

**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



The American Cable Association (“ACA”) hereby submits these reply comments in response to comments on the Federal Communications Commission’s (“Commission”) Further Notice of Proposed Rulemaking on Leased Commercial Access (“FNPRM”).¹ In its initial comments, ACA explained that the conditions that gave rise to the existing leased access regime no longer exist, as there has been an explosive growth in competition and diversity among video programmers driven by the development of alternative methods of distribution. ACA also explained that the current rules impose substantial burdens on cable operators, particularly small operators, and therefore urged the Commission to take several steps to reduce the administrative costs of complying with the existing leased access requirements. In these reply comments,

¹ *Leased Commercial Access; Modernization of Media Regulation Initiative*, Further Notice of Proposed Rulemaking, FCC 18-80, MB Docket Nos. 07-42; 17-105 (rel. Jun. 8, 2018) (“FNPRM”).

ACA renews its call for Commission action, expresses support for NCTA's proposal that the Commission revisit the rules regarding part-time leased access programming, and urges the Commission to vacate the 2008 Leased Access Order² in its entirety.

As ACA explained in its comments, the leased access rules impose significant administrative costs, and these costs are not taken into account by the Commission's formula for determining commercial leased access rates. Instead, the Commission's rate formula is designed to compensate cable operators for the value of their channel capacity, and is structured such that systems that are more profitable – those with more subscribers and with higher profits per-subscriber³ – are permitted to charge higher rates. As a result, even though the administrative costs of leased access are generally the same for all cable operators, small cable systems are less able than large systems to charge leased access fees that are sufficient to cover those costs. The problem has been getting worse over time, as small cable systems' profit margins for multichannel video programming distribution ("MVPD") services have been steadily decreasing, bringing the maximum per channel rate that small systems are permitted to charge closer and closer to zero.

To help remedy this situation, ACA outlined several steps that the Commission can take, in addition to adopting the proposals outlined in the FNPRM,⁴ to reduce

² *Leased Commercial Access, Report and Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd 2909 (2008), *appeal pending*, *United Church of Christ v. FCC*, No. 08-3245 (6th Cir.).

³ Small cable operators generally pay higher programming fees than their larger competitors, which lowers their per-subscriber profits.

⁴ The proposals include permitting all cable operators to respond only to "bona fide" requests for information, providing additional time for cable operators to respond to such requests, and permitting cable operators to charge a nominal application fee or deposit. FNPRM, ¶¶ 16-22.

administrative costs. Specifically, ACA urged the Commission to do three things: First, to adopt and publish a “safe harbor” per channel rate that all cable operators may elect to use in lieu of calculating a system-specific rate determined by the existing formula;⁵ second, to revise the list of information that cable operators must provide in response to requests for information (Even some leased access programmers agree that certain information, such as technical and studio costs, and sample contracts, is not needed for that purpose.⁶); and third, to permit cable operators to charge a reasonable, non-discriminatory closing fee when a leased access agreement has been finalized. If the Commission chooses not to adopt these measures for all cable operators, it should at least provide this relief for small operators, who are permitted to charge only a fraction of the leased access rates that larger operators may charge.

As an alternative to establishing a safe harbor rate as ACA proposed in its initial comments, the Commission could reduce the burden of calculating a new rate for every leased access request by clarifying that a cable operator may use the formula to

⁵ ACA explained that the requirement to provide a complete schedule of full-time and part-time leased access rates is “[b]y far the most burdensome element of the Commission’s rules related to responding to information requests.” Because the Commission’s rate formula is based on data that is constantly changing, a cable operator must recalculate its rates in response to each request for leased access. Adopting a safe harbor rate that any cable operator could use would eliminate the need to repeat these calculations, and would also establish a guaranteed payment so that an unprofitable cable system would not be forced to give away channel capacity for free.

⁶ See, e.g. *Leased Commercial Access; Modernization of Media Regulation Initiative*, Docket Nos. 07-42; 17-105, Comments of the Leased Access Programmers Association at 13 (filed Jul 30, 2018) (“LAPA Comments”) (“There is a difference between a request for information and a need to submit a bona fide leased access request. There is a need for certain general information to determine whether or not there is a reason to proceed with a leased access request. ... When a prospective user has sufficient information to determine that they are ready to move forward and need more detailed information such as a sample contract, detail rate information, tier placement etc., that would take more effort to compile or mail, that should be submitted in a more formal (bona-fide) leased access request.”); see also Comments of the Small Business Network at 3 (filed Jul 30, 2018) (“SBN Comments”) (arguing in favor of imposing additional information requirements, but excluding information on technical and studio costs and sample contracts from their list of information that leased access programmers need in advance of making a leased access request).

calculate the leased access rate on a specific date and use that rate for all leased access agreements for the next three years. For example, a cable operator would calculate the leased access rate on January 1, 2019, based on the relevant data for that date, then use that same rate for all leased access agreements until December 31, 2021, after which it would calculate the rate anew, to be used for the following three years.

In addition to adopting the reforms discussed above, ACA agrees with NCTA that the Commission should consider eliminating or limiting part-time leases, and permitting cable operators to establish minimum per day purchase requirements. Part-time leased access is a regulatory invention, and is in no way mandated by statute. Despite the Commission's recognition that part-time programming "may impose additional administrative and other costs on cable operators," and that cable operators may not be "adequately compensated for their capacity,"⁷ the agency elected to impose part-time leased access requirements because it believed that such programming "provid[ed] much of the competition and diversity of programming sources that Section 612 was intended to promote,"⁸ and because it was not strictly prohibited from doing so.⁹

⁷ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Leased Commercial Access*, Second Report and Order and Second Order on Consideration of the First Report and Order, 12 FCC Rcd 5267, ¶ 62 (1997).

⁸ *Id.*

⁹ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Leased Commercial Access*, 8 FCC Rcd 5631, 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.").

The Commission's concerns about inadequate compensation proved well-founded, and cable operators – especially those who are small – rarely, if ever, generate sufficient revenue from part-time programming to cover their administrative costs, let alone make a “reasonable profit,” as the Commission intended when it adopted the current formula.¹⁰ Generally speaking, the cost of responding to a request for information about leased access is the same no matter how much channel capacity a programmer is looking to lease.¹¹ Yet the revenue generated by a part-time lease is a miniscule fraction of what cable operators may earn from full-time programming. In today's market, there is simply no reason to expect cable operators to continue incurring losses from part-time leased access agreements, especially when there are even cheaper distribution alternatives available for independent content creators.

Part-time programming is thriving in today's market, which is more competitive and diverse than Congress or the Commission could ever have imagined in the 1980s and 1990s. The idea that diverse and independent programmers cannot thrive without cable distribution is an anachronism, and content creators who wish to distribute content “free of the editorial control of [a] cable operator”¹² have many options. There are well known online distribution platforms such as Netflix, Amazon Prime, and Hulu, of course,

¹⁰ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation Leased Commercial Access*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933, ¶ 31 (1996) (“1996 Leased Access Order”) (“When the set-aside requirement is not met, the rate should be high enough to recover all reasonable costs of leasing and a reasonable profit, but no higher.”).

¹¹ As NCTA explains, the cost of accommodating part-time leased access can actually be substantially higher than full-time programming. *Leased Commercial Access; Modernization of Media Regulation Initiative*, Docket Nos. 07-42; 17-105, Comments of NCTA – The Internet and Television Association at 23 (filed Jul. 30, 2018) (“NCTA Comments”).

¹² 1996 Leased Access Order at 2.

but also many other less well-known online services that distribute niche content that often cannot be found on traditional MVPD services.¹³ As evidence of the viability of online options for independent producers, one need only look to the amount of original programming that is available on these services, some of which is award winning.¹⁴

Even content creators who cannot or do not wish to contract with a curated streaming service can make use of any number of platforms that specialize in the distribution of user-generated content, such as YouTube, Facebook Watch,¹⁵ Vimeo, Twitch, and others.¹⁶ As Business Insider's John Lynch recently put it, "YouTube is the new TV," and independent content creators have leveraged that platform to reach millions of people (and in some cases earn millions of dollars).¹⁷ Platforms like YouTube are ideal for part-time programming because they allow content creators to produce videos of any length, and to decide exactly when and how often to post new

¹³ James K. Wilcox, *5 Streaming Sites for People Who Want More Than Netflix*, Consumer Reports (Jun. 5, 2018), <https://www.consumerreports.org/streaming-media/streaming-sites-for-people-who-want-more-than-netflix/>.

¹⁴ For example, in 2018, Netflix alone earned 112 Emmy nominations for its programming, more than any cable network. Joy Press, *2018 Emmy Nominations: Netflix, Hulu, and Amazon Hit a TV Tipping Point*, Vanity Fair (Jul. 12, 2018), <https://www.vanityfair.com/hollywood/2018/07/2018-emmy-nominations-netflix-nabs-most-nominations-in-tv-streaming-wars>.

¹⁵ Andrew Wallenstein, *Facebook Watch Aims to Reinvent TV With New Interactive Shows*, Variety (Jun. 19, 2018), <https://variety.com/2018/digital/news/facebook-watch-aims-to-reinvent-tv-with-new-interactive-shows-1202849582/>.

¹⁶ Hitesh Bhasin, *Top 14 YouTube Competitors*, Marketing91 (Dec. 17, 2017), <https://www.marketing91.com/top-14-youtube-competitors/>.

¹⁷ John Lynch, *These are the 19 most popular YouTube stars in the world — and some are making millions*, Business Insider (Feb. 2, 2018), <https://www.businessinsider.com/most-popular-youtubers-with-most-subscribers-2018-2#no-19-fine-brothers-entertainment-fbe-167-million-subscribers-1>; see also TV Guide, *These 23 YouTube Stars Make More Money Than Most People on TV* <https://www.tvguide.com/galleries/youtube-stars-make-more-1089689/>, last visited (Aug. 12, 2018).

content. They also allow viewers to discover new programs at their leisure and watch at any time of day or night, on any device.¹⁸

Given the immense variety of distribution outlets available to content creators today, it is no longer supportable for the Commission to force cable operators to accommodate requests for leased access that will never generate sufficient revenue to even cover administrative costs. The Commission should therefore consider eliminating the obligation on cable operators to accept part-time leased access requests, or at least permit cable operators to establish minimum per day purchase requirements.¹⁹ In the alternative, the Commission should permit cable operators to charge a surcharge for part-time programming to help offset some of the costs.²⁰

At a minimum, the Commission should exempt small cable systems from part-time leased access requirements. While the Commission has previously expressed the belief that Congress did not intend for cable operators to “subsidize programmers who seek access to their system through the provisions of Section 612,”²¹ the current rules force small cable operators to spend money to carry part-time leased access programming because, as explained above, it is nearly impossible for a less profitable

¹⁸ Technology makes it easy for any viewer, even those who are not internet savvy, to access over-the-top content and user-generated content. Consumers can use a smart TV or streaming player, such as Amazon Firestick, Google Chromecast, or Roku Express.

¹⁹ For example, by requiring a leased access programmer to purchase a minimum of 8 hours of programming per day.

²⁰ ACA’s proposed closing fee is distinct from the surcharge for part-time leased access that NCTA has proposed. ACA’s proposed closing fee would be a one-time, non-discriminatory fee that a cable operator could charge any leased access programmer with whom they enter into an agreement to cover the administrative costs of completing the deal. NCTA’s proposed surcharge is designed to offset the extremely low payments for part-time programming and could conceivably be structured as an ongoing fee, rather than a lump sum payment.

²¹ 1996 Leased Access Order at 27.

system to break even on such agreements. This simply cannot be justified in today's marketplace.

Finally, the Commission should act on its own proposal to vacate the 2008 Leased Access Order.²² Several leased access programmers have urged the Commission to reject this proposal, and to instead “move forward with those parts of the 2008 Leased Access Rules that are not subject to the objection of the OMB due to burdensome paperwork requirements, nor are subject to the scrutiny or concerns of the Sixth Circuit Court of Appeals when it issued its stay order.”²³ As NCTA explained, however, “[t]he 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 precisely the wrong direction.”²⁴ Implementing those misguided rules now, after ten years of incredible growth in diversity and competition, would undermine the Commission's ongoing efforts to modernize its media regulations.

In support of their arguments that the Commission should make the leased access rules more burdensome for cable operators by implementing parts of the 2008 Leased Access Order, leased access programmers claim that the alternative distribution platforms that have been so succesful in democratizing the video programming market are not sufficiently tailored to their own business models – many of which are focused

²² FNPRM, ¶¶ 8-12.

²³ LAPA Comments at 2. *See also Leased Commercial Access; Modernization of Media Regulation Initiative*, Docket Nos. 07-42; 17-105, Comments of Combonate Media Group at 2 (filed Jul. 30, 2018) (“Combonate Comments”); Comments of Baskin L. Jones at 2 (filed Jul. 30, 2018); Comments of Stogmedia at 11-12 (filed Jul. 30, 2018); SBN Comments at 4-7.

²⁴ NCTA Comments at 15-16.

on local programming.²⁵ As discussed above, ACA strongly disagrees with the idea that alternative outlets are not a viable option for independent programmers, but more importantly, the purpose of the leased access framework has never been to privilege specific types of programming over others – it is simply to encourage diversity and competition among video programmers of all kinds.²⁶ Incredibly, one programmer also makes the argument that the existing market is *too competitive*, making it “impossible to break through or reach an audience without massive investment.”²⁷ But again, this argument misconstrues the purpose of the rules, which is to ensure that independent programmers have the opportunity to distribute their programming, not to guarantee that people actually watch it (which, incidentally, the leased access rules cannot do anyway).

The simple fact is that leased access is less necessary than ever to ensure diversity and competition among video programmers, and as such the burdens that the rules impose on cable operators – especially smaller, less profitable cable operators who are, in some cases, unable to break even on leased access agreements – can no longer be justified. Until Congress takes the opportunity to eliminate leased access

²⁵ See, e.g., Combonate Comments at 3 (“DBS is not a viable option for local programming[.]”); LAPA Comments at 13-14 (“We contend that DBS or satellite delivery of programming is not a viable method for use by independent programmers, not only due to the costs or access to, but it has no validity or option to provide locally focused programming.”).

²⁶ Additionally, Commission rules ensure that there are many other sources of local programming available on cable systems. For example, the must carry rules guarantee that local commercial and qualified noncommercial educational broadcast stations have the option of carriage on every cable system. 47 C.F.R. § 76.56. Additionally, Section 611 of the Communications Act permits local franchising authorities to require cable operators to set aside channels for public, educational, or governmental (“PEG”) use. 47 U.S.C. § 531.

²⁷ *Leased Commercial Access; Modernization of Media Regulation Initiative*, Docket Nos. 07-42; 17-105, Comments of American Independent Media, Inc. at 5 (filed Jul. 30, 2018) (“Anyone can post on YouTube or create a website for streaming video, but today’s fragmented media environment makes it impossible to break through or reach an audience without massive investment.”).

altogether, ACA urges the Commission to do what it can to minimize the burdens of leased access by adopting the proposals discussed above.

Respectfully submitted,



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