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VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Wireline Infrastructure, WC Docket No. 17-84

Dear Ms. Dortch:

NCTA – The Internet & Television Association (NCTA) submits this letter in support of the Commission's efforts to reduce or eliminate obstacles to broadband deployment. The cable industry is a leader in the deployment of broadband infrastructure in the United States and cable operators are poised to continue expanding and upgrading their broadband networks for the benefit of American consumers and businesses, including the continued densification of fiber and provision of backhaul services that will be the foundation for 5G wireless services. Cable operators have gained that leadership position while working constructively with states and municipalities, collectively paying about $3 billion annually in franchise fees to state and local governments under their Title VI franchises, in addition to permit fees to local governments in connection with construction activity. Separately, cable operators must obtain agreements with utilities for access to poles pursuant to Section 224 of the Communications Act and they must pay rental fees and make-ready costs associated with those agreements.

While many local governments are supportive of the cable industry's deployment of new facilities and new services, some are imposing additional, unwarranted burdens on the provision of broadband and other non-cable services over a franchised cable system. As we explain below, such regulatory overreach is inconsistent with the statutory rights granted to cable systems and the restrictions placed on franchising authorities under Title VI, and results in disparate treatment of cable operators as compared to other broadband providers. Accordingly, for the cable industry to be a constructive part of achieving the Commission's goals of driving investment in broadband, closing the digital divide, and leading the world in 5G, it is essential for the Commission to eliminate regulatory obstacles that stand in the way of continued, rapid broadband deployment.

I. THE COMMISSION SHOULD EXERCISE ITS TITLE VI AUTHORITY TO STREAMLINE STATE AND LOCAL OBLIGATIONS THAT ARE HINDERING DEPLOYMENT

In the Cable Act, Congress has created a regime in which video is the floor, not the ceiling, with respect to the services that may be delivered by a franchised cable operator. That regime places strict limits on the ability of state and local governments to regulate the technology that is deployed and the services that are provided by franchised cable operators.[1] Under Section 621(a)(2), Title VI cable franchises authorize cable operators to construct and operate cable systems in the public rights-of-way. Congress, the Commission, and courts have consistently found that a cable system remains a "cable system" under Section 602(7) even when used to provide non-cable services, and that delivering non-cable services over a cable system is within the scope of the rights that Congress intended a cable franchise to grant.[2] Moreover, Title VI provides that "[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with" the provisions of Title VI and that "*any* provision of law of any State, political subdivision, or agency thereof, or franchising authority . . . which is inconsistent with this [Act] shall be deemed to be preempted and superseded."[3] Consequently, while the rights granted to a franchised cable operator extend beyond cable service, the ability of the franchising authority to regulate them does not.

The *Wireline Infrastructure* proceeding presents the Commission with the opportunity to take targeted action that reduces the cost and time frames for deployment of broadband and other non-cable services by affirming the broad scope of services authorized under Title VI franchises and the reasonable limitations on local authority to impose burdensome fees and conditions. In particular, there are four specific barriers to deployment that cable operators experience and that the Commission can remedy: (1) demands for unwarranted franchises or authorizations and duplicative franchise fees; (2) refusal, delay, unnecessary expense, or discriminatory treatment in processing permit requests and in overall permitting practices; (3) challenges to use of utility easements; and (4) uncompensated or discriminatory treatment in the relocation of facilities. As explained below, the Commission can remove these obstacles with targeted, straightforward

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1 *See* 47 U.S.C. §§ 541(a)(2), 522(9).

2 *See, e.g.*, H.R. Rep. No. 98-934, at 44 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4659, 4661 ("The term 'cable system' is not limited to a facility that provides only cable service which includes video programming. Quite the contrary, many cable systems provide a wide variety of cable services and other communications services as well. A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service."); *Heritage Cablevision Associates of Dallas, L.P. v. Texas Utilities Electric Co.*, Memorandum Opinion and Order, 6 FCC Rcd 7099, 7104 ¶ 24 (1991), *aff'd*, *Tex. Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333 (2002); *see also* 47 U.S.C. § 521(4) (the Cable Act is intended to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public").

3 47 U.S.C. §§ 544(a), 556(c). As a matter of statutory public policy, preemption may not be contracted around or waived. *See* 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 3 n.12 (filed May 3, 2018) (NCTA May 3 Letter).

declaratory rulings under well-established precedent and authority.[4]

1. Unwarranted Authorizations and Fees. It has been clear since the 1984 Cable Act that a Title VI franchise authorizes a cable operator to deploy a cable system and deliver *both* cable and non-cable services over that system.[5] Specifically, Section 624(b) provides that, in any franchise granted after 1984, a franchising authority "may not . . . establish requirements for video programming *or other information services*."[6]

The Commission consistently has confirmed this approach with respect to Internet access services. When the Commission first classified cable modem services as information services in its *Cable Modem Declaratory Ruling*, it tentatively concluded that the legal classification of Internet access service "should not affect the right of 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."[7] When the Commission classified cable modem service as a telecommunications service in 2015, and again when it reclassified cable modem service as an information service in the 2018 *RIF Order*, it reached the same conclusion.[8] Many courts have likewise affirmed that Title VI cable franchises authorize cable operators to provide non-cable services without additional franchise or fee payments to state or local authorities.[9]

Similar protections apply with respect to any telecommunications services a cable operator offers over a franchised cable system. Section 621(b)(3)(A) prohibits a franchising

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[4] *See* 5 U.S.C. § 554(e) ("The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.").

[5] *See* Comments of NCTA – The Internet & Television Association, at 24-25, 30-32 (filed Jan. 17, 2018) (NCTA Comments); NCTA May 3 Letter at 3-4.

[6] 47 U.S.C. § 544(b)(1) (emphasis added).

[7] *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities,* Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4849-50 ¶ 102 (2002) (*Cable Modem Declaratory Ruling*).

[8] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5804 ¶ 433 n.1285 (2015) (*Title II Order*) (the classification of Internet access as a telecommunications service should not serve as "justification for a state or local franchising authority to require a party with a franchise to operate a 'cable system' . . . to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services."); *Restoring Internet Freedom*, Declaratory Ruling, Report & Order, and Order, 32 FCC Rcd 311, 426-28 ¶¶ 194-95 (2018) (*RIF Order*) (reaffirming the need for "a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements" and expressly preempting "entry and exit restrictions.").

[9] *See, e.g., Comcast Cable of Plano, Inc. v. City of Plano*, 315 S.W.3d 673, 680 (Tex. Ct. App. 2010) ("We conclude that § 542(b) unambiguously prohibits the City from charging Comcast any franchise fee on revenues generated from services that are furnished over its cable system and are not 'cable services.'"); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 900 N.E.2d 256 (Ill. 2008); *Par. of Jefferson v. Cox Commc'ns La., LLC*, No. Civ.A. 02-3344, 2003 WL 21634440 (E.D. La. July 3, 2003); *City of Cincinnati v. Time Warner Cable, Inc.*, No. C-1-07-724, 2008 WL 11352596, at *4, *7 (S.D. Ohio July 1, 2008) (determining that Section 622(b) "clearly now provides that the franchise fee *on the entire system* cannot exceed five percent of the revenues derived from the provision of cable services only," and holding that the statute does not "permit the imposition of two franchise fees—one for cable services and one for non-cable services") (emphasis added).

authority from imposing any requirement for telecommunications services as part of a cable franchise under Title VI. Section 621(b)(3)(B) similarly precludes a franchising authority from imposing any requirement "that has the purpose or effect of prohibiting, limiting, restricting or conditioning the provision of a telecommunications service by a cable operator . . . ."[10] And Section 621(b)(3)(D) states that a franchising authority "may not require a cable operator to provide any telecommunications service or facilities . . . as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise."[11] As one court has explained, the Telecommunications Act of 1996 (1996 Act) reflects a clear federal policy "that market competition, rather than state or local regulations, would primarily determine which companies would provide the telecommunications services demanded by consumers. To carry out this goal, Congress adopted sweeping restrictions on the authority of state and local governments to limit the ability of telecommunications companies to do business in local markets."[12]

Likewise, the offering of non-cable services over a cable system cannot be used as an excuse for local governments to impose additional fees beyond the cable franchise fee. In the 1996 Act, Congress amended Section 622 to cap the amount of compensation that franchising authorities can require for use of the public right-of-way to 5% of the cable operator's revenues from "cable services." That cap serves to limit all fees for all uses of the cable system; it includes any "franchise fees paid by a cable operator with respect to any cable system" and covers "any tax, fee, or assessment of any kind."[13] Courts have confirmed that Congress added this limitation to promote the use of cable systems for the provision of non-cable services *without* additional fees or burdens imposed by state and local governments.[14] Moreover, the Commission has specifically stated that franchising authorities may not assess additional fees on broadband services provided over cable systems, regardless of whether such services are classified as information services or telecommunications services.[15]

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[10] 47 U.S.C. § 541(b)(3)(A), (b)(3)(B). Section 621(b)(3)(C) further provides that a franchising authority may not order a cable operator or affiliate to discontinue the provision of a telecommunications service for lack of a franchise for telecommunications services; *see also AT&T Corp. v. City of Portland*, 216 F.3d 871, 878-79 (9th Cir 2000) (finding that no franchise is required to offer cable broadband service), *overruled on other grounds by Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[11] 47 U.S.C. § 541(b)(3)(D).

[12] *Bell Atl.-Md., Inc. v. Prince George's Cty.*, 49 F. Supp. 2d 805, 813 (D. Md. 1999) (internal citation omitted), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000) (internal citation omitted).

[13] 47 U.S.C. §§ 542(b), 542(g)(1).

[14] *See supra* n.9.

[15] *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4849-50 ¶ 102 (tentatively concluding that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service"); *Title II Order*, 30 FCC Rcd at 5804 ¶ 433 n.1285 (2015) (noting that the reclassification of broadband is not grounds to require a cable operator "to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services").

Notwithstanding these guardrails, cable operators are encountering demands by local governments for new authorizations and fees beyond the cable franchise and routine permits. For example:

- The Oregon Supreme Court in *City of Eugene v. Comcast* rejected a challenge to the city's 7% fee on broadband and telecommunications revenue, notwithstanding clear language in Commission orders prohibiting such fees.[16] In its wake almost two dozen Oregon cities have adopted or reinterpreted ordinances to impose fees on gross revenues from broadband and other services in addition to the fees already imposed under cable franchises.

- Some Ohio communities have adopted right-of-way ordinances that impose additional franchising requirements, over and above the state issued franchise process, including new fees and extensive applications.

- Some California communities have presented cable and video providers with sidecar franchising/encroachment agreements that seek to impose obligations and extract fees above and beyond those in existing state-issued franchises. Some communities are also attempting to pass through to cable and video providers surveying costs that are required by California statute. This pass-through adds $2000 to the cost of any construction permit that involves underground excavation work.

- Some communities in North Carolina are attempting to circumvent limits on the fees they can charge by requiring cable operators to sign new agreements that impose new payment obligations to place facilities in the right-of-way.

- In eastern Kentucky, several municipalities have proposed requiring a new authorization for use of the right-of-way to provide non-cable services, including broadband. The proposal would require payment of fees on non-cable gross revenue in addition to cable franchise fees.

- A town in West Virginia recently passed an ordinance that requires an annual rental fee, on top of the existing cable franchise fee, for the installation of facilities in the public right-of-way.

- One New York community has demanded a separate authorization and hundreds of thousands of dollars in additional fees (beyond the cable franchise fee) for a franchised cable operator to deploy small, unobtrusive broadband equipment from its cable strand.

The Commission should address these sorts of unlawful demands by adopting a declaratory ruling clarifying that local authorities may not require additional franchises, fees, conditions or authorizations beyond a Title VI cable franchise and routine, straightforward permits for the placement of the cable system (and equipment attached thereto) in the public

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[16] *See City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (Or. 2016) (rejecting challenge to municipal license fee of 7% on broadband and telecommunications revenues).

right-of-way, or for the offering of new services over such facilities. Such a ruling should confirm that a franchise granting authority to build a "cable system," as defined in Section 602 and interpreted by Congress, the Commission, and courts,[17] includes authority to install and operate, as a part of the cable system, communications equipment to provide additional non-cable services without obtaining a separate franchise or authorization or paying additional fees.

The declaratory ruling should explicitly state that local authorities may not require cable operators to obtain separate authorization beyond the cable franchise for the placement of small wireless equipment on a cable system. When such equipment is mounted on existing, already approved, cable facilities, there is no meaningful additional burden on the public right-of-way. Local authorities are not free to regulate a cable operator's choice between wired and wireless equipment to deliver service.[18] Consequently, given the clear limits on franchising authority control regarding the services provided by a franchised cable operator using this equipment – including broadband Internet access service that the Commission has said should be free of local regulation – there is no basis for requiring a separate authorization for these wireless facilities.

With respect to fees, the Commission should reaffirm that the federal 5% cap on cable service franchise fees establishes an upper limit on the imposition of franchise fees (or equivalent taxes or fees such as those at issue in the *Eugene* case) on franchised cable operators for use of the public right-of-way for the provision of cable *and* non-cable services and that franchised cable operators should not be required to pay more than 5% of their cable service revenue for the operation of their systems.[19] For broadband Internet access in particular, this would align with the longstanding "light touch" policy for information services, as recognized by Congress in the

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[17] *See supra* n.2.

[18] *See* 47 U.S.C. § 544(e) ("No State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology."). Congress specifically curtailed such local authority to avoid "the patchwork of regulations that would result from a locality-by-locality approach," and to promote "today's intensely dynamic technological environment." H.R. Rep. No. 104-204, at 110 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 11, 78. In implementing this provision, the Commission determined that Congress intended to allow cable systems to deploy wired and wireless facilities of their own choosing, and that "local authorities may not control whether a cable operator uses . . . coaxial cable, fiber optic cable, or microwave radio facilities." *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296 ¶ 141 (1999).

[19] The Commission is specifically charged with "the *ultimate* responsibility for ensuring" the statutory franchise fee limits established by Congress are implemented. *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (holding that the Commission has "the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees"); *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) ("It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication."); *All. for Cmty. Media*, 529 F.3d 763 (interpreting Section 622).

1996 Act[20] and reaffirmed recently by the Commission.[21] The Commission should declare that, because a cable franchise already provides a cable operator with the authorization to use the right-of-way for cable and non-cable services, cable service franchise fees more than fully compensate local governments for right-of-way use and any additional authorization, fee, or tax would be duplicative and prohibited.

In addressing this issue, the Commission should explicitly state that the *Eugene* court erred when it held that Comcast's existing cable franchise did not authorize the use of Comcast's cable system to provide broadband service and that the fee assessed by the city was not subject to the 5% franchise fee cap under Title VI. The court disregarded statutory language regarding the scope of a Title VI franchise and misconstrued the Commission's statement in the *Title II Order* that local franchising authorities did not have the authority to "require a party with a franchise to operate a 'cable system' . . . *to obtain an additional or modified franchise in connection with the provision of broadband Internet access service*, or to pay any new franchising fees in connection with the provision of such services."[22] The court's suggestion that this passage addressed only additional *cable* franchises and *cable* franchise fees, but not additional franchises or fees required for broadband service, is the opposite of what the Commission and Congress intended.[23]

2. Slow Permitting for Equipment Installation. Relatedly, the Commission should declare that local governments may not abuse routine permitting processes for construction activity as a backdoor way of extracting unwarranted authorizations and fees from cable operators and otherwise delaying the deployment of new facilities. While local governments have authority to require a franchised cable operator to obtain a permit before digging up their streets, Title VI establishes clear limits on that authority. In particular, Section 624(e) prohibits

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[20] *See* 47 U.S.C. § 230(b) (stating that it is the policy of the United States to "promote the continued development of the Internet" and to "preserve the vibrant and *competitive free market* that presently exists for the Internet . . . *unfettered by Federal or State regulation*") (emphasis added); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 1302(a)) (directing the Commission to encourage the deployment on a reasonable and timely basis of broadband to all Americans by "remov[ing] barriers to infrastructure investment").

[21] *See, e.g., RIF Order*, 32 FCC Rcd at 431 ¶ 202 (describing "longstanding federal policy of nonregulation for information services" and the concomitant preemption of state regulation of such services); *Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3315-16 ¶ 16 (2004) ("[F]ederal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation.").

[22] *Title II Order*, 30 FCC Rcd at 5804 ¶ 433 n.1285 (emphasis added). The Commission reached the same conclusion in the subsequent *RIF Order*. *See supra* n.8.

[23] *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[A]s we have repeatedly explained, when federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation.") (internal quotation marks and citations omitted); *City of Minneapolis v. Time Warner Cable, Inc.*, No. Civ. 05-994 ADM/ADB, 2005 WL 3036645 (D. Minn. Nov. 10, 2005), at *6 (holding that "a fee of virtually any kind targeting cable providers . . . is a franchise fee," and that "[c]ongressional intent is completely defeated if a franchising authority can simply cite to another federal law or state law as authority to charge what Congress forbids").

local governments from limiting the use of particular transmission technologies or subscriber equipment, including by conditioning or restricting the use of wireless transmissions. Notwithstanding the statute, cable operators are facing unwarranted impediments in their efforts to deploy state-of-the-art broadband networks as a result of abusive permitting requirements:

- One California community refused to issue permits until the cable operator signed a separate agreement limiting the amount of time the cable operator's facility can be in the right-of-way and requires the cable operator to turn those facilities over to the municipality (its competitor) at the end of the agreement if the City chooses not to renew the agreement.

- One New York community has refused to grant a routine permit for cable system equipment for 13 months (and counting), as compared to the 30-60 day periods typical for routine right-of-way permits, while a separate New York community demanded a $20,000 payment, over and above the cable franchise fee, for the franchised cable operator to site a fiber cabinet needed to upgrade its network.

- In one Arizona community, recurring delays in the permitting review process have delayed the installation of residential and commercial broadband service by many months.

- A community in Washington refused to issue permits for additional facilities on franchised cable infrastructure claiming that "Internet of Things" service equipment was not authorized under the long-standing cable franchise because the equipment did not support any cable service purpose.

- A community in Oregon has refused to issue permits allowing installation of Wi-Fi equipment on cable facilities, on the grounds that the equipment does not support cable service, even though the equipment is used in part to allow cable subscribers to watch subscription video programming on their mobile devices.

- Local officials in one Arizona county have delayed issuing construction permits to place fiber needed to serve cell sites on the grounds that transmission of cellular data is not covered by the cable franchise.

In response to these abuses, and for the same reasons outlined above, the Commission should declare that: (1) a franchising authority cannot refuse to process permit requests on the ground that the equipment can be used for non-cable services, including wireless services; (2) a provider may not be required to obtain additional approval or consent from the franchising authority, other than generally applicable traffic control permits, for lashing communications facilities to facilities already installed under a cable franchise;[24] (3) new facilities to be installed

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[24] These installations place no additional burden on the right-of-way and there is no basis for requiring approval of the franchising authority for each installation. *See, e.g.*, NCTA Comments at 2 ("[T]he Commission's policy of encouraging unrestricted overlashing, including its decision to prohibit prior approval requirements for

as part of a franchised cable system in the public right-of-way may be subject only to generally applicable permit provisions addressing time, place and manner of access for construction that will disrupt use of the right-of-way and should be processed in a timely manner; and (4) any fees for routine permits should be limited to the actual cost of processing and reviewing the permit.[25]

The relief that NCTA is seeking with respect to these permitting issues is analogous to the types of measures that wireless carriers have proposed to facilitate the placement of small wireless facilities.[26] The Commission's goal should be to promote broadband by all types of providers using all types of technologies. To the extent that deployment requires local permits, permit requests should be reviewed promptly, subject to a shot clock, and fees should be used to recover costs, not as a municipal profit center, consistent with longstanding Commission policy and congressional intent.[27]

3. Refusal to Provide Access to Utility Easements. In addition to deploying facilities in the public right-of-way, cable operators also require access to utility easements when they deploy facilities. In the early days of cable deployment, the right of a cable operator to use existing utility easements had to be adjudicated on a state-by-state basis as a matter of common law.[28] But in the 1984 Cable Act, Congress created a statutory right for cable operators to access and share in the use of existing, compatible easements and in doing so established a national policy that precludes the application of a patchwork of sometimes conflicting or abstruse state

overlashing, is a critical element of the regulatory foundation on which hundreds of billions of dollars of new investment have been made.").

25 Any permit fees that are above the cost of processing and reviewing the permit should be considered franchise fees for purposes of the 5% cap because they are inherently *de facto* fees for the right to install in the right-of-way. *See* 47 U.S.C. §542(g)(2)(A) (requiring that even a generally applicable tax, fee, or assessment be considered a "franchise fee" where it is "unduly discriminatory against cable operators or cable subscribers"); *Robin Cable Sys.*, *L.P. v. City of Sierra Vista*, 842 F. Supp. 380 (D. Ariz. July 23, 1993) (finding that the term "franchise fee" should be construed "broadly" and that exceptions should be construed as "narrowly tailored," and concluding that "[a]ny substantial fee charged on top of the annual license fee is inconsistent with the Cable Act.").

26 *See, e.g.*, Letter from Scott Bergmann, Senior Vice President - Regulatory Affairs, CTIA, to Marlene Dortch, Secretary, Federal Communications Commission, WT Docket No. 17-79 (filed May 18, 2018) ("CTIA urged the Commission to establish clear timelines for the entire local review process, with enforceable remedies; clarify actions that prohibit or have the effect of prohibiting wireless service; and ensure that fees charged by state and local governments are cost-based, non-discriminatory, and transparent.").

27 *See, e.g.*, *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 F.C.C.2d 141, ¶ 185 (1972) ("[M]any local authorities appear to have exacted high franchise fees more for revenue-raising than for regulatory purposes. . . . The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers."); 129 Cong. Rec. S8254 (daily ed. June 13, 1983) (statement of Sen. Goldwater) ("The overriding purpose of the 5-percent fee cap was to prevent local governments from taxing private cable operators to death as a means of raising local revenues for other concerns."); S. Rep. No. 98-67, at 25 (1983) ("The committee feels it is necessary to impose such a franchise fee ceiling because the committee is concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors.").

28 *See* NCTA Comments at 10 n.23.

property laws. Specifically, Section 621(a)(2) of the Communications Act provides that "[a]ny franchise *shall be construed* to authorize the construction of a cable system over public rights-of-way, and *through easements*, which is within the area to be served by the cable system and which have been dedicated for *compatible uses*."[29] The legislative history accompanying Section 621(a)(2) adds that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities are in violation of this section and not enforceable."[30]

Key cases have held that this right cannot be restricted by private agreements,[31] and the Commission has held that cable operators have the right under Section 621 to access any compatible easement within their franchise areas, including those used by a utility.[32] Nevertheless, the old obstacles are resurfacing and cable operators are being deprived of the ability to deploy facilities in utility easements in violation of Section 621(a)(2) of the Act and the Commission's precedent applying that provision:

- Utilities in South Carolina and the state's Highway Department are asserting that the easements underlying poles and rights-of-way may not be used unless the cable operator is specifically named in the easement.

- The West Virginia Department of Highways is considering requiring that cable operators obtain a separate license agreement, in addition to existing local franchise authorization, for use of state-controlled rights-of-way in order to generate additional revenue for the state.

Such state actions interfere with the ability of cable operators to deploy facilities for the benefit of consumers. The Commission should address these concerns by adopting a declaratory ruling that, in addition to their rights under state property law, franchised cable operators have the right under Section 621(a)(2) to utilize compatible utility easements, regardless of the services provided over the cable system, and that owners of private easements may not engage in discriminatory behavior or restrict a franchised cable operator's rights to utilize compatible easements for such purposes.[33] The Commission should make clear that, with limited exceptions for wiring inside multiple dwelling units, these federal rights do not depend on whether the easement is public or private or whether it is formally dedicated, filed, registered, or whatever other technical procedure may be called for by state property law. The fact that a utility

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29 47 U.S.C. § 541(a)(2) (emphasis added).

30 H.R. Rep. No. 934, 98th Cong., 2d Sess. 59, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696.

31 *See Centel Cable Television Co. of Fla. v. Thos. J. White Dev. Corp.*, 902 F.2d 905, 908-09 (11th Cir. 1990) (finding a private agreement prohibiting a cable provider from using utility easements across private roads violated the Act); *Centel Cable Television Co. of Fla. v. Burg & DiVosta Corp.*, 712 F. Supp. 176, 177-78 (S.D. Fla. 1988) (recognizing a cable operator's federal right to access utility easements in a new development and rejecting a requirement to enter into a separate "right-of-entry" agreement).

32 *Implementation of the Provisions of the Cable Communications Policy Act of 1984*, 58 RR2d 1, ¶¶ 78-80 (1985).

33 *See* NCTA Comments at 8-11.

"easement" may not be recorded as such, "dedicated," or even be an "easement" at all does not mean that it is not divisible for shared use. Utility land use rights might be held in fee, or as easements, or with no paperwork at all, and be equally subject to shared use.[34] Finally, cable operators should have access to easements under the terms and conditions of existing easement agreements, without being required to negotiate a new agreement with the grantor of the easement.

4. Forced Relocation of Facilities. Some communities have prohibited a cable operator from upgrading its existing aerial lines with fiber, even if all other providers are allowed to remain on the poles. Operators also have experienced situations where a franchising authority will impose relocation costs and reimburse those costs for some providers, but not for cable operators. While requiring relocation of aerial facilities may be a defensible policy in some cases (such as a road widening project or similar public works project), discrimination among providers is not. For example:

- Despite exceptions in the state law, local communities in Florida have pressured service providers to accommodate relocation expenses without compensation.

- A Montana community refused to enter into standard franchise language committing to reimburse a provider if it reimburses other users of the rights-of-way for city-mandated relocation of facilities. Given that Montana law mandates reimbursement of other entities for such relocations, it is apparent the City was seeking to treat the provider differently than other rights-of-way users.

To address these concerns, the Commission should adopt a declaratory ruling that any costs incurred by a cable operator and not reimbursed by a franchising authority in connection with any discriminatory forced relocation of facilities are considered franchise fees for purposes of Title VI.[35] Such a ruling should cover both discrimination as to the relocation requirement (i.e., where only some parties are required to relocate facilities) and discrimination as to reimbursement of costs (i.e., where only some parties are reimbursed). Both types of discrimination have the effect of penalizing cable operators and costs attributable to both types of policies should be counted toward the statutory cap on franchise fees.

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[34] *See, e.g.*, *Gilpin v. Blake*, 712 P.2d 1051, 1055 (Colo. Ct. App. 1985) (finding an "implied easement of necessity" based on an interest in real property that arose from investment-backed usage).

[35] Under Section 622, "a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers," even a tax, fee, or assessment of general applicability, counts as a franchise fee and therefore should be subject to the statutory 5% cap. 47 U.S.C. § 542(g)(2)(A).

II. THE COMMISSION HAS ADDITIONAL AUTHORITY UNDER SECTION 253 TO STREAMLINE STATE AND LOCAL OBLIGATIONS THAT ARE HINDERING DEPLOYMENT

While Title VI gives the Commission ample authority to grant the relief requested by NCTA, the statutory preemption of entry barriers need not be grounded solely in Title VI.[36] As part of the 1996 Act, Congress likewise sought to limit burdens on all telecommunications providers by enacting Section 253. Section 253(a) prohibits state or local governments from adopting any telecommunications regulation that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment."[37] Section 253(c) further clarifies that any such local regulation must be "competitively neutral and nondiscriminatory" and limited to providing "fair and reasonable compensation" for the use of the public right-of-way.[38]

Many of the situations described in this letter could be addressed through the Commission's authority under Section 253. For example, it cannot be considered "fair and reasonable," or "competitively neutral and nondiscriminatory" for state and local governments to require further "compensation" from cable operators for deploying fiber or other communications facilities that could be – and in many cases are[39] – used for telecommunications services when those cable operators already pay more than "fair and reasonable compensation" for their use of the public right-of-way. Such fees are particularly unfair and unreasonable where the provision of new services has no incremental impact on the public right-of-way. Removing these barriers is not only fully supported by well-established precedent and authority, it is consistent with the longstanding federal policy of non-regulation of information services.[40]

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[36] NCTA Comments at 27-30; Comments of Comcast Corp., WC Docket No. 17-84, at 14-16 (filed Jan. 17, 2018); Comments of Charter Communications, Inc., WT Docket No. 17-79, WC Docket No. 17-84, at 24-26, 29-32 (filed June 15, 2017); Reply Comments of Comcast Corp., WC Docket No. 17-84, at 15-18 (filed Feb. 16, 2018).

[37] *See California Payphone Association Petition for Preemption of Ordinance No. 576 NS of City of Huntington Park, California Pursuant to Section 253(d) of Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14206 ¶ 31 (1997); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266, 3299 ¶ 108 (2017); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *Global Network Commc'ns, Inc. v. City of New York*, 562 F.3d 145, 152 (2d Cir. 2009) (noting conclusion in *TCG v. White Plains* that municipality had violated federal law by "undertaking to regulate telecommunications beyond the scope of its lawful authority to regulate the use of the public rights-of-way"); *Bell Atl. Md.*, 49 F. Supp. 2d at 819 (holding that federal law "restricts the regulatory authority of local governments to . . . activities that relate to the physical alteration, occupation, and restoration of the public rights-of-ways" and prohibits fees and burdens unrelated to the "use of public rights-of-way"), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000); *AT&T Commc'ns of Sw., Inc. v. City of Austin*, 975 F. Supp. 928, 941 (W.D. Tex. 1997) ("The City's only legitimate interest under federal and [state] law is to regulate its public rights-of-way."), *vacated on other grounds*, 235 F.3d 241 (5th Cir. 2000).

[38] 47 U.S.C. § 253(c), (d); *TCG N.Y.*, 305 F.3d at 76-77.

[39] *See* NCTA May 3 Letter at 2 n.10 (explaining that "[m]any cable operators provide telecommunications services on a common carrier basis").

[40] *See supra* n.22.

Section 230(b) of the Communications Act and Section 706 of the 1996 Act embody the same congressional intent to reduce local barriers to competition and to promote the provision of information services.[41]

CONCLUSION

The *Wireline Infrastructure* proceeding presents the Commission with the opportunity to expand broadband and advance the infrastructure supporting 5G by reconfirming the broad scope of services authorized under Title VI cable franchises and the strict limitations on scope of local authority over non-cable services. The Commission should address all of these issues in this docket by means of a declaratory ruling, on its own motion, to clarify the meaning of these terms in the Communications Act.

Respectfully Submitted,

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41 *See supra* n.21.