

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

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.

As I've stated many times since we began the media modernization effort, the video marketplace is changing dramatically, and each step we have taken to update anachronistic and clunky regulations makes it slightly easier for regulated industries to compete with their unregulated competitors. Though much work remains, I look forward to continuing the effort. At the same time, and as we see in the background of today's item, it is unsurprising that other stakeholders, such as franchise authorities, also feel their own pressures due to the changing market dynamics, whether budgetary or political. They too seek ways to either continue their past practices unabated or seek ways to maximize returns on their regulatory roles. However, Title VI of the Communications Act places important restraints on their reach, and unauthorized expansion of the statute is flatly wrong and must be held in check. The courts have agreed, and I am pleased that today we make strides toward answering the Sixth Circuit, by addressing three main areas raised in or affected by its remand.

First, the Order rightly counts cable-related "in-kind" contributions against the statutory cap. Failing to do so would effectively render the statute's restraints meaningless, or nearly so. Critics may argue that local franchise authorities have the weaker position when dealing at arm's length with video providers, but the record and experience show otherwise. There are numerous examples of where video providers lack the ability to say no to "voluntary" waivers of the five percent cap, having no recourse but to agree to all manner of in-kind contributions, ranging from providing all the necessary equipment to produce PEG programming in New York City, to supplying transport lines to cover ice cream socials in Minnesota. There are many examples in the record, but the point is: failure to agree to such terms could result in jeopardizing the franchise, and that is a risk many companies simply cannot afford to take. The Commission's role is to interpret and enforce the statute based on the record, and today we appropriately define cable-related in-kind contributions to prevent end-runs around the statutory cap.

Second, the Order also correctly preempts state-level franchise authorities who would seek to obliterate the statutory boundaries that are in place. Unfair and unreasonable fees and contributions beyond five percent of gross revenues for cable services conflict with the law, whether the franchisor is a state or local actor. The statute itself explicitly refuses to restrict states from exercising jurisdiction over cable services. In fact, about half of all states have authorized state-level franchise authorities. There is no good legal or policy reason for restraining the activities of local franchisors while allowing state authorities to continue unbounded, and I thank the Chairman for including this matter in the NPRM so that we could go to Order today on it.

Third, there are two issues regarding PEG contributions that could receive further attention as the record more fully develops. While I would have preferred a narrower definition of "capital costs," limiting such contributions to construction-related costs for PEG facilities, the item does acknowledge today that the current record has room to grow, leaving us the option to revisit this matter in the future. Similarly, we clearly acknowledge the need to resolve the PEG channel capacity cost question and expressly commit to doing so within the next year. This is a vital endeavor, so I thank the Chairman for working with me on this matter and look forward to the admittedly complex and rigorous undertaking.

Separately, and perhaps most significantly, the item properly rejects the ability of state or local governments to impose franchise fees on non-cable services. Inappropriate court determinations, such as the Eugene, Oregon, franchise case, have wrongly tried to open the door to the imposition of such fees on other services offered by what have traditionally been called cable operators. However, the statute is quite clear on the matter and the item appropriately clarifies that franchises authorities can only regulate

cable services. Today's action closes off potential revenues for franchise authorities from non-cable services, which is the right statutory reading. Further, allowing these entities to usurp the statute by imposing fees on the offering of broadband services would ignore the resulting harm to consumers. For instance, Congress has recognized multiple times that allowing governmental fees and taxes does affect Internet adoption rates. Given that almost everyone recognizes the importance of broadband availability, deterring its use would be at best, counterproductive. Moreover, without such a limitation, there appears to be no outer limit to the types of non-cable services for which a cable operator could be forced to pay fees. Today, it's broadband in the cross-hairs, but tomorrow it could be cloud services or over-the-top video services, for example.

Finally, I'll end with two points regarding the judicial and legislative implications of today's item. On the matter of applying today's Order to existing franchise agreements, I worry that we are punting too much of the burden to the overworked courts and would be better served by delineating a clear process under the Commission's purview. However, I support the efforts of my colleague Commissioner Carr to make Section 636 controlling, which will at a minimum provide a clearer starting point for negotiations. I would also note that I support my colleague's effort to clarify that the provisions of this Order cannot be waived. We will be closely watching to ensure that no franchise authorities seek to make an end run around the reforms contained in this Order by demanding that franchisees waive any of the provisions. Regarding the need for legislation, I hope that Congress will take note of our effort today and consider launching an ambitious, but much needed, review of Title VI in its entirety. We are bringing the regulations more in line with the statute today, but the whole ecosystem would be well-served by a wholesale rewrite of the statute and an acknowledgement of the current market realities.

But, this item shouldn't and won't be the end of our work to eliminate outdated rules and scale back inappropriate actions by state and local franchise authorities. For our media modernization initiative, I will be submitting soon a new round of ideas for the Chairman's consideration. On a larger scale, I am hard at work on a blog outlining the fundamental overhaul needed to address our outdated franchising regime and the need to further curtail "creatively harmful" efforts by franchise authorities.

I approve.