

BACKGROUND | APRIL 2022

Mandatory Access Ordinances

The multifamily rental housing industry is concerned about several ordinances that have been introduced or enacted in localities across the country that could limit a property owner's ability to manage communications services for their apartment communities. These ordinances may also impact the market for broadband overall. Many are concerned that the ordinances could be replicated by additional local governments and may have implications at the federal level.

Much of the recent activity began with San Francisco enacting a mandatory access ordinance in 2016, also known as Article 52, which created a right for residents to request service from any city-authorized communications provider regardless of whether, or how many, providers already serve the property. The main provisions of this ordinance have also been used as a model for other jurisdictions, like Oakland, California and for legislation at the state level in Maryland.

Summary of Recent Mandatory Access Ordinances/Legislation

Recent mandatory access proposals have typically sought to:

- Create a right for an “occupant” of most multifamily communities with four or more units and commercial office buildings to request service from a communications provider, regardless of how many providers are already on site.
- Force a property owner to grant access to a communications provider, including installation of facilities and equipment, and the use of existing “home run wiring” and “cable home run wiring” owned by the building owner. Access to wiring essentially would be forced even if a building owner has contractually assigned the use of the wiring to a provider that already serves the building, thereby creating a conflict with existing provider agreements, and potentially impacting service quality.
- Allow an authorized communications provider to request an inspection of a property to determine whether the provider believes service is feasible. A building owner must either allow the service provider to inspect the property, agree subject to “reasonable conditions,” or state reasons for turning down the request. An inspection request may be refused only for reasons specified by the ordinance such as physical constraints that would prevent the new provider’s equipment or use of existing wiring.
- Require an apartment community to grant access to a provider following a property inspection and the provider’s notice of intent to the building, subject to specific exceptions. The burden then shifts to the building owner, who must either allow service or cite reasons authorized by the proposal to deny access. If an owner allows building access, it must either accept the service provider’s proposal for compensation or set forth an alternative, and identify “reasonable conditions” for service. The ordinances typically leave major issues to be resolved through costly legal proceedings, including conflicts with existing contracts with providers already serving a building and parameters for determining “just and reasonable” compensation.

Multifamily Rental Housing Industry Position Statements

- **Mandatory access statutes do not promote deployment.** Proponents of mandatory access statutes often claim that only through legislation or local ordinances can we expand deployment, boost competition and eliminate the digital divide. In reality, these claims could not be further from the truth.
- **Mandatory access statutes do not address the digital divide.** Despite claims of the opposite, these ordinances do nothing to help the residents they aim to support. In fact, it often further exacerbates the digital divide for Americans living in communities that lack adequate broadband service—particularly those living in lower-income, affordable and smaller rental properties. Mandatory access statutes drive up costs and work against shared broadband affordability goals. As such, broadband providers simply cannot make the needed infrastructure investments to best serve

the apartment residents in the communities they serve. Further, low-income and rural Americans are particularly underserved, not because of contract terms or building access issues, but because of the economics of extending and upgrading infrastructure.

- **Mandatory access statutes enable cherry-picking.** As providers look to maximize their returns, they will inevitably focus on serving high-end customers in high-end communities. This type of cherry-picking will leave smaller and more affordable properties with little to no competition and fewer service options, furthering the digital divide rather than improving connectivity. In practice, competitive broadband providers would continue to have discretion about what properties they serve and would have to bear the cost of installing their own inside wiring. Under current market conditions, competitive providers are granted access to apartment buildings because the provider has made the case for the value of its presence. But there is no corresponding mandatory service obligation. Competitors are and will continue to cherry-pick opportunities in high-end properties.
- **Mandatory access does not increase broadband adoption.** Proponents of regulation often claim that there is a direct relationship between mandatory access ordinances and increased broadband adoption and, in doing so, cite a 2018 FCC study showing a 1.8% increase in adoption in jurisdictions with these types of laws enacted. This is simply not the case. As pointed out in a [review of that study](#), the main problem with the findings is that it includes non-MTE households. Because mandatory access laws do not apply to non-MTE households, they should not have been included. NMHC's model that eliminated non-MTE households showed no significant additional association between mandatory access laws and broadband subscription rates. It is important to note that there are many other variables that were found to be significant in both the FCC's findings and NMHC's. Namely, both findings showed that there are a variety of other factors that determine adoption—such as educational attainment, age, race/ethnicity, household type, and household income. This is unsurprising, given that the survey question addresses whether the household has a broadband subscription—not whether the household has access to broadband. Given the cost associated with internet subscriptions, it is especially unsurprising that household income also correlates with broadband use. This further underscores why broadband subsidy programs like the [FCC's Affordable Connectivity](#) Program are so important.
- **Mandatory access actually reduces broadband deployment.** Current mandatory access laws reduce deployment because a competitive provider never knows when the franchised cable operator or another company with mandatory access rights might choose to enter a building it is serving. A rule granting mandatory access to all providers would force every provider to hedge its bets and pursue only the safest investments.
- **Extending mandatory access rights is unlikely to increase competition.** Industry data show competition and superior broadband service already exists, with 80 percent of apartments surveyed having two or more providers on site. Given the high level of competition and choice already in place in much of the multifamily market, a competitor could obtain access to a building, but it would then have to pay installation costs and compete with not one but two or more providers. This would only make sense at the top of the market and would do nothing to deliver critically needed broadband service to those who need it.
- **Federal and state laws already bar exclusive access agreements.** To encourage market competition, federal and state laws already bar exclusive access agreements between building owners and most communications services providers.
- **Federal law recognizes the importance of negotiating agreements to foster market competition,** higher service standards and competitive prices.

- The market is working effectively to allocate scarce capital for network construction, maintenance and service upgrades. Mandatory access ordinances interfere with an apartment owner's ability to negotiate with providers to invest in their properties and bring quality service to apartment residents.
- Resident satisfaction is a primary motivation for apartment owners in selecting communications services providers. Owners recognize the importance of reliable and fast broadband service for residents. Owners support competition among providers for better service standards and prices that meet resident expectations.
- Apartment residents, by-and-large, are well served and often receive better, faster, cheaper, and more reliable broadband than what is typically available in the broader market. This is the model that policymakers should look to replicate as we aim to address the digital divide—not upend it.