

**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

**REPLY COMMENTS OF
NCTA – THE INTERNET & TELEVISION ASSOCIATION**

NCTA – The Internet & Television Association (“NCTA”) submits these reply comments in response to the comments filed on the *Second Further Notice of Proposed Rulemaking* in the above-captioned proceedings.¹

The Commission should reject arguments from Free Press and the Alliance for Communications Democracy (“ACD”) that the cable industry continues to dominate the video marketplace. As most of the comments in this proceeding attest, cable’s market position has eroded significantly since the statutory leased access provisions were enacted in 1984 and amended in 1992. Indeed, not only have the market changes invalidated any need for the leased access regime—assuming there ever was one—they have rendered the leased access regime unconstitutional. The Commission should therefore expressly conclude that the leased access provisions and the Commission’s implementing rules can no longer withstand First Amendment scrutiny and take action to reduce the First Amendment burdens imposed by this regime by eliminating or at least altering the current rate formula.

¹ *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) (“*Report and Order*” and “*Second FNPRM*,” respectively).

I. CLAIMS THAT CABLE OPERATORS CONTINUE TO DOMINATE THE VIDEO MARKETPLACE ARE BASELESS.

Free Press and ACD erroneously contend that cable operators continue to dominate the video marketplace.² To support this specious claim, they provide a handful of cherry-picked—and mostly irrelevant—data points, frequently omitting information that would make plain the data’s inapplicability. Free Press’s and ACD’s assertions are also contrary to the substantial evidence put forth by NCTA and other commenters in this proceeding and the courts’ and Commission’s prior findings.³

Contrary to Free Press’s and ACD’s claims, cable television does not control the viewing habits of American consumers. Netflix is by far the leading pay-TV service in the U.S., with more video subscribers than Comcast, AT&T, and Charter combined.⁴ Netflix is also the most popular platform for watching entertainment on TV, ahead of cable and broadcast.⁵ Other online video providers, Amazon and Hulu, are the number two and number five pay-TV services,

² See Comments of Free Press, MB Dkt. Nos. 07-42, 17-105, at 7-13 (filed July 22, 2019) (“Free Press Comments”); Comments of the Alliance for Communications Democracy, MB Dkt. Nos. 07-42, 17-105, at 7-10 (filed July 22, 2019) (“ACD Comments”).

³ See *Report and Order* ¶¶ 39-40, *Second FNPRM* ¶ 47; *Comcast Cable Commc’ns, LLC v. FCC*, 717 F.3d 982, 993-994 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (“[T]he video programming distribution market has changed dramatically, especially with the rapid growth of satellite and Internet providers. . . . In today’s highly competitive market, neither Comcast nor any other video programming distributor possesses market power in the national video programming distribution market.”).

⁴ Mae Anderson, *Netflix raised its prices and its subscriptions slowed*, PBS NEW HOUR (July 18, 2019), <https://www.pbs.org/newshour/arts/netflix-raised-its-prices-and-its-subscriptions-slowed>; *AT&T Reports Second-Quarter Results*, AT&T (July 24, 2019), https://about.att.com/story/2019/att_second_quarter_earnings_2019.html; *Comcast Reports 2nd Quarter 2019 Results*, COMCAST (July 25, 2019), <https://www.cmcsa.com/news-releases/news-release-details/comcast-reports-2nd-quarter-2019-results>; *Charter Announces Second Quarter 2019 Results*, CHARTER (July 26, 2019), <https://charter.gcs-web.com/static-files/e0f7c07a-b669-4978-a22c-3ee1e42b958b>.

⁵ See Todd Spangler, *Netflix Is No. 1 Choice for TV Viewing, Beating Broadcast, Cable and YouTube (Study)*, VARIETY (July 3, 2018), <https://variety.com/2018/digital/news/netflix-tv-survey-broadcast-cable-youtube-1202864459/>.

respectively.⁶ Internet video constituted 76% of all U.S. Internet traffic in 2017⁷ and is expected to be 79% of all U.S. Internet traffic by 2022.⁸ These numbers are not surprising given the growing popularity of online video content and the declining subscribership of cable and other traditional MVPD services. In fact, cable providers have lost 15 million video customers since 2006, a decline of 23%. Over that same period, the subscription numbers for online video providers like Netflix have skyrocketed.⁹

Despite all this, Free Press contends that MVPDs “are laying claim to the future of the video marketplace” online through v-MVPD services that they own.¹⁰ The rise in v-MVPD services, Free Press argues, means that “many users are not actually cutting the cord but merely changing how they pay the same cable operator.”¹¹ This argument ignores yet another inconvenient fact: many of the most popular v-MVPDs are owned by companies like Google, Hulu, and Sony, not by traditional MVPDs.

Perhaps recognizing the weakness of their argument, Free Press and ACD fall back on the unsupported assertion that it is difficult for content providers to reach audiences over the Internet and that therefore content providers need cable leased access. This too is belied by the

⁶ See Industry Data, NCTA – THE INTERNET AND TELEVISION ASS’N, <https://www.ncta.com/industrydata> (last accessed July 26, 2019) (“NCTA Industry Data”). DIRECTV and Dish are also among the top 10 pay-TV providers, occupying the third spot and the seventh spot, respectively. *Id.*

⁷ NCTA’s comments mistakenly stated that video constituted 76% of all *consumer* Internet traffic in 2017. Video traffic was in fact 80% of consumer Internet traffic in 2017 and will be 81% of consumer Internet traffic by 2022. See *VNI Forecast Highlights Tool*, CISCO, https://www.cisco.com/c/m/en_us/solutions/service-provider/vni-forecast-highlights.html# (last accessed July 26, 2019).

⁸ See *id.* In addition, video is expected to be 80% of U.S. mobile data traffic by 2022, up from to 64% at the end of 2017. *Id.*

⁹ See, e.g., *Here’s how huge Netflix has gotten in the past decade*, BUSINESS INSIDER (Jan. 19, 2017), <https://www.businessinsider.com/netflix-subscribers-chart-2017-1>.

¹⁰ Free Press Comments at 8.

¹¹ *Id.* at 9.

facts. ACD claims, for instance, that cable leased access remains vital because 10% of American adults do not use the Internet¹²—but a full 60% of Americans households do not use cable television service.¹³ Not only is online video widely available, online video platforms have proven themselves incredibly effective for distributing content, even for programmers of limited means.¹⁴ For instance, YouTube—the most popular online video platform in the world—is free for content providers to use and has enabled many to gain large audiences and significant fame without large monetary investments.¹⁵ Indeed, many YouTube “stars” are discovered organically through social media.

Last, Free Press invokes a favorite boogeyman: cable ISPs, freed from the burdens of Title II regulation, could unfairly impede Internet video traffic. Free Press argues that cable ISPs “are seeking to control more” of the video marketplace and could do so by throttling competitors and/or subjecting competitors to usage caps.¹⁶ These arguments are unfounded. The Commission’s repeal of its *2015 Title II Order* has been in effect for over a year,¹⁷ and Free Press cannot cite a single instance in which a cable operator has engaged in the practices about

¹² ACD Comments at 9.

¹³ See NCTA Industry Data.

¹⁴ Cf. Free Press Comments at 9 (“[T]oday’s fragmented media environment makes it impossible to break through to reach an audience without massive investment[.]”) (quoting Comments of American Independent Media Comments, MB Dkt. Nos. 07-42, 17-105, at 5 (filed July 30, 2018)).

¹⁵ See, e.g., John Lynch and Travis Clark, *A 7-year-old boy is making \$22 million a year on YouTube reviewing toys*, BUSINESS INSIDER (Dec. 3, 2018); Kevin Webb, *The 10 highest-paid YouTubers include the Paul brothers and a 7-year-old toy reviewer — here’s the full list*, BUSINESS INSIDER (Apr. 2, 2019); (listing the ten highest paid YouTube stars in 2018, which included multiple gamers, a five-man sports crew that specializes in videos of trick shots, and a child who reviews toys).

¹⁶ Free Press Comments at 12.

¹⁷ See *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (“*2015 Title II Order*”); *Restoring Internet Freedom*, Declaratory Ruling, Order, Report and Order, 33 FCC Rcd. 311 (2018) (restoring broadband Internet access service’s Title I classification and eliminating the *2015 Title II Order*’s conduct rules); News Release, FCC’s Restoring Internet Freedom Order, FCC (May 10, 2018) (announcing the June 11, 2018 effective date of the *Restoring Internet Freedom* order).

which it is allegedly concerned—for the simple reason that it has not happened. Not only does it make good business sense to provide customers full value for their Internet connections, but every major ISP, including NCTA’s members, has made public commitments about blocking and throttling, enforceable by the Federal Trade Commission. Given the tremendous continuing success of online video providers and the lack of a single complaint that an ISP has not fully lived up to its commitments, Free Press’s baseless speculation should be given no weight.¹⁸

II. THERE IS BROAD CONSENSUS THAT THE LEASED ACCESS PROVISIONS CANNOT SURVIVE FIRST AMENDMENT SCRUTINY, AND THE CONTRARY ARGUMENTS IGNORE RECENT PRECEDENT.

The comments submitted in this proceeding demonstrate broad consensus that the leased access requirements are subject to strict scrutiny.¹⁹ Even if the requirements were subject only to intermediate scrutiny, it is clear that they still could not stand in light of the changes in the marketplace.²⁰ Contrary to Free Press’s suggestion,²¹ the Commission has an obligation to take account of constitutional issues in implementing its statutory directives.²²

¹⁸ Free Press also incorrectly asserts that cable operators have “tremendous market power” over Internet access. *See* Free Press Comments at 12. Only 53% of occupied households are cable broadband subscribers. *See* NCTA Industry Data. Sixty-seven percent of the population has access to broadband speeds of 25/3 Mbps from a non-cable terrestrial provider and 99.86% have access from a non-cable provider if satellite is included. In addition, 84.98% of the population has access to broadband speeds of 10/1 Mbps—which is more than sufficient to stream HD video—from a non-cable terrestrial provider and 99.95% have access from a non-cable provider if satellite is included. *See Broadband Availability in Different Areas*, FCC, <https://broadbandmap.fcc.gov/#/area-comparison> (last accessed July 25, 2019). In addition, 4G wireless coverage is widespread, and 92% of the population has access to multiple mobile broadband providers offering speeds up to 25 Mbps. The introduction of 5G wireless services may also accelerate the growing convergence between the mobile and fixed broadband markets, resulting in even greater competition. *See Communications Marketplace Report et al.*, Report, 33 FCC Rcd. 12558, ¶ 11 (2018).

¹⁹ *See* Comments of NCTA – The Internet & Television Association, MB Dkt. Nos. 07-42, 17-105, at 13-18 (filed July 22, 2019) (“NCTA Comments”); Comments of Americans for Prosperity, MB Dkt. Nos. 07-42, 17-105, at 2-3 (filed July 22, 2019); Comments of the Free State Foundation, MB Dkt. Nos. 07-42, 17-105, at 9-10 (filed July 22, 2019); Comments of the International Center for Law & Economics, MB Dkt. Nos. 07-42, 17-105, at 12-15 (filed July 22, 2019).

²⁰ *See* NCTA Comments at 18-21; Comments of Americans for Prosperity at 2-3.

²¹ Free Press Comments at 3-6.

²² *See* NCTA Comments at 21 & n.71.

ACD argues that the leased access rules remain subject to intermediate scrutiny. In support of its argument, ACD does no more than restate the D.C. Circuit’s decades-old precedent in *Time Warner Entertainment Co. v. FCC*.²³ As NCTA explained in its comments, however, the court’s reasoning in *Time Warner* has been directly undermined by more recent Supreme Court precedent—precedent that makes abundantly clear that laws can be content-based even if they are viewpoint neutral, and that laws that compel speakers to speak particular messages and alter the content of their speech are subject to strict scrutiny.²⁴ ACD’s argument that strict scrutiny is not triggered unless the government interest is related to the suppression of free expression²⁵ is directly contradicted by the Supreme Court’s decision in *Reed*, which “rejected the argument that discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.”²⁶ The D.C. Circuit’s reasoning in *Time Warner* therefore has been effectively superseded,²⁷ and ACD’s mere recitation of the holding in *Time Warner* does not save the leased access requirements from strict scrutiny under current Supreme Court precedent.²⁸

²³ 93 F.3d 957 (D.C. Cir. 1996); see ACD Comments at 3-4.

²⁴ NCTA Comments at 14 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) and *Nat’l Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018)).

²⁵ ACD Comments at 3-4.

²⁶ *Reed*, 135 S. Ct. at 2229 (quotation marks and citations omitted).

²⁷ NCTA Comments at 15-17.

²⁸ Throughout its comments, ACD also references the Cable Act’s public, educational, and government (PEG) access channel requirements. See, e.g., ACD Comments at 5. Those provisions are not the subject of the *Second FNPRM* and therefore the arguments ACD presents concerning any differing governmental interests those provisions might serve are irrelevant to the Commission’s determination of whether the leased access provisions can survive First Amendment scrutiny. The PEG requirements also implicate constitutional concerns, which should be considered at the appropriate time, but NCTA’s comments in this docket are limited to the leased access provisions at issue in the *Second FNPRM*.

ACD urges the Commission²⁹ to continue to accept *Time Warner*'s conclusion that the leased access provisions were subject to intermediate scrutiny because those provisions are framed in terms of the "*sources* of information rather than the *substance* of the information."³⁰ Elsewhere, however, ACD claims that the government has a legitimate interest in promoting not just "*more* sources of video programming" but "*more diverse* sources of video programming."³¹ ACD supports its claim by pointing to studies questioning whether streaming services better feature underrepresented groups than cable programming.³² ACD's argument that leased access is necessary to ensure diversity in the substantive content of programming directly undermines ACD's contention that the leased access requirements are not content-based.³³

ACD asserts that market changes are irrelevant not only to which level of scrutiny should be applied to the leased access rules,³⁴ but also that these changes are irrelevant to *whether* the leased access provisions can survive intermediate scrutiny.³⁵ That assertion is incorrect. Whether the market has enabled the dissemination of alternative sources of content is directly relevant both to whether the leased access provisions serve an important (let alone compelling) governmental interest and whether forcing cable operators to carry such content is an

²⁹ ACD Comments at 3-4.

³⁰ *Time Warner Entm't Co., LP v. FCC*, 93 F.3d at 969.

³¹ ACD Comments at 10-11 (emphasis in original).

³² *Id.*

³³ See, e.g., *Reed*, 135 S. Ct. at 2227; see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 677 (1994) (O'Connor, J., concurring in part and dissenting in part) ("Preferences for diversity of viewpoints, for localism, for educational programming, and for news and public affairs all make reference to content."); NCTA Comments at 14-15 (explaining that speaker-based preferences also warrant application of strict scrutiny when speakers are preferenced based on the substance of those speakers' speech).

³⁴ ACD Comments at 3-4.

³⁵ *Id.* at 4-12.

appropriately tailored means to further that interest. The leased access provisions flunk both of these elements of the intermediate scrutiny inquiry.³⁶

First, as explained above and in NCTA's opening comments,³⁷ the profound changes in the video marketplace since the enactment of the leased access provisions, and in particular over the last decade, have fostered a significant variety of information sources without the need for government intervention. These dramatic market changes have greatly diminished the governmental interest in regulations to promote this objective. The very fact that there are more sources of programming does indeed show that the leased access provisions are not necessary to achieve the government's interest.³⁸

Second, ACD is wrong that leased access provisions are an appropriately tailored means of ensuring diversity of programming in today's marketplace. There can be no doubt that content providers now have access to a number of other, and in many cases superior, methods to transmit their content to the public, and the fact that cable television may remain "uniquely important"³⁹ to some segment of the public does not demonstrate that the leased access provisions are essential to serve the government's interest.⁴⁰

³⁶ NCTA Comments at 18-21.

³⁷ See *supra* Part I; NCTA Comments at 3-9.

³⁸ For that reason, ACD's claim that NCTA's comments have not analyzed "whether video programming has actually become any more diverse" is inapt. ACD Comments at 10. It was the promotion of alternative *sources* of programming that led the D.C. Circuit in *Time Warner* to conclude only intermediate scrutiny applied. As NCTA has shown, the leased access provisions are not necessary to ensure the dissemination of other sources of programming to the public.

³⁹ ACD Comments at 7-10; see also Free Press Comments at 7-8.

⁴⁰ See *Report and Order* ¶ 13 ("While we recognize that some leased access programmers have expressed a preference for leased access via cable as compared to alternatives such as online programming distribution, we are persuaded that these alternatives have developed into a viable substitute for leased access today.").

While some commenters argue that leased access is still necessary for households that subscribe to cable but not broadband,⁴¹ that is not a sufficient reason to justify the considerable First Amendment intrusion on cable operators' editorial discretion.⁴² Today there are far more households with broadband than cable, and the total number of cable households continues to decline in the face of competition from other MVPDs and over the top providers. As explained above, a full 60% of American households do not subscribe to cable television, a far larger number than the 10% of adults that ACD claims do not use the Internet.

More importantly, *Time Warner* based its conclusion about the government's interest in promoting dissemination of multiple sources of programming on the "bottleneck" rationale that, unless cable operators were required to carry leased access programming, such programming could not reach consumers.⁴³ This rationale is no longer valid in today's marketplace. Now, cable customers who want access to leased access programming can choose to subscribe to broadband. As a result, the leased access provisions are no longer an appropriately tailored means of ensuring consumers' access to diverse information sources.

For all these reasons, the leased access provisions are subject to strict scrutiny, but in any event can no longer survive even intermediate scrutiny under the First Amendment. The Commission should therefore adopt NCTA's proposals to implement the statute in the way that mitigates the First Amendment burdens to the greatest extent possible.⁴⁴ Notably, no commenter expressed opposition to the Commission's proposal to allow cable operators to calculate leased

⁴¹ ACD Comments at 8; Free Press Comments at 8-9.

⁴² *See Report and Order* ¶ 17 (declining to continue to require part-time leased access because the costs imposed by such requirements outweigh the benefits "to the small portion of the population without Internet access but with cable television").

⁴³ *Time Warner*, 93 F.3d at 969 (citing and applying *Turner*).

⁴⁴ *See* NCTA Comments at 21-24.

access rates based on the tier on which the programming will be carried.⁴⁵ While adopting that proposal would not eliminate the constitutional infirmities of the leased access requirements, it would reduce the First Amendment burdens.⁴⁶

III. CONCLUSION

The record in this proceeding makes clear that today's video marketplace is robust and competitive, providing programmers of all types and sizes with innumerable platforms for distributing their content and consumers myriad ways for accessing it. The leased access regime no longer serves a useful purpose—if it ever did—and can no longer withstand constitutional scrutiny.

Respectfully submitted,

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⁴⁵ See *Second FNPRM* ¶ 45.

⁴⁶ This burden would be further reduced by allowing the maximum reasonable rate to be determined through negotiations between operators and lessees, NCTA Comments at 21-22, although even this solution would not cure the First Amendment infirmities of leased access.