STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART, DISSENTING IN PART

In the Matter of *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*

Today, the Commission acts to ensure that, at the end of the national transition to digital television (DTV), cable operators will not disenfranchise their viewers. We take important steps to ensure that digital broadcast signals of must-carry stations will be carried on cable systems and consumers, including analog cable subscribers, will be able to view the signals. In short, we preserve the vitality of the free over the air broadcasting system, and ensure that the critical public interest value of broadcast television is enjoyed by cable consumers.

The useful attention we are providing to protecting the vitality of our over-the-air system stands in stark contrast to the outright dereliction of our duty in fulfilling the obligation to protect other interests of American viewers during this DTV transition. Since 1999, the Commission has failed to act on defining the public interest obligations of digital TV broadcasters. Today, I again implore my colleagues to act on this critical issue.

Since, as the *Order* makes clear, "must-carry requirements serve the important and interrelated governmental interests of (1) preserving the benefits of free, over-the-air local broadcast television; and (2) promoting the widespread dissemination of information from multiplicity of sources," *Order* at ¶ 54, we should fulfill the congressional mandate to define the "benefits" broadcasters are required to provide the American viewer. The *Order* dwells on the point that "[b]roadcasters denied carriage on cable systems lose a substantial portion of their audience, which, in turn, translates into lost advertising revenues." *Id.* There is no mention, however, about how broadcasters will serve the public in the digital era. This stark omission belies the integrity of this Commission's commitment to advancing the DTV transition in the interests of American consumers. *See* Recommendations of the FCC Consumer Advisory Committee.

The Commission's hitherto lackluster participation in educating over-the-air viewers about the DTV transition is also troubling. While the firm DTV transition cut-off date was signed into law since February 8, 2006, the Commission has yet to develop a comprehensive, coordinated plan to educate over-the-viewers, which include some of the most vulnerable members of society. In fact, it was only last month – more than a year after the hard date was set – and only after prodding from Members of Congress -- that the Commission contemplated issuing a Notice of Proposed Rulemaking on proposals relating to DTV consumer education.

While the Commission's effort to date – in terms of protecting consumers – has been disappointing, the broadcast, cable and consumer electronics industries have picked up the slack, and they have economic incentives to do so. The DTV Transition Coalition has done an admirable job in attempting to coordinate the efforts of industry and consumer advocacy groups. With only 525 days left, the Commission has no more time to waste.

In today's *Order*, we endeavor to not only protect must-carry stations, but also ensure that we minimize the potential cost and service disruption to consumers. Accordingly, the Commission's action today has much to do with allocating the burden and costs associated with the national DTV transition. But, to be sure, our guiding principle is that no over-the-air viewer or analog cable subscriber is left behind.

In this regard, the Commission has permitted a limited number of over-the-air broadcasters to turn off their analog signals and to transmit in digital only. Moreover, in the Third Periodic proceeding, the Commission is also considering whether to permit broadcasters to reduce the power of their analog signals during the transition, in order to minimize the costs associated with transmitting in both analog and digital. The net effect of these actions is that many over-the-air viewers are today required to either purchase digital TV sets or pay for a digital-to-analog converter box. If an over-the-air viewer does neither, he may be left behind before February 17, 2009.

In the cable context, the Congress, the courts, and the Commission have recognized that the relationship between a cable operator and a subscriber is different than that of the broadcaster and over-the-air viewer. Nevertheless, the Commission is required to ensure that cable subscribers are not left behind after the DTV transition. We must ensure that cable subscribers will receive a signal that is "viewable," pursuant to Section 617(b)(7). The instant *Order* accomplishes this important goal.

Because the Commission has twice rejected mandatory dual carriage and multicast must-carry, it is important to recognize that the *Order* is not intended to be mandatory dual or multicast carriage disguised as "viewability". The requirement that cable operators must deliver a "viewable" signal to cable subscribers is not a mandate for the Commission to specify the ways in which an operator can deliver a "viewable" signal. Nevertheless, if a cable operator fails to deliver a "viewable" signal to any cable subscriber, the Commission is obligated to protect the consumer. Cable operators must ensure that all customers can obtain the necessary equipment to view the signal. This is analogous to the need for over-the-air viewers to purchase digital TV sets or invest in a digital-to-analog converter box in order to view over-the-air signals.

Within this context of "viewability", the *Order* provides cable operators with hybrid analog/digital systems the flexibility to carry the signals of must-carry stations in different ways, as long as all customers receive a "viewable" signal. The practical effect of this flexibility is that some cable operators could carry the analog, SD and HD signals to viewers. Other operators could carry the analog and the HD signal to viewers, when the must-carry stations broadcasts in HD only. The operator could also decide to go "all digital" and invest in set-top boxes for all of their subscribers. This solution protects consumers' right to a "viewable" signal, and it ensures that must carry stations will be "viewable" by all cable subscribers.

We encourage cable operators to upgrade their systems and deploy solutions, such as switched digital, QAM or IPTV, to increase system capacity for more channels, enhanced services and faster broadband speeds. Such technological innovations promote efficient network management and the greater diversity of programming. But even as cable operators deploy these and other approaches, they must protect cable subscribers' ability to view signals. Nothing in this *Order* precludes a cable operator from making available equipment – preferably for free -- that would enable subscribers to take advantage of these innovations.

In 1992, Congress determined that the preservation of free over the air television, for the benefit of cable and non-cable households, required mandating cable systems to carry all local television broadcast stations up to no more than one-third of a cable system's capacity. The *Order* achieves this goal.

Beyond achieving the statutory goal of "viewability," the *Order* should have better advanced the interrelated goal of promoting broadband, pursuant to section 706 of the

Communications Act. The telecommunications and cable industries are the principal providers of broadband services to most Americans. And, as the Commission has stated repeatedly, encouraging the deployment of broadband is one of our primary goals

I must dissent in part because the *Order* does not provide small, often rural, cable operators a much-needed exemption from the carriage obligations in this *Order*. Unlike the major MSOs and LECs, small system operators face serious financial and technological resource constraints, and the Commission should consider these limitations moving forward. We cannot achieve our goal of promoting rural broadband if the Commission forces small rural cable operators to use their limited capacity for uses other than what the market and their customers demand, including broadband. While I am pleased that the *Order* provides for waivers, it is not fair to ask these tiny rural systems to engage lawyers in Washington when a simple exemption would have sufficed.

In terms of broadband, other than the failure to provide for small rural systems, this *Order* has come a long way to balance the needs of these systems to have the capacity to deliver the higher speeds consumers are demanding, along with the diversity of channels that they also enjoy. Some of the proposals considered, such as shoving "all the bits" down operators' throats, even though the human eye cannot tell the difference, would have been an enormous waste of capacity that can be better deployed for broadband and programming diversity. I am pleased that reason prevailed in terms of the standard we employ to ensure there is no material degradation of the signals. Consumers are the big winners when such gratuitous regulation does not distort the marketplace incentives operators have to deliver what their customers want. Moreover, there have never been actionable complaints upheld to date complaining of material degradation.

In short, I thank all my colleagues for working together to craft a reasonable proposal that has dramatically improved from what was presented to us. Together, we achieved the paramount goal of ensuring that all cable subscribers can continue to view broadcast signals after the digital transition is complete. Now, we must attend to the overdue work of rolling up our sleeves to ensure that over-the-air viewers are better informed about the ongoing DTV transition.