different approach. If anything, that form of entry merely underscores that Article 52 is not necessary to foster competition.

Finally, there is evidence that the City adopted Article 52 specifically to facilitate its own deployment plans. MBC noted in its Petition that the anti-competitive threat of Article 52 is aggravated by the City’s apparent desire to offer a municipal broadband service,⁶⁸ and the City does not deny this objective. In fact, the City’s policy analysis of that initiative identified access to MDUs as one challenge to be addressed in deploying municipal broadband.⁶⁹ It surely is no coincidence that the City launched the process that led to Article 52 shortly thereafter.

⁶⁵ MBC Pet. at 8 & n.22 (citing Article 52 § 5200); *see also* San Francisco Comments at 6.

⁶⁶ CALTEL Comments at 12.

⁶⁷ Even if Article 52 did benefit Sonic itself, of course, that says nothing about its overall effect on competition.

⁶⁸ MBC Pet. at 7 n.19.

⁶⁹ City and County of San Francisco Board of Supervisors, Budget and Legislative Analyst Policy Analysis Report: Financial Analysis of Options for a Municipal Fiber Optic Network for Citywide

In the end, efforts to characterize Article 52 in pro-competitive (or pro-consumer) terms fall flat. The ordinance tilts the playing field against property owners and small service providers, to the detriment of consumers and competition. That outcome not only contravenes the Commission’s policy goals – which it is pursuing vigorously – but, as discussed below, conflicts with specific areas of federal law and policy.⁷⁰

C. Opponents Mischaracterize the Law Governing Preemption.

Opponents of the Petition also rely on a bevy of erroneous conceptions regarding the law of preemption itself. MBC addresses below parties’ responses to its specific preemption requests, but takes this opportunity to correct several misconceptions that pervade these opponents’ arguments.

First, opponents of the Petition erroneously argue that there can be no conflict preemption because the Commission has not expressly prohibited that which Article 52 requires. The FBA suggests that the Commission’s refusal to adopt a wire-sharing mandate “does not establish a prohibition on mandatory wire sharing.”⁷¹ The City, for its part, claims that

Internet Access, at 59 (Mar. 15, 2016), <http://sfbos.org/sites/default/files/FileCenter/Documents/55324-BLA.MuniGigabitFiber-Finance031516.pdf>.

⁷⁰ Contrary to the FBA’s aspersions, *see* FBA Comments at 5-6, MBC and its members welcome competition – provided that it occurs on a level playing field. Indeed, MBC’s members and similarly situated companies regularly face competition in MDU environments. *See, e.g.*, Consolidated Comments at 2 (“Consolidated provides [connectivity] services to over 73,000 multi-family units in California and Arizona. In 95% of the communities that Consolidated services we are competing directly with one of the major Telco’s or cable companies.”); Data Stream Comments at 2 (“Data Stream, Inc. ... is a fiber-based gigabit Internet service provider that provides voice and Internet services to residential multi-tenant properties, in direct competition with larger, well-funded entities.”); Elauwit Comments at 1 (“Elauwit ... provides bulk Internet and television services to residential multi-tenant properties, in direct competition with larger, well-funded entities.”); GigaMonster Comments at 1 (“GigaMonster ... is a private fiber-based gigabit Internet service provider, offering voice and Internet services to residential multi-tenant properties in direct competition with larger, well-funded entities.”). But Article 52 does not create a level playing field – rather, it selects preferred competitors and gives them particular advantages, as described above. There is no basis for a regime in which the City pre-selects marketplace winners and losers.

⁷¹ FBA Comments at 23.

preemption cannot arise from an agency’s decision not to apply a specific mandate.⁷² These claims misunderstand the governing precedent.

As an initial matter, it is not necessary that it be impossible to comply with both the federal mandate and the state or local directive; it is enough that, as here, the latter undercuts the policies embodied by the former. As the Supreme Court made clear in *Fidelity Federal Savings & Loan Association v. de la Cuesta*, conflict preemption “arises 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.”⁷³ Or, in the D.C. Circuit’s words: “Because what must be implied is of no less force than that which is expressed, federal law may preempt state [or local] law even if the conflict between the two is not facially apparent.”⁷⁴

As MBC explained in the Petition, a state or local requirement that disrupts a balance struck by federal policy-makers also conflicts with, and is preempted by, federal law. Thus, in *Geier v. American Honda Motor Co.*, which MBC discussed in the Petition but no opponent addressed in response, the Supreme Court struck down a tort-law judgment that effectively required car manufacturers to install airbags when the Department of Transportation had permitted the phase-in of airbags (or other “passive restraints”) over time.⁷⁵ There, it was clear that federal policy had not *forbidden* the manufacturer from installing airbags. Nevertheless, the Court held, a state tort-law requirement that effectively mandated airbags would have frustrated

⁷² San Francisco Comments at 12.

⁷³ 458 U.S. 141, 153 (1982) (emphasis added) (internal quotations and citations omitted).

⁷⁴ *Comm’n’s Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 326 (D.C. Cir. 2014) (internal quotations and citations omitted).

⁷⁵ 529 U.S. 861 (2000).

the federal preference for flexibility, and was accordingly preempted.⁷⁶ Likewise, in *Farina v. Nokia*, the Third Circuit explained that “regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption” because, in those cases, allowing a state or local requirement “to impose a different standard permits a re-balancing of those considerations.”⁷⁷ State or local decisions that disrupt an agency’s balancing of relevant objectives, the court held, “stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁷⁸

The City itself quotes *Farina*, apparently recognizing the difficulties the decision poses to its argument,⁷⁹ but then pivots to other decisions that it hopes will defeat MBC’s claims. They do not. For example, in *Sprietsma*, the Supreme Court emphasized that “[a] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to* regulate.”⁸⁰ In that case, the Court held that the U.S. Coast Guard’s decision not to require use of propeller guards on motorboats did not preempt state-law tort claim premised on a motor manufacturer’s failure to install such a guard, but only because the decision did *not* reflect the Coast Guard’s determination that propeller guards were “unsafe” or otherwise inadvisable.⁸¹ Thus, the Coast Guard’s decision “d[id] not convey an authoritative message of a federal policy

⁷⁶ *Id.* at 881.

⁷⁷ *Farina v. Nokia*, 625 F.3d 97, 123 (3d Cir. 2010).

⁷⁸ *Id.* at 134, quoting *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985).

⁷⁹ “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.” San Francisco Comments at 11, quoting *Farina*, 625 F.3d at 123.

⁸⁰ *Sprietsma v. Mercury Marine*, 537 U.S. 51, 66 (2002), quoting *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm’n*, 461 U.S. 375, 284 (1983).

⁸¹ *Id.* at 66-67 (internal quotations omitted).

against propeller guards.”⁸² By contrast, as elaborated below, the Commission *has* issued “an authoritative message of a federal policy” with respect to issues such as bulk billing arrangements (which it has chosen to permit on account of their “pro-consumer effects”).⁸³

In *Fellner v. Tri-Union Seafoods, L.L.C.*,⁸⁴ the claimed preemption had no basis in any binding agency decision at all. Rather, the defendant in a tort case – a seafood company being sued for harmful mercury in its tuna fish products – argued that preemption of state tort law could be implied from certain FDA guidelines.⁸⁵ The court disagreed, finding that the cited guidelines were “non-binding” and that the FDA had made “no ‘conclusive determination’ of the sort which will preempt state law.”⁸⁶ The court would not “afford preemptive effect to less formal measures lacking the ‘fairness and deliberation’” associated with rulemakings and similar proceedings, and thus allowed the plaintiff’s tort suit to proceed.⁸⁷ Here, in contrast, the Commission *has* released authoritative rules governing the topics at issue – bulk billing, inside wiring, and network-sharing mandates – in the course of full notice-and-comment proceedings bearing the hallmarks of agency “fairness and deliberation.” The orders adopted, and the policies that they embody, conflict with Article 52.

Nor is the Tenth Circuit’s *Guschke* decision⁸⁸ relevant here. There, the court held that the broad federal scheme regulating radio and telecommunications and the Commission’s

⁸² *Id.* at 67 (internal quotations omitted).

⁸³ *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, Second Report and Order, 25 FCC Rcd 2460, 2471 ¶ 28 (2010) (“*Exclusivity Second Report and Order*”).

⁸⁴ 539 F.3d 237 (3d Cir. 2008).

⁸⁵ *Id.* at 252-54.

⁸⁶ *Id.* at 254.

⁸⁷ *Id.* at 245.

⁸⁸ *Guschke v. Oklahoma City*, 763 F.2d 379 (10th Cir. 1985).

regulations encouraging the development of the amateur radio service, which had no provisions regarding antenna height, did not preempt local zoning radio tower limitations.⁸⁹ “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.”⁹⁰ Here, of course, there are several Commission rulings directly on point addressing the areas subject to conflict preemption, rendering *Guschke* facially inapposite.⁹¹

As these decisions make clear, opponents’ claims that Article 52 merely seeks to “complement” the federal regime miss the mark.⁹² They also are disingenuous. The City elsewhere admits to a more aggressive intention of supplanting the balance struck by federal law and policy, stating that it was compelled to act because “[e]fforts by this Commission and the California Public Utilities Commission to enhance competition among providers of communications services in MDUs have not been successful.”⁹³ As the Petition made clear and the discussion above underscores, this is not a permissible objective. The Commission has constructed a balanced building access regime, and even efforts meant to supplement and advance that regime would disrupt the federal balance and fall afoul of federal supremacy. As the Supreme Court has long held, “[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy,”⁹⁴ and “[t]he fact of a common end hardly

⁸⁹ *Id.* at 383-84.

⁹⁰ *Id.* at 384.

⁹¹ To this end, the City notes that preemption must be “based on specific agency regulations, orders, or decisions.” San Francisco Comments at 12. The preemption MBC seeks here *is* based on specific orders and decisions, as the Petition explains at length.

⁹² FBA Comments at 14; *see also* San Francisco Comments at 2 (“Article 52 complements the Commission’s regulations, orders, and decisions by furthering competition.”).

⁹³ San Francisco Comments at 3.

⁹⁴ *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 287 (1971).

neutralizes conflicting means.”⁹⁵ Here, even if Article 52 actually promoted the general objectives of federal policy (and, as discussed below, it does not), it would be preempted on this basis.

Second, opponents of the Petition erroneously focus their preemption arguments on the stated *purpose* of Article 52 rather than on the provision’s actual effects. The City spends pages discussing the *intent* of Article 52,⁹⁶ but does not even attempt to refute MBC’s factual evidence as to how the provision will in fact undermine competition by smaller providers. Likewise, the FBA allots three pages to discussion of Article 52’s intent,⁹⁷ concluding that the ordinance “further and enhances the Commission’s efforts to promote consumer choice and competition” without ever addressing, much less rebutting, the evidence put forth by MBC (and now by other parties) showing that the Article 52 will disserve rather than promote its stated purpose. Nothing in the preemption jurisprudence, however, allows the decision-maker to simply presume that a state or local law is permissible because its intent is consistent with federal goals. What matters is not whether the requirement under consideration *aims* to conflict with federal policy, but whether it will, in fact, have the practical effect of frustrating federal goals.⁹⁸ As MBC and

⁹⁵ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 379-80 (2000).

⁹⁶ San Francisco Comments at 3-6.

⁹⁷ FBA Comments at 17-19.

⁹⁸ See, e.g., *Michigan Canners & Freezers Ass’n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461, 478 (1984) (although state law did not force farmers to join marketing cooperative associations, because it had the “practical effect” of imposing the incidents of association membership on farmers by binding them to the association’s marketing contracts, it was preempted by federal law prohibiting coerced association membership); *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977) (although state weight labeling law was not expressly preempted by provision in federal weight labeling law preempting state laws less stringent than or requiring different information from federal law, state law was preempted “as interpreted and applied” to packaged flour because the law failed to take into consideration weight differences resulting from variations in moisture, contrary to the intent of more flexible federal law); *Universal Service Contribution Methodology*, Declaratory Ruling, 25 FCC Rcd 15651, 15659 ¶ 19 (2010) (duplicative state USF assessments “conflict with the federal rules and policies governing interconnected VoIP services because their practical effect is to increase the portion of interconnected VoIP revenue

others have shown,⁹⁹ providing evidence that opponents have barely acknowledged, much less addressed, the effect of Article 52 will be to diminish competition in the MDU marketplace, particularly by smaller providers that require financing to fund network build-out. Put differently, in addition to conflicting with the Commission’s specific policies with regard to inside wiring, bulk billing, and mandatory network sharing, Article 52 will undercut, not promote, the Commission’s broader pro-deployment, pro-competition objectives. The fact that its supporters intended otherwise is meaningless.

Third, there is no merit to the FBA’s claim that Article 52 could not be preempted by federal law because the Commission has not directly regulated property owners in the building-access context.¹⁰⁰ In the D.C. Circuit’s words, “federal law may preempt state [or local] law even if the conflict between the two is not facially apparent – as when, for example, the federal and state laws govern different subject matters.”¹⁰¹ The appropriate focus is not on whether federal and local laws regulate the same entities, but whether the local requirements impair or frustrate the federal scheme. Here, as detailed in the Petition and below, they do, even if the federal regime does not itself apply mandates to the same class of entities targeted by the local ordinance.

Fourth, the FBA is wrong to suggest that there can be no preemption here because the Commission has not previously held that “wire sharing pursuant to a state or local law or

assigned to the intrastate jurisdiction beyond that contemplated under the [FCC] rules”); *Commercial Communications, Inc.*, Memorandum Opinion and Order, 81 F.C.C.2d 106, 113-14 ¶ 26 (1980) (although Oklahoma Corporation Commission regulation of telephone equipment manufacturers did not expressly restrict interconnection of equipment with telephone network, regulation was preempted because, “in practical effect,” it restricted such interconnection, in conflict with FCC regulation).

⁹⁹ See *supra* Section I.

¹⁰⁰ See FBA Comments at 14.

¹⁰¹ *Comm’ns Imp.*, 757 F.3d at 326, citing *Perez v. Campbell*, 402 U.S. 637 (1971).

ordinance would contradict federal policy.”¹⁰² As the Supreme Court held in *Geier*, it has never required “a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists.”¹⁰³ “To insist on a specific expression of agency intent to pre-empt ... would be in certain cases to tolerate conflicts that an agency, and therefore Congress, is most unlikely to have intended.”¹⁰⁴ Here, for the reasons MBC has stated, there are multiple conflicts between Article 52 and federal policy. This is true irrespective of whether the Commission has previously identified such conflicts.

For these reasons, and the specific reasons discussed below, Article 52 is preempted by federal law and should be invalidated.

III. ARTICLE 52 IS PREEMPTED BY FEDERAL LAW.

Once opponents’ mischaracterizations of Article 52 and the governing law are swept aside and their failure to rebut the robust factual record concerning the provision’s actual effect on the provision of service in San Francisco is exposed, they are left with no real response to the specific preemption claims MBC has asserted.

A. Article 52 Conflicts with Federal Law and Policy Regarding Competitive Access to Multi-Tenant Buildings.

As MBC explained in its Petition, the Commission’s longstanding competitive access framework with regard to multi-tenant buildings provides property owners with certainty as to their rights to home run wiring upon termination of an incumbent’s service.¹⁰⁵ This approach has benefitted property owners, providers, and consumers alike by establishing and preserving

¹⁰² FBA Comments at 24.

¹⁰³ *Geier*, 529 U.S. at 884.

¹⁰⁴ *Id.* at 885.

¹⁰⁵ MBC Pet. at 14-18

incentives that promote deployment of facilities and competitive choice.¹⁰⁶ MBC further explained that Article 52 upends this federal policy by rejecting and displacing the Commission’s policy judgment favoring property owner control over inside wiring.¹⁰⁷ Article 52 thus re-balances the considerations underlying the Commission’s policies, frustrating federal objectives. Accordingly, Commission action under the conflict preemption doctrine is warranted.

The City argues that there is no conflict between federal law and Article 52’s mandatory access provision. In doing so, the City points to the Second Circuit’s decision in *AMSAT Cable Ltd. v. Cablevision of Connecticut L.P.*,¹⁰⁸ as well as several decisions in which the Commission declined to preempt mandatory access statutes. These decisions are inapposite. As an initial matter, the 1993 *AMSAT* case pre-dated the Commission’s policy choices and balancing efforts with respect to competitive access to the inside wiring in multi-tenant buildings, which arose from orders issued between 1997 and 2003.¹⁰⁹ It thus has no bearing here. Furthermore, as discussed at length above, Article 52 is distinguishable from “traditional” mandatory access statutes due to its wire-sharing mandate and its series of draconian enforcement measures targeted at property owners.¹¹⁰

¹⁰⁶ See, e.g., DIRECPATH Comments at 4 (“Prior to the enactment of these rules, DIRECPATH and other PCOs were shut out from being able to serve thousands of communities, due to anti-competitive agreements signed by the large service providers. There is no doubt that this type of thoughtful, evidence-based rulemaking on the part of the FCC has created a more equal playing field in multi-family communities, which has led to more choices for consumers now than ever before.”).

¹⁰⁷ MBC Pet. at 18-20.

¹⁰⁸ 6 F.3d 867 (2d Cir. 1993).

¹⁰⁹ See *Telecommunications Services – Inside Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3685-86 ¶ 49 (1997) (“*Inside Wiring Report and Order*”); *Telecommunications Services Inside Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1348-49 ¶¶ 13-14 (2003).

¹¹⁰ See *supra* Section II.A.

The City acknowledges (as it must) that the Commission adopted its inside wiring rules “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.”¹¹¹ Nevertheless, the City asserts that Article 52 is not subject to preemption because it “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.”¹¹² The record assembled does not support this conclusion.

As MBC observed in its petition, by rejecting and displacing the Commission’s policy judgment favoring property owner control over inside wiring – and substituting the City’s own business judgment for that of property owners – Article 52 places severe constraints on a property owner’s ability to bargain for the optimal mix of communications services on behalf of his or her tenants.¹¹³ Property owners that filed opening comments agree, citing their need to have contracting flexibility,¹¹⁴ to be able to ensure quality services,¹¹⁵ and to “sensibly curate

¹¹¹ San Francisco Comments at 22 (citation omitted).

¹¹² *Id.* at 23. Likewise, the FBA asserts that “Article 52 does not undercut the Commission’s reasoned judgment in creating its inside wiring rules, but furthers and enhances the Commission’s efforts to promote consumer choice and competition consistent with the City’s jurisdiction.” FBA Comments at 19.

¹¹³ MBC Pet. at 19.

¹¹⁴ NMHC Comments at 8 (“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”). *See also* Declaration of Matt Harris at 2 (attached to NMHC Comments) (“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 telecommunication’s carrier’s sluggish DSL).”).

¹¹⁵ NAA Comments at 5 (“Tenants have come to expect that building owners will assure that high quality and fairly priced cable and Internet services are available to tenants. But, this role is eliminated because none of the list of acceptable conditions in [Article 52] includes conditions designed to assure residents receive a range of services of expected quality and prices.”).

options and to hold providers accountable if they do not provide quality or reliable service.”¹¹⁶

Parties supporting MBC’s Petition also underscore that property owners who must relinquish control over their wiring will have little incentive to invest in that that wiring in the first place, which undermines the core rationale of the Commission’s inside wiring regime. As RealtyCom Partners explains:

Owners who can no longer control the wiring they install will be far less likely to expend capital on state of the art fiber and other wiring needed to provide high-quality Services in their MDUs. In the wild-west scenario that Article 52 allows in which multiple Service Providers will be able to gain unfettered access to Owner-owned wiring, the benefits of making significant investment in such wiring will vanish. Owners will have no incentive to install any wiring at Properties where such wiring is up for grabs. Instead, our clients have indicated, they will likely reduce their own infrastructure expenditures and rely on Service Providers to make those types of investments.¹¹⁷

The City also tries to evade conflict preemption by asserting that Article 52 addresses “the Commission’s concern about [wire] sharing by allowing property owners to refuse a request to share existing wiring when it is not technically feasible.”¹¹⁸ But Article 52 does not use the words “technically” or “feasible,” together or separately. Even assuming *arguendo* that Article 52 could be interpreted as establishing this test, the protection that any such exception would afford to property owners is illusory: Not only will they be ill-equipped to evaluate whether a

¹¹⁶ AvalonBay Communities Comments at 3; *see also supra* Section I (describing harms cited by property owners).

¹¹⁷ Comments of RealtyCom Partners, MB Docket No. 17-91, at 5 (filed May 17, 2017). *See also* Declaration of Michael Manelis at ¶ 9 (“Manelis Declaration”) (attached to NMHC Comments) (“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.”).

¹¹⁸ San Francisco Comments at 23. *See also* FBA Comments at 24 (“Rather than forcing wire sharing unconditionally, Article 52 establishes a test of technical feasibility: it requires access to the property owner’s wiring only if (among other conditions) such use would not significantly and adversely impact an existing service.”).

new entrant’s use of existing wiring is “technically feasible,” but they face harsh consequences if they get it wrong given the imbalanced enforcement regime described above. As the Executive Vice President of Property Operations of Equity Residential explains, the wiring provisions in his company’s agreements with service providers “are critical to ensuring quality service to residents” because his company is “not a telecom provider” and “do[es] not have employees with telecom or wiring expertise.”¹¹⁹ AvalonBay Communities echoes these concerns.¹²⁰

As MBC noted in its Petition, the Commission’s rules prohibit many exclusive contracts for provision of video and telecommunications services to multi-tenant properties.¹²¹ However, the Commission has *not* applied this ban to exclusive video contracts in multi-tenant properties.¹²² In this respect, Section 5203 of Article 52 cannot be squared with the Commission’s rules on exclusive video contracts in multi-tenant properties. Specifically, Section 5203 provides that Article 52’s requirements apply to any property owner that is party to an agreement “that purports to grant [a] communications service provider exclusive access to a multiple occupancy building and or the existing wiring to provide services.”¹²³ Yet, because Section 5203 applies to all exclusive contracts in multi-tenant properties, it vitiates any exclusive contract for video or telecom services that a property owner may have with a private cable

¹¹⁹ Manelis Declaration at ¶ 6.

¹²⁰ AvalonBay Comments at 4 (“AvalonBay is not a telecommunications provider. While our employees are highly trained to provide excellent customer service and are proficient at real estate management, they do not have wiring or telecom experience as a whole.”).

¹²¹ MBC Pet. at 18 n.61.

¹²² See *Exclusive Service 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, 20251 ¶ 32 (2007) (“*Exclusivity FNPRM*”).

¹²³ Article 52 § 5203.

operator.¹²⁴ This outcome creates an irreconcilable conflict with the Commission’s decision to permit such contracts, and, as such, demands preemption.

Finally, opponents of preemption also make much of the fact that Article 52 regulates wiring owned by property owners, which, they claim, places Article 52 outside the Commission’s jurisdiction.¹²⁵ As described above and in the Petition, this argument ignores the interconnectedness of Commission policies with private property owners’ rights. What matters is the fact that Article 52 frustrates and thus conflicts with achievement of the Commission’s policy objectives, not which specific type of entity Article 52 regulates.¹²⁶ Here, the record demonstrates overwhelmingly that the mandate at issue will directly undercut Commission policy. Article 52 regulates the types of contracts service providers can enter into. In effect, it is a regulation of exclusive wiring contracts, and thus regulates the kinds of property rights service providers can and cannot have in system wiring. This, in turn, shapes the type of *investments* they are willing to make. Regulation of exclusive wiring contracts, and the rights of property owners and service providers to inside wiring generally, are unquestionably matters within the Commission’s jurisdiction.

¹²⁴ CALTEL counters that Article 52 does not affect “existing wire exclusivity arrangements or prevent negotiation of new ones” because existing providers are not required “to relinquish cable inside wire to a new provider that it is using to provide service to an occupant, nor “share” that wire with new providers (even if that were technically-feasible).” CALTEL Comments at 16. As discussed in further detail above, this argument is not supported by the plain text of Article 52. *See supra* Section II.A.

¹²⁵ *See, e.g.*, San Francisco Comments at 9; FBA Comments at 13.

¹²⁶ *See supra* Section II.C.

B. Article 52 Conflicts with Federal Law and Policy Regarding Bulk Billing Arrangements.

MBC's Petition demonstrates that Article 52 “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of”¹²⁷ the Commission's “bulk billing” policy governing situations in which a multi-tenant building owner procures communications service for the entire building at a low bulk billing flat fee and then provisions discounted service to the tenants.¹²⁸ The Commission has endorsed the use of such arrangements, finding that they “predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband.”¹²⁹

As the Commission has recognized, the spreading of fixed costs among many subscribers using common facilities allowed by bulk billing arrangements depends on the provider's ability to serve all or almost all of the tenants in a building.¹³⁰ Article 52, however, forces owners of multi-tenant buildings to “allow” any “communications services provider to install the facilities and equipment necessary to provide communications services” and to “use any existing wiring” belonging to the owner “to provide communications services.”¹³¹ These provisions effectively bar bulk-billing arrangements by denying the bulk billing service provider the exclusive right to use designated wiring necessary for the delivery of its services and forcing property owners to accommodate multiple providers, thereby destroying the economic rationale on which such deals are struck and raising prices for tenants. Under Article 52, every single new tenant in an MDU could select a new provider, eviscerating any economies of scale and destroying any ability for a

¹²⁷ *Farina*, 625 F.3d at 122, quoting *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 251 (3d Cir. 2008).

¹²⁸ MBC Pet. at 21-25.

¹²⁹ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461 ¶ 2.

¹³⁰ *See id.* at 2461-62, 2464-65, 2466-67 ¶¶ 2, 6, 11-14, 19.

¹³¹ Article 52 § 5201(b); *see also id.* § 5200 (definition of “Existing wiring”).

small provider to offer bulk-billing arrangements. As MBC has noted, even if there were many fewer providers than that within the building, smaller independent service providers would be left unable to obtain the third-party financing that is necessary in order to finance construction of a single distribution system.¹³²

In finding that “the benefits of bulk billing outweigh its harms,”¹³³ the Commission noted the record evidence of the need for bulk billing arrangements in securing and maintaining financing.¹³⁴ The crimping of bulk billing arrangements also will raise the cost of service for residents of multi-tenant buildings by forcing them to choose among much higher priced individual service arrangements.¹³⁵ Article 52 thus “negates a valid federal policy”¹³⁶ by “interfer[ing] with the Commission’s achievement of its valid goal of” permitting bulk billing arrangements and thus “necessarily thwart[s] or impede[s] the operation of a free [multi-tenant building] market.”¹³⁷ By effectively precluding bulk billing arrangements, Article 52 also conflicts with Commission policy by “re-balancing” the “considerations” that led the Commission to allow them.¹³⁸

The City insists that Article 52 does not conflict with the Commission’s bulk billing policies because there are no such policies but merely Commission “inaction,” which cannot sustain conflict preemption. As the *Exclusivity Second Report and Order* demonstrates,

¹³² MBC Pet. at 22-23.

¹³³ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2470 ¶ 26.

¹³⁴ *Id.* at 2465-66 ¶ 17.

¹³⁵ *See id.* at 2471 ¶ 28 (noting that prohibiting bulk billing “would result in higher ... service charges for the vast majority of [multi-tenant building] residents who are content with such arrangements.”) (citation omitted).

¹³⁶ *NARUC v. FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989).

¹³⁷ *Id.* at 430 (affirming Commission’s preemption of state regulation of inside wiring to the extent necessary to maintain a free market in the installation and maintenance of inside wiring).

¹³⁸ *Farina*, 625 F.3d at 123.

however, this is hardly a case of agency inaction. The Commission “carefully” weighed the benefits and potential harms of bulk billing arrangements in ten detailed paragraphs¹³⁹ – including the benefit of enabling providers to secure financing¹⁴⁰ – and found that “the benefits of bulk billing outweigh its harms.”¹⁴¹ The Commission concluded that “on balance, banning bulk billing would harm more MDU residents than it would help.”¹⁴² “Accordingly, we will allow bulk billing by all MVPDs to continue because, under current marketplace conditions, it is clear that it has significant pro-consumer effects.”¹⁴³

This careful balancing is a far cry from the cases cited by the City. As discussed above, whereas *Sprietsma* involved no federal policy giving rise to preemption,¹⁴⁴ here the Commission has issued “an authoritative message of a federal policy” “allow[ing] bulk billing” arrangements because of their “pro-consumer effects.”¹⁴⁵ *Fellner* addressed nonbinding advisory materials without an “authoritative message of a federal policy,”¹⁴⁶ but here the Commission has released an authoritative decision finding about the benefits of bulk billing arrangements.¹⁴⁷ *Guschke* involved no agency action at all,¹⁴⁸ but here the Commission balanced the relevant considerations and provided the necessary “text” for preemption of any state policy that

¹³⁹ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2465-70 ¶¶ 16-25.

¹⁴⁰ *Id.* at 2465-66 ¶ 17.

¹⁴¹ *Id.* at 2470 ¶ 26.

¹⁴² *Id.* at 2463 ¶ 10.

¹⁴³ *Id.* at 2471 ¶ 28 (citation omitted).

¹⁴⁴ *Sprietsma*, 537 U.S. at 67 (internal quotations omitted).

¹⁴⁵ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2471 ¶ 28.

¹⁴⁶ *Fellner*, 539 F.3d at 246-47, quoting *Sprietsma*, 537 U.S. at 67.

¹⁴⁷ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461 ¶ 2 (finding that they “predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband”).

¹⁴⁸ *Guschke*, 763 F.2d 379.

undermines the use of bulk billing arrangements.¹⁴⁹ And as in *Farina*, the Commission “use[d] its reasoned judgment to weigh the relevant considerations” under the statute to “determine how best to prioritize between these objectives.”¹⁵⁰ “Allowing” the City, via Article 52, “to ... second-guess the FCC’s conclusion would disrupt the expert balancing underlying the federal scheme.”¹⁵¹

The City argues that part of the Commission’s rationale for permitting bulk billing was that such arrangements do not significantly hinder competitors from serving some tenants and that Article 52 thus is consistent with the Commission’s expectation of competition under a bulk billing regime. As the FBA and CALTEL acknowledge,¹⁵² however, the Commission also noted that “[b]ulk billing arrangements may deter second video service providers from providing service in such buildings because residents are already subscribed to the incumbents’ services and residents would have to pay for both MVPDs’ services.”¹⁵³ As NCTA explains, Article 52 upsets the economic rationale contemplated by the Commission in allowing bulk billing arrangements by forcing the building owner to share inside wiring with any new provider, thereby undercutting the potential for securing a bulk billing agreement.¹⁵⁴

The City’s reliance on the statement in *ESCOM* that the Commission is not “an economic guarantor of competing communication technologies which may offer similar services to

¹⁴⁹ *Exclusivity FNPRM*, 22 FCC Rcd at 20237 ¶ 4, 20265 ¶¶ 64-65.

¹⁵⁰ *Farina*, 625 F.3d at 123.

¹⁵¹ *Id.* at 126. Presumably, if the Commission had performed the same balancing and concluded that bulk billing should be prohibited, the City would not characterize that determination as “inaction.” There is no principled basis for a different characterization, for preemption purposes, of the opposite conclusion.

¹⁵² FBA Comments at 26; CALTEL Comments at 20-21.

¹⁵³ *Exclusivity Second Report and Order*, 25 FCC Rcd at 2461 ¶ 2. *See also id.* at 2465 ¶ 15.

¹⁵⁴ NCTA Comments at 7; *see also* GigaMonster Comments at 3.

subscribers” is misplaced.¹⁵⁵ Read in context, that statement explains the Commission’s holding that it would not permit states to burden one category of provider (Satellite Master Antenna Television (“SMATV”) systems in that case) in order to eliminate a supposedly unfair advantage over a competing category (cable television operators):

State or local government regulatory control over, or interference with, a federally licensed or authorized interstate communications service, intentionally or incidentally resulting in the suppression of that service in order to advance a service favored by the state, is neither consistent with the Commission’s goal of developing a nationwide scheme of telecommunications nor with the Supremacy Clause of the Constitution.¹⁵⁶

Here, the City has “intentionally or incidentally” suppressed bulk billing services provided by small firms requiring outside financing “in order to advance” services provided by larger firms that do not need such financing in order to deploy facilities to a new building. That suppression of competing services – albeit implemented indirectly by coercing building owners to undermine bulk billing agreements – should be preempted, as in *ESCOM*. Although Article 52 is disguised as a vehicle to facilitate consumer choice, its sabotage of bulk billing arrangements will force building tenants to take higher priced services, if they can afford them at all.

The City finally asserts that 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 does not conflict with the Commission’s bulk billing policies.¹⁵⁷ As explained above, this argument is fallacious, because federal law preempts not only state or local law that expressly prohibits that which federal law expressly allows, but also state or local law that

¹⁵⁵ San Francisco Comments at 17, quoting *Earth Satellite Communications, Inc.; Petition for Expedited Special Relief and Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling and Order, 95 FCC2d 1223, 1232-33 ¶ 20 (1983) (“*ESCOM*”).

¹⁵⁶ *ESCOM*, 95 F.C.C.2d at 1233 ¶ 20.

¹⁵⁷ San Francisco Comments at 17; *see also* FBA Comments at 25.

undermines federal policy objectives, or has the “practical effect” of conflicting with federal law.¹⁵⁸ Because Article 52 has the economic effect of undermining the Commission’s bulk billing policies, it stands “as an obstacle to the accomplishment and execution of” those policies and must be preempted.¹⁵⁹

C. Article 52 Conflicts with Federal Law and Policy Regarding Network Unbundling Mandates.

The Petition also demonstrates that Article 52 conflicts with federal law and Commission decisions regarding network unbundling mandates. It compels property owners to allow any communications service provider to use their inside wire, without any showing that this shared access is necessary or appropriate to promote consumer choice and competition. This unqualified unbundling requirement is at odds with the Commission’s balanced approach to network-sharing mandates, reflected most directly in its Section 251 unbundling precedents. The Commission has found that mandatory unbundling of next-generation network elements “would blunt the deployment of advanced telecommunications infrastructure” and that refraining from such unbundling requirements would “promote investment in infrastructure.”¹⁶⁰ Notably, in deciding not to require unbundling of fiber loops serving predominantly residential MDUs, the Commission concluded that “[i]t would be inconsistent with the Commission’s goal of promoting broadband deployment to the mass market to deny this substantial segment of the

¹⁵⁸ See *supra* Section II.C.

¹⁵⁹ *Geier*, 529 U.S. at 881 (internal quotations omitted).

¹⁶⁰ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17149, 17153 ¶¶ 288, 295 (2003) (subsequent history omitted).

population the benefits of broadband by retaining the regulatory disincentives associated with unbundling.”¹⁶¹

In response to this point, the FBA and CALTEL triumphantly proclaim that Section 251 governs only ILEC facilities, whereas Article 52 covers only a building owner’s inside wire.¹⁶² This response misses the point: Federal policy looks upon network-sharing mandates of the type at issue here with great skepticism, recognizing the high costs that attend such requirements and permitting them only when absolutely necessary. The Commission’s wariness about unbundling, particularly with regard to broadband, is motivated in large part by the Section 706 mandate to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” and, if necessary, to “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment.”¹⁶³ Concerns regarding the ways in which network-sharing mandates undercut investment incentives apply across-the-board: The Commission’s view on unbundling is not, and should not be, based on the identity of the provider or the technology being used.

For example, in *BellSouth*, the Commission preempted state commission orders requiring the unbundling of the low frequency portion of the customer loop (“LFPL”), finding that those orders conflicted with the Commission’s prior decision not to mandate LFPL unbundling.¹⁶⁴ The Commission noted that its unbundling rules were based on Section 706, which requires that “the

¹⁶¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Reconsideration, 19 FCC Rcd 15856, 15859-60 ¶ 7 (2004) (citation omitted).

¹⁶² *See, e.g.*, CALTEL Comments at 22-23.

¹⁶³ 47 U.S.C. §§ 1302(a), (b).

¹⁶⁴ *See BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, Memorandum Opinion and Order and Notice of Inquiry, 20 FCC Rcd 6830 (2005).

Commission consider the impact that its rules would have on the deployment of advanced telecommunications capability and thus curtailed unbundling in instances where the Commission found the costs of unbundling, including disincentives for innovative deployment, outweighed the benefits of unbundling.”¹⁶⁵ In preempting the conflicting state orders, the Commission stated that its “determinations regarding LFPL unbundling incorporate the additional goals and obligations of section 706 and establish deployment of broadband facilities as a goal of the Act that is incorporated into the Commission’s unbundling determinations.”¹⁶⁶ “[T]hese state requirements undermine the effectiveness of the incentives for deployment, including the advancement of section 706 goals.”¹⁶⁷

The scope of Section 706, of course, is not limited to ILEC facilities or even common carrier services. In the *Cable Modem Order*, the Commission declined to require cable operators offering broadband Internet access to unbundle the underlying transmission capacity of cable modem service, but did not dispute that it could have done so.¹⁶⁸ In the *BPL Internet Order*, the Commission classified broadband over power line-enabled Internet access service as an information service, partly on the basis of Section 706.¹⁶⁹ As in the *Cable Modem Order*, the

¹⁶⁵ *Id.* at 6833 ¶ 7 (citation omitted).

¹⁶⁶ *Id.* at 6845 ¶ 29.

¹⁶⁷ *Id.* at 6846 ¶ 30.

¹⁶⁸ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Inquiry, 17 FCC Rcd 4798, 4825-26 ¶¶ 44-47 (2002).

¹⁶⁹ *United Power Line Council’s Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281, 13287 ¶ 10 (2006).

Commission, relying on Section 706, also rejected any unbundling requirement for the transmission component of BPL-enabled Internet access service.¹⁷⁰

Accordingly, the Commission’s balanced approach to unbundling next-generation facilities, based partly on Section 706, covers the entire gamut of advanced services, not just ILEC facilities. Article 52 conflicts with that approach and the Commission’s underlying policy concerns, and must be preempted in order to “remov[e]” this “barrier[] to infrastructure investment” by small providers seeking to serve multi-tenant buildings.¹⁷¹

D. Federal Law Occupies the Field With Respect to Inside Wiring.

As discussed above, Article 52 compels the sharing of wiring – something that the City does not shy away from acknowledging. This imposition of wire sharing is also separately invalid under the “field preemption” doctrine, which applies 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.”¹⁷² As MBC explained in its Petition, the Commission’s comprehensive regulation of cable home wiring and home run wiring, combined with its explicit refusal to mandate sharing of home run wiring, leaves no room for the City to impose its own wire sharing requirements.¹⁷³ The Commission’s detailed framework leaves no room for state or local regulation of wire sharing in multi-tenant properties. Indeed, on two separate occasions the Commission expressly refused to mandate sharing of home run wiring by multiple providers, citing signal interference concerns that Congress has placed squarely within the Commission’s

¹⁷⁰ *Id.* at 13290 ¶ 15 (“We believe, as the Commission explained in the *Cable Modem Declaratory Ruling* ... , that subjecting BPL-enabled Internet access service providers to these obligations would disserve the goals of section 706 of the 1996 Act.”).

¹⁷¹ 47 U.S.C. § 1302(b).

¹⁷² *Hillsborough Cnty.*, 471 U.S. at 713 (citation and internal quotation marks omitted).

¹⁷³ MBC Pet. at 29-32.

purview.¹⁷⁴ These considerations all demonstrate that the federal interest in the regulation of inside wiring is so dominant that it precludes enforcement of Article 52's wire sharing requirement.

Preemption opponents also argue that any adverse effect on the customer that would result from wire sharing is prevented by Section 5206(b)(5)(C) of the ordinance,¹⁷⁵ which says that the landlord may deny competitive entry where "[t]he communications service provider's proposed installation of facilities and equipment in or on the property would ... have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property."¹⁷⁶ This argument fails for several reasons.

First, the provision does not refer to "existing wiring" at all. Had the City intended to limit the broad taking of wiring with this section, it would have been easy enough for the Board of Supervisors to include language to that effect. Second, the plain language that *is* included in this provision does not support the opponents' position. Existing wiring cannot be "installed" by a new provider, since the wiring is already deployed inside the building. Finally, the ordinance clearly treats "existing wiring" and "facilities and equipment" as separate categories. Section 5201(b) provides that property owner interference occurs if the owner "refus[es] to allow a

¹⁷⁴ 47 U.S.C. § 544(e) ("[T]he Commission shall prescribe regulations which establish minimum technical standards relating to cable systems' technical operations and signal quality. The Commission shall update such standards periodically to reflect improvements in technology."); *see also Inside Wiring Report and Order*, 13 FCC Rcd at 3772 ¶ 245; 47 C.F.R. § 76.605.

¹⁷⁵ *See, e.g.,* San Francisco Comments at 9 n.41 ("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"); *id.* at 23 ("Article 52 also recognizes the Commission's concern about such [wire] sharing by allowing property owners to refuse a request to share existing wiring when it is not technically feasible."); CALTEL Comments at 17 ("Section 5206 would ensure protection for the existing provider to the extent that use of the existing wiring would interfere with their ability to continue providing video service to the requesting occupant."); FBA Comments at 24 ("Rather than forcing wire sharing unconditionally, Article 52 establishes a test of technical feasibility: it requires access to the property owner's wiring only if (among other conditions) such use would not significantly and adversely impact an existing service.").

¹⁷⁶ Article 52, § 5206(b)(5)(C).

communications services provider to install the facilities and equipment necessary to provide communications *or* use any existing wiring to provide communications services as required by this Article 52.”¹⁷⁷ Thus, a landlord cannot block wire sharing based on the “facilities and equipment” exception, because that exception applies only if there is not sufficient space for the new provider’s gear, or if installation of the new provider’s gear otherwise interferes with the operation of a competing system.

For the foregoing reasons, the FBA’s contention that “[o]nly one provider would use the [existing] wiring at a time” also misses the mark.¹⁷⁸ While this is undoubtedly true where the subscriber is taking a bundle of services and then terminates the entire bundle, it is not true where the subscriber switches providers for only part of the bundle (*e.g.*, taking video from the incumbent and broadband Internet access from the new entrant). It is these subscribers that face the prospect of interference or unwanted disconnects under Article 52.

The City also argues that field preemption cannot apply because the existing wiring governed by Article 52 is owned by property owners, and the Commission has only asserted jurisdiction over MVPD-owned wiring.¹⁷⁹ Thus, the City claims, Article 52 “regulates in a *separate and distinct* field.”¹⁸⁰ This misconstrues MBC’s field preemption claim. As the Petition makes clear, the field that the Commission has preempted is *wire sharing*,¹⁸¹ not the

¹⁷⁷ *Id.* § 5201(b).

¹⁷⁸ FBA Comments at 23.

¹⁷⁹ San Francisco Comments at 26.

¹⁸⁰ *Id.* (emphasis in original).

¹⁸¹ *See* MBC Pet. at 30 (“The Commission’s detailed framework leaves no room for state or local regulation of wire sharing in multi-tenant properties.”).

wiring itself.¹⁸² The salient point is that Article 52 calls for inside wiring to be shared, and the Commission’s decisions reflect that the sharing of inside wiring is a matter of federal, not state or local, concern.

CONCLUSION

For the reasons discussed herein and in MBC’s Petition, the Commission should find that Article 52 is preempted by federal law and policy and is therefore invalid.

Respectfully submitted,

/s/ Bryan N. Tramont
Bryan N. Tramont
Russell P. Hanser
Brian W. Murray
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
(202) 783-4141

*Attorneys for the Multifamily
Broadband Council*

June 9, 2017

¹⁸² As MBC noted in its Petition, the courts have recognized that “the scope of a field deemed preempted by federal law may be narrowly defined.” *Farina*, 625 F. 3d at 120 n.25, quoting *Abdullah v. Am. Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999).