**STATEMENT OF**
**COMMISSIONER AJIT V. PAI**

Re: *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules, CS Docket No. 98-120.*

The Commission must routinely reevaluate its rules to ensure that they reflect current economic and technological realities. Otherwise, agency inertia can allow regulations to stay on the books far longer than they should. One way to avoid this result is through the use of sunset clauses. A sunset clause forces an agency to take a fresh look at rules that are about to expire and decide whether they are still warranted in the face of changes in the marketplace.

The viewability proceeding illustrates the benefits of this approach. Two key facts have changed since the Commission adopted the viewability rule half a decade ago. First, in the wake of the digital television transition, the number of households receiving analog-only cable service has dropped substantially, from about 40 million in 2007 to 12 million today. And second, Digital Transport Adapters ("DTAs") that enable analog-only subscribers to view digital signals are increasingly available and inexpensive.

Given these changed circumstances, I support the Commission's decision to modify the five-year-old viewability rule. Specifically, so-called hybrid systems (those carrying both analog and digital signals) should no longer be subject to what effectively has been a dual-carriage mandate. Rather than being required to carry the same broadcaster's signals twice (in both analog and digital), cable operators should have the flexibility to use the bandwidth to supply customers the advanced services and/or additional programming options they demand.

That having been said, today's decision was not an easy one. I take seriously my duty as a Commissioner to implement the laws passed by Congress, and I agree with broadcasters that the Commission's 2007 interpretation of the viewability statute, 47 U.S.C. § 534(b)(7), appears more consistent with its structure. In particular, I am sympathetic to the broadcasters' argument that the Commission's new interpretation of the statute obscures the distinction between the provision's second and third sentences, and do not find the Order's refutation of this point to be particularly persuasive.

However, the issue before us is not solely one of statutory interpretation. Constitutional concerns, too, are involved. Cable operators present a powerful argument that renewing the viewability mandate on the state of the current record would run afoul of the First Amendment.

In *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997), the U.S. Supreme Court rejected a First Amendment challenge to must-carry on the grounds that the carriage mandate was justified by the government's substantial interest in the preservation of over-the air broadcasting. But it is difficult to see how that rationale would apply here. The rule change we adopt today will have absolutely no effect on the ability of about 80% of cable subscribers to view must-carry stations. And the diminishing minority of cable customers who have analog-only service will be able to continue viewing must-carry stations on cable systems simply by obtaining affordable DTAs that cable operators must offer as a result of this Order.

In light of these facts, I have serious doubts that continuing to impose the current viewability mandate would be consistent with the First Amendment. Moreover, cable operators correctly point out that the viewability statute does not unambiguously preclude the use of affordable equipment provided by cable operators to view must-carry signals. As a result, I believe that the Commission not only has the discretion to interpret the statute in a manner that avoids constitutional difficulties, but that it is best to do so.

During the next six months, cable operators and broadcasters must work together to ensure that the transition proceeds as smoothly as possible for consumers. Must-carry stations need to educate their viewers on the steps they must take to be able to continue viewing affected stations. It is therefore critical that cable operators have committed in the record to notifying must-carry stations no fewer than 90 days in advance of ceasing carriage of their analog signals. Cable operators also must give affected subscribers timely information on how they can acquire DTAs, and I am pleased that they have committed to provide such notices to their customers no fewer than 30 days ahead of time.

An old proverb says that the more things change, the more they stay the same. When it comes to regulation, however, that shouldn't be the case. The Commission should calibrate its rules to the current state of the marketplace in order to secure for American consumers the benefits of innovation. After listening to the views of all stakeholders and carefully reviewing the record, I have reached the conclusion that now is the time to change the Commission's 2007 viewability requirement. I therefore support this Order.