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
	)	

To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

In the current proceeding, the Commission seeks comment on aspects of its leased access rules and offers proposals for modifying its formula for cable leased access rates.[1] The National Association of Broadcasters[2] expresses no opinion on the FCC's proposals for changing its leased access rules, but replies here to certain commenters' erroneous arguments about the standard of review that applies in analyzing the consistency of the leased access or similar content neutral rules with the First Amendment.

Contrary to the assertions of some commenters, a reviewing court would continue to evaluate the FCC's leased access rules under intermediate scrutiny because they are content neutral. After determining the appropriate level of scrutiny to apply, a court may look at technological and marketplace developments as part of its analysis. But to be clear, these types of developments would not convert a content-neutral statute or regulation, such as leased access or other similar FCC program access and carriage requirements, into content-

[1] Report and Order and Second Further Notice of Proposed Rulemaking, MB Docket Nos. 07-42, 17-105, FCC 19-52 (rel. June 7, 2019) (R&O/Second Further NPRM).

[2] NAB is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

based ones subject to strict scrutiny. Moreover, when analyzing whether such rules satisfy intermediate scrutiny, a reviewing court may find that any relevant technological and marketplace developments have only served to reduce the burdens of these regulations on multichannel video programming distributors (MVPDs).

I. PASSAGE OF TIME OR CHANGES IN THE COMMUNICATIONS MARKETPLACE DO NOT REVERSE DECADES OF JUDICIAL PRECEDENT HOLDING THAT INTERMEDIATE FIRST AMENDMENT SCRUTINY APPLIES TO CONTENT NEUTRAL LAWS AND REGULATIONS

Under long-established and recently reaffirmed First Amendment jurisprudence, content-based statutes and rules are subject to strict scrutiny by reviewing courts, while content-neutral ones are subject to intermediate scrutiny.[3] Typically, laws that favor or disfavor speech on the basis of the ideas or views expressed or the messages conveyed are content based, while laws that do not burden or benefit speech due to its content are content neutral.[4] Put more concisely, "[c]ontent-based regulations target speech based on its communicative content."[5]

The Supreme Court and multiple circuit courts of appeals have upheld against First Amendment challenges various program access and carriage-related statutes and regulations applicable to MVPDs, finding that the requirements did not favor or disfavor speech because of its content and therefore applying intermediate scrutiny.[6] The D.C. Circuit

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[3] *See, e.g., Packingham v. North Carolina*, 137 S.Ct. 1730, 1736 (2017); *McCullen v. Coakley*, 573 U.S. 464, 485-86 (2014); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994) (*Turner I*).

[4] *See, e.g., Turner I*, 512 U.S. at 643-46.

[5] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (citations omitted).

[6] *See, e.g., Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997) (*Turner II*) (must-carry rules); *Satellite Broadcasting and Commc'n Ass'n v. FCC*, 275 F.3d 337 (4th Cir. 2001) (carry one, carry all rules); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011) (extended program access requirements); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2d Cir. 2013) (video program carriage discrimination rules).

previously rejected cable industry arguments that the leased access provisions at issue in this proceeding should be subject to strict scrutiny, with the succinct statement that "[t]here is nothing to this," as the "provisions are not content-based."[7]

Faced with clear precedent over the course of decades, a few commenters in this proceeding have contended that the leased access rules should now be evaluated under strict scrutiny because the video marketplace has changed since those provisions were adopted.[8] Changes in the marketplace, however, have absolutely nothing to do with determining the applicable level of First Amendment scrutiny. Rather, as made abundantly clear above and as noted by other commenters,[9] a court determines the level of scrutiny to be applied based on whether the provision is content neutral or content based. The D.C. Circuit previously found the leased access rules to be content neutral,[10] and recent changes in technology or the marketplace have not somehow transformed those rules into ones burdening or benefitting speech based on the communicative content of the particular programming. The Commission should reject contentions that developments in the video

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[7] *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996) (also finding other regulations applicable to cable and DBS operators to be content neutral and subject to intermediate scrutiny).

[8] R&O/Second Further NPRM at ¶ 39 & n.148 (identifying commenters, including NCTA and Charter Communications, making that claim in earlier stage of this proceeding); Comments of The Free State Foundation, MB Docket Nos. 07-42, 17-105, at 7-10 (July 22, 2019); Comments of the Int'l Center for Law & Economics (ICLE), MB Docket Nos. 07-42, 17-105, at 3-4 (July 22, 2019). *See also* Comments of Americans for Prosperity, MB Docket Nos. 07-42, 17-105, at 1-3 (July 22, 2019) (noting marketplace changes and exhibiting confusion as to the applicable standard of review, including making inapposite reference to the Supreme Court's commercial speech standards); Comments of NCTA – The Internet & Television Ass'n, MB Docket Nos. 07-42, 17-105, at 3-21 (July 22, 2019) (describing changes in the video marketplace, claiming that strict scrutiny of the leased access rules is appropriate under recent Supreme Court precedent, and arguing that the leased access rules are unconstitutional regardless of the standard of review applied).

[9] *See, e.g.,* Comments of Alliance for Communications Democracy, MB Docket Nos. 07-42, 17-105, at 3-4 (July 22, 2019).

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

marketplace alter the standard of First Amendment review applicable to its leased access or other similar rules.

NCTA asserts that two recent Supreme Court cases make clear that strict scrutiny is the appropriate standard for reviewing the leased access rules.[11] Its argument is unconvincing. In *NIFLA*, the court applied strict scrutiny to and struck down a state law requiring certain clinics that primarily serve pregnant women to "provide a government-drafted script about the availability of state-sponsored services, as well as contact information for how to obtain them."[12] Such a content-based law in which the "government seeks to impose its own message"[13] is a far cry from the FCC's leased access (or other program access or carriage) rules, which do not mandate access for, or carriage of, any government drafted or approved message. Nor did the government adopt leased access requirements because the messages of those (unknown) speakers who might seek access were "in accord with its own views."[14]

Reed is similarly inapposite. In that case, the court addressed a town's code governing people's display of outdoor signs. The code identified and defined various categories of signs "based on the type of information they convey[ed]" (*e.g.*, "ideological" signs, "political" signs and "temporary directional signs relating to a qualifying event") and then "subject[ed] each category to different restrictions."[15] Because the code "impose[d]

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[11] NCTA Comments at 2, 15.

[12] *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (*NIFLA*). Other facilities covered by the law were required to include a specific "government-drafted statement" in all of their print and digital advertising materials, with detailed requirements as to how this statement must be displayed. *Id.* at 2378.

[13] *Id*. at 2379 (Kennedy, J., concurring).

[14] *NIFLA* at 2378.

[15] *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2224-25 (2015). For example, an "ideological" sign was defined as one "communicating a message or ideas for noncommercial purposes that is not a Construction Sign, Directional Sign, Temporary Directional Sign Relating to a

more stringent restrictions" on signs based on the "messages" conveyed, the court found it content based, applied strict scrutiny and struck it down.[16] In reaching this conclusion, the court stressed that the restrictions in the code that apply to any given sign "depend entirely on the communicative content of the sign."[17] In stark contrast, the leased access regulations (and similar access or carriage rules) do not "depend entirely on the communicative content" of the programming for which an entity seeks access or carriage. Thus, NAB does not agree that *Reed* or *NIFLA* mandates the application of strict scrutiny to such regulations.

II. CONSTITUTIONAL ANALYSES OF MPVD REGULATIONS MUST ACCOUNT FOR TECHNOLOGICAL AND MARKETPLACE DEVELOPMENTS THAT HAVE REDUCED THE BURDENS OF THOSE REGULATIONS

While marketplace or technological changes are irrelevant to determining the appropriate level of judicial scrutiny, NAB does not contend that such developments are irrelevant to determining whether a statute or regulation impacting speech may be sustained under the appropriate level of review. In more recent challenges to MVPD program access and carriage requirements, for example, both the Second Circuit and the D.C. Circuit concluded that the provisions at question were content neutral. The courts then proceeded to determine whether the Commission had satisfied its constitutional burden under intermediate scrutiny,[18] which included examining the video programming industry to

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Qualifying Event, Political Sign, Garage Sale Sign, or a sign owned or required by a governmental agency." *Id.* at 2224.

[16] *Id.* at 2224.

[17] *Id*. at 2227 (noting that if a sign informs its readers of the time and place a book club will discuss John Locke's Two Treatises of Government, that sign will be treated differently from a sign expressing the view that one should vote for one of Locke's followers in an upcoming election, and both signs will be treated differently from a sign expressing an ideological view rooted in Locke's theory of government).

[18] To "survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest"; in other words, it "must not burden substantially more speech than

determine whether the challenged rules would in fact advance the government's asserted interests without burdening substantially more speech than necessary.[19] In both cases, the courts concluded that the FCC had satisfied its burden under the First Amendment.

Several commenters appear to assume that video marketplace changes automatically make the leased access (and perhaps other program access and carriage requirements) constitutionally suspect.[20] It is, however, incorrect to presume that all relevant marketplace or technological developments militate toward a finding of unconstitutionality. Consider, for example, the channel capacity of MVPDs, which has exponentially increased in recent years due to digital technologies. With vastly greater capacity, any First Amendment-related burdens placed on MVPDs by various program carriage requirements have significantly declined.[21] And the courts – including in the case

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is necessary to further the government's legitimate interests." *Packingham*, 137 S.Ct. at 1736 (internal quotation marks and citations omitted). *Accord Turner II*, 520 U.S. at 189.

[19] *See Time Warner*, 729 F.3d at 161-67; *Cablevision*, 649 F.3d at 710-13.

[20] *See* Free State Comments at 4-6; ICLE Comments at 8-10; NCTA Comments at 3-9; Americans for Prosperity Comments at 1-2.

[21] Even with the limited channel capacity available in analog cable systems, the Supreme Court found that must carry did not represent a significant First Amendment harm to either cable systems or programmers, stating that the vast majority of cable operators were able to satisfy their must-carry obligations using previously unused channel capacity and were not forced to drop programming to fulfill their obligations. *Turner II*, 520 U.S. at 214-15. The burdens associated with must carry also have been reduced by another marketplace development – the election of retransmission consent by most commercial TV stations. With vastly increased capacity and fewer must carry stations than in the past, the First Amendment burdens on cable and satellite operators associated with must carry and carry one, carry all have decreased over time. Noting the increase in cable capacity due to digital technology, the D.C. Circuit in a more recent case dismissed for lack of standing cable programmers' First Amendment challenge to a signal carriage requirement applicable to cable systems, as the programmers failed to show any First Amendment injury-in-fact. *C-Span v. FCC*, 545 F.3d 1051, 1056-57 (D.C. Cir. 2008) (stating that petitioners failed to show how carriage of a handful of must-carry channels in analog format would have any impact on cable operators' programming choices and that there was no evidence that cable systems with hundreds of channels were saturated with must-carry stations so as to deprive the petitioners of an opportunity to secure a channel slot).

previously upholding the leased access rules – have made clear that showing First Amendment harm is necessary to sustaining a claim that program access or carriage requirements are unconstitutional.[22]

Commenters asserting that the leased access rules can no longer withstand constitutional scrutiny also provide a somewhat one-sided view of developments in the video marketplace. Take, for example, commenters who cite increasing competition in the video marketplace, especially from online video programmers.[23] While NAB does not dispute that more U.S. households today have broadband access than subscribe to cable television,[24] NCTA neglects to mention that the same large cable MSOs with millions of video subscribers also are the leading providers of broadband services. At the end of 2018, the two largest cable MSOs in the U.S. each had more video subscribers than the ten largest MVPDs combined had in 1985.[25] In addition, these two cable MSOs at year-end 2018 were the two largest broadband internet providers in the U.S. by a very considerable margin.[26] As a result,

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[22] *See supra* note 21. In *Time Warner*, 93 F.3d at 970-71, the D.C. Circuit cited Time Warner's assertion that there was not at that time, nor would there be under the FCC's leased access rules, any appreciable demand by unaffiliated programmers for access to cable systems. Accepting Time Warner's assertion as true, the court reasoned that Time Warner could not establish that the leased access rules actually harmed its First Amendment rights. *Id*. (stating that if unaffiliated programmers do not "exploit the leased access provisions, then the provisions will have no effect on the speech of the cable operators"). Interesting, the FCC stated in this proceeding, citing the American Cable Association, that demand for "leased access has remained low and most leased access inquiries do not result in carriage," R&O/Second Further NPRM at ¶ 10, thereby undercutting claims that the leased access rules "significantly burden" cable operators by interfering with their speech, consuming limited capacity that could be used for other purposes and placing them at a competitive disadvantage. NCTA Comments at 9-11.

[23] *See, e.g.,* ICLE Comments at 8-9; NCTA Comments at 6-8.

[24] NCTA Comments at 7.

[25] *See* Leichtman Research Group, *Research Notes 1Q 2019*, at 7; Mike Farrell, *Eat or Be Eaten*, Multichannel News, at 9 (Aug. 17, 2015).

[26] *See* Leichtman Research Group, *Research Notes 1Q 2019*, at 8.

tens of millions of households now depend on the same traditional pay TV providers to gain access to online video content.[27]

As NAB described in earlier proceedings,[28] this concentration in the video distribution marketplace, combined with fragmentation in the video programming marketplace, gives consolidated pay TV/broadband providers (1) "significant bargaining power" over video programmers, whose advertising revenues depend on being available on as many platforms as possible and accessible to as many viewers as possible;[29] and (2) "significant bargaining leverage over edge providers," including online video service providers, because they can "block edge providers from reaching a significant fraction of households."[30] In light of these marketplace developments, commenters were perhaps premature in flatly asserting that cable operators no longer have any "bottleneck" power,[31] particularly, as discussed below, in local markets.

Beyond failing to discuss certain developments in broadband distribution, commenters also ignored local and regional aspects of the video marketplace. While

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[27] The MVPD and broadband marketplace is highly concentrated. Despite cord cutting, 70 percent of all TV households still subscribed to a traditional MVPD service at the end of 2018. Measured by subscribers, the ten largest providers controlled a whopping 94.5 percent of the nationwide pay TV market and 91.5 percent of the nationwide broadband market; the top four providers controlled 79.4 percent of the pay TV market and 71.0 percent of the broadband market; and the top three controlled 68.4 percent of the pay TV market and 64.4 percent of the broadband market. Kagan, a media research group within S&P Global Market Intelligence (Q4 2018).

[28] *See, e.g.,* Reply Comments of NAB, MB Docket No. 17-318, at 26-27 (Apr. 18, 2018).

[29] David S. Evans, Chairman, Global Economics Group, *Economic Findings Concerning the State of Competition for Wired Broadband Provision to U.S. Households and Edge Providers*, White Paper, at 23-24 (Aug. 29, 2017) (Evans Competition White Paper); *accord* U.S. Dep't of Justice, Competitive Impact Statement at 5, 12-14, *U.S.A. v. Charter Communications, Inc.*, Civil Action No. 1:16-cv-00759 (RCL) (D.D.C. May 10, 2016).

[30] Evans Competition White Paper at 5.

[31] *See, e.g.*, ICLE Comments at 8; Free State Comments at 2.

commenters cite nationwide statistics to show increased competition to cable's MVPD services from satellite and fiber-optic operators,[32] available local market data may be more revealing. For example, in 37 Designated Market Areas (DMAs), Charter Communications (Spectrum) still controls over 50 percent of the total MVPD market (and over 60 percent of the entire MVPD market in 11 of those DMAs).[33] Charter's share of the broadband market is over 50 percent in many more – 64 – DMAs (and is over 60 percent in 46 of those DMAs). Notably, in those 37 DMAs where Charter's share of the MVPD market exceeds 50 percent, its share of the broadband market is greater still.[34] And even (relatively) smaller cable operators may possess a dominant share of the total MVPD and broadband market in individual DMAs.[35]

The courts have relied upon such evidence concerning cable operators' local market share in sustaining program access and carriage-related requirements against First Amendment challenges.[36] By avoiding discussion of local markets, commenters conveniently have not presented a full picture of developments in the video marketplace.

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[32] ICLE Comments at 9-10.

[33] These 11 DMAs include: Utica, NY (73.8 percent); Rochester, NY (70.9 percent); Honolulu, HI (70.3 percent); Albany, NY (67.4 percent); Watertown, NY (65.1 percent); Alpena, MI (64.6 percent); Portland, ME (63.9 percent); Syracuse, NY (63.6 percent); Laredo, TX (62.3 percent); Binghamton, NY (62.2 percent); and Zanesville, OH (60.5 percent). (Q1 2019 data from Kagan, a media research group within S&P Global Market Intelligence; DMA® is a registered service mark of The Nielsen Company, and is used pursuant to a license from The Nielsen Company, all rights reserved.)

[34] *Id*. Looking at the 11 DMAs in which Charter controls over 60 percent of the total MVPD market, for example, its share of the broadband market exceeds 90 percent in four of those DMAs (Utica, Laredo, Zanesville and Rochester), is above or near 80 percent in six of the other 11 DMAs, and exceeds 70 percent in one DMA. *Id*.

[35] Suddenlink (Altice), for instance, controls 64.7 percent of the entire MVPD market in Victoria, TX and more than 50 percent in five other DMAs. *Id*. In the Victoria, TX DMA, Suddenlink's share of the broadband market is 92.1 percent, and it has more than 50 percent of the broadband market in eight other DMAs. *Id*.

[36] *See Time Warner*, 729 F.3d at 153, 162-63 (noting cable operators' "significant MVPD market shares in many localities," ranging from 40 percent to above 60 percent in

III. CONCLUSION

For the reasons stated above, the Commission should reject contentions that a reviewing court should or would apply strict scrutiny to content-neutral program access or carriage requirements. Marketplace changes do not convert content-neutral laws or regulations into content-based ones subject to strict scrutiny under the First Amendment. Any appropriate constitutional analysis of such MVPD regulations, moreover, must account for technological and marketplace developments that have reduced the burdens of those rules and be based on a broad range of relevant data.

Respectfully submitted,

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August 5, 2019

numerous markets); *Cablevision*, 649 F.3d at 712 (stating that, for the program access rules to survive intermediate scrutiny, the FCC had no obligation to establish that vertically integrated cable companies retained a "stranglehold on competition nationally" and that the FCC need show only that cable operators remained "dominant in *some* video distribution markets") (emphasis in original).