

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

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
)	

COMMENTS OF THE FIBER BROADBAND ASSOCIATION

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The Fiber Broadband Association (“FBA”)¹ hereby submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding seeking comment to refresh the record developed in response to the multiple tenant environment (“MTE”) Notice of Inquiry (“NOI”)² and garner “further targeted comment on a variety of issues that may affect the provisioning of broadband to MTEs,” so that it can “establish effective, clear policy that is carefully tailored to promote broadband deployment to MTEs.”³

¹ FBA is a not for profit trade association with more than 250 members, including telecommunications, computing, networking, system integration, engineering, and content-provider companies, as well as traditional service providers, utilities, and municipalities. Its mission is to accelerate deployment of all-fiber access networks by demonstrating how fiber-enabled applications and solutions create value for service providers and their customers, promote economic development, and enhance quality of life. A complete list of FBA members can be found on the organization’s website: <https://www.fiberbroadband.org/>.

² *Improving Competitive Broadband Access to Multiple Tenant Environments*, Notice of Inquiry, 32 FCC Rcd 5383 (2017) (“NOI”).

³ *Improving Competitive Broadband Access to Multiple Tenant Environments; Petition for Preemption of Article 52 of the San Francisco Police Code Filed by the Multifamily Broadband Council*, GN Docket No. 17-142, MB Docket No. 17-91, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 19-65, ¶ 15 (rel. July 12, 2019) (“NPRM”).

In its 2017 NOI Comments, FBA conveyed to the Commission that “the millions of Americans that live and work in MTEs”⁴ were eager to access fiber and other advanced, high-performance communications networks.⁵ That is truer today than it was then. A 2018 FBA survey, conducted by market research firm RVA, LLC,⁶ and following up on the 2016 survey previously cited by FBA,⁷ shows that MTE residents continue to rank fast and reliable broadband as the single most important amenity, increasing to 86% in 2018 from 81% in 2016.⁸ Additionally, in 2018, just as in 2016, survey respondents indicated that having a choice of multiple broadband providers in the MTE is also highly important.⁹ MTE residents continue to spend more time online per day (about 5.7 hours for renters and 5.2 hours for unit owners, up from 5.1 hours combined in 2016) than single family home residents (about 5.1 hours, up from 4.8 hours in 2016).¹⁰ The 2016 study further showed that MTE owners reap the benefits of fiber broadband in their MTEs, as it reduces tenant churn and increases sales value perception.¹¹ This is buttressed by a 2015 FBA study showing that fiber deployed in residential and commercial properties can increase the value of the properties by 3.1 percent.¹²

⁴ *Id.* at ¶ 2.

⁵ FBA NOI Comments at 3.

⁶ Appendix A: *Study Of MDU Owners And Renters*, RVA, LLC (2018) (“2018 Study”)

⁷ FBA NOI Comments at 3-4, *citing* Michael C. Render, *The Tangible Value Of Advanced Broadband To MDUs*, RVA, LLC (2016), <http://glenechogroup.isebox.net/ftthconnect?default=tXExg6Xo> (“2016 Study”).

⁸ 2016 Study at 9; 2018 Study at 2-3.

⁹ 2016 Study at 9; 2018 Study at 3.

¹⁰ 2016 Study at 8; *see* 2018 Study at 6-7.

¹¹ 2016 Study at 15.

¹² *Study Shows Home Values Up 3.1% with Access to Fiber*, Fiber to the Home Council (June 29, 2015), <https://www.fiberbroadband.org/blog/study-shows-home-values-up-3.1-with-access-to-fiber>.

FBA explained in its 2017 NOI Comments and Reply Comments that demand for fast broadband among MTE residents and the large concentration of customers in MTEs motivates FBA service provider members to deploy all-fiber networks to these MTEs, but that deployment barriers remained. This is still true today. FBA explained that, to facilitate the deployment of fiber and other advanced communications infrastructure to customers in MTEs, the Commission (1) should not interfere with State and local mandatory access laws that promote competition in broadband deployment in MTEs; (2) should continue to allow broadband providers to enter into marketing and bulk-billing arrangements with MTE owners; (3) should prohibit sale-and-leaseback arrangements within MTEs except where providers can show they are not anticompetitive; and (4) should permit cost-based and non-discriminatory revenue sharing agreements.¹³

Given the continued existence of deployment barriers, FBA commends the Commission for reviving its efforts “to accelerate the deployment of next-generation networks and services within MTEs”¹⁴ and urges it to act expeditiously in doing so. To achieve that outcome, the Commission should: (1) require service providers to disclose revenue-sharing agreements and permit service providers to enter into such agreements only when they are cost-based and non-discriminatory; (2) prohibit sale-and-leaseback arrangements for inside wire between providers and MTE owners, unless the parties can show they are not anticompetitive; (3) encourage disclosure of exclusive marketing arrangements to address potential concerns about their effect on competition; and (4) not interfere with the jurisdiction of State and local governments to

¹³ See FBA Reply Comments.

¹⁴ NPRM at ¶ 2.

adopt mandatory access laws that promote deployment and enhance competition. These provisions mirror those that FBA provided in 2017. We discuss them in greater detail below.

I. REVENUE SHARING AGREEMENTS SHOULD BE DISCLOSED AND ONLY PRESUMED TO BE IN THE PUBLIC INTEREST IF THEY ARE COST-BASED AND NON-DISCRIMINATORY

In the experience of FBA members, they are seeing fewer revenue sharing agreements between service providers and MTE owners related to access to and the deployment of inside wire in MTEs, which may indicate that such agreements are not needed to promote broadband deployment. As discussed above, fiber and other advanced communications networks deployed in MTEs increase MTE property values and the positive perception of those MTEs, thereby allowing MTE owners to attract tenants at a higher value. However, revenue sharing agreements still are present at times and in certain instances may be anticompetitive.

Accordingly, to the extent revenue sharing agreements are used, the Commission should require that providers disclose the existence and terms of revenue sharing agreements to the Commission upon request. In addition, revenue sharing agreements should only be presumed to be consistent with the public interest if they are cost-based and non-discriminatory. Cost-based agreements reflect the reasonable and direct costs incurred by an MTE owner in connection with a provider's access to and use of the MTE, including by the installation of inside wire. In its NOI Reply Comments, FBA recognized that MTE owners may incur costs related to the installation and maintenance of facilities for communications services by service providers.¹⁵ Revenue sharing agreements can allow MTE owners to recover these costs in the instances where that is needed to incentivize owners to allow providers to extend their networks into their property. For these agreements to be non-discriminatory, MTE owners cannot extract greater

¹⁵ FBA NOI Reply Comments at 6.

fees from one provider over another provider if the actual costs associated with the provider's access and use of the MTE are not greater. This ensures providers can compete on equal footing and prevents MTE owners from extracting excessive rents. These provisions would not prohibit in-kind arrangements, such as when a provider contributes to building infrastructure or provides WiFi service in common areas, so long as the entirety of the arrangement does not exceed actual costs.¹⁶

Above-cost revenue sharing agreements harm deployment and consumers because they create a perverse financial incentive for MTE owners to either exclude access to competing service providers when it would reduce the owner's share or upcharge those service providers if they want to deploy within the MTE to maximize profits. As a result, above-cost revenue sharing will either depress deployment, and thus competition, or cause additional costs to be passed on to consumers, raising their expenses and destroying the competitive benefit that the revenue sharing arrangement was supposedly meant to achieve. Thus, revenue sharing agreements in the form of *pro rata* fees based solely on a service provider's revenue generated from MTE resident subscription fees should be presumed impermissible.¹⁷

¹⁶ The Commission recently recognized that in-kind contributions can be attributable in such a manner. *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, FCC 19-80, ¶ 21, n. 100 (rel. Aug. 2, 2019) (noting that assessments do not lose their purpose when in-kind contributions are counted).

¹⁷ NPRM at ¶ 16.

II. SALE-AND-LEASEBACK ARRANGEMENTS OF INSIDE WIRE SHOULD BE PRESUMPTIVELY PROHIBITED, UNLESS SHOWN NOT TO BE ANTICOMPETITIVE

As FBA stated in its NOI Comments, providers should maintain their ability to control use of inside wiring they install and continue to own because such control ensures providers can receive a sufficient return on their investment in deploying facilities within MTEs.¹⁸

According to FBA members, sale-and-leaseback arrangements of inside wire between providers and MTE owners are rarely used in the market, but to the extent they are, they can be anticompetitive and allow for circumvention of the Commission's rules proscribing exclusive access agreements. Section 76.802(a)(2) of the Commission's rules states in part that:

Upon voluntary termination of cable service by an individual subscriber in a multiple-unit installation, a cable operator shall not be entitled to remove the cable home wiring unless: it gives the subscriber the opportunity to purchase the wiring at the replacement cost; the subscriber declines, and neither the MDU owner nor an alternative MVPD, where permitted by the MDU owner, has provided reasonable advance notice to the incumbent provider that it would purchase the cable home wiring.¹⁹

Section 76.802(j) further states that:

Cable operators are prohibited from using any ownership interests they may have in property located on the subscriber's side of the demarcation point . . . to prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service. In addition, incumbent cable operators must take reasonable steps within their control to ensure that an alternative service provider has access to the home wiring at the demarcation point.²⁰

These rules are designed to facilitate consumer choice and competition among providers.²¹

¹⁸ FBA NOI Comments at 11-12.

¹⁹ 47 CFR § 76.802(a)(2). "MDU" means multiple dwelling unit building, which is a term the Commission has sometimes used to refer to MTEs. NPRM at n.2.

²⁰ 47 CFR § 76.802(j).

²¹ *Telecommunications Services Inside Wiring, Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of*

If a provider sells its wiring to an MTE owner and leases it back before a resident/subscriber terminates the provider's services, the Commission's rules giving the subscriber the opportunity to purchase the wiring upon termination are never triggered. Under these circumstances, the MTE owner can inhibit the subscriber from choosing an alternative provider, which is the circumstance the rules were meant to prevent.²² Since the Commission does not have jurisdiction over MTE owners, it cannot prohibit them "from using any ownership interests they may have . . . to prevent, impede, or in any way interfere with, a subscriber's right to use his or her home wiring to receive an alternative service,"²³ as it has done for incumbent providers. Yet, the lessee provider still gets the benefit of what effectively is an exclusive access agreement, which comes at the expense of competition. Since sale-and-leaseback arrangements have the indicia of being anticompetitive and can be used to evade the Commission's rules against exclusive access agreements, they should be presumptively prohibited unless the provider and MTE owner can demonstrate they are not anticompetitive.

III. EXCLUSIVE MARKETING ARRANGEMENTS ARE NOT INHERENTLY ANTICOMPETITIVE; THE COMMISSION SHOULD ENCOURAGE DISCLOSURES OF SUCH AGREEMENTS

FBA appreciates that the Commission has decided not to revisit its 2010 conclusion that "exclusive marketing [can] 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."²⁴ As FBA made clear in its NOI Comments, these arrangements do

1992: Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659, 3718, ¶ 122 (rel. Oct. 17, 1997).

²² *See id.* at 3717-18, ¶¶ 121-122.

²³ 47 CFR § 76.802(j).

²⁴ NPRM at ¶ 27.

indeed facilitate deployment of fiber to and inside MTEs, as well as the provision of advanced communications services to tenants,²⁵ thus they should be permitted unless there is evidence an agreement is anticompetitive.

The FCC seeks comment “on whether there are specific circumstances in which exclusive marketing arrangements result in *de facto* exclusive access,”²⁶ which would be anticompetitive. The Commission premises its query on an assertion it attributes to FBA “that exclusive marketing arrangements ‘inhibit competition in practice because MTE owners misinterpret the otherwise acceptable terms of the agreement’”²⁷ FBA did not make such an assertion and instead made that statement in its NOI Reply Comment to characterize the arguments of other commenters as making that assertion.²⁸ Nevertheless, while FBA generally supports exclusive marketing arrangements and does not believe they are inherently anticompetitive, they could be viewed as exclusive access arrangements if they prohibit other providers from, for instance, distributing information to tenants or going on the premises to market to prospective tenant customers.

The Commission can help address this concern by encouraging providers to disclose such agreements. Additionally, FBA stands by its proposal that the Commission clarify 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

²⁵ FBA NOI Comments at 9.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See FBA NOI Reply Comment at 4 (“Indeed, the most prevalent “harm” *that these commenters proffer in support of their positions*, particularly with regard to exclusive marketing arrangements, is that they inhibit competition in practice because MTE owners misinterpret the otherwise acceptable terms of the agreement.”) (emphasis added).

tenants about the ability of other providers to provide service in the MTE.”²⁹ The Commission also should examine exclusive marketing arrangements where there is evidence that the arrangement is anticompetitive or otherwise violates the Communications Act.³⁰

IV. STATE AND LOCAL MANDATORY ACCESS LAWS PROMOTE DEPLOYMENT AND ENHANCE COMPETITION

The Commission is “seek[ing] comment on examples of state or local regulations or other policies that have successfully promoted broadband deployment, competition, and access to MTEs.” As FBA detailed in its NOI Comments, State and local mandatory access laws are derived from their authority over property rights and address local deployment issues where access to MTEs are limited by MTE owners thereby harming competition. The laws generally provide: (1) the right for service providers to install facilities in MTEs either unconditionally or upon request for services from a provider of a tenant’s choosing;³¹ (2) “reasonable” or “just” compensation to the property owner for the access³² and reasonable restrictions on how a provider can access the property;³³ and (3) indemnity to the landlord for damages caused by

²⁹ *Id.* at 5.

³⁰ These instances should be rare because, as FBA noted in its NOI Reply Comments, at n.14, these arrangements are subject to scrutiny under State laws that protect the rights of residents of homeowners’ and condominium associations and of other MTEs to obtain services of their choice from providers of their choice.

³¹ *See, e.g.*, N.Y. Pub. Serv. Law § 228 (Consol., 2017).

³² *See, e.g.*, 55 Ill. Comp. Stat. Ann. 5/5-1096 (LexisNexis, 2016); Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017); R.I. Gen. Laws, § 39-19-10(6) (2016).

³³ *See* N.Y. Pub. Serv. Law § 228 (1)(a)(1) (Consol., 2017) (requiring “the installation of cable television facilities [to] conform to such reasonable conditions as are necessary to protect the safety, functioning and appearance of the premises, and the convenience and well being of other tenants”); *see also* Wis. Stat. § 66.0421(3) (2017) (requiring a “video service provider [to] install facilities to provide video service in a safe and orderly manner and in a manner designed to minimize adverse effects to the aesthetics of the multiunit dwelling or condominium”).

installation and provision of service.³⁴ These laws promote competition of cable and telecommunications services in MTEs. Eighteen States, the District of Columbia, and numerous municipalities have passed mandatory access laws,³⁵ and the Commission has twice declined to pre-empt these laws, giving deference to states.³⁶ The Commission should not frustrate its longstanding policy of acknowledging the jurisdiction of State and local governments to adopt mandatory access laws where State and local lawmakers perceive they are needed.

CONCLUSION

For the reasons set forth above, the Commission should: (1) require service providers to disclose revenue-sharing agreements and presume service providers can enter into such agreements when they are cost-based and non-discriminatory; (2) prohibit sale-and-leaseback arrangements for inside wire between providers and MTE owners, unless the parties can show they are not anticompetitive; (3) encourage disclosure of exclusive marketing arrangements to help address potential concerns about their effect on competition and view such arrangements as potentially anticompetitive if they prohibit other providers from, for instance, distributing

³⁴ See, e.g., Conn. Gen. Stat. § 16-333a (2016); Mass. Ann. Laws Ch. 166A, § 22 (LexisNexis, 2017); W. Va. Code § 5-18A-1 (1995); Nev. Rev. Stat. Ann. § 711.255 (1987).

³⁵ See Connecticut (Conn Gen. Stat. § 16-333a (2016)), Delaware (26 Del. C. § 613) (1983) (only if utility easements also exists), District of Columbia (D.C. Code § 43-1844.1) (1981), Florida (Fla. Stat. § 718.1232) (1982) (condos only), Illinois (55 Ill. Comp. Stat. Ann. 5/5-1096) (1993), Iowa (Iowa Code § 477/1) (1977), Kansas (K.S.A. § 58-2553) (1983), Maine (14 M.R.S.A. § 6041) (1987), Massachusetts (Mass. Ann. Laws. Ch. 166A, § 22 (LexisNexis, 2017)), Minnesota (Minn. Stat. § 238.23) (1983), Nevada (Nev. Rev. Stat. Ann. § 711.255) (1987), New Jersey (N.J. Stat. § 48:5A-49) (1982), New York (N.Y. Pub. Serv. Law § 228) (1995), Ohio (ORC Ann 4931.04) (1998); Pennsylvania (68 P.S. § 250.503-B) (1993), Rhode Island (R. I. Gen. Laws, § 39-19-10) (1993), Virginia (Va. Code Ann. § 55.248, 13:2) (1997), West Virginia (W. Va. Code § 5-18A-1) (1995), and Wisconsin (Wis. Stat. § 66.0421) (2001).

³⁶ FBA NOI Comments at 7-8.

information to tenants or going on the premises to market to prospective tenant customers; and
(4) not interfere with the jurisdiction of State and local governments to adopt mandatory access laws that promote deployment and enhance competition. .

Respectfully Submitted,



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Appendix A

Study Of MDU Owners And Renters Survey Data From 2018

BroadbandCommunities
BUILDING A FIBER-CONNECTED WORLD **MAGAZINE**

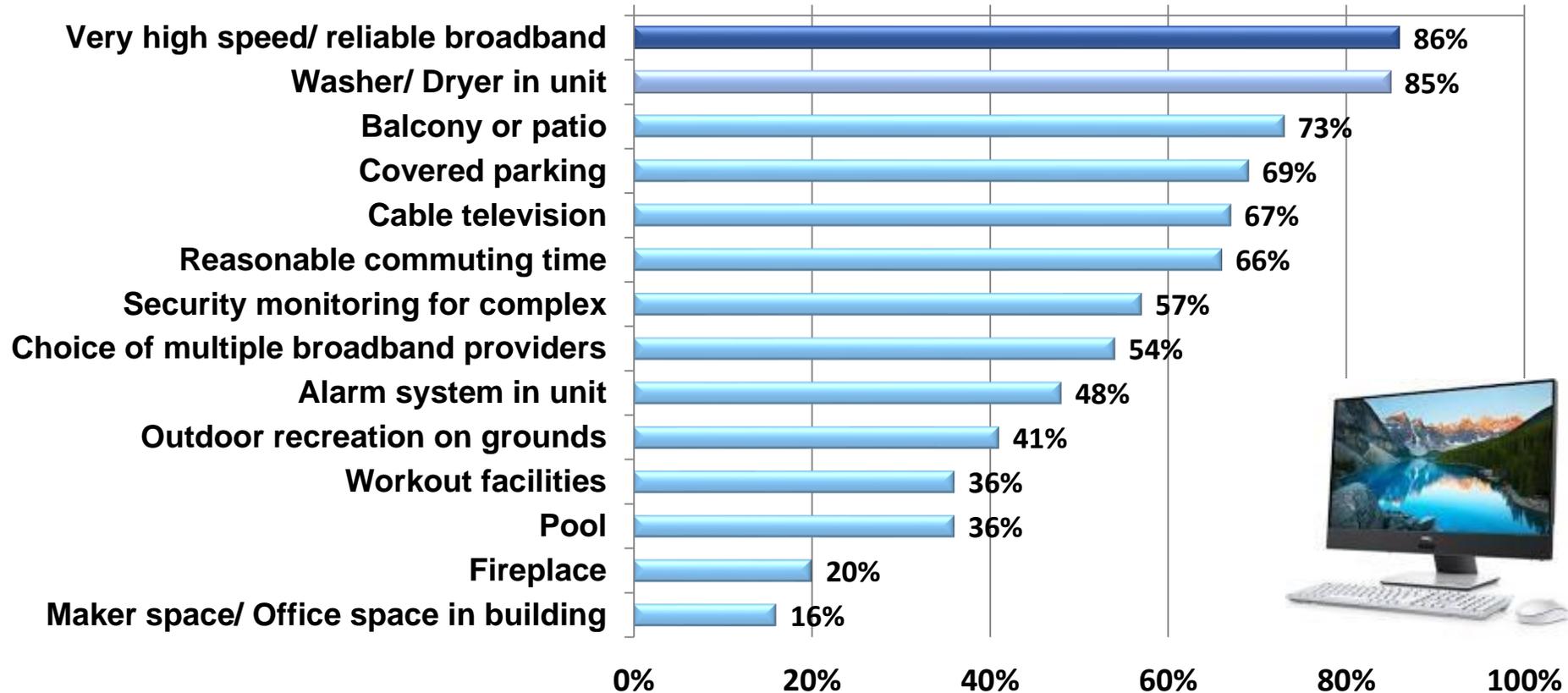

FiberBroadband
ASSOCIATION

*Accelerating the
Connected Future*

RVA LLC
Market Research & Consulting

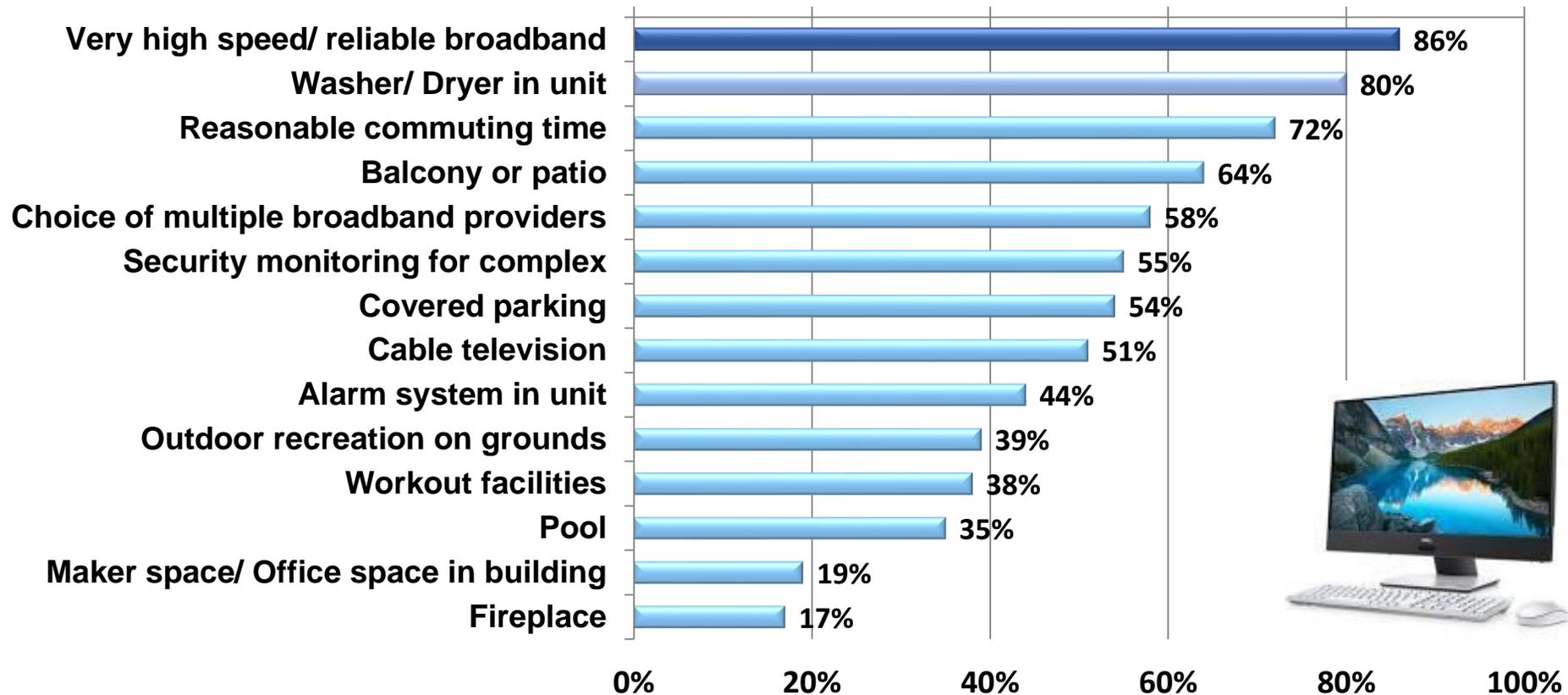
Great Broadband Is the Most Important Amenity For MDU Owners

Amenity Somewhat Or Very Important



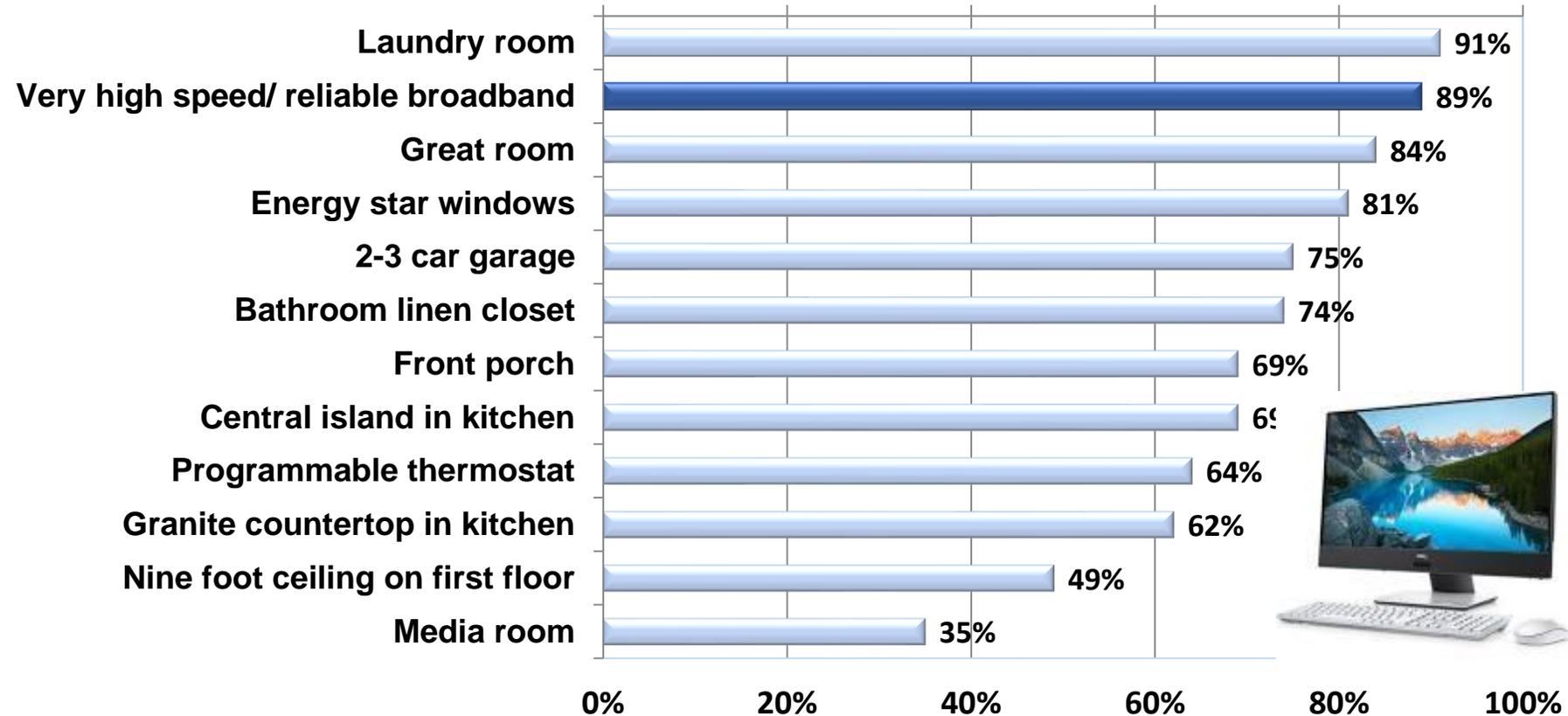
Importance Of Amenities For MDU Renters

Amenity Somewhat Or Very Important



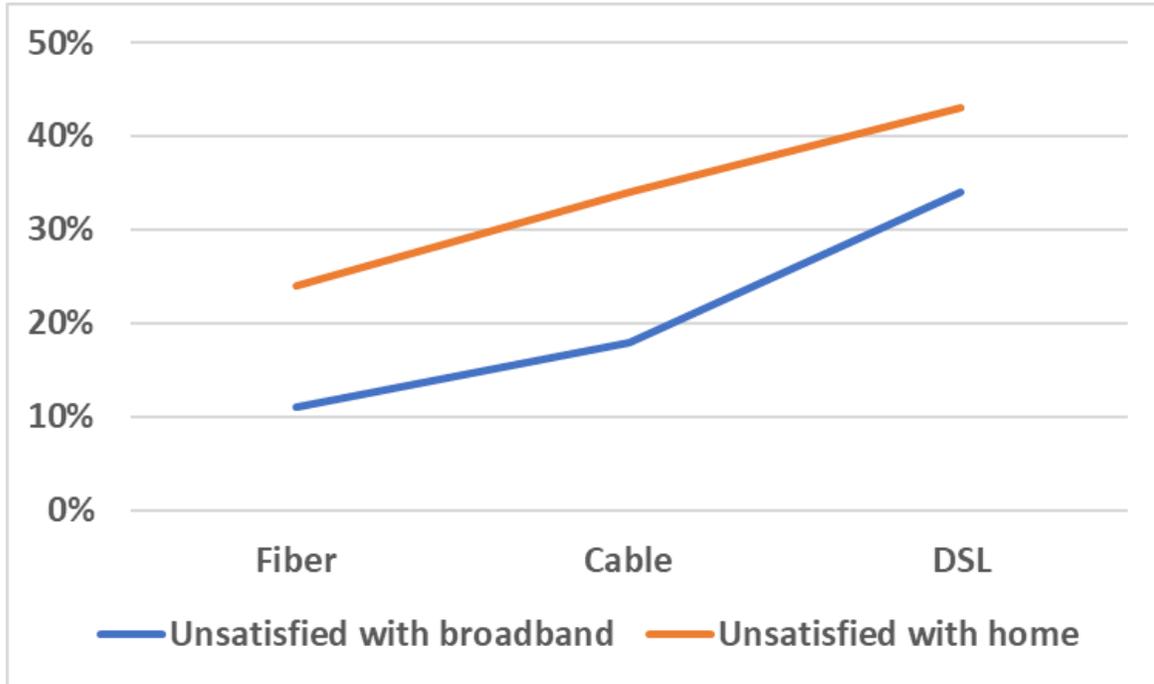
Great Broadband Is the Most Important Amenity For Single Family Owners

Amenity Somewhat Or Very Important

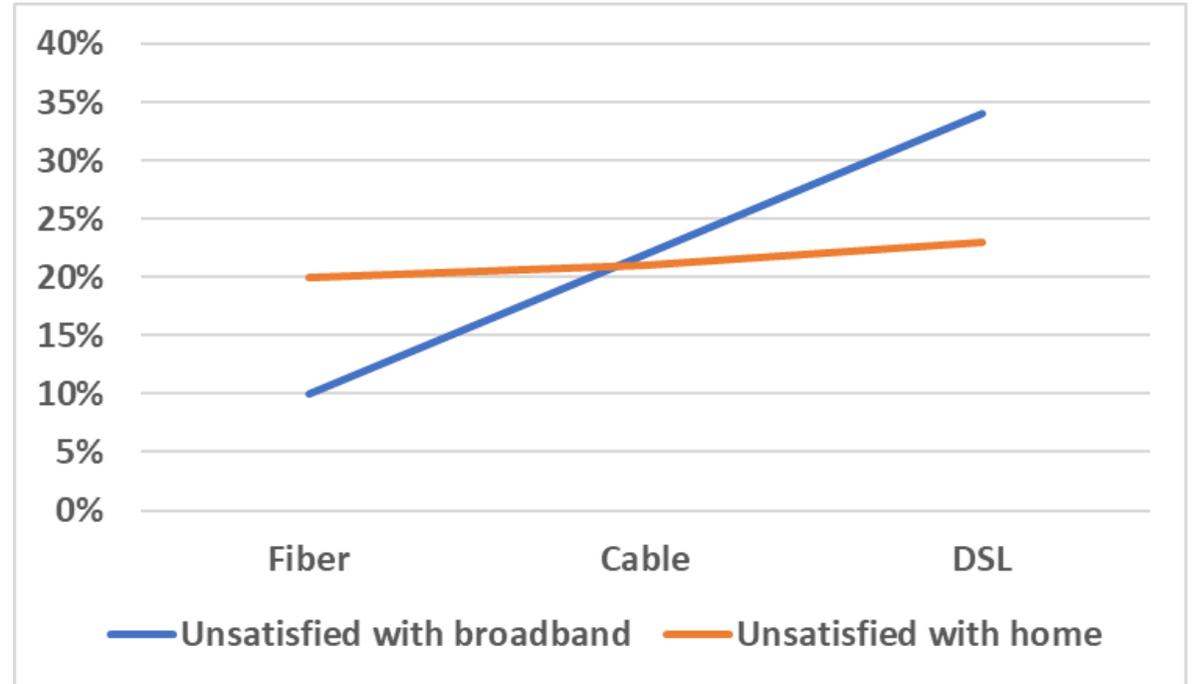


Dissatisfaction With Broadband Versus Dissatisfaction With Home

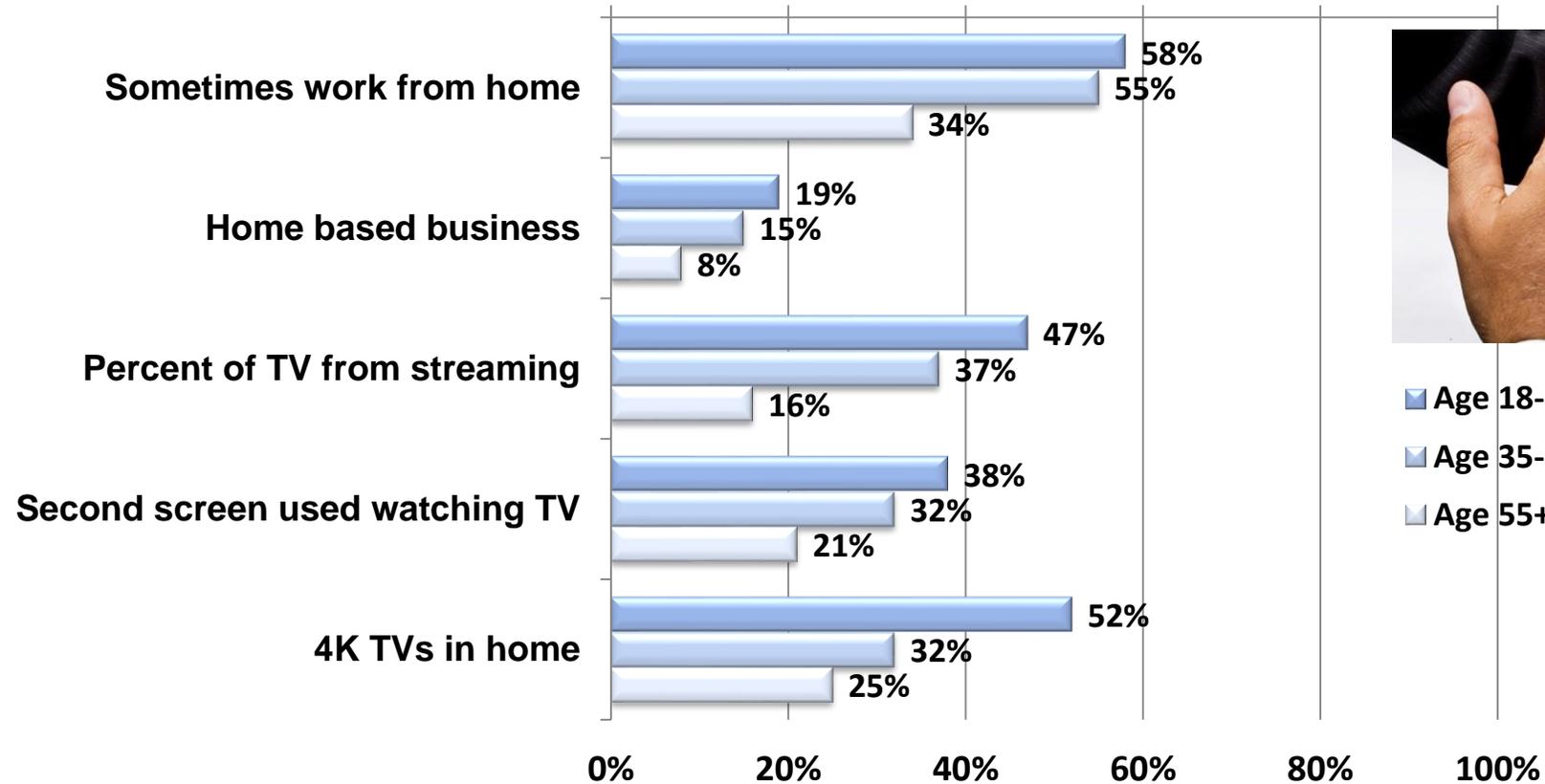
Apartments



Condominiums

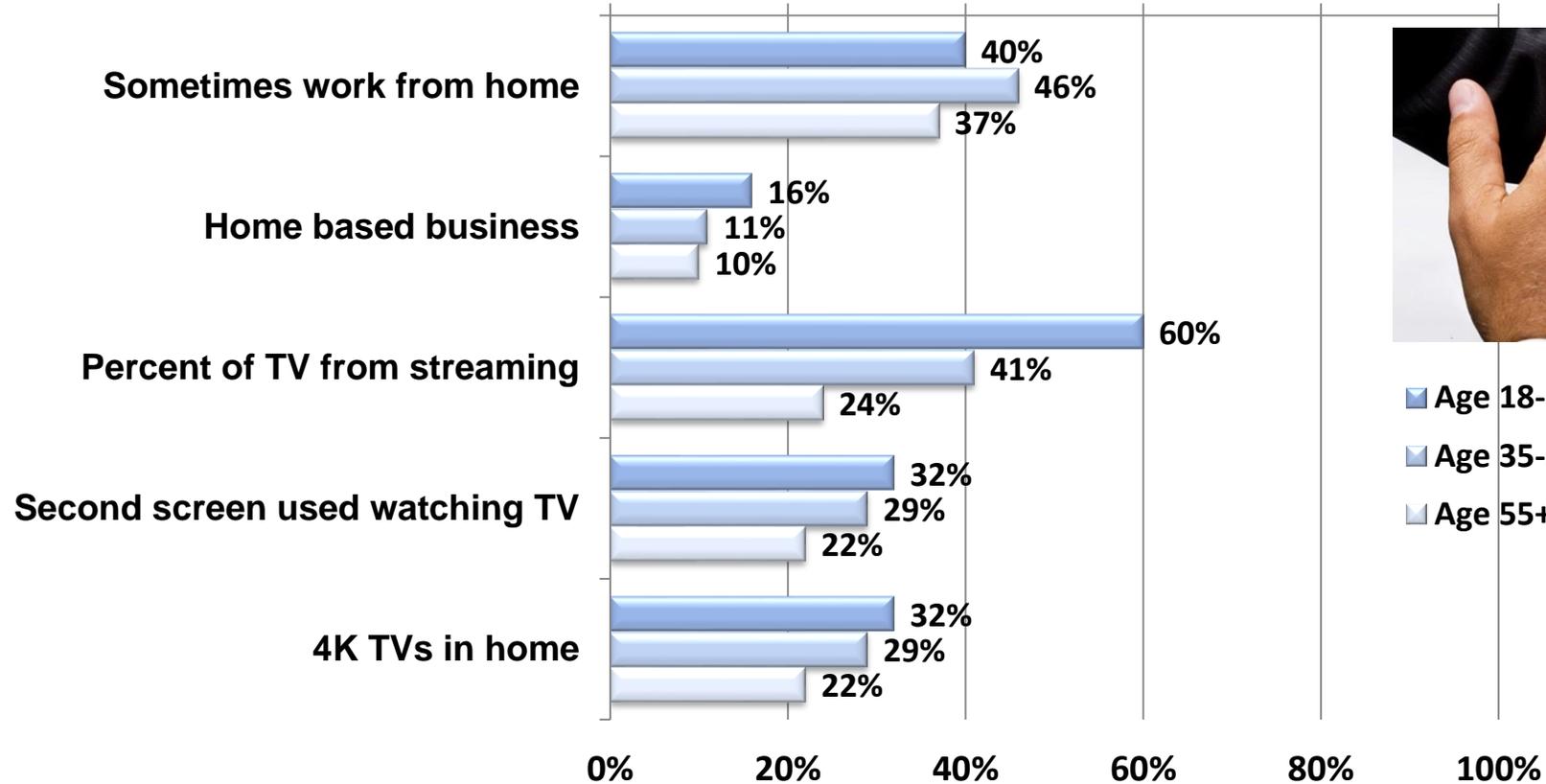


Why Broadband Is Important To MDU Owners



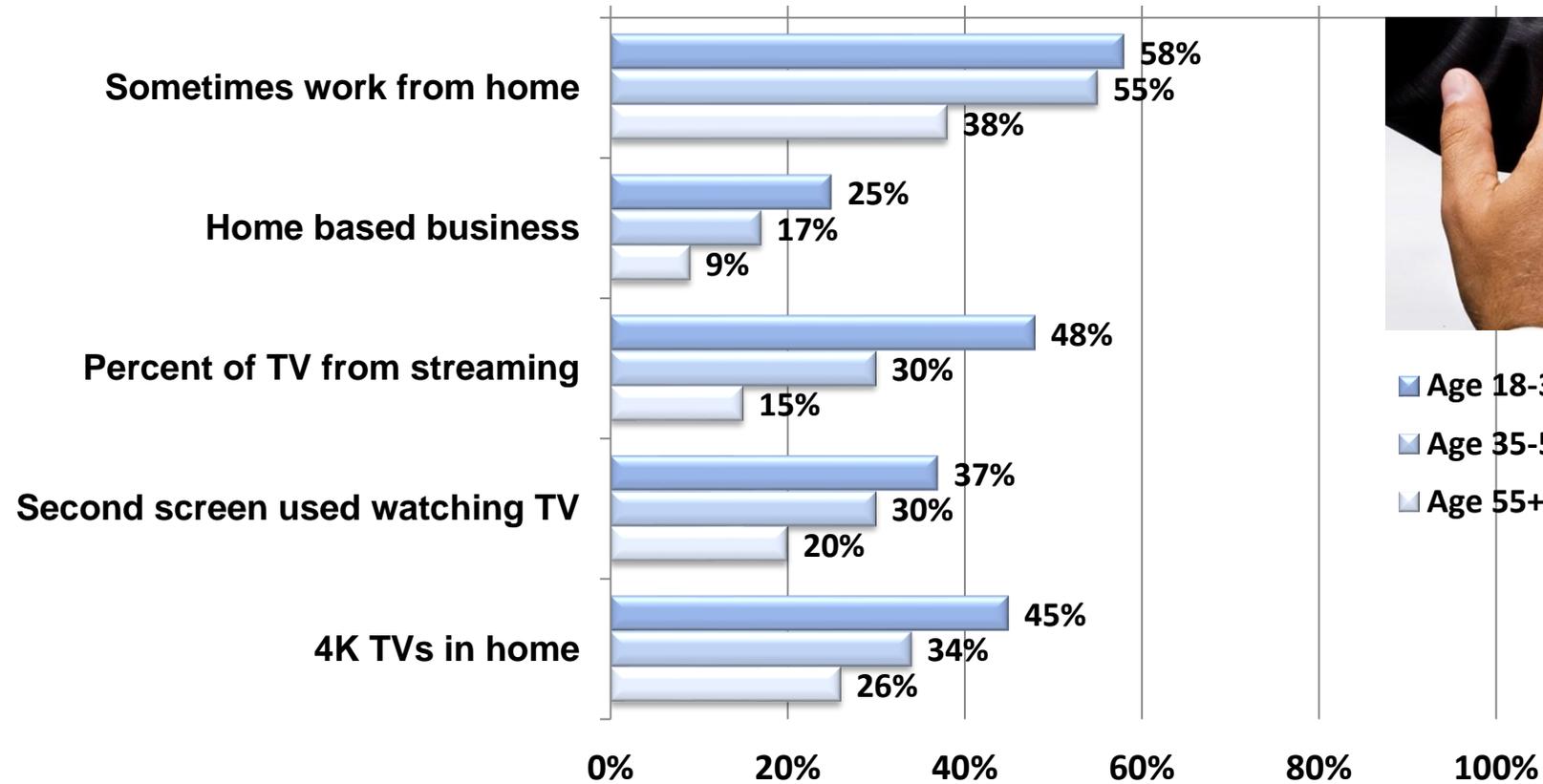
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- Age 35-54: 5.1 hrs daily online at home
- Age 55+: 4.5 hrs daily online at home

Why Broadband Is Important To MDU Renters



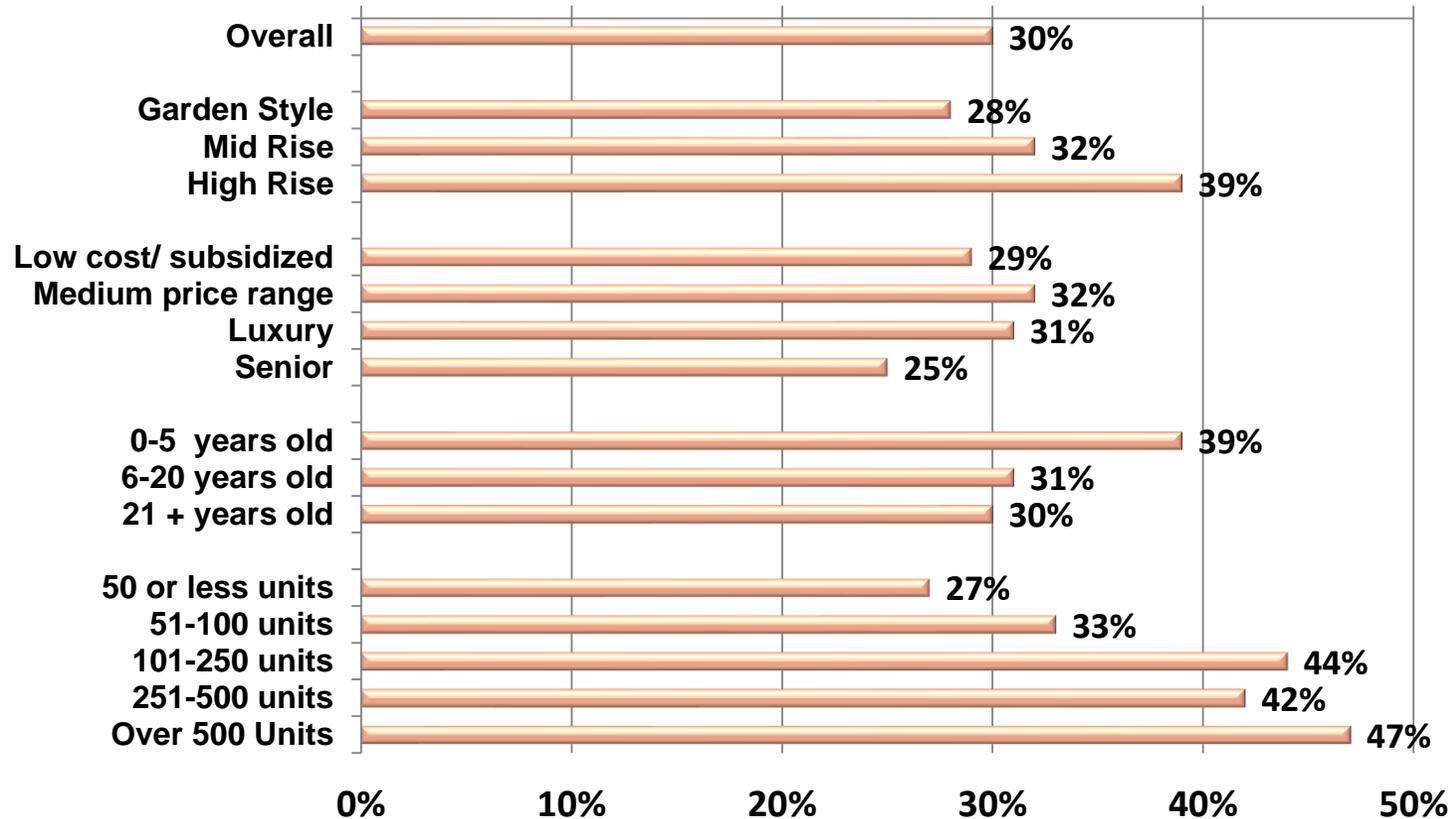
- Age 18-34: 6.5 hrs daily online at home
- Age 35-54: 5.7 hrs daily online at home
- Age 55+: 5.0 hrs daily online at home

Why Broadband Is Important To Single Family Owners



- Age 18-34: 6.1 hrs daily online at home
- Age 35-54: 5.0 hrs daily online at home
- Age 55+: 4.3 hrs daily online at home

Reported Fiber Broadband Availability By Apartment Characteristics



Study Of MDU Owners And Renters Survey Data From 2018

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