STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

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

I support the issues raised in today's item because Congress clearly sought to promote competitive cable offerings and to facilitate the approval of competitive cable franchises in the Cable Act of 1992.[1] While it remains far from clear whether Congress specifically intended any role for the Commission in preempting and superseding the practices of local governments in the local franchising process, the questions we raise in today's NPRM will give us a better record to determine whether we do indeed have such authority, and, if so, a clearer sense of its possible limits.

It is a goal of Congress, this Commission, and me personally to promote video competition and broadband deployment. Consumers will benefit if they are given more choices of video providers in a world where cable and satellite form a duopoly that some have argued has constrained price competition and alternative voices. In my long effort to constrain media consolidation, I have called for more diversity in the distribution and production of video content. Nothing we have seen in recent years offers more hope for consumers to gain new choices than the serious entry of our largest telephone companies into the video marketplace. It is a long-awaited and welcome development that this Commission needs to encourage with all of the tools available to us. We should help new entrants in every reasonable way we can to enter and succeed in providing more consumer choice in video services.

Competition in the video marketplace 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 critical to the future of our democracy itself that our citizens 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 their own financial or ideological interests.

Broadband competition and an open Internet are also critical components of what the Supreme Court called the "uninhibited marketplace of ideas."[2] The award of competitive cable franchises will encourage broadband deployment by new entrants, such as telephone companies, by granting them a new revenue source that helps justify investment in new high capacity fiber networks. So the award of new franchises will improve access not only to innovative new cable services but also to more robust broadband networks. Both of these promote the open exchange of video content, ideas, and indeed all communications. So the decision to enter the video marketplace by some of the largest telephone companies heralds an historic opportunity to improve our communications networks.

The larger question that hangs over this proceeding, though, is whether the local franchising process truly is a hindrance to the deployment of alternative video networks, as some new entrants assert. It is clear that most, if not nearly all, local authorities welcome competition in their communities. Even if for some reason they wanted to resist, it will prove very difficult for local officials to try to prevent services from reaching their citizens who thirst for new choices. As the CEO of one major new entrant recently noted, "Any place it's come to a vote, we win."[3]

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. *See* 47 U.S.C. § 521(6) (stating that one of the purposes of Title VI is "to promote competition in cable communications").

[2] *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

[3] 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.

What I hear from local officials is that they really want to ensure that these new advanced video services are deployed in a fashion that serves all of their communities, in a manner that maximizes the benefits for everyone. This is a vital role, not an anti-competitive one. Most importantly, it is a role granted to them by Congress. The franchising process and the role of local governments are products of specific policy decisions made by Congress. For example, Congress specifically allocated to local franchise authorities (LFAs) the authority to ensure that all households are served; to seek public, educational, and governmental (PEG) channel capacity; and to recover PEG capital costs.[4]

The Commission needs to tread with caution and care before it asserts any authority to interpose itself with LFAs to the extent Congress specifically delegated power to local officials. We are going out on limb already by creating a "de facto" refusal theory and tentatively concluding that the Commission has the ability to determine whether an LFA is "unreasonably refus[ing] to award a competitive franchise." I eagerly await a vigorous debate in the record, a public hearing, and, if necessary, a Commission report, before agreeing to make that tentative conclusion final.

I would not have been willing to support this NPRM if we had not also made clear that we will consider it reasonable for local officials to carry out their basic responsibilities as Congress intended. Specifically, we tentatively conclude that it is "not unreasonable" for an LFA to carry out its statutory mandate to prevent economic redlining, to establish reasonable build-out requirements to "all households in the franchise area," and to "provide adequate public, educational and governmental access channel capacity, facilities or financial support." We should not and indeed cannot usurp for ourselves the authority granted by Congress to local governments. This tentative conclusion makes clear we respect the powers specifically enumerated by Congress for the LFAs.

I am also pleased that we acknowledge the deference the courts have granted to LFAs in making determinations pursuant to the powers granted under Section 621. We ask important questions about how much deference this imputes to the Commission to grant to LFAs in the exercise of their authority. My opinion is that to the extent they are operating in a manner to carry out the responsibilities Congress intended, they deserve substantial deference, and the courts have clearly afforded them such deference.

We can learn more about the LFA process by examining the record we generate. We have heard allegations by some new entrants that LFAs have made demands completely unrelated to what Congress intended. If such "shakedowns" are occurring, and particularly if they are creating unreasonable refusals to award franchises, the Commission is fully justified to explore ways to promote Congressional goals. That should be the focus of our efforts, not a larger undertaking to undermine the entire franchising process, as new entrants have urged upon us. Even if the Commission were to agree from a policy perspective that the franchising process is cumbersome and unwieldy, as competitors argue passionately, those arguments are better made before Congress, not the Commission. The franchising process and local powers are spelled out clearly in statute, and only Congress can provide such relief.

Still, we can play an important role in combating abuse, to the extent it is occurring, and by encouraging best practices. The good news is that both the LFAs and the Commission share the goals of promoting vigorous competition. If all parties would simply apply themselves to working through the process, rather than seeking to subvert it through federal or state regulatory or legislative efforts, they would make greater progress in getting franchises awarded, as many competitors already have done. I support this NPRM because it provides an opportunity to get beyond the rhetoric to the facts of what is actually happening in local communities.

Finally, I am especially pleased we have agreed to hold a hearing to explore these issues directly with the parties involved. That forum should provide an excellent opportunity to explore best practices, get to the bottom of what is really happening and encourage progress under the framework that Congress has established.

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[4] *See* 47 U.S.C. §§ 541(a)(2), (3) and (4).