Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF NCTA – THE INTERNET & TELEVISION ASSOCIATION

Howard J. Symons
Jessica Ring Amunson
Matthew E. Price
Andrew C. Noll
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Rick Chessen
Neal M. Goldberg
Radhika Bhat
NCTA – The Internet & Television Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

July 22, 2019

TABLE OF CONTENTS

I. Introduction and Summary 1

II. The Video Marketplace Has Changed Dramatically Since the Leased Access Provisions Were Adopted..................... 3

III. The Leased Access Regime Continues to Significantly Burden Cable Operators. 9

IV. The Statutory Leased Access Requirements and the Commission's Implementing Rules Can No Longer Withstand First Amendment Scrutiny. 12

V. The Commission Must Ensure that Its Rules Reduce the First Amendment Burden on Cable Operators. 21

VI. Conclusion..................... 24

Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION

NCTA – The Internet & Television Association ("NCTA")[1] submits these comments in response to the *Second Further Notice of Proposed Rulemaking* in the above-captioned proceedings.[2]

I. INTRODUCTION AND SUMMARY

NCTA appreciates the Commission's ongoing efforts to modernize cable operators' regulatory obligations to reflect today's vibrant video marketplace, and applauds the steps the Commission recently took in these proceedings to reduce the burdens imposed on cable operators by the leased access regime, most notably by eliminating the requirement to provide part-time leased access.[3] The Commission wisely continues these efforts in the *Second FNPRM*,

[1] NCTA is the principal trade association of the cable television industry in the United States, which is a leading provider of residential broadband service to U.S. households. Its members include owners and operators of cable television systems serving nearly 80% of the nation's cable television customers, as well as more than 200 cable program networks. Cable service providers have invested more than $290 billion over the last two decades to deploy and continually upgrade networks and other infrastructure—including building some of the nation's largest Wi-Fi networks.

[2] *Leased Commercial Access; Modernization of Media Regulation Initiative*, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 19-52 (rel. June 7, 2019) (subparts separately referred to as the "*Report and Order*" and the "*Second FNPRM*").

[3] *See id*.

proposing changes to and seeking comment on the full-time leased access rules and on the leased access regime generally.

The Commission is right to question the constitutionality of the leased access regime.[4] The video marketplace has changed dramatically since the leased access provisions were enacted. Today, consumers have access to innumerable sources of video programming, and content providers can distribute their content over an incredibly wide variety of platforms. The leased access regime is simply not needed—if it ever was—to promote competition and diversity in the marketplace. The marketplace has achieved those goals on its own. In addition, the remaining—and unnecessary—full-time leased access requirements impose real and significant burdens on cable operators' speech, resources, and competitive position.

In light of the changes to the video marketplace, the statutory leased access requirements and the Commission's implementing rules can no longer withstand First Amendment scrutiny. The leased access requirements are unconstitutional under either strict scrutiny—which recent Supreme Court precedent makes clear is the appropriate standard of review—or intermediate scrutiny, the standard applied previously by the D.C. Circuit to burdens on cable operators' speech. Although the Commission cannot eliminate the leased access statutory requirements, it can—and must—implement the statute in a way that minimizes the First Amendment burdens imposed on cable operators.

Accordingly, the Commission should consider eliminating its current rate formula and allowing leased access rates to be determined through negotiations between operators and potential lessees. In the alternative, the Commission should adopt its proposal to allow rates to be calculated using a tier-specific implicit fee calculation.

---

[4] *See Report and Order* ¶ 40; *Second FNPRM* ¶ 47.

II. THE VIDEO MARKETPLACE HAS CHANGED DRAMATICALLY SINCE THE LEASED ACCESS PROVISIONS WERE ADOPTED.

As the Commission correctly notes, today's video marketplace is vastly different than it was just a few years ago, and almost unrecognizable compared to what it was several decades ago when Congress created the leased access regime.[5] Today, the vast majority of Americans have access to fixed and/or mobile Internet-connected devices on which they can stream video content from all over the world, from countless sources on a variety of platforms.[6] But as NCTA has detailed, the statutory leased access provisions enacted in 1984 and amended in 1992 were premised on a dramatically more limited video marketplace.[7]

Back then, consumers generally had just three options for watching video programming—video cassette rentals and purchases, over-the-air broadcast television, and typically a cable operator authorized to serve the consumer's local area. For most households, cable operators were the *only* source of multichannel video programming.[8] Neither the Internet nor Direct Broadcast Satellite (DBS) service were commercial services, and telephone companies were legally barred from offering video programming to consumers in their telephone service areas. Therefore, any content provider hoping to provide viewers with full-time non-broadcast programming needed to seek carriage on the single franchised cable system serving that community.

---

[5] *See Second FNPRM* ¶¶ 39-40, 47.

[6] *See infra* pp. 6-9.

[7] *See* Comments of NCTA – The Internet & Television Association, MB Dkt. Nos. 07-42, 7-105, at 6-7 (filed July 30, 2018) ("NCTA Comments").

[8] Of the 54.3 million subscribers to MVPD service in 1991, over 95% subscribed to cable service. Most non-cable subscribers lived in areas not yet served by cable operators. *See* S. Rep. No. 102-92, at *7 (1991) ("Senate Report") (finding that cable did not face "significant competition from other multichannel video providers").

Given these circumstances, Congress was concerned that programming networks unaffiliated with the cable operator, or that competed with channels already carried by the cable operator, might have few opportunities to gain carriage on the limited number of channels available on most systems, and that as a result, there would be a lack of diverse ownership in the programming offered to cable customers.[9] To promote competition and increased diversity in the sources of video programming available to the public,[10] Congress required cable operators to ensure that up to 15% of their channels would be available for lease by unaffiliated networks that were not selected by the cable operator.

The government's predictions about technology and the marketplace—and the requirements based on those predictions—missed the mark. Leased access never became a robust, valuable source of video programming. On the other hand, radical changes in the video marketplace have provided consumers with far greater diversity and competition in sources of video programming than Congress imagined when it created the leased access regime.

For instance, unaffiliated content providers need no longer rely on a single franchised cable operator for access to viewers in a community. Content providers seeking MVPD carriage may now choose among multiple providers in almost every community in America. Nearly all consumers have access to at least three competing MVPDs—a franchised cable operator and the two national DBS services.[11] Many consumers also have access to a fourth or fifth MVPD, often

---

[9] *See* H.R. Rep. No. 98-934, at 48 (1984) ("House Report") (stating that "cable operators do not necessarily have the incentive to provide a diversity of programming sources, especially when . . . the offering competes with a program service already being provided by that cable system"); Senate Report at *26.

[10] *See* 47 U.S.C. 532(a); *see also* House Report at 47 (stating that leased access is intended to "provide the public with a true diversity of programming sources"); Senate Report at *26 (discussing the need to "promote competition in the delivery of diverse sources of video programming").

[11] *See Communications Marketplace Report et al.*, Report, 33 FCC Rcd. 12558, ¶ 51 (2018) ("December 2018 Consolidated Marketplace Report"); *see also id.* n.186 (noting that cable operators in nearly all

their local telephone company and/or another franchised "overbuilder." Each of these MVPDs provides comparably sized arrays of linear and on-demand programming—typically hundreds of linear channels and tens of thousands of on-demand programs.[12] If an unaffiliated content provider is refused carriage by a franchised cable operator, it may still reach viewers in that same community by seeking carriage on one of the other MVPDs.[13]

Cable services today look little like the cable services of the past. As noted above, today's cable systems usually provide a considerable number of channels and on-demand programs offering a wide diversity of content that covers a sweeping variety of interests. This diversity is deep as well as broad: Operators routinely carry multiple networks that serve similar interests and that often compete for audience share.[14] Moreover, the great majority of cable networks and programming carried on cable systems today are unaffiliated with the cable operator. Cable operators' ownership interest in programming networks has declined significantly over the past few decades—between 1994 and 2017, the percentage of national cable programming networks in which cable operators had an ownership interest dropped from

---

communities are now subject to effective competition); *NATOA v. FCC*, 862 F.3d 18 (D.C. Cir. 2017) (upholding the FCC's rebuttable presumption that effective competition exists).

[12] *See* December 2018 Consolidated Marketplace Report ¶¶ 57, 59 (discussing channel packages provided by major MVPDs, including cable operators); *id*. ¶ 58 ("The average number of VOD movies and TV episodes offered by major MVPDs reached 77,570 selections per month at the end of 2017[.]").

[13] Correspondingly, viewers who seek this programming can receive it by switching to one of the other available MVPDs.

[14] With cable operators now offering hundreds of channels, a list of each network carried by operators that serves interests similar to another network carried by the same operators would take multiple pages. We provide here a few representative examples. Comcast, Charter, and Cox each carry the following in markets across the country: National Geographic Wild and Animal Planet, both of which focus on programming about wildlife; HLN and Oxygen, which heavily feature true crime programming; Nick Jr. and Disney Junior, which primarily feature programming aimed at children under 8; and ESPN and Fox Sports, which focus on sports programming.

52.8% to 9.1%.[15] There is now enormous opportunity for networks unaffiliated with a cable operator to gain carriage, even if the programming may compete with channels the cable operator already carries. Indeed, if cable operators simply declined to carry unaffiliated programming, they would have significantly fewer channels, including some of the most popular channels on their line-ups, and would likely cease to be competitive providers of video services.

In addition, in the decades since the leased access provisions were enacted, the Internet has transformed from its origins as a limited research network to an engine of the American economy that has revolutionized how we consume video content. The Internet supports a broad array of platforms through which program networks and other content providers may distribute their content to viewers.[16] For instance, content providers may gain carriage on online streaming services that provide linear video channels, such as SlingTV, DIRECTV NOW, PlayStation Vue, Hulu with Live TV, YouTube TV, AT&T Watch TV, etc. Content providers can also seek carriage on on-demand platforms, such as Netflix, Hulu, Amazon Prime, iTunes, Google Play, Vudu, Epix, Crackle, etc.

The Internet also affords content providers numerous options for distributing their content directly to consumers. Content providers can post or stream their content on video-sharing platforms, such as YouTube, Metacafe, Dailymotion, Vimeo, Veoh, Facebook Live, Periscope, Twitch, etc., or make their content available on their own websites. They can create

---

[15] *See* NCTA – The Internet & Television Association Comments, MB Docket No. 17-214, at 10 (filed Oct. 10, 2017).

[16] *See also Report and Order* ¶ 10 ("[C]onsumers are able to access video programming via means other than traditional broadcast and cable television, and the Internet is widely available for this purpose.").

their own video apps, which viewers can use on a countless array of mobile devices, as well as on television sets using devices such as Chromecast, Roku, Apple TV, Amazon FireTV, etc.[17]

Further, content providers can contractually arrange to have their apps automatically placed on such devices. Some of these devices also enable viewers to wirelessly "mirror" any programming that they receive via apps or their Internet browser on their television screen. Even without such devices, today's digital televisions and other devices allow cable subscribers to easily view non-cable video programming—including Internet-delivered programming—on their televisions,[18] which means that content providers that cannot obtain carriage on a particular cable system can still reach the television screens of that very system's customers.

These myriad online platforms provide programmers, including full-time leased access programmers, an incredibly effective way to reach a wide audience—and one that is not limited to cable subscribers. Only approximately 40% of U.S. households currently subscribe to cable video.[19] By contrast, 80% of all U.S. households now have broadband access at home.[20] The vast majority of American adults—81%—carry on their person a smartphone capable of connecting

---

[17] Over 40% of U.S. broadband households own a streaming media player. *See* Press Release, Parks Associates (Dec. 4, 2018), http://www.parksassociates.com/blog/article/83--of-smart-tvs-now-internet-connected--up-from-70-.

[18] *See* NCTA Comments at 10 (noting that digital TVs have several inputs that enable the connection of multiple devices and MVPD services and easy switching among inputs via remote control, and stating that some set-top boxes eliminate even the need to switch inputs). In addition, 53% of U.S. broadband households own a smart TV that can be connected to the Internet. *See* Press Release, Parks Associates (Dec. 4, 2018), http://www.parksassociates.com/blog/article/83--of-smart-tvs-now-internet-connected--up-from-70-.

[19] *See Industry Data*, NCTA – THE INTERNET AND TELEVISION ASS'N, https://www.ncta.com/industry-data (last accessed July 7, 2019) ("NCTA Industry Data").

[20] *See id.*

to the Internet.[21] Video content provided online therefore has the potential to be seen by significantly more viewers than content carried by cable alone.

Indeed, consumers now watch substantial amounts of video content online, and online video platforms have become enormously successful. Internet video constituted 76% of all consumer Internet traffic in 2017.[22] The top two video subscription services in the U.S. are Netflix and Amazon Prime, outranking every cable operator.[23] Non-subscription platforms are even more popular. YouTube—which is free to viewers *and* content providers—is the most widely used video platform in the world, with more than 1.9 billion users per month.[24] YouTube users upload more than 720,000 hours of new content and watch over 1 billion hours of video each *day*,[25] more than 250 million hours of which are viewed on television screens.[26] There are currently upwards of 5,000 YouTube channels with at least one million subscribers each,[27] and the number of channels with more than one million subscribers is increasing rapidly, doubling in

---

[21] *See Mobile Fact Sheet*, PEW RESEARCH CENTER (June 12, 2019), https://www.pewinternet.org/fact-sheet/mobile/.

[22] *See VNI Forecast Highlights Tool,* CISCO, https://www.cisco.com/c/m/en_us/solutions/service-provider/vni-forecast-highlights.html# (last accessed July 7, 2019).

[23] *See* NCTA Industry Data. In fact, only one cable operator ranks among the top five video subscription services—the remaining two spots are occupied by DIRECTV and Hulu.

[24] *See YouTube for Press*, YOUTUBE, https://www.youtube.com/yt/about/press/ (last accessed July 7, 2019).

[25] *See id.*; *More Than 500 Hours of Content Are Now Being Uploaded to YouTube Every Minute,* TUBEFILTER (May 7, 2019), https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute/.

[26] *See More Than 500 Hours of Content Are Now Being Uploaded to YouTube Every Minute,* TUBEFILTER (May 7, 2019), https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute/.

[27] *See Top 5000 Subscribed YouTube Channels*, SOCIALBLADE, https://socialblade.com/youtube/top/5000/mostsubscribed (last accessed July 7, 2019).

2018 alone.[28] In an average week, YouTube reaches more adults during prime time than any cable network.[29]

As the above demonstrates, today's robust video marketplace provides the American public and content providers with precisely the competition and diversity in sources of video programming that Congress desired. This has occurred entirely independent of the leased access requirements and negates any need there may once have been for this regulatory intrusion. In addition, leased access programmers today have numerous outlets for their content, many of which they do not have to pay to use. The Commission should fully consider these changes to the video marketplace as it assesses possible modifications to the rules governing full-time leased access.

III. THE LEASED ACCESS REGIME CONTINUES TO SIGNIFICANTLY BURDEN CABLE OPERATORS.

As noted above, NCTA appreciates the Commission's recent decision to eliminate its prior requirement that cable operators provide part-time leased access, due in part to the burdens part-time leased access imposes on cable operators.[30] However, the leased access regime and the Commission's full-time leased access rules continue to significantly burden cable operators by interfering with their speech; consuming capacity and resources that could be used for other purposes, content, and services that are much more highly valued by consumers; and placing cable operators at a competitive disadvantage.

---

[28] *See* Danielle Abril, *YouTube Nears Major Milestone Amid Emphasis on Subscriptions*, FORTUNE (Feb. 4, 2019), https://fortune.com/2019/02/04/youtube-google-subscriptions-q4-2018/.

[29] *See The latest YouTube stats on when, where, and what people watch*, THINK WITH GOOGLE, https://www.thinkwithgoogle.com/data/youtube-mobile-reach-statistics/ (last accessed July 7, 2019).

[30] *See Report and Order* ¶¶ 16-17, 40.

By design, the leased access regime requires cable operators to carry programming that they would otherwise decline to carry. The regime therefore explicitly impinges on cable operators' exercise of editorial discretion, forcing them to carry content even if their subscribers do not want it and/or the cable operator finds it objectionable, harmful, or offensive. This forced carriage puts cable operators at risk of reputational harm, because even though the content is beyond the operators' control, subscribers may nevertheless attribute the content to the operators.

For example, multiple cable operators have been required in recent years to carry RT, the Russian government-backed English-language news outlet that serves as Russia's "principal international propaganda outlet" and that was a component of Russia's efforts to influence the 2016 U.S. presidential election.[31] Only after Congress passed legislation in December 2017 allowing cable operators to decline to lease capacity for programming owned, controlled, or financed by the Russian government were these operators able to cease carriage of RT's programming.[32] Yet cable operators could still be required to carry leased access programming owned, controlled, or financed by other foreign governments for propaganda purposes.

Leased access also consumes capacity and other resources the cable operator could otherwise use for the benefit of its subscribers. Bandwidth is not infinite—if a cable operator is required to dedicate bandwidth to leased access channels, it has less bandwidth available for other purposes, including broadband service. The leased access regime also requires that a cable operator expend valuable time and resources for, among other things, system-specific price and

---

[31] ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS, INTELLIGENCE COMMUNITY ASSESSMENT, OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, ICA 2017-01D, at 3 (2017) (declassified version).

[32] *See* 47 U.S.C. § 537a. Notably, RT's inability to retain its leased access carriage has not prevented it from distributing its programming to a wide audience—RT livestreams its news programming via YouTube 24 hours a day. *See* RT, *RT News: On-air livestream 24/7 (HD)*, YouTube, https://www.youtube.com/watch?v=IFAcqaNzNSc (last accessed July 15, 2019).

channel availability calculations and contract negotiation and review, regardless of whether a potential leased access programmer ultimately pays for carriage. The negative impacts of these capacity and resource constraints are compounded by the fact that cable's competitors are not subject to leased access requirements. No other MVPD and no online video platforms are required to dedicate capacity, time, personnel, or funds to leased access, which allows them to dedicate more of their resources to uses they freely choose.

Moreover, because cable's competitors are not subject to leased access requirements, they are able to tailor their offerings in ways cable operators cannot. For instance, satellite operators and online platforms can offer consumers "skinny bundles" with carefully limited selections of non-broadcast channels. But cable operators are obligated to place leased access channels on a tier that has a subscriber penetration of more than 50%—regardless of whether subscribers are interested in receiving these channels[33]—which hamstrings cable operators' ability to offer consumers streamlined packages and contributes to consumers' adverse perception of tier bloat. This, in turn, places cable operators at a further competitive disadvantage.

These burdens on cable operators' speech, resources, and competitive position are unwarranted and—as discussed below—unconstitutional, and the Commission should take action in this proceeding to reduce them.

---

[33] *See* 47 C.F.R. § 76.971(a)(1).

IV. THE STATUTORY LEASED ACCESS REQUIREMENTS AND THE COMMISSION'S IMPLEMENTING RULES CAN NO LONGER WITHSTAND FIRST AMENDMENT SCRUTINY.

The Commission seeks comment on whether the statutory leased access requirements or the Commission's rules implementing those requirements can continue to withstand First Amendment scrutiny.[34] The answer is clearly no.

"There can be no disagreement" that "cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."[35] As the Supreme Court has explained, "cable operators exercise 'a significant amount of editorial discretion regarding what their programming will include.'"[36] Simply put, leased access requirements constitute compelled speech,[37] like the newspaper access requirements invalidated in *Miami Herald Publishing Co. v. Tornillo*.[38] As discussed above, the explicit purpose of leased access is to force a cable operator to carry content that it would not otherwise carry. The statute itself expressly states that, except in very limited cases, a "cable operator shall not exercise any editorial control over any video programming provided" through leased access.[39] In light of recent Supreme Court precedent as well as the changes to the video marketplace—which allow content providers to deliver content to consumers through a variety of alternative means—the

---

[34] *Second FNPRM* at ¶ 47.

[35] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636-37 (1994).

[36] *City of Los Angeles v. Preferred Commc'ns, Inc.*, 476 U.S. 488, 494 (1986) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979)); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1322 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) (noting that cable operators "are similar to publishing houses, bookstores, playhouses, movie theaters, or newsstands in the sense that they exercise editorial control in picking the content they will provide to consumers").

[37] *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 820 (1996) (Thomas, J., concurring in the judgment and dissenting in part) ("There is no getting around the fact that leased and public access are a type of forced speech.").

[38] 418 U.S. 241, 254-56 (1974).

[39] 47 U.S.C. § 532(c)(2).

leased access requirements and the Commission's implementing rules can no longer be squared with the First Amendment.

A. Leased Access Requirements Are Content-Based Regulations Subject to Strict Scrutiny, Which They Cannot Survive.

The Supreme Court has made clear that laws "defining regulated speech by its function or purpose" are subject to strict scrutiny.[40] Even "facially content neutral laws" are nevertheless "content based" and subject to strict scrutiny if they "cannot be justified without reference to the content of the regulated speech."[41]

The leased access regime is content based both on its face and because it cannot be justified without reference to the content of the regulated speech. The express intent of the leased access requirements is to override a cable operator's editorial discretion so as to affect the ultimate composition of programming provided to their subscribers.[42] Congress thus compelled cable operators to carry unaffiliated commercial content that "competes with existing cable offerings" or was "otherwise not offered by the cable operator (for political reasons, for instance)."[43] An operator may partially satisfy its leased access obligation, up to 33% of designated channel capacity, with programming regardless of it affiliation,[44] but that programming must meet a definition of "qualified" that is based *explicitly* on the programming's content and, indeed, even based on the particular topics and viewpoints covered by the programming.[45]

---

[40] *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

[41] *Id.* (internal quotation marks omitted).

[42] House Report at 19.

[43] *Id.* at 30.

[44] 47 U.S.C. § 532(i)(1).

[45] *See* 47 U.S.C. § 532(i)(2)-(3) (defining "qualified educational programming source" as "a programming source that devotes substantially all of its programming to educational or instructional programming that

The unmistakable goal of the leased access regime is to regulate the composition of programming content that a cable operator may offer its subscribers by requiring it to carry unaffiliated programming that it might otherwise choose not to carry or to replace a portion of that programming with alternative programming that meets the statute's content-based (and viewpoint-based) definition of "qualified" programming. The leased access law thus cannot even be described—let alone justified—without reference to the content of the regulated speech.

Strict scrutiny applies even assuming that the leased access requirements are neutral among viewpoints. The Supreme Court has made clear that a government regulation mandating speech can be content-based—and thus subject to strict scrutiny—even if it is viewpoint-neutral.[46] Indeed, just last Term, the Supreme Court reiterated that laws that compel speakers to "speak a particular message" and thereby "alter the content of their speech" are content-based regulations without regard to the particular viewpoint communicated in the compelled speech.[47] Leased access is expressly intended to "alter[] the content" of cable operators' speech by mandating the carriage of programming that they would otherwise reject.

Leased access also triggers strict scrutiny for the independent reason that it establishes *speaker*-based preferences for unaffiliated programmers with whom the cable operator would not otherwise voluntarily negotiate a cable carriage agreement. Thus, irrespective of the content those independent programmers provide, the leased access requirements force cable operators to

---

promotes public understanding of *mathematics, the sciences, the humanities, or the arts*" and "qualified minority programming source" as "a programming source that devotes substantially all of its programming to *coverage of minority viewpoints, or to programming directed at members of minority groups*" (emphasis added)); 47 C.F.R. § 76.977(b)-(c) (same).

[46] *Reed*, 135 S. Ct. at 2230 ("[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.").

[47] *Nat'l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) ("*NIFLA*") (internal quotation marks and brackets omitted) (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

carry the speech of speakers to whom they would not otherwise provide a platform. The Supreme Court and other courts have made clear that speaker-based preferences warrant strict scrutiny just as content-based preferences do.[48]

Relatedly, the fact that the leased access requirements place a burden *only* on the speech of cable operators also warrants strict scrutiny. Leased access forces cable operators to set aside capacity and associate themselves with and disseminate content over which they have no editorial control, while leaving the speech of their competitors completely unburdened. The fact that the statute singles out for regulation the speech of only certain speakers is deeply problematic. The Supreme Court has warned that its "precedents are deeply skeptical of laws that 'distinguis[h] among different speakers, allowing speech by some but not others.'"[49]

For all of these reasons, the leased access requirements are subject to strict scrutiny. While the D.C. Circuit's 1996 ruling in *Time Warner* applied intermediate scrutiny in upholding the leased access requirements against a facial challenge, the Supreme Court's recent decisions in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) and *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*") have effectively superseded the D.C. Circuit's reasoning. In *Time Warner*, the D.C. Circuit first concluded that leased access requirements were not content-based because they "do not favor or disfavor speech on the basis

---

[48] *See, e.g.*, *Reed*, 135 S. Ct. at 2230; *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265-66 (11th Cir. 2005); *Beckerman v. City of Tupelo*, 664 F.2d 502, 513-14 (5th Cir. 1981).

[49] *NIFLA*, 138 S. Ct. at 2378 (quoting *Citizens United v. FEC*, 558 310, 340 (2010)); *see also Reed*, 135 S. Ct. at 2230 ("Because speech restrictions based on the identity of the speaker are all too often simply a means to control content, we have insisted that laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content preference. Thus, a law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny simply because it could be characterized as speaker based." (internal quotation marks, citations, and brackets omitted)); *Minneapolis Star and Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. 575, 581 (1983) (applying strict scrutiny to hold that a state tax on paper and ink that "single[d] out the press" and "target[ed] a small group of newspapers" violated the First Amendment).

of the ideas contained in the speech or the views expressed."[50] But that reasoning confuses viewpoint-based regulation with content-based regulation in exactly the way that *Reed* rejects.

In *Reed*, the Ninth Circuit had similarly reasoned that the ordinance at issue "was content neutral because it does not mention any idea or viewpoint, let alone single one out for differential treatment."[51] As the Supreme Court explained in overturning the Ninth Circuit, that court had conflated the "two distinct but related limitations"—content-based regulation and viewpoint-based regulation—"that the First Amendment places on government regulation of speech."[52] The Supreme Court clarified that laws can be content-based even if they are viewpoint neutral.[53] As explained above, the leased access requirements are content-based because they impose restrictions based on categories of speech and require cable operators to carry specific content—unaffiliated programming that the operator would not otherwise carry—for the express purpose of providing "diversity of information services."[54] Strict scrutiny therefore applies to these requirements "regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."[55] Indeed, the leased access regime is no less content-based than would be a regulation requiring a newspaper to print five letters to the editor chosen at random.[56]

---

[50] *Time Warner Entm't Co., LP v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996).

[51] *Reed*, 135 S. Ct. at 2229 (internal quotation marks omitted).

[52] *Id.* at 2229-30.

[53] *Id.* at 2230.

[54] House Report at 19.

[55] *Reed*, 135 S. Ct. at 2228.

[56] *See Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 816-17 (Thomas, J., concurring in the judgment and dissenting in part).

In *Time Warner*, the D.C. Circuit also concluded that the leased access requirements were not subject to strict scrutiny because they were "framed in terms of the sources of information rather than the substance of the information," and because the qualification for other programmers to be able to lease access depends on those other programmers' "lack of affiliation with the operator"—not the "content of their speech."[57] The D.C. Circuit therefore considered it dispositive that the leased access requirements are aimed at promoting diverse *sources* of programming rather than diverse *content*. But that reasoning, too, runs headlong into recent Supreme Court precedent: "the fact that a distinction is speaker based does not, as the Court of Appeals seemed to believe, automatically render the distinction content neutral."[58]

If the law favors one category of speakers over others to "reflect[] a content preference," then strict scrutiny applies.[59] Today, as discussed above, cable operators regularly carry programming from unaffiliated programmers, and leased access programmers have many other avenues to reach viewers. Against the backdrop of today's market, leased access does not advance any interest in diverse sources of programming, but instead promotes carriage of a particular type of content: unaffiliated programming that cable operators, exercising their editorial discretion, have chosen *not* to carry.

The leased access requirements cannot survive strict scrutiny. The requirements could be upheld only if they were narrowly tailored to advance a compelling governmental interest.[60] No court has ever upheld the leased access requirements under this most demanding form of scrutiny, nor suggested that a governmental interest in promoting diverse sources of

---

[57] *Time Warner*, 93 F.3d at 969.

[58] *Reed*, 135 S. Ct. at 2230.

[59] *Id.* (quoting *Turner*, 512 U.S. at 658).

[60] *Id.* at 2231.

programming is the kind of compelling interest that could survive strict scrutiny. Even assuming, however, that this was a compelling government interest, the law is nowhere close to narrowly tailored to advance that interest. As explained below, in light of market changes that have given programmers numerous ways to reach a potential audience, restricting cable operators' editorial discretion to provide a platform to leased access programmers can no longer pass muster under even intermediate scrutiny. *A fortiori* they cannot survive strict scrutiny.

B. Leased Access Requirements Cannot Survive Even Intermediate Scrutiny Due to Dramatic Market Changes Since the Statute Was Enacted.

As explained above, the leased access requirements must be given strict scrutiny. Even if intermediate scrutiny did apply, however, the leased access requirements still would violate the First Amendment. A content-neutral regulation of speech will only be upheld under intermediate scrutiny if it "furthers an important or substantial governmental interest" that is "unrelated to the suppression of free expression" and imposes restrictions on First Amendment freedoms that are "no greater than is essential to the furtherance of that interest."[61] The leased access requirements flunk both the "governmental interest" and "tailoring" tests.

As an initial matter, given the dramatic market changes described above, the purported government interest in forcing cable operators to lease access to non-affiliated programmers to promote the availability of "the widest possible diversity of information sources"[62] can no longer justify the burden imposed—if it ever did. In light of changes to the video marketplace, the purported government interest in forcing cable operators to provide leased access channels is dramatically diminished. A diverse array of alternative platforms provided by MVPDs and online streaming services mean that cable operators are no longer "bottlenecks" or "gatekeepers"

---

[61] *Turner*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

[62] 47 U.S.C. § 532(a).

to television programming.[63] As a result, there is no longer an "important technological difference" between newspapers and cable operators that justifies forcing cable operators to carry the content of non-affiliated programmers.[64] Indeed, the D.C. Circuit has recognized that cable operators "no longer have the bottleneck power over programming that concerned the Congress in 1992."[65]

Yet the significant First Amendment burdens associated with compelled speech remain.[66] The leased access requirements force cable operators to carry programming regardless of whether their subscribers are interested in receiving it, and even if cable operators—or their subscribers—find the programming objectionable or offensive. As discussed in detail above, this forced association with content that cable operators cannot control puts them (but not their video competitors) at risk of reputational harm. In addition, forced carriage of leased access programming consumes capacity and resources and limits operators' ability to offer the types of streamlined video packages that many consumers now seek. All of the above places cable operators at a disadvantage in today's competitive video marketplace.

---

[63] *See Turner*, 512 U.S. at 656.

[64] *Id.*; *Time Warner Entm't Co., LP v. FCC*, 56 F.3d 151, 184 (D.C. Cir. 1995).

[65] *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009); *see also, e.g.*, *Agape Church, Inc. v. FCC*, 738 F.3d 397, 413-14 (D.C. Cir. 2013) (Kavanaugh, J. concurring) ("In the two decades since Congress enacted the Cable Act of 1992, the video programming marketplace has radically transformed. Cable operators today face intense competition from a burgeoning number of satellite, fiber optic, and Internet television providers—none of whom are saddled with the same program carriage and non-discrimination burdens that cable operators bear."); *Comcast Cable Commc'ns, LLC v. FCC*, 717 F.3d 982, 993-94 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("In today's highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market."); *Cablevision Sys. Corp. v. FCC*, 597 F.3d 1306, 1315-16 (D.C. Cir. 2010) (Kavanaugh, J., dissenting) ("Cable operators no longer possess bottleneck monopoly power.").

[66] *But see Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 171 (2d Cir. 2013) ("[I]mposing current burdens . . . must be justified by current needs." (quoting *Shelby County v. Holder*, 570 U.S. 529, 536 (2013)).

The leased access requirements also do not satisfy the "tailoring" inquiry, because they are no longer necessary (if they ever were) to ensure diverse sources of programming. Leased access programmers now have numerous other—and indeed, in many cases, better—means to transmit their content to the public. Requiring cable operators to nevertheless carry these channels is unnecessarily burdensome.[67] And as noted above, the government does not impose these carriage requirements on other video programming platforms like broadcasters, satellite, and over the top video providers including "virtual" MVPDs whose offerings essentially replicate those of traditional cable operators. As a result, the government's means of advancing its interest is also fatally *under*inclusive.[68]

The D.C. Circuit's contrary conclusion when confronted with a facial challenge to the statute in *Time Warner* is no longer valid. When the D.C. Circuit evaluated the leased access statute in 1996 on its face and with no administrative record, it concluded that the government interests that those statutory requirements 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 in light of the market conditions at the time; and that the requirements did not burden substantially more speech than necessary to promote such interests.[69] Today, a contrary conclusion is compelled by the record assembled in this proceeding, which shows that the leased access requirements are not needed to ensure a diversity of information sources, but instead impose an unneeded, unjustified, and

---

[67] *See supra* at Sections II and III.

[68] *See, e.g.*, *Reed*, 135 S. Ct. at 2232 (explaining that underinclusive regulations of speech are not narrowly tailored because they leave "appreciable damage to [the government's] interest unprohibited"); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) (striking down selective ban on newsracks under intermediate scrutiny because the prohibited newsracks were "no more harmful than permitted newsracks").

[69] *Time Warner*, 93 F.3d at 969-71.

unique burden on the editorial discretion of cable operators in an increasingly competitive marketplace containing wireline companies, satellite providers, and Internet-based video services. The D.C. Circuit's determination in *Time Warner* that the leased access statute could pass constitutional muster in 1996 does not apply to real-world conditions in 2019.

V. THE COMMISSION MUST ENSURE THAT ITS RULES REDUCE THE FIRST AMENDMENT BURDEN ON CABLE OPERATORS.

As demonstrated above, the leased access statute is unconstitutional. Recognizing that the Commission nonetheless has a statutory obligation to implement the leased access requirements,[70] NCTA urges the Commission to implement the statute in the way that mitigates the First Amendment burdens to the extent possible. Indeed, the Commission has a duty to do so. As the Commission has recognized in prior orders, agencies must implement statutory directives in ways that, while consistent with their statutory duties, minimize constitutional harm to the greatest extent possible.[71]

In particular, the Commission seeks comment on proposals to modify its approach to calculating leased access fees.[72] The surest means to reduce the First Amendment burdens associated with leased access would be for the Commission to eliminate its current rate formula and decline to adopt any new rules that include a mandatory rate formula. Instead, the

---

[70] *See* 47 U.S.C. § 532(4)(B) (directing that the Commission "shall establish rules" implementing the leased access requirements).

[71] *See, e.g.*, *Carriage of Digital Television Broadcast Signals*, Fifth Report and Order, 27 FCC Rcd. 6529, 6537 (2012) (invoking the canon of constitutional avoidance and explaining that the Commission was "persuaded by cable commenters' argument that the dramatic changes in technology and the marketplace over the past five years render less certain the constitutional foundation for an inflexible rule compelling carriage of broadcast signals in both digital and analog formats"); *see also Agape Church, Inc.*, 738 F.3d at 413 (Kavanaugh, J., concurring) (noting that "the FCC also invoked the principle of constitutional avoidance to support its result" and that "the Commission was right to perceive a serious First Amendment problem with the Viewability Rule").

[72] *Second FNPRM* ¶¶ 45-46.

Commission would establish rules under which the "maximum reasonable rates"[73] required by statute could be determined through negotiations between operators and lessees. Such a rule would enable cable operators to negotiate voluntary carriage of leased access programming at market rates. Because the Internet offers content providers a multitude of routes to reach viewers on television sets and mobile devices, often at minimal or no cost, it is no longer necessary or reasonable for the Commission to set a formula to establish the "maximum reasonable rates" for leased access.

To be clear, however, even this regime would not eliminate the First Amendment problem.[74] Cable operators still would be required to conduct negotiations with leased access programmers, with whom they may prefer not to deal at all, and still could be forced to carry content at a rate that the cable operator believes to be too low, but that the Commission finds to be reasonable.

Assuming that the Commission nonetheless concludes that the statute requires it to establish a formula for setting maximum reasonable leased access rates, the Commission should adopt NCTA's proposal to modify the existing rate formula by substituting a tier-specific implicit fee calculation for the current cross-tier approach that dates back more than 20 years.[75]

Tier-specific rates are the fairest approximation of the maximum reasonable rate. If an operator is prepared to place the leased access programmer on the Basic Service Tier, the rate calculation should be limited to the Basic Service Tier. As NCTA has previously explained,[76]

---

[73] 47 U.S.C. § 532(c)(4)(A)(i).

[74] *See Report and Order* ¶ 17 n.60 ("[S]imply adjusting the price that cable operators may charge for part-time leased access would not address the First Amendment concerns that it presents.").

[75] *Second FNPRM* ¶ 45.

[76] NCTA Comments at 25-28.

under the Commission's existing rules, the average implicit fee is currently derived by determining the subscriber revenues from *all* tiers with greater than 50% subscriber penetration and then subtracting the total amount the operator pays in programming costs per month for those tiers, weighted by "subscriber channels."[77] This calculation results in a "tier neutral" leased access rate, but it means that the lessee will pay the same per-channel fee regardless of whether it is carried on the basic tier or on a higher level tier (accounting for differences in the number of subscribers). The Commission adopted this element of its leased access rate formula because, it explained, its rate rules at that time "generally are based on the principle of tier neutrality, which required cable operators to charge the same per channel rate regardless of the programming costs incurred on a particular tier."[78] But those "tier neutral" rate rules are long gone, since Congress deregulated cable programming service tier rates in 1999.

A "tier neutral" approach distorts the true value of the carriage of leased access programming on the basic service tier. There is no reason to continue to require operators to undertake this artificial "tier blending" when calculating the rates. Instead, the Commission should modify its implicit fee calculation to permit cable operators that choose to carry a leased access channel on the basic service tier to calculate the implicit fee based only on the channels and programming costs for that specific tier. Adopting such an approach would have several positive outcomes. Tier-specific rates will better reflect the value to the leased access programmer of carriage on the tier on which it is actually being carried. It also will better match an operator's marketplace decision as to tier placement. In addition, this approach would substantially simplify and streamline the rate calculation by eliminating the need for an operator

---

[77] 47 C.F.R. § 76.970(e).

[78] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access*, Report and Order, 12 FCC Rcd. 5267, 5291 (1997).

to determine programming costs for many dozens of programming networks that are typically carried on other tiers.

VI. CONCLUSION

Today's video marketplace is vibrant and competitive, providing consumers with innumerable sources of video programming that they can access on a wide variety of platforms. The leased access regime is a relic of the past and, to the extent it was ever justified, technological advancements over the past two decades have invalidated any justification for the regime's continued existence today. NCTA therefore respectfully requests that the Commission expressly conclude that the leased access provisions and the Commission's implementing rules can no longer withstand First Amendment scrutiny, and to reduce the First Amendment burdens imposed by this regime by eliminating the current rate formula in favor of market negotiations. In the alternative, the Commission should allow rates to be calculated using a tier-specific implicit fee calculation.

Respectfully submitted,

/s/ Rick Chessen

Howard J. Symons
Jessica Ring Amunson
Matthew E. Price
Andrew C. Noll
Jenner & Block LLP
1099 New York Avenue, NW
Suite 900
Washington, DC 20001
(202) 639-6000

Rick Chessen
Neal M. Goldberg
Radhika Bhat
NCTA – The Internet & Television Association
25 Massachusetts Avenue, N.W. – Suite 100
Washington, D.C. 20001-1431
(202) 222-2445

July 22, 2019