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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Leased Commercial Access; Modernization of Media Regulation Initiative: MB Docket Nos. 07-42; No. 17-105

Dear Ms. Dortch:

NCTA—The Internet & Television Association submits this letter in response to the Small Business Network's ("SBN") May 29, 2019 letter in the above referenced dockets.[1] SBN contends that the Draft Order's proposed elimination of the part-time leased access mandate,[2] if adopted, would be ill-advised and inconsistent with congressional intent and the Administrative Procedure Act ("APA"). These claims are patently incorrect, and the Commission should reject them. I also spoke today by phone with Alexander Sanjenis of Chairman Pai's office and broadly made the points set forth below.

I. Part-Time Leased Access Is Not Required by the Communications Act and the Commission's Current Mandate Raises Significant Constitutional Issues

SBN argues that to realize Congress's intent in adopting the leased access provisions of the Communications Act, the Commission must mandate that cable operators provide part-time leased access.[3] But as NCTA detailed in its comments,[4] there is no evidence that Congress ever intended cable operators to be in the business of leasing time on a program-by-program basis. Instead, Congress required only that cable operators provide an outlet for *channels* of programming, as is reflected by the plain language of the statute.[5] The requirement for part-time

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1 Small Business Network *Ex Parte*, Dkt. Nos. 07-42, 17-105 (filed May 29, 2019) ("SBN *Ex Parte*").

2 *See Leased Commercial Access; Modernization of Media Regulation Initiative*, Draft Report and Order and Second Further Notice of Proposed Rulemaking, FCC-CIRC1906-02 (rel. May 16, 2019) ("Draft Order").

3 *See* SBN *Ex Parte* at 1-2.

4 Comments of NCTA – The Internet & Television Association, Dkt. Nos. 07-42, 17-105, at 22 (filed July 30, 2018) ("NCTA Comments").

5 As is further discussed below, the circumstances that led Congress to require full-time commercial leased access no longer exist. For instance, video programmers in today's marketplace have many outlets for reaching

leased access is regulatory, not statutory, and the Commission has ample authority to adopt rules consistent with the statutory language mandating only full-time leased access.

Striking the part-time leased access mandate would also avoid at least some of the serious First Amendment concerns posed by the leased access requirements. SBN argues that"[t]here is no reasonable speech-related distinction between the two types of access" – but that may be true only because *both* of them raise constitutional issues. As SBN recognizes, the statutory leased access provisions were originally upheld by the D.C. Circuit despite the First Amendment burdens they imposed because the Court found at the time that (i) the government interests that the leased access provisions were intended to serve – promoting "the widest possible diversity of information sources" for cable subscribers and promoting "competition in the delivery of diverse sources of video programming" – were important government interests, and (ii) the statutory requirements did not burden substantially more speech than necessary to promote such interests.[6] But as NCTA and others have explained, due to the massive changes in the video marketplace over the last two decades, the rules can no longer be justified as necessary to further the government's interests in promoting diversity and competition.[7] In this now diverse and competitive market, these statutory requirements instead burden speech far more than the interests they were designed to promote.

When the statutory leased access provisions were adopted in 1984, there were only 20 or 30 channels available on most cable systems, most communities were served by only a single franchised cable system, and there were no alternative sources of multichannel video programming, or any other video programming beyond the three broadcast networks and VCR rentals and purchases. Congress's concern was that, in these circumstances, there would be a lack of diversity of ownership in program networks and little opportunity for networks unaffiliated with the cable operator to gain carriage. But today, cable systems typically provide *hundreds* of linear channels – the vast majority of which cable operators have no ownership interest in – and consumers nationwide have access to video programming from a wide array of non-cable sources, including online platforms and other multichannel video programming distributors.[8] In other words, there is enormous diversity and competition in the video marketplace, independent of the leased access requirements.

Included among the many online platforms available is YouTube, which provides producers of video content such as SBN easy and affordable access to viewers. In fact, tens of millions of videos are viewed each day on YouTube, allowing producers of content to reach many more viewers than can be reached by a single cable operator. With such accessible and

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consumers. *See* NCTA Comments at 6-10; NCTA – The Internet & Television Association *Ex Parte*, Dkt. Nos. 07-42, 17-105, at 1-2 (filed Feb. 14, 2019) ("NCTA February *Ex Parte*").

6 *See Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

7 *See* NCTA Comments at 6-15; Reply Comments of Charter Communications, Inc., Dkt. Nos. 07-42, 17-105, at 2-7 (filed Aug. 13, 2018) ("Charter Reply Comments").

8 *See* NCTA Comments at 8-10; Charter Reply Comments at 5-6, 9.

affordable options available to video programmers, it is no longer sustainable to burden the speech of cable operators with unnecessarily onerous leased access requirements.

Given these dramatic changes to the video marketplace, the leased access provisions can no longer withstand First Amendment scrutiny. To the extent the Commission follows the statutory mandate, it should interpret that mandate in a manner that minimizes the burden it imposes on protected speech. The part-time leased access requirement is a regulatory obligation that unnecessarily *expands* First Amendment burdens,[9] and accordingly, the Commission should eliminate it.[10]

II. An Order Permitting Part-Time Leased Access at the Cable Operator's Discretion Would Satisfy the APA

A. The FNPRM Explicitly Requests Comment on Changes to the Part-Time Leased Access Rules

Contrary to SBN's contentions,[11] the Draft Order, if adopted, would not violate the APA's notice requirements. Changes to the part-time leasing rules would be far from the "complete, unexpected shock" SBN claims.[12] In the FNPRM, the Commission expressly raised the possibility of changes to part-time leased access, asking if the Commission should "adopt any new rules governing leased access rates or part-time leased access[.]"[13] Interested parties were therefore on notice that the rules governing part-time leased access and how they apply were under consideration in this proceeding. Indeed, multiple commenters – on both sides of the issue – addressed in comments and reply comments responding to the FNPRM whether the part-time mandate should be retained.[14]

The FNPRM and the record developed in this proceeding therefore provide sufficient notice to support the Draft Order's proposal to permit cable operators to offer part-time leased

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[9] In addition to First Amendment burdens, the part-time leased access requirement places numerous administrative and cost burdens on cable operators. *See* NCTA Comments at 23-24; NCTA February *Ex Parte* at 2; NCTA – The Internet & Television Association *Ex Parte*, Dkt. Nos. 07-42, 17-105, at 1-2 (filed Mar. 21, 2019).

[10] The Commission should also reject SBN's argument that eliminating the part-time leased access mandate would violate the Section 257 of the Act. Section 257 is not an independent grant of authority – rather, Congress intended that, when acting pursuant to its authority under other provisions in the Act, the Commission should seek to reduce market entry barriers for entrepreneurs and small businesses. Even assuming that Section 257 grants the Commission standalone authority to reduce barriers to market entry, the Commission would still be obligated to ensure that its interpretation of the statutory leased access provisions avoids constitutional infirmity.

[11] SBN *Ex Parte* at 2-3.

[12] *Id*. at 3.

[13] *Leased Commercial Access; Modernization of Media Regulation Initiative*, Further Notice of Proposed Rulemaking, 33 FCC Rcd. 5901, ¶ 24 (2018) ("FNPRM").

[14] *See* NCTA Comments at 22-25; Charter Reply Comments at 8-9; Comments of Combonate Media Group, Dkt. Nos. 07-42, 17-105, at 3 (filed July 30, 2018).

access at their discretion rather than mandating it. Importantly, NCTA is not proposing that the Commission abrogate existing contracts. Rather, existing commercial leased access agreements would remain in place under their current terms, and consistent with the elimination of the mandate, any renewals would be at the discretion of the cable operator. Contrary to SBN's claim, such a framework clearly qualifies as a "new" rule "governing" part-time leased access noticed in the FNPRM.

B. Eliminating the Mandate for Part-Time Leased Access Would Constitute a "Logical Outgrowth" of the FNPRM

In addition to having been explicitly raised in the FNPRM, adopting a new approach to leased access that eliminates the mandate would be a "logical outgrowth" of the FNPRM's text.[15] In the FNPRM, the Commission makes clear that its focus is on updating the leased access rules to reflect changes in the video marketplace, including by addressing the related First Amendment concerns. For instance, the FNPRM "invite[s] comment on . . . whether the prevalence of alternative means of video distribution should influence our actions in this proceeding."[16] It further asks how the Commission's leased access rules "implicate First Amendment interests," and "seek[s] comment on whether there have been any changes in the video distribution market since Congress and the FCC first addressed these issues that are relevant to the First Amendment analysis."[17]As explained above and in further detail in NCTA's Comments and Charter's Reply Comments, these marketplace and First Amendment considerations necessarily implicate part-time leased access and alerted interested parties that the Commission was considering elimination of the part-time mandate.[18]

Respectfully Submitted,

/s/ Rick Chessen

Rick Chessen

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[15] *See, e.g., Agape Church, Inc. v. F.C.C.*, 738 F.3d 387, 422 (D.C. Cir. 2013) (an agency's final rule is the "logical outgrowth" of an FNPRM "if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period"); *Sprint Corp. v. F.C.C.*, 315 F.3d 369, 376 (D.C. Cir. 2003) ("The necessary predicate [for satisfying the logical outgrowth test] . . . is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed.") (internal quotation marks omitted). An FNPRM satisfies this test "if it expressly asks for comments on a particular issue or otherwise makes clear that the agency is contemplating a particular change." *U.S. Telecom Association v. F.C.C.*, 825 F.3d 674, 700 (D.C. Cir. 2016) (internal quotation marks and alterations omitted). *See also City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (finding under the "logical outgrowth" standard that sufficient notice was provided where the EPA asked questions in a proposed rulemaking that indicated that the final rule could implement the substance of the questions).

[16] FNPRM ¶ 14

[17] *Id*. ¶ 25.

[18] *Cf. Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 548 (D.C. Cir. 1983) (upholding a rule closing a loophole that had not been specifically identified, because parties were on notice that the agency was seeking to identify and close "as-yet-undefined loopholes").

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