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

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

INTRODUCTION AND SUMMARY

The "commercial leased access" provisions of Title VI of the Communications Act were initially enacted in 1984 and refined in 1992. Their purpose was explicitly set forth in the statute – "to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information services are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."[2] In the years that followed, the video marketplace has been radically transformed in a manner that makes leased access an anachronism. In particular, the Internet has evolved into a readily available and virtually unlimited platform for the distribution of free and subscription-based video services. As a result, and with the development of competition among cable operators and other multichannel video

1 NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving approximately 85 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest provider of broadband service after investing more than $250 billion over the last two decades to build two-way interactive networks with fiber optic technology. Cable companies also provide state-of-the-art competitive voice service to more than 30 million customers.

2 47 U.S. Code § 532(a).

programming distributors ("MVPDs"), consumers now have a competitive choice of multiple delivery systems offering more programming options of more diverse types from more diverse sources than was imaginable a quarter century ago.

Today, to the extent leased access affects video competition at all, its impact is adverse. Its burdens are imposed solely on cable operators and on none of cable's robust competitors. This reality has obvious implications for the continuing need for, and constitutionality of, the statutory requirement. And while the Commission cannot repeal the statute, it should, (1) take steps, in revisiting its rules, to minimize the burdens that these unnecessary constraints on speech impose on cable operators, and (2) recommend to Congress that the leased access provisions be repealed.

The Further Notice of Proposed Rulemaking takes the right steps in this direction. It proposes to vacate the order and rule amendments that were adopted a decade ago, but never took effect, because both the United States Court of Appeals for the Sixth Circuit and the Office of Management and Budget found them to be flawed from the outset. In any event, the factual record assembled in 2008 provides no meaningful basis for assessing whether any such amendments are beneficial or reasonable in 2018. Continuing to argue about the legality of the never implemented 2008 rules would be a useless exercise, and the Commission is right to propose pulling the plug on them.

We welcome the Commission's specific request for comments on whether and to what extent the leased access rules implicate First Amendment interests. Forcing cable operators – whose constitutionally-protected exercise of editorial discretion was recognized more than 30 years ago by the Supreme Court – to carry programming that they would otherwise choose not to carry raises serious First Amendment problems. When the United States Court of Appeals for the D.C. Circuit upheld the statutory leased access provisions in 1996, it relied on legal precedents and

factual findings that were based on the video marketplace and the cable technology of another, very different era. In today's marketplace, competition among MVPDs and between MVPDs and online video providers, the enormous number of cable channels carrying networks unaffiliated with the cable operator, and the ability of cable customers to easily switch among different video delivery platforms have eliminated the "bottleneck" characteristics on which the Court relied in finding that the leased access rules were subject to and survived "intermediate" First Amendment scrutiny.

The Commission is also right to propose and/or seek comment on several rule changes that would reduce unnecessary and unreasonable burdens on cable operators and to ask whether there are "any other ways in which we should modernize our leased access rules." In particular, NCTA welcomes and endorses the proposed amendment that would require cable systems, large or small, to respond only to "bona fide" requests for leased access information. Requiring a more substantial degree of seriousness on the part of prospective leased access applicants (including an initial application fee) is wholly reasonable and will help weed out frivolous requests.

So, too, would be an amendment to the rules clarifying that cable systems can impose reasonable security deposits and/or prepayment requirements equivalent to sixty days of the applicable lease fee. These modest steps would help offset the considerable costs incurred by cable operators in preparing for the use of a leased access channel and, in particular, ensure that such costs are not incurred for an application that is ultimately not used or used for only a brief period of time before termination based on non-payment.

At a minimum, we support extending the time for responding to leased access requests, especially for requests to lease time on multiple systems. In addition, we propose that the Commission revisit its part-time least access rules. If it chooses to retain them, it should, at the

very least, modify them in light of the burdens of making part-time access available and in light of changes in the video marketplace that provide numerous alternative outlets for programmers wanting to distribute single programs or blocks of programming instead of leasing a linear cable channel. Nor is it necessary or reasonable to continue to impose on cable operators the costs and burdens of calculating maximum permissible leased access rates pursuant to a ratemaking formula. Even if such a formula were retained, it should be rationalized by focusing on the average implicit fee for the basic tier on which the leased access channels are actually offered and by affording operators the option of establishing regional or national leased access rates.

I. THE CIRCUMSTANCES THAT CAUSED CONGRESS TO REQUIRE A LEASED ACCESS OPTION FOR UNAFFILIATED CABLE PROGRAMMERS NO LONGER EXIST.

When Congress adopted the leased access provisions in 1984 and amended them in 1992, it did so based on a number of relevant facts that no longer exist today. For most television households at that time, the only video alternative to over-the-air broadcast television stations – was the single cable operator authorized to serve its area. No video programming at all was available over the Internet, which did not even exist as a commercial matter. There was no competition yet from Direct Broadcast Satellite (DBS) services, and no competition from telephone companies, which were barred by law from offering video programming to customers in their telephone service areas.

Cable television made it possible to receive more channels of programming than the handful of broadcast stations available over the air – but not many more. Even as late as 1992, the average cable system offered only 36 channels, which included local broadcast stations, public, educational, and governmental access channels, and a smattering of satellite-delivered program

networks.[3] Many of those networks were owned, wholly or in part, by cable operators, who had invested in them in order to ensure that their service – which originally consisted of the retransmission of distant broadcast signals into rural areas unserved or underserved by broadcast stations – would offer a sufficient array of quality *non-broadcast* programming to attract viewers and justify their investment in new systems in urban and suburban areas already served by over-the-air broadcasting.

Congress's concern in 1984 was that, in these circumstances, there would be a lack of diversity of ownership in the program networks offered to cable customers and little opportunity for networks unaffiliated with the cable operator to gain carriage on the small number of available channels on most systems.[4] With only 20 or 30 channels available on most cable systems, 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 economics of such leased access were never conducive to its purpose. Most cable program networks, to be sustainable, relied at least in part on subscriber fees. Cable operators typically paid networks for carriage to their subscribers on a per-subscriber basis. Yet leased access required competitors of those networks to pay the cable operator for carriage – a model that was only conducive to certain types of programming whose business models did not resemble that of most networks competing for carriage on cable systems, such as channels carrying full-time advertising or shopping (where revenues are not dependent on subscriber fees) or programming not intended to be self-supporting.

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3 *See, e.g.*, Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102nd Cong., 1 Sess. 12 (1991).

4 *See, e.g.*, Report of the House Committee on Energy and Commerce, H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. 48 (1984).

Congress recognized this fact from the outset and did not expect cable operators to subsidize leased access programmers. In 1984, Congress expressly authorized operators to establish rates, terms and conditions that were "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[5] In 1992, Congress directed the Commission itself to establish maximum reasonable rates, but Congress retained the requirement that such rates not adversely affect cable systems.[6] Since then, the Commission has tried three times to establish a maximum rate formula that meets this directive, based on the "implicit fees" that program networks "pay" for carriage on cable systems.

But while the Commission was struggling to arrive at a rate formula that met its statutory mandate, cable systems – and the marketplace in which they compete – were dramatically changing in ways that have completely obviated the concerns that led to enacting leased access in the first place. Today, cable systems typically provide *hundreds* of linear channels of programming, and *thousands* of on-demand programs. At the same time, vertical integration of program networks and cable systems has greatly diminished.[7] The overwhelming majority of channels are filled with networks and programming of diverse content and diverse ownership, with no affiliation with the cable operator. This fact alone would eliminate any concern that there is no room on cable systems for unaffiliated programming of interest to viewers.

Moreover, the ability of a single franchised cable operator in a community to foreclose unaffiliated programmers' access to viewers in that community no longer exists because there are now many alternative routes to the consumer – including, most prominently, routes created by the

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5 47 U.S.C. § 532(c)(1).

6 *Id.* § 532(c)(4).

7 Between 1994 and 2017, the percentage of national cable programming networks in which cable operators had an ownership interest declined from 52.8% to an estimated 9.1%. *See* NCTA – The Internet & Television Association Comments, MB Docket No. 17-214 (filed Oct. 10, 2017).

Internet. YouTube is the most widely used platform already being used to distribute all sorts of video programming – long-form or short-form, single programs or series – aimed at general, nationwide, local, or special interest audiences.

Program networks and other content providers may gain carriage on the platforms of online streaming services, such as SlingTV, DirectTV Now, PlayStation Vue, Hulu with Live TV, YouTube TV, and others, or on an on-demand platform such as Netflix, Hulu, Amazon Prime, iTunes, Google Play, Vudu, Epix, Crackle, and others. Content providers can also create their own video apps or websites, which can be downloaded or accessed by viewers and viewed on a countless array of mobile devices, as well as television sets using devices such as Chromecast, Roku, Apple TV, Amazon FireTV, and others. Content providers can contractually arrange to have their apps 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, so that virtually *every* content provider can reach television viewers without gaining carriage on *any* multichannel platform.

Moreover, even before the advent of Internet video and online video distributors, new MVPD alternatives were already enabling programmers to reach viewers through a variety of pathways other than a sole franchised cable operator – at least the two national DBS services, and often the local telephone company and, perhaps, another franchised "overbuilder," each providing comparably sized arrays of linear and on-demand programming. If attractive programming is refused carriage by a cable operator, viewers can receive it by switching to one of the other available MVPDs.[8] If *none* of the available alternatives chooses to carry the programming, it will

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[8] Those DBS and telephone companies are sturdy competitors. Indeed, three of the top five MVPDs, in terms of number of customers served nationwide, are DBS and/or telephone companies.

not be because of non-affiliation, but rather because multiple MVPDs have independently determined that the programming will be of little value to viewers.

Unlike the television sets on the market when the leased access statute was enacted, today's digital sets all have multiple inputs that enable the connection of multiple devices and MVPD services and the easy switching among such inputs using a remote control. This means that a content provider that cannot obtain carriage on a cable system can even reach the customers *of that system*. And some MVPDs have even begun to provide subscribers with access to alternative video services via the set-top boxes they provide subscribers, thus eliminating even the need to switch inputs to access a virtually limitless variety of content.[9] A content provider may get paid a per-subscriber fee to be carried on an online streaming service, it may sell its programming directly to subscribers on the Internet, or it may simply make its programming available online at no charge. In other words, unlike leased access, under which content providers must pay a fee to be carried, the Internet now affords content providers, including those that cannot be sustained simply by advertising revenue, a host of other options to reach potential viewers.

The Internet, therefore, is not simply a substitute for leased access. It is a *superior* alternative to leased access and has achieved what leased access could not. It provides program networks and other content providers with a route to all viewers – not just cable subscribers. And, unlike leased access, it makes that route available to *all* content providers that might have sought cable carriage – not just those that can afford to *pay* for carriage. This does the job that Congress intended and obviates the need for the imperfect, ineffective, burdensome – and, as we discuss

[9] *See, e.g.*, Comcast, *Comcast Debuts Integrated YouTube App on XFINITY X1* (Sept. 12, 2017), https://corporate.comcast.com/news-information/news-feed/x1-youtube-app; *see also*, Comcast, *Sling TV's International Programming Now Available on X1* (Apr. 5, 2018), https://corporate.comcast.com/stories/sling-tvs-international-programming-now-available-on-x1.

below, constitutionally problematic – alternative that Congress created for a far different video marketplace a generation ago.

II. LEASED ACCESS IS NO LONGER SUSTAINABLE UNDER THE FIRST AMENDMENT.

In light of these changed circumstances, the leased access provisions of the Communications Act, which compel cable operators to carry content not of their choosing, are unconstitutional on their face.

In *Time Warner Entertainment Co., LLP v. FCC*,[10] the D.C. Circuit upheld the statutory provisions in 1996. Relying on *Turner Broadcasting Sys., Inc. v. FCC*,[11] the Court held that the provisions are "content-neutral" and therefore subject to intermediate First Amendment scrutiny, and that the provisions survived such scrutiny. First, it found that the government interests that they 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. Second, it held that the statutory requirements did not burden substantially more speech than necessary to promote such interests.

Because of the enormous changes in the video marketplace during the last two decades, neither of those determinations remain valid. While, as the result of those marketplace developments, strict scrutiny may now be the appropriate standard of review,[12] strict scrutiny is

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10 *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) ("*Time Warner*").

11 *Turner Broad. Sys. v. FCC*, 512 U.S. 622 (1994) ("*Turner*").

12 The D.C. Circuit's determination that the leased access provisions are not, in fact, aimed at favoring or restricting particular content and are content-neutral was consistent with the Supreme Court's holding in *Turner*. But while laws that target specific content are *always* subject to strict scrutiny, it is not the case that laws that are content-neutral are *never* subject to strict scrutiny. For example, laws that force a newspaper to publish content that it would otherwise choose not to publish are subject to strict scrutiny and are generally impermissible even when the requirement is content-neutral. *See Miami Herald Pub. Co. v. Tornillo*, 418 U.S.

hardly necessary to find that the leased access rules no longer pass First Amendment muster. Even under intermediate scrutiny, it's not a close call. The bases on which the D.C. Circuit upheld the leased access rules under intermediate scrutiny in 1996 have been completely eroded.

Specifically, the rules' impact on cable operators' editorial discretion can no longer be justified as necessary to further the government's interests in promoting diversity and competition. Those interests, it should be noted, are *not* the same as the government's interests underlying the must-carry rules addressed in *Turner*. In that case, the interest was in ensuring availability of diverse programming from a multiplicity of sources for viewers who relied on *over-the-air* broadcast television. Leased access, in contrast, was aimed at ensuring diverse programming from a multiplicity of sources for *cable* customers.

With respect to diversity of sources, the average number of channels provided by cable systems in 1992 when the statutory provisions were adopted was 36.[13] Most communities were served by only a single franchised cable system, and there were no alternative sources of multichannel video programming. If the cable operator chose, for whatever reason, not to carry a particular content provider's programming on one of those channels, the content provider would have had no ability to compete for viewing in the community. Today, there is no such bottleneck, and the array and diversity of programming available to consumers in virtually all

241 (1974). The *Turner* decision distinguished cable from newspapers because while nothing prevents newspaper readers from accessing other newspapers from other cities, the physical connection of cable to subscribers' television sets effectively precludes them from accessing any other television programming in their homes. *Turner*, 512 U.S. at 656. But that distinction has been overcome by changes in the marketplace and in technology. Today, virtually all television sets and A/V receivers are designed with multiple video inputs that enable households to receive content from two or more MVPDs, as well as from Internet-delivered video programming services and over-the-air broadcasters. And they can access and readily switch among all these newly available video programming services (most of which did not exist at the time of the *Turner* decision) using their remote controls. In light of this erosion of the Court's rationale for distinguishing *Tornillo*, it is likely that strict scrutiny would now be found to be the appropriate standard of review.

[13] *See, e.g.*, Report of the Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102nd Cong., 1st Sess. 3 (1991).

communities is unbounded. Sparked by the transition to digital technology and the massive rebuilds and upgrades of cable facilities, cable systems now provide hundreds of channels of programming – and thousands of on-demand programs – of all formats, serving the broadest and the narrowest of interests.

With respect to competition, the number of cable program networks in which cable operators have ownership interests has dwindled to only a small fraction of the total number of networks available on all those channels. The notion that any single cable operator might significantly diminish the number and diversity of sources of programming on a system by unfairly favoring networks that it owns – or even by refusing to carry a particular network that it simply would prefer not to carry (*i.e.*, by exercising its editorial discretion) – is no longer a realistic concern. As the U.S. Court of Appeals for the Second Circuit observed in a related context, changes in the video programming marketplace "strongly suggest an industry trending toward more rather than less competition," and "[i]f the trend continues, a day may well come when the anticompetitive concerns animating Congress's enactment of [program carriage obligations under 47 U.S.C. § 616(a)(3)-(5)] will so effectively be eliminated or reduced as to preclude government intrusion on MVPDs' carriage decisions."[14] That day has come with respect to leased access.

Moreover, it has been many years since content providers and consumers had to rely on a single franchised cable operator as the only provider of non-broadcast video programming in a community. For all homes with Internet access, the array of available video programming from

14 *Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 161 (2d Cir. 2013). Although the Second Circuit found that "such a day has not yet arrived" in the program carriage context, the video programming industry has evolved significantly since 2013, and a court analyzing today's marketplace might well reach a different conclusion. In any event, the clear trend is for courts to treat MVPD carriage mandates with increasing skepticism in light of the principle that "a law 'impos[ing] current burdens . . . must be justified by current needs." *Id.* (*quoting Shelby County v. Holder, 570 U.S. 529, 536 (2013)*).

an infinite number of sources eliminates any worries that consumers will be deprived of diverse and competitive video programming. It also ensures that any content provider will have a platform to reach consumers – although the leased access requirements were meant to ensure only that there would be diversity of voices and competition in the marketplace, not that *every* programmer could gain a spot on a cable platform.

In addition, the two large national DBS services are available in virtually all communities. And telephone companies have entered the MVPD marketplace in many communities, with AT&T and Verizon ranked 1st and 5th among all MVPDs nationwide. (DISH is 4th). This further reduces any likelihood that particular programming of interest to consumers will not be available because of any anticompetitive or other reason that a particular operator might have for refusing to carry it.

As a result of these marketplace developments, the leased access rules are no longer necessary or effective in promoting their intended goals – because the marketplace is already doing the job. The only effect of the rules is to interfere with the marketplace and, more importantly, with the protected editorial discretion of cable operators. And given that changes in marketplace conditions have rendered the rules unnecessary and ineffective in promoting the government's interests in diversity and competition, *any* forced carriage of content at odds with the editorial discretion of cable operators is sufficient to render the rules unconstitutional under the standards of intermediate scrutiny.

The FCC should express its view that, given the marketplace changes over the past two decades, the leased access provisions can no longer withstand First Amendment scrutiny. To the extent the Commission follows the statutory mandate in the interim, the Commission should at least interpret that mandate in a manner that lessens the burden it imposes on protected speech.

As we discuss in the following sections, there are several steps, including those identified in the Notice of Proposed Rulemaking, that the Commission can readily take to achieve that end, and it should do so.

III. THE COMMISSION SHOULD VACATE THE NEVER-IMPLEMENTED REPORT AND ORDER OF A DECADE AGO AND SHOULD MODIFY THE RULES TO ALLEVIATE THEIR BURDEN ON CABLE OPERATORS.

A. The Commission Should Vacate the 2008 Report and Order

The first step towards reducing the unnecessary burdens of the leased access rules is to vacate the Report and Order released by the Commission in 2008.[15] The rules adopted in that decision are not themselves currently imposing any additional burden on cable operators only because they have never taken effect.[16] The Office of Management and Budget refused to approve the Report and Order because of its unreasonable regulatory burdens.[17] Meanwhile, the United States Court of Appeals for the Sixth Circuit stayed the rules because of the prospect of irreparable harm – and the likelihood that NCTA would prevail on the merits of its challenge to the reasonableness of the Report and Order.[18] The Court held the appeal in abeyance until the Commission determined whether it would accede to or override OMB's disapproval.

The 2008 Order, if allowed to take effect, would have made leased access *more* burdensome on cable operators – an action that even a decade ago would have been a step in

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15 *In re Leased Commercial Access*, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2008) ("2008 Order").

16 *In re Leased Commercial Access*, Report and Order and Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2013) (clarifying that rules published prior to the 2008 Order have remained in effect continuously and are still in effect).

17 *Notice of Office of Management and Budget Action*, OMB Control No. 360-0568 (July 9, 2008).

18 Order, *United Church of Christ Office of Commc'ns, Inc. et al. v. FCC*, No. 08-3245 (and consolidated cases) (6th Cir., May 22, 2008).

precisely the wrong direction. Among other things, the Order would have changed the formula for establishing the maximum permissible rate for leased access in a manner that would have resulted in rates approaching zero. It was premised on the flawed view that the Commission's task was to ensure more extensive usage of leased access by content providers – a view specifically rejected by the United States Court of Appeals for the District of Columbia Circuit in *ValueVision v. FCC*,[19] and implicitly rejected by the Sixth Circuit when it found that NCTA was likely to succeed in its challenge to the 2008 rules.[20] Congress made clear that the maximum permissible rate should not be so low as to adversely affect the operation of the cable system.

Today, for the reasons described above, it is necessary to take steps to make leased access *less* burdensome. A good and expeditious way to do that is to clear away the overhang of the 2008 rules altogether by vacating the 2008 Order, which will simultaneously put to rest any further proceedings involving the OMB determination and the Sixth Circuit appeal. This will enable the Commission to again consider whether any modifications of its existing rules are appropriate – and, this time, to adopt lawful modifications that *alleviate* rather than *exacerbate* the burdens imposed by leased access.

B. The Rules Should Only Require Responses to Bona Fide Requests.

As the rules currently stand, the procedures and responsibilities imposed on anyone seeking to lease capacity to provide programming on a cable channel are essentially non-existent.[21] Yet the costs, burdens and responsibilities of cable operators to comply with a request for leased access are

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19 *ValueVision International, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

20 Order, *United Church of Christ Office of Communications, Inc. et al.* No. 08-3245 (6th Cir., May 22, 2008).

21 Larger operators must respond to all written leased access requests. *See In re Implementation of Sections of the Cable Teleision Consumer Protection and Competition Act of 1992; Leased Commercial Access*, Report and Order, 12 FCC Rcd 5267, 5331 (1997) ("1997 Report and Order").

significant. Cable operators at the cable system level are compelled to deal with anyone who asks about information on leased access rates, terms and conditions, and larger cable operators are not allowed to ask the prospective user for even the most basic information.[22] The lack of any sort of application screening process has resulted in the unnecessary imposition of significant, unreimbursed costs on cable operators – costs that ultimately are borne by their cable customers.

Cable operators, and cable operators alone, incur these costs due to the unique nature of compliance with this government-mandated leased access obligation.[23] Unlike the marketplace rates that advertisers pay to buy time on a cable system, the rates charged to leased access users are based on a government-mandated formula that depends on highly specific, variable inputs.[24] Gathering the information necessary to determine leased access rates is no simple task. In addition to calculating the "average implicit fee" rates for full-time and part-time use, operators must also quote prices for technical and studio costs. Those costs are also subject to government scrutiny and can only reflect costs over and above those provided in the usual course to non-leased access programmers.[25] The rules also mandate that operators provide information on how much leased access capacity is available, which is another system-specific calculation. Furthermore, if asked, operators must make sample contracts for leasing time available for review. The steps required to even respond to a simple query about leased access, therefore, consume valuable operator resources.

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[22] *Id.* at 5333 (barring operators from "ask[ing] for any information before responding to a leased access request unless the information is necessary to prepare the required response" and allowing only an exception for certain small systems "because their initial costs of providing this information may be higher than other systems").

[23] In contrast, other Commission rules permit regulated entities to respond only to requests from bona fide requesters. *See, e.g.*, 47 C.F.R. § 22.711 (requiring information regarding rural radio service be provided to bona fide prospective applicants).

[24] *See* 47 C.F.R. § 76.970(e).

[25] 1997 Report and Order, 12 FCC Rcd at 5324.

Cable operators are required to incur these up-front costs without any assurance that the applicant for leased access will actually commit to leasing cable capacity. This means that cable leased access is an all-too-ready and tempting offer for the least serious and least reliable entities to apply for carriage. It is not at all unusual for this to be a wasted exercise on the part of a cable operator. Indeed, it is not unheard of for *more than half* of the requests for information about leased access to not result in any agreements.

The Commission previously recognized this problem, and the rules already provide small cable companies – those that serve a total of 400,000 or fewer subscribers – with some protection against wasting valuable time and resources by allowing them to respond only to "bona fide" leased access applications. Section 76.970 defines a "bona fide" request to require that an applicant provide "(i) The desired length of a contract term; (ii) The time slot desired; (iii) The anticipated commencement date for carriage; and (iv) The nature of the programming." At the very least, those minimal requirements should be extended to apply to *all* leased access requests to *all* cable operators.

But the definition of a bona fide application also should be expanded and amended because those requirements are hardly sufficient to ensure that applications are appropriately serious to warrant the costs and burdens of responding. Operators should be allowed to impose a reasonable application fee ($100), and they should also be allowed to inquire about how the prospective lessee intends to deliver the programming to the cable system. In addition to certain operational questions, operators also should be permitted to require an acknowledgement in the application that certain ordinary commercial protections will apply, including that a lessee must provide proof of

insurance,[26] pay a security deposit, and pass a credit check prior to entering into a lease.[27] The operator should also be permitted to require an affidavit identifying all owners in the applicant and declaring that the applicant and its owners are in compliance with all applicable trade sanctions, including sanctions established under the Office of Foreign Assets Control ("OFAC").

C. The Commission Should Minimize Burdens by Extending the Response Time.

Those cable system personnel tasked with responding to leased access requests have a variety of other responsibilities. This is unsurprising, since whether – if ever – someone might express interest in leasing time on a cable system is wholly outside the operator's control. Leased access requests can come in at any time, seeking launch of programming channels on a random, irregular basis, not tied to any regular system operations.

Under these circumstances, the current rule's provision of 15 calendar days to respond to a leased access request impose an unreasonable and unjustified burden on many cable systems.[28] Allowing just over two weeks for those operators that need to gather and review the complicated data needed to calculate leased access rates (and to draft a leased access contract, if requested) is inadequate regardless of system size. And this is particularly true if a prospective lessee seeks information about multiple cable systems, as is often the case. Accordingly, the Commission should extend the amount of time that operators, large and small, are provided to respond, to 45 days from the date an operator receives a completed bona fide leased access written request.

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[26] Operators are permitted to impose "reasonable insurance requirements on leased access programmers." 47 CFR § 76.971(d).

[27] In addition, the rules should make clear that operators may protect themselves against having to lease time to users whose past history demonstrates lack of financial responsibility. Specifically, to protect operators against financial losses, the rules on bona fide requesters should provide that if a leased access user has previously been dropped for non-payment, an operator can refuse to enter into a leasing agreement with that entity or its principals in the future.

[28] 47 C.F.R. § 76.970(i)(1). Small systems have an additional 15 calendar days to respond. *Id.* § 76.970(i)(2).

D. Application Fees and Deposits.

In dealing with leased access requests over the years, cable operators have found that many costs incurred while processing and accommodating such requests have never been recouped. While limiting responses to "bona fide" prospective lessees is a good first step toward protecting operators against wasting time on frivolous requests, it will not fully protect operators against these unreimbursed expenditures. Cable operators (and their customers) should not be required to pick up the tab for these real costs incurred to process requests. Rather, cable operators should be able to recover some of the costs of gathering the information necessary to respond to a bona fide request in the form of a modest processing fee of no more than $100 per system-specific application.[29]

In addition to permitting operators to assess an application processing fee, operators should also be able to protect themselves against losses that unfortunately arise all too often after launching a financially shaky leased access venture. Experience has shown there remains a need to clarify the rules regarding security deposits to ensure that they continue to serve their original purpose of adequately protecting cable operators.

Current rules permit operators to "require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels."[30] The FCC has explained that "determinations of what is a 'reasonable' security deposit will be made on a case-by-case basis, taking into consideration the past relationship between the operator and the

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[29] The Commission previously rejected a proposal to require a $500 deposit to defray the costs of small systems negotiating an agreement and computing rates. That decision was based on the mistaken notion that restricting requests to "bona fide" applicants would sufficiently protect operators. 1997 Report and Order, 12 FCC Rcd at 5333, ¶ 134. However, experience has shown that even bona fide applicants may opt to walk away without signing agreement once they gain a better understanding of leased access. That still can leave cable operators with unreimbursed costs.

[30] 47 C.F.R. § 76.791(d).

programmer, the amount of time to be leased, the credit history of the leased access programmer, the operator's practices with respect to security deposits in other, similar contexts, and any other relevant factors."[31] Launching a leased access channel, especially on a full-time basis, requires operators to engage in several costly activities, working through the details with the prospective user and engineering the launch of a new video channel on the cable system. Operators may have to modify their existing channel line-up to make room for the launch, make changes to software, coordinate technical needs with the engineering staff, verify that equipment is functioning properly, and arrange to receive the new channel at the system headend, to name just some of the steps.

If a user can only afford to pay for the channel for a single month, an operator will never be able to recoup these costs. This is not uncommon under the existing regime. Given the unusual business model of leased access users, lessees often have difficulty making payments over the contract term and many of these businesses are unsustainable over the long-– and the short -- term. Not surprisingly, some users fall into a non-pay status almost immediately after launch, leaving operators with only a bare security deposit and no way to recoup the additional costs already incurred in connection with the channel launch.

Under the circumstances, rather than leaving operators with the uncertainty attending any case-by-case review of their security deposit practices, the Commission should allow operators to protect themselves against these costs and abuses of the leased access system. Specifically, the Commission should deem a 60-day security deposit or two-month pre-payment to be a "reasonable security deposit." Such an approach would inject a level of seriousness into the endeavor on the

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31 *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933, 16955 (1996) ("1996 Rate Reg Order on Recon.").

part of the lessee that is more commensurate with the level of undertaking needed to launch a full-time leased access channel.

E. Part-Time Leased Access.

Congress imposed a leased access requirement on cable operators to provide an outlet for *channels* of programming that would pay for access to the system.[32] Part-time leased access is nowhere referenced in the Act, and there is no evidence that Congress ever intended cable operators to be in the business of leasing time on a program-by-program basis.[33] Instead, part-time leased access is a regulatory, not statutory, obligation, so the First Amendment concerns highlighted above are particularly relevant.[34] It is past time to revisit this burdensome, Commission-created obligation.

Changes to the marketplace justify a new approach. Part-time programmers today have many alternative ways to reach potential viewers. Most importantly, as discussed previously, the Internet provides a panoply of options, many of which have minimal costs.[35] Part-time programmers can take advantage of these options without imposing any operational, financial, or administrative burden on cable operators. In addition, many cable networks and broadcast stations now offer entities the opportunity to purchase time for program-length material, or even for blocks

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32 47 U.S.C § 532 ("Cable *Channels* for Commercial Use") (emphasis supplied).

33 *In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992-Rate Regulation*, Report and Order, 8 FCC Rcd 5631, 5939 n.1277 (1993) ("Because neither the Act itself, its legislative history nor the record before us distinguishes among particular terms and conditions appropriate for various types of leasing – e.g., leasing an hour on a regular leased channel, leasing a whole channel, or leasing for use a subscription service, we believe that cable operators should be required to accommodate all such leases in a reasonable manner."); 1996 Rate Reg Order on Recon., 11 FCC Rcd at 16952 (1996) (affirming requirement to accommodate both full-time and part-time leases).

34 1997 Report and Order, 12 FCC Rcd at 5298 ("[W]e recognize that part-time leasing is not expressly required by the statute, that it may impose administrative and other costs on cable operators, and that it may pose the risk of capacity being under-used.").

35 *See supra* at 15.

of programming. Even assuming there ever was a reason for the Commission to mandate that operators engage in this line of business, there is no longer.

Nothing in the statute requires that channels be leased on a part-time basis, and the Commission has ample authority to interpret the statutory language as mandating only full-time leased access or otherwise limiting the part-time requirements. And to the extent that the burdens of leased access have become, at the least, constitutionally suspect, the Commission has a duty to interpret the statute in a manner that avoids, to the maximum feasible extent, serious First Amendment problems – which should lead to elimination of mandatory part-time leasing.

If the Commission were nevertheless to retain rules for part-time leasing, it should at the very least limit the burdens imposed by such a requirement. It should reevaluate and revise the current part-time leasing rates to ensure that they adequately compensate operators for the costs and burdens imposed by the part-time obligation.

Much of the administrative burden of leased access stems from the agency's decision in the early days of rate regulation to try to promote leased access usage by permitting leasing in increments of as little as a half-hour. The burdens, administrative and otherwise, of such a requirement far exceed those imposed by 24/7 leased access users. Operators must divert personnel from their other responsibilities to respond to requests from these programmers, engage in contract negotiations and arrange for program delivery from multiple entities per channel. In addition to the manpower issues, requiring operators to open up their systems to part-time leasing often leads to inefficient use of channel capacity. Sporadic leasing has the potential to leave many vacant slots on a channel in cases where part-time lessees come and go, and other part-time users cannot be found to round out a 24/7 channel lineup.

None of these regulatory burdens and additional costs are accounted for in the part-time leasing rates. Rather, the stringent part-time rate rules require a cable operator to derive its part-time rates by prorating its full-time leasing rates, without permitting operators to impose additional charges that might cover the additional costs associated with leasing in such small increments of time or the loss of revenue if a channel occupied by part-time lessees is underutilized.[36]

Cable operators should be able to charge a surcharge to part-time users so that cable operators are fully compensated for unused time on the leased access channel. Such a surcharge for part-time users also would help defray the considerable additional administrative costs that cable operators face for leasing time in much smaller increments.[37]

Further, the Commission currently does not allow operators to wait for a critical mass of part-time lessees before being forced to open up a first channel for leasing. While Commission policy allows cable operators to avoid making room for additional channels for leasing unless the first leased access channel is leased for 75% or more of its programming day and a part-time lessee agrees to lease eight contiguous hours daily for at least a year,[38] there is no minimum amount of part-time leasing required before an operator can be forced to accommodate the first leased access channel.[39] To minimize the burdens of leased access, the Commission should not require operators

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36 The Commission allows operators to charge different time-of-day pricing "provided that the total of the rates for a day's schedule (i.e., 24 hour block) does not exceed the maximum rate for one day of a full-time leased channel (prorated from the monthly rate) and provided that the overall pattern of time of day rates is otherwise reasonable and not intended to unreasonably limit leased access use." 1996 Rate Reg Order on Recon., 11 FCC Rcd at 16951.

37 *See* 1997 Report and Order, 12 FCC Rcd at 5303 (rejecting proposal for 10% surcharge on part-time leased access users based on the expectation that "the financial impact of part-time programming on cable operators should be minimal"). As described above, this has not been borne out by experience.

38 *Id.*, 12 FCC Rcd at 5301.

39 Operators need to accommodate the initial part-time request for leased access by opening up a new channel for part-time leasing if they cannot accommodate leased access part-time users in a comparable time slot on a programmed channel. *Id.* at 5299.

to open up even the first part-time leased access channels unless the lessee (or collective of part-time lessees) commits to providing at least 12 contiguous hours of programming daily for one year. Otherwise, operators would be forced unfairly to displace other programmers, or use valuable bandwidth, to accommodate the occasional user.

F. Full-Time Leased Access Rates.

As Congress intended, the Commission's involvement in all manner of cable rate regulation has been sharply reduced as the rise in competitive multichannel video alternatives has exponentially grown.[40] Congress realized decades ago that it no longer made sense for the Commission to regulate the rates that cable operators could charge their customers to receive the "cable programming service" tier. And in 2015, recognizing the high degree of nationwide multichannel video competition faced by cable operators, the Commission adopted a presumption of "effective competition" that freed cable operators from basic tier rate regulation in virtually all communities. The only remnant of the highly intrusive 1992 rate regulation regime is one that consumes an outsize proportion of cable operator time and energy -- the complicated rules for calculating rates for leasing time from a cable system.

The entire rationale for leased access, as we have shown, has been eroded by the enormous changes in the video marketplace. Continuing to impose a complex rate regulation regime on this continuing requirement is even more anachronistic. The Internet offers content providers of all sorts such a multitude of routes to viewers on television sets and mobile devices, often at minimal or no cost, that it is no longer necessary or reasonable to continue to try to identify a formula that identifies the precise maximum fee that is "at least sufficient to assure that such use will not

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40 *See* 47 U.S.C. § 543(a)(2) (expressing Congress' "preference for competition" over government rate regulation).

adversely affect the operation, financial condition, or market development of the cable system."[41] Nor is it necessary or reasonable to continue to impose on cable operators the costs and burdens of calculating maximum permissible leased access rates pursuant to a ratemaking formula.[42]

Even if the Commission were to retain rate regulation for leased access, at the very least those rate rules should be modified to reduce burdens and to reflect the many changes that have occurred since the "average implicit fee" rules were adopted in 1997. Over time, flaws in the average implicit fee formula have become magnified as cable system bandwidth has increased in value yet the fee formula has failed to keep up.

First, if the 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. 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."[43] This results in a "tier neutral" leased access rate, meaning that the lessee will pay the same per-channel fee if 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."[44] Those "tier neutral" rate rules are long gone, since Congress deregulated cable

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41 47 U.S.C. § 532(c)(1).

42 *See Cable Television Consumer Protection and Competition Act of 1992*, Public Law No. 102-385, 102nd Cong., § 2(b) (stating policy of "rely[ing] on the marketplace, to the maximum extent feasible, to achieve" the goal of promoting the "availability to the public of a diversity of views and information through cable television and other video distribution media").

43 47 C.F.R. § 76.970(e).

44 1997 Report and Order, 12 FCC Rcd at 5291.

programming service tier rates in 1999. Yet the leased access rate rules still require operators to calculate the average implicit fee rates on that basis.

This "tier neutral" approach distorts the true value of carriage of leased access programming on the basic service tier, and 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 average implicit fee calculation to permit cable operators that choose to carry a leased access channel on the basic service tier to calculate the average implicit fee based *only* on the channels and programming costs for that specific tier.

Adopting such a basic tier-specific calculation will have several positive outcomes. It will better reflect the value to the leased access programmer of carriage on the tier on which it is actually being carried, and it also will better match an operator's marketplace decision as to tier placement. An additional benefit is that this approach would substantially simplify and streamline the rate calculation by eliminating the need for an operator to determine programming costs for many dozens of programming networks that are typically carried on other tiers.

Second, the Commission should afford operators the discretion to aggregate system-specific calculations and establish a regional or national leased access rate that would be applied on a "per subscriber" basis. This aggregated per subscriber rate might be higher or lower than the existing system specific rate in any particular case, but the aggregation itself would be revenue-neutral overall. This discretionary option is similar to the equipment averaging approach that Congress and the Commission have permitted in the rate regulation context and should be adopted here.[45]

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[45] *See* 47 U.S.C. § 543(a)(7) (allowing cable operators to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories regardless of the varying levels of functionality of the equipment within each such broad category); *see also id.* § 76.923(c)(1).

Finally, because there may be special circumstances in which the maximum rates derived by the Commission-imposed formula do not adequately compensate an operator for the actual costs and opportunity costs incurred as the result of leased access, operators should be afforded the discretion to exceed the formula's rates, provided it can demonstrate that its rates are, for such reasons, reasonable.

CONCLUSION

Leased access was an imperfect solution to a problem that may have existed when Title VI was enacted but has been solved by a completely transformed video marketplace. The burdensome rules and requirements that leased access inflicts on cable operators — and on no other competitors in the marketplace — no longer serve any useful purpose or government interest, and they no longer can survive even intermediate First Amendment scrutiny, much less the strict scrutiny that would be appropriate today. The Commission is right to revisit its rules implementing the leased access provisions of Title VI. Accordingly, while the Commission cannot, of course, repeal the statute, it should recommend to Congress that the leased access provisions be repealed. It should, to the maximum extent possible, eliminate the unnecessary costs and burdens imposed by those rules in the manner described herein.

Respectfully submitted,

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