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 THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AND THE ALLIANCE FOR COMMUNITY MEDIA

A. INTRODUCTION

The National Association of Telecommunications Officers and Advisors ("NATOA")[1] and the Alliance for Community Media ("ACM")[2] submit these comments in response to the Second Further Notice of Proposed Rulemaking ("Second FNPRM") released by the Federal Communications Commission ("Commission") on June 7, 2019, in the above-captioned proceeding.[3]

We reject the Second FNPRM's assertion that perceived changes in the media landscape impact the First Amendment rights of cable operators. We also reject the notion that this

[1] NATOA's membership includes local government officials and staff members from across the nation whose responsibility is to develop and administer communications policy and the provision of such services for the nation's local governments.

[2] ACM is a national nonprofit membership organization representing over 3,000 PEG access organizations, community media centers and PEG channel programmers throughout the nation, which includes more than 1.2 million volunteers and 250,000 community groups that provide PEG access cable television programming in local communities across the United States.

[3] *In re Leased Commercial Access*, MB Docket No. 07-42*; Modernization of Media Regulation Initiative,* MB Docket No. 17-105, FCC 19-52 (June 7, 2019).

Commission can or should attempt to circumvent Congressional mandates by undertaking its own review of a First Amendment question already settled by the courts.

We agree with the concern noted by Commissioner Starks in dissenting in part on this item that the Commission's proposed revision of the courts' First Amendment analysis may "have a sweeping impact that will upend long-standing programming that Americans have come to rely on." As the Second FNPRM notes, this analysis is not necessary to support the Commission's changes to the leased access rules. Opining on First Amendment issues is thus an unnecessary exercise that will serve only to inject uncertainty into long-standing statutory mandates the Commission has no authority to rewrite.

B. DISCUSSION

As amply demonstrated by the Comments of the Alliance for Communications Democracy ("ACD"), the changes in the video marketplace outlined in the Second FNPRM are "significantly overstated" and "have not eliminated the important governmental interest in diverse sources of video programming" nor "increased the burden on cable operators' First Amendment free expression."[4] We fully support ACD's analysis and conclusions.

Free Press further articulated that other changes in the media landscape not mentioned in the Second FNPRM—for example, "incumbent cable operators' position within that marketplace"—cannot be ignored should the Commission undertake an analysis of the new media landscape.[5] While we do not support the Commission's exploration of this issue (as further explained below), if the Commission is determined to undertake it, it should not take such a narrow view of what changes in the media landscape are relevant.

[4] Comments of the Alliance for Communications Democracy at 7; 2.

[5] Comments of Free Press at 2.

While the leased access obligations in the Cable Act are significantly different from the public, educational and governmental ("PEG") access obligations in the Act, we are concerned that any First Amendment analysis undertaken in this proceeding may mistakenly be applied to PEG or other Cable Act obligations in the future. PEG access requirements are negotiated obligations in cable franchise agreements, which agreements allow cable operators to use the public's property. It is far from clear that PEG benefits provided in exchange for use of public property burden cable operators' First Amendment rights to the extent of other Cable Act obligations, such as the federally-mandated must-carry obligations upheld in *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994), regardless of the state of the media marketplace. Whatever conclusions this Commission may reach regarding the First Amendment implications of leased access, those conclusions cannot be applied to PEG requirements, where cable operators have granted access to a small portion of the cable system in exchange for the valuable benefit of using public property over which they do not have an independent right of access.

Finally, we question the purpose of the Commission undertaking this inquiry. While we disagree with NCTA's First Amendment analysis, we appreciate that NCTA acknowledges the Commission does not have authority to simply ignore the provisions of the Cable Act.[6] Whatever the scope of the Commission's authority to implement the provisions of the Act and to interpret ambiguous provisions of the Act, the Commission does not have the authority to declare an act of Congress unconstitutional and refuse to comply with it. Given this uncontested limitation, it is unclear what the Commission would or could do should it decide this statutory mandate—which has been declared constitutional by the courts—is now unconstitutional. The Commission is not free to rewrite or ignore the law, and this is not a matter of interpreting an ambiguous provision of

[6] Comments of NCTA – The Internet & Television Association at 21 ("Recognizing that the Commission nonetheless has a statutory obligation to implement the leased access requirements …".).

the Act. We respectfully suggest that the Commission make any further revisions to the leased access rules based only on the authority Congress delegated it in Section 612 of the Cable Act[7] and leave the constitutional analysis for the courts.

C. CONCLUSION

For the reasons discussed above, we urge the Commission not to adopt, or take any action based on, the assertion in the Second FNPRM that changes in the marketplace alter the First Amendment analysis with respect to the provisions of the Cable Act. We strongly object to the Commission, should it nevertheless undertake such action, extending that flawed analysis to the Act's PEG provisions, which are fundamentally different from the leased access provisions at issue in this docket.

Respectfully submitted,

Nancy L. Werner
General Counsel
NATOA
3213 Duke Street, #695
Alexandria, VA 22314
(703) 519-8035

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[7] 47 U.S.C. § 532(b)(1) requires cable operators to "designate channel capacity for commercial use by persons unaffiliated with the operator… ." Section (c)(4) requires the Commission to "determine the maximum reasonable rates" for leased access; "establish reasonable terms and conditions for such use[;]" and "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section." This Section does not authorize the Commission to relieve cable operators of the mandate to designate channel capacity as provided in Section (b)(1).