May 9, 2019

<u>VIA ECFS</u>

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***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*, MB Docket No. 05-311**

Dear Ms. Dortch:

Altice USA, Inc. ("Altice USA" or the "Company") submits this letter in further support of its reply comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("*Second Further Notice*") in this proceeding.[1] As discussed in Altice USA's reply comments and in more detail below, the Commission has ample legal and factual bases to:

- <u>Spur Network Investment</u>: Impose procedural requirements (*e.g.*, shot clock on permit applications) and confirm substantive limits (*i.e.*, only incidental permit fees) on applications to site "cable system" equipment in the public rights-of-way ("ROWs"), in order to address delays and demands that have slowed deployment of the Company's fiber-to-the-home ("FTTH") network for 10 Gbps broadband and which will facilitate 5G wireless; and

- <u>Confirm the 5 Percent Cap</u>: Clarify that the statutory cap applies to all franchise-mandated costs—including PEG channel capacity, to which the Commission should attach a rebuttable presumption of no more than three channels—other than those carved out by the Cable Act, and confirm that a cable operator may not be forced to "voluntarily" waive the 5 percent cap to secure a renewal.

[1] *In re 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*, Second Further Notice of Proposed Rulemaking, 33 FCC Rcd 8952 (2018) ("*Second Further Notice*").

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I. The Commission Can and Should Adopt New Remedies Under Section 621 to Address Abusive Permitting Practices that Deny Cable Operators the Ability to Install and Upgrade Cable System Facilities in ROWs.

Altice USA's construction of a FTTH network have been frustrated by some franchising authorities' delays and demands in connection with permitting processes for the installation of necessary equipment.[2] In the most egregious cases, franchising authorities have delayed the issuance of necessary permits for *two years* and/or have demanded unreasonable and excessive payments in connection with ROWs access—over and above the 5 percent cable franchise fee.[3] There is abundant factual support in the record illustrating the need for Commission action—including clear preemption, the adoption of shot clocks, strict enforcement of the franchise fee cap, and a streamlined framework for resolving disputes—to make sure there is a workable *remedy* attached to the *right* conferred on cable operators by Section 621 of the Cable Act to site cable system equipment in the ROW.[4]

The Commission has ample legal authority to adopt the Company's requested remedies to ensure effective and efficient permitting processes for "cable system" equipment. As a threshold matter, the plain text of Section 621(a)(2) authorizes the Commission to adopt the remedies requested by Altice USA. In that provision, Congress conferred on cable operators the right to construct, operate, maintain, and upgrade a cable system within ROWs by mandating that "[a]ny [cable] franchise *shall be construed* to authorize the construction of a cable system over public [ROWs]."[5] As the Commission has previously explained, franchising authorities' lengthy delays on permit applications to site cable system facilities and equipment, often coupled with fee demands unrelated to ROW management and well in excess of the 5 percent statutory cap on franchise fees, deprive cable operators of their statutory rights.[6]

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[2] Reply Comments of Altice USA, Inc. at 1-2, MB Docket No. 05-311 (Dec. 14, 2018) ("*Altice USA Reply Comments*").

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

[4] *Id.*; *see also, e.g.*, Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, Att. 1, at 7-8 (Apr. 19, 2019) (cataloging franchising authority delays and demands that "abuse routine permitting processes for construction activity as a backdoor way of extracting unwarranted authorizations and fees from cable operators").

[5] 47 U.S.C. § 541(a)(2) (emphasis added); *cf. id.* § 256(a) (authorizing preemption of franchising authority practices that are tantamount to an effective prohibition on a cable operator's provision of telecommunications services).

[6] *See In re Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4849-50 ¶ 102 (2002) (explaining that Section 621 allows cable operators to "access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service"), *aff'd in part, vacated in part by Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd and remanded by Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005); *In re TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21396, 21428-29 ¶ 76 (1997) ("An unexplained failure to respond to a permit application by the incumbent cable operator within a reasonable time would lead to the assumption that local franchising authority

In the case of competitive applicants for cable franchises, the Commission adopted a shot clock to ensure that franchising authorities act on franchise applications within a reasonable period of time.[7] The Commission recognized then that providers with "existing authorization[s] to access [ROWs] should be subject to a shorter time frame for review than other applicants."[8] The Commission even adopted an interim "deemed granted" remedy; when a franchising authority fails to rule on a competitive application within the prescribed time, the applicant may begin providing service based on the terms of the proposed franchise application, which terms remain in effect until the franchising authority takes final action.[9] The same logic supports adoption of a shot clock and a "deemed granted" remedy in support of all cable operators' rights under Section 621(a)(2) to access ROWs under their cable franchises to the full extent conferred by the Cable Act.[10]

Adoption of these remedial steps is supported by Section 201(b) of the Communications Act, which grants the Commission broad rulemaking authority to adopt rules "in the public interest to carry out the provisions" of the Communications Act, including Title VI.[11] This broad

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under Title VI is being used for some other purpose, thereby violating section 621."); *cf. In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.,* 33 FCC Rcd 9088, 9102-05 ¶¶ 35-37 (2018) (affirming that "effective prohibition" standard under Sections 253(a) and 332(c)(7) bars "a state or local legal requirement" that "materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment" (internal quotation marks omitted)).

[7] *See In re 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*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5137 ¶ 73 (2007) ("*Franchise Reform First Report and Order*") (finding that failure to act on competitive provider's franchise application in a prescribed timeframe "is unreasonable and constitutes" a violation of Section 621(a)(1)), *aff'd by All. for Cmty. Media v. FCC*, 529 F.3d 763, 778-80 (6th Cir. 2008).

[8] *Id.* at 5135-36 ¶ 70 (finding that in franchise application process, "entities with existing authority to access [ROWs] should be entitled to expedited process, and that lengthy consideration of franchise applications made by such entities would be unreasonable").

[9] *Id.* at 5139 ¶ 77; *see also id.* at 5139-40 ¶¶ 78-81 (explaining that deemed grant remedy was lawful and consistent with other federal regulations).

[10] While the Commission found that the limits it had adopted regarding new competitive franchise *applications* in the *Franchise Reform First Report and Order* under Section 621(a)(1) could not be extended to franchise *renewals* by incumbent operators, *see In re 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*, Second Report and Order, 22 FCC Rcd 19633, 19636 ¶ 8 (2007), *review granted in part, denied in part by Montgomery Cty. v. FCC*, 863 F.3d 485 (6th Cir. 2017), the Commission's reasoning was based on the fact that Section 626 prescribes a different time limit for franchise renewal. The Commission can and should exercise its authority to enforce the rights of cable operators under Section 621(a)(2), which affords incumbents and competitive operators alike the same right of access. *See* sources cited *supra* note 6.

[11] 47 U.S.C. § 201(b); *All. for Cmty. Media*, 529 F.3d at 774; *see also AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) ("We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act'…"); *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) ("Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and

grant endows the Commission with "clear jurisdictional authority to formulate rules and regulations interpreting the contours" of Section 621(a)(2)—including measures to address unreasonable delays and demands associated with the installation and upgrading of cable system equipment and facilities.[12] Title VI, in conjunction with Section 201(b), thus empowers the Commission to promulgate rules, standards, and procedures aimed at "defining and limiting the authority that a franchising authority may exercise"—including the time and manner in which a franchising authority exercises its authority—in connection with a cable franchise.[13] The Commission determined in the *Franchise Reform First Report and Order* that it had authority to issue rules interpreting Section 621(a)(1) to preempt unreasonable franchising authority practices, even though the provision does not grant the Commission specific rulemaking authority,[14] and the Sixth Circuit agreed.[15] The same is true with respect to the adoption of rules to interpret and enforce Section 621(a)(2).

In addition to confirming the Commission's *general* rulemaking power to adopt regulations and procedures governing franchising authorities' practices under Title VI, courts have affirmed the Commission's *specific* power to adopt the reasonable measures that Altice USA has proposed in this proceeding. For example, courts have affirmed Title VI's broad preemption of franchising authority practices that are inconsistent with cable operators' statutory rights under the Cable Act. Congress expressly provided for the preemption of such practices.[16] Courts have also approved of the Commission's adoption of shot clocks,[17] enforcement of the

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adjudication."); *City of Chicago v. FCC*, 199 F.3d 424, 428 (7th Cir. 1999) ("We have said that the FCC is charged by Congress with the administration of the Cable Act.").

[12] *See All. for Cmty. Media*, 529 F.3d at 774.

[13] H.R. Rep. No. 98-934, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656; *cf. Warner Cable Commc'ns, Inc. v. City of Niceville*, 911 F.2d 634, 641 n.7 (11th Cir. 1990) (describing how the Cable Act generally "limit[s] a franchising authority's ability to regulate a cable operator," including by giving the FCC power to "prescribe" "procedures for modification, renewal, and sale of cable franchises"); *City of New York v. FCC*, 814 F.2d 720, 725 (D.C. Cir. 1987) (explaining that Section 624 clearly limits a franchisor's freedom of action and "delegate[s] to the FCC" the authority to curtail that freedom), *aff'd*, 486 U.S. 57 (1988).

[14] *See Franchise Reform First Report and Order*, 22 FCC Rcd at 5129 ¶ 56 n.213 (citing *Iowa Utils. Bd.*, 525 U.S. at 385 (holding that although provisions of the 1996 Act entrusted the states with certain tasks, the assignments did not logically preclude the Commission's issuance of rules to guide the state-commission judgments)).

[15] *All. for Cmty. Media*, 529 F.3d at 774.

[16] 47 U.S.C. § 556(c). *See Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (citing 47 U.S.C. § 556(c) as evidence that "Congress has made it 'unmistakably clear' that the Cable Act will preempt any inconsistent state or local law").

[17] *See City of Arlington*, 569 U.S. at 295, 307; *All. for Cmty. Media*, 529 F.3d at 778-80 (affirming Commission's adoption of shot clocks for franchising authorities to rule on competitive operators' franchise applications in *Franchise Reform First Report and Order*); *see also supra* notes 8-9.

statutory cap on franchise fees,[18] and imposition of rational evidentiary presumptions,[19] as tools to curtail unreasonable state and local practices that cause excessive delays and deprive consumers of competitive services.

The Commission made clear in the *Second Further Notice* that this rulemaking is "part of the Commission's larger, ongoing effort to reduce regulatory barriers to infrastructure investment."[20] In addition, the record developed in this proceeding demonstrates that franchising authorities sometimes use siting and permitting processes to delay and demand concessions or unreasonable fees, which hampers infrastructure investment.[21] It is therefore timely and appropriate, and well within the Commission's authority, for the Commission to adopt remedies in this proceeding to ensure that abusive franchising practices do not frustrate investments that will be necessary to support the transition to 5G networks.[22] The solutions Altice USA supports fulfill the Commission's stated aim in this proceeding "to faithfully interpret the statutory provisions at issue in a way that preserves incentives for all cable operators to deploy infrastructure that can be used to provide numerous services, including video, voice, and broadband Internet access service, to consumers."[23] As a result, the Commission can and should act quickly to adopt these measures as part of this proceeding.

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[18] *Montgomery Cty.*, 863 F.3d at 491-92; *All. for Cmty. Media*, 529 F.3d at 782-83.

[19] *Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, 862 F.3d 18, 23-24 (D.C. Cir. 2017); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011); *accord In re TCI Cablevision*, 12 FCC Rcd at 21428-29 ¶ 76.

[20] *Second Further Notice*, 33 FCC Rcd at 8959 ¶ 15.

[21] *See supra* notes 2-4 and accompanying text.

[22] *See, e.g.*, *Altice USA Reply Comments* at 8-10; *see also Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 512 F.3d 696, 699-700 (D.C. Cir. 2008) (citing cases that considered "the comments, statements and proposals made during the notice-and-comment period" in evaluating whether a rule was the "logical outgrowth"); *see also Ne. Md. Waste Disposal Auth. v. EPA*, 358 F.3d 936, 952 (D.C. Cir. 2004) ("A rule is deemed a logical outgrowth if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period." (internal quotation marks omitted)); *Fertilizer Inst. v. U.S. EPA*, 935 F.2d 1303, 1311 (D.C. Cir. 1991) ("a final rule will be deemed to be the logical outgrowth of a proposed rule if a new round of notice and comment would not provide commentators with their first occasion to offer new and different criticisms which the agency might find convincing." (internal quotation marks omitted)). Indeed, in prior proceedings featuring many of the same parties as here, the Commission has adopted the very measures that Altice USA is proposing. *See* sources cited *supra* notes 8-10 and 16-19.

[23] *Second Further Notice*, 33 FCC Rcd at 8960 ¶ 15; *see also id.* at 8964 ¶ 23 (asking whether the Commission's interpretation of Section 621 would impact "incumbent cable operators' ability to invest in new facilities and services, including improving broadband services"); *id.* at 8971 ¶ 32 & n.152 ("seek[ing] comment on whether to apply the proposals and tentative conclusions set forth herein, as well as the Commission's decisions in the *First Report and Order*," which adopted a shot clock on franchising authorities, precluded unreasonable mandates, and clarified what falls within the 5 percent fee cap); *accord Franchise Reform First Report and Order*, 22 FCC Rcd at 5152 ¶ 112 ("we have the authority to interpret what Congress meant by 'adequate PEG access channel capacity, facilities, and financial support,' and to prohibit excessive LFA demands in this area, if necessary").

II. The Commission Should Confirm that the "Franchise Fee" Cap Applies Broadly to All Franchise-Required Commitments Not Explicitly Excepted by Congress and Should Find that Section 622's Cap Is Not Waivable.

In the *Second Further Notice*, the Commission reaffirmed that non-cable-related in-kind contributions are "franchise fees" subject to Section 622's statutory cap and requested comment on its proposal to adopt the same conclusion as to cable-related in-kind contributions.[24] The record strongly supports the Commission's reaffirmation and tentative conclusion.

When franchising authorities demand cable- and non-cable-related in-kind contributions that are not offset against the 5 percent statutory cap on franchise fees, the ultimate impact is borne by consumers. The cost of each such contribution either must be passed on to cable subscribers (*i.e.*, as higher rates) or must trade off with investments that the cable operator otherwise might make (*i.e.*, as opportunity costs). Thus, for example, when a franchising authority demands additional PEG support, it is forcing the cable operator to divert resources and bandwidth that the operator might otherwise have used for faster broadband, new services, or programming of greater interest to consumers; when a franchising authority demands a "technology grant," it is siphoning dollars that might otherwise have been spent on new fiber cabinets; and when a franchising authority demands free internet access for itself, it is effectively demanding that citizens subsidize its service.[25]

To avoid these and other harms, and for the avoidance of any remaining doubt—of which there should be none—the Commission should reaffirm that Section 622's definition of "franchise fee" is broad, and its exceptions are narrow:

First, the Commission should adopt its proposal that in-kind contributions offset the franchise fee cap based on "their fair market value."[26] The alternative, valuing such contributions based on their incremental "cost to the cable operator," gives a windfall to franchising authorities by denying cable operators the ability to recover the opportunity cost of those in-kind contributions.[27] That result is "contrary to Congress's goals of limiting the overall amount a provider is required to give to the community and that works against the Commission's goals of ensuring that providers can put funds to their highest and best use."[28] The record includes proposed methodologies for establishing the fair market value for the most common in-

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[24] *Second Further Notice*, 33 FCC Rcd at 8960-62 ¶¶ 17-19.

[25] *See Altice USA Reply Comments* at 6-7, 19.

[26] *Second Further Notice*, 33 FCC Rcd at 8964 ¶ 24.

[27] *See* Reply Comments of NCTA, MB Docket No. 05-311, Att. 1, Report of Jonathan Orszag and Allan Shampine at 8-9 ¶¶ 20-21 (Dec. 14, 2018).

[28] Comments of NCTA, MB Docket No. 05-311, at 51 (Nov. 14, 2018) ("*NCTA Comments*"); *see also* 47 U.S.C. § 521(6) ("The purpose[] of [Title VI] [is, among other things] to . . . promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems").

kind exactions (*e.g.*, free service, free advertising, PEG operating costs, etc.),[29] and, as discussed below, the Commission can adopt alternative measures to address exactions for which the record does not yet support a valuation methodology (*i.e.*, PEG channel capacity).[30]

Second, the Commission must ensure that Section 622(g)(2)(C)'s "narrow" exclusion for PEG capital costs required by the franchise does not become a vehicle for franchising authorities to extract PEG operating costs (and other contributions) labeled as PEG capital costs.[31] As Altice USA has explained, franchising authorities continue to demand excessive in-kind contributions—often in the form of PEG operational support.[32] For example:

- In one of its largest franchise areas, Altice USA has paid a PEG grant of $4 million and has made promotional payments of $2 million; continues to pay an annual PEG operational grant of $8.4 million (nearly one-fourth of the annual franchise fee); and is required to provide up to 17 PEG SD channels, 1 public HD channel, 1 government HD channel, PEG return feed, connection and interconnection support, 25 hours of video-on-demand, and more than 1700 free cable, phone, and internet accounts (in addition to a PEG capital grant of $3 million with accounting rights, as well as other in-kind contributions, such as dark fiber backbone and I-Nets);

- In one town, Altice USA is obligated to pay PEG grants of almost $1 million over the 5 percent franchise fee cap over the term of the franchise; to provide 3 PEG channels, 3 PEG origination feeds, and operational support; and to provide free video or internet accounts at more than 250 locations within an area less than 100 square miles;

- In one suburb, Altice USA has paid PEG grants (upfront and installments) that more than double the annual franchise fee and provides 4 PEG channels, 4 PEG origination feeds, and free video accounts at more than 30 locations;

- In one Northeastern state, Altice USA pays an additional 0.25 percent franchise fee on gross receipts for PEG support, and $600,000 for PEG support on top of the 5 percent cap (collected in the form of a gross earnings tax), and provides more than 130 free video accounts;

[29] *See, e.g.*, Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (Apr. 4, 2019); *NCTA Reply Comments* at 21-22; *NCTA Comments* at 51-55.

[30] *See infra* notes 39-44 and accompanying text.

[31] *Second Further Notice*, 33 FCC Rcd at 8962 ¶ 19; *see also* 47 U.S.C. § 542(g)(2)(C).

[32] *Altice USA Reply Comments* at 19.

- In one service area of fewer than 10,000 subscribers, Altice USA has paid over $2 million for PEG support since 2012—roughly four times the annual franchise fee—and is obligated to provide 7 PEG channels, 11 PEG origination feeds, 15 government origination feeds, and free video service at more than 50 locations.

While Section 622's exclusion for PEG capital costs may extend to a cable operator's "costs incurred in or associated with the construction of PEG access facilities,"[33] it does not extend to support for operations at those facilities or the provision of free services. Nor should a franchising authority be permitted to claim that a contribution covers PEG capital costs if there is no restriction on the use of the contribution or grant by the franchising authority.[34]

Third, and relatedly, it follows from this construction of Section 622(g)(2)(C) that the provision of PEG channel capacity under Section 611(a) must be offset against the franchise fee as a cable-related in-kind contribution. Altice USA urges the Commission to make this offset clear, and not to allow franchising authorities to continue demanding PEG channel capacity without meaningful limitations.[35] Earlier in this proceeding, the Commission exercised its "authority to interpret what Congress meant by 'adequate PEG access channel capacity. . .' and to prohibit excessive LFA demands in this area" by determining that "adequate" means "satisfactory or sufficient."[36] The record reflects that further intervention is necessary because some franchising authorities are demanding excessive numbers of PEG channels[37] and have

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[33] *All. for Cmty. Media*, 529 F.3d at 783-84 (quotation marks omitted).

[34] *See NCTA Comments* at 49 ("To ensure that . . . PEG capital contributions are properly and timely used for construction of PEG facilities and not for other purposes, the Commission should make clear that cable operators have the right to audit a franchising authority's use of the contributions and that a franchising authority must provide reasonable supporting documentation during an audit that such funds are, or were, being used for PEG capital expenses."); *see also* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 2 (Apr. 18, 2019) ("*NCTA 4-18-19 Ex Parte*").

[35] *See Second Further Notice*, 33 FCC Rcd at 8963 ¶ 20 (noting that franchising authorities are authorized "to require channel capacity be designated for PEG use" but explaining that "[t]he fact that the Act authorizes [franchising authorities] to impose such obligations does not . . . mean that the value of these obligations should be excluded from the five percent cap on franchise fees."), *id.* at 8963 ¶ 21 ("We also seek comment on whether there are other requirements besides build-out obligations that are not specifically for the use or benefit of the LFA."), *id.* at 8964 ¶ 23 ("We seek comment on the effect, if any, that our statutory interpretation would have on LFAs' ability to impose cable-related, in-kind obligations on new entrants and incumbents" and on the effect of "allowing LFAs to seek unlimited cable-related, in-kind contributions on top of the five percent franchise fee permitted by Section 622.").

[36] *Franchise Reform First Report and Order*, 22 FCC Rcd at 5152 ¶ 112. The Sixth Circuit affirmed this interpretation, holding that it was "well within" the agency's lawful gap-filling authority under the Federal Cable Act. *All. for Cmty. Media*, 529 F.3d at 785.

[37] *See NCTA Reply Comments*, Att. 2 at 10-11 (describing LFA demands ranging from seven to as many as 43 PEG channels); *NCTA 4-18-19 Ex Parte*.

attempted to defend such demands in this proceeding.[38] Each additional PEG channel takes up capacity and resources that otherwise could be dedicated to providing broadband, other innovative services, or other programming.

Given the uncertainty around the valuation of channel capacity on cable systems for PEG use,[39] the Commission should consider adopting a rebuttable presumption under Section 621(a)(4)(B) that providing three linear standard-definition PEG channels satisfies a cable operator's obligations under Section 611(a),[40] unless state law requires fewer channels.[41] The Commission itself has expressed concerns about franchising authorities' excessive demands for PEG channel capacity,[42] and the record supports these concerns.[43] Providing guidance that three PEG channels is presumptively sufficient would serve as a necessary backstop to ensure that cable operators can allocate channel capacity consistent with community needs and desires. And because the presumption would be rebuttable, it would still allow franchising authorities to request additional PEG channel capacity if supported by local community needs and desires.[44] Even within this rebuttable presumption, however, the operator must still be able to offset the provision of PEG channel capacity against the franchise fee once a methodology is in place for appropriately valuing that contribution.

Fourth, the Commission should make clear that the franchise fee cap imposed by Section 622 cannot be waived. Some franchising authorities take advantage of periods in which they have maximum leverage to ask cable operators like Altice USA to "voluntarily" waive the cap and accede to making payments or contributions that are not offset against the statutory limit on franchise fees. That pressure puts operators in a bind because, as a practical matter, they are often not in a position to resist franchising authority demands since the franchising authority exercises the sole domain over ROW access—which is one of the precise concerns that led to adoption of the Federal Cable Act in the first place. Altice USA's experience is telling here.

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[38] *See, e.g.*, Letter from Jacque A. Smith, President, Minnesota Association of Community Telecommunications Administrators, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 2-3 (Mar. 5, 2019).

[39] *Compare NCTA 4-18-19 Ex Parte* at 4, *with* Letter from Kenneth S. Fellman, Kissinger & Fellman, P.C., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 5 (Apr. 3, 2019), *and* Letter from Zach Friend, Board of Supervisors, County of Santa Cruz, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 1 (Dec. 13, 2018).

[40] *NCTA 4-18-19 Ex Parte* at 5-7.

[41] *See, e.g.*, Kan. Stat. § 12-2023(a)(5)(B), (h)(1) (establishing limit of two PEG channels); Ga. Code Ann. § 36-76-8 (maximum of two PEG channels where the population is less than 50,000); Tenn. Code Ann. § 7-59-309 (maximum of one PEG channel where the population is less than 25,000, maximum of two PEG channels where the population is greater than 25,000 but less than 50,000).

[42] *See* sources cited *supra* note 35.

[43] *See Altice USA Reply Comments* at 19; *NCTA Reply Comments*, Att. 2 at 10-11; *NCTA 4-18-19 Ex Parte*.

[44] *See NCTA 4-18-19 Ex Parte* at 5-7 (describing relevant queries and framework for determining how many PEG channels is "adequate").

Because the Company needs permits for its FTTH network from franchising authorities, it is difficult for Altice USA to resist a municipality that seeks a waiver from the 5 percent cap in the franchise. The result is that the Company is confronted with demands for payments or grant concessions above the cap, the franchising authority escapes Congress's careful limits, and consumers bear the added cost.

To avoid this negative result, the Commission should interpret the fee cap as a statutory protection that cannot be waived. The Commission has recognized the Supreme Court's longstanding rule that "'[w]here a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.'"[45] In other words, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy."[46]

The cap on franchise fees is just such a statutory right, and the Commission therefore should hold that it "may not be waived."[47] "Congress imposed a cap" because "large fees would place cable operators at a substantial competitive disadvantage, thereby stifling competition which, in turn, harms the public."[48] In addition, because "'ultimately, money assessed as franchise fees . . . shows up on cable customer's monthly bills,'" the fee cap has "strong public interest implications."[49] If the cap's protections could be waived "the policy behind the enactment of [Section 622] and the Act would be unquestionably contravened"—waiver would "eviscerate the safeguards which protect both the cable operator's long term ability to remain competitive as new franchises enter the market and the public's ability to choose from a variety of cable companies at reasonable rates," as well as "upset the regulatory balance struck by Congress between the authority of the local, state and federal governments."[50] By contrast, treating the fee cap as non-waivable avoids these deleterious effects. And barring operators from

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[45] *In re Cablevision Systems Corp.*, Memorandum Opinion and Order, 11 FCC Rcd 14934, 14943 ¶ 19 n.24 (CSB 1996) (quoting *Brooklyn Sav. Bank v. O'Neil,* 324 U.S. 697, 704 (1944)), *reconsideration granted in part by* 12 FCC Rcd 13121 (CSB 1996).

[46] *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 704 (1944); *see also Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740 (1981).

[47] *Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96 C 5962, 1997 WL 433628, at *25 (N.D. Ill. July 29, 1997); *see also City of Dubuque v. Grp. W Cable, Inc.*, No. C 85-1046, 1986 WL 15646, at *2 (N.D. Iowa June 18, 1986) ("By the very language of the Act it is clear that Congress intended to pre-empt local franchises and create a uniform national policy. To now uphold waivers of that national policy would directly contravene the intent of Congress."); *Nashoba Commc'ns Ltd. P'ship No. 7 v. Town of Danvers*, 703 F. Supp. 161, 165 (D. Mass. 1988) ("Public policy concerns, particularly in the context of a comprehensive federal statute such as the Cable Communications Policy Act of 1984, militate against permitting a cable services provider to waive key provisions in the statute."), *rev'd on other grounds*, 893 F.2d 435 (1st Cir. 1990).

[48] *Cable TV Fund*, 1997 WL 433628, at *25 (citing S. Rep. No. 98–67, at 25 (1983)).

[49] *Id.* (quoting H.R. Rep. No. 101–682, at 375 (1990)).

[50] *Id.*

waiving the fee cap also would honor Congress's intent to limit franchise fees to encourage investment and discourage abusive exactions by franchising authorities.[51]

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Altice USA appreciates the Commission's commitment to reduce regulatory barriers to investment by cable operators in their cable systems. Cable franchising authority practices in some instances have delayed, inhibited, or traded off with the Company's investments in deploying its FTTH network in contravention of Congress's carefully designed franchising framework for cable systems. The Commission has ample legal authority and a record basis to address such abuses by adopting common-sense rules and remedies to govern cable system permitting processes—such as clear preemption, express shot clocks, strict enforcement of the franchise fee cap, and a streamlined framework for resolving disputes—and by making clear that the franchise fee cap cannot be "voluntarily" waived. It is timely and appropriate for the Commission to take these actions in this proceeding to achieve Congress's purposes and the Commission's objectives under the Cable Act.

Respectfully submitted,

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[51] *See* 47 U.S.C. § 542(b) ("For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system *shall not* exceed [five] percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services." (emphasis added)); *see also NCTA Comments* at 55-59.