



# Residents' Choice: Ensuring Consumers in Multiple-Dwelling Units Can Choose Their Communications Provider

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## INTRODUCTION

Fast, affordable broadband access and other communications services are increasingly essential to Americans and their communities. But whether or not you have a choice of communications providers often depends on where you live.

For the approximately thirty percent of American families that reside in multi-dwelling unit buildings or communities (MDUs),<sup>1</sup> their communications service access is largely determined by the building owner/manager.<sup>2</sup> In many instances, the building owner/manager understands the value their residents place on having a choice of communications providers offering high-performance services and permits multiple providers to enter and offer service.<sup>3</sup> However, far too often, the building owner/manager prevents competing providers from entering and offering service or otherwise limits residents' choices. For virtually all residents in these underserved locations, moving to another MDU where there is a choice of providers is not a practical alternative.

Some state and local governments began addressing the MDU access problem decades ago to enable cable operators to enter and offer service. But, these laws are only in a limited number of states and localities. In addition, they may not apply broadly to all video providers, let alone to broadband or other types of service providers. As for the Federal Communications Commission,

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<sup>1</sup> See table from the U.S. Census Bureau's 2010-2014 American Community Survey 5-Year Estimates, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS\\_13\\_5YR\\_B25024&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B25024&prodType=table) (*Units in Structure Table*).

<sup>2</sup> MDU residence is on the rise. According to the federal Census data, the percentage of Americans residing in MDUs is increasing. See *Units in Structure Table*. See also *2007 Exclusivity Order*, ¶ 1.

<sup>3</sup> By enabling new entrants such as non-incumbent fiber broadband providers to install service in their MDUs, building owners not only increase the choices of service providers available to their residents, but also increase their property values. According to a recent study, fiber to MDUs creates an 8% greater rental value and 2.8% greater sales value perception. *Fiber Optic Broadband Boosts Value of Multifamily Homes*, Fiber to the Home Council Americas, June 13, 2016, <http://www.ftthcouncil.org/blog/fiber-optic-broadband-boosts-value-of-multifamily-homes>.

it has examined this problem on numerous occasions, but it is not clear that it has sufficient authority to ensure MDU residents can access a choice of providers.<sup>4</sup>

Successful commercial negotiations between building owners/managers and communications providers to permit access are preferable. However, should negotiations fail, MDU residents need government to act as a backstop to ensure they have a choice of providers.

This paper explores why it is so important for MDU residents to have a choice of communications offerings. It then reviews existing federal, state, and local laws aimed at providing these residents with a choice of providers and concludes by discussing potential reforms that states and localities should adopt as a backstop so that MDU residents can be assured they will have a choice of internet and video providers.

## **I. PROVIDING MDU RESIDENTS WITH A CHOICE OF COMMUNICATIONS PROVIDERS RESULTS IN SUBSTANTIAL ECONOMIC, SOCIAL, AND OTHER BENEFITS**

Ensuring MDU residents have a choice of communications providers has numerous benefits for residents, the building owner/managers, and communities:

1. **Enabling choice allows MDU residents to tailor their services to meet their preferences.** MDU residents and their households have widely different needs when it comes to accessing communications services -- including speed and other performance characteristics of their broadband Internet access and varied levels of price sensitivity. The needs of a videographer may be very different than those of a young family next door, for example. As the FCC has noted, “the best results for consumers come from preserving their ability to play an active role in making an individual choice” rather than allowing incumbents to “foreclose individual choice.”<sup>5</sup>
2. **Enhancing MDU resident’s choice increases overall competition in the marketplace, driving lower prices, more innovation, and better service.** Because MDUs are such a large segment of the market, service to them is an important aspect of overall broadband and video competition in particular. Even where there are multiple providers in a market, if those providers are unable to provide service to MDU residents, the overall level of competition will be diminished. In the end, by having multiple providers that have deployed broadband facilities to all locations, all consumers can be assured of having over the long term access to high-performance services that continue to evolve at the lowest prices.
3. **Enabling choice is especially important given that Internet access is so vital to families and the broader community.** As the FCC recently emphasized, “Accessing

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<sup>4</sup> The federal government recognizes, at least to some extent, that consumers should access to communications services, as it has given MDU residents the right install a satellite dish or wireless receiver. See <https://www.fcc.gov/media/over-air-reception-devices-rule>

<sup>5</sup> *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 20235, ¶ 28 (2007) ([2007 Exclusivity Order](#)).

the Internet has become a prerequisite to full and meaningful participation in society.”<sup>6</sup> States and local jurisdictions can take great steps in fostering such access in large part by ensuring that MDU owners cannot limit residents’ ability to obtain the broadband service of their choosing.

4. **Enabling choice will especially benefit minorities, low-income individuals, and seniors who reside in MDUs.** According to the FCC, “[t]he percentage of minorities living in MDUs is larger than that of the general population.”<sup>7</sup> The same is true for senior and low-income Americans in major metropolitan areas, according to statistical studies by the United States Telecom Association.<sup>8</sup> As a result, giving MDU residents choice of a service provider will especially benefit those underserved communities. It also will benefit video programmers specializing in programming oriented to those groups.<sup>9</sup>
5. **Providing residents with choice will address the problem that residents generally cannot “vote with their feet.”** While in theory residents can move if a building opts for a particular provider that is not the residents’ preference, the reality is that the costs associated with moving from one residence to another (i.e., switching costs) are generally prohibitive. For instance, leases tend to be long-term obligations of months or even years, and once a resident is finally out of a lease, the out-of-pocket costs of moving are often high.

Enabling multiple service providers to access an MDU also is consistent with standard industry practices, where providers share infrastructure or common areas. Under existing federal and state laws and regulations, certain communications providers have the right to attach their network lines to poles owned by electric utilities and incumbent local telephone companies.<sup>10</sup> Similarly, many municipalities have “dig once” regulations requiring utilities and communications providers to cooperate in trench and conduit construction by installing infrastructure at the same time, in the same trench, or in the same conduit as public utilities—and to share the costs of the construction.<sup>11</sup> Video, communications, and broadband service providers have all demonstrated

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<sup>6</sup> *In the Matter of Lifeline and Link Up Reform and Modernization; Telecommunications Carriers Eligible for Universal Service Support; Connect America Fund*, Order on Reconsideration, 31 FCC Rcd. 3962, ¶ 1 (2016) ([2016 Lifeline Reform Order](#)).

<sup>7</sup> *Id.*, ¶ 8.

<sup>8</sup> See Letter from Glenn T. Reynolds, Vice President, Policy, United States Telecom Association, to Marlene H. Dortch, Secretary, FCC (filed Oct. 24, 2007), *available at* <https://ecfsapi.fcc.gov/file/6519743646.pdf>.

<sup>9</sup> *2007 Exclusivity Order*, ¶ 18.

<sup>10</sup> 47 U.S.C.S. § 224 (LexisNexis 2016) (*Pole Attachment Act*); 47 C.F.R. § 1.1403 (1978); *see, e.g.*, Wash. Rev. Code § 80.54.020 (1979); Utah Admin. Code r. 746-345-1 (2016). The recent Open Internet Order of the Federal Communications Commission (FCC) ensures the application to broadband providers of the Pole Attachment Act and the FCC’s pole attachment rules. This guarantees access by broadband providers to poles owned by investor-owned utilities. *See Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, ¶ 56 (2015) (*Open Internet Order*).

<sup>11</sup> *See, e.g.*, Orange Beach, Ala., Code of Ordinances § 66-115; Glendale, Ariz., Code of Ordinances § 10-57; Boulder, Colo., Mun. Code § 8-5-15; Broomfield, Colo., Code of Ordinances § 14-10-130(A); Fulton County, Ga., Code of Ordinances § 62-96(b); Des Moines, Iowa, Code of Ordinances § 102-720; Minneapolis, Minn., Code of Ordinances § 430.80; Watertown, Minn., Code of Ordinances § 51-39; Oxford, Miss., Code of Ordinances § 98-159; Jersey City, N.J., Code of Ordinances § 296-25; Austin,

the ability to successfully share access to poles and conduit pursuant to these federal, state, and local regulations, which were promulgated out of recognition that such sharing affords numerous benefits to the public.<sup>12</sup> Sharing or reusing existing infrastructure that has available space is an efficient way to get services to customers at lower cost and with less inconvenience and less aesthetic impact. Ensuring MDU owners act to enable shared access to MDUs is consistent with this industry norm and would benefit residents of such buildings.

With these myriad policy advantages in mind, the next section examines government actions taken over the past decades to address the provision of communications choice for MDU residents and then discusses reforms that are needed to provide a backstop to achieve the benefits that choice can afford MDU residents and the broader community.

## II. MDU ACCESS LAWS AND REGULATIONS

Over 30 years ago, when cable operators were first building out urban markets, the federal government considered adopting legislation to give cable operators the right (mandatory access) to MDUs at reasonable rates, terms, and conditions. However, while the federal government gave cable operators a process for accessing public right of way and utility easements, it did not provide a general right of access to MDUs. 18 states stepped in to fill this vacuum, and either gave MDU residents a right to choose their cable provider or gave cable operators a right of access.<sup>13</sup> So too did many municipalities.<sup>14</sup>

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Tex., Code of Ordinances § 14-11-167(C-E); Plano, Tex., Code of Ordinances § 19-74; Richmond, Va., Code of Ordinances § 90-466(a); Duvall, Wash., Code of Ordinances § 5.17.060. *See also* City of Mountain View, Cal., Excavation Permit Application, at 5 (revised Aug. 17, 2013), *available at* <http://mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=12003>; City of San Mateo, Cal., Recommendation for Draper University Row Encroachment License Agreement, Attachment 2, at 8 (Mar. 17, 2014) (“Licensee agrees to cooperate in the planning, locating and constructing of its Telecommunications Conduit Facilities in joint utility trenches or common duct banks with other similar utilities and to participate in cost-sharing for the joint trench and ducts when such joint utility installations are being planned for or such opportunities exist in any area; provided that such activities do not unreasonably impair or disrupt Proprietary Telecommunications Services of Licensee.”).

<sup>12</sup> *See* “Role of State and Local Governments in Simplifying the Make-Ready Process for Pole Attachments,” Fiber to the Home Council (2015), *available at* <http://www.ftthcouncil.org/d/do/1959>.

<sup>13</sup> *See e.g.* Connecticut (Conn. Gen. Stat. § 16-333a (1997)); Delaware (Del. Code Ann. tit. 26, § 613 (1997)) (only if utility easements also exist); District of Columbia (D.C. Code Ann. § 34-1261.01 (LexisNexis 2016)); D.C. Mun. Regs. tit. 15, § 3000 (1988)); Florida (Fla. Stat. Ann. § 718.1232 (West 1997)); Illinois (55 Ill. Comp. Stat. Ann. 5/5-1096 (1997)); Iowa (Iowa Code § 477.1 (1997)); Kansas (Kan. Stat. Ann. § 58-2553(b) (1997)); Maine (Me. Rev. Stat. Ann. tit. 14, § 6041 (1997)); Massachusetts (Mass. Gen. Laws ch. 166A, § 22 (1998)); Minnesota (Minn. Stat. Ann. § 238.23 (1997)); Nevada (Nev. Rev. Stat. Ann. § 711.255 (1997)); New Jersey (N.J. Rev. Stat. § 48:5A-49 (1997)); New York (N.Y. Pub. Serv. Law § 228 (1996)); Pennsylvania (68 Pa. Stat. Ann. § 250.503-B (1997)); Rhode Island (R.I. Gen. Laws § 39-19-10 (1997)); Virginia (Va. Code Ann. § 55-248.13:2 (1997)); West Virginia (W. Va. Code Ann. § 24D-2-3 (2015)); Wisconsin (Wis. Stat. § 66.0421 (1999)).

Below are two examples from West Virginia and Florida, respectively:

*(a) A landlord may not: (1) Interfere with the installation, maintenance, operation or removal of cable television facilities upon his property or multiple dwelling premises...[.]; (2) Demand*

Unfortunately, these laws have not been adopted in all states, and even then, some are too limited, including by excluding certain providers of video, broadband, and communications services.

The issue of MDU access took on increasing importance in the early 2000s when competitive providers began to enter and offer first video and then voice and broadband Internet services. Without access to these concentrations of potential customers, competitive entry was much more difficult. MDU owners reacted in many different ways to this new environment. Some embraced it and struck deals with competitive providers. Others, however, were hemmed in by long term, exclusive agreements and had little ability to permit competitive providers to enter, even if they wanted to enable choice. Still other owners were concerned about damage to their property and building security and forestalled new entrants.

In sum, MDU residents were not assured of having a choice of providers. In the face of these challenges, some state and municipal laws provided adequate relief, but too few states and municipalities have adopted MDU tenants rights or access laws, and even where they were adopted, they often were inadequate to act as a backstop should private negotiations fail.

To address potential barriers to competition and choice, the Federal Communications Commission (“FCC”) got involved. In its *2007 Exclusivity Order*, the FCC expressly [prohibited](#) the enforcement of existing contractual clauses granting one multichannel video programming distributor (“MVPD”) exclusive access to MDUs and other real estate developments, as well as the execution of new agreements with such terms.<sup>15</sup> In addressing the harms of those exclusivity arrangements, the Commission noted that “[i]ncumbent providers commonly engage in a flurry of activity to lock up MDUs and other real estate developments in exclusive arrangements as soon as it becomes clear that a new entrant will be coming to town. Sometimes these clauses are inserted in fine print, in ‘legalese,’ and without adequate notice to the MDU owner.”<sup>16</sup> Against that backdrop -- and in recognition that the “greatest harm that

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*or accept any payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or multiple dwelling premises, or from any cable operator in exchange therefor except as may be determined to be just compensation in accordance with this article; [or] (3) Discriminate in rental charges, or otherwise, between tenants who receive cable television service and those who do not.*

*No resident of any condominium dwelling unit . . . shall be denied access to any available franchised or licensed cable television service, nor shall such resident or cable television service be required to pay anything of value in order to obtain or provide such service except those charges normally paid for like services by residents of, or providers of such services to, single-family homes within the same franchised or licensed area and except for installation charges as such charges may be agreed to between such resident and the provider of such services.*

<sup>14</sup> See, e.g., TAMPA, FLA., CODE OF ORDINANCES ch. 7, art. 1, § 7-14 (2015); CHICAGO, ILL., MUNICIPAL CODE § 4-280-480 (2015).

<sup>15</sup> *2007 Exclusivity Order*, ¶ 1.

<sup>16</sup> *Id.*, ¶ 14.

exclusivity clauses cause residents of MDUs is that they deny those residents another choice of MVPD service and thus deny them the benefits of increased competition”<sup>17</sup> -- the Commission acted under Section 628 of the Communications Act<sup>18</sup> to render such clauses unenforceable.<sup>19</sup> The Commission, however, did not find it had the authority to regulate the rates, terms, and conditions for entry and access. As a result, the Commission’s prohibition on exclusive agreements did not amount to much, if any, relief for MDU residents.

However, the FCC repeatedly highlighted the important role cities and states can play in fostering choice. For instance, the FCC recognized in its *2007 Order* that there were already some states whose laws similarly prohibited or limited exclusivity arrangements.<sup>20</sup> And several years prior, the Commission emphasized the crucial role that state and local jurisdictions could - - and should -- play in encouraging choice for MDU residents. Noting that a number of states had enacted “mandatory access” laws granting franchised cable operators with a legal right to install and maintain cable wiring in MDU buildings, the Commission urged that such laws tended to “preclude alternative (non-cable) MVPDs from executing MDU contracts.”<sup>21</sup> Rather than preempt such laws, however, the Commission explained that they could be revised to benefit competition and consumers:

*States and local jurisdictions are well-positioned to decide whether the need for mandatory access laws outweighs the anti-competitive effects of such laws, as described above. Therefore, we urge states and municipalities that have mandatory access laws to carefully consider the level of effective competition among MVPDs in the MDU market place, and if competition is found to be lacking, to determine whether a repeal or reform of such laws might enhance such competition and thereby benefit consumers.*<sup>22</sup>

The FCC thus has encouraged states and localities to enact legislative reforms aimed at providing MDU residents with a choice of communications providers.

### **III. ADOPTING AND ENHANCING STATE AND LOCAL MDU LAWS AND REGULATIONS**

Just as the federal government created a vacuum several decades ago which states and municipalities filled, so too there is a need for states and localities to play a role to adopt and enhance laws and regulations to give MDU residents a choice of communications providers that offer high-performance video and broadband Internet services. To address this problem, state

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<sup>17</sup> *Id.*, ¶ 17.

<sup>18</sup> [47 U.S.C. § 548](#) (1992).

<sup>19</sup> *2007 Exclusivity Order*, ¶ 1.

<sup>20</sup> *2007 Exclusivity Order*, n. 79; see also McDowell concurrence at 55.

<sup>21</sup> *In the Matter of Telecommunications Services Inside Wiring and Customer Premises Equipment; In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, First Order on Reconsideration and Second Report and Order, 18 FCC Rcd. 1342, ¶¶ 35, 38 (2003) ([2003 Inside Wiring Order](#)).

<sup>22</sup> *Id.*, ¶ 39.

and local jurisdictions should enhance their “residents’ choice” or “open MDU access” laws -- and other jurisdictions should adopt laws -- to include a more expansive view of the types of service providers from which MDU residents should be afforded the opportunity to obtain service. Illinois provides a good illustration of such updated legislation. Its statute reads, in part:

*Neither the owner of any multiple-unit residential dwelling nor an agent or representative nor an assignee, grantee, licensee, or similar holders of rights, including easements, in any multiple-unit residential dwelling . . . shall unreasonably interfere with the right of any tenant or lawful resident thereof to receive cable service or video service installation or maintenance from a holder of a State-issued authorization, or related service that includes, but is not limited to, voice service, Internet access or other broadband services (alone or in combination) provided over the holder's cable services or video services facilities[.]*<sup>23</sup>

Rhode Island’s statute is another strong example, notably including the following description of its legislative intent:

*[A] tenant in a multiple dwelling unit shall have the freedom and right to select the provider of cable television, telephone, telecommunications or information service to their living unit, without any restraints, limitations or conditions imposed by a landlord, and to enable CATV operators or other telephone, telecommunications or information service providers to offer meaningful choices to tenants of multiple dwelling of a commercial units a tenant in a multiple dwelling unit may subscribe to CATV, telephone, telecommunications or information service[.]*<sup>24</sup>

What the Illinois and Rhode Island statutes have in common is a recognition that MDU residents should be afforded the choice of any service provider that wishes to serve them -- whether they be traditional cable operators or other types of video service provider, as well as providers of broadband access and voice services. Both laws also recognize the need for a balanced approach to fostering residents’ choice and provide various mechanisms for the MDU owners and managers to assert reasonable controls over the entry of such service providers into their buildings. For instance, the Illinois statute requires that broadband providers “conform to reasonable conditions necessary to protect safety, functioning, appearance, and value of premises or the convenience and safety of persons or property.”

Drawing in part from those statutes, technology-neutral model legislation is included in Appendix A for other jurisdictions to use in their efforts to reform their existing laws on MDU residents choice of service providers, or promulgate new such laws.

## **CONCLUSION**

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<sup>23</sup> [220 Ill. Comp. Stat. Ann. 5/21-1201\(a\) \(2013\)](#).

<sup>24</sup> [R.I. Gen. Laws § 39-19-10 \(2014\)](#).

At a time when “[a]ccessing the Internet has become a prerequisite to full and meaningful participation in society,”<sup>25</sup> more states and localities should adopt or reform policies to ensure that residents of multi-unit buildings and developments have a real choice in the selection of their internet and video providers. Doing so would not only benefit residents of those buildings, but also foster a more vibrant, competitive marketplace for the broader community.

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<sup>25</sup> *2016 Lifeline Reform Order*, ¶ 1.

## APPENDIX A MODEL LEGISLATION

### **Multiple-unit residential dwellings; interference with permittee prohibited**

#### **PREAMBLE**

- (1) Access to and use of video, telecommunications, including broadband Internet access, and other communications services are essential for all citizens to participate fully economically, socially, and politically;
- (2) Having a choice of communications providers will maximize citizens' access to and use of state-of-the-art communications services at reasonable rates, terms, and conditions;
- (3) Having a choice of communications providers will provide economic, social, and political benefits for communities; and
- (4) Because residents of multiple dwelling units may not be able to access and use communications providers of their choice and are unable practically to move to other dwellings, it is important that government ensure their access to and use of communications providers of their choice.

#### **ENSURING MDU RESIDENT CHOICE**

**(a)** No owner of a multiple-unit residential dwelling shall unreasonably interfere with the right of a tenant or resident thereof to request or receive installation, operation, maintenance, or removal of a video service, telecommunications service, broadband Internet access service, or other communications service from a permittee.

**(b)** No owner shall penalize, threaten, or discriminate in any way against a tenant or resident on account of requesting or receiving video service, telecommunications service, broadband Internet access service, or other communications service from a permittee.

**(c)** Nothing in this Section shall prohibit the owner from requiring:

- (i) just and reasonable compensation from the permittee for the loss in value, if any, to the owner's multiple-unit residential dwelling resulting from the permittee's access to and use of such property to provide installation of video service, telecommunications service, broadband Internet access service, or other communications service, provided that such access and use of such property shall be provided in a nondiscriminatory manner;
- (ii) that a permittee's facilities conform to reasonable conditions necessary to protect safety, functioning, appearance, and value of premises or the convenience and safety of persons or property; or
- (iii) agreement by the permittee to indemnify the owner for damages or from liability for damages caused by the installation, operation, maintenance, or removal of video

service, telecommunications service, broadband Internet access service, or other communications service facilities.

**(d)** Any person or entity harmed by a violation of this Section may seek enforcement pursuant to the process and procedures established in Section [insert reference].

**(f) Definitions.** For purposes of this Section:

(i) "Access and use" or "access to and use of" means the physical occupation and use of the multiple-unit residential dwelling by the permittee providing services at such property, including common areas, corridors, and hallways of such property; inside wire in the individual unit of any tenant or lawful resident thereof that requests or receives service from the permittee; and the physical occupation and use of building infrastructure, including but not limited to existing cables, wiring, conduit, or inner duct, to provide such permittee's services.

(ii) "Broadband Internet access service" means that term as defined by the Federal Communications Commission in 47 C.F.R. Part 8.

(iii) "Multiple-unit residential dwelling" means a multiple dwelling unit building such as an apartment building, condominium building, or cooperative, and any other centrally managed residential real estate development such as a gated community, mobile home park, or garden apartment, provided however, that multiple-unit dwelling shall not include time share units, academic campuses and dormitories, military bases, hotels, rooming houses, prisons, jails, halfway houses, nursing homes or other assisted living facilities, and hospitals.

(iv) "Owner" means an owner of a multiple-unit residential dwelling, or the agent or representative of such owner, a homeowners association, condominium association, or other community association entity associated with a multiple-unit residential dwelling, or an assignee, grantee, licensee, or similar holder of rights, including easements, in any multiple-unit residential dwelling.

(v) "Permittee" means any entity having permission to place facilities within the public rights-of-way, including any agent, representative, affiliate, or partner of such entity, for the provision of video service, telecommunications service, broadband Internet service, or other communications service within a service area encompassing the multiple-unit residential dwelling.

(vi) "Telecommunications service" means that term as defined in 47 U.S.C. § 153.

(vii) "Unreasonably interfere" includes, but is not limited to, the act of an owner of a multiple-unit residential dwelling to enter into any agreement with any provider of video service, telecommunications service, broadband Internet access service, or other communications service that would materially diminish or interfere with the rights of any tenant or resident thereof to request or receive installation, operation, maintenance, or removal of a video service,

telecommunications service, broadband Internet access service, or other communications service from a permittee.

(viii) "Video service" means a "cable service" as that term is defined in 47 U.S.C. § 522, or other video programming service that is provided through facilities located, at least in part, in or on the public rights-of-way without regard to delivery technology, including Internet protocol technology. This definition does not include any video programming provided by a commercial mobile service provider defined in subsection (d) of 47 U.S.C. 332 or any video programming provided solely via a service that enables users to access content, information, electronic mail, or other services offered over the public Internet.