

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Improving Competitive Broadband Access to)	GN Docket No. 17-142
Multiple Tenant Environments)	
)	July 24, 2017
)	

**COMMENTS OF THE INSTITUTE FOR LOCAL SELF-RELIANCE
AND NEXT CENTURY CITIES**

I. Introduction

The Institute for Local Self-Reliance (ILSR) mission is to provide innovative strategies, working models and timely information to support environmentally sound and equitable community development. To this end, ILSR works with citizens, activists, policymakers and entrepreneurs to design systems, policies and enterprises that meet local or regional needs; to maximize human, material, natural and financial resources; and to ensure that the benefits of these systems and resources accrue to all local citizens.

Next Century Cities is a nationwide coalition of more than 170 mayors and local government leaders committed to ensuring the benefits of fast, affordable, reliable broadband Internet access for their communities.

II. Summary

ILSR and Next Century Cities strongly believe that by supporting local communities' efforts to adopt local ordinances requiring building owners to allow competitive ISPs access to their buildings, multiple tenant environments (MTEs) would experience greater competition. Tenants would have more choice, which would reduce costs, improve services, and encourage investment from private ISPs.

III. Local Ordinances That Require Building Owners and Landlords to Provide Access to More Than One ISP Remove A Substantial Barrier to Competition

The legislative history of the 1996 Telecommunications Act, suggests that Congress expected a robust competitive telecommunications market; their vision has yet to be realized. According to the FCC's Wireline Competition Bureau's June 2016 data based on Form 477 information,¹ competition in general for FCC-defined broadband Internet service (25 Mbps / 3 Mbps) is weak. Only 29 percent of U.S. census blocks have

¹ http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0503/DOC-344499A1.pdf, see Figure 4, p. 6.

access to two or more ISPs that offer 25 Mbps / 3 Mbps speeds via a residential fixed connection. Thirteen percent of census blocks can choose between three ISPs to deliver those same speeds. But anecdotal evidence suggests that those living in MTE's within those census blocks likely do not have as many options. Though a census block may have multiple providers, the statistics do not claim that all residents within the block have service options from those providers.

While rural areas lack choice because providers can't or won't justify infrastructure investment, the inability for multiple providers to access MTEs often negatively impacts competition in urban environments. Even though exclusivity agreements between property owners and ISPs are not legally enforceable under federal law, "de facto" exclusivity agreements occur regularly in many large cities.² It is typical for one ISP and the MTE building owner or landlord to enter into an agreement in which the latter prevents additional ISPs access to the building and its tenants in exchange for a fee of some sort.³ Without municipal, state, or federal laws that require a building owner or landlord to allow more than one ISP access to their property, the practical reality of these "de facto" exclusivity agreements continues.

These harmful agreements between MTE building owners or landlords and ISPs typically disadvantage tenants who have no choice. Rate increases, poor customer service, and lack of reliability accompany a "take it or leave it" situation for tenants in MTEs where these agreements prevail. With no other option than the ISP that has entered into an agreement with their landlord, tenants have no negotiating power.

Situations in which developers of new building structures establish deals with a provider to only install cabling to serve the needs for that one provider also occur. These agreements also negatively impact competition in MTEs. When wiring is installed in a new structure, no other provider is able to serve tenants in the new building because physical infrastructure is unavailable. These types of agreements should also be prohibited if a city chooses to include such a provision in their building code.⁴

a. MTE Barriers to Competition Benefit the Largest ISPs, Discouraging Competition

In communities where these agreements are common place, new entrants are loathe to enter a new facility or building; the situation harms tenants by eliminating the possibility of increasing competition. Rather than pay a special fee (sometimes an ongoing fee) to the MTE building owner or landlord in exchange for access to potential subscribers, new entrants often choose not to serve tenants in a particular building.⁵ Unfortunately, there is currently no effective market mechanism to differentiate whether

² <https://muninetworks.org/content/san-francisco-passes-ordinance-tenants-have-isp-choice-last> and <https://muninetworks.org/content/transcript-community-broadband-bits-episode-231>.

³ <http://broadbandnow.com/report/apartment-landlords-holding-internet-hostage/>.

⁴ <https://muninetworks.org/content/transcript-community-broadband-bits-episode-197>.

⁵ <https://muninetworks.org/content/transcript-community-broadband-bits-episode-245> in which the owner of Boston ISP netBlazr stated that he has also encountered building owners and landlords that demand a fee (sometimes recurring fee) in order to gain access to their buildings in order to serve tenants.

a given building manager or landlord allows multiple ISPs to serve tenants.

Over the years, large ISPs have mastered the art of the “de facto” exclusivity agreement. They retain large legal departments that include highly skilled attorneys, armies of staff, and the funds to develop more of these agreements and enforce existing commitments. They’ve also learned how best to attract MTE building owners and landlords and convince them to enter into these exclusivity agreements.⁶

Challenging agreements between large corporate ISPs with significant legal resources requires comparable resources. Small ISPs, which have in recent years expressed interest in serving MTEs, typically don’t have access to in-house counsel or the funds to retain necessary expertise. Often small ISPs determine that their limited resources are best spent elsewhere.⁷

Consolidation of large ISPs in the United States during recent years has limited the field of providers; true competition depends on the work of small ISPs. Their work is especially challenging because they operate in a market controlled by large and powerful corporate ISPs that seek to maintain their strong status by limiting competition. MTEs are a substantial share of urban markets; the FCC needs to recognize that large ISPs damage attempts to encourage competition by preventing small ISPs from serving MTE tenants.

b. Policies That Require MTE Building Owners and Landlords to Allow Multiple ISPs Access to Their Structures Empower MTE Subscribers

The relationship between a subscriber and an ISP is already considerably tipped in the favor of the ISP. Families and individuals on fixed budgets who live in MTEs are especially disadvantaged when their home is subject to an exclusivity agreement. When their landlord or MTE building owner doesn’t allow more than one ISP to offer service to their home, lower-income citizens lose a right to choose. MTE tenants have weaker subscriber rights and negotiating leverage based only on the building where they live.

Single-family households across the U.S. have the benefits of comparatively low promotional rates when switching providers if they live in locations where there is more than one provider. They may also have more negotiating power than people in MTEs when those promotional periods are over. If subscribers threaten to switch, ISPs sometimes entice single-family household subscribers with better prices or enhanced bundles.

For more than 20 years, MTE tenants have not experienced the intention of the

⁶ <http://www.kandutsch.com/glossary/MTE-right-of-entry-agreement-bulk-cable-agreement-door-fee-revenue-share>.

⁷ Charles Barr, founder of Webpass said there are roughly 400 large apartment buildings in San Francisco that deny his company access to their property. ‘Some don’t want fiber in the building or don’t want a radio in the building or don’t want anybody other than AT&T to come in,’ he said,” <http://www.sfgate.com/bayarea/article/SF-supervisor-would-give-tenants-access-to-all-9979280.php> also See fn2.

1996 Telecommunications Act - that all Americans have a choice in providers. Policies that require MTE building owner and landlords to open their facilities to multiple ISPs offer a local tool to change that dynamic. Past federal efforts to encourage competition in MTEs have not succeeded but if local communities wish to adopt such a policy, they may be able to achieve this national goal at the local level.

c. Article 52 of the Police Code of the City of San Francisco Should be Considered A Model Local Policy

The City of San Francisco adopted a local ordinance in 2016⁸ that implements rules and remedies designed to discourage these “de facto” exclusivity agreements. While establishing policies to support their belief that Internet access is an “economic right” rather than a nicety, city leaders determined that these agreements were more pervasive than originally believed. These agreements limited competition to tens of thousands of tenants.⁹

San Francisco is densely populous, a landscape ISPs typically choose to serve because it is more profitable and less expansive to deploy. Its citizens should be able to enjoy ample competition between ISPs. These exclusivity agreements have negatively impacted the city’s ability to achieve its goal - creating a community where competitive choice for affordable Internet access is available to its citizens.

While Article 52 of the Police Code is only one tool in improving local competition and connectivity, it shifts power from large ISPs to potential subscribers and encourages competition. It should be considered a model policy that other communities, especially urban centers, should consider in order to bring ISPs competition and its benefits to their citizens.

Local government should be empowered to develop these types of approaches in order to collect evidence and demonstrate which approaches are best at encouraging investment and improving access. Though the FCC appears largely focused on how to remove barriers to competition, ILSR and Next Century Cities believe that new policies may be required to improve competition. Simply removing existing regulations and law may not be sufficient to develop the desired market.

VI. Local Communities Should Have Broad Authority to Determine How to Meet Their Local Internet Access Goals

Communities across the U.S. realize that Internet access is essential for their citizens. Many of those communities have adopted policies that encourage current and future infrastructure investment, including dig once policies¹⁰ and smart conduit policies.¹¹ These efforts are typically in line with federal goals and policies. In

⁸ <https://muninetworks.org/content/san-francisco-passes-ordinance-tenants-have-isp-choice-last>

⁹ <https://muninetworks.org/content/transcript-community-broadband-bits-episode-231>

¹⁰ <https://muninetworks.org/tags/dig-once>

¹¹ <https://muninetworks.org/tags/conduit>

communities where a large segment of the population lives or works in MTEs, increasingly these policies will need to include more specific focus.

While federal and state laws have the potential to help cities and counties, local communities are best at determining their needs. Decision makers at the federal or state level are too far removed from a local community's experiences with large or small ISPs, MTE building owners and landlords, or local politics. Local communities are the best suited to plan and implement policies that help improve Internet access in their MTEs.

VII. Conclusion

For the reasons stated above, local ordinances requiring MTE building owners and landlords to allow competing ISPs to offer services in their buildings should be encouraged. San Francisco's Article 52 of the Police Code should be viewed as a model policy. Additionally, local communities should have broad authority to establish municipal and local government policies that meet their local Internet access goals.

Respectfully submitted,

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