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

In the Matter of	)	
	)	
Improving Competitive Broadband Access to Multiple Tenant Environments	)	GN Docket No. 17-142
	)	
Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council	)	MB Docket No. 17-91
	)	

NOTICE OF PROPOSED RULEMAKING AND DECLARATORY RULING

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Comment Date: [30 days after date of publication in the Federal Register]
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Chairman Pai and Commissioners O'Rielly and Carr issuing separate statements; Commissioner Starks concurring in part, dissenting in part and issuing a statement; Commissioner Rosenworcel dissenting and issuing a statement.

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I. INTRODUCTION

1. Thirty percent of Americans live in apartments or condominiums, and millions more work every day in office buildings.[1] As we strive to close the digital divide, we must address the needs of those who live and work in these buildings, which we refer to as multiple tenant environments (MTEs).[2] Although the density of MTEs makes them attractive for broadband providers,[3] they also present unique challenges to broadband deployment. First, installing facilities inside MTEs is often complicated and expensive because providers must access building conduits, lay wire that can reach each unit in the building or premises, and make necessary repairs once the wiring is installed.[4] Second, broadband deployment to MTEs involves three, rather than two, interested parties—the broadband provider, the end-user tenant, *and* the premises owner or controlling party—all of whom must take coordinated action for deployment to occur.[5]

2. Consumers increasingly rely on broadband Internet access services for employment and educational opportunities, access to healthcare services, civic and social engagement, and entertainment.[6] It is therefore essential that we work to promote broadband access for the millions of Americans who live and work in MTEs. To encourage facilities-based broadband deployment and competition in MTEs—and, as a result, competition in the video distribution market and for other communications services[7]—today we take three specific actions. First, we seek comment on additional actions we could take to accelerate the deployment of next-generation networks and services within MTEs. Second, we clarify that we welcome state and local experimentation to increase *access* to MTEs consistent with federal policy. Third, we preempt an outlier San Francisco ordinance to the extent it requires the *sharing* of in-use facilities in MTEs and thus deters broadband deployment, undercuts the Commission's carefully-

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[1] *See* INCOMPAS NOI Comments at 3 (citing United States Census Bureau, 2010-14 American Community Survey 5-Year Estimates, Units in Structure, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B25024&prodType=table). We refer to comments to the *MTE Notice of Inquiry* as "NOI Comments," while we refer to comments filed in response to the Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council, MB Docket No. 17-91, as "Article 52 Comments."

[2] By MTEs, we specifically mean "commercial or residential premises such as apartment buildings, condominium buildings, shopping malls, or cooperatives that are occupied by multiple entities." *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383, 5383-5384, para. 2 (2017) (*MTE Notice of Inquiry*). The term MTE, as we use it here, encompasses everything within the scope of two other terms the Commission has used in the past—multiple dwelling unit and multiunit premises. When referring to residential MTEs, past Commission's rules and actions have sometimes used the term multiple dwelling unit, or MDU. *See, e.g.,* 47 CFR § 76.800(a) (defining an MDU for purposes of the cable inside wiring rules as a "multiple dwelling unit building (e.g., an apartment building, condominium building or cooperative)"); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20235, para. 1 (2007) (*2007 Exclusive Service Contracts Order*), *aff'd, National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) (*NCTA*). In the context of its rules prohibiting multichannel video programming distributors from entering into exclusive access agreements with building owners, the Commission has interpreted the term MDU to include "gated communities, mobile home parks, garden apartments, and other centrally managed residential real estate developments," and the Fourth Circuit Court of Appeals applied the Commission's prohibition on exclusive access to a homeowners' association. 47 CFR § 76.2000(b); *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20238, para. 7; *see Lansdowne on the Potomac Homeowners Ass'n v. OpenBand at Lansdowne, LLC*, 713 F.3d 187 (4th Cir. 2013). The Commission's rules prohibiting carriers from entering into exclusive access agreements to provide telecommunications services to customers in MTEs employ the term "multiunit premises" to refer to commercial or residential premises occupied by multiple entities. *See* 47 CFR § 64.2501 (defining a "multiunit premises" as "any contiguous area under common ownership or control that contains two or more distinct units").

[3] FBA NOI Comments at 4 (explaining that "because MTEs represent dense concentrations of potential customers, fiber build decisions frequently target passing MTEs").

balanced rules regarding control of cable wiring in residential MTEs, and threatens the Commission's framework to protect the technical integrity of cable systems.

II. BACKGROUND

3. For decades, congressional and Commission policy has reflected an overarching principle: encouraging facilities-based competition by broadly promoting *access* to customers and infrastructure, including MTEs and their occupants, while sharply limiting to only narrow circumstances any mandatory *sharing* requirements that reduce incentives to invest. In that vein, the Commission has acted to ensure that non-incumbent providers have access to potential customers in MTEs,[8] while declining to impose a requirement to share in-use facilities in MTEs.[9] The Commission has found that promoting access to infrastructure encourages competition by eliminating restrictions on who can compete, while mandatory sharing decreases broadband providers' and MTE owners' incentives to deploy facilities because they cannot recover the full benefit of their investment.[10] The Commission's actions to promote access to MTEs account for the unique features of multi-unit buildings. This approach aligns with the Commission's broader efforts to promote facilities-based competition in the communications market generally by facilitating competitive access and reducing barriers to investment.[11]

4. *Congressional and Commission Actions to Promote Competitive Access to MTEs*. Since the passage of the Telecommunications Act of 1996,[12] the Commission has acted on many occasions to promote competitive access to MTEs. In a series of orders from 2000 to 2010, the Commission prohibited multichannel video programming distributors (MVPDs) and telecommunications carriers from entering into contracts with MTEs that grant a single provider exclusive access to the MTE.[13] The Commission found that these exclusive access agreements "discourage[d] the deployment of broadband facilities" and "hinder[ed]" entry by competitive MVPDs.[14] The Commission has also recognized the importance of permitting some measure of exclusivity in other arrangements between MTE owners and providers, in order to encourage MTE owners, MVPDs, and telecommunications carriers to invest in infrastructure in the MTE and to lower costs for MTE residents.[15] In the *2007 Exclusive Service*

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[4] *See* Letter from Maureen A. O'Connell and Christianna L. Barnhart, Charter, and Howard J. Symons, Counsel to Charter, to Marlene A. Dortch, Secretary, FCC, GN Docket No. 17-142, at 2 (filed Oct. 12, 2017) (Charter *Ex Parte* Letter); *see also* Letter from Real Estate Trade Associations to the Hon. Ajit Pai, Chairman, FCC, and Elizabeth Bowles, Chair, Broadband Deployment Advisory Committee (stating that the installation of Network Access Point equipment and conduit is often very expensive).

[5] *See Promotion of Competitive Networks in Local Telecommunications Markets et al*., WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983, 22990, para. 11 (2000) (*2000 Competitive Networks Order*) (explaining that in MTEs, important facilities are controlled by the building owner, and therefore "unlike in the case of a stand-alone residence or commercial enterprise, a competitive facilities-based carrier cannot supply service simply by dealing with the end user.").

[6] *MTE Notice of Inquiry*, 32 FCC Rcd at 5383, para. 1 ("High-speed Internet access is an increasingly important gateway to jobs, health care, education, and information, allowing innovators and entrepreneurs to create businesses and revolutionize entire industries."); *see also Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3267, para. 1 (2017).

[7] *See Communications Marketplace Report, The State of Mobile Wireless Competition, Status of Competition in the Market for the Delivery of Video Programming, Status of Competition in the Marketplace for Delivery of Audio Programming, Satellite Communications Services for the Communications Marketplace Report*, GN Docket No. 18-231, WT Docket No. 18-203, MB Docket Nos. 17-214, 18-227, IB Docket No. 18-251, Report, 33 FCC Rcd 12558, 12620, para. 114 (*2018 Communications Marketplace Report*) (describing increasing intermodal competition between online video distributors (OVDs), MVPDs, and television broadcasters). In addition, most MVPD entry and expansion in the past decade has come from deployment of fiber facilities used for the provision of video,

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Contracts Order, the Commission concluded that it should continue to permit (1) exclusive wiring arrangements, by which a building owner allows additional providers into a residential MTE "but prohibits them from using the existing wires"; as well as (2) exclusive marketing arrangements, by which a building owner only permits one provider to market its services within the residential MTE, but allows other providers access to the premises.[16] The Commission reasoned that exclusive wiring rights and exclusive marketing arrangements "do not absolutely deny new entrants access to [residential MTEs] or real estate developments" and, as a result, "do not cause the harms to consumers" that exclusive access agreements caused.[17] In a subsequent order, the Commission concluded that exclusive marketing arrangements may lower costs for MTE residents and provide an "added revenue stream" that may "help the [building] owner or MVPD provider . . . fund the expensive wiring" of the residential MTE.[18]

5. The Commission's actions to promote competitive access to MTEs dovetail with prior Commission action to promote competitive access to cable inside wiring in residential MTEs. In 1992, Congress directed the Commission to establish cable inside wiring rules to promote video competition,[19] and pursuant to that direction, the Commission promulgated inside wiring rules to facilitate competitive access to unused cable wiring.[20] The Commission's rules governing cable inside wiring are "intended to foster opportunities for [MVPDs] to provide service in [residential MTEs]" by establishing procedures governing the disposition of wiring after the building owner or tenant terminates service by the cable provider that owns the wiring.[21] These procedures apply to two types of cable inside wiring: (1) home run wiring, which is wiring that runs from a common space (such as a telecommunications closet) and reaches a specific unit; and (2) cable home wiring, meaning wiring that is inside of a specific unit.[22] The Commission's cable inside wiring rules provide that when MVPDs lose the right to remain on the premises of residential MTEs, they must (1) offer to sell the home run wiring to the building owner, (2) abandon the home run wiring, or (3) pull out the home run wiring and restore the building.[23] These rules allow a building owner to permit multiple service providers to compete for the right to use the individual home run wires dedicated to each unit if the building owner wishes to promote individual subscriber choice.[24] The disposition of cable home wiring depends on whether the MTE owner terminates service

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broadband, and telephone services. *Id.* at 12603, para. 69 ("Most MVPD entry and expansion in the past decade has come from telephone companies building fiber networks to compete with cable companies for video, Internet, and phone services.").

[8] *See 2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1; *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1; *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217, Report and Order, 23 FCC Rcd 5385, 5386, para. 5 (2008) (*2008 Competitive Networks Order*).

[9] *See Telecommunications Services Inside Wiring et al.,* First Order on Reconsideration and Second Report and Order, 18 FCC Rcd 1342, 1343, para. 4 (*2003 Inside Wiring Order*) ("[W]e decline to adopt DirecTV's proposal to allow MDU owners to require sharing of incumbent-owned cable wiring.").

[10] *See, e.g.*, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks et al.*, Memorandum Opinion and Order, 31 FCC Rcd 6157, 6194, para. 65 (2015) (*2015 US Telecom Forbearance Order)* (forbearing from the requirement to unbundle 64 kbps channel from fiber loops because the requirement "dampens incentives for incumbents to deploy these loops by making it considerably more costly to retire the overbuilt copper [and] any minimal competitive benefits the requirement may continue to provide are not sufficient to outweigh the potential for this unbundling obligation to impede the transition to next-generation fiber networks capable of delivering enormous benefits for consumers"); *Business Data Services in an Internet Protocol Environment*, Report and Order, 32 FCC Rcd 3459, 3581-83, paras. 286-88 (2017) (*BDS Order*) (declining to extend the interim wholesale access condition for UNE-P replacement services in part because an extension would harm competition, reduce incumbent LEC investment, and "distort the market"); *Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd 2533, 2633-2635, paras. 182-185 (2005) (*Triennial Review Remand Order*) (declining to require unbundling of dark fiber loops in part because "an overly broad dark fiber unbundling regime would undermine deployment, pushing competitors to use incumbent-owned fiber rather than building their own alternatives where it is economic to do so"); *see also 2000 Competitive Networks Order*, 15 FCC Rcd at 22986 (in the context of promoting competitive access to MTEs,
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for the entire building or instead allows unit-by-unit competition. If the building owner terminates an MVPD that served the whole premises, the terminated MVPD provider must either (1) offer to sell to the building owner any cable home wiring within the individual dwelling units that the incumbent provider owns, (2) abandon the cable home wiring, or (3) pull out the cable home wiring and restore the units.[25] If, on the other hand, the building owner has allowed unit-by-unit competition, when a tenant terminates a MVPD, the MVPD must offer to sell the home wiring to the tenant, and if the tenant refuses, to the building owner.[26]

6. *Congressional and Commission Actions to Promote Access to Infrastructure.* To promote access to the infrastructure necessary to build out communications networks, Congress granted the Commission broad authority to regulate attachments to utility-owned-and-controlled poles, ducts, conduits, and rights-of-way.[27] Section 224 of the Communications Act, as amended (the Act), authorizes the Commission to prescribe, among other things, rules that require utilities to provide nondiscriminatory access to their poles, ducts, conduits, and rights-of-way to telecommunications carriers and cable television systems.[28] Following a recommendation[29] of the Broadband Deployment Advisory Committee (BDAC), a federal advisory committee established by the Commission to provide advice on methods to accelerate broadband deployment,[30] the Commission recently used its authority under section 224 to ensure that communications providers have greater access to utility poles by adopting a One Touch Make Ready (OTMR) regime for attachments that require "simple" make ready work.[31] OTMR speeds and reduces the cost of broadband deployment by allowing the new communications attacher to access and prepare the pole quickly by performing all of the work itself, rather than spreading the work across multiple parties.[32] While OTMR promotes access to poles for communications providers, those providers must install their own facilities on and between the poles in order to furnish service. The Commission also enacted a number of reforms to its pole attachment rules to speed access and lower the costs of other non-simple types of attachments.[33] The Commission has also interpreted section 253 of the Act to bar

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affirming that the Commission has "recognized that the greatest long-term benefits to consumers will arise out of competition by entities using their own facilities.")

[11] *See, e.g.*, *BDS Order*; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, Second Report and Order, 33 FCC Rcd 5660 (2018) (*Wireline Infrastructure Second Report and Order*); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, WT Docket No. 17-79, Third Report and Order and Declaratory Ruling, 33 FCC Rcd 7705 (2018) (*Wireline Infrastructure Third Report and Order*).

[12] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*).

[13] *See 2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1; *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1; *2008 Competitive Networks Order*, 23 FCC Rcd at 5386, para. 5. *See also Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd 2460 (2010) (*2010 Exclusive Service Contracts Order*).

[14] *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20243-44, para. 16. *See 2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1 (prohibiting common carriers from entering into exclusive access contracts that restrict or effectively restrict owners and managers of commercial MTEs from permitting access to competing common carriers in order to serve tenants); *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20236, para. 1 (concluding that exclusive access agreements to provide MVPD services to customers in residential MTEs harm competition and broadband deployment, and prohibiting cable operators and other entities subject to the relevant statutory provisions from entering into or enforcing such agreements); *2008 Competitive Networks Order*, 23 FCC Rcd at 5386-87, para. 5 (restricting telecommunications carriers from executing or enforcing exclusive access agreements in residential MTEs).

certain state and local laws and regulations that restrict providers' access to the right-of-way and other public infrastructure, including express and *de facto* moratoria on broadband deployment and certain restrictions on small cell wireless facilities deployment, because these state or local actions prohibit or have the effect of prohibiting the provision of telecommunications services.[34] In 2018, the BDAC also adopted a series of recommendations on additional measures to promote competitive access to broadband infrastructure, including poles, ducts, conduit, and rights-of-way.[35]

7. *Commission Actions to Protect Incentives to Deploy to MTEs.* The Commission has been cautious to regulate only where necessary and to avoid risking undermining the case to invest in broadband and video deployment to MTEs. For example, in the *2010 Exclusive Service Contracts Order*, the Commission "conclude[d] that the benefits to consumers of bulk billing arrangements outweigh their harms"[36] because bulk billing could "enhanc[e] deployment of broadband" and lower prices without significantly reducing competition.[37] In bulk billing agreements, a building owner pays a single provider for service to all tenants and "factors each unit's *pro rata* charge into the unit's rent."[38] In the same Order, the Commission also decided against prohibiting exclusive marketing arrangements. An exclusive marketing arrangement is an agreement that gives a provider "the exclusive right to certain means of marketing its service" to tenants.[39] The Commission found no indication that such arrangements significantly hinder other MVPDs from providing service to tenants.[40]

8. *Congressional and Commission Actions to Promote Incentives to Invest by Limiting Facilities Sharing.* In the 1996 Act, Congress sought "to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."[41] The Commission has long interpreted the 1996 Act to express a preference for facilities-based competition, because only competitors that own their own facilities "can . . . provide services without having to rely on their rivals for critical components of their offerings [and] can fully unleash . . . incentives to innovate, both technologically and in service

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[15] *See 2010 Exclusive Services Contracts Order*, 25 FCC Rcd at 2461, 2472, paras. 2, 33.

[16] *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20237, para. 1 & n.2.

[17] *Id*.

[18] *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2472, para. 33.

[19] 47 U.S.C. §§ 521, 544(i); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring,* Notice of Proposed Rulemaking, 7 FCC Rcd 7349, 7349, para. 2 (1992) (*1992 Inside Wiring NPRM*); *see also Telecommunications Services Inside Wiring et al.*, CS Docket No. 95-184, MM Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3704, para. 89 (*1997 Inside Wiring Order*).

[20] In the telecommunications context, Commission rules mandate that common carriers transfer the control, but not necessarily the ownership, of inside telephone wiring to the building owner. *See Review of Sections 68.104 and 68.213 of the Commission's Rules Concerning Connection of Simple Inside Wiring to the Telephone Network*, Order on Reconsideration, Second Report and Order and Second Further Notice of Proposed Rulemaking, 12 FCC Rcd 11897, 11917-18, paras. 31-32 (1997). In addition, our rules require an incumbent local exchange carrier (LEC) to provide a requesting telecommunications carrier nondiscriminatory access on an unbundled basis to subloops necessary to access wiring at or near an MTE, including the loop plant between the minimum point of entry and the point of demarcation. *See* 47 CFR § 51.319(b)(2).

[21] *2003 Inside Wiring Order*, 18 FCC Rcd at 1343, para. 1.

[22] More precisely, home run wiring is "wiring from the demarcation point to the point at which the MVPD's wiring becomes devoted to an individual subscriber or individual loop." 47 CFR § 76.800(d). Cable home wiring is "internal wiring contained within the premises of a subscriber which begins at the demarcation point," which is "a point at (or about) twelve inches outside of where the cable wire enters the subscriber's dwelling unit." 47 CFR § 76.5(ll), (mm)(2); *see also 2003 Inside Wiring Order*, 18 FCC Rcd at 1344, para. 2, n.5 ("Generally, in non-loop-

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development, packaging, and pricing," as Congress envisioned.[42] Accordingly, the Commission has in many proceedings "encouraged the innovation and investment that come from facilities-based competition" and limited the mandatory sharing of facilities.[43] For example, in implementing the unbundling requirements in the 1996 Act, the Commission declined to require unbundling of next-generation network facilities because such a requirement would reduce investment in such facilities and new technologies.[44] The Commission has similarly taken a deregulatory approach toward business data services, with the goal of promoting incentives for broadband deployment.[45] And in recent wireline infrastructure proceedings, the Commission has reduced regulatory burdens on carriers upgrading their networks to fiber.[46]

9. *Commission Regulation of Cable Signal Quality and Technical Standards.* The Commission has refused to mandate sharing of facilities when doing so could lead to potential technical problems. In 2003, the Commission declined to require competitors to simultaneously share cable home run wiring in residential MTEs due to "significant unresolved technical problems."[47] Such problems included the potential for both signal interference when more than one amplified signal is transmitted on a single wire and lack of bandwidth capacity.[48] Pursuant to congressional direction, the Commission has established minimum technical standards for cable systems' technical operation and signal quality,[49] and recently updated these standards in 2017 to reflect improvements in technology.[50] The current rules require that cable operators provide "good quality" signals to cable subscribers.[51]

10. *State Efforts to Promote Access to MTEs*. To promote tenants' access to the communications provider of their choice, several states have enacted mandatory access laws. Such laws generally provide franchised cable operators with a legal right to install and maintain cable wiring in residential MTE buildings, even over MTE owners' objections.[52] States that enacted mandatory access laws generally did so to ensure that residential MTE tenants would have cable programming service and to prevent MTE owners from denying access.[53] The Commission has on multiple occasions declined to impose a federal mandatory access law or to preempt state mandatory access laws, finding that states and localities were "well-positioned to decide" whether the benefits of such laws outweighed their costs.[54] In

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through configurations, each cable subscriber in an MDU has a dedicated line or 'home run' line running to his or her premises from a common 'feeder line' or 'riser cable' that serves as the source of video programming signals for the entire MDU. The riser cable typically runs vertically in a multi-story building (e.g. up a stairwell) and connects to the dedicated home run wiring at a 'tap' or 'multi-tap.' In loop-through configurations, a single cable provides service to multiple subscribers, and every subscriber on the loop receives the same cable service.").

[23] *See* 47 CFR §§ 76.800 *et seq.*; *see also 1997 Inside Wiring Order*, 13 FCC Rcd at 3680-99, 3713-19, paras. 39-80, 115-128.

[24] 47 CFR § 76.804(b); *1997 Inside Wiring Order,* 13 FCC Rcd at 3685-6, para. 49.

[25] 47 CFR § 76.804(a)(4); *1997 Inside Wiring Order,* 13 FCC Rcd at 3714-15, paras. 117-18.

[26] 47 CFR § 76.802(a)(2); *1997 Inside Wiring Order*, 13 FCC Rcd at 3717-18, paras. 122-124.

[27] *See* 47 U.S.C. § 224(b)(1). The Act exempts from our jurisdiction those pole attachments in states that have elected to regulate pole attachments themselves. *See* 47 U.S.C. § 224(c). Pole attachments in thirty states and the U.S. Territories are currently governed by our rules. *See States That Have Certified That They Regulate Pole Attachments*, WC Docket No. 10-101, Public Notice, 25 FCC Rcd 5541, 5541-42 (WCB 2010).

[28] 47 U.S.C. § 224(b), (f).

[29] *See* Letter from Paul D'Ari, Designated Federal Officer, Broadband Deployment Advisory Committee, FCC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-84 (filed July 3, 2018), at Attach. Broadband Deployment Advisory Committee, FCC, *Report of the Competitive Access to Broadband Infrastructure Working Group* at 19 (2018), https://ecfsapi.fcc.gov/file/107030255502405/Competitive%20Access%20to%20Broadband%20Infrastructure%20Report.pdf.

December 2018, the BDAC adopted a mandatory access provision in its approved Model Code for States.[55] While state and local mandatory access laws vary in their specifics, until 2016 none had required that building owners make in-use facilities available for sharing by new service providers.[56]

11. *San Francisco Article 52*. In 2016, the San Francisco Board of Supervisors enacted Article 52 of the San Francisco Police Code, titled "Occupant's Right to Choose a Communications Provider."[57] Article 52 prohibits a building owner from "interfer[ing] with the right of an occupant to obtain communications services from the communications services provider of the occupant's choice,"[58] and provides that an owner so interferes by refusing to allow a communications services provider to (1) "install the facilities and equipment necessary to provide communications services," or (2) "use any existing wiring to provide communications services as required by this Article 52."[59] Article 52 goes beyond traditional mandatory access laws by permitting communications providers to "use any existing wiring" owned by the building owner to provide service to tenants.[60] Article 52 does not require providers to show that the use of existing wiring is necessary to provide service.[61] Nor does Article 52 specifically exempt in-use wiring from the requirement to share facilities.[62]

12. In 2017, the Multifamily Broadband Council (MBC), a coalition of providers to MTEs, filed a petition with the Commission seeking preemption of Article 52.[63] In its petition, MBC contends that Article 52 conflicts with the Commission's regulatory framework governing competitive access to inside wiring,[64] bulk billing arrangements,[65] and unbundling,[66] and that San Francisco's attempt to regulate inside wiring intrudes into areas in which federal law and policy have "occupied the field."[67] The Media Bureau sought comment on the petition[68] and received comments from stakeholders including competitive and incumbent providers, building owners, local governments, and advocacy groups.

13. *Notice of Inquiry*. In 2017, the Commission released a Notice of Inquiry with the goal of "promoting competition and easing deployment of broadband services within MTEs."[69] The *MTE Notice of Inquiry* sought comment on the state of broadband competition within MTEs,[70] state and local regulatory barriers to broadband deployment within MTEs,[71] and whether the Commission should revisit

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[30] *See* FCC, Broadband Deployment Advisory Committee, Organization, Charter, https://www.fcc.gov/sites/default/files/bdac-charter.pdf.

[31] *See generally Wireline Infrastructure Third Report and Order*, 33 FCC Rcd 7705. Simple make-ready is "make-ready where existing attachments in the communications space of a pole could be transferred without any reasonable expectation of a service outage or facility damage and does not require splicing of any existing communication attachment or relocation of an existing wireless attachment." 47 CFR § 1.1402(q).

[32] *See Wireline Infrastructure Third Report and Order*, 33 FCC Rcd at 7706, para. 2.

[33] *See id.* at 7743-61, paras. 77-114.

[34] *See id.* at 7775, para. 140; *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, WC Docket No. 17-84, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018) (*2018 Wireless Infrastructure Third Report and Order*). The *2018 Wireless Infrastructure Third Report and Order* also interpreted section 332 to bar certain restrictions on small cell deployment. *See* 33 FCC Rcd at 9100-01, paras. 30-33.

[35] *See* FCC, Broadband Deployment Advisory Committee, Report of the Competitive Access to Broadband Infrastructure Working Group, https://www.fcc.gov/sites/default/files/bdac-cabi-report-01232018.pdf; FCC, Broadband Deployment Advisory Committee, Addendum to the Report of the Competitive Access to Broadband Infrastructure Working Group, https://www.fcc.gov/sites/default/files/bdac-cabi-report-04252018.pdf.

[36] *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2463, para. 9.

[37] *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2461, para. 2.

[38] *See 2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2464, para. 11.

its decision in the *2010 Exclusive Service Contracts Order* declining to prohibit exclusive marketing and bulk billing arrangements.[72] The *Notice of Inquiry* further sought comment on two types of contractual provisions that parties alleged adversely affected competition in the MTE market: (1) revenue sharing agreements, in which a provider "agree[s] to pay a *pro rata* share of the revenue generated from the tenants' subscription service fees, and in many cases, a 'door fee' to the MTE owners to have access to the MTE";[73] and (2) exclusive wiring arrangements, in which a building owner agrees to make wiring within its control available to a provider on an exclusive basis.[74] The Commission also sought comment on a subset of exclusive wiring arrangements, so-called "sale-and-leaseback" arrangements, in which a provider sells wiring it owns to a building owner and then leases that wiring back on an exclusive basis.[75] The Commission received comment on the *Notice of Inquiry* from various stakeholders, including competitive and incumbent providers, building owners, local governments, and advocacy groups.

III. NOTICE OF PROPOSED RULEMAKING

14. In this *Notice of Proposed Rulemaking* (*Notice*), we continue our efforts to ensure that all Americans have access to high-speed broadband, regardless of the type of housing in which they reside or the level of income they earn, and regardless of where they work. Specifically, we seek comment on

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[39] *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2471, para 30 (explaining that exclusive marketing "includes advertising in . . . common areas, placement of the MVPD's brand on the . . . building's web page, placement of the MVPD's brochures in 'welcome packs' for new residents, sponsoring events on the premises . . . and slipping brochures under residents' doors").

[40] *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2462, para. 3.

[41] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 1 (1996).

[42] *Promotion of Competitive Networks in Local Telecommunications Markets et al.*, Notice of Proposed Rulemaking, 14 FCC Rcd 12673, 12677, para. 4 (1999). Congress has also demonstrated a preference for facilities-based deployment in the Universal Service Fund. *See* 47 U.S.C. § 214(e)(1)(A) (requiring that an eligible telecommunications carrier seeking Universal Service Fund support offer services "either using its own facilities or a combination of its own facilities and resale of another carrier's services").

[43] *Triennial Review Remand Order*, 20 FCC Rcd at 2535, para. 2; *see also BDS Order*, 32 FCC Rcd at 3581-82, para. 288.

[44] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17141, para. 272 (2003) (*Triennial Review Order*); *Triennial Review Remand Order*, 20 FCC Rcd at 2535, para. 2. We consider unbundling to be a form of sharing, as we use the term here, for two reasons. First, the incumbent LEC must forego use of some component of the facility. *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, 15631, para. 258 (1996) (*Local Competition Order*) (stating that when telecommunications carriers request access to unbundled elements within an incumbent LEC's network, they, in effect, seek "to purchase the right to obtain exclusive access to an entire element, or some feature, function or capability of that element" but that this access "does not alter the incumbent LEC's physical control or ability or duty to repair and maintain network elements"). Second, because the incumbent LEC must make the network element available to competitors at highly regulated rates, it has a reduced incentive to deploy additional such facilities. *See Triennial Review Remand Order*, 20 FCC Rcd at 2555, para. 36 (finding that "unbundling can create disincentives for incumbent LECs and competitive LECs to deploy innovative services and facilities, and is an especially intrusive form of economic regulation"); *Triennial Review Order*, 18 FCC Rcd at 17229, para. 404 ("After incurring substantial fixed and sunk costs, a carrier that has deployed transport facilities must continue to compete against carriers able to obtain unbundled transport without incurring any large costs.")

[45] *See generally BDS Order*.

[46] *See generally Wireline Infrastructure Second Report and Order*, 33 FCC Rcd 5660.

[47] *See 2003 Inside Wiring Order*, 18 FCC Rcd at 1377, para. 88.

ways to facilitate enhanced deployment and greater consumer choice for Americans living and working in MTEs.

15. In this *Notice*, we refresh the record in response to the *MTE Notice of Inquiry* and seek further targeted comment on a variety of issues that may affect the provisioning of broadband to MTEs, including exclusive marketing and wiring arrangements, revenue sharing agreements, and state and local regulations. We believe that the questions we ask here will facilitate the development of a more detailed record to establish effective, clear policy that is carefully tailored to promote broadband deployment to MTEs. We also seek comment on our legal authority to address broadband, telecommunications, and video deployment and competition in MTEs. Specifically, we seek comment on ensuring that any new rules we adopt apply equally to all competitors in the MTE marketplace and do not create regulatory asymmetry.

A. Revenue Sharing Agreements

16. We seek comment on whether we should require the disclosure or restrict the use of revenue sharing agreements for broadband service. In revenue sharing agreements, the building owner receives consideration from the communications provider in return for giving the provider access to the building and its tenants. This consideration can take many forms, ranging from a *pro rata* share of the revenue generated from tenants' subscription service fees, to a one-time payment calculated on a per-unit basis (sometimes called a door fee), to provider contributions to building infrastructure, such as WiFi service for common areas.[76]

17. We seek comment on what impact revenue sharing agreements have on competition and deployment within MTEs. Some commenters contend that such agreements are a key tool in building owners' ability to build out, maintain, and upgrade their networks, and they also contend that revenue sharing agreements do not raise costs for tenants.[77] They argue that these agreements enable MTE owners to use the consideration they receive from communications providers to offset infrastructure costs

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[48] *See id.*

[49] *See* 47 U.S.C. § 544(e); *See Cable Television Technical and Operational Standards et al.*, Report and Order, 32 FCC Rcd 7754, 7755 n.2 (2017) (*2017 Cable Technical Standards Order*).

[50] *See generally 2017 Cable Technical Standards Order*.

[51] *See id.* at 7757, para. 7; 47 CFR § 76.605.

[52] *2003 Inside Wiring Order*, 18 FCC Rcd at 1357, para. 35.

[53] *Id*.

[54] *2003 Inside Wiring Order*, 18 FCC Rcd at 1358-59, para. 38-39; *see also 1997 Inside Wiring Order*, 13 FCC Rcd at 3742-44, 3748, paras. 178-80, 189 (finding that "[w]hile commenters opposing state mandatory access laws argue that these laws act as a barrier to entry [to non-franchised providers], the record also indicates that property owners deny access for reasons unrelated to the state laws, including property damage, aesthetic considerations and space limitations").

[55] *See* BDAC Approved Dec 6-7, 2018 Recommendations at Art. 7, https://www.fcc.gov/sites/default/files/bdac-12-06-2018-model-code-for-states-approved-rec.pdf.

[56] For example, some states have passed laws that prohibit building owners from entering into agreements that would interfere with the rights of a tenant to obtain communications services, but those state laws do not impose a duty to share building-owned wiring. *See, e.g.*, Me. Rev. Stat. tit. 14, § 6041(1)(B) (prohibiting providers from entering into agreements with landlords that "would directly or indirectly diminish or interfere with the rights of any tenant to use a master or individual antenna system"); Mass. Gen. Laws Ann. Ch. 166A, § 22; N.Y. Pub. Serv. Law § 228(3); 39 R.I. Gen. Laws Ann. § 39-19-10(2).

[57] *See* Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code, MB Docket No. 17-91, at 2 (filed February 24, 2017) (MBC Petition).

associated with providing broadband service to tenants, and that restricting these types of agreements will induce MTE owners to raise rents or cut costs by reducing infrastructure investment.[78] Blue Top Communications, a small cable and broadband provider, claims that, without revenue sharing agreements and other similar agreements granting access to the MTE, it will be unable to compete in the MTE market.[79] We seek comment on these assertions. Do revenue sharing agreements enable competitive broadband providers to offer services in MTEs and, if so, how? For example, what effect do these agreements have on competitive providers' ability to secure financing to deploy facilities?[80] Do revenue sharing agreements affect competition and deployment only if they are exclusive to a single provider?

18. Conversely, we seek comment on whether revenue sharing agreements reduce incentives for building owners to grant access to competitive providers when any subscriber gained by such a provider means reduced income to the building owner.[81] Some commenters argue further that protracted negotiations over these types of agreements can inhibit competition by preventing providers from deploying broadband services on a timely basis.[82] We seek comment on these assertions. In addition, we seek comment on whether revenue sharing agreements are being used to circumvent the ban on exclusive access agreements, as some commenters assert.[83] To the extent that revenue sharing agreements are combined with other contractual provisions, such as exclusive wiring, sale-and-leaseback, bulk billing, and exclusive marketing, what effect does the combination of these arrangements have on competition and deployment within MTEs?[84]

19. Should we require all Internet service providers or only telecommunications carriers and covered MVPDs[85] to disclose the existence of revenue sharing agreements to the public?[86] Disclosure requirements are less burdensome than outright prohibitions and can promote informed decision-making.[87] What are the costs and benefits of a disclosure requirement here? Would a disclosure

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[58] S.F., Cal., Police Code art. 52, § 5201(a).

[59] S.F., Cal., Police Code art. 52, § 5201(b). "Existing wiring" is defined as "both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R § 76.800(d) and 47 C.F.R. § 76.5(ll) respectively, except that those terms as used herein shall apply only to the home run wiring or cable home wiring owned by a property owner." *Id.* at § 5200.

[60] *See* S.F., Cal., Police Code art. 52, § 5201(b).

[61] *See generally* S.F., Cal., Police Code art. 52.

[62] *Id.*

[63] MBC Petition. On the same day it filed its preemption petition, MBC filed a separate petition seeking a declaratory ruling that Article 52 impairs the installation, maintenance, and use of covered antennas in violation of the Commission's Over-the-Air Reception Devices rule (OTARD Rule). Finding that "MBC has not established, as a threshold matter, that Article 52 impairs an antenna user's ability to install, maintain, or use a covered antenna under the OTARD Rule," the Media Bureau dismissed this separate petition. Letter from Maria Mullarkey, Assistant Division Chief, Policy Division, FCC Media Bureau, to Bryan N. Tramont, Esq., Counsel to the Multifamily Broadband Council, 32 FCC Rcd 3794, 3796 (MB 2017) (filed February 24, 2017)).

[64] MBC Petition at 14-21.

[65] MBC Petition at 21-25.

[66] MBC Petition at 26-29.

requirement, by promoting transparency to prospective and current tenants, increase the likelihood that revenue sharing agreements benefit competition, deployment, and individual subscribers? What impact would a disclosure requirement have on small businesses, and should we consider exempting some small businesses from such a requirement? If we were to require disclosure of revenue sharing agreements, should we require the disclosure only of agreements that exceed the building's actual costs of allowing service, or all revenue sharing agreements? If we require disclosure, where, when, and how should we require covered providers to provide the disclosure, and how can we ensure that the public is able to associate the disclosure with a particular building? What contents should we require in a disclosure, and should we specify a format? How would such a disclosure requirement interact with First Amendment jurisprudence on compelled corporate speech?[88]

20. If we determine that revenue sharing agreements harm competition and deployment and that transparency is an insufficient remedy, should we adopt a rule to restrict or prohibit revenue sharing agreements? For example, we could restrict covered MVPDs and telecommunications carriers[89] from entering into revenue sharing agreements that provide the building owner with a share of revenue beyond the building's actual costs of allowing service. What are the benefits, drawbacks, and estimated costs of this approach? What is the impact of this approach on small businesses? What economic and business justifications, if any, exist for any such revenue sharing agreements that exceed the building's actual costs of allowing service? Would we face practical difficulties in administering such a prohibition? For instance, would covered MVPDs and telecommunications carriers when considering entering a revenue sharing agreement, and the Commission when considering an enforcement proceeding, be able to determine the building's actual costs of allowing service? If we determine that a rule restricting revenue sharing agreements is necessary, would a different rule be more appropriate?

B. Rooftop Antenna and DAS Facilities Access

21. We seek comment on whether we should act to increase competitive access to rooftop

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[67] MBC Petition at 29-32.

[68] *Media Bureau Seeks Comment on Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91, Public Notice, 32 FCC Rcd 2893 (MB 2017).

[69] *MTE Notice of Inquiry*, 32 FCC Rcd at 5383.

[70] *MTE Notice of Inquiry*, 32 FCC Rcd at 5387-88, para. 11.

[71] *MTE Notice of Inquiry*, 32 FCC Rcd at 5388, para. 12.

[72] *MTE Notice of Inquiry*, 32 FCC Rcd at 5388-89, para. 13.

[73] *MTE Notice of Inquiry*, 32 FCC Rcd at 5389, para. 14.

[74] *MTE Notice of Inquiry*, 32 FCC Rcd at 5389, para. 15.

[75] *See* FBA NOI Comments at 11-13.

[76] *See* Hubacher & Ames NOI Reply at 14 (stating that "the revenue share paid by the service provider pursuant to a service contract with an MTE owner is 'consideration,'" and that this "[r]evenue share is nothing more than the type of consideration that is negotiated to help the owner offset the considerable costs to bring high quality broadband service to residents"); RealtyCom NOI Comments at 4-6.

[77] *See* Choice NOI Comments 2-3; *see also* RealtyCom NOI Comments at 4-5, 8-10 ("These agreements have a positive impact on competition in MTEs because they allow MTE owners to recoup some of the substantial costs associated with new or upgraded infrastructure installation which, in many cases, means the difference between an MTE owner deciding they can afford having additional carriers serve their community."); Satel NOI Comments at 3 ("The effect [of revenue sharing agreements] on residents is neutral so long as rates and services remain competitive with other providers."); NMHC NOI Comments at 10; NCTA NOI Reply at 2-3; RealtyCom NOI Reply at 4-5 ("In the absence of such investment recovery payments, all costs would be borne by developers and, through higher rents, their residents"); Hubacher & Ames NOI Reply at 12 (arguing that revenue sharing agreements promote high-

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facilities, which are often subject to exclusivity agreements. Wireless communications providers rely on access to building rooftops to establish or improve backhaul for wireless services.[90] We seek comment on the benefits and drawbacks of rooftop exclusivity agreements. How prevalent are such agreements, and what are common terms and conditions of such agreements that could affect broadband deployment? Do such agreements encourage building owners to allow rooftop access to the paying party, thereby promoting broadband, telecommunications, and video services deployment? Are there technical or safety benefits to a service provider, instead of the MTE owner, exercising control over rooftop facilities? As to drawbacks, in their comments, both INCOMPAS and Lumos Networks cite rooftop exclusivity agreements as an example of a common industry practice that reduces competition and deployment in MTEs with little to no consumer benefits.[91] We seek comment on these claims. If we find that rooftop exclusivity agreements harm competition, should we prohibit telecommunications carriers and covered MVPDs from entering into such agreements, including agreements that would have the effect of exclusivity, just as the Commission previously prohibited telecommunications carriers from reaching exclusive access agreements with residential and commercial MTEs and covered MVPDs from reaching exclusive access agreements with residential MTEs?

22. We also seek comment on whether we should take action on access to distributed antenna systems (DAS) facilities, which are "small antennas []typically installed on shared wiring within the MTE" which transmit signals using internal wiring within the building "to a carrier point-of-presence."[92] Wireless providers use DAS facilities within MTEs to "fill gaps in coverage caused by dense walls . . . and provide additional capacity" in areas with dense concentrations of people including stadiums and arenas.[93] According to T-Mobile, if a fixed wireless provider is unable to access a DAS facility, that provider's customer may have little or no indoor cellular coverage.[94] INCOMPAS, Sprint, and T-Mobile allege that building owners enter into private agreements with fixed wireless providers or third party operators for control over the deployment of wireless broadband service via DAS facilities.[95] These commenters claim that fixed wireless providers or third party operators benefit from these arrangements

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quality service by including provisions that allocate the responsibility for supplying and installing building materials, specify provider access rights and service quality standards, and specify responsibilities related to the maintenance of wiring).

[78] *See* Hubacher & Ames NOI Reply at 13-14 ("A restriction against revenue shar[ing] would have the same impact as a restriction on exclusive wiring contracts: MTE Owners will be discouraged from making investments in broadband infrastructure if they are unable to recoup at least some of their costs through contract negotiations."); *see also* Choice NOI Comments at 2 (arguing that revenue sharing payments "assist property owners in offsetting costs associated with providing the required infrastructure"); Aimco, ArchCo Residential, and AvalonBay Communities et al., NOI Comments at 1 (stating that regulating . . . revenue sharing and exclusive wiring arrangements could actually raise prices, result in degraded services, decrease competition and slow broadband deployment in [MTEs]") (Apartment Industry NOI Comments); RealtyCom NOI Comments at 5 (noting that "[i]n new developments, Carriers may offer consideration to partially offset a variety of costs associated with facilitating the Carrier's service to the property").

[79] Blue Top Communications NOI Reply at 1 (stating that "[w]ithout the use of these tools, Blue Top likely will not be able to compete with the [cable] and telephone monopolies who have been given service rights to our communities over the last 100 years").

[80] *See* FBA NOI Reply at 6; *see also* Building Owners and Managers Association International, Institute of Real Estate Management, and International Council of Shopping Centers et al. NOI Reply at 1 (contending that revenue sharing agreements "enhance competition and serve as an important mechanism to incentivize infrastructure deployment, reduce costs, and establish higher service quality standards").

[81] INCOMPAS NOI Comments at 10; *see also* Public Knowledge NOI Comments at 3 (stating that "MTE occupants in buildings with revenue sharing agreements have no choice of fixed BIAS provider, eliminating competition and its benefits for those tenants because MTE owners deny access to MDUs to competitive providers who refuse to participate in these 'kickback schemes'"); Starry NOI Comments at 3 ("Door fees and revenue sharing agreements can create incentives for building owners and managers to shut out competitive service providers to the detriment of

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by charging "monopoly rents" or otherwise restricting access to their facilities, to the detriment of competition and ultimately consumers.[96] We seek comment on these assertions. Are such agreements between building owners and fixed wireless providers or third-party operators common practice? If so, are there benefits to this practice, such as encouraging investment in DAS facilities by allowing building owners to recoup their costs of installing such facilities, and such as allowing building owners to control access to their premises? Have any commenters found that these agreements encourage deployment of wireless broadband services? T-Mobile claims that in barring LECs from entering into exclusive access agreements with commercial MTEs, the Commission also prohibited agreements "that do not explicitly deny access to competing carriers, but nonetheless establish such onerous prerequisites to the approval of access that they effectively deny access."[97] Do commenters agree with this argument? Should we take action against agreements that render DAS systems effectively inaccessible to certain providers due to unreasonable limitations or terms? Should we prohibit providers within our jurisdiction from enforcing existing DAS exclusivity agreements, and if so, in what circumstances? Alternatively, would any such action discourage investment in DAS facilities, undermine MTE owners' control over their property, or lead to any other harmful outcomes? Property owners note that DAS deployments are expensive, and contend that owners often have no assurance that carriers will use DAS facilities even if the owner incurs the cost to build them.[98] Are there any steps that the Commission should take to promote efficient use of DAS in MTEs? Should the Commission take any action with respect to wireless providers that would reduce the burden of DAS deployment on building owners? Are there policies the Commission could adopt that would increase incentives for property owners to deploy DAS facilities?

23. We also seek comment on the effect DAS access agreements have on deployment of advanced technology. For example, commenters argue that existing DAS facilities may be incompatible with a new provider's technology or so antiquated that they require replacement, as they are typically designed for the first provider to use them.[99] As a result, T-Mobile claims that "many of the DAS facilities currently in place will be incompatible with . . . 5G wireless technologies once they are available for deployment."[100] We seek comment on these claims. Should we require parties within our jurisdiction

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their residents and should be more closely examined."); FastMesh NOI Comments at 1 (arguing that MTE owners routinely deny access due to "an exclusive agreement with a cable company"); City of Seattle NOI Comments at 1 (citing revenue sharing agreements as a "practice[] occurring in the MTE environment in Seattle that [is] adversely affecting competition and broadband deployment"); New America NOI Comments at 18-19.

[82] *See* Lumos NOI Reply at 3-4; FastMesh NOI Comments at 1 (arguing that the approval process to provide services to a resident in a new MTE "can be unnecessarily long (3-6 months), which is hurting [the company's] ability to grow, and hurts the consumers ability to choose").

[83] *See* INCOMPAS NOI Reply at 10; FastMesh NOI Comments at 1 (stating that it struggles to gain access to MTEs despite efforts to inform building owners of the ban on exclusive access agreements).

[84] *See* Starry NOI Comments at 5-7.

[85] For purposes of this *Notice*, the term "covered MVPDs" mean those MVPDs subject to section 628(b) of the Act: cable operators; common carriers or their affiliates that provide video programming directly to subscribers; and operators of open video systems. 47 U.S.C. §§ 548(b), 548(g), 573(c)(1)(A).

[86] Any disclosure requirement we adopt would apply to the Internet service provider (or MVPD or telecommunications carrier) and not the building owner, similar to the Commission's prohibition on covered MVPDs and telecommunications carriers, but not building owners, entering into exclusive access agreements.

[87] *See Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 435, para. 209 (2018) (*Restoring Internet Freedom Order*) (explaining how "[a]ppropriate disclosures help consumers make informed choices, . . . improve consumer confidence, [and] . . . provid[e] entrepreneurs and other small businesses the information they may need to innovate and improve products."); *id.* at 452, para. 245 (finding that "the costs of compliance with a [disclosure requirement] are much lower than the costs of compliance with conduct rules").

who deploy DAS facilities to take into account the compatibility of the systems with potential future provider occupants? Should we encourage or require providers to use DAS facilities that meet certain compatibility or future-proofing requirements?[101] Would any such action reduce the level of investment of DAS facilities or otherwise harm deployment and/or competition? Are there quantifiable benefits and drawbacks to these approaches? What is the impact of these approaches on small businesses? We seek comment on these and other actions that can be taken to promote wireless broadband deployment and competition in and on MTEs.

C. Exclusive Wiring and Marketing Arrangements

24. We seek comment on the effect of sale-and-leaseback arrangements on competition and deployment of broadband, telecommunications service, and video in MTEs. Sale-and-leaseback arrangements occur when a service provider sells its wiring to the MTE owner and then leases back the wiring on an exclusive basis.[102] The record reflects that sale-and-leaseback arrangements often include provisions requiring the provider to maintain the inside wiring and other facilities.[103]

25. Some commenters argue that sale-and-leaseback arrangements violate the Commission's existing cable inside wiring rules, as set out in section 76.802(j).[104] Our rules require a cable provider to "take reasonable steps within [its] control to ensure that an alternative service provider has access to the home wiring at the demarcation point" and to not "prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service."[105] FBA contends that "[if] the incumbent provider transfers legal title to its home wiring to the property owner before a customer terminates service and then leases it back with an exclusivity provision that prevents competitive use, the inside wiring will be unavailable for use by competitors when the customer is ready to change providers."[106] Do sale-and-leaseback arrangements violate our existing cable inside wiring rules? Are sale-and-leaseback arrangements used to evade our exclusive access, cable inside wiring, or any other Commission rules? Regardless of whether they violate our rules currently, should we adopt a

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[88] *See Restoring Internet Freedom Order*, 33 FCC Rcd at 448, para. 235; *American Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 18 (D.C. Cir. 2014) (en banc) (holding that "Government interests, in addition to correcting deception, can be invoked to sustain mandate for disclosure of purely factual information in the commercial context in face of First Amendment free speech challenge"); *SEC v. Wall Street Pub. Institute, Inc.*, 851 F.2d 365, 372, 373 (D.C. Cir. 1988) (recognizing that within an agency's regulated "field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government" and applying "limited First Amendment scrutiny"); *see also, e.g., Pharm. Care Mgmt. Ass'n v. Rowe*, 429 F.3d 294, 316 (1st Cir. 2005) ("What is at stake here . . . is simply routine disclosure of economically significant information designed to forward ordinary regulatory purposes-in this case, protecting covered entities from questionable [pharmacy benefit manager] business practices. There are literally thousands of similar regulations on the books-such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer. The idea that these thousands of routine regulations require an extensive First Amendment analysis is mistaken.").

[89] To the extent we propose to regulate the practices of communications providers rather than require disclosures to the public, we do not propose to impose such behavioral regulations on entities other than telecommunications carriers and covered MVPDs.

[90] *See* INCOMPAS NOI Comments at 18; Lumos NOI Reply at 8. The Commission recently proposed to revise the over-the-air-reception devices (OTARD) framework to allow fixed wireless providers to deploy hub and relay antennas more quickly and efficiently in order to facilitate the investment in and deployment of modern fixed wireless infrastructure. *See generally Updating the Commission's Rule for Over-the-Air-Reception Devices,* Notice of Proposed Rulemaking, WT Docket No. 19-71, FCC 19-36 (rel. Apr. 12, 2019).

[91] *See* INCOMPAS NOI Comments at 18 (stating that rooftop exclusivity agreements are those that are used primarily by fixed wireless communications providers to prevent competitors from accessing space on the MTE rooftop in order to establish or improve existing wireless backhaul services); Lumos NOI Reply at 6-8 (same); *see also* NetMoby NOI Comments at 10 (arguing that the Commission "[m]ust allow complete access to an MTE's

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new rule prohibiting such arrangements? Alternatively, should we prohibit sale-and-leaseback arrangements in limited circumstances? For instance, should we prohibit these arrangements unless the provider can demonstrate that they are not anti-competitive?[107] What is the impact of these arrangements on small businesses, and how would any restrictions on sale-and-leaseback arrangements affect small businesses? Can commenters quantify specific costs and benefits of restricting sale-and-leaseback arrangements? Are sale-and-leaseback arrangements beneficial because they give building owners and service providers incentives to deploy facilities?[108]

26. Sale-and-leaseback arrangements are a subset of exclusive wiring arrangements. Under exclusive wiring arrangements, communications providers enter into agreements with MTE owners under which they obtain the exclusive right to use the wiring in the building.[109] In the *2007 Exclusive Service Contracts Order*, the Commission drew a distinction between exclusive access agreements, which it prohibited because they completely denied new entrants access to buildings, and exclusive wiring arrangements, "which do not absolutely deny new entrants access to [residential MTEs] and thus do not cause the harms to consumers" caused by exclusive access agreements.[110] We seek comment on whether we should revisit the Commission's decision as to exclusive wiring arrangements. Do the policy considerations around sale-and-leaseback and other exclusive wiring arrangements differ? Is it the case today that exclusive wiring arrangements do not preclude competitive providers' access to buildings? If a building owner will only permit one set of wiring on its premises and enters into an exclusive wiring arrangement, is the effect tantamount to an exclusive access agreement? Do exclusive wiring arrangements take different forms in states and localities that have mandatory access laws? For example, NCTA contends that in states and localities with mandatory access laws, "building owners must allow additional providers to offer service," and the exclusive wiring arrangement will only require the new provider to install its own facilities.[111] Is that a correct statement of fact and the law in areas with

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rooftop for the installation of necessary receive and transmit antennas for the provision of broadband Internet service to an MTE").

[92] T-Mobile NOI Reply at 3.

[93] T-Mobile NOI Reply at 3.

[94] *See* T-Mobile NOI Reply at 3.

[95] *See* INCOMPAS NOI Comments at 18-19; Sprint NOI Comments at 2-3 (contending that venues leverage exclusive access to Distributed Antenna Systems (DAS) facilities for higher rents to the detriment of competition, and ultimately consumers); *see also* T-Mobile NOI Reply at 4 ("[Limited access] agreements often preclude T-Mobile from deploying its own indoor coverage solution separate from the existing DAS, even when the MTE could physically accommodate a new system.").

[96] INCOMPAS NOI Comments at 18-19; T-Mobile NOI Reply at 4; Sprint NOI Comments at 3-4.

[97] T-Mobile NOI Reply at 6 (quoting *2000 Competitive Networks Order*, 15 FCC Rcd at 23001, para. 37).

[98] *See* Letter from Matthew C. Ames, Counsel, National Multifamily Housing Council, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 and MB Docket No. 17-91, at 2 (filed June 25, 2019).

[99] Sprint NOI Comments at 4-5; T-Mobile NOI Reply at 4-5.

[100] T-Mobile NOI Reply at 4-5.

[101] A second type of DAS facility is a Neutral Host DAS that is "generally constructed and operated by a carrier through an agreement with a facility owner or manager." T-Mobile NOI Reply at 3. In this scenario, a wireless
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mandatory access laws, or can buildings still exclude new entrants? And in states and localities without mandatory access laws, do exclusive wiring arrangements reduce competition? If we were to revisit the Commission's policy about exclusive wiring arrangements, should we prohibit providers from entering into these arrangements? What are the estimated costs and benefits of this potential action? Would it benefit or burden small entities and if so, how and to what extent?

27. *Exclusive Marketing Arrangements*. An exclusive marketing arrangement is an arrangement, either written or in practice, between an MTE owner and a service provider that gives the service provider, usually in exchange for some consideration, the exclusive right to certain means of marketing its service to tenants of the MTE.[112] In 2010, the Commission concluded that exclusive marketing arrangements "have no significant effects harmful to [MTE] residents and have some beneficial effects."[113] In declining to regulate such arrangements, the Commission found that exclusive marketing could lead to lower costs to subscribers or partially defray deployment costs borne by buildings, without prohibiting or significantly hindering other providers from entering the building.[114] While we do not revisit that conclusion at this time, we seek comment on whether there are specific circumstances in which exclusive marketing arrangements result in *de facto* exclusive access. In its comments, FBA asserts that exclusive marketing arrangements "inhibit competition in practice because MTE owners misinterpret the otherwise acceptable terms of the agreement."[115] We seek comment on whether and to what extent there is confusion among tenants and/or building owners regarding the distinction between exclusive access agreements, which are not permitted by the Commission's rules, and exclusive marketing agreements, which are permitted. If such confusion exists, how prevalent is it and what might be done to correct it?

28. Would transparency regarding exclusive marketing arrangements reduce any confusion about the impact of exclusive marketing agreements? Should we require specific disclaimers or other disclosures by carriers and covered MVPDs making clear that there is no exclusive access agreement and

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provider who is a first-occupant to a Neutral Host system would account for the compatibility of the system with potential future wireless provider occupants. *See id*. at 6.

102 *MTE Notice of Inquiry*, 32 FCC Rcd at 5389, para. 15; FBA NOI Comments at 12.

103 *See* Hubacher & Ames NOI Comments at 5; Choice Property Resources NOI Comments at 2-3.

104 *See* FBA NOI Comments at 13; INCOMPAS NOI Comments at 15 n.39; INCOMPAS NOI Reply at 13; Lumos NOI Reply at 6-7.

105 47 CFR § 76.802(j); *see also* FBA NOI Comments at 13.

106 FBA NOI Comments at 13.

107 *See* FBA NOI Comments at 3.

108 *See* NCTA Article 52 Comments at 3.

109 *MTE Notice of Inquiry*, 32 FCC Rcd at 5387, 5389, paras. 9, 15; INCOMPAS NOI Comments at 14.

110 *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20237, para. 1 & n.2.

111 *See* NCTA NOI Comments at 3-4 ("Exclusive wiring agreements do not necessarily preclude the provision of service by additional providers, and, in fact, in those states and localities where there are "access to premises" laws, building owners must allow additional providers to offer service.")

112 *See 2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2471, para. 30; *MTE Notice of Inquiry*, 32 FCC Rcd at 5385-86, para. 6.

113 *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2471, para. 29.

that customers are free to obtain services from alternative providers?[116] If so, when, where, how, and in what circumstances should we require carriers and covered MVPDs to make any such disclosures, and how can we ensure that the public would associate the disclosure with the specific buildings to which they relate? How would such a requirement impact the incentives of providers to enter into exclusive marketing agreements and the potential benefits of such agreements for building owners and tenants? What impact, if any, would a disclosure requirement have on small entities? What are the costs and benefits of a disclosure requirement?

D. Other Contractual Provisions and Practices

29. We seek comment on whether there are other types of contractual provisions and non-contractual practices, other than those already mentioned, that impact the ability of broadband, telecommunications service, and video providers to compete in MTEs. If so, what form do these provisions and/or practices take, and how do they impact competition within MTEs? Are any such practices already prohibited under our existing rules?

E. State and Local Policies and Regulations

30. We seek comment on examples of state or local regulations or other policies that have successfully promoted broadband deployment, competition, and access to MTEs. We also seek comment on examples of state or local government programs that have succeeded in improving competition, deployment, and access to broadband in MTE buildings. For example, in response to the *MTE Notice of Inquiry*, Montgomery County, Maryland, explained how it had collaborated with private developers in an effort to spur broadband deployment and how it planned to host a summit that convened architects, building engineers, urban planners, and broadband service providers.[117] Similarly, the City of Boston described how the Boston Planning and Development Agency planned to incorporate broadband competition as an element of its review process for new projects, planned development areas, and institutional master plans.[118] Have such local government programs proved effective?

31. We also seek comment on whether there are state and local regulations, or other state or local requirements, that deter broadband deployment and competition within MTEs because they "prohibit or have the effect of prohibiting" the ability of any entity to provide telecommunications service.[119] Facilities that provide telecommunications service are frequently used for the provision of

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[114] *Id.* at 2472, para. 33; *see also* Hubacher & Ames NOI Comments at 11; RealtyCom NOI Comments at 2; Choice NOI Comments at 2-3; FBA NOI Comments at 9-10; FBA NOI Reply at 3-4 (stating that exclusive marketing and bulk billing arrangements make infrastructure builds possible and tend to improve service quality without stifling competitive entry); NCTA NOI Comments at 6-7.

[115] FBA NOI Reply at 4; *see also* Starry NOI Comments at 5 ("While marketing exclusivity agreements do not explicitly bar other broadband providers from providing service within a building, the overly restrictive language and threatening tone leaves building owners and managers with the impression that they will face litigation for simply allowing their residents a choice in Internet providers.").

[116] *See* FBA NOI Reply at 5 (encouraging the Commission to require MTE owners to provide a disclaimer informing tenants that exclusive marketing arrangements "may not prohibit MTE owners from providing information about other service providers upon request of a tenant or responding to inquiries by tenants or would-be tenants as to other providers in the MTE").

[117] Cities of Boston, Mass. and Portland, Ore., and Anne Arundel and Montgomery Counties, Maryland NOI Reply at 9 (City of Boston et al. NOI Reply).

[118] *Id.* at 8.

[119] *See* 47 U.S.C. § 253(a). The Commission has previously concluded that "[i]nfrastructure for wireline and wireless telecommunication services frequently is the same infrastructure used for the provision of broadband Internet access service, and our ruling today [that state and local moratoria on telecommunications services and facilities deployment are barred by section 253(a) of the Act] will promote broadband deployment." *Wireline*

(continued….)

broadband Internet access service on a commingled basis.[120] What form do any such regulations or legal requirements most often take? Commenters identifying regulations or legal requirements should explain how the provisions in question deter broadband deployment and investment within MTEs, and why they believe the provisions in question violate section 253 of the Act. What should we do to address any such regulations or legal requirements? Sprint argues that state and local governments that own large MTEs should not be able to enter into exclusive access contracts with providers.[121] Do commenters agree, and if so what action—if any—should we take consistent with our authority under section 253?[122]

F. Legal Authority

32. We seek comment on our jurisdiction and statutory authority to address the issues raised in this *Notice*. In prohibiting exclusive access agreements, the Commission has previously relied on sections 201(b) and 628 of the Act. We seek comment on our authority pursuant to these statutory provisions to facilitate broadband, telecommunications service, and video deployment and competition within MTEs.

33. In the past, the Commission has found that sections 201(b) and 628 of the Act provide statutory authority to prohibit the execution and enforcement of anti-competitive contractual arrangements granting common carriers exclusive access to commercial and residential MTEs and covered MVPDs exclusive access to residential MTEs.[123] Section 201(b) of the Act expressly authorizes the Commission to regulate all "charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service," to ensure that such practices are "just and reasonable."[124] In the *2008 Competitive Networks Order*, the Commission found that a carrier's execution or enforcement of an exclusive access provision within an MTE is an "unreasonable practice," and that the Commission thus has "ample authority" under section 201(b) to prohibit such exclusivity provisions in the provision of telecommunications services.[125] Section 628 makes it unlawful for a covered MVPD "to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing . . . programming to subscribers or customers."[126] In the *2007 Exclusive Service Contracts Order*, the Commission held that it had "ample authority under Section 628(b) of the Act to adopt rules prohibiting [covered MVPDs] from executing or enforcing contracts that give them the

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Infrastructure Third Report and Order, 33 FCC Rcd at 7790, para. 167 (citing *Restoring Internet Freedom Order*, 33 FCC Rcd at 424-425, para. 188-190 (reaffirming that the Commission retains statutory authority to regulate facilities that provide commingled services where the Commission has statutory authority over one of the services)).

[120] *See infra* para. 34.

[121] *See* Sprint NOI Comments at 5-6.

[122] While the Commission clarified in the *2018 Wireless Infrastructure Third Report and Order* that its interpretations of sections 253 and 332 applied to government-owned property in the public right-of-way, it did not take a position on whether sections 253 and 332 applied to "government-owned property located outside the public [right-of-way]," such as the government-owned MTEs that may be at issue in this proceeding. 33 FCC Rcd at 9134, para. 92 n.253.

[123] *See* 47 U.S.C. §§ 201(b), 548(b), (g).

[124] 47 U.S.C. § 201(b).

[125] *See 2008 Competitive Networks Order*, 23 FCC Rcd at 5391, paras. 14-15 (citing 47 U.S.C. § 201(b)); *see also* 47 U.S.C. § 254(b)(3) (detailing the Act's overarching commitment to universal service and ensuring consistently competitive and diverse telecommunications service regardless of demographics); 47 U.S.C. § 257(b) (charging the Commission with protecting competition in telecommunications markets, stating that "the Commission shall seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity").

[126] 47 U.S.C. § 548(b), (j).

exclusive right to provide video programming services alone or in combination with other services to [residential MTEs]"[127]—a determination upheld by the D.C. Circuit.[128] The Commission's existing rules thus prohibit both the execution and enforcement of any contractual provisions granting common carriers exclusive access to commercial and residential MTEs and covered MVPDs exclusive access to residential MTEs.[129] We seek comment on whether, if we were to act with respect to revenue sharing agreements, rooftop exclusivity clauses, or exclusive wiring, sections 201(b) and 628(b) would provide us authority to do so for telecommunications carriers and covered MVPDs, respectively.[130] Are there other statutory provisions that grant us sufficient authority to act?

34. As stated by prior Commission decisions, we have authority over infrastructure that can be used for the provision of both telecommunications and other services on a commingled basis.[131] Infrastructure for fixed and mobile telecommunications services frequently is used for the provision of broadband Internet access service,[132] and we believe that any steps we take in this proceeding to promote competition and deployment of telecommunications services within MTEs will simultaneously encourage broadband deployment in MTEs. We therefore believe that we have authority under sections 201(b) to facilitate broadband competition within MTEs, in cases where broadband services are offered over the same telecommunications facilities, to the same extent that we have authority under that provision to facilitate competition in the provision of telecommunications services. We seek comment on the foregoing analysis.

35. Congress also provided the Commission authority under section 628 to prohibit "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing" programming to subscribers or consumers.[133] We seek comment on whether and how we can use this authority to promote competition and deployment of broadband services in MTEs.

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[127] *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20254, para. 40. The Commission recognized that the business model for competitive entrants was a triple-play bundle of video, broadband, and telephone, and that "[a]n exclusivity clause in a [residential MTE's] agreement with a MVPD denies all these [competitive] benefits to the [MTE's] residents." *Id.* at 20245, para. 19.

[128] *NCTA*, 567 F.3d at 666 (concluding "that Section 628(b) authorizes the Commission's action" in the *2007 Exclusive Service Contracts Order*).

[129] *See* 47 CFR § 76.2000 (prohibiting exclusive video programming service contracts in MDUs); 47 CFR § 64.2500 (prohibiting common carriers from entering into or enforcing exclusive service contracts in MTEs).

[130] *See, e.g.*, INCOMPAS NOI Reply at 15-17 (asserting that that the Commission has authority under sections 201 and 628(b) to prohibit the use of anticompetitive contracts in MTEs by any MVPD or telecommunications provider); *see also* Public Knowledge NOI Comments at 6-7.

[131] *See 2018 Wireline Infrastructure Third Report and Order*, 33 FCC Rcd at 7790, para. 167; *Restoring Internet Freedom Order*, 33 FCC Rcd at 424-425, para. 188-190 (reaffirming that the Commission retains statutory authority to regulate facilities that provide commingled services where the Commission has statutory authority over one of the services); *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5924, para. 65 (2007) (applying section 224 to facilities that provide both telecommunications and wireless broadband Internet access service, and applying section 332(c)(7)(B) to facilities providing personal wireless service and wireless broadband Internet access service).

[132] *Restoring Internet Freedom Order*, 33 FCC Rcd at 423, 425, paras. 185, 190 (citing Cisco Systems, Inc. Comments, WC Docket No. 17-108, at 2-3 (July 17, 2017)); Mobilitie, LLC Comments, WC Docket No. 17-108, at 4 (July 17, 2017). For instance, DAS facilities provide telecommunications and other services on a commingled basis. *See Wireless Facilities Siting Order*, 29 FCC Rcd at 12973, para. 270-272 ("[T]o the extent [distributed antenna system] or small-cell facilities, including third-party facilities such as neutral host [distributed antenna system] deployments, are or will be used for the provision of personal wireless services, their siting applications are subject to [section 332(c)(7)].").

[133] 47 U.S.C. § 548(b), (c).

36. *Disclosure Requirements*. To the extent that we impose disclosure requirements, as suggested in the revenue sharing and exclusive marketing discussions, under what basis of legal authority could such requirements apply to ISPs that are not telecommunications carriers under Title II or cable operators under Title VI? We seek comment on whether sections 13 and 257 of the Act, as amended by section 401 of the RAY BAUM'S Act of 2018, provides the Commission with authority to require such disclosures for all Internet service providers, and not just MVPDs and telecommunications carriers.[134] The Commission has previously interpreted section 257 as providing a continuing obligation on the Commission "to identify any new barriers to entry," and that the "statutory duty to 'identify and eliminate'" such barriers "implicitly empower[s] the Commission to require disclosures from third parties who possess the information necessary for the Commission and Congress to find and remedy market entry barriers."[135] Congress replaced the triennial reporting requirement of section 257(c) with a virtually identical biennial reporting requirement in section 401 of the RAY BAUM'S Act, which continues to require the Commission to report to Congress on "market entry barriers for entrepreneurs and other small businesses in the communications marketplace."[136] Section 401 of the RAY BAUM'S Act requires the Commission to assess competition and deployment in the communications marketplace, and to determine whether "demonstrated marketplace practices pose a barrier to competitive entry into the communications marketplace or to the competitive expansion of existing providers of communications services."[137]

37. If we were to act only as to covered MVPDs and telecommunications carriers, would sections 201(b) and 628(b) provide us authority to require revenue sharing and exclusive marketing disclosures? The Commission has previously relied on section 201(b) to ensure that telecommunications carriers convey accurate and sufficient information about the services they provide to consumers.[138] Do we have authority under section 201(b) to require carriers to disclose revenue sharing and/or exclusive marketing agreements in order to ensure that carriers' charges and practices that affect MTE residents are just and reasonable?[139] Section 202(a) of the Act makes it unlawful for common carriers to engage in "unjust or unreasonable" discrimination, to give "undue or unreasonable preference or advantage" to any particular person, class, or locality, or to subject any person, class, or locality to "undue or unreasonable prejudice or disadvantage."[140] Does section 202(a) provide additional authority to require these disclosures as to telecommunications carriers?[141] Under section 218, the Commission has broad authority

[134] *See* 47 U.S.C. § 163(a), (b)(1), (b)(2), (b)(3), & (d) (codifying section 401 of the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018).

[135] *Restoring Internet Freedom Order*, 33 FCC Rcd at 446, para. 232.

[136] 47 U.S.C. § 163(d)(3). Further, the RAY BAUM's Act contains a savings clause, confirming that "[n]othing in this title or the amendments made by this title shall be construed to expand or contract the authority of the Commission." Pub. L. No. 115-141, Div. P, § 403, 132 Stat. at 1090.

[137] 47 U.S.C. § 163(b)(1), (2), & (3).

[138] *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7503-04, para. 21 (1999); *see generally Truth-in Billing and Billing Format*, CC Docket No. 98-170, CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448 (2005); *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges ("Cramming"), Consumer Information and Disclosure, Truth-in-Billing and Billing and Billing Format*, CG Docket Nos. 11-116, 09-158, CC Docket No. 98-170, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 4436, 4476-4479, paras. 114-122 (2011).

[139] *See* 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . .").

[140] 47 U.S.C. § 202(a).

[141] *See* 47 U.S.C. § 202(a).

to obtain "full and complete information" from carriers.[142] Does section 218 grant us authority to impose a revenue sharing and/or exclusive marketing disclosure requirement on carriers?[143] Would section 218 allow us to mandate such disclosures be made to the public? Are there other sources of authority on which we could rely?[144] Would disclosure to the public of the existence or terms of revenue sharing and/or exclusive marketing agreements raise any confidentiality concerns? Would disclosure requirements be consistent with First Amendment jurisprudence?[145]

38. *Sections 253 and 332*. We seek comment on whether sections 253 or 332 can serve as a basis for the Commission to address state or local regulations with respect to facilities deployment and competition within MTEs. Section 253(a) generally provides that no state or local legal requirements "may prohibit or have the effect of prohibiting" the provision of interstate or intrastate telecommunications services,[146] and provides the Commission with "a rule of preemption" that "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers."[147] Section 332(c)(7)(B) provides that state or local government regulation of the siting of personal wireless service facilities "shall not prohibit or have the effect of prohibiting the provision" of personal wireless services.[148] We seek comment on whether the Commission has authority under sections 253 and/or 332 to restrict or prohibit any of the contractual provisions and/or non-contractual practices listed in this *Notice* where a state or local government owns or controls the MTE.[149] Why or why not? Are there other preemptive actions we should take under sections 253 and/or 332 to promote the deployment of next-generation networks and services to MTEs?

39. *Other Authority*. Finally, we seek comment whether there exist any additional sources of authority on which the Commission may rely to prohibit, restrict, or require disclosure of the types of agreements or arrangements on which this *Notice* seeks comment. If so, from where does this authority derive?

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[142] 47 U.S.C. § 218.

[143] *Cf. US West, Inc. v. FCC*, 778 F.2d 23, 26–27 (D.C. Cir. 1985) (acknowledging Commission's authority under section 218 to impose reporting requirements on holding companies that owned local telephone companies).

[144] *See Stahlman v. FCC*, 126 F.2d 124, 126-27 (D.C. Cir. 1942) (citing 47 U.S.C. § 403) (the Commission has "full authority . . . to institute an inquiry concerning questions arising under the . . . Act or relating to its enforcement. This . . . includes authority to obtain the information necessary to discharge its proper functions, which would embrace an investigation aimed at the prevention or disclosure of practices contrary to public interest."). In the broadcast context, the Commission has asserted authority under various statutory provisions to support the requirement that licensees disclose certain agreements in their public inspection files, 47 CFR § 73.3526. *2014 Quadrennial Regulatory Review F Review of the Commission's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket Nos. 14-50 et al., Second Report and Order, 31 FCC Rcd 9864, 10015 & n.1075, para. 356 (2016), *recon. denied in relevant part and granted in part on other grounds*, Order on Reconsideration and Notice of Proposed Rulemaking, 32 FCC Rcd 9802 (2017), *petitions for review pending, Prometheus Radio Project et al. v. FCC,* 3d Cir. Nos. 17-1107 (filed Nov. 3, 2016).

[145] *See Restoring Internet Freedom Order*, 33 FCC Rcd at 438, 448, paras. 215, 235 (concluding that our rule requiring an Internet service provider to publicly disclose "accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings" "readily survives First Amendment scrutiny" and "represent[s] permissible regulation of commercial speech"); *American Meat*, 760 F.3d at 18; *Wall Street Pub. Institute*, 851 F.2d at 372-373.

[146] 47 U.S.C. § 253(a).

[147] *Level 3 Commc'ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 531-32 (8th Cir. 2007).

[148] 47 U.S.C. § 332(c)(7)(B).

[149] *See supra* para. 31.

IV. DECLARATORY RULING

A. State and Local Experimentation Consistent with Federal Law and Policy to Promote Broadband Competition and Access to MTEs Is Permissible

40. At the outset, we emphasize that we welcome state and local experimentation regarding policies to promote broadband and video competition in MTEs. Given the unique challenges regarding broadband and video deployment to MTEs and the potential for a variety of solutions to prove effective, we see significant benefits to states and localities testing a range of approaches. We clarify that we do *not* preempt state and local efforts to promote facilities-based broadband deployment and competition in MTEs so long as those efforts do not contravene federal law and policy.

41. Permissible state and local experimentation may take a variety of forms. For instance, states and localities may consider mandatory access laws that comport with the limits of federal law and policy; requirements for landlords to make disclosures about the availability of broadband and other communications services in their buildings to current and potential tenants; and actions preventing building owners from entering into exclusive access contracts.[150] As an example, states have passed laws that prohibit building owners from entering into agreements that would interfere with the rights of a tenant to obtain communications services without imposing a duty to share building-owned wiring.[151] The Commission has previously declined to preempt mandatory access laws that simply create a right to access—i.e., "a legal right to install and maintain cable wiring in MDU buildings, even over MDU owners' objections."[152] In fact, the Commission's Office of Economics and Analytics found in a recent working paper that these kinds of mandatory access laws are associated with higher rates of broadband adoption among MTE residents.[153] Today, we reaffirm our decision not to preempt mandatory access laws that simply create a right of access.[154] Similarly, if the attached *Notice of Proposed Rulemaking* leads to future Commission actions to encourage broadband and video deployment and competition within MTEs, we will not preempt state and local regulations or requirements consistent with any such prospective Commission actions or associated findings.

B. San Francisco Article 52 Is Preempted to the Extent It Requires the Sharing of In-Use Wiring Because It Conflicts with Federal Law and Policy

42. Article 52 differs from traditional mandatory access laws in that it not only imposes a right to *access* buildings and conduit, it also mandates the *sharing* of the building owner's wiring. Further, Article 52 does not explicitly limit its sharing requirement to *unused* wiring: the ordinance

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[150] *See* 47 CFR §§ 64.2500, 76.2000(a); *see also* City of Boston et al. NOI Reply at 4-9 (noting the actions taken by many state and local governments to ensure access and promote competitive service to tenants in MTEs, including the 19 states that have enacted a variety of mandatory access laws to promote MTEs competition since the 1980s, and efforts by Montgomery County, Maryland to expand the deployment of competitive broadband services and business awareness of the 15 wireline broadband service providers operating within the county); City of Seattle NOI Reply at 2-3.

[151] *See* Me. Rev. Stat. tit. 14, § 6041(1)(B); Mass. Gen. Laws Ann. Ch. 166A, § 22; 39 R.I. Gen. Laws Ann. § 39-19-10(2).

[152] *2003 Inside Wiring Order*, 18 FCC Rcd at 1356-58, paras. 35-41; *see also 1997 Inside Wiring Order*, 13 FCC Rcd at 3748, paras. 188-90.

[153] Steven Kauffman and Octavian Carare, FCC, Office of Economics and Analytics Staff Working Paper 49, "An Empirical Analysis of Broadband Access in Residential Multi-Tenant Environments" (July 2019), https://docs.fcc.gov/public/attachments/DOC-358298A1.pdf. The paper also found that mandatory access laws are associated with higher rates of broadband adoption among non-MTE residents. *Id.* at 9-10.

[154] The City of Boston claims that preempting Article 52 would have a chilling effect on state and local efforts to promote broadband deployment, jeopardizing the city's plans to promote broadband access. City of Boston Article 52 Reply at 9-11. As we explain, however, we encourage efforts to promote broadband competition and deployment in MTEs that are consistent with federal law and policy.

appears to require sharing of *in-use* wiring as well. We question all forms of sharing required by Article 52, and much of our policy analysis below applies without regard to whether the facility at issue is in use. Today, however, we preempt Article 52 to the extent that it would require that building owners share their *in-use* wiring with communications services providers upon request.[155] We do so because our concerns about wire sharing under Article 52 are amplified when the wiring is already in use. Requiring the sharing of in-use facilities reduces investment, slows the deployment of new facilities in MTEs, poses significant technical issues, and undermines the quality of communications services. To the extent that Article 52 requires in-use wire sharing, we find that it interferes with federal policy established by the Act, infringes on the Commission's regulation of cable inside wiring, and intrudes on the Commission's authority over cable signal quality and technical standards.

43. Additionally, the record demonstrates that the ambiguity itself about whether Article 52 requires in-use wire sharing has had a chilling effect on broadband and video investment. San Francisco fails to clarify in the record whether and to what extent Article 52 requires that building owners share in-use wiring, and the possibility that San Francisco may interpret Article 52 to mandate in-use wire sharing exacerbates these concerns about inhibiting investment.

44. Our preemption reflects an incremental approach: we reach only the narrow question of whether Article 52's wire-sharing requirement as applied to *in-use* facilities should be preempted.[156] Unlike unused wire sharing, of which the parties contest the benefits, no party defends in-use wire sharing,[157] and the ambiguity over whether Article 52 imposes an in-use wire sharing mandate has alone chilled investment.[158] The controversy surrounding unused wire sharing, meanwhile, warrants further development of the record, particularly as to the effects it has on broadband competition and deployment. Any further proceedings concerning requests for preemption would also benefit from all parties being able to reference our analysis in this Declaratory Ruling. And although MBC attacks Article 52 in its entirety, most of MBC's and other commenters' filings concern the wire-sharing requirement and only briefly touch on other provisions. We may proceed incrementally,[159] and we do so here while preserving the opportunity to go further with the benefit of a more developed record. We therefore deny without

[155] *See* S.F., Cal., Police Code art. 52, § 5201(b).

[156] Free Press claims that by "leaving open the possibility of further incremental preemption," the Commission may deter smaller ISPs from investing, and that today's decision will discourage cities from experimenting with other open-access models in the future. *See* Letter from Dana Floberg, Policy Manager, Free Press, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 and MB Docket No. 17-91, at 3-4 (filed July 3, 2019) (Free Press *Ex Parte* Letter). As explained above, however, we welcome state and local policies that would encourage broadband deployment. Today's Declaratory Ruling seeks, then, to delineate the boundaries of federal policy in which experimentation is permitted, not leave them obfuscated. *See, e.g., supra* para. 41 (reaffirming that the Commission will not preempt mandatory access laws that simply create a right of access).

[157] Following the public release of a draft version of this item, Free Press noted that "[f]iber has the capacity to allow multiple providers to offer service over the same wires without any interference or quality disruptions. Consequently, as more fiber is deployed, any supposed technological threats of sharing 'in use' wiring will disappear . . . ." Free Press *Ex Parte* Letter at 4. Free Press's argument is limited to fiber, however, and largely theoretical. Moreover, even if fiber does not suffer the kinds of "interference or quality disruptions" typical of other wiring, *id.*, Free Press does not address the remainder of our analysis disapproving of in-use wire sharing.

[158] Contrary to Free Press's claims, *see* Free Press *Ex Parte* Letter at 2-3, such harm is not merely "theoretical," but is currently deterring investment. *See infra* paras. 59-63.

[159] *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) ("Agencies, like legislatures, do not generally resolve massive problems in one fell swoop, . . . but instead whittle away over time, refining their approach as circumstances change and they develop a more nuanced understanding of how best to proceed[.]" (internal citations omitted)); *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (explaining that a problem may be so complicated or novel as to warrant an ad hoc, incremental approach); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1208 (D.C. Cir. 1984) ("[T]he Commission is not constrained . . . to act in one transcendent blow, radically reshaping much of communications law, or not to act at all.").

prejudice the MBC Petition to the extent it seeks preemption of the sharing of unused wiring and other aspects of Article 52.

1. Article 52 Is Ambiguous and May Require the Sharing of In-Use Facilities

45. San Francisco asserts that it enacted Article 52, entitled "Occupant's Right to Choose a Communications Provider," to "enable persons living or working in multiple occupancy buildings in San Francisco to choose among communications providers."[160] Under Article 52, a building owner may not "interfere with the right of an occupant to obtain communications services from the communications services provider of the occupant's choice."[161] A building owner must "allow a communications services provider[162] to . . . use *any* existing wiring [owned by the building owner] to provide communications service,"[163] subject to certain enumerated exceptions.[164] Article 52 defines "existing wiring" as "both home run wiring and cable home wiring, as those terms are defined by the Federal Communications Commission in 47 C.F.R. § 76.800(d) and 47 C.F.R. § 76.5(ll) respectively,"[165] and limits the definition of existing wiring to wiring "owned by a property owner."[166] The record suggests that building owners own most of the home run wiring and cable home wiring found in MTEs today.[167]

46. Under Article 52, a building owner may deny a communications services provider access to existing wiring if providing access would "have a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property."[168] Alternatively, a demonstration by the building owner "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" may serve as grounds for refusing access.[169]

47. According to San Francisco, it enacted the provision requiring the sharing of existing wiring to address two specific concerns. First, San Francisco states that it found that incumbent providers and building owners, by entering into sale-and-leaseback arrangements for inside wiring, restricted

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[160] San Francisco Article 52 Comments at 1.

[161] S.F., Cal., Police Code art. 52, § 5201(a).

[162] Article 52 defines a "communications service provider" as an entity licensed by the California Public Utilities Commission to provide video or telecommunications service, or a telephone corporation under California law. S.F., Cal., Police Code art. 52, § 5200. A provider must also obtain a Utility Conditions Permit from the City.

[163] S.F., Cal., Police Code art. 52, § 5201(b) (emphasis added).

[164] S.F., Cal., Police Code art. 52, § 5206.

[165] S.F., Cal., Police Code art. 52, § 5200. The definitions of home run wiring and cable home wiring in our rules do not specify the technology used (e.g., coaxial cable), and Article 52 does not further define these terms. *See* 47 CFR §§ 76.5(ll), 76.800(d). It is unclear whether Article 52 implicates more than coaxial cable, which affects its applicability to service providers that may, for example, offer triple-play packages over a single, noncoaxial wire, and the record reflects confusion as to what kinds of wiring Article 52 reaches. *See* MBC Petition at 20; San Francisco Article 52 Reply at 7 (contending that inside wiring will not be shared because of technical issues related to both twisted-pair wiring and coaxial video cabling); CALTEL Article 52 Comment at 3 (asserting, without explanation, that Article 52's definition of "existing wiring" encompasses only "coaxial cable inside wire," as distinct from "twisted-pair telecommunications wiring"). In any event, we preempt any forced sharing of in-use wiring required by Article 52, regardless of whether such wiring is coaxial cable or some other form.

[166] *Id.* Section 5200 defines a "property owner" as "a person that owns a multiple occupancy building or controls or manages a multiple occupancy building on behalf of other persons."

[167] *See* CALTEL Article 52 Comments at 22.

[168] S.F., Cal., Police Code art. 52, § 5206(b)(5)(C). A building owner may also deny access on other grounds, such as for failure to "verify that one or more occupants of the [MTE] have made a request for services." S.F., Cal., Police Code art. 52, § 5206(b)(2).

competing communications services providers' access to MTEs.[170] Second, the City hoped to minimize the cost of replicating existing wiring where feasible, which it found made it cost prohibitive for many competitive carriers to provide service.[171]

48. Based on the record, it appears that Article 52 is the only mandatory access law in the country that requires that building owners provide new communications providers access to existing home run and cable home wiring. In fact, Article 52 sweeps so broadly that it appears to mandate not only the sharing of existing building-owned wiring—already a significant distinction—but also *in-use* wiring.[172] The ordinance states that a building owner must make available "*any* existing wiring" owned by the building owner, without qualification as to in-use or unused, to a requesting communications services provider.[173] The plain language suggests that existing "in-use" wiring would be included within that requirement, since the language is so broadly applicable.

49. Although San Francisco and other commenters argue either that section 5206's exceptions to Article 52's wire-sharing requirement make in-use wire sharing impossible or highly unlikely, we find these arguments unconvincing for three reasons.[174]

50. *First*, Article 52 lacks a provision that explicitly limits wire sharing to unused facilities. Section 5206(b)(5)(C) allows building owners to reject applications to use building-owned wiring if the new "communications services 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," but it does not specifically refer to and exempt in-use wiring. Moreover, what constitutes a "significant, adverse effect" is unclear—does, for example, one customer's impaired use qualify as "significant"? Arguably, an effect on a small number of customers may not qualify as significant, leaving room for uncertainty and potentially rendering the exception inapplicable.[175]

51. San Francisco, which has responsibility for enforcing Article 52, does not rule out that Article 52 may be invoked to require in-use wire sharing.[176] It instead sidesteps the issue, indicating that the record "suggest[s] sharing of existing wiring may not be technically feasible in many buildings" and that "[n]o reasonable provider would opt to share inside wiring when separate wiring is readily

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[169] S.F., Cal., Police Code art. 52, § 5206(b)(3).

[170] San Francisco Article 52 Comments at 5-6. San Francisco also claims, without explanation, that such arrangements sidestepped the Commission's prohibition on exclusive access agreements. *Id.* at 5.

[171] San Francisco Article 52 Comments at 5-6.

[172] For the purposes of this Declaratory Ruling, "in-use wiring" refers to home run or cable home wiring currently being used by a communications services provider to deliver service. *See* Letter from Steven F. Morris, Vice President and Deputy General Counsel, NCTA, to Marlene H. Dortch, FCC, GN Docket No. 17-142 and MB Docket No. 17-91, at 1 (filed June 28, 2019) (suggesting that the definition of in-use wiring should apply to "wiring currently being used to provide service in the MTE more generally (e.g., in-building WiFi . . .)." The term "in-use wiring," as we use it, does not encompass wiring supporting passive distributed antenna systems (DAS) because such wiring is not used to provide fixed service in the MTE.

[173] S.F., Cal., Police Code art. 52, § 5201(b) (emphasis added).

[174] San Francisco Article 52 Reply at 6. FBA and CALTEL similarly argue that in-use wire sharing would not occur because exceptions to Article 52 allow building owners the opportunity to deny installation if a new service provider would disrupt existing service. *See* FBA Article 52 Reply at 4 (citing S.F., Cal., Police Code art. 52, § 5206(b)(5)(C)); CALTEL Article 52 Comments at 16-18.

[175] *See* Sares Regis Article 52 Reply at 11.

[176] *See generally* San Francisco Article 52 Comments; San Francisco Article 52 Reply.

available."[177] These statements, however, at best support San Francisco's asserted conclusion that sharing of in-use wiring is unlikely.[178]

52. The Fiber Broadband Association (FBA) similarly contends that Article 52's wire-sharing requirement only applies when the building owner's wiring "lies fallow after a resident discontinues the incumbent's service due to an exclusive wiring arrangement."[179] But neither San Francisco nor FBA point to any provision explicitly limiting the wire-sharing requirement to "fallow" or unused wiring. While FBA cites section 5206(b)(5)(C)'s "significant, adverse effect" language in support of its argument, that section, as discussed above, does not effectively cabin the wire-sharing requirement.

53. FBA further contends that "[t]ypically, residents . . . discontinue their existing bundled service, making the wiring for their home available for use by the new provider," and "[o]nly one provider would use the wiring at the time."[180] But FBA also concedes that it is possible a subscriber would continue receiving "service from an existing provider . . . while taking service from a second provider."[181] As noted by other commenters, such situations may occur more commonly in San Francisco than in other locations because higher-cost areas such as San Francisco have many apartments that rent by the bed or room, not the unit.[182] Under Article 52, each of the occupants of an apartment could select a different preferred communications provider, which would then be able to request and use the existing wiring.[183]

54. *Second*, building owners may be disinclined to object to any requests by communications services providers, even to share in-use wiring, because of Article 52's unbalanced enforcement procedures. The ordinance imposes stiff penalties on building owners if they improperly deny access to their buildings but does not impose the same penalties on communications services providers for violations of Article 52.[184] This "asymmetric enforcement regime" will likely dissuade building owners from objecting to requests for access even if they result in the sharing of in-use wiring that may impair

[177] San Francisco Article 52 Reply at 6, 7.

[178] Following the public release of a draft of this item, San Francisco for the first time claimed that "Article 52 does not require sharing of 'in-use' wiring." Letter from Dennis J. Herrera, City Attorney, City and County of San Francisco, California, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 and MB Docket No. 17-91, at 2 (filed July 2, 2019) (San Francisco *Ex Parte* Letter). In support of this conclusion, San Francisco claims without textual support that Article 52 does not apply when sharing is not technically feasible—and then repeats its claim that wire sharing is not feasible. Although wire sharing may be unlikely, that does not render the possibility moot nor does San Francisco's last-minute claim eliminate the chance that a party, a court, or the city itself will reinterpret Article 52 to impose in-use wire sharing. Accordingly, we find this Declaratory Ruling necessary to eliminate any controversy on whether federal law preempts in-use wire-sharing requirements.

[179] FBA Article 52 Reply at 4; *see also* CALTEL Article 52 Comments at 3.

[180] FBA Article 52 Comments at 23.

[181] *Id.*; *accord* Declaration of Dan Terheggen, Ex. B to MBC Petition, ¶ 13 (Terheggen Decl.) ("[W]hen 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."); NCTA Article 52 Comments at 4 (arguing that when a customer purchases service from two or more providers, "there is a heightened risk that a new provider will simply take control of the wiring to a unit even if an existing provider is still providing service," which may result in disconnection of existing services); Declaration of Richard Holtz, Ex. B. to NMHC Article 52 Comments, ¶ 3 (Holtz Decl.) ("Because most MSOs and ILECs use a single cable to carry voice, video, and data signals, another provider that performs a cross-connect to deliver a requested service to a resident may cause an unwanted disconnect of other services that the same resident was receiving."); Declaration of Scott Casey, Ex. D to NMHC Article 52 Comments, ¶ 5 (Casey Decl.) ("A provider who takes use of a coaxial home run in order to deliver Internet service to a requesting resident will, in many cases, unwittingly disconnect that resident's bulk video service."); Avalon Bay

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existing service.[185] This fact further distinguishes Article 52 from other mandatory access laws.[186]

55. *Third*, Article 52 creates problems of administration that in practice may lead to the sharing of in-use facilities. Article 52 contains no specific provision requiring notice of changes to existing providers, raising the likelihood of both intentional and inadvertent disconnections of service in the course of new providers entering the building,[187] contrary to the congressional goal of protecting subscribers from service disruptions.[188] And the probability of these disconnections is only increased because the practical effect of Article 52 requires building owners to referee disputes among providers about wiring, even though building owners generally lack the expertise to do so.[189] Additionally, as a trade group of apartment building owners observes, "[m]ost wiring closets in MDUs are a patchwork of cables that the building owner relies on existing service providers to navigate," making it difficult in practice for building owners to "determine whether wiring is 'idle' or 'disconnected and replaced.'"[190] By shifting responsibility to building owners, Article 52 requires them to manage their existing facilities regardless of their capability to do so.

56. We need not definitively determine whether Article 52 requires building owners to permit the sharing of in-use wiring. As discussed below, the record demonstrates that the appearance alone is enough to have a significant deterrent effect on investment. Significantly, San Francisco itself did not attempt to define the boundaries of the wire-sharing provision prior to MBC's petition, and it continues to evade the question. The Commission, meanwhile, has not addressed this precise issue before today. Thus, while Article 52 contains language stating that "[n]othing [in the ordinance] shall be interpreted or applied so as to create any requirement, power, or duty in conflict with any federal . . . law,"[191] additional clarity is needed. Preemption is therefore warranted to eliminate the chilling effect caused by the law's ambiguity, as well as to prevent other harmful effects discussed below. As we explain, an in-use wire sharing requirement reaches far beyond traditional mandatory access laws and conflicts with federal law and the Commission's regulations. We therefore preempt Article 52 to the extent it mandates in-use wire

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Article 52 Comments at 5 ("For apartment units with multiple, unrelated adult tenants (which is increasingly common in dense, high-rent markets like San Francisco), we anticipate issues in a shared wiring scenario where one resident's services will be disrupted when another resident within the same unit selects an alternative provider."); Declaration of Michael Manelis, Ex. C to NMHC Article 52 Comments, ¶ 8 (Manelis Decl.) (observing that wire sharing leads to a "significant increase in damage to wiring and unwanted disconnections of service").

[182] Elauwit Networks Article 52 Comments at 5-6 ("[T]he use of common wiring, communication rooms, and lock-boxes by two or more providers usually results in interference . . . . This is especially true in student housing where unlike in conventional housing, which is rented by the unit, student housing typically rents by the *bed*. So if one student 'occupant' in a three-bedroom unit requests service and the incoming provider takes the home run to that unit, it would deprive the residents of the *other* two bedrooms of the bulk service for which the property owner contracted.").

[183] S.F., Cal., Police Code art. 52, § 5201 (establishing that a "property owner interferes with the *occupant's* choice of communications services provider by . . . refusing to allow a communications services provider to . . . use any existing wiring to provide communications services" (emphasis added)); S.F., Cal., Police Code art. 52, § 5200 (defining "occupant" broadly as "a person occupying a unit in a multiple occupancy building").

[184] *See* S.F., Cal., Police Code art. 52, § 5213 (imposing civil penalties on "[a]ny property owner that violates this Article 52"); *see also* NCTA Article 52 Comments at 5-6; MBC Article 52 Reply at 11-12 ("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. . . . Meanwhile, property owners have no recourse in the event of a dispute with a communications service provider."). Despite also being subject to obligations under Article 52, *see* S.F., Cal., Police Code art. 52, §§ 5204, 5205, communications services providers do not face these same civil penalties in the event of noncompliance. *See id.* at §§ 5204, 5205, 5213.

[185] MBC Article 52 Reply at 11-13.

sharing while denying, without prejudice, MBC's petition in all other respects.[192]

2. To the Extent Article 52 Requires Sharing of In-Use Wiring, It Reduces Deployment, Causes Technical Problems, and Intrudes on Commission Regulation of Cable Inside Wiring and Commission Authority over Cable Signal Quality

57. We preempt Article 52 to the extent it requires sharing of in-use wiring on three independent grounds: (1) it impedes federal policy of promoting facilities-based competition as a means of encouraging deployment, investment, and innovation in broadband and other communications infrastructure and services; (2) in-use wire sharing infringes on the Commission's regulation of cable inside wiring; and (3) an in-use wire sharing requirement intrudes on the Commission's authority over cable signal quality and technical standards and is inconsistent with the Commission's prior decision not to mandate wire sharing.

a. An In-Use Wire Sharing Requirement Reduces Deployment, Service, and Quality, Frustrating the Act

58. As the record demonstrates, an in-use wire sharing requirement would generate numerous problems for both MTEs and communications services providers, including technical, service quality, and economic challenges. These issues stem from Article 52's imbalance between promoting the ability to reach customers while preserving adequate incentives to deploy, maintain, and upgrade infrastructure. By contrast, Congress and the Commission carefully balanced these factors in devising, for example, the prohibitions on exclusive access agreements with MTEs, the cable inside wiring rules, and the pole attachment rules. Congress's and the Commission's approach to access and sharing embody this balance: regulation that allows *access* to infrastructure such as poles, conduit, and buildings is vital for new

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[186] *See id.* (explaining how Connecticut's mandatory access statute, which FBA claims was a model for Article 52, includes equivalent enforcement mechanisms for any party, rather than only against property owners).

[187] NCTA Article 52 Comments at 5-6; Sares Regis Article 52 Reply at 13-14 (noting that nothing in Article 52 requires incoming providers to specify the type of wiring it intends to use, making it difficult for building owners to determine if the wire is currently unused). In the pole attachment context, when the Commission adopted OTMR, which allows new pole attachers to move the facilities of existing attachers, the Commission designed a regime that imposed notice and coordination obligations on the new attachers to protect existing attachers. *See Wireline Infrastructure Third Report and Order*, 33 FCC Rcd at 7737-41, paras. 65-72. Unlike our OTMR regime, which only allows new attachers to *move* equipment, Article 52 potentially provides a new provider serving an MTE the right to actually *use* the same equipment; yet it provides none of the notice or other safeguards the Commission established when adopting OTMR. Similarly, when incumbent LECs make changes to their network that affect the "transmission and routing of services" that use the incumbent LECs' network, the Act and Commission regulations require that they provide "reasonable public notice." *See* 47 U.S.C. § 251(c)(5); 47 CFR §§ 51.325-51.335.

[188] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring,* Notice of Proposed Rulemaking, 7 FCC Rcd 7349, 7349, para. 2 (1992) (noting that Congress sought "to protect terminating subscribers from unnecessary disruption and expense caused by removal of internal wiring" and foster competition among MVPDs) (citing H.R. Rep. No. 628, 102d Cong., 2d Sess. (1992) at 118; Senate S. Rep. No. 92, 102d Cong., 1st Sess. (1991) at 23); *1997 Inside Wiring Order*, 13 FCC Rcd at 3706, para. 94 (statutory directive to adopt rules for disposition of inside wiring promotes competition by protecting subscribers from disruption in service when they terminate service by their existing provider and subscribe to service from a competing provider).

[189] NMHC Article 52 Reply at 6 ("San Francisco also makes unrealistic assumptions about the technical abilities of MDU owners by assuming that owners will have the expertise to identify when use of existing wiring is technically infeasible . . . [O]wners . . . do not have the ability themselves to identify technical infeasibility. It is therefore impractical to assume that owners will be able to rely on their assessment of technical infeasibility to refuse resident requests for wire sharing"); Sares Regis Article 52 Reply at 6-7 ("[T]he City implausibly views it as an MDU owner's responsibility to make th[e] determination [if sharing is technically feasible]. This puts owners in an

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competitors to overcome a barrier to entry, and allowing reasonable access to such infrastructure does not significantly impede the owner's ability to make effective use of the infrastructure. Conversely, *sharing* mandates akin to Article 52 are more likely to deter investment in circumstances where the marketplace can support multiple facilities-based service providers, and are more likely to impede the owner's ability to make effective use of the facility.[193] Article 52 not only ignores these policy considerations but undermines both Congress and the Commission's efforts, leading us to act today.

59. *Article 52's Effects on Investment and Quality of Service*. Article 52's ambiguity as to whether it requires not only sharing of unused wiring but in-use wiring has deterred investment by both building owners and communications services providers.[194] We agree with commenters expressing concern that Article 52 creates a scenario in which building owners "can no longer control the wiring they install," thus making them "far less likely to expend capital on state of the art fiber and other wiring needed to provide high-quality [s]ervices" within MTEs.[195] Those who wish to make use of a building owner's wiring know that they have a regulatory right to share the facility, so they do not need to offer the building owner the same compensation for use that they would otherwise need to in the absence of a regulatory mandate. Thus, the building owner is deprived of compensation, which it may not be able to otherwise recover. Consequently, Article 52 reduces the value of wiring to a building owner, and therefore the building owner has less incentive to invest in deploying new, additional, or upgraded wiring. Moreover, "[i]n some cases, a service provider may agree to install and convey to a building owner new or upgraded wiring and equipment to serve the building in return for exclusive use of that wiring for some period of time," but "any service provider would have significantly diminished incentives to invest in [MTE] wiring if the wiring it installed and upgraded could be used by a competitor who bore none of the wiring's costs and without regard for the necessity of the investing service provider to generate a return on its wiring investment."[196] As a result, Article 52 "effectively discourages facilities-based competition and infrastructure investment" in MTEs and "harms broadband deployment."[197]

60. The record reflects that Article 52 is in fact complicating and deterring investment by

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untenable position . . . because this approach rests protection of residents' service quality on the shoulders of an MDU property manager who will undoubtedly not be a telecommunications engineer with the knowledge and expertise necessary to make an informed evaluation of such risks.").

[190] NMHC Article 52 Reply at 5-6 (also stating that "an existing service provider will not provide such status to protect its customer's privacy. Also, many apartments are occupied by more than one person, making it extremely unlikely that an owner could determine which wire goes where, whether it is in use, for what service(s), and for which resident(s)."). *See* Sares Regis Article 52 Reply at 15-16 & Image 1 (illustrating how complicated cabling can be within a residential MTE lockbox). The Commission's cable inside wiring rules do not raise similar issues, because they only apply when a cable provider is terminated and any affected wiring could not be in use.

[191] S.F., Cal., Police Code art. 52, § 5218.

[192] We may preempt an interpretation of state law while preserving other possible interpretations. *See generally Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460 (1997), *review denied sub nom. City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir. 1999) (preempting a provision of state law to the extent that state officials' interpretation thereof was determined by the Commission to conflict with section 253 and other provisions of the Act).

[193] These economic and technical distinctions explain why we view use of poles, ducts, conduits, and rights-of-way by multiple parties as "access" and use of a transmission wire by multiple parties as "sharing." We note that in referencing the owner's ability to make effective use of the infrastructure or facility, we include within that concept use by a lessee or other party to whom the owner willingly chooses to give usage rights.

[194] *See, e.g.*, RealtyCom Partners Article 52 Comments at 4; Mill Creek Article 52 Reply at 2-4; Camden Property Trust Article 52 Comments at 7.

[195] RealtyCom Article 52 Comments at 5.

[196] NCTA Article 52 Comments at 3-4.

communications services providers.[198] RealtyCom reports that "[a]t least one major Service Provider in San Francisco has already informed us that its policy to accept contractual responsibility for repairs and maintenance of Owner-owned inside wiring will change in the San Francisco market as a result of Article 52," likely due to it being "[un]able to enforce an exclusive contractual right to use the Owner's inside wiring . . . ."[199] Article 52 thus creates confusion as to who is responsible for the maintenance of inside wiring. As explained by Equity Residential, a real estate investment trust which owns 2,440 units in San Francisco:

> We are not a telecom provider, do not have employees with telecom or wiring expertise, and are therefore in no position to diagnose service problems and maintain and upgrade wiring. We rely on our telecom partners, who are experts in the field, to evaluate and address problems with wiring. . . . Without those obligations for wiring responsibility, we run a greater risk of service disruption, degradation of quality, and eventual system obsolescence.[200]

61. The threat of sharing facilities has chilled investment by both communications services providers and building owners in part because building owners must bear increased costs for the installation and maintenance of wiring without the benefit of exclusive control. Mill Creek Residential Trust, which owns several buildings in San Francisco and routinely allows four communications services providers to serve tenants and sometimes as many as six providers in a single building, commented that "since the passage of Article 52, the market has changed in San Francisco" and detailed how multiple communications services providers have changed their policies and now refuse to install inside wiring, or insist that Mill Creek absorb the full cost of wiring.[201] According to Mill Creek, a "major communications provider stated that, if Mill Creek would not accede to its terms, it would wait for Mill Creek to install inside wiring in its apartment communities, then overbuild its distribution plant and exercise its rights under Article 52 to gain access to Mill Creek's inside wiring," though it later claimed to be "just joking."[202] Joke or not, the mandated sharing of facilities reduces incentives for the facilities owner to invest in and maintain these facilities, as the Commission has found in the unbundling context.[203]

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[197] Prometheus Article 52 Comments at 1; *see also* RealtyCom Article 52 Comments at 5; Spot On Networks Article 52 Comments at 2-3 (explaining how the building owner's control over inside wiring allowed the offering of "WiFi Calling to augment the cellular services in the building which are practically non-existent"). While we acknowledge that some of these arguments apply to the sharing of unused wiring, as discussed, we proceed incrementally and only preempt the sharing of in-use wiring at this time.

[198] Even if other aspects of Article 52, which we do not preempt, have had positive effects on broadband deployment, *see* Free Press *Ex Parte* Letter at 2, the record does not indicate that an in-use wire sharing requirement is a cause for such growth. Further, both providers cited by Free Press as examples of smaller and mid-sized ISPs expanding their reach due to Article 52, Monkeybrains and Sonic, disclaim or do not rely on in-use wire sharing. *See* Letter from Preston Rhea, Director of Field Operations, Another Corporate ISP, LLC, dba Monkeybrains, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142 and MB Docket No. 17-91, at 2 (filed July 3, 2019); Declaration of Dane Jasper, Attach. to CALTEL Article 52 Comments, ¶ 23 (Jasper Decl.).

[199] RealtyCom Partners Article 52 Comments at 4.

[200] Manelis Decl. ¶ 6 (explaining that exclusive "wiring provisions in [their] agreements are critical to ensuring quality service to residents").

[201] Mill Creek Article 52 Reply at 2-4.

[202] *Id.* at 4-5.

[203] *See Triennial Review Order*, 18 FCC Rcd at 17141, para. 272; *Triennial Remand Review Order*, 20 FCC Rcd at 2555, para. 36.

62. In a similar vein, many commenters argue that disconnections of service and subsequent declines in quality increase when there is a lack of clear lines of accountability over inside wiring and other communications infrastructure located inside buildings.[204] Avalon Bay, a company which owns more than 2,000 apartments in San Francisco, explains that it "frequently install[s] multiple home runs of cabling to ensure each provider has exclusive use of the wiring specifically designated for its use," because where it previously allowed shared wiring, it "experienced damaged cabling as technicians continually cut the wire to replace tips with their own connectors, a significant increase in service disruptions as residents were accidentally or intentionally disconnected during connection of service to another resident, and an increased number of failed service installations due to providers moving wiring around."[205] Likewise, Camden Property Trust, which encourages facilities-based competition by "routinely install[ing] extra conduit, microduct, and other pathways to enable entry by additional services providers," contends that shared wiring results in service disruptions and poor maintenance of wiring.[206] Relatedly, a number of commenters argue that Article 52 requires building owners to referee disputes between providers, particularly when customers are disconnected, despite their lack of knowledge or tools to adequately do so.[207]

63. An in-use wire sharing requirement would also potentially introduce technical problems that would deter investment. Commenters note that Article 52 allows service providers "to disconnect wiring that delivers signals to a smart door lock, learning thermostat, home automation hub, or other devices, creating enormous operational problems and legal liability for the property owner."[208] Under such a regulatory scheme, some parties claim that they "cannot safely and confidently invest in deploying such advanced technologies" within MTEs.[209] Commenters also contend that Article 52 deters owners and service providers from implementing upgrades to existing facilities and services, thereby reducing the quality of services for consumers and creating an upgrade gap between those consumers residing in MTEs and those who do not.[210] And beyond deterring deployment and infrastructure investment, some building owners contend that Article 52's in-use wire sharing requirement may make it difficult for owners and

[204] Declaration of Matt Duncan, Ex. E to NMHC Article 52 Comments, ¶¶ 4-5 (executive of REIT explaining that when they allowed two providers "non-exclusive use" of home run wiring in an MTE, residents "suffered due to the providers' inability to coexist in a competitive environment with shared wiring rights. In effect, the home runs have become a battleground between the providers" due to repeated advertent and inadvertent disconnections); Avalon Bay Article 52 Comments at 4-5 ("We recently experienced a recurring issue at a community . . . where an existing resident's service delivered by one provider was disconnected as another provider connected service for a new resident. The issue was due to wiring problems, and the existence of strong agreements with clarity for wiring responsibility ensured the two providers worked together to solve the issue," without which "the providers would have continued to point fingers at each other and our residents would still be suffering from poor service."); Camden Property Trust Article 52 Comments at 5-6; Consolidated Smart Systems Article 52 Comments at 5-6.

[205] Avalon Bay Article 52 Comments at 3-4.

[206] Camden Property Trust Article 52 Comments at 4-6; Essex Property Trust Article 52 Reply at 3-4 (owner of 2000 apartments existing or under construction in San Francisco). *See also* Sares Regis Article 52 Reply at 7-8 ("The only way an MDU owner can effectively eliminate such conflicts [over potential interference] is by giving each provider exclusive use of a designated home run. If there are not enough existing runs of wiring to go around, and an incoming provider is unwilling to install its own wiring, the owner must decide which service provider would best serve residents' needs.").

[207] RealtyCom Article 52 Comments at 5 ("When multiple Service Providers try to connect to the same run of inside wiring and when no Service Provider has any contractual obligation to repair and maintain such wiring, our experience is that the telecommunications closets and lockboxes where these multiple connections to wiring are made are often a mess . . . . In these unmanaged situations, Owners will likely attempt to police the shared use of the wiring and Owners may try to take on repair and maintenance responsibilities which Owners are generally not qualified to perform."); Holtz Decl. ¶ 7 (Article 52 likely to "result in . . . MDU owners having to perform work for which they generally lack the technical wherewithal"); Manelis Decl. ¶ 7 (REIT, which has 2,440 units in San Francisco, contends that Article 52 "will discourage any of our telecom partners from taking on the maintenance and upgrade responsibilities we typically require, since the wiring may be used by any number of other providers.

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providers to rectify in-building coverage issues because the ordinance could allow in-use wiring to be redirected from or negatively impact its intended use.[211]

64. *Article 52's Inconsistency with Congressional and Commission Policies*. Article 52 evinces a failure to consider the deterrent effect that mandatory sharing can have on investment. In stark contrast to Article 52's deficiencies, the Commission's MTE exclusive access orders, cable inside wiring rules, and pole attachment rules promote access to infrastructure while avoiding overly burdensome sharing mandates that undermine incentives to invest.

65. The Commission's series of MTE exclusive contracts orders from 2000 to 2010, unlike Article 52's in-use wire sharing mandate, promote competitive access without burdensome and counterproductive reductions in incentives to invest. In these orders, the Commission prohibited telecommunications carriers and MVPDs from entering into or enforcing exclusive access agreements with MTEs because, among other reasons, exclusive access agreements "discourage the deployment of broadband facilities."[212] These actions provided new entrants into the broadband, video, and telecommunications market access to MTEs and their customers.[213] Contrary to FBA's misreading of the *2007 Exclusive Service Contracts Order*, which they assert supports their view that exclusivity does not increase investment,[214] the Commission also deliberately preserved incentives to invest for MTE owners and incumbent providers by permitting some degree of exclusivity, including exclusive wiring arrangements, exclusive marketing arrangements, and bulk billing.[215] To the extent Article 52 requires the sharing of in-use wiring, it ignores these considerations. Rather than promoting access to buildings and customers, Article 52 requires building owners to share existing facilities. And the forced sharing of in-use facilities reduces incentives for incumbent providers and building owners to invest in shared infrastructure and encourages providers to take advantage of existing infrastructure rather than building

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Except on the rare occasion when we can clearly determine who damaged inside wiring, repair obligations will fall to [the REIT]."); Avalon Bay Article 52 Comments at 3-4.

208 Camden Property Trust Article 52 Comments at 7; *see also* Mill Creek Article 52 Reply at 6 (stating that "Mill Creek is developing plans to deploy Ethernet wiring to each unit at its apartment communities in preparation for hub-based home automation devices, power over Ethernet door locks, and Wi-Fi calling," and that "[t]here is zero incentive for Mill Creek to invest in forward-looking infrastructure, if communications services providers can wrest control of that inside wiring for their own benefit" as they could "[u]nder the terms of Article 52").

209 Camden Property Trust Article 52 Comments at 7; Mill Creek Article 52 Reply at 6.

210 *See* Manelis Decl. ¶ 9 ("Article 52 also discourages owners from making significant investments to upgrade or future-proof low voltage infrastructure, since a property owner cannot exercise reasonable control over its future use."); *see also* Holland Partner Group Article 52 Comments at 4 (stating that if Holland loses control over which providers can serve its properties, it may be required to raise rents and service quality for tenants will decrease).

211 *See* Mill Creek Article 52 Reply at 6 ("[I]f Mill Creek installs additional cabling to address in-building cellular coverage issues (*i.e.*, wiring to each unit and common areas to implement a full-property inbuilding wireless system), that wiring can be redirected from its intended use, making it difficult if not impossible for Mill Creek to rectify in-building coverage issues.").

212 *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20243-44, para. 16. *See also id.* at 20236, para. 1; *2000 Competitive Networks Order*, 15 FCC Rcd at 22985, para. 1; *2008 Competitive Networks Order*, 23 FCC Rcd at 5386, para. 5.

their own.[216] These deleterious outcomes would frustrate the policies the Commission sought to achieve in the MTE orders, and this fact informs our decision to preempt in-use wire sharing.

66. Similarly, Article 52's in-use wire sharing requirement ignores the policy judgment embodied in the Commission's cable inside wiring rules. In those rules, the Commission crafted a balanced scheme that promoted new entry by non-incumbent MVPDs by allowing them use of existing home run and cable home wiring in residential MTEs after the incumbent MVPD was terminated. At the same time, the cable inside wiring rules took steps to give residential MTE owners ultimate ownership and control over the home run and the cable home wiring.[217] The Commission rules thus preserved building owners' incentives to maintain and upgrade their facilities. By making these same facilities available to any provider on request even if the facilities are in use, in contrast to other mandatory access laws, Article 52 undermines the balance struck by the cable inside wiring rules and threatens to lead to depressed levels of investment in inside wiring.

67. Article 52 imposes an extreme form of wire sharing on building owners without considering incentives for infrastructure investment, in contrast to federal policy in the unbundling context. Although building-owned inside wiring is not an incumbent LEC facility, a comparison between Article 52 and the section 251(c)(3) regime demonstrates how Article 52 fails to consider incentives by facilities owners to invest. First, when Congress passed the 1996 Act, it viewed limited, regulated access to certain incumbent LEC facilities as necessary to open the local exchange market to competition, a market that had previously been viewed as a natural monopoly.[218] By way of contrast, due in significant part to Commission efforts to promote access to MTEs, many MTEs have more than one broadband provider.[219] San Francisco's unique and extreme approach to mandatory sharing—which applies without regard to competition rather than as a limited market-opening mechanism in response to a monopoly—thus goes far beyond the mandatory sharing regime Congress created through section 251.[220] Second, in determining which network elements should be subject to unbundling, the Commission has historically balanced the entry-encouraging effects of unbundling with its potential to dampen investment in new

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[213] *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20261, para. 54 (finding that the exclusive access prohibition "will promote the development of new technologies that will provide facilities-based competition to existing cable operators").

[214] FBA Article 52 Reply at 5-6.

[215] *2007 Exclusive Service Contracts Order*, 22 FCC Rcd at 20237, para. 2 & n.2; *2010 Exclusive Service Contracts Order*, 25 FCC Rcd at 2461, 2463, 2464, paras. 2, 9, 11.

[216] *See* Mill Creek Article 52 Reply at 2-5; RealtyCom Partners Article 52 Comments at 4-5.

[217] *1997 Inside Wiring Order*, 13 FCC Rcd at 3689-91, paras. 58, 60, 61; *2003 Inside Wiring Order*, 18 FCC Rcd at *Id.* at 1349-50, paras. 14-15.

[218] *See Local Competition Order*, 11 FCC Rcd at 15499, para. 1 ("In the old regulatory regime government encouraged monopolies. . . . The 1996 Act adopts precisely the opposite approach. Rather than shielding telephone companies from competition, the 1996 Act requires telephone companies to open their networks to competition."); *id.* at 15500, para. 4 ("[U]nder the 1996 Act, the opening of one of the last monopoly bottleneck strongholds in telecommunications – the local exchange and exchange access markets – to competition is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets."). *See also* FCC, Common Carrier Bureau, Industry Analysis Division, Local Competition Report at 5 (1998), https://transition.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcomp98.pdf at 5 (finding incumbent LECs had 99% of share of local voice market).

[219] NMHC NOI Comments at 3; NMHC Article 52 Comments at 6 (citing NMHC surveys finding that most MTE residents have access to multiple providers).

[220] Unbundled network elements (UNEs) are "shared" in the sense that the incumbent LEC must allow a competitive LEC to use the required facility under specified circumstances at cost-based rates, not in the sense that incumbent LEC and competitive LEC use the same facility at the same time. *See Local Competition Order*, 11 FCC Rcd at

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infrastructure and technologies.[221] Thus, for example, the Commission chose not to require unbundling of next-generation networks and dark fiber loops after determining that doing so would harm innovation and reduce incentives for deployment.[222] Moreover, Congress gave the Commission the power to forbear from unbundling requirements if certain statutory factors are met.[223] Although the unbundling scheme established by Congress and implemented by the Commission thus includes careful limitations and safeguards to ensure ongoing necessity and balance, Article 52 imposes unbundling-like requirements on building owners on an ongoing basis irrespective of necessity or value.

68. In the pole attachment context, Congress and the Commission have created a framework that provides access to infrastructure without sharing of wiring, in contrast to Article 52. Congress granted the Commission authority under section 224 of the Act to ensure that telecommunications carriers and cable television systems have nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way.[224] Congress and the Commission have recognized that access to poles and other broadband infrastructure is necessary for the deployment of a competitive broadband network.[225] Congress has also acknowledged that due to the significant costs of installing new utility poles or underground cables, and environmental and zoning factors, "there is often no practical alternative [for network deployment] except to utilize available space on existing poles."[226] To this end, the Commission recently relied on its section 224 authority to adopt an OTMR regime and other pole attachment reforms that promote greater access for communications providers to utility poles.[227] Importantly, while section 224 provides for and the Commission's pole attachment regime aims to increase access to utility poles, neither section 224 nor the Commission's rules thereunder provide for mandatory sharing of wiring like Article 52 does. Rather, section 224 and the Commission's rules provide communications providers access to necessary infrastructure, but providers remain responsible for laying or stringing their own fiber. By contrast, Article 52 would allow providers to use not only the building's ducts, conduit, and telecommunications closet, but the building owner's wiring, regardless of whether that wiring was laid or strung entirely at the

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15628, para. 258 ("Carriers requesting access to unbundled elements within the incumbent LEC's network seek in effect to purchase the right to obtain exclusive access to [the] element, or some feature, function or capability of that element. . . . This concept of network elements . . . does not alter the incumbent LEC's physical control or ability or duty to repair and maintain network elements.").

[221] *See, e.g.*, *Triennial Review Order*, 18 FCC Rcd at 17141, para. 272; *Triennial Review Remand Order*, 20 FCC Rcd at 2633-2635, paras. 182-185 (declining to unbundle dark fiber loops because, among other things, the Commission's preference for "competitive deployment" and to "an overly broad dark fiber [loop] unbundling regime would undermine deployment, pushing competitors to use incumbent-owned fiber rather than building their own alternatives where it is economic to do so.").

[222] *See Triennial Review Order*, 18 FCC Rcd at 17141, para. 272 ("Although we require the unbundling of legacy technology used over hybrid loops, we decline to attach unbundling requirements to the next-generation network capabilities of fiber-based local loops, i.e., those loops that make use of fiber optic cables and electronic or optical equipment capable of supporting truly broadband transmission capabilities."); *Triennial Review Remand Order*, 20 FCC Rcd at 2634, para. 184 (concluding that "a bar on dark fiber loop unbundling is reasonable to ensure appropriate deployment incentives"). In the *Triennial Review Order*, the Commission determined that unbundling fiber-based local loops would deter investment in new technologies while the absence of such a requirement would encourage incumbent LECs to develop and deploy new, advanced networks and force competitive LECs to "seek innovative network access options to serve end users and to fully compete against incumbent LECs in the mass market." *Triennial Review Order*, 18 FCC Rcd at 17141, para. 272. Indeed, in the *2015 US Telecom Forbearance Order*, the Commission granted forbearance from a previous requirement to unbundle a 64 kbps channel from fiber loops, in part because the requirement dampened incentives to invest and "impede[d] the transition to next-generation fiber networks." *2015 US Telecom Forbearance Order*, 31 FCC Rcd at 6194, para. 65.

[223] 47 U.S.C. § 160(a). In determining whether to forbear, the Commission must consider whether forbearance will enhance competition. 47 U.S.C. § 160(b).

[224] 47 U.S.C. § 224(b), (f).

building owner's, rather than their own, expense. Article 52 thus undercuts incentives to invest in facilities and does so in an unbalanced way that section 224 does not.

69. Last, we find unpersuasive FBA's argument that wire sharing is justified because the cost of overbuilding inside wiring increases the costs of deployment.[228] The Commission has long been guided by the principle of "protect[ing] effective competition, not competitors,"[229] and has reversed regulatory interventions that "deter investment in next-generation facilities or distort the market," even if these interventions lower certain parties' costs of entry.[230] Here, the record demonstrates that, in spite of the costs, facilities-based competitor Sonic successfully entered the San Francisco market "by pulling fiber facilities into an MDU and running it through building risers and conduit to deliver it to the door of each individual unit in the building where [Sonic] ha[s] a request for service from the tenant."[231] Numerous building owners who oppose Article 52's wire-sharing requirement have commented that they have installed multiple sets of wiring and made conduit available to many providers and that multiple providers in fact serve their buildings in San Francisco.[232] We find facilities-based entry on this basis to be highly preferable to artificial "competition" based on the shared use of facilities installed by a competing provider and now owned by a building owner, or the shared use of facilities installed and owned by the building owner, since competing providers retain strong incentives to deploy facilities when shared use is not available.[233]

b. An In-Use Wire Sharing Requirement Infringes on the Commission's Regulation of Cable Inside Wiring

70. In-use wire sharing upsets the balance struck by the Commission in its cable inside wiring rules. In those rules, the Commission aimed to promote competition while preserving incentives for the deployment and maintenance of modern in-building facilities. Therefore, to the extent Article 52

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[225] *C.f. Implementation of Section 224 of the Act, A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5242, para. 5 (2011) ("[D]eploying a broadband network depends significantly on the costs that service providers incur to access poles and other infrastructure.") (*2011 Pole Attachment Order*).

[226] S. Rep. No. 580, 95th Congress, 1st Sess. at 13 (1977) (1977 Senate Report), *reprinted in* 1978 U.S.C.C.A.N. 109; *see also 2011 Pole Attachment Order*, 26 FCC Rcd at 5242, para. 4.

[227] *See Wireline Infrastructure Third Report and Order*, 33 FCC Rcd at 7706, para. 2.

[228] FBA Article 52 Comments at 19 & n.74; San Francisco Article 52 Comments at 5-6; INCOMPAS Article 52 Reply at 4-5; San Francisco *Ex Parte* Letter at 3. We note FBA limits its argument about deployment costs to when "the former provider's wiring to the same customer stays unused," presumably because it believes in-use wiring would not or could not be shared.

[229] *BDS Order*, 32 FCC Rcd at 3583, para. 290 (quoting *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company*, Memorandum Opinion and Order, 12 FCC Rcd 22280, 22288, para. 16 (1997)). We note that in protecting "effective competition, not competitors," our promotion of competitive conditions supersedes the welfare of any particular provider, big or small. *See* Free Press *Ex Parte* Letter at 4 (claiming that the Declaratory Ruling "denigrate[s] as ineffective all smaller competitors who might benefit from the efficiencies of using existing wiring as competition not worth promoting"). There is no evidence that smaller providers benefit from the existence of an in-use wire sharing requirement.

[230] *BDS Order*, 32 FCC Rcd at 3581-82, para. 289 (allowing interim wholesale access rule for discontinued TDM-based BDS and UNE-platform replacement services to expire, over the objections of competitive LECs that used these services, to promote deployment and the transition to next-generation networks).

requires in-use wire sharing, we preempt it today.[234]

71. For more than 20 years, the Commission has balanced various competing policy considerations in its cable inside wiring rules. Following congressional direction, the Commission has taken steps to increase competition in residential MTEs and promote choice by individual tenants, while also promoting the deployment and maintenance of broadband, cable, and other technologies. In the 1992 Cable Act, Congress directed the Commission to issue rules on the disposition of cable inside wiring after a subscriber terminated service.[235] In subsequently issuing rules in the *Inside Wiring Order*, the Commission attempted to balance Congress's dual goals "to protect terminating subscribers from unnecessary disruption and expense caused by removal of internal wiring *and* to foster multichannel service competition."[236]

72. When the Commission established its cable inside wiring rules, it explained that it elected to give the building owner "the initial option to negotiate for ownership and control of the home run wiring because the property owner is responsible for the common areas of a building, including safety and security concerns, compliance with building and electrical codes, maintaining the aesthetics of the building and balancing the concerns of all of the residents."[237] The Commission also found that building owner control of home run wiring would "reduce future transaction costs . . . if service is subsequently switched again."[238]

73. The *Inside Wiring Order* rejected arguments that building owners would act against their tenants' interests.[239] The Commission acknowledged that building owners would "seek to maximize their profits," but found that "market forces will compel . . . owners in competitive real estate markets to take their tenants' desires into account."[240] Although the Commission did not "assume" that tenants would switch buildings in search of better MVPD service, it expressed its belief that, in the course of normal rental turnover, "owners must compete with rival owners to keep current residents and attract additional residents," and therefore "consumer welfare will be maximized by letting the market determine the

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[231] Jasper Decl. at ¶ 23; *see also* CALTEL Article 52 Comments at 19; MBC Article 52 Reply at 15 ("Sonic Telecom's . . . form of entry merely underscores that Article 52 is not necessary to foster competition.").

[232] *See, e.g.*, Avalon Bay Article 52 Comments at 2; Holland Partner Group Article 52 Comments at 3; Prometheus Article 52 Comments at 2-3.

[233] *See, e.g., BDS Order*, 32 FCC Rcd at 3581-83; *Triennial Review Order*, 18 FCC Rcd at 17141, para. 272 (declining "to attach unbundling [network element] requirements to next-generation network capabilities of fiber-based local loops" so as to promote increased investment and competition in broadband services); *Triennial Review Remand Order*, 20 FCC Rcd at 2633-35, paras. 182-185 (declining to unbundle dark fiber loops so as to "ensure appropriate deployment incentives"); *2015 US Telecom Forbearance Order*, 31 FCC Rcd at 6194, para. 65 (forbearing from requirement to unbundle 64kbps channel from fiber loops because any marginal competitive benefits were outweighed by the reduction in investment incentives for providers who deployed fiber).

[234] To the extent that Article 52 applies to non-residential MTEs, the analysis in this section does not apply, as the cable inside wiring rules only apply to residential MTEs. Further, nothing in today's order suggests that Title VI of the Act extends to broadband. Irrespective of any intention by San Francisco to promote broadband access through Article 52, the ordinance creates inconsistencies with our regulations promulgated pursuant to Title VI, necessitating preemption. That it does so should come as no surprise: Article 52 imports the definitions of "home run wiring and cable home wiring" from the Commission's Part 76 rules, S.F., Cal., Police Code art. 52, § 5200, promulgated pursuant to Title VI. Thus, Article 52 affects cable operators, regardless of whether they offer broadband services. And our explanation of the harm that in-use wire sharing imposes on broadband deployment does not imply that Title VI authorizes regulation of broadband.

[235] Cable Consumer Protection and Competition Act of 1992 at Section 16(d), codified at 47 U.S.C. § 544(i).

[236] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring,* Notice of Proposed Rulemaking, 7 FCC Rcd 7349, 7349, para. 2 (1992) (emphasis added); *1997 Inside Wiring Order*, 13 FCC Rcd at 3704, para. 89. The Commission issued its first rules on the disposition of inside

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appropriate mix of price and amenities in the [residential MTE] marketplace."[241]

74. In the *2003 Inside Wiring Order*, the Commission reaffirmed the importance of building owner control of inside wiring, finding that allowing building owners, rather than tenants, to control home run wiring promoted the objectives of the Cable Act.[242] The Commission rejected arguments that the inside wiring rules should only apply when the building owner allows unit-by-unit competition, finding that allowing building owners to control all of a building's inside wiring could "facilitate competitive entry," particularly "where the market could only support another competitor that serves the entire building."[243]

75. Article 52 upends the Commission's carefully constructed framework by overturning building owner control of in-use wiring. Under Article 52, building owners lose their control over inside wiring, conduits, and other common spaces,[244] which, as the Commission previously explained, is important for many reasons, including safety and aesthetics.[245] As commenters argue, this loss of control may disrupt service.[246]

76. The Commission's existing framework promotes the maintenance and upgrading of inside wiring, while the forced sharing of in-use wiring does not. Under the Commission's framework, wiring is either owned by (1) a communications provider, which has an obvious incentive to maintain its own infrastructure, or (2) a building owner, which has an incentive to prioritize the maintenance of existing infrastructure and hold providers responsible for necessary repair and maintenance efforts. In either case, one party has clear incentives to ensure the maintenance of infrastructure and make upgrades as needed. Requiring the sharing of in-use wiring, by contrast, would permit communications services providers to use the existing building-owned infrastructure while reducing their incentives to maintain or upgrade the same infrastructure, since other providers could benefit from any such maintenance or upgrades.[247]

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wiring in 1993, but they focused on single-family homes and included little on residential MTEs. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Cable Home Wiring*, Report and Order, 8 FCC Rcd 1435 (1993).

237 *1997 Inside Wiring Order*, 13 FCC Rcd at 3689, para. 58.

238 *Id.*

239 *Id.* at 3689-90, para. 60.

240 *Id.* at 3690, para. 61.

241 *Id.* at 3691, para. 61.

242 *2003 Inside Wiring Order*, 18 FCC Rcd at 1349-50, paras. 14-15.

243 *2003 Inside Wiring Order*, 18 FCC Rcd at 1348, 1350, paras. 12, 15.

244 *See supra* paras. 59, 61.

245 *2003 Inside Wiring Order*, 18 FCC Rcd at 1349-50, paras. 14-15. We acknowledge that some of these arguments could apply to the sharing of unused wiring but as discussed, we limit our preemption today to the more egregious case of sharing in-use wiring.

246 Elauwit Networks Article 52 Comments at 5 ("[A] significant portion of service interruptions . . . in multi-tenant properties are caused by issues relating to uncontrolled access to inside wiring by any entity other than the contracted service provider."); Holtz Decl. ¶¶ 4-5; NMHC Article 52 Reply at 10-11.

247 *See supra* paras. 59-63; RealtyCom Partners Article 52 Comments at 3-4 (arguing that building owners offer exclusive use of wiring to providers in exchange for providers' "contractual commitment to repair, maintain and upgrade the wiring," which is particularly important in older buildings); Prometheus Article 52 Comments at 3; Holtz Decl. ¶ 7 (Article 52 will make it "difficult or even impossible to determine who should be responsible for performing the work and bearing the costs[, which] can result in delay in repairs[,] . . . shifting of maintenance and

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c. Forced Sharing of In-Use Wiring Intrudes on the Commission's Authority over Cable Technical Standards and Signal Quality and Is Inconsistent with the Commission's Prior Decision Not to Mandate Wire Sharing

77. The forced sharing of in-use wiring intrudes on the Commission's jurisdiction over technical standards for cable systems and is inconsistent with the Commission's 2003 decision not to require the sharing of in-use wiring. This conflict provides an independent ground for preemption.

78. In the 1992 Cable Act, Congress directed the Commission to "establish minimum technical standards relating to cable systems' technical operation and signal quality," and to "update such standards periodically to reflect improvements in technology."[248] The Commission most recently updated these standards in 2017.[249] Among other things, the current standards require that cable operators adhere to the Society of Cable Telecommunications Engineers standard number 40 to provide "good quality" signals to cable subscribers.[250] The Supreme Court has previously affirmed the FCC's preemption of local regulation of cable technical standards.[251]

79. All parties in the Article 52 record, including San Francisco and other commenters generally supportive of Article 52, agree that the sharing of in-use wiring would cause significant technical problems.[252] Indeed, some supporters of Article 52 contend that the technical problems raised by the sharing of in-use wiring are so great that Article 52 should be read not to require the sharing of in-use wiring.[253] As a technical matter, simultaneous sharing of wiring is extremely difficult, if it is possible at all.[254] Congress left it to the Commission to set "technical standards relating to cable systems' technical operation," and this issue is necessarily technical.[255] So to the extent that Article 52 requires cable operators to simultaneously share wiring with other providers, that requirement is preempted under

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upgrade costs from providers to MDU owners" and deteriorating facilities"); Camden Property Trust Article 52 Comments at 4 (contending that "[t]rue facilities-based services providers outright refuse to replace or upgrade wiring in shared wiring environments, particularly . . . if other providers can access and use the wiring without participating in the capital investment.").

[248] *See* 47 U.S.C. § 544(e). The Commission has promulgated technical standards for cable systems since 1972. *See 2017 Cable Technical Standards Order*, 32 FCC Rcd at 7755 n.2 (citing *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 FCC 2d 143 (1972)).

[249] *See generally 2017 Cable Technical Standards Order*.

[250] *See id.* at 7757, para. 7; 47 CFR § 76.605.

[251] *City of New York v. FCC,* 486 U.S. 57, 69 (1988).

[252] San Francisco Article 52 Reply at 6, 7 (conceding that the record "suggest[s] sharing of existing wiring may not be technically feasible in many buildings"); FBA Article 52 Comments at n.72 ("FBA is currently unaware of any widely available commercial technology that would allow sharing of wires without signal degradation."); CALTEL Article 52 Comments at 3 ("[T]here is no technically-feasible means for two providers to share coaxial cable inside wire without incurring significant degradation of both of their services."); NCTA Article 52 Comments at 4-5; AvalonBay Article 52 Comments at 4-5 ("For apartment units with multiple, unrelated adult tenants (which is increasingly common in dense, high-rent markets like San Francisco), we anticipate issues in a shared wiring scenario where one resident's services will be disrupted when another resident within the same unit selects an alternative provider."); Satel Article 52 Comments at 4 ("[T]he use of common wiring for two signals usually results in interference, which leads to service cutoffs and, eventually, loss of customers."); Terheggen Decl. ¶¶ 13-14; Declaration of Richard N. Hylen, Ex. C to MBC Petition, ¶ 8; RealtyCom Partners Article 52 Comments at 8-9. We

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section 624(e) of the Act.[256]

80. The Commission has acted in the cable inside wiring context to avoid technical problems with wire sharing. In 2003, the Commission rejected DirecTV's proposal to allow building owners to require that incumbent providers "allow competitors to share their home run wiring." The Commission found that there were "significant unresolved technical problems" with the proposal, including "the possibility of interference when amplified signals are transmitted on a single wire and the possible lack of bandwidth capacity in existing cable plant."[257] Mandated sharing of in-use wiring is inconsistent with the Commission's determination in 2003, and there is no indication in the record that the technical problems identified then have been resolved in the intervening years.[258] As Richard Holtz, President and CEO of a low voltage design firm serving MTEs averred, his firm would "never recommend" sharing home run wiring, be it fiber, twisted pair, or coaxial cable, because of numerous "technical and practical challenges," including loss of service quality and potential service interruptions.[259]

81. Accordingly, to the extent it requires the sharing of in-use wiring, Article 52 is inconsistent with the Commission's 2003 decision denying DirecTV's wire-sharing proposal.[260] As the Supreme Court explained when affirming the Commission's decision to preempt New York City's attempt to regulate cable signal quality, "the statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof."[261] Requiring the sharing of in-use wiring is at odds with the Commission's denial of DirecTV's proposal to share home run wiring and frustrates our regulation of cable signal quality. Therefore, the in-use wire sharing requirement must be preempted.[262]

3. The Commission Has Authority to Preempt Article 52 to the Extent It Requires In-Use Wire Sharing

82. *Standard for Preemption*. The Administrative Procedure Act and the Commission's own

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therefore reject Free Press's claim that any technical harm posed by in-use wire sharing is "largely mythical." Free Press *Ex Parte* Letter at 2.

[253] *See* CALTEL Article 52 Comments at 3, 16-18. We reject San Francisco's argument that there are "adequate safeguards to prohibit sharing of existing wiring whenever such sharing is not feasible." San Francisco Article 52 Comments at 7. As previously discussed, building owners might not be able to confidently invoke such safeguards. For example, a building owner may not object to a communications services provider's request due to the asymmetric enforcement regime Article 52 imposes. *See supra* para. 54. Further, building owners may not possess the expertise necessary to determine what, for example, constitutes "a significant, adverse effect on the continued ability of existing communications services providers to provide services on the property," S.F., Cal., Police Code art. 52, § 5206(b)(5)(C), which is itself an ambiguous standard, *see supra* para. 50; nor may they be able to determine what "physical limitations at the property," S.F., Cal., Police Code art. 52, § 5206(b)(3), are sufficient to refuse access, *see supra* para. 55. Additionally, as we observe above, Article 52 does not explicitly limit wire sharing to "unused" or "fallow" wiring. *See supra* para. 52.

[254] Indeed, even the technical expert on the record did not contemplate simultaneous sharing of wiring. *See* NMHC Article 52 Comments at Exhibit B (addressing *non-simultaneous* sharing of cabling between providers). *See also* CALTEL Article 52 Comments at 3 ("there is no technically-feasible means for two providers to share coaxial cable inside wire without incurring significant degradation of both of their services. Instead, a reasonable reading of the ordinance simply requires the building owner to make the coaxial cable inside wire available to a new provider as an option to installing new wiring, and only if the existing wiring is idle or an existing service using the wiring is being disconnected and replaced with a new service.").

[255] 47 U.S.C. § 544(e).

[256] *Id.*

[257] *2003 Inside Wiring Order*, 18 FCC Rcd at 1377, para. 88.

rules authorize us to issue a declaratory ruling to terminate a controversy or remove uncertainty.[263] In this instance, we find issuing a declaratory ruling is necessary to remove the uncertainty created by Article 52's ambiguity as to whether it requires in-use wire sharing.

83. The Commission may preempt state law where it "stands as an obstacle to the accomplishment and execution of the full objectives of Congress."[264] This preemption "may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation."[265] The Supreme Court has found state laws requiring standards inconsistent with those adopted by a federal regulatory agency to be preempted by regulation.[266] Consistent with this precedent, courts have determined that a state law which "re-balanc[es]" competing objectives already considered by a federal agency is similarly preempted.[267] Where an agency promulgates regulations or a declaratory ruling intended to preempt state law, courts determine whether the "choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute."[268]

84. When considering whether federal law preempts a state or local law, courts examine whether a state or local law "in essence . . . second guess[es] the [agency's] conclusion on how to balance its objectives."[269] And in determining whether state laws "disturb the FCC's balance of its statutory objectives, [courts] afford some weight to the views of the FCC itself."[270] Because agencies "have a unique understanding of the statutes they administer and an attendant ability to make informed determinations about how state requirements may pose an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," courts give due weight to "an agency's explanation of how state law affects the regulatory scheme."[271]

85. The Commission has used its authority to preempt state law in numerous contexts. For instance, when it adopted regulations establishing technical standards to govern the quality of cable television signals, the Commission prohibited local authorities from imposing more stringent technical standards because such standards were "inconsistent with the congressional intent that competition in

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[258] *See supra* notes 252, 254; Jasper Decl. ¶ 25 (stating that "the Commission correctly determined that it is technically infeasible for two service providers to literally share inside wire without significant degradation to both their services. I also believe this is unlikely to change"); *see also* NCTA Article 52 Comments at 4 (noting allegations by Cox that attachment of DirecTV diplexers to residential MTE inside wiring that DirecTV used for video service and Cox used for broadband service resulted in "harmful interference to Cox's DOCSIS 3.0 broadband signals" (citing *Applications of AT&T and DirecTV to Transfer Control of FCC Licenses and Other Authorizations*, MB Docket No. 14-90, Petition to Condition Consent of Cox Communications at 29-30 (Sept. 16, 2014))).

[259] Holtz Decl. ¶¶ 2-3. *See id.* at ¶ 3 (stating the sharing of coaxial cable or twisted pair home run wiring may lead to a number of problems, including "mistaken disconnects" because of improper labeling of wiring or when providers cross-connect to deliver requested services while another provider is providing a different service over the same wiring, loss of service quality due to splicing, and more frequent replacement of the home run wiring, "which entails considerable expense and disruption").

[260] *2003 Inside Wiring Order*, 18 FCC Rcd at 1377, para. 88.

[261] *City of New York,* 486 U.S. at 64.

[262] *See Farina v. Nokia Inc.*, 625 F.3d 97, 124 (3d Cir. 2010).

[263] 5 U.S.C. § 554(e); 47 CFR § 1.2(a); *see also City of Arlington, Tex. v. FCC*, 668 F.3d 229, 243 (5th Cir. 2012), *aff'd* 569 U.S. 290 (2013).

[264] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986).

[265] *Id.* at 369; *see also Hillsborough County, Fla. v. Auto. Med. Labs.*, 471 U.S. 707, 713 (1985) ("state laws can be preempted by federal regulations as well as by federal statutes"); *Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153-54 (1982) ("Federal regulations have no less pre-emptive effect than federal statutes."); *National Association of Regulatory Utility Commissioners Petition for Clarification or Declaratory Ruling That No FCC Order or Rule Limits State Authority to Collect Broadband Data*, Memorandum Opinion and Order, 25 FCC

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cable communications be promoted."[272] Additionally, in response to a petition, the Commission preempted state and local entry regulation of Satellite Master Antenna Television because it found such regulation would "'chill development' of this service or impede its growth."[273]

86. *Preemption of Article 52*. Article 52, insofar as it imposes an in-use wire sharing requirement, contravenes federal policy, infringes on the Commission's regulation of cable inside wiring, and intrudes on the Commission's regulation of cable signal quality and technical standards. These inconsistencies with congressional directives and the Commission's goals create "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[274] We therefore possess the authority to preempt the ordinance to the extent it requires in-use wire sharing.

87. We reject arguments that Article 52 simply mimics other mandatory access laws that the Commission has refrained from challenging.[275] The Commission has not been previously presented with a petition for preemption of a state or local law that could be read as requiring wire sharing in MTEs in the highly imbalanced manner adopted by San Francisco. Moreover, in the time since the 1997 and 2003 decisions that FBA cites,[276] the explosive growth of broadband competition has only highlighted the benefits of facilities-based competition unfettered by overly burdensome regulation.[277] Additionally, an in-use wire sharing requirement introduces significant technical challenges that a traditional mandatory access law does not. The Commission has the expertise to evaluate such challenges, and there is no evidence that San Francisco attempted to do so. Further, any such state or local regulatory scheme must comply with federal law and the Commission's rules.[278] FBA contends that Article 52 should not be preempted because the Commission has not previously held that wire sharing would contradict federal policy.[279] In both decisions cited by FBA, however, the Commission simply declined to adopt a federal wire-sharing requirement and did not address whether a state or local wire-sharing requirement would violate federal law or policy.[280]

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Rcd 5051, 5053, para. 6 (2010) ("Where State regulation conflicts with a federal regulatory objective, and that conflict impinges upon the Commission's exercise of its own lawful authority, the Commission may preempt.").

[266] *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 881 (2000) (court finding a requirement of airbags in all vehicles was preempted by federal regulation allowing vehicle manufacturers to choose among different safety standards).

[267] *Farina*, 625 F.3d at 123 (court finding that radio frequency emissions were unsafe was preempted by FCC regulation of same); *see also Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 347-51 (2001) (state law claims that company made fraudulent misrepresentations to the FDA were preempted by FDA's own efforts to punish and deter fraud, which attempt "to achieve a somewhat delicate balance of statutory objectives").

[268] *Fidelity Federal Sav. & Loan Ass'n*, 458 U.S. at 154; *see also New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 807 (D.C. Cir. 1984) (limiting review of a declaratory judgment by the Commission to whether the decision was a reasonable accommodation of the conflicting policies).

[269] *Farina*, 625 F.3d at 125 (finding that "[a]llowing juries to impose liability on cell phone companies for claims like [plaintiff's] would conflict with the FCC's regulations" because "[a] jury determination that cell phones in compliance with the FCC's [specific absorption rate] guidelines were still unreasonably dangerous would, in essence, permit a jury to second guess the FCC's conclusion on how to balance its objectives.").

[270] *Farina*, 625 F.3d at 126.

[271] *Wyeth v. Levine*, 555 U.S. 555, 557 (2009).

[272] *Review of the Technical and Operational Requirements of Part 76, Cable Television*, Report and Order, 102 FCC 2d 1372, 1377-80, paras. 11-18 (1985), *aff'd sub nom. City of New York*, 486 U.S. at 66-70.

[273] *Earth Satellite Communications, Inc. Petition for Expedited Special Relief and Declaratory Ruling*, 55 Rad. Reg. 2d (P&F) 1427, 1232, para. 19 (1983), *aff'd New York State Comm'n on Cable Television*, 749 F.2d at 807-12.

[274] *Fidelity Fed. Sav. & Loan Ass'n*, 458 U.S. at 153.

88. Moreover, supporters of Article 52 themselves acknowledge that the ordinance goes beyond traditional mandatory access laws. For example, FBA states that while Article 52 "is modeled on numerous other state and local mandatory access laws," it also "improves" on these older laws and differs from them in important ways, such as by making "existing wiring infrastructure . . . available for use by competitive entrants."[281] San Francisco affirms that Article 52 "expanded" on older mandatory access laws "by requiring property owners to allow communications providers to access their existing wiring to provide service," thereby reducing costs for providers which wish to use existing wiring.[282] As NCTA explains, "[w]hile obligations on building owners to provide communications service providers with access to their properties for the purpose of installing the service provider's own communications equipment are not uncommon under state law, Article 52's obligation to provide third-party access to wiring installed and maintained by other providers is novel."[283] Thus, Article 52 does more than simply provide access to competitors and enable "residents to select the [I]nternet provider of their choice."[284] It obligates building owners to share their facilities and, specifically, wiring already in use by another communications services provider. It is this "improvement" to and "expansion" of traditional mandatory access laws, as applied specifically to in-use wiring, that we preempt today.

89. For largely the same reasons, we find unconvincing San Francisco's argument that the Second Circuit's 1993 decision in *AMSAT Cable Ltd. v. Cablevision of Conn. L.P.* is dispositive.[285] That the Second Circuit found that federal law did not preempt traditional mandatory access laws has little relevance to Article 52. Article 52 goes beyond traditional mandatory access laws in potentially requiring the sharing of in-use wiring.[286] Moreover, *AMSAT Cable* made much of the fact that the Commission had, in prior decisions, implied that traditional mandatory access statutes were not preempted,[287] and in its brief to the *AMSAT Cable* court, the Commission "expressly disavowed any intention to preempt cable access laws."[288] It goes without saying that we express a different intention here.

90. Several supporters of Article 52 argue that it should not be preempted because it only

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[275] *See, e.g.*, City of Boston Article 52 Reply at 8; FBA Article 52 Comments at 14-15; San Francisco NOI Comments at 7-8.

[276] FBA Article 52 Comments at 14-15.

[277] *See generally Restoring Internet Freedom Order*, 33 FCC Rcd 311, 375-388, paras. 109-130.

[278] *See, e.g.*, *Local Competition Order,* 11 FCC Rcd at 15527, para. 53.

[279] FBA Article 52 Comments at 23-24 (stating that "the Commission has never held that wire sharing pursuant to a state or local law or ordinance would contradict federal policy").

[280] *See 1997 Inside Wiring Order*, 13 FCC Rcd at 3729, para. 148; *2003 Inside Wiring Order*, 18 FCC Rcd at 1377, para. 88.

[281] FBA Article 52 Comments at 2.

[282] San Francisco Article 52 Comments at 4, 6.

[283] NCTA Article 52 Comments at 2; MBC Article 52 Reply at 11-12.

[284] Engine Advocacy Article 52 Comments at 2.

[285] San Francisco Article 52 Comments at 18-19 (citing *AMSAT Cable Ltd. v. Cablevision of Conn. L.P*, 6 F.3d 867 (2d Cir. 1993)).

[286] Moreover, *AMSAT Cable* preceded the bulk of the relevant inside wiring rules, which were implemented in 1997 and 2003 orders, and the Commission's prohibition of exclusive access contracts in 2000, 2007, and 2008 orders. While we do not intend to imply that the inside wiring rules and exclusive access rules preempt traditional mandatory access laws—indeed, the Commission has reaffirmed on multiple occasions and we reaffirm today that they do not—we simply point out that the legal backdrop has shifted since *AMSAT Cable* was decided in 1993.

seeks to regulate building owners, not communications providers within the Commission's jurisdiction.[289] But this argument misses the mark. As MBC points out: "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, . . . they do, even if the federal regime does not itself apply mandates to the same class of entities targeted by the local ordinance."[290] Even FBA concedes that "the Commission asserted jurisdiction over communications providers in a manner that may have an indirect and incidental impact on property owners," as the detailed cable inside wiring rules necessarily do.[291] For similar reasons, San Francisco's argument that Article 52 does not directly conflict with the inside wiring rules because Article 52 only applies to wiring owned by building owners takes an overly narrow and formalistic view of the Commission's scheme and its impact on incumbent and would-be competitive providers.[292] As the D.C. Circuit explained when affirming the exclusive access rules over the objection that they effectively regulated MTE building owners, "most every agency action has relatively immediate effects for parties beyond those directly subject to regulation."[293] Finally, FBA and the Institute for Local Self-Reliance argue that Article 52 is consistent with the "spirit" of the cable inside wiring rules.[294] We disagree. Article 52 undermines the cable inside wiring rules' preference for building-controlled wiring. Insofar as it mandates sharing of in-use wiring, Article 52 conflicts with federal law and policy because its ambiguity creates a chilling effect on investment from both building owners and communications services providers alike, and because it infringes on our cable inside wiring rules and cable technical standards and signal quality rules. And it is on this account that Article 52 must be preempted to the extent that it requires in-use wire sharing.

V. PROCEDURAL MATTERS

91. *Ex Parte Rules*. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[295] Persons making *ex parte* presentations must file a

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[287] *AMSAT Cable*, 6 F.3d at 876 (discussing *Earth Satellite Communications Inc., Petition for Expedited Special Relief and Declaratory Ruling*, Memorandum Opinion, Declaratory Ruling, and Order, 95 F.C.C.2d 1223, 1235, para. 22 (1983), *aff'd sub nom. New York State Comm'n on Cable Television*, 749 F.2d 804).

[288] *AMSAT Cable*, 6 F.3d at 876.

[289] FBA Article 52 Comments at 13; San Francisco Article 52 Comments at 26; City of Boston Article 52 Reply at 6.

[290] MBC Article 52 Reply at 22.

[291] FBA Article 52 Comments at 13 n.48.

[292] San Francisco Article 52 Comments at 23.

[293] *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 666 (D.C. Cir. 2009).

[294] Institute for Local Self-Reliance et al. Article 52 Comments at 3; FBA Article 52 Comments at 17-18. San Francisco, FBA, and INCOMPAS also contend that Article 52 should not be preempted because it restricts sale-and-leaseback arrangements, which they claim communications services providers use to end run the inside wiring rules. San Francisco Article 52 Comments at 5; FBA Article 52 Reply at 7-8 ("By putting formal title to inside wiring into the hands of the property owner, but giving incumbents exclusive control over its use, [sale-and-leaseback] arrangements are aimed at avoiding the Commission's wiring disposition rules designed to provide competitive access to incumbent provider wiring in the event a resident terminates the incumbent provider's service."); INCOMPAS Article 52 Reply at 5 (arguing that sale-and-leasebacks "obfuscate the original intent of the Commission's rules and make it difficult for competitive providers to gain lawful access to consumers in MDUs"). However, Article 52's in-use wire sharing requirement conflicts with federal law, warranting preemption irrespective of its claimed objectives. *See Farina*, 625 F.3d at 125. Moreover, mandating the sharing of *in-use* wiring is not necessary to restrict sale-and-leaseback arrangements. We solicit comments in the Notice of Proposed Rulemaking above regarding whether sale-and-leaseback arrangements are beneficial or pose problems and, if the latter, how to address them.

[295] 47 CFR §§ 1.1200 *et seq.*

copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

92. *Initial Regulatory Flexibility Analysis*. Pursuant to the Regulatory Flexibility Act (RFA),[296] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this NPRM. The text of the IRFA is set forth in Appendix A. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.[297]

93. *Filing of Comments and Reply Comments*. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: www.fcc.gov/ecfs.

- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

[296] *See* 5 U.S.C. § 603.

[297] *See* 5 U.S.C. § 603(a).

  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

- People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

94. *Paperwork Reduction Act.* This document may propose new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it may contain new or modified information collection burdens for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.[298]

95. *Contact Person.* For further information, please contact Annick Banoun, Competition Policy Division, Wireline Competition Bureau, 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-1521, Annick.Banoun@fcc.gov.

VI. ORDERING CLAUSES

96. IT IS ORDERED that pursuant to the authority contained in sections 1-4, 201(b), 202, 303(r), 403, 601(4), 601(6), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201(b), 202, 303(r), 403, 521(4), 521(6), and 548, and section 401 of the RAY BAUM's Act of 2018, 47 U.S.C. § 163, this Notice of Proposed Rulemaking IS ADOPTED.

97. IT IS FURTHER ORDERED that pursuant to sections 1-4, 201-202, 224, 251, 303, 544(e), 544(i), 601, 624, 624(e), 624(i), and 628 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201-202, 224, 251, 303(r), 521, 544(e), 544(i), and 548 and sections 1.2, 1.1402, 51.319, 76.5, 76.605, and 76.800 *et seq.* of the Commission's rules, 47 CFR §§ 1.2, 1.1402, 51.319, 76.5, 76.605, and 76.800 *et seq.*, that the Multifamily Broadband Council's Petition for Preemption is GRANTED in part and DENIED WITHOUT PREJUDICE in part, and that Article 52 of the San Francisco Police Code is PREEMPTED to the extent specified herein.

98. IT IS FURTHER ORDERED that the Notice of Proposed Rulemaking will be EFFECTIVE upon publication in the Federal Register and comments will be due on the dates stated therein.

99. IT IS FURTHER ORDERED that the Declaratory Ruling and the obligations set forth therein ARE EFFECTIVE upon release of this Declaratory Ruling.

100. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center SHALL SEND a copy of this Declaratory Ruling and Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the SBA.

[298] *See* 44 U.S.C. § 3506(c)(4).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking (Notice). The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. The Notice seeks to facilitate enhanced deployment and provide greater consumer choice for workers and residents of MTEs.[4] Specifically, the Notice solicits comments on whether revenue sharing agreements should be disclosed or otherwise regulated,[5] on whether the Commission should preempt state and local regulations that may inhibit broadband deployment and competition within MTEs;[6] on whether the Commission should act to increase competitive access to distributed antenna systems and rooftop facilities;[7] about what effect exclusive wiring and sale-and-leaseback arrangements have on competition and deployment in MTEs;[8] whether exclusive marketing arrangements should be disclosed;[9] and on whether there exist other types of contractual provisions and noncontractual practices that impact the ability of broadband providers to compete in MTEs.[10] The Notice also asks what impact these proposals would have on small businesses and entities.[11]

B. Legal Basis

3. The Notice solicits comments about its jurisdiction and statutory authority to address these issues.[12] It specifically asks whether sections 201(b) and 628[13] of the Communications Act of 1934, as amended, authorize prohibiting revenue sharing agreements.[14] To the extent that the Commission would impose disclosure requirements, the Notice also invites comments on whether section 257 of the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. § 603(a).

[3] *See* 5 U.S.C. § 603(a).

[4] *See supra* para. 14.

[5] *See supra* paras. 16-20.

[6] *See supra* paras. 30-31.

[7] *See supra* paras. 21-23.

[8] *See supra* paras. 24-26.

[9] *See supra* paras. 27-28.

[10] *See supra* para. 29.

[11] *See supra* paras. 19, 20, 23, 25, 26, 28.

[12] *See supra* paras. 32-35.

[13] *See* 47 U.S.C. §§ 201(b), 548(b), (j).

[14] *See supra* para. 33.

Act, as amended by section 401 of the RAY BAUM'S Act of 2018,[15] authorizes the Commission to require disclosures from ISPs.[16] The Notice seeks comment on whether sections 201(b), 202(a), 218, and 628 of the Act would provide authority to impose disclosure requirements on MVPDs and telecommunications carriers.[17] The Notice also solicits comments on whether sections 253 and 332 of the Act authorize the Commission to address state or local regulations with respect to facilities deployment and competition within MTEs.[18] Additionally, the Notice seeks comments on whether any additional sources of authority exist on which the Commission may rely to prevent parties from entering into any agreements or arrangements on which it seeks comment.[19]

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

4. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules and by the rule revisions on which the Notice seeks comment, if adopted.[20] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[21] In addition, the term "small business" has the same meaning as the term "small-business concern" under the Small Business Act.[22] A "small-business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[23]

5. *Small Businesses, Small Organizations, Small Governmental Jurisdictions*. Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein.[24] First, while there are industry-specific size standards for small businesses that are used in the regulatory-flexibility analysis, according to data from the SBA's Office of Advocacy, a small business in general is an independent business having fewer than 500 employees.[25] These types of small businesses represent 99.9% of all businesses in the United States, which translates to 30.2 million businesses.[26]

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[15] *See* 47 U.S.C. § 163(a), (b)(1), (b)(2), (b)(3), & (d) (codifying section 401 of the Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018).

[16] *See supra* para. 36.

[17] *See supra* para. 37.

[18] *See supra* para. 38.

[19] *See supra* para. 39.

[20] *See* 5 U.S.C. § 603(b)(3).

[21] *See* 5 U.S.C. § 601(6).

[22] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[23] *See* 15 U.S.C. § 632.

[24] *See* 5 U.S.C. § 601(3)-(6).

[25] *See* SBA, Office of Advocacy, "Frequently Asked Questions About Small Business," https://s3.amazonaws.com/advocacy-prod.sba.fun/wp-content/uploads/2017/08/04125711/Frequently-Asked-Questions-Small-Business-2018.pdf (August 2018).

[26] *See id.*

6. Next, the type of small entity described as a "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field . . . ."[27] Nationwide, as of March 2019, there were approximately 356,494 small organizations based on registration and tax data filed by nonprofits with the Internal Revenue Service (IRS).[28]

7. Finally, the small entity described as a "small governmental jurisdiction" is defined generally as "governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."[29] U.S. Census Bureau data from the 2012 Census of Governments[30] indicates that there were 90,056 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States.[31] Of this number, there were 37,132 general purpose governments (county,[32] municipal, and town or township[33]) with populations of less than 50,000, and 12,184 special purpose governments (independent school districts[34] and special districts[35]) with populations of less than 50,000. The 2012 U.S. Census Bureau data for most types of governments in the local government category shows that a majority these governments have populations of less than 50,000.[36] Based on this data, we estimate that at least 49,316 local government jurisdictions fall in the category of "small governmental jurisdictions."[37]

8. *Multiple Tenant Environment (MTE) Operators - Residential*. The appropriate U.S. Census category for MTE residential operators is that of Residential Property Managers[38] and is defined as an industry that "comprises establishments primarily engaged in managing residential real estate for others."[39] The SBA has established a small business size standard for this category of firms having $7.5 million or less in annual receipts.[40] Economic Census data for 2012 show that 25,936 residential property managers operated for that entire year.[41] Of that number, 25,010 had annual receipts of less than $5 million.[42] Thus, under this size standard, the majority of firms in this industry can be considered small.

9. *Multiple Tenant Environment (MTE) Operators - Nonresidential*. The appropriate U.S. Census category for MTE nonresidential operators is that of Nonresidential Property Managers[43] and is defined as an industry that "comprises establishments primarily engaged in managing nonresidential real

[27] 5 U.S.C. § 601(4).

[28] Data from the Urban Institute, National Center for Charitable Statistics (NCCS) reporting on nonprofit organizations registered with the IRS was used to estimate the number of small organizations. Reports generated using the NCCS online database indicated that as of August 2016 there were 356,494 registered nonprofits with total revenues of less than $100,000. Of this total, 326,897 entities filed tax returns with 65,113 registered nonprofits reporting total revenues of $50,000 or less on the IRS Form 990-N for Small Exempt Organizations and 261,784 nonprofits reporting total revenues of $100,000 or less on some other version of the IRS Form 990 within 24 months of the August 2016 data release date. *See* http://nccsweb.urban.org/tablewiz/bmf.php where the report showing this data can be generated by selecting the following data fields: Show: "Registered Nonprofit Organizations"; By: "Total Revenue Level (years 1995, Aug to 2016, Aug)"; and For: "2016, Aug" then selecting "Show Results."

[29] 5 U.S.C. § 601(5).

[30] *See* 13 U.S.C. § 161. The Census of Government is conducted every five (5) years compiling data for years ending with "2" and "7." *See also* Census Bureau, *Census of Government*, https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=program&id=program.en.COG.

[31] *See* U.S. Census Bureau, *2012 Census of Governments, Local Governments by Type and State: 2012 - United States — States*, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG02.US01. Local governmental jurisdictions are classified in two categories: general purpose governments (county, municipal and town or township) and special purpose governments (special districts and independent school districts).

[32] *See* U.S. Census Bureau, *2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States — States*, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01. There were 2,114 county governments with populations less than 50,000.

[33] *See* U.S. Census Bureau, *2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States — States*,

(continued….)

estate for others."[44] The SBA has established a small business size standard for this category of firms having $7.5 million or less receipts.[45] Economic Census data for 2012 show that 12,828 nonresidential property managers operated for that entire year.[46] Of that number, 12,344 had annual receipts of less than $5 million.[47] Thus, under this size standard, the majority of firms in this industry can be considered small.

10. *Wired Telecommunications Carriers*. The U.S. Census Bureau defines this industry as "establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[48] The SBA has developed a small-business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[49] Census data for 2012 shows that there were 3,117 firms that operated that year and that of this total, 3,083 operated with fewer than 1,000 employees.[50] Thus, under this size standard, the majority of firms in this industry can be considered small.

11. *Local Exchange Carriers (LECs)*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers.[51] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[52] U.S. Census Bureau data for 2012 shows that 3,117 firms operated for the entire year.[53] Of that total, 3,083 operated with fewer than 1,000 employees.[54] Thus under this category and the associated size standard, the Commission estimates

(Continued from previous page)
https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01. There were 18,811 municipal and 16,207 town and township governments with populations less than 50,000.

[34] *See* U.S. Census Bureau, *2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States — States*, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. There were 12,184 independent school districts with enrollment populations less than 50,000.

[35] *See* U.S. Census Bureau, *2012 Census of Governments, Special District Governments by Function and State: 2012 - United States — States*, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG09.US01. The U.S. Census Bureau data did not provide a population breakout for special district governments.

[36] *See* U.S. Census Bureau, *2012 Census of Governments, County Governments by Population-Size Group and State: 2012 - United States — States*, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG06.US01; U.S. Census Bureau, *2012 Census of Governments, Subcounty General-Purpose Governments by Population-Size Group and State: 2012 - United States — States*, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG07.US01; U.S. Census Bureau, *2012 Census of Governments, Elementary and Secondary School Systems by Enrollment-Size Group and State: 2012 - United States — States*, https://factfinder.census.gov/bkmk/table/1.0/en/COG/2012/ORG11.US01. While U.S. Census Bureau data did not provide a population breakout for special district governments, if the population of less than 50,000 for this category of local government is consistent with the other types of local governments, then the majority of the 38,266 special district governments have populations of less than 50,000.

[37] *Id.*

[38] 13 C.F.R. § 121.601 (NAICS 531311).

[39] *See*, U.S. Census Bureau, 2012 NAICS Definitions, "531311 Residential Property Managers," https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.531311.

[40] 13 C.F.R. § 121.601 (NAICS 531311).

that the majority of local exchange carriers are small entities.

12. *Incumbent LECs*. Neither the Commission nor the SBA has developed a small-business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers.[55] Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[56] U.S. Census Bureau data for 2012 indicates that 3,117 firms operated the entire year.[57] Of this total, 3,083 operated with fewer than 1,000 employees.[58] Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by our actions. According to Commission data, 1,307 Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.[59] Of this total, an estimated 1,006 have 1,500 or fewer employees.[60] Thus, using the SBA's size standard, the majority of incumbent LECs can be considered small entities.

13. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers*. Neither the Commission nor the SBA has developed a small-business size standard specifically for these service providers. The most appropriate NAICS Code category is Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[61] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated during that year.[62] Of that number, 3,083 operated with fewer than 1,000 employees.[63] Based on these data, the Commission concludes that the majority of Competitive LECS, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.[64] Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees.[65] In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.[66] Additionally, 72 carriers have reported that they are Other Local Service Providers.[67] Of this total, 70 have 1,500 or fewer employees.[68] Consequently, based on internally researched FCC data, the

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[41] *See* U.S. Census Bureau, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/53SSSZ4//naics~531311.

[42] *Id.*

[43] 13 C.F.R. § 121.601 (NAICS 531312).

[44] *See*, U.S. Census Bureau, 2012 NAICS Definitions, "531312 Nonresidential Property Managers," https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.531312.

[45] 13 C.F.R. § 121.601 (NAICS 531312).

[46] *See* U.S. Census Bureau, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/53SSSZ4//naics~53131.

[47] *Id.*

[48] U.S. Census Bureau, *NAICS Code Description*, https://www.naics.com/naics-code-description/?code=51731.

[49] 13 CFR § 121.201 (NAICS Code 517311). The Wired Telecommunications Carrier category formerly used the NAICS code of 517110. As of 2017, the U.S. Census Bureau definition shows the NAICs Code as 517311 for Wired Telecommunications Carriers. *See* U.S. Census Bureau, *2017 NAICS Definition*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517311&search=2017.

[50] *See* U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016) http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities.

14. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small-business size standard (e.g., a telephone communications business having 1,500 or fewer employees) and "is not dominant in its field of operation."[69] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[70] We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

15. *Interexchange Carriers (IXCs)*. Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers.[71] The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.[72] U.S. Census Bureau data for 2012 indicate that 3,117 firms operated for the entire year.[73] Of that number, 3,083 operated with fewer than 1,000 employees.[74] According to internally developed Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.[75] Of this total, an estimated 317 have 1,500 or fewer employees.[76] Consequently, the Commission estimates that the majority of interexchange service providers are small entities.

16. *Local Resellers*. The SBA has developed a small-business size standard for Telecommunications Resellers that includes Local Resellers.[77] The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households.[78] Establishments in this industry resell

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[51] *See* 13 CFR § 121.201 (NAICS Code 517311).

[52] *Id.*

[53] *See* U.S. Census Bureau, *2012 Economic Census of the United States,* Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers), https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[54] *Id.*

[55] *See* 13 CFR § 121.201 (NAICS Code 517311).

[56] *Id.*

[57] *See* U.S. Census Bureau, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[58] *Id.*

[59] *See Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

[60] *Id*.

[61] *See* 13 CFR § 121.201.

[62] *See* U.S. Census Bureau, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[63] *Id.*

[64] *See Trends in Telephone Service*, at Table 5.3.

[65] *Id*.

telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry.[79] Under the SBA's size standard, such a business is small if it has 1,500 or fewer employees.[80] U.S. Census Bureau data for 2012 shows that 1,341 firms provided resale services during that year.[81] Of that number, all operated with fewer than 1,000 employees.[82] Thus, under this category and the associated small-business size standard, the majority of these resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[83] Of these, an estimated 211 have 1,500 or fewer employees.[84] Consequently, the Commission estimates that the majority of Local Resellers are small entities.

17. *Toll Resellers*. The Commission has not developed a definition for Toll Resellers. The closest NAICS Code category is Telecommunications Resellers. The Telecommunications Resellers industry comprises establishments engaged in purchasing access and network capacity from owners and operators of telecommunications networks and reselling wired and wireless telecommunications services (except satellite) to businesses and households. Establishments in this industry resell telecommunications; they do not operate transmission facilities and infrastructure. Mobile virtual network operators (MVNOs) are included in this industry.[85] The SBA has developed a small-business size standard for the category of Telecommunications Resellers.[86] Under that size standard, such a business is small if it has 1,500 or fewer employees.[87] Census data for 2012 shows that 1,341 firms provided resale services during that year. Of that number, 1,341 operated with fewer than 1,000 employees.[88] Thus, under this category and the associated small-business size standard, the majority of these resellers can be considered small entities. According to Commission data, 881 carriers have reported that they are engaged in the provision of toll resale services.[89] Of this total, an estimated 857 have 1,500 or fewer employees.[90] Consequently, the Commission estimates that the majority of toll resellers are small entities.

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[66] *Id*.

[67] *Id*.

[68] *Id*.

[69] 5 U.S.C. § 601(3).

[70] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (filed May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 CFR § 121.102(b).

[71] *See* 13 CFR § 121.201.

[72] *Id*.

[73] *See* U.S. Census Bureau, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

[74] *Id*.

[75] *See Trends in Telephone Service*, at Table 5.3.

[76] *Id*.

[77] *See* 13 CFR § 121.201; NAICS Code 517911.

[78] U.S. Census Bureau, *2012 NAICS Definition*, NAICS Code 517911 "Telecommunications Resellers," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517911&search=2017+NAICS+Search&search=2017 .

18. *Other Toll Carriers*. Neither the Commission nor the SBA has developed a definition for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers as defined above. Under the applicable SBA size standard, such a business is small if it has 1,500 or fewer employees.[91] Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.[92] Thus, under this category and the associated small-business size standard, the majority of Other Toll Carriers can be considered small. According to internally developed Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.[93] Of these, an estimated 279 have 1,500 or fewer employees.[94] Consequently, the Commission estimates that most Other Toll Carriers are small entities.

19. *Wireless Communications Services*. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined "small business" for the wireless communications services (WCS) auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a "very small business" as an entity with average gross revenues of $15 million for each of the three preceding years.[95] The SBA has approved these small-business size standards.[96]

20. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The closest applicable SBA category is Wireless Telecommunications Carriers (except Satellite),[97] and under the most appropriate size standard for this category, such a business is small if it has 1,500 or fewer employees.[98] For this industry, U.S. Census Bureau data for 2012 shows that there were 967 firms that operated for the entire year.[99] Of this total, 955 firms had fewer than 1,000 employees and 12 firms had 1000 employees or more.[100] Thus,

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[79] *Id*.

[80] 13 CFR § 121.201 (NAICS Code 517911).

[81] *See* U.S. Census Bureau, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517911.

[82] *Id*.

[83] *See Trends in Telephone Service*, at Table 5.3.

[84] *Id*.

[85] U.S. Census Bureau, *2012 NAICS Definition*, https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517911&search=2012+NAICS+Search&search=2012 (NAICS 517911 Telecommunications Resellers).

[86] 13 CFR § 121.201 (NAICS Code 517911).

[87] *Id.*

[88] U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

[89] *Trends in Telephone Service*, at Table 5.3.

[90] *Id.*

[91] 13 CFR § 121.201 (NAICS Code 517110).

[92] *See* U.S. Census Bureau, *American Fact Finder* (Jan. 08, 2016), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table.

under this category and the associated size standard, the Commission estimates that a majority of these entities can be considered small. According to Commission data, 413 carriers reported that they were engaged in wireless telephony.[101] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[102] Therefore, more than half of these entities can be considered small.

21. *Cable Companies and Systems (Rate Regulation)*. The Commission has developed its own small-business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.[103] Industry data indicates that there are currently 4,600 active cable systems in the United States.[104] Of this total, all but 11 cable operators nationwide are small under the 400,000-subscriber size standard.[105] In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[106] Current Commission records show 4,600 cable systems nationwide. Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.[107] Thus, under this standard as well, we estimate that most cable systems are small entities.

22. *Cable System Operators (Telecom Act Standard)*. The Communications Act, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[108] There are approximately 52,403,705 cable video subscribers in the United States today.[109] Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate.[110] Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.[111] The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual

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[93] *Trends in Telephone Service*, at Table 5.3.

[94] *Id.*

[95] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS)*, Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[96] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC (filed Dec. 2, 1998) (*Alvarez Letter 1998*).

[97] 13 CFR § 121.201 (NAICS Code 517210).

[98] *Id.*

[99] U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC1251SSSZ5, Information: Subject Series: Estab and Firm Size: Employment Size of Firms for the U.S.: 2012 NAICS Code 517210 (rel. Jan. 8, 2016). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517210.

[100] *Id*. Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

[101] *See Trends in Telephone Service*, at Table 5.3.

[102] *Id.*

[103] 47 CFR § 76.901(e).

[104] This figure was derived from an August 15, 2015 report from the FCC Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS). *See* http://www.fcc.gov/coals.

[105] Data obtained from SNL Kagan database on April 19, 2017.

revenues exceed $250 million.[112] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

23. *All Other Telecommunications*. The "All Other Telecommunications" category is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation.[113] This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems.[114] Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.[115] The SBA has developed a small-business size standard for All Other Telecommunications, which consists of all such firms with annual receipts of $ 32.5 million or less.[116] For this category, U.S. Census Bureau data for 2012 shows that there were 1,442 firms that operated for the entire year.[117] Of those firms, a total of 1,400 had annual receipts less than $25 million and 42 firms had annual receipts of $25 million to $49,999,999.[118] Thus, the Commission estimates that the majority of "All Other Telecommunications" firms potentially affected by our action can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

24. The Notice seeks comments on a number of potential rule changes that would affect reporting, recordkeeping, and other compliance requirements. Specifically, the Notice seeks comment on potential regulation or disclosure of revenue sharing and exclusive marketing arrangements. If the Commission were to move forward with such a rule, MVPDs and telecommunications carriers, and potentially all ISPs, would have new reporting, recordkeeping, and other compliance requirements with regard to these arrangements.

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106 47 CFR § 76.901(c).

107 August 5, 2015 report from the FCC Media Bureau based on its research in COALS. *See* http://www.fcc.gov/coals.

108 47 CFR § 76.901(f) & nn.1-3.

109 *See* SNL Kagan at http://www.snl.com/interactivex/MultichannelIndustryBenchmarks.aspx (subscription required).

110 47 CFR § 76.901(f) & nn.1-3.

111 *See* SNL Kagan at http://www.snl.com/interactivex/TopCable MSOs.aspx (subscription required).

112 The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 CFR § 76.901(f).

113 *See* U.S. Census Bureau*, 2017 NAICS Definitions*, NAICS Code "517919 All Other Telecommunications," https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=517919&search=2017+NAICS+Search&search=2017.

114 *Id.*

115 *Id*.

116 *See* 13 CFR § 121.201 (NAICS Code 517919).

117 U.S. Census Bureau, *Information: Subject Series - Estab and Firm Size: Receipts Size of Firms for the United States*, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~517919.

118 *Id.*

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

25. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.[119]

26. In the Notice, the Commission seeks comment on alternatives to the proposals and on alternative ways of implementing the proposals. Any revisions proposed to the Commission's rules are not expected to result in significant economic impact to small entities. The Commission specifically seeks comment on what effect the proposals will have on small entities and whether the Commission should consider alternative rules or exemptions for small entities.

27. We expect to take into account the economic impact on small entities, as identified in comments filed in response to the Notice and this IRFA, in reaching our final conclusions and promulgating rules in this proceeding.

28. As discussed in the Notice, the Commission has initiated this proceeding to solicit comments on various types of actions the Commission is considering to facilitate enhanced broadband deployment and provide greater consumer choice for MTE workers and residents.

F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rules

29. None.

[119] 5 U.S.C. § 603(c)(1)-(4).

STATEMENT OF
CHAIRMAN AJIT PAI

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91.

Most Americans probably aren't familiar with the acronym MTE. But I'll bet the vast majority of us has lived or worked in an MTE at some point in our lives. At the FCC, MTE stands for "multiple tenant environments." These are the apartments, condominiums, and office buildings that a substantial percentage of Americans live or work in every day. As part of our efforts to close the digital divide, then, the FCC must take steps to promote the deployment of high-speed broadband to residents of MTEs.

This kind of deployment presents unique challenges, however. To provide service, broadband providers must have *access* to potential customers in the building. But when they know that they will have to *share* the communications facilities that they install with their competitors, they're less likely to make the effort in the first place. For similar reasons, you'd be less likely to build a home at your own expense if you knew it could easily become someone else's castle.

So for decades, Congress and the Commission have encouraged facilities-based competition by broadly promoting access to customers and infrastructure—including MTEs and their occupants—while avoiding overly burdensome sharing mandates that reduce incentives to invest.

With these principles in mind, we take several steps today to promote facilities-based broadband deployment and greater consumer choice for Americans living and working in MTEs. *First*, in this *Notice of Proposed Rulemaking*, we ask for public input on actions the FCC could take to accelerate the deployment of next-generation networks and services within MTEs. More specifically, we refresh the record in the Commission's 2017 *MTE Notice of Inquiry* and seek further targeted comment on a variety of issues with the goal of increasing broadband competition and deployment in MTEs. These include revenue sharing agreements between building owners and broadband providers, exclusivity agreements regarding rooftop facilities, and exclusive wiring arrangements.

Second, in the accompanying *Declaratory Ruling*, we clarify that the FCC welcomes state and local efforts to increase *access* to MTEs, so long as those efforts are consistent with federal law and policy. At the same time, we preempt an outlier San Francisco ordinance to the extent it requires *sharing of in-use wiring* in MTEs. We do so on several grounds. One is that an in-use wire sharing requirement is inconsistent with the federal policy of promoting facilities-based competition as a means of encouraging broadband deployment and investment. In fact, record evidence shows that the ambiguity alone over whether the ordinance requires in-use wire sharing has already chilled broadband investment in San Francisco. Mill Creek Residential Trust, which owns several buildings in San Francisco and allows as many as six service providers in a single building, commented that "since the passage of Article 52, the market has changed in San Francisco" and detailed how several providers have changed their policies and now refuse to install inside wiring.[1]

Unsurprisingly, some oppose our decision to preempt today. I would say that they are making a mountain out of a molehill, but in reality, there isn't even a molehill here. Throughout this proceeding, the City of San Francisco has failed to mount any defense whatsoever of requiring the sharing of in-use wiring. Yet before I circulated this draft Declaratory Ruling to my colleagues three weeks ago, the city *also* refused to say that its ordinance *didn't* mandate the sharing of in-use wiring. Indeed, it was only last

[1] Mill Creek Residential Trust Reply Comments, MB Docket No. 17-91, at 2-5 (filed June 9, 2017).

week that the city finally stopped playing games with this Schrödinger's cat of an ordinance and belatedly claimed that its ordinance "does not require sharing of 'in-use' wiring."[2]

The language of the ordinance itself suggests otherwise. But if the city is correct, then there is no reason for it—or anyone else—to object to our narrow ruling today. It is difficult to understand how anyone could be harmed by a decision to preempt a city mandate that the city itself claims doesn't exist. And if the city isn't correct—if the ordinance does indeed require the sharing of in-use wiring—then it is also difficult to understand how the city—or anyone else—could object to our ruling. After all, the city has had every opportunity to mount a substantive defense of an in-use wiring sharing mandate and has utterly failed to do so. In the end, all of this suggests that the opposition here is driven not by the facts or the law, but instead that crassest impulse in politics: "if he's for it, I'm against it."

For their outstanding work on behalf of consumers living in MTEs, I'd like to thank Pam Arluk, Annick Banoun, Allison Baker, Michele Berlove, Matt Collins, Adam Copeland, Justin Faulb, Jesse Goodwin, Dan Kahn, Melissa Kirkel, Ed Krachmer, Kris Monteith, Ramesh Nagarajan, Terri Natoli, and John Visclosky from the Wireline Competition Bureau; Michelle Carey, Martha Heller, Paul Jackson, and Brendan Murray from the Media Bureau; Paul D'Ari, Garnet Hanly, and Jiaming Shang from the Wireless Telecommunications Bureau; Malena Barzilai, Ashley Boizelle, David Konczal, Rick Mallen, Scott Noveck, Linda Oliver, and Royce Sherlock from the Office of General Counsel; Joseph Calascione, Tavi Carare, Steven Kauffman, Susan Lee, Giulia McHenry, Eric Ralph, and Emily Talaga from the Office of Economics and Analytics; and Maura McGowan and Sanford Williams from the Office of Communications Business Opportunities.

[2] Letter from Dennis J. Herrera, City Attorney, City and County of San Francisco, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-142, MB Docket No. 17-91, Attachment, at 1 (filed July 2, 2019), https://ecfsapi.fcc.gov/file/1070278322780/CCSFExparte.pdf.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91.

For years, I have been a loud and persistent voice in urging the Commission to take action against harmful state and local barriers to the deployment of broadband and other communications services—even using the unspeakable word, "preemption." Today's item complements that call to action and, aside from a couple of concerns, I am generally supportive of it.

While the preemption decision in the Declaratory Ruling is completely warranted, I am somewhat troubled by certain language that seems to endorse state and local experimentation regarding policies to allegedly promote competition in MTEs. In addition to the fact that broadband Internet is fundamentally an interstate service, and not the appropriate subject of state and local regulatory experimentation, a patchwork of regulation is extremely burdensome for providers and undermines investment. Further, support for experimentation does not match well with our approach in the broadband infrastructure context, where we have made considerable progress in response to state and local overreach.

As for the NPRM portion, I am concerned about our legal basis to require the disclosure of or restrict the use of revenue sharing agreements for Internet service providers that are not telecommunications providers under Title II or cable operators under Title VI. In the absence of such authority—which I am having difficulty squaring with the law—we run the risk of imposing asymmetrical regulations to competitors in the same MTE marketplace, a problem that the current Commission has worked diligently to eliminate in various other proceedings. Thus, I thank the Chairman for working with my office to add questions to the draft on our legal authority for imposing new rules on the entire universe of Internet service providers.

Despite these rather minor points, I support our decision to preempt the San Francisco ordinance to the extent that it requires the sharing of in-use wiring and vote to approve.

STATEMENT OF
COMMISSIONER BRENDAN CARR

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91.

This Commission's top priority is closing the digital divide. And that requires policies that enable the private sector to pull thousands of miles of fiber over the vast distances that stretch across rural America. But it also means policies that allow providers to cover the last few feet to a consumer's home. And this presents unique challenges when it comes to serving apartments and condos or "multi-tenant environments" (MTEs).

I can speak to some of those challenges from personal experience, since, like 30 percent of Americans, I live in an MTE. So I am particularly pleased that we seek comment today on steps that could open up MTEs to even more competition. And we do so by striking a balance that reflects both our precedents and the iron laws of economics.

After all, a rule that requires providers to share their communications facilities with competitors generally reduces incentives to invest, meaning less build out and decreased competition. At the same time, promoting access to an MTE, including the conduit needed to reach an apartment, can encourage new entrants to build out their own facilities and increase competition.

We've seen this time and time again. Facilities-based competition thrives in the absence of mandatory sharing and similarly heavy-handed regulations. For example, in 2003, the Commission exempted new fiber builds from unbundling obligations to encourage more deployment. After we did so, two large phone companies began building residential fiber networks and offering service. Similarly, when the FCC eliminated "line sharing," which required incumbent phone companies to open up the lines running into a customer's home for use by their competitors, DSL subscribership rose by 65 percent—9 million households more than anticipated under the old line sharing regime.

And in the context of MTEs, the Commission has adopted policies over the years to help encourage competitive access and deployment to such facilities. Such actions include prohibiting broadband providers from entering into exclusive access contracts with MTEs, while still permitting exclusive marketing and wiring arrangements. As a result, we have promoted access and competition without discouraging investment by broadband providers in MTEs.

The proposals we seek comment on today reflect this same approach. By taking steps to ensure competitive access for broadband providers to MTEs, while at the same time cracking down on local laws that go beyond the bounds of federal rules, our decision can help bring affordable and reliable broadband to more consumers. So I want to thank the staff of the Wireline Competition Bureau, the Media Bureau, the Wireless Telecommunications Bureau, the Office of Economics and Analytics, and the Office of General Counsel for your work on this item. It has my support.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL,
DISSENTING

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91.

Too many Americans have no choice when it comes to broadband service. I'm familiar with this problem, because I'm one of them. For the roughly one-third of Americans who live in apartment buildings, choice is especially hard to find. Securing high-speed service in multi-tenant environments is challenging. It involves a tangle of different wire facilities, property rights, and marketing arrangements. So many apartment dwellers—who just want a competitive choice for broadband—find that the deck is stacked against them and they are unable to sign up for service from other than the existing provider in their building.

Across the country consumers want more choices when it comes to broadband. Because Washington is doing too little to increase competition, cities and states have stepped into the breach. They are developing their own efforts to increase consumer choice. They are not waiting for national polices to fix this predicament. They are passing their own laws to break through the complicated web of relationships between property owners, providers, and consumers and make it possible for apartment dwellers to see broadband competition. This is good. We should support these efforts.

But today the Federal Communications Commission says not so fast. We stop efforts in California designed to encourage competition in multi-tenant environments. Specifically, we say to the city of San Francisco—where more than half of the population rents their housing, often in multi-tenant units—that they cannot encourage broadband competition. This is crazy.

There is so much that is wrong with this decision.

For starters, Americans don't take kindly to Washington telling them what they can or cannot build in their own backyard or in their own buildings. It is part of our long legal tradition that we let our cities and towns develop their own policies about service in their own communities. Plus, our preemption of this municipal ordinance is stunningly weak. We somehow claim we have unfettered authority when it comes to broadband in buildings but disown our general authority over the same in our net neutrality proceeding, where we pronounced broadband beyond the reach of this agency. So this ruling borrows from old cable signal leakage policies to suggest some new theory of preemption is appropriate. This doesn't add up.

Second, it is not clear this agency even understands the San Francisco law it seeks to preempt. The law prohibits building owners from interfering with the right of tenants to exercise choice when it comes to communications. It is designed to make sure those in apartment buildings have more broadband options. So the ordinance includes a requirement that existing wiring controlled by property owners should be made available, if feasible. However, the FCC contorts this into a non-existent bogeyman, suggesting that the ordinance compels sharing of wiring that is already in use. This is simply not true. In fact, San Francisco has told us on the record that this is not what the law does. But even if it were true, the agency fails to determine here if such sharing would even be technically possible. All of which begs the question, why is the FCC doing this? Why are we preempting an imaginary possibility in a city ordinance in San Francisco?

Third, instead of worrying ourselves with the hypothetical, we should be taking action. We should be finding ways to increase broadband competition. Our own data demonstrates too few Americans have choice when it comes to high-speed service. Yet the best this agency can do is throw itself in front of a municipal effort to try and increase competition for consumers?

I appreciate that this declaratory ruling is accompanied by a rulemaking about breaking down the messy collection of revenue sharing, ownership rights, facilities access, and marketing that can serve as barriers to competition in multi-tenant environments. But the agency doesn't propose any real action. Moreover, it is hard to square this rulemaking with the broad preemption in our declaratory ruling. I fear the latter lays bare our priorities, and it makes clear for all to see that this FCC doesn't support local efforts to increase broadband competition.

This is not right. I dissent.

STATEMENT OF
COMMISSIONER GEOFFREY STARKS
CONCURRING IN PART AND DISSENTING IN PART

Re: *Improving Competitive Broadband Access to Multiple Tenant Environments*, GN Docket No. 17-142; *Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, MB Docket No. 17-91.

Ensuring that all Americans have access to broadband is one of my highest priorities – and, where American's have competitive choices among broadband providers they should be able to choose the provider that best meets their needs. But, in many apartment and office buildings, building owners become involved in the choice by entering into preferential or exclusive agreements with broadband service providers to serve or market to the building.

The Notice of Proposed Rulemaking portion of this item asks questions about what rules should govern the relationship between building owners and broadband providers. These are questions that the Commission needs to ask in order to learn from stakeholders and to prepare to make policy in this area and I'm glad we are asking them. But, my concurrence with this NPRM will not translate into support for an order adopting rules if those rules do not promote robust broadband deployment and competition for residents and tenants in multi-tenant buildings.

Taking action like adopting this Notice of Propose Rulemaking is the right way for the Commission to determine the best policies for broadband access in multiple-tenant buildings. But, let me be very clear on this point, preempting municipal laws, as the declaratory ruling portion of this item does, is not sound law and not good policy. The City of San Francisco adopted a law to ensure that tenants in apartment buildings in San Francisco would have access to service from any competitor that wants to serve. Today the majority uses the Commission's preemption authority to insert the Commission into San Francisco's decision-making process. Preemption is a blunt tool to be used only in limited circumstances – and the Commission should not be using it here.

First of all, it is a fundamental canon of construction that a law should not be interpreted unfavorably where there are other interpretations that do not present a problem. The Commission seemed all too eager here to lean into a potential interpretation of San Francisco's law that would require preemption. But a more reasonable and unproblematic interpretation exists, one which the Commission has not fully considered. San Francisco's law prohibits property owners from refusing to allow new providers to use "any existing wiring" in a building. As the majority's analysis admits, this language is at worst merely ambiguous and can be reasonably read to not include in-use wiring. Further, the law then proceeds to expressly permit property owners to refuse access to wiring wherever doing so would have an "adverse" effect on service. This is precisely the issue the majority argues would be caused by an in-use wire sharing requirement. Therefore, to the extent that in-use wire sharing poses any technical problems, San Francisco's law can and should be read not to require it.

As a matter of policy, it is equally clear that the Commission rushed to its preemption conclusion. The Commission had other options besides preemption – it could have used the ongoing rulemaking proceeding to clarify it polices. And it could have waited to see what would happen with San Francisco's law, in practice, in the market place, and possibly in the courts. But that's not what we are doing today. I don't think it is necessary or appropriate for the Commission to take this action to overrule a decision that San Francisco rightfully made for itself. Accordingly, I dissent from the Declaratory Ruling portion of this item.

That said, I recognize the work that goes into an this and every item and I thank the staff of the Wireline Competition Bureau for preparing it.