Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
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

REPLY COMMENTS OF ALTICE USA, INC.

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Altice USA, Inc. ("Altice USA" or the "Company") submits these reply comments in response to the Commission's Second Further Notice of Proposed Rulemaking ("*Further Notice*") in this proceeding.[1]

INTRODUCTION AND EXECUTIVE SUMMARY

Altice USA, whose 21-state footprint includes both dense urban markets and rural areas, is investing heavily in multiple initiatives to advance core Commission and congressional policy goals of upgrading broadband networks, increasing broadband speeds, and enhancing consumers' access to innovative broadband products and applications. Specifically, the Company's network investment is focused on:

- <u>FTTH</u>: The Company's ambitious plan to construct a fiber to the home ("FTTH") network capable of delivering up to 10 Gbps and innovative offerings including 4K ultra-HD streaming is underway. Construction is ongoing, and Altice USA has already made 1 Gbps service available over its FTTH network in parts of Long Island and Connecticut, and will expand availability and ramp speeds in response to demand.

[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, MB Docket No. 05-311, FCC 18-131 (rel. Sept. 25, 2018) ("*Further Notice*").

- Speed Upgrades: Altice USA is also increasing speeds over its existing network. More than 80 percent of households passed in its western footprint, including second and third tier markets in West Virginia, Texas, and Arkansas, have access to 1 Gbps service. In its eastern footprint, the Company offers 400 Mbps to every household passed, and its triple play offering now includes 100 Mbps.

- Mobile: Altice USA is an industry leader in deploying wireless antennas for WiFi offerings at no incremental cost to broadband customers. Next year, the Company will launch a mobile wireless product, offering customers a compelling alternative to existing CMRS plans.

But in some cases, Altice USA's broadband investment has been delayed or frustrated by actions of state and local franchising authorities, including:

> (1) unlawful delays and demands regarding permitting of FTTH and incidental equipment—including delays of 18 months or more and demands of an additional $10,000 for each fiber cabinet, on top of the 5 percent cable franchise fee;
>
> (2) requirements that Altice USA obtain an additional franchise and/or pay additional franchise fees to offer non-cable services over the cable system; and/or
>
> (3) other demands for in-kind contributions, fees, or cash payments—often related to non-cable service and on top of the maximum permissible cable franchise fee—that can add substantially to the cost of a franchise.

These demands not only undermine the Commission's goal of broadband deployment and put pressure on retail cable rates, but also are at odds with Title VI of the Communications Act and Commission precedent defining the appropriate scope of cable franchising.

Altice USA therefore urges the Commission to confirm the boundaries of state and local franchising authority and establish structural protections against the violation of those limits. If, as the Commission recently determined, establishing limits on state and local permitting processes and costs for *wireless* network deployment is key to broadband investment,[2] then it is

[2] *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket Nos. 17-79, 17-84, FCC 18-133 ¶¶ 4-5 (rel. Sept. 27, 2018) ("*Wireless Infrastructure Third Report and Order*") (explaining that new reforms addressed state and local excessive fees and other requirements for deploying small wireless infrastructure that materially inhibit the buildout and deployment of networks and infrastructure).

no less an imperative for the Commission also to streamline regulatory requirements and costs for network investment authorized by *cable franchises*. The Commission possesses ample legal authority to adopt these reforms. Specifically, Altice urges the Commission to:

- ***Permit Application Delays and Demands – Preemption, Shot Clock, Dispute Resolution Framework, and Fee Limits***: Franchising authorities sometimes use siting and permitting processes to delay and/or demand concessions or unreasonable fees in exchange for access to the public rights-of-way ("ROW"). The Commission should reaffirm that under Sections 621, 624, and 253 of the Act, a cable operator is entitled to ROW access in its franchise areas to install and upgrade facilities to provide cable and non-cable services. The Commission should likewise declare that the imposition of unreasonable delays, demands, or fees in connection with ROW access is preempted. To enforce these holdings, the Commission should adopt a self-executing shot clock and dispute resolution framework and should make clear that no fees (other than nondiscriminatory, incidental permit processing fees) beyond the cable franchise fee may be imposed.

- ***Broadband Services – No Separate Franchises or Fees***: Some franchising authorities have demanded that Altice USA obtain a separate franchise and/or pay separate fees in connection with the provision of non-cable services over its cable system. The Commission should reaffirm that such demands, and other attempts to regulate the provision of non-cable services, are unlawful as to cable operators.

- ***5 Percent Cap – No Exclusions for Franchising Costs or In-Kind Contributions Unless Expressly Required by Section 622 and No Waiver***: In multiple contexts—including during franchise renewals and transfers as well as in connection with equipment upgrades and new service introductions—franchising authorities have demanded payments and in-kind contributions without offsetting these costs against the statutorily capped franchise fee. The Commission should declare that all franchise-related payments and cable-related and non-cable-related in-kind contributions (except those expressly excluded under the statute) count toward the statutory cap, which the Commission should find is unwaivable.

The Commission should act expeditiously to adopt these clarifications and safeguards, and do so unambiguously to minimize the need for further Commission or judicial proceedings to effectuate them. The Company further urges the Commission to make their scope applicable to *state* as well local franchising authorities alike; otherwise, the reforms adopted in this proceeding will leave the majority of the over 1300 communities served by Altice USA without the benefit of clarifications that will advance the Commission's broadband policy agenda.

Below we detail instances where franchise authority demands have impeded the Company's pro-consumer broadband investment initiatives and elaborate on the corrective measures the Commission should adopt in this proceeding.

I. State and Local Governments Have Exceeded Their Lawful Franchising Authority and Interfered with Altice USA's Installation of Facilities to Upgrade Its Cable System.

Despite the numerous benefits of the Company's wireline and wireless broadband investment initiatives described above, Altice USA continues to encounter unreasonable and unlawful delays, fees, and demands throughout the franchising process (*e.g.*, during renewals and transfers), and specifically in connection with the siting and installation of new cable and incidental facilities at the local and state franchising level. These demands and fees are in excess of the compensation franchisors already receive through the statutorily capped franchise fee, in exchange for rights that are already conferred on Altice USA under federal law.

The following examples are illustrative of how franchising authorities—at the state, county, and local level—are abusing permitting processes in a manner that hinders network investment by Altice USA.

- <u>Equipment Fees</u>: One local franchising authority ("LFA") in New York has demanded a payment of $100,000 (separate from the annual franchise fee) to grant "permission" for Altice USA to place FTTH fiber cabinets in ROW.

- <u>Permitting Delays</u>: One state franchisor has subjected the Company to a notification/consent process that has delayed by several months the installation of FTTH fiber cabinets. Similarly, a local franchising authority has refused *for over two years* to process permits for fiber cabinets and has demanded the payment of franchise, siting, permit, and consultant fees for ancillary equipment.

- <u>Regulation of Cable System Under Non-Cable Regimes</u>: One state in Altice USA's footprint is considering defining cable operators as "telecommunications" providers, which would obligate the Company to obtain a separate use agreement to access state ROW and make recurring cash or in-kind contributions (for example, dark fiber installation) to state entities. As these requirements likely would include geographic areas covered by existing cable franchises, their effect would be to force Altice USA to pay twice—the cable franchise fee and the separate fee under the use agreement—

to be in the ROW. Similarly, an LFA in New York demanded that all cable system equipment be subject to a local wireless siting law on the theory that all such equipment is used as base equipment for wireless services.

- Additional Compensation for ROW Access: A county government in New York caused significant delay in Altice USA's FTTH investment by demanding permitting for aerial cabling, as well as compensation in exchange for permission to place fiber cabinets in the county ROW. Here too, the county ROW is located in municipal franchise areas for which Altice USA is currently paying the statutorily capped franchise fee.

Adoption of the remedies discussed below—broad preemption, a permitting shot clock, a limitation on permitting fees, and a streamlined dispute resolution framework—will redress these practices and facilitate investment by cable operators to deploy broadband.

Local franchising authorities are also increasingly adopting duplicative franchise requirements and fees for the provision of non-cable services over cable systems, which inhibit network investment and undermine innovative broadband services offered over those networks. For example:

- Separate Fees and Authorizations for Broadband: An LFA in New York has recently proposed a franchise renewal agreement containing conflicting provisions that require the payment of franchise fees on non-cable services.

- Separate Fees and Authorizations for Non-Cable: An LFA in Altice USA's Kentucky footprint recently passed a cable ordinance, without engaging in prior franchise renewal negotiations, which imposes a franchise fee for the provision non-cable services. The same LFA additionally is seeking to adopt a separate franchise authorization for cable franchisees to provide non-cable services.

- Separate Franchise for Wireless: A New York LFA similarly has recently demanded that cable operators obtain separate authorizations to provide WiFi and other wireless services.

- Regulation of Cable Networks for Wireless Backhaul: LFAs are also increasingly attempting to regulate the use of on-strand cable equipment and *wireline* cable facilities to provide backhaul under *wireless* siting laws and other ordinances.

Altice USA has also encountered instances of *state* franchising authorities' attempts to impose requirements, fees, or regulations on the provision of non-cable services.

- Fees Over 5 Percent Cap: One state requires cable providers to pay operational costs for ROW access over and above the 5 percent annual gross earnings tax (tantamount to the cable franchise fee) imposed on the holder of a state-issued cable franchise.

- Broadband Reporting: Another state requires cable operators that provide broadband internet access service ("BIAS") to file annual deployment reports at the census-block level.

The Commission can address these abuses by reaffirming prior holdings that were not disturbed by the Sixth Circuit's decision in *Montgomery County v. FCC*,[3] by extending the mixed-use rule to all cable operators, and by foreclosing franchising authorities from relying on purported non–Title VI powers to impose franchise requirements and fees.

Finally, despite the Commission's clear prior rulings, franchising authorities continue to demand franchising-related costs and non-cable-related in-kind contributions that are not offset against the cable operator's annual franchise fee. Altice USA has had first-hand experience with such abuses.

- Escrow Fee: One franchising authority has refused to negotiate a franchise renewal unless Altice USA agrees to deposit a yet-unspecified amount into escrow to cover a consultant fee for the franchising authority. Local law places no limit on the amount of money that may be placed in escrow in connection with this ambiguous fee, and the franchising authority will not count the escrow amount or the consultant fee drawn from it against the 5 percent revenue cap on franchise fees.

- Non-Cable Exactions: Numerous franchise authorities have made similarly onerous demands of Altice USA for non-cable-related contributions, without offsetting the cost of such exactions from the franchise fee to keep that fee within the 5 percent cap.

- Free Service: One franchising authority demanded that Altice USA provide high-speed routers for all municipal buildings within the local franchising area and provide free cabling and upgraded broadband speeds ranging from 100 to 300 mbps for four municipal buildings—all without offsetting Altice USA's franchise fee. A separate franchising authority has demanded that Altice USA provide free internet accounts for the franchise authority's employees to access outdoor WiFi, as well as free internet at each municipal building in the franchising area.

[3] *See* 863 F.3d 485 (6th Cir. 2017).

- Technology Grant: Yet another franchising authority has more bluntly demanded that Altice USA provide a $15,000 "technology grant" as a condition of franchise renewal, which would not be offset against Altice USA's franchise fee.

Similarly, demands for cable-related in-kind contributions—especially PEG operational contributions—are common and routinely treated as separate from the 5 percent franchise fee.

- Excessive PEG Support: In one of its larger franchise areas, in which Altice USA pays $30M annually in franchise fees, Altice USA also is required to pay operational and capital support for PEG and institutional network costs amounting to another 32 percent of the underlying franchise fee when annualized. These payments are also in addition to free video and internet services, availability of dark fiber, subsidization of new construction in developing business districts, free public service announcement production and telecasting, and other forms of in-kind support. A separate franchising authority has demanded from Altice USA over $1M in PEG support over the course of 10 years—including "retroactive" payments from the period of franchise expiration—without any restrictions on the operational use to which the franchising authority may put such payments.

- Excessive Release Demand: Another franchising authority, in order to release Altice USA from its franchise access-studio obligation, has demanded excessive payments in lieu of the cost of maintaining an access studio that has only one regular public user—with no offset to the 5 percent franchise fee.

These examples provide additional support for the Commission to reaffirm its prior determinations regarding the scope of Section 622 and to adopt its tentative conclusions in the *Further Notice*.

II. The Commission Should Preempt Franchising Authority Practices That Interfere with or Have the Effect of Constraining a Cable Operator's Ability to Install or Upgrade Its Cable System and Should Adopt New Remedies for Cable Operators.

The Commission should use this opportunity to address practices by franchising authorities that prevent or delay the provision of new services over cable systems—*i.e.*, demands, delays, or inactions that interfere with the installation and upgrade of cable system and incidental facilities in ROW. These practices are already unlawful under Sections 621(a)(2) and 622, and the Commission has ample authority to address them through expansive preemption and

self-executing remedies. The Commission should also proactively stop franchising authorities from circumventing these sensible limitations based on purported authority outside of Title VI.

A. Sections 621 Authorizes ROW Access by Cable Operators, and the Commission Should Adopt Self-Executing Remedies to Enforce This Right.

Under Section 621(a)(2) of the Act, a cable franchise authorizes the franchisee to construct, operate, and maintain a cable system within ROW.[4] Altice USA's cable systems include, among other things, equipment and components for processing, transmitting, and receiving visual, as well as audio, digital, and other signals. As long ago as 1984, Congress made clear that a cable system is "not limited to a facility that provides only cable service" but also includes the operator's facilities "designed to include the provision of cable services . . . along with communications services other than cable service."[5] In exchange for this access, a franchising authority is entitled under Section 622 to a franchise fee with a statutory cap of 5 percent of a cable operator's cable service revenue.[6]

Commission precedent establishes that Section 621(a)(2) already guarantees cable operators access to ROW. In its *2002 Cable Modem Order*, the Commission noted that "[o]nce a cable operator has obtained a franchise," it has the right under Section 621 to "access rights-of-

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[4] *See* 47 U.S.C. § 522(9) (defining "franchise"); *id.* 541(a)(2) (A cable franchise "shall be construed to authorize the construction of a cable system over public rights-of-way . . . ."). While the specific terms of Altice USA's cable franchise agreements vary from jurisdiction to jurisdiction, the rights conferred on Altice USA under its franchises are sufficient to authorize Altice USA to access ROW to upgrade its cable systems to provide cable and non-cable services. Moreover, Altice USA's franchise agreements generally provide that franchising authorities may not unreasonably delay or deny the issuance of any permits or otherwise interfere with Altice USA's exercise of these rights.

[5] H.R. Rep. No. 98-934, at 44 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4681; *cf. Nat'l Cable Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333 (2002) ("If one day, [a cable television company's] cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.' The addition of a service does not change the character of the attaching entity . . . .").

[6] *See* 47 U.S.C. § 542(b).

way as necessary to provide" broadband and other services "or to use [its] previously franchised systems to provide" BIAS and other services.[7] And in its 1997 *TCI Cablevision Order*, the Commission anticipated that an "unexplained failure to respond to a permit application by" a cable operator "within a reasonable time would lead to the assumption that the local franchising authority under Title VI is being used for some" purpose other than permissible ROW management, "thereby violating Section 621."[8]

The Commission should therefore reaffirm that Sections 621(a)(2) and 622 prohibit franchising authorities from imposing unreasonable delays, demands, or additional fees (other than nondiscriminatory incidental fees related to the cost of permit processing) on access to ROW. The Commission should go further than merely announcing a policy and deferring enforcement until it is presented with specific disputes. Instead, as it did to promote wireless broadband deployment, the Commission should establish a shot clock for franchising authorities to act on cable system permitting applications, as well as a streamlined framework for resolving disputes between cable providers and franchising authorities. The Commission's conclusions in the *Cable Modem Order* and the *TCI Cablevision Order* already establish that Section 621(a)(2) guarantees cable operators ROW access free from unreasonable delays or demands, and the Commission's broad rulemaking authority under Section 201(b) empowers it to adopt a shot

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[7] *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) ("*Cable Modem Order*"), *aff'd in part, vacated in part by Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *rev'd, Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[8] *See In re TCI Cablevision of Oakland County, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 21,396, 21,428-29 ¶ 76 (1997) ("*TCI Cablevision Order*"); *see also id.* ("Unexplained administrative failure[s] to provide permit applicants with responses within a reasonable time may lead the Commission to construe the circumstances most favorably to the party aggrieved by the delay."). While the *TCI Cablevision Order* is specific to "incumbent cable operators," the same statutory analysis would apply to incumbents and new entrants alike.

clock and dispute framework implementing that guarantee.[9] These remedies are necessary to prevent franchising authorities from continuing to impose unreasonable demands and unexplained and other unreasonable delays on the construction, maintenance, and upgrade of cable systems.[10]

The Commission should expressly apply this preemption and these remedies to *state* franchising authorities as well as LFAs. Section 621(a)(2) provides that "[a]ny franchise" authorizes construction and upgrading of a cable system,[11] without regard to the nature of the franchising entity. And Section 622 caps the "franchise fee" that must be paid to any "franchising authority."[12] The Communications Act defines "franchising authority" as "any governmental entity empowered by Federal, State, or local law to grant a franchise," thereby supporting application of the Commission's franchising limitations to state and local franchising authorities alike. Moreover, as demonstrated above, there is now a robust record supporting that state franchising authorities, too, are abusing the franchising process in a manner that contravenes federal law and congressional intent.[13]

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[9] *See* 47 U.S.C. § 201(b); *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'…"). Section 201(b) empowers the Commission to adopt rules to implement Title VI. *See Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 774 (6th Cir. 2008) (finding that the Commission possesses "clear jurisdictional authority to formulate rules and regulations interpreting the contours of section 621(a)(1)").

[10] As discussed below, the Commission also has authority to establish shot clocks that would apply to permitting applications for facilities to provide telecommunications and information services over a cable system under Section 253. *See infra* notes 24-27 and accompanying text.

[11] *See* 47 U.S.C. § 541(a)(2).

[12] *See id.* § 542(b).

[13] *See supra* at 4-5; *see also* Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311, at 59-64 (Nov. 14, 2018) ("NCTA Comments").

B. The Commission Should Prevent Franchising Authorities from Avoiding These Remedies by Asserting Authority Outside of Title VI to Regulate ROW.

Franchising authorities have already revealed how they will seek to circumvent the rules discussed above: by asserting purported authority outside of Title VI to regulate ROW.[14] As the record demonstrates, however, Title VI and Section 253 of the Act preclude such assertions of authority.[15]

First, viewed in context, Title VI establishes an integrated system of franchise regulation and reflects Congress's intent to prevent regulation of cable systems based on putative powers from some source other than Title VI. The Act's text and structure make this clear.[16] Moreover, Section 624 specifically prohibits franchising authorities from "establish[ing] requirements for . . . information services"[17] and from "prohibit[ing], condition[ing], or restrict[ing], a cable system's use of any type of . . . transmission technology."[18] Franchising practices exceeding these limitations "shall be deemed to be preempted and superseded."[19]

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[14] *See, e.g.*, Comments of Anne Arundel County, Maryland [et al.], MB Docket No. 05-311, at 37-40 (Nov. 14, 2018) ("Joint LFA Comments"); Comments on Second Further Notice of Proposed Rulemaking of the Alliance for Communications Democracy [et al.], MB Docket No. 05-311, at 17 (Nov. 14, 2018).

[15] *See, e.g.*, NCTA Comments at 17-21.

[16] Section 621 reserves to franchising authorities limited, specific jurisdiction over cable systems—for example, cable operators must ensure that the safety, functioning, and appearance of ROW, as well as public convenience and safety, are not adversely affected by the installation or construction of facilities and equipment. *See* 47 U.S.C. § 541(a)(2)(A). Likewise, a franchising authority may require assurances of a cable operator's financial, technical, and legal qualifications. *See id.* § 541(a)(4). But beyond these limited reservations, Section 624 prohibits regulation of a cable operator's services, facilities, or equipment. *See id.* § 544(a) ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this subchapter.").

[17] *See id.* § 544(b)(1).

[18] *See id.* § 544(e).

[19] *See id.* § 556(c).

Second, Section 253(a) preempts any franchising authority practice that is tantamount to an effective prohibition on a cable operator's provision of telecommunications services.[20] Section 253 reflects the 1996 Act's deregulatory, pro-competitive purposes, and its preemptive effect is "broad" and "expansive."[21] Franchising authority practices with respect to the installation and upgrade of cable system facilities—including delays, fees unrelated to application processing costs, and non-fee demands—trigger Section 253(a), because Altice USA, like many cable operators, currently provides telecommunications services on a common carrier basis over its cable systems.[22] The record also makes clear that unreasonable fees, non-fee demands, or burdensome procedures cannot be justified under Sections 253(b) or 253(c).[23]

Like Section 621, discussed above, Section 253(a), buttressed by Section 201(b), empowers the Commission to adopt a shot clock for franchising authority review of permitting applications. In its recent *Wireless Infrastructure Third Report and Order*, the Commission held that inaction on small wireless siting applications amounts to not only a "failure to act" under

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[20] *See id.* § 253(a); *see also Further Notice* ¶ 31 (requesting comment on application of Section 253 to franchising authority practices).

[21] *See, e.g.*, *Wireless Infrastructure Third Report and Order* ¶ 53; *see also id.* ¶¶ 35-37 (discussing effective prohibition standard from *In re California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant To Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14,191, 14,206 (1997)).

[22] *See, e.g.*, Letter from Rick Chessen, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 05-311, at 2 n.10 (May 3, 2018) (explaining that "[m]any cable operators provide telecommunications services on a common carrier basis" over the same facilities they use to provide video and broadband services); *see also In re Bright House Networks, LLC, Complainants v. Verizon California, Inc., Defendants*, Memorandum Opinion and Order, 23 FCC Rcd 10,704, 10,717-20 ¶¶ 37-41 (2008), *aff'd*, *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275-76 (D.C. Cir. 2009). At least one court has suggested that Section 253 may have direct applicability to the provision of information services. *See, e.g.*, *Ill. Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 946 (N.D. Ill. 2007). Section 253(a) also supports preemption for cable operators who do not yet provide telecommunications services, because it is "focused on state and local barriers to entry for the provision of service," and a franchising authority's unreasonable practices with respect to ROW permitting poses an unreasonable barrier for potential providers as well. *See Wireless Infrastructure Third Report and Order* ¶ 56.

[23] *See* NCTA Comments at 21-26.

Section 332(c)(7)(B)(v), but also an "effective prohibition" on the provision of service under Section 332(c)(7)(B)(i)(II).[24] Because the Commission also found that the "effective prohibition" standard applies equally to Sections 332(c)(7)(B)(i)(II) and 253(a),[25] the Commission should, as an exercise of its authority under the latter provision, impose a shot clock on action by franchising authorities on ROW permitting and siting applications. This remedy is necessary to prevent undue delays by franchising authorities that would effectively prohibit the provision of telecommunications services by, for instance, impeding investments in facilities that can be used for such services.

The Commission should also establish a streamlined framework for providers to seek relief from a state or local government's unreasonable delay on a siting or permitting application.[26] This approach would harmonize the cable franchising framework with the Commission's recent *Wireless Infrastructure Third Report and Order*[27]—and would be consistent with the goal of removing regulatory barriers to the deployment of more broadband infrastructure.

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[24] *See Wireless Infrastructure Third Report and Order* ¶¶ 118-119.

[25] *See id.* ¶ 36 ("As an initial matter, we note that our Declaratory Ruling applies with equal measure to the effective prohibition standard that appears in both Sections 253(a) and 332(c)(7)."). The Second Circuit similarly has found that "extensive delays" in responding to procedural requests can be tantamount to an effective prohibition for purposes of Section 253(a). *See TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2d Cir. 2002).

[26] *Cf. Wireless Infrastructure Third Report and Order* ¶¶ 116-130.

[27] *See id.* ¶ 34 n.74 ("The actions in this proceeding update the FCC's approach to Sections 253 and 332 by addressing effective prohibitions that apply to the deployment of services covered by those provisions. Our interpretations in this proceeding do not provide any basis for increasing the regulation of services deployed consistent with Section 621 of the Cable Communications Policy Act of 1984.").

III. Altice USA Supports the Commission's Tentative Conclusion That Franchising Authorities May Not Regulate the Provision of Non-Cable Services, or the Facilities or Equipment Used to Provide Such Services, over a Cable System.

The Commission proposed in the *Further Notice* to reaffirm its "mixed-use rule," which limits franchising authority jurisdiction over mixed cable systems (*i.e.*, networks that provide broadband, voice services, and other non-cable services) to only the provision of video programming services.[28] Altice USA supports the proposed prohibition on franchising authorities' "using their video franchising authority to regulate most non-cable services offered over cable systems," such as telecommunications services, BIAS, VoIP, and other services.[29]

This approach makes good practical sense and will support the Commission's pro-deployment objectives. As recounted above, local franchising authorities sometimes attempt to regulate the provision of non-cable services by cable operators through the imposition of new franchise requirements and fees and/or the application of wireless siting laws and ordinances to cable system equipment.[30] Moreover, the policy interests that underlie the mixed-use rule also support its application to state-level franchising as well. Congress and the Commission have made clear that the federal policy of non-regulation of information services supports preemption of local *and state* requirements to prevent a patchwork of regulation that deters investment in

[28] *See Further Notice* ¶¶ 7, 25.

[29] *See id* ¶ 25. As a threshold matter, the *Further Notice* correctly confirms that the Sixth Circuit's decision in *Montgomery County* "vacated the mixed-use rule only as applied to incumbent cable operators that are not common carriers." *See id.* ¶ 26; *see also Montgomery Cty.*, 863 F.3d at 492-93. But for the avoidance of any doubt or arguments to the contrary, *see, e.g.*, Joint LFA Comments at 40-43, the Commission should expressly confirm that, under Sections 3(51) and 602(7)(C), franchising authorities may not regulate the provision of telecommunications services by cable operators that are also common carriers.

[30] *See supra* at 4-5.

infrastructure deployment.[31] As noted above, Altice USA's experiences with state franchising also bear out the wisdom of this approach.

Commission precedent, as well as the text and legislative history of the Cable Act, already establishes that local franchising authority jurisdiction does not extend to the regulation of non-cable services. For example, the Commission already has interpreted Section 622 to prohibit the imposition of franchise fees on a cable operator's revenues from non-cable services.[32] The Commission likewise already has interpreted Section 621 to prohibit an LFA from requiring a cable operator to obtain a separate franchise to provide BIAS, whether classified as an information service or a telecommunications service.[33] The Commission should confirm both prior holdings—for the avoidance of any doubt—and should expressly extend these conclusions to state-level franchising authority practices.[34]

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[31] *See* 47 U.S.C. § 230(b); *In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 426-27 ¶ 194 (2018); *In re Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22,404, 22,427 ¶ 37 (2004) ("Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations"), *aff'd sub nom. Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[32] *See Further Notice* ¶¶ 6 & n.24, 9, 28 n.134; *see also* NCTA Comments at 14-17; *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 19,633, 19,637-38 ¶ 11 (2007) ("*Second Section 621 Order*") (incumbents), *review granted in part, denied in part sub nom. Montgomery Cty. v. FCC*, 863 F.3d 485 (6th Cir. 2017)*; 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, 5146-47 ¶ 98 (2007) ("*First Section 621 Order*") (new entrants), *aff'd sub nom. Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[33] *See Cable Modem Order*, 17 FCC Rcd at 4849-50 ¶ 102; *In re Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 ¶ 433 n.1285 (2015). The same logic that the Commission relied on in the *Section 621 Second Report and Order* to extend its franchise fee holding to incumbents applies to the Commission's conclusions under Section 621, which states that "[*a*]*ny* franchise," regardless of the nature of the franchisee, "shall be construed to authorize the construction of a cable system." 47 U.S.C. § 541(a)(2).

[34] *See supra* at 10.

Moreover, the Commission should further adopt its interpretation that Section 624(b)(1) and longstanding federal policy prohibit franchising authority regulation of telecommunications and information services—as well as the facilities and equipment used in the provision of such services—whether provided by a cable operator that is or is not a common carrier.[35] The Commission also should specifically clarify that the mixed-use rule applies to the regulation of cable facilities under wireless siting laws. This application follows clearly from the tentative conclusions in the *Further Notice*,[36] but given the current practices of some franchising authorities, Altice USA requests that the Commission specifically address this application of the mixed-use rule. And finally, the Commission should expressly hold that franchising authorities may not evade these prohibitions by invoking authority outside of Title VI.[37]

IV. Altice USA Supports the Commission's Proposal to Reaffirm That Costs, Fees, and In-Kind Exactions Count Toward the 5 Percent Franchise Fee Cap, Except as Excluded by Section 622, and Urges the Commission to Find That the Cap Is Not Waivable.

In the *Further Notice*, the Commission requested comment regarding its tentative conclusion that cable-related, in-kind contributions demanded by franchising authorities are "franchise fees" subject to the 5 percent statutory cap set forth in Section 622. Both Altice USA's experience and a commonsense approach to statutory interpretation support the reasonableness and practical necessity of this interpretation. Indeed, as Altice USA's experience

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[35] *See Further Notice* ¶¶ 28-29; *see also* NCTA Comments at 11-14.

[36] *See Further Notice* ¶ 25 ("Non-cable services offered by incumbent cable operators include telecommunications services and non-telecommunications services. Telecommunications services offered by incumbent cable operators may include, for example, some business data services. Non-telecommunications services offered by incumbent cable operators may include . . . private carrier services, such as certain types of business data services." (footnote omitted)).

[37] *See supra* Part II.B.

shows, some franchising authorities continue to attempt to evade the 5 percent cap in a variety of ways, and will continue to do so absent Commission intervention.

Accordingly, the Commission should reaffirm its prior rulings that franchising costs and non-cable-related, in-kind exactions count toward the 5 percent cap—if they are not preempted outright as impermissible regulation of non-cable services—and should further make clear that cable-related, in-kind exactions count toward the cap as well. In order to prevent franchising authorities from using their leverage in franchise negotiations to circumvent these holdings, the Commission should clarify that application of these fees and exactions toward the 5 percent cap cannot be waived.

A. The *Further Notice* Correctly Reaffirms That Certain Franchising Costs and Non-Cable-Related In-Kind Exactions, at Minimum, Already Count Toward the 5 Percent Franchise Fee.

Previously in this docket, the Commission has interpreted "franchise fees" as defined in Section 622 to include most costs and exactions imposed by franchising authorities, thereby ensuring that these costs count toward the 5 percent cap on the portion of a cable operator's cable service revenue that must be paid to franchising authorities.[38] The *Montgomery County* decision left this conclusion undisturbed with respect to franchising-related costs and non-cable-related in-kind exactions.[39] Such costs—such as consultant and attorneys' fees and unreasonable application or processing fees—accordingly remain subject to the 5 percent cap.

Based on the practices described above,[40] however, the Commission should reaffirm that the practice of demanding franchising costs (beyond reasonable processing costs) and in-kind

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[38] *See First Section 621 Order*, 22 FCC Rcd at 5149 ¶ 105; *see also Further Notice* ¶¶ 4, 17.

[39] *See Montgomery Cty*, 863 F.3d at 490-92.

[40] *See supra* at 5-6.

non-cable-related contributions, in any posture, without offsetting those costs against the 5 percent franchise-free cap, is impermissible. The Commission should not stop there. For the reasons described above in Part III, the Commission should consider preempting entirely demands for in-kind contributions related to information services and telecommunications services, whether asserted under Title VI or otherwise, and regardless of whether the franchising authority offsets those demands against the franchise fee. Franchising authority demands related to the speed, service quality, or other aspects of information and/or telecommunication services are, both in intent and practice, efforts by those authorities to regulate the provision of such services, and thus are preempted by federal law and contrary to federal policy.

B. Altice USA Supports the Commission's Tentative Conclusions Regarding Cable-Related, In-Kind Contributions.

In *Montgomery County*, the Sixth Circuit remanded for further proceedings the Commission's prior determination that cable-related, in-kind exactions qualify as franchise fees under Section 622.[41] Pointedly, however, the court did not hold that the Commission's prior interpretation of Section 622 was impermissible; it merely required the Commission to provide additional explanation of the grounds for its decision.[42] As the Commission explained in the *Further Notice*, demands for cable-related in-kind contributions separate from, and additional to, annual franchise fees—except when explicitly exempted by Section 622—are inconsistent with the statute and with federal policy.[43]

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[41] *See* 863 F.3d at 491-92.

[42] *Id.* at 492 ("On remand, the FCC should determine and explain anew whether, and to what extent, cable-related exactions are 'franchise fees' under the Communications Act.").

[43] *Further Notice* ¶¶ 17-19.

The problem is not merely theoretical. Franchising authorities continue to demand excessive cable-related in-kind contributions, especially in the form of PEG operational costs. The costs involved in complying with these demands impede Altice USA's planned investments to upgrade its cable system, and to roll out new products and services that offer significant consumer benefits.[44] Altice USA thus supports the Commission's proposed treatment of PEG operational, and any other non-expressly excluded, costs as cable-related, in-kind contributions subject to the 5 percent cap.

Section 622 makes clear that Congress intended to subject all in-kind exactions, with the exception of those expressly reserved by the statute, to the 5 percent revenue cap on franchise fees. The statute defines a franchise fee as "*any* tax, fee, or assessment *of any kind* imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such."[45] As the Commission has recognized, interpreting Section 622 contrary to its plain text, to exclude *some kinds* of fees or assessments would simply permit franchising authorities to end run the statute's cap by converting its otherwise excessive requests into demands for in-kind contributions.[46]

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44 *See supra* at 7.

45 47 U.S.C. § 542(g)(1) (emphases added); *see also Montgomery Cty.*, 863 F.3d at 490-91 ("[Section] 542(g)(1) more specifically defines 'franchise fee' to include '*any* tax, fee, or assessment *of any kind*[,]' . . . , which requires us to give those terms maximum breadth."); *cf. Wireless Infrastructure Third Report and Order* ¶ 53 ("Our interpretation . . . is informed by . . . the observation of courts that when a preemption provision precedes a narrowly-tailored savings clause, it is reasonable to infer that Congress intended a broad preemptive scope.").

46 *See Further Notice* ¶ 17 ("If in-kind contributions unrelated to the provision of cable services were not treated as franchise fees, LFAs could easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee. Likewise, if cable-related, in-kind contributions are not counted as franchise fees, LFAs could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee.").

Comments in this proceeding, however, demonstrate the aggressive positions that franchising authorities take in franchise negotiations and other postures, without regard to the text or history of Section 622.[47] And the number of franchising authorities that will demand cable-related, in-kind contributions (without offsetting the franchise fee) and franchise fees based on cable operators' non-cable revenues will increase absent reaffirmation of the Commission's prior conclusions and adoption of the Commission's tentative conclusions.

The *Further Notice* also requests comment on whether the interpretation of "franchise fee" to include franchising-related costs should apply uniformly to all franchising authorities, state as well as local.[48] It should. Section 622 does not textually distinguish between local franchising authorities and state franchising authorities. Likewise, the Commission's ruling should apply to all franchisees. The Commission previously applied its interpretations of Section 622 to both incumbent and new entrants, noting that Section 622 "does not differentiate between the two, and that "when Congress intended to treat providers differently, it was explicit [about] doing so."[49] So too here. Section 622 sets forth the franchise fee for "any franchise" "with respect to any cable system" without regard to the nature of the franchising authority.[50]

C. The Commission Should Make Clear That the Cap Cannot Be Waived.

Taken together, the Commission's prior orders in this docket and its proposals in the *Further Notice* establish a sensible and fair framework that is fully consistent with the language of Section 622: In-kind exactions generally are not prohibited, but they must be subject to the 5

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[47] *See, e.g.*, Joint LFA Comments at 17-18; Comments of Access Humboldt, MB Docket No. 05-311, at 2 (Nov. 13, 2018).

[48] *Further Notice* ¶ 22.

[49] *See Second Section 621 Order*, 22 FCC Rcd at 19,637 ¶ 10.

[50] 47 U.S.C. § 542(a), (b).

percent revenue cap on franchise fees, except for the limited items specifically exempted by the statute. Unfortunately, some franchising authorities have found an effective end run around the 5 percent cap, which operators such as Altice USA often are not in a position to resist. Franchising authorities can extract concessions above the 5 percent cap by making demands when their leverage in the franchise relationship is at a high point, and then effectively require cable operators to describe their waiver as "voluntary."

This sleight-of-hand ability to obtain a waiver, if not cabined, "would effectively eviscerate the safeguards which protect both the cable operator's long term ability to remain competitive . . . and the public's ability to choose from a variety of cable companies at reasonable rates."[51] In Altice USA's experience, franchising authorities have taken advantage of a variety of high-leverage situations to extract such "voluntary" waivers. These opportunities for franchising authorities include known buildout schedules, transfer proceedings, and pending franchise expirations. At each of these junctures, franchising authorities have acquired, or attempted to acquire, "voluntary" compensation that otherwise would exceed the 5 percent cap, such as PEG support, that is in fact used for operational purposes.

In order to fulfill Congress's intent when enacting the 5 percent cap, the Commission should conclude that the 5 percent cap is unwaivable by cable operators and local franchising authorities in its application to in-kind exactions.[52] This rule would be consistent with Section 622, which speaks in mandatory language forbidding franchise fees to exceed 5 percent of a

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[51] *See Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96-Civ-5962, 1997 WL 433628, at *25 (N.D. Ill. July 29, 1997).

[52] *See* NCTA Comments at 55-59.

cable operator's revenue.[53] It would also eliminate the opportunity and incentive for franchising authorities to strong-arm cable operators into payments that exceed their statutory obligations, and keep in place the statutory balance struck by Section 622.

CONCLUSION

The Commission is to be commended for its ongoing efforts to reduce regulatory barriers to infrastructure investment in advanced networks. Altice USA is investing heavily in broadband through multiple initiatives; once completed, these projects will deliver substantial benefits to consumers and businesses in the form of faster and more reliable speeds, broader coverage, and greater connectivity on the go. Unfortunately, over the last decade, cable franchising authorities at the local and state level have developed a playbook of techniques that have inhibited Altice USA's progress, by delaying access to ROW, imposing additional franchise requirements and fees, and seeking cash and in-kind contributions in excess of the statutory franchise fee cap. The Commission should therefore adopt its tentative conclusions from the *Further Notice* and also should address each of the above-described practices directly and clearly to ensure that cable operators such as Altice USA are not locked in costly and uncertain litigation to enforce their rights under the Communications Act.

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[53] 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 5 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)).

Respectfully submitted,

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