|  | <!DOCTYPE html> |
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|  | <html> |
|  | <head> |
|  | <title>San Francisco Internet Ordinance</title> |
|  | <meta charset="utf-8"> |
|  | <meta name="viewport" content="width=device-width, initial-scale=1.0"> |
|  | <link rel="stylesheet" type="text/css" href="[CommentsStylesheet.css](http://k-band.us/CommentsStylesheet.css)"> |
|  | </head> |
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|  | <body> |
|  | <header></header> |
|  | <main> |
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|  | <article> |
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|  | <p id="title"><b style="font-size:1.3em;">Supervisor Farrell's Feelgood Internet Ordinance</b><br> |
|  | <i>Lauren Saine, December 14, 2016</i></p> |
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|  | <p> <b><i>Another name for rev share</i></b><br></p> |
|  | <p>San Francisco's new<a href="<https://sfgov.legistar.com/View.ashx?M=F&ID=4815289&GUID=E9BFBB5F-87FC-4DF7-AD1B-BC66B08C14E5>"> internet ordinance</a> aims to bring competitive internet choices to tenants. But it has within it a kind of regulatory malware, a seemingly benign provision that undermines the ordinance's purpose.</p> |
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|  | <p>The "just and reasonable compensation" requirement is the malicious provision that guts the ordinance, because it means that companies trying to compete with AT&T and Comcast for tenants' business will still have to pay landlords to get in.</p> |
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|  | <p>Supervisor Peskin <a href="<http://www.sfexaminer.com/legislation-opening-internet-service-competition-passes/>"> was right.</a> The ordinance will benefit only large companies like Google that can afford to pay compensation, known in the industry as "rev share" or <a href="<https://backchannel.com/the-new-payola-deals-landlords-cut-with-internet-providers-cf60200aa9e9#.l1fit316v>">kickbacks</a>. Even for them, the ordinance will help only where there was an exclusive agreement. |
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|  | <p><b><i>Unintended consequences</i></b></p> |
|  | <p>In some cases, the incumbents AT&T and Comcast do have exclusive agreements with big real estate investment trusts (REITs) and other property owners. Here<i> the ordinance will help--but only for companies rich enough to pay. </i> </p> |
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|  | <p>But in many cases competitors already have access to multi-unit buildings if they pay. The property owner simply asks the requesting internet provider to pay kickbacks and refuses entry if they won't pay. In those cases <i>the ordinance will not help.</i>​ </p> |
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|  | <p>In some cases the ordinance may actually hurt small, competitive internet companies. Many developers are happy to work with new providers without any payment at all. In those cases, where the developer has been willing to work with an internet company without kickbacks, <i>the ordinance could have a negative effect.</i></p> |
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|  | <p>Although the ordinance says the landlord is "entitled to" compensation, and not that they "must" get compensation, the expectation is set. While the ordinance will in some cases help a company that can pay, small independents will be locked out. </p> |
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|  | <p>The bottom line is that the measure does very little to disrupt AT&T and Comcast's stranglehold on the market. In fact, upon Google’s recent purchase of Webpass, AT&T <a href="<https://www.attpublicpolicy.com/fcc/broadband-investmentnot-for-the-faint-of-heart/>">declared victory</a> in its more than decade-long <a href="<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302211.html>">campaign</a> to kill off Google Fiber. (Jon Brodkin <a href="<http://arstechnica.com/information-technology/2016/08/att-lectures-google-fiber-about-challenges-of-broadband-investment/>">explains.)</a> </p> |
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|  | <p> <b><i>Landlords decide what's "reasonable"</i></b></p> |
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|  | <p>To make matters worse, the ordinance lets the property owner decide what’s reasonable. There is neither an independent regulatory determination of what's reasonable, factors for determining what’s reasonable in this context, nor administrative review.</p> |
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|  | <p>The ordinance defines just and reasonable compensation as the "fair market value" of the impact on the property. A landlord who demands more and withholds permission can be sued, but a landlord probably would not withhold permission outright. They would simply claim that the internet provider refused to pay what's reasonable. Small independents would then have to spend their scarce resources litigating fair market value. </p> |
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|  | <p>Valuation is one of the most difficult issues in property law, and in this novel context, valuation is wide open to interpretation.​ The burden of going to court is simply another barrier to market entry for smaller companies, similar to competitors having to <a href="<http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M162/K203/162203507.PDF>"> litigate </a> to force AT&T to share their conduit as already required by law.</p> |
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|  | <p> <b><i>The legal landscape</i></b></p> |
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|  | <p>The legal justification for the reasonable compensation requirement, <a href="<https://www.law.cornell.edu/supremecourt/text/458/419>">Loretto, </a> is pre-Telecom Act cable TV law that was, even in 1982, “curiously anachronistic,” in the words of Justice Marshall's dissent. We need new law for internet service as a public utility, and Justice Marshall would undoubtedly agree. </p> |
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|  | <p>No amount of payment is reasonable to wire a building for competitive internet service. The city should require internet wiring in every building, like electrical wiring. Unlike electricity, internet rates are unregulated, and so more than one provider must be allowed in. As a de facto public utility, internet rates should be just and reasonable; but they clearly are not. (See incumbents’ <a href="<https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1061A1.pdf>">EBITDA</a> margins.) The city must allow competition within buildings to gain price discipline.</p> |
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|  | <p>The fear is that a mandate for internet wiring without reasonable compensation would violate the constitutional takings clause, since internet wiring physically occupies space in the landlord's property. San Francisco needs leaders willing to go to court and fight for a new legal regime that recognizes the city's authority to insure good internet for everyone.</p> |
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|  | <p><b><i>Other considerations</i></b></p> |
|  | <p> While the new ordinance will not threaten the AT&T/Comcast business model, it may annoy the multi-billion dollar REITs. Rev share is a windfall for them. Based on its <a href="<https://www.sec.gov/Archives/edgar/data/915912/000091591216000024/a201510-k.htm#s9AC6A9AB305C0F86DC1A1DC489D9EB08>">"rental and other income"</a> line, which includes “ancillary income” for rev share, one can estimate that Avalon Bay alone took in about $6 million in rev share payments last year, or roughly 0.3% of revenues.</p> |
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|  | <p>The ordinance suffers from an additional weakness. It covers only state-regulated companies--but pure play internet companies are currently <a href="<http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=PUC&sectionNum=710>">unregulated</a> in California. The ordinance's definition of “communications services provider” includes state-franchised subscription video companies, state-certificated telephone companies, and state law-defined telephone companies. It does not include internet-only companies that have not gained state recognition as video or telephone companies. </p> |
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|  | <p>The policy group Engine supported the San Francisco ordinance with a petition campaign, in spite of its negative implications for startups. The Electronic Frontier Foundation, a national nonprofit that supports free speech and privacy online, chose to write a letter of support. (The EFF also declined to support the Webpass model internet access ordinance.) AT&T and Comcast did not weigh in, at least not publicly.</p> |
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