STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
DISSENTING

***Re*:** Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking,* MB Docket No. 05-311

The policy goals of this *Order*, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, today's item goes out on a limb in asserting federal authority to preempt local governments, and then saws the limb off with a highly dubious legal and policy scheme that substitutes our judgment as to what is reasonable for that of local officials – all in violation of the franchising framework established in the Communications Act.

This *Order* is certain to offend many in Congress, who worked long and hard on this important issue, only to have a Commission decision rushed through with little consultation. The result will be heavy oversight after-the-fact, and a likely rejection by the courts. It will solve nothing, add to the confusion, and provide little or no progress on our shared goal of promoting video competition.

This outcome is disappointing because I believe we must do everything we can to encourage competitive video offerings. As I was driving to work this morning, I saw a line of heavy Verizon trucks installing FiOS in my neighborhood. I must admit, I am very excited about this new service, and plan to take it up if I can convince my wife to do so. FiOS is now available because our local county officials approved a franchise for Verizon. If they hadn't, I imagine many of my neighbors would have complained loudly. Maybe that's why Verizon's CFO told Wall Street just this month, "Even in those states where we don't have the whole state, places like Pennsylvania, we have become very successful now in getting franchising. So we don't see that as an issue going forward."[1]

As I said in response to the underlying *NPRM* in this proceeding: "Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992."[2] I agree the Commission should do what it can within the scope of the law to facilitate increased video competition because it benefits American consumers, promotes U.S. deployment of broadband networks and services, and enhances the free exchange of ideas in our democratic society.

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[1] *Final Transcript,* Thomson StreetEvents, VZ-Verizon at UBS 34th Annual Global Media Conference, Dec. 6, 2006, at page 7, available at, http://investor.verizon.com/news/20061206/20061206_transcript.pdf

[2] Statement of Commissioner Jonathan S. Adelstein, *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, Notice of Proposed Rulemaking, FCC 05-180 (rel. Nov. 18, 2005) (*Local Franchising NPRM*).

Unfortunately, notwithstanding these worthy goals, I cannot support this *Order* because the FCC is a regulatory agency, not a legislative body. In my years working on Capitol Hill, I learned enough to know that this is legislation disguised as regulation.

Today's *Order* is disappointing because there is bipartisan agreement that the current video franchising framework can use refinement to better reflect marketplace realities, technological advancement, and consumer demands. Instead, the majority attempts to accomplish today what the elected representatives of the American people have tried to do through the legislative process. In doing so, the Commission not only disregards current law and exceeds its authority, but it also usurps congressional prerogatives, ignores cannons of statutory construction and the plain meaning of Title VI. In crafting an overly broad and aggressive solution, the majority engages in "legal gymnastics" that would only impress an Olympic judge whose vote has been promised before the competition even begins.

When we launched this proceeding, the central question I posed was "whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert[ed]."[3] In response, the record evidence provides scant, dated, and isolated examples that fall far short of demonstrating a systematic failure of local governments to negotiate in good faith and above board. According to the Telecommunications Industry Association (TIA), "some recent examples of overly-burdensome, and … 'unreasonable,' extraneous obligations"[4] include: (1) Merton Group's two year negotiations with Hanover, New Hampshire, which concluded in December, 2004; (2) Knology's negotiations with Louisville, Kentucky, in early 2000; (3) Knology's franchise negotiations with the greater Nashville, Tennessee area in March 2000; and (4) Grande Communication's negotiations with San Antonio and Corpus Christi, Texas, in 2002. Additionally, Fiber-To-The-Home Council cites the efforts of Guadalupe Valley Telephone Cooperative to seek a franchise in the City of Bulverde, Texas in 2004. Moreover, the *Order* relies on generalized complaints by Verizon and AT&T about negotiations being drawn out over an extended period of time; and complaints by U.S. Telecom Association, Qwest and Bell South[5] about new entrants accepting franchise terms that they considered unreasonable in order to avoid further delay in obtaining the franchise.

These abovementioned examples, based on my review of the record evidence, are the extent to which competitive video providers argue that LFAs are delaying in acting on franchise applications. I find these examples, individually and collectively, wholly insufficient to justify an extra-statutory process in which Commission action federalizes the nation's local franchising process. Nothing here rises to the level that warrants the drastic measures adopted by the Commission in this *Order*. The Commission's blind acceptance of a few alleged instances as illustrative of a much broader problem is telling. The Commission did not conduct any independent fact-finding, nor did it attempt to verify the allegations made by parties who have a

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[3] Adelstein Statement, *Local Franchising NPRM*.

[4] Letter from Grant Seiffert, to Jonathan S. Adelstein, Commissioner, FCC, MB Docket No. 05-311 (filed dated December 11, 2006).

[5] Curiously a number of references to the efforts of BellSouth to obtain franchises contained in earlier drafts of the Report and Order have been struck from later versions of the item.

vested interest in the outcome of this proceeding. Even more shocking, the Commission and the commenters fail to cite to an actual, present day problem with any specific LFA.[6]

I don't normally quote Ronald Reagan, but his view is so relevant here. In his first inaugural address, he exhorted us: "Together, after 50 years of taking power away from the hands of the people in their states and local communities we have started returning power and resources to them. … Some will also say our states and local communities are not up to the challenge of a new and creative partnership. Well, that might have been true 20 years ago. … It's no longer true today. This Administration has faith in state and local governments and the constitutional balance envisioned by the Founding Fathers."[7]

My, how times have changed back again.

To be sure, the franchise process is not perfect and, by definition, LFA review may result in some delay. But the process was enacted after careful consideration, and Congress delegated authority to LFAs to make certain policy decisions in determining the merit of granting cable franchises. These policy goals are clearly set out in the Act whatever parties now feel with regard to this carefully calibrated and negotiated balance. While Congress has the power to revisit this scheme, and has strongly considered doing so, this Commission must adhere to the law as written, not as we might like it to be, until it is amended.

Yet today, the Commission is federalizing the franchising process, taking it upon ourselves to determine in every local dispute what is "unreasonable," without having actually looked into any local examples to get at the real situation. Instead of acknowledging the vast dispute in the record as to whether there are actually any unreasonable refusals being made today, the majority simply accepts in every case that the big phone companies are right and the local governments are wrong. This is breathtaking in its disrespect of our local and state government partners.

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[6] During the Commission's Agenda Meeting in Keller, Texas, on February 10, 2006, at my request, one Verizon official identified Montgomery County, Maryland, as an obstinate LFA that was insisting upon unreasonable illegal demand and delaying negotiations. Since that meeting, Verizon has in fact obtained a franchise in Montgomery County. *See* Press Release, Montgomery Country, Md., County Negotiates Cable Franchise Agreement with Verizon; Agreement Resolves Litigation, Provides Increased Competition for Cable Service (Sept. 13, 2006) (available at http://www.montgomerycountymd.gov/apps/News/press/PR_details.asp?PrID=2582). In fact, this Order blatantly ignores public statements that significantly undermine representations some proponents of this decision have made to the Commission. For example, AT&T has publicly stated the Project Lightspeed will be available to 90% of its "high-value" customers, but to less than 5% of its "low value" neighborhoods, but today the Commission undermines a localities' ability to ensure all residents are served. Leslie Cauley*, Cable, phone companies duke it out for customers*, USA Today, May 22, 2005, available at: http://www.usatoday.com/money/media/2005-05-22-telco-tv-cover-usat_x.htm?csp=34 (last viewed 12/20/06). As the CEO of one major new entrant recently noted, "Any place it's come to a vote, we win." Dionne Searcey, *As Verizon Enters Cable Business, It Faces Local Static Telecom Giant Gets Demands As It Negotiates TV Deals*, Wall St. J., Oct. 28, 2005, at A1. Yet in today's Order, the Commission somehow determines that there is widespread bad faith just on the part of the LFAs, not the new entrants, in order to justify this sweeping federal preemption.

[7] Ronald Regan, *State of the Union Address*, January 26, 1982, available at, http://www.reagan.utexas.edu/archives/speeches/1982/12682c.htm.

This *Order* also displays a fundamental misunderstanding about the commitment of LFAs to bring competition to their citizens. Unlike us, many of these officials are elected and very directly accountable to their citizens. Our knee-jerk embrace of everything big companies say while discounting local elected officials certainly does not inspire a lot of confidence that the Commission has the ability on the Federal level to actually arbitrate every local dispute in the country to fairly decide who is being reasonable and who is not. Even if we did, there is no mechanism outlined in this *Order* to establish how that process will work. The end result will likely be litigation, confusion, abuse of the process, and a certain amount of chaos. It is sadly ironic that this agency, which is now in violation of one of its own 90 day statutory deadlines, is telling localities to do as I say, not as I do.[8]

For the past two years, both chambers of Congress have held nearly two dozen hearings, and sought to enact legislation amending the Cable Act to reform the current franchising process and "strike the right balance between national standards and local oversight."[9] Yet, the Commission has finalized in the dark of last night what Congress was unable to resolve in two years of intensive deliberations. In contrast to the Senate where I used to work, one might call the FCC the world's least deliberative body. And the final product shows it.

The House bill proposed a national cable franchising regime, while the Senate bill proposed an expedited competitive franchise process and would have required local franchising authorities to issue franchises pursuant to a standard franchise application form that would be drafted by the Commission. Today's Order turns federalism on its head by putting the Commission in the role of sole arbiter of what is a reasonable or unreasonable LFA practice and simply eliminating the franchise process in certain circumstances if an arbitrary shot clock has expired.

While Congress was working to change federal law and empower the Commission, there was and continues to be considerable state and local activity to reform the local franchise process. To date, nearly half of all states have adopted state-wide franchise reform or mandatory state franchise terms, or have engaged in a democratic process to enact meaningful franchise reform legislation.[10] Hundreds of other localities have approved new franchises, and many more are in the works.

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[8] *See, e.g., In the Matter of Comcast Corporation's Request for Waiver of 47 C.F.R. § 76.120(a)(1), CSR-7017-Z, CS Docket No 97-80*, DA-06-2543, CS Docket No 97-80, filed 5/17/06 (waiver proceeding still pending past the statutory "shot clock"); 47 U.S.C. § 549(c) ("the Commission shall grant any such waiver request within 90 days of any application filed under this subsection"); 47 C.F.R. § 76.1207 (omitting the ninety day "shot clock").

[9] H.R. REP. No. 109-470, at 3 (2006).

[10] While the Order purportedly refrains from explicitly preempting "statewide franchising decisions" and only addresses "decisions made by [instrumentalities of the state, such as] county – or municipal level franchising authorities," this dubious distinction has questionable legal basis. Moreover, the Commission's assertion – "we lack a sufficient record to evaluate whether and how [ ] relatively few states that have had statewide franchising for a longer period of time to draw general conclusions with respect to the operation of statewide franchising process" (*Order at n.2)* – that it does not have sufficient information in the record to consider the effect of franchising by states (some of which have had laws in place for a decade), but has sufficient record evidence to preempt 33,000 LFAs, is facially disingenuous.

Notwithstanding the scant evidence to justify the creation of a nationwide local franchising process in contravention of federal law, the Commission conjures its authority on just two words in 621(a)(1)[11] – "unreasonably refuse" – to reinterpret and, in certain respects, rewrite Title VI of the Communications Act. While I agree that the Commission has authority to interpret and implement the Communications Act, including Title VI, the Commission does not have authority to ignore a tenet of statutory construction, *expressio unius est exclusio tlterius*, that the expression of one thing is the exclusion of another, especially if the excluded language is opposite of the expressed. This tenet applies in this case.

Section 621(a)(4), for example, expressly states "[i]n awarding a franchise the franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of *providing cable service to all households in the franchise*."[12] Absent express statutory authority, the Commission cannot declare it unreasonable for LFAs to require a build-out and service to households in the franchise area over a reasonable period of time. The Commission's argument in this regard is particularly spurious in light of the stated objectives of this *Order* to promote broadband deployment and our common goal of promoting affordable broadband to all Americans. In the end, this is less about fiber to the home and more about fiber to the McMansion.

There are certain salient features of today's *Order* that raise serious legal questions requiring careful scrutiny: (1) imposing 90-day shot clock for new entrants with existing rights of way; (2) requiring the grant of a new entrant's franchise after 90-days; (3) limiting the scope of a new entrant build-out obligation; (4) authorizing a new entrant to withhold payment of fees that its deems to be in excess of the 5 percent cap; (5) undermining PEG and INET support; and (6) authorizing a new entrant to refrain from obtaining a franchise when it is upgrading mixed use facilities that will be used for the delivery of video content.

The *Order* finds that franchising negotiations that extend beyond time frames created today by the Commission amount to an unreasonable refusal to award a competitive franchise within the meaning of 621(a)(1). This finding ignores the plain reading of section 621(a)(1), which provides, in pertinent part, that a franchising authority "may not *unreasonably refuse to award* an additional competitive franchise."[13] On its face, Section 621(a)(1) does not impose any time limitation on an LFA's authority to consider, award or deny a competitive franchise. The following sentence of the same provision provides judicial relief, with no Commission involvement contemplated, when the competitive franchise has been "denied by *a final decision* of the franchising authority."[14] There is no ambiguity here: Congress simply did not impose a time limit on franchise negotiations, as it did on other parts of the process. Hence, whether you read section 621(a)(1) alone or in context of the entire provision, its plain and unambiguous

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[11] 47 U.S.C. 541(a)(1).

[12] 47 U.S.C. 541(a)(4) (emphasis added).

[13] 47 U.S.C. 541(a)(1) (emphasis added).

[14] Id. (emphasis added).

meaning, is contrary to the Commission's interpretation. It provides an expressed limitation on the *nature*, not the timing, of the refusal to award a competitive franchise.[15]

Even if I were able to move beyond this *Order*'s facially defective reading of 621(a)(1), the Commission's selection of 90 days as the only reasonable time frame for an LFA to consider the franchise application of a competitive provider that already has rights-of-way access before it is "deemed granted" is inconsistent with the overall framework of Title VI and is not demonstrably supported by the record evidence.

The franchising framework established in Title VI does not support the Commission's decision to select 90 days as the deadline for a default grant – another Commission creation – to become effective. When Congress specifically decided to impose a deadline for LFAs to consider renewals and transfers of preexisting franchises, in both instances, Congress chose 120 days. In other sections of the Act, the prevalent time frame Congress imposed on LFAs and, in certain limited instances, the Commission is 180 days. Today, the Commission, without explicit authority, cannot take the place of Congress and impose a tighter time frame than Congress ever contemplated to impose on LFAs in the franchising process.

Not only is the Commission acting without authority and inconsistently with the current framework of Title VI, the Commission lacks record evidence to support the creation of such an arbitrary and capricious time frame. Generalities and unconfirmed allegations should not be the basis for a radical shift from a well-established franchising process. While a 90-day deadline is certainly reasonable, the problem is that the legal basis for demanding it is the assertion that anything more – such as 91 days – is unreasonable. That is unreasonable on its face, given that Congress itself set a 120 day deadline for franchise transfers, which tend to be simpler than awarding new franchises, unless my colleagues are willing to assert that Congress was unreasonable.

To make matters worse, the Commission-created 90-day shot clock seems to function more like a waiting period, during which time the new entrant has little incentive to engage in meaningful negotiations. An objective review of the evidence shows that there is sufficient blame on both sides of the negotiation table. Sometimes, there are good reasons for delay; and at other times, one side might be stalling to gain leverage. While the majority must be aware of this standard negotiations tactic, they have failed to even mention the need for LFAs and new entrants to have reciprocal good faith negotiations obligations. The majority also has ignored the apparent need to develop a complaint or grievance mechanism for the parties to ensure compliance. Perhaps imposing on the Commission a binding deadline to resolve complaints would inject an incentive for both sides to negotiate, meaningful and in good faith.

[15] Congressional intent to qualify the nature of an LFA's refusal, not the timing of the refusal, is clear when you consider another provision of Section 621(a). In 621(a)(4)(A) – "franchising authority shall allow the applicant's cable system a reasonable period of time to become capable of providing cable service to all households in the franchise area" – Congress explicitly qualified timing, not the scope of buildout. The Commission's attempt to super-inflate the significance of "unreasonably" in 621(a)(1), and diminish the significance of "unreasonable" as a qualifier of "period of time" – not "service to all household" – is transparently inconsistent and unpersuasive.

Another weakness in this *Order* is that the Commission, again without anything other than the authority to interpret "unreasonable refuse," creates a remedy for an LFA's failure to negotiate within the Commission-created time limits. The consequences of the failure to reach agreement within either the 90-day – the LFA will be deemed to have granted the new entrant an interim franchise based on the terms proposed in the new entrant's franchise application. In selecting this remedy, the Commission merely "seeks to provide a meaningful incentive for local franchising authority to abide by the deadlines contained in the *Order*."[16]

Aside from this blatantly one-sided approach, the Commission cited no specific authority that empowers the Commission to deem a new entrant's franchise application granted by the LFA. When construing a statute, principles of construction caution against any interpretation that may contravene the law or U.S. Constitution. In this case, I am wary of a federal agency, which purports to not preempt any state franchising law, but yet is prepared to step into the shoes of an LFA – an instrumentality of the state – to grant, effectively and perhaps temporarily, a franchise application with all the attendant rights-of-way privileges.[17]

An option that was rejected by the majority was a "deemed denied" approach in the event the shot clock expired without LFA action. This approach seems more consistent with the letter and spirit of the Communications Act, Title VI, and specifically sections 621(a)(1) and 635. So while nowhere in the Act is the Commission granted the authority to grant franchises or force localities to do so, the "deemed denied" approach seems to fall more within the bounds of our authority to speed the opportunity for judicial review.

The Commission seems to make a deliberate effort to overlook the plain wording of the statute. The Commission concludes that "it is unlawful for LFAs to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates." As I mentioned earlier, the Commission's analysis in this regards is anemic. The Commission is correct on one point, that Section 621(a)(4)(A) is actually a limitation on LFAs authority. However, consistent with plain reading of the provision and its legislative history, Section 621(a)(4)(A) surely is not a grant of authority to the Commission and does not impose a limitation on the scope of a competitive provider's build out obligation. Indeed, the provision explicitly limits the "period of time" to build-out, but an LFA is unrestrained to impose full, partial or no build-out obligations on all cable service providers. While this policy should change to facilitate competitive entry and promote broadband deployment, that's not the current state of the law. The Commission has not been ordained with a legislative "blue pencil" to rewrite law.

The rapid deployment of broadband has been a goal of mine since I joined this Commission. Wireline competition in the video market, particularly, is not only critical as a means to constrain prices, which in itself is a worthy goal after year upon year of price hikes. It is also critical to the future of our democracy that Americans have access to as many forms of video content as possible so they can make up their own minds about the issues of the day and not remain subject to a tiny number of gatekeepers who can decide what deserves airing based on

[16] *Order* at para 76.

[17] U.S. Const, Amend. X

their own financial or ideological interests. But, in order for the Commission to promote these goals effectively, we must operate within our legal authority.

The broad pen with which the majority authors today's *Order* does not stop with build out, the *Order* also uses the Commission's expansive authority under Section 621(a)(1) to determine that "any refusal to award an additional competitive franchise because of an new entrants refusal to accede demands that are deemed impermissible shall be considered to be unreasonable." To state this finding is sufficient to refute it.[18] PEG facilities and access provide an important resource to thousands of communities across this country. Equally important, redundancy or even duplicative, I-NET provide invaluable homeland security and public health, safety and welfare functions in towns, city, localities and municipalities across America. It is my hope today's decision does not undermine these and other important community media resource needs.

While my objections to today's *Order* are numerous and substantial, that should not overlook the real need I believe there is for franchise reform. Indeed, there is bipartisan support for reform in Congress, and LFAs, throughout this country, are committed to bring video competition to their jurisdiction. My fundamental concern with this *Order* is that it is based on such paper-thin jurisdiction, but yet it is truly broad in scope, ignores the plain reading of the statute, usurps congressional prerogative and pre-empts LFAs in certain important respects that are inconsistent with the Act.

The sum total here is an arrogant case of federal power riding roughshod over local governments. It turns federalism on its head. While I can support certain efforts to streamline the process and preclude local authorities from engaging in unreasonable practices, this item blatantly and unnecessarily tempts the Federal courts to overturn this clearly excessive exercise of the limited role afforded to us by the law. The likely outcome of being reversed in Federal Court could have pernicious and unintended consequences in limiting our flexibility to exercise our discretion in future worthy endeavors.

Accordingly, I dissent.

[18] The legislative history of 1984 Cable Act provides "in general, [section 622(g)(2)(C)] defines as a franchise fee only monetary payments made by the cable operator, and does not include as 'fee' any franchise requirement for the provision of services, facilities or equipment. As regards PEG access in new franchises, payment for capitol costs required by the franchise to be made by the franchise to be made by the cable operator are not defined as fees under this provision" H.R. REP. No. 98-934, at 65 reprinted in 1984 U.S.C.C.A.N. 4702