**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

In the *First Report and Order*, I said that "the policy goals of [that] *Order*, to promote competitive video offerings and broadband deployment, are laudable. But while I support these goals, [the] 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."

Today's *Second Report and Order* picks up where the *First Report and Order* left off, providing further disruption, confusion and complication to the operation of the local franchising process. Similar to its predecessor order, the instant *Order's* attempt to provide comparable regulatory relief to incumbent cable operators is arbitrary and capricious. Unlike the prior decision, however, today's decision undermines the Commission's principal responsibility and local governments' ability to ensure the safety and welfare of the American people.

While I understand the need for regulatory parity, today's decision represents a "race to bottom," an unraveling of important local protections set in motion by the Commission's prior misguided decision-making in the *First Report and Order*.

In the *Further Notice of Proposed Rulemaking* that established the record for today's *Order*, the Commission sought comment on what effect, if any, the findings in the *First Report and Order* have on "most favored nation" (MFN) clauses in existing franchise agreements. Now, in a cursory discussion wanting of serious analysis, the Commission asserts that "we expect the MFN clauses, pursuant to the operation of their own design, will provide some franchisees the option and ability to change provision of their existing agreements." The Commission simply concludes that "we do not believe that our *First Report and Order* has any effect on MFN clauses." In the real world, this finding could not be further from the truth.

As I predicted, the *First Report and Order*, which purported to provide clarification with respect to which franchise fees are permissible under the Communications Act, has in fact muddled the regime and left communities, incumbent cable operators and new entrants with conflicting views about funding and support for public, education and government (PEG) facilities, including local institutional networks (I-NETs). For example, while section 622(g)(2)(C) of the Communications Act excludes from the term "franchise fee" any "capital costs which are required by the franchise to be incurred by the cable operator for public, educational or governmental access facilities," the Commission has limited "capital costs" to simply the costs associated with the "construction of PEG access facilities." But the Communications Act defines "PEG access facilities" to mean channel capacity, facilities and equipment. 47 U.S.C. §522(16). Moreover, the legislative history of the 1984 Cable Act clearly

indicates that "any franchise requirement for the provision of services, facilities or equipment is not included as a 'fee.'"

Many local governments, however, receive payments from cable operators that are not simply for the construction of PEG studios, but also for the acquisition of equipment needed to produce PEG access programming. PEG facilities and access provide important resources to thousands of communities across this country.

In terms of public safety, redundant or even duplicative I-NETs provides invaluable homeland security and public health, safety and welfare functions in towns, cities, localities and municipalities across America. It was my hope that the *First Report and Order* would not have undermined these and other important local community resource needs. But it has because local governments cannot require new entrants to provide I-NET support beyond that which has been provided by the incumbent. The Commission effectively created a *per se* rule that freezes PEG/INET funding support to what constituted as "adequate" many years ago when the incumbent cable franchise was consummated.

In this post-911 era, the Commission's action is an unfortunate undermining of public safety, which could otherwise benefit from redundant communications networks. PEG capacity and facilities are interconnected with local I-NETs and they provide local first responders with essential public safety communication capabilities. When you couple the effects of the *First Report and Order* with today's decision to leave MFN clauses in force – without any meaningful analysis, the Commission has created a dangerous two-step, downward spiral. Step one: local government cannot require more from the new entrant today than it required from the incumbent provider years ago. Step two: the incumbent providers can enforce the MFN clause to get the same treatment as the new entrant. By adding bad decisions on top of one another, this Commission has converted the entire cable franchise fees and PEG/I-NET support regime into a regulatory minefield for local governments, and that will likely impact the ability of local governments to provide critical, state-of-the-art services when they matter most.

Accordingly, I dissent.