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 COMCAST CORPORATION

Comcast Corporation ("Comcast") submits these reply comments in response to the *Second Further Notice of Proposed Rulemaking* in the above-captioned proceedings.[1]

Americans today have access to a greater diversity of sources of video programming than ever before. The Internet has emerged as a leading platform for both amateur and professional video content creators. As a result, any historic barriers to these content creators accessing potential viewers have been all but obliterated. The Congress that enacted leased access requirements in 1984 could not possibly have anticipated that such a remarkable diversity of video programming would materialize via the marketplace, and entirely independent of its efforts to promote cable operators' carriage of unaffiliated content through leased access.

Comcast applauds the Commission's recent decision to review and modernize its leased access regime and appreciates its decision to conduct this follow-on proceeding to consider further reforms. In light of the dramatic changes in the video marketplace, leased access requirements can no longer withstand First Amendment scrutiny. Accordingly, the Commission should take all steps within its authority to minimize the burdens the leased access rules impose

[1] *Leased Commercial Access; Modernization of Media Regulation Initiative*, Report and Order and Second Further Notice of Proposed Rulemaking, MB Docket Nos. 07-42 & 17-105, FCC 19-52 (June 7, 2019) ("*Order*" and "*Second FNPRM*," respectively). Unless otherwise specified, comments cited herein refer to comments filed on or around July 22, 2019 in MB Docket Nos. 07-42 & 17-105.

on cable operators' editorial discretion. In this proceeding, the Commission should cease artificially regulating leased access rates, or, at a minimum, replace its "blended-tier" rate formula with a tier-specific formula that would simplify the calculation and better reflect marketplace considerations.

I. FOLLOWING SIGNIFICANT CHANGES IN THE VIDEO MARKETPLACE, LEASED ACCESS CAN NO LONGER WITHSTAND FIRST AMENDMENT SCRUTINY.

The record strongly supports the Commission's recognition that the video landscape has been radically transformed since the leased access regime was created.[2] In 1984, cable was the only way for Americans to subscribe to multichannel video programming, and the majority of that programming was affiliated with cable operators. In contrast, today's video marketplace is characterized by an abundance of choices among diverse sources of video programming.[3] Given

[2] *See Order* ¶¶ 17, 40; *FNPRM* ¶ 47; NCTA Comments 2-9; Americans for Prosperity Comments at 1-2; Free State Foundation Comments at 2-6; International Center for Law and Economics ("ICLE") Comments at 8-11.

[3] *See* Americans for Prosperity Comments at (1-2) ("Today, both content producers and public audiences have access to an unprecedented choice of distribution platforms, over-the-air broadcast stations, online video distributors and . . . user-generated content platforms."); Free State Foundation Comments at 2-3 (noting that "most consumers can choose between a cable provider and two [DBS] providers," as well as a "former 'telco' video services provider," in addition to OVD services); NCTA Comments at 4-5 (observing that "[n]early all consumers have access to at least three competing MVPDs," and that "[m]any . . . have access to a fourth or fifth MVPD"); *id*. at 6-7 (describing the plethora of linear and on-demand video services and user-generated content outlets available online). One commenter suggests that there has *not* been a significant increase in the diversity of video content available since 1984, *see* Alliance for Communications Democracy ("ACD") Comments at 10-11, and supports this view based on a single reference to data suggesting that certain online platforms fall short of standards related to the racial diversity of cast members. *See id*. Without pointing to any authority, this commenter suggests that it is *this* sort of diversity that leased access is intended to promote. *See id*. at 10 ("[T]he extent to which alternative sources of video programming has furthered diversity in video programming is uncertain at best."). That is plainly wrong as Congress enacted leased access to promote a diversity of *sources* of programming. *See* 47 U.S.C. § 532(a) ("The purpose of [leased access] is to promote competition in the delivery of diverse *sources* of video programming and to assure the widest possible diversity of information *sources* are made available to the public . . . .") (emphasis added); *Time Warner Entm't Co. L.P. v. FCC*, 93 F.3d 957, 968 (D.C. Cir. 1996) ("Leased access was originally aimed at bringing about the widest possible diversity of information *sources* for cable subscribers.") (emphasis added).

these changes, the burdens leased access imposes on cable operators' First Amendment rights can no longer be justified.

A. Leased Access Should Be Analyzed Under the Strict Scrutiny Standard.

The First Amendment safeguards cable operators' editorial control over the content they distribute to their subscribers, and leased access impinges on that right.[4] Under Section 612 of the Cable Act, cable operators are expressly forced to carry programming, and they are forced to do so even if they determine that their subscribers would find the content objectionable, harmful, or offensive. The record confirms that these requirements should be analyzed under strict scrutiny because they establish "speaker-based" obligations applicable to cable operators and not to their competitors.[5] The notion that such discrimination among media is justified by a "special characteristic" of cable – namely, that cable operators exercise "bottleneck monopoly power"[6] – is no longer defensible (if it ever was) in today's media landscape, in which cable operators are one of myriad sources of video programming.[7]

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[4] *See Time Warner Entm't*, 93 F.3d at 966; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643-44 (1994); *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."); Free State Foundation Comments at 7-8 (noting that regulation of leased access rates imposes further First Amendment burdens on cable operators).

[5] *See* NCTA Comments at 14-15; Americans for Prosperity Comments at 2; *see also Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230 (2015) ("[A] law limiting the content of newspapers, but only newspapers, could not evade strict scrutiny . . . ."); *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630, 638-39 (5th Cir. 2012) (applying strict scrutiny to a law discriminating among video providers, and noting that such laws are "inherently suspect"). NCTA also correctly explains that strict scrutiny should apply for the independent reason that leased access requirements would now be considered "content-based" under recent Supreme Court jurisprudence. *See* NCTA Comments at 13-17 (discussing *Reed* and *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*")).

[6] *See Time Warner Entm't*, 93 F.3d at 966-67 (citing *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151, 182-84 (D.C. Cir. 1995) and *Turner*, 512 U.S. at 661).

[7] Free State Foundation Comments at 2-4; ICLE Comments at 4-11; NCTA Comments at 18-19; *see also* NCTA Comments, MB Docket Nos. 07-42 & 17-105, at 11 n.12 (July 30, 2018) ("NCTA July 2018 Comments") (noting that *Turner* held that a "bottleneck" was also created by the physical connection of cable to subscribers' televisions, whereas today's televisions are designed with multiple video inputs and

Leased access also is not "narrowly tailored" to further a "compelling interest," as required by strict scrutiny.[8] In today's Internet-centric media landscape, promoting a diversity of video content sources on cable cannot rationally be viewed as a compelling interest for the government. To the contrary, there are virtually no barriers to distributing video online, leading to an unprecedentedly robust diversity of video content on the Internet *without any government mandates whatsoever*.[9]

A regulation fails the narrow tailoring test if it "leaves appreciable damage to that supposedly vital interest unprohibited."[10] Because leased access rules apply only to cable operators and not to any of their non-cable MVPD and OVD competitors, they would fail First Amendment review, even if they could otherwise be justified, because they are "hopelessly

simple input switching, enabling households to easily receive content from two or more MVPDs, as well as Internet-based services and broadcast stations).

[8] *Reed*, 135 S. Ct. at 2231 (citing *Ariz. Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2817 (2011)); *see also* ICLE Comments at 16 (observing that no court has ever found the government interests in a diversity of sources of video programming and promoting fair competition in the market for television programming to be "compelling" for First Amendment purposes).

[9] Two commenters argue that taking the Internet video landscape into account is inappropriate because some people subscribe to cable but not broadband. *See* ACD Comments at 8; Free Press Comments at 8. As the Commission has already recognized, however, this is a very "small portion of the population," and the burdens of leased access requirements cannot be justified on this basis. *See Order* ¶ 17 ("We find that the costs of mandating part-time leased access to provide programming to the small portion of the population without Internet access but with cable television outweighs the benefits."). Indeed, the more widespread trend is the growing number of consumers who subscribe to broadband but not cable – a testament to the significant and effective competition cable operators face from Internet-based distribution platforms. *See Communications Marketplace Report*, Report, 33 FCC Rcd. 12558 ¶ 116 (2018) (noting that increasing competition between MVPDs and online platforms is "an important recent trend in the video marketplace," and that "many consumers may increasingly view MVPDs and virtual MVPDs as substitutes . . . ."); *id*. ¶ 124 ("In general, traditional cable, DBS, and telephone company MVPDs lost subscribers from 2016 and 2017, while virtual MVPDs and large OVDs offering VOD content gained subscribers.").

[10] *Reed*, 135 S. Ct. at 2232 (citing *Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002)).

underinclusive."[11] There is no evidence that cable operators in particular in today's competitive video market favor affiliated content over unaffiliated content, so as to warrant a cable-specific carriage mandate. In any event, other Commission rules already clearly prohibit MVPD carriage decisions based on such favoritism[12] – rules which, notably, do not apply to OVDs like Netflix, Amazon Prime Video, YouTube, Hulu, Facebook Watch, and Apple TV+, all of which are investing heavily in original content for exclusive distribution on their own platforms.[13]

B. Leased Access Also Fails Under Intermediate Scrutiny.

Even assuming *arguendo* that the leased access regime should be considered under the more lenient intermediate scrutiny standard, it would still not pass muster. Under intermediate scrutiny, a regulation must "not burden substantially more speech than necessary to achieve" an "important" government interest.[14] The fact that an *unregulated* Internet has brought about such a diversity of video programming belies the notion that there is an "important" government

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[11] *Id*. at 2231; NCTA Comments at 20; *see also NIFLA*, 138 S. Ct. at 2375 (holding that a regulation targeting only a subset of the hospitals and clinics offering a particular service was not narrowly tailored, because it was "wildly underinclusive").

[12] *See* 47 C.F.R. § 76.1301.

[13] *See* Rani Molla, *Netflix and Hulu Go In for Comedies While Amazon Sticks to Drama: A Look at the Original Content Boom*, Vox (Sept. 28, 2018), https://www.vox.com/2018/9/28/17906772/netflix-hulu-amazon-original-content-streaming-new-shows-facebook-apple. Free Press appears to suggest that Comcast is free to favor affiliated content due to the expiration of certain merger conditions. *See* Free Press Comments at 10 & n.30. But Free Press fails to mention that Comcast remains subject to an express prohibition against such favoritism, *see* 47 C.F.R. § 76.1301, and that its cable systems already feature a robust diversity of content from independent programmers. *See, e.g.*, Comments of Comcast Corp. and NBCUniversal Media, LLC, MB Docket No. 16-41, at 13-14 (Jan. 26, 2017) (providing examples of Comcast's support for independent and diverse programming, including carriage of over 160 independent networks and on-demand choices from over 70 independent networks featured on Xfinity On Demand and online platforms; efforts to launch multiple African American owned independent networks and multiple independent networks targeted to bicultural Hispanic youth; and work with independent programmers on innovative ways to feature content across multiple screens).

[14] *Time Warner Entm't*, 93 F.3d at 969.

interest continuing to support leased access.[15] It has been the case for years that anyone with a smartphone and an Internet connection can be the next big video star.[16] Clearly then, video diversity can be realized "without burdening a speaker with unwanted speech."[17]

Free Press's contrary analysis suggests that it would be "myopic" of the Commission to consider whether Internet video is relevant to whether leased access requirements can survive First Amendment scrutiny today, arguing instead that the Commission should limit its focus to "promot[ing] a diversity of sources *on cable TV systems*."[18] This obviously has it backwards. It would be truly "myopic" to arbitrarily focus only on cable given the massive growth of online and other video competitors.[19] The Commission has already correctly determined that online distribution is a "viable substitute" for commercial leased access on a cable system.[20] Even just focusing on the multichannel video marketplace, the International Center for Law and Economics has underscored that, based on subscribership, only four of the top 10 providers are traditional cable operators.[21] A government interest in promoting diversity *only on cable systems*

[15] *Turner*, 512 U.S. at 662 (quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968)) (stating that, under intermediate scrutiny, a regulation must further an "important, or substantial governmental interest" that is "unrelated to the suppression of free expression," and it must limit "First Amendment freedoms no greater than is essential to the furtherance of that interest.").

[16] *See, e.g.*, Chris Morris, *Ordinary Folks Who Became Millionaires on YouTube*, CNBC (May 10, 2014), https://www.cnbc.com/2014/05/10/-folks-who-became-millionaires-on-youtube.html.

[17] *NIFLA*, 138 S. Ct. at 2376 (quoting *Riley v. Nat'l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988)) (internal quotation marks omitted).

[18] Free Press Comments at 9 (emphasis added).

[19] *See Order* ¶¶ 17, 40; *FNPRM* ¶ 47; NCTA Comments 2-9; Americans for Prosperity Comments at 1-2; Free State Foundation Comments at 2-6; ICLE Comments at 8-11.

[20] *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.").

[21] ICLE Comments at 10.

cannot be "compelling" or "important" given so many alternative sources of video programming.[22]

Tellingly, the two commenters who support leased access discourage the Commission from even considering whether its rules comport with the Constitution.[23] But even if the Commission cannot itself fully address a First Amendment violation resulting from an act of Congress, in light of the First Amendment concerns identified in the record, the Commission has a duty to ensure that it does everything it can to minimize leased access burdens on cable operators.[24]

II. THE COMMISSION SHOULD MINIMIZE LEASED ACCESS BURDENS BY ENDING OR SIMPLIFYING RATE REGULATION.

The Commission has significant leeway under the Cable Act to reduce the leased access-related burdens currently borne by cable operators. The *Second FNPRM* accordingly seeks comment on changes to the formula for calculating maximum rates for leased access.[25] The Commission should defer to the market to establish leased access rates. At a minimum, it should modify the current rate formula to be tier-specific.

As NCTA has proposed, the Commission should replace its current formula-based rules with "rules under which the 'maximum reasonable rates' [for leased access] could be determined

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[22] *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)).

[23] ACD Comments at 2; Free Press Comments at 3-6.

[24] *Meredith Corp. v. FCC*, 809 F.2d 863, 874 (1987) (citing U.S. Const. art. VI, cl. 3); *see also Inquiry into the General Fairness Doctrine Obligations of Broadcast Licensees*, Notice of Inquiry, 49 Fed. Reg. 20317, 20344 (May 14, 1984) (separate statement of Commissioner James H. Quello) (stating that the Commission "has an obligation to continually reexplore – for both our own benefit and for the benefit of Congress – any doctrine that precludes full exercise of journalistic rights by the electronic media").

[25] *Second FNPRM* ¶¶ 45-46.

through negotiations between operators and lessees."[26] Even assuming *arguendo* a cumbersome rate formula was appropriate in 1992, it does not follow that the same level of regulatory intrusion is warranted in 2019. Given the dramatic intervening change in the marketplace, the Commission has no basis in this proceeding to assume that cable operators would either unduly discriminate in the rates charged commercial leased access programmers or have the market power to do so. Absent clear contemporary evidence to the contrary, relying on marketplace negotiations would be a far superior, less intrusive means of establishing a reasonable rate for leased access carriage than a cumbersome rate formula. This approach would also align with Congress's express preference for competition over rate regulation,[27] and the Commission's recognition that rate regulation is now presumptively unnecessary in most communities due to effective competition.[28]

Should the Commission opt to continue to regulate maximum leased access rates by formula, it should adopt its proposal "to make leased access fee calculations specific to the tier on which the programming will be carried."[29] A tier-specific formula would substantially simplify the task of calculating regulated leased access rates – enabling operators to focus on the subscriber rates and programming costs associated with the particular tier at issue and ignore data from unrelated tiers.[30] If an operator is prepared to position a leased access applicant on the basic service tier, there is no logical basis to impose on operators the extra administrative burden of considering channel-specific rates and costs associated with non-basic service.

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[26] NCTA Comments at 21-22.

[27] *See* 47 U.S.C. § 543(a)(2).

[28] *See Amendment of the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd. 6574 ¶ 6 (2015).

[29] *Second FNPRM* ¶ 45; NCTA Comments at 22-24; ACA Comments at 2.

[30] *See* NCTA Comments at 23-24.

Moreover, as NCTA points out, tier-specific rates would mean basic tier programmers pay rates tailored for the basic tier, "better reflect[ing] the value to the leased access programmer of carriage on the tier on which it is actually being carried."[31] By contrast, the current "blended-tier" approach distorts the value of leased access by lumping in irrelevant data regarding tiers other than the one on which the leased access channel appears.[32] There is simply no reason for tier blending anymore.[33]

III. CONCLUSION

In light of today's vibrant media landscape in which the Internet and other video distribution networks afford programmers substantial options for delivering their content to consumers, leased access regulations cannot withstand First Amendment scrutiny. Against that backdrop, although the Commission cannot eliminate by itself the leased access statutory regime that Congress enacted, it has a duty to minimize the harm this regime imposes. Accordingly, the

[31] NCTA Comments at 22-23.

[32] *Id.*; NCTA July 2018 Comments at 27.

[33] The rationale underlying that framework is anchored in rate regulation rules that have not been in force since the deregulation of cable programming service tier rates in 1999. *See* NCTA Comments at 23; NCTA July 2018 Comments at 26-27.

Commission should either cease regulating leased access rates, or, at the very least, move to a tier-specific rate formula that does not distort the value of carriage.

Respectfully submitted,

COMCAST CORPORATION

/s/ Kathryn A. Zachem
Kathryn A. Zachem
Jordan B. Goldstein
James R. Coltharp
Regulatory Affairs,
Comcast Corporation

Francis M. Buono
Catherine Fox
Brian A. Rankin
Ryan G. Wallach
Legal Regulatory Affairs,
Comcast Corporation

COMCAST CORPORATION
300 New Jersey Avenue, N.W., Suite 700
Washington, DC 20001

WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, D.C. 20006

Counsel for Comcast Corporation

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