Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 FREE PRESS ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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Summary

In this proceeding, the Commission continues to question the constitutionality of its leased access rules, citing various commenters' speculations that growth of the video marketplace has eroded justification for the leased access regime.

Put simply, this is the wrong test and wrong question to ask. The Commission cannot find that development of the online video marketplace in particular is the only measure for whether leased access continues to promote competition and diversity on cable systems.

Leased access has not been a wild success since its inception in 1984. Yet its shortcomings in implementation by cable operators, affecting programmers who might otherwise have made more use of it, do not justify the Commission backing itself into a shabby and unnecessary constitutional analysis in an attempt to further weaken the rules.

These rules derive from a statutory mandate upheld by the courts, and within Congress's prerogative to change – not the Commission's to abandon. The current online video marketplace does not provide evidence that the market can self-regulate to ensure diversity and competition on cable systems. In contrast, eviscerating leased access would create a market where cable operators who already wield tremendous power would be accountable to no one, including most importantly the communities they serve.

The Commission's focus on online video marketplace developments alone ignores incumbent cable operators' position within that marketplace too. Cable operators are also dominant wired broadband providers, and ultimately control their broadband customers' access to the online platforms that cable filers in this docket claim are their direct competition.

I. The Commission Takes the Wrong Approach to Reviewing its Leased Access Rules by Questioning Their Constitutionality When the Rules Were Mandated by Congress and Upheld by the Courts.

Having already unjustifiably swept aside many of its existing leased access rules, the Commission continues with its *Second FNPRM* in the above-captioned dockets to inquire about the constitutionality of these rules. But questioning their validity under the First Amendment is not a proper concern of the Commission's supposed "modernization" efforts since the rules were mandated by Congress and have been upheld by the courts. What's more, the Commission's First Amendment musings are simply wrong, as changes in the market do not change Congress's and the courts' longstanding answers to this question of the law's constitutionality and utility.

Congress established leased access as part of the Cable Communications Policy Act of 1984 ("1984 Act") to "promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public <u>from cable systems</u>."[1] Congress then updated cable regulations, including leased access, in the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act," together with the 1984 Act, the "Cable Act"). It expanded the Commission's authorization to regulate the industry, and particularly, to curb cable operators' use of their market power for anti-competitive ends.[2] In the decades since and on numerous occasions, cable companies have challenged leased access and other provisions of the Cable Act under the First Amendment. In 1996, the D.C. Circuit upheld the leased access rules in just such a challenge.[3]

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[1] 47 U.S.C. § 532(a) (emphasis added).
[2] *See Time Warner Cable, Inc. v. FCC*, 729 F.3d 137, 145 (2d Cir. 2013).
[3] *See Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996) (finding statutory objectives promoted diversity in sources of information rather than substance of information, making them content-neutral, subject to intermediate scrutiny, and consistent with the "First Amendment's 'assumption that the widest possible dissemination of information from diverse and antagonistic sources' promotes a free society.").

Now, the Commission conjures the specter of First Amendment concerns once more, despite the definitive instruction given the agency on this issue by Congress and the ruling handed down by the reviewing court.[4] It claims the development of the online video marketplace in particular may render leased access unconstitutional, going so far as to suggest intermediate scrutiny is no longer the appropriate standard of review.[5] This claim disregards that historically, "[C]ourts have consistently reviewed challenges to the Cable Act and regulations promulgated pursuant thereto under intermediate scrutiny."[6] The Cable Act, by its terms, is content-neutral[7] and remains so today regardless of any developments in the video marketplace.

Commissioner Starks was correct in asserting that the Commission has a "fundamental duty to act according to the directives of Congress whenever it has spoken on a matter in question."[8] Until Congress chooses to amend the Cable Act's commercial leased access provisions, raising the question of its constitutionality is not a useful, valid, or necessary exercise in the Commission's self-styled Modernization of Media Regulation Initiative.[9] Yet the Commision incorrectly presumes there is no longer a need to promote diversity in video programming because cable allegedly no longer has monopoly power over video markets.[10]

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[4] *See Leased Commercial Access*, *Modernization of Media Regulation Initiative*, Report & Order and Second Further Notice of Proposed Rulemaking, MB Docket Nos. 07-42, 17-105, ¶ 39 (rel. June 7, 2019) (suggesting that "changes in the video marketplace . . . call into question whether our leased access rules are consistent with the First Amendment") ("Second FNPRM"); *see also id.* ¶ 47.

[5] *See id.* ¶ 39; *see also* Comments of NCTA, MB Docket Nos. 07-42, 17-105, at 11-12 (filed July 20, 2018) (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974)) ("NCTA Comments").

[6] *See Time Warner Cable*, 729 F.3d at 155 (citing *Turner Broad. Sys. Inc. v. FCC*, 520 U.S. 180, 213 (1997); *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 661-62 (1994); *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 711 (D.C. Cir. 2011); *Cablevision Sys. Corp. v. FCC*, 570 F.3d 83, 97 (2d Cir. 2009); *Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001); *Time Warner Entm't Co., L.P. v. FCC*, 211 F.3d 1313, 1318 (D.C. Cir. 2000); *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d at 969).

[7] *Time Warner Cable*, 729 F.3d at 156.

[8] *See* Second FNPRM, Statement of Commissioner Geoffrey Starks Approving in Part and Dissenting in Part.

[9] *See Commission Adopts Public Notice to Modernize Media Rules*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017).

[10] *See* Second FNPRM ¶ 39.

This supposition ignores the fact that cable operators do indeed still occupy a dominant position in the pay-TV marketplace, and they remain especially dominant on a regional basis and in particular local markets. It also ignores the fact that, no matter how many online video choices some people may have today, nothing about the increase in choices on other platforms obviates the need for cable TV customers to have a diverse array of options available to them – nor changes the level of First Amendment scrutiny given to content-neutral rules designed to promote such diversity. In sum, it is not true that the leased access provisions have outlived their usefulness – nor that eviscerating them will do anything to incentivize cable operators to keep their systems open and accessible to independent programmers.

Additionally, no credible evidence has been put forth on the record to suggest that leased access stands in the way of competition and innovation, or that it is a legitimate burden on cable companies' free speech rights in particular.[11] The filings put forth by cable industry commenters suggests that technological advancements have created more opportunities for programmers to distribute content, and that the addition of new multichannel video programming distributors ("MVPDs") and online video distributors ("OVDs") has mitigated cable's monopoly on programming distribution.[12]

Still, these changes have no effect on what courts clarified in 1996: leased access does not burden cable operators' free speech rights because it allows them to use their leased access channels for their own programming until an unaffiliated programmer seeks carriage.[13] At the

[11] *See* NCTA Comments at 11-14 (arguing that marketplace developments make leased access "no longer necessary or effective in promoting their intended goals . . . the only effect of the rules is to interfere with the marketplace and, more importantly, with the protected editorial discretion of cable operators.").
[12] *See* Reply Comments of Charter Communications, Inc., MB Docket Nos. 07-42, 17-105, at 5-6 (filed Aug. 13, 2018) ("Charter Reply Comments").
[13] *Time Warner Entm't*, 93 F.3d at 971.

time that decision issued, cable operators reported leased access requests were low.[14] That's not surprising: Independent programmers explain that cable operators have created barriers to entry since leased access's inception, rebutting cable operators' claims that the economics of leased access were somehow fundamentally flawed.[15]

Still, changes in the video marketplace do not negate Congress's goals for promoting competition and diversity on cable systems, nor lessen the Commission's obligations to keep those goals at the forefront of any Modernization Initiative. The statutory mandate is intact, and leased access does not burden the free speech rights of cable operators thus remains constitutional. And it is important to keep it in place until <u>everyone</u> can benefit from the next generation of video programming without undue interference by the cable operators that serve as the country's largest broadband internet access providers.

II. The Growth in the Online Video Marketplace Does Not Provide Sufficient Justification for Weakening or Eliminating Rules Such as Leased Access That Are Designed to Promote Diverse Voices on Cable Systems.

The Commission is correct in pointing out that the video marketplace has undergone incredible changes in the last thirty years, but that does not support the claim that the cable TV industry can self-regulate and provide diverse options for existing pay-TV customers.

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[14] *Id.* at 969-70.

[15] *Compare Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, MB Docket No. 16-41, ¶ 5, 6, 10 (June 7, 2019) (reporting that "[I]ndependent programmers and others have asserted that certain MVPDs often demand that carriage agreements include certain contractual provisions, such as most favored nation (MFN) and alternative distribution method (ADM) clauses, that hinder programming competition, innovation and diversity") *with* NCTA Comments at 7 (claiming the economics of "leased access were never conducive to its purpose. Most cable program networks, to be sustainable, relied at least in part of subscriber fees. Cable operators typically paid networks for carriage to their subscribers on a per-subscriber basis. Yet leased access required competitors of those networks to pay the cable operator for carriage – a model that was only conducive to certain types of programming whose business models did not resemble that of most networks competing for carriage on cable systems.").

Cable's dominance is not necessarily diminished in the new landscape, even as the methods and devices on which people watch content change. The Commission's 2018 Communications Marketplace Report cited data showing the total number of MVPD subscribers (including cable, telephone and satellite) declined from 99.7 million in 2015 to 94 million in 2017, but with cable gaining relative share of the market and capturing 55.2% of video revenues in 2017.[16] Yet as Free Press recently noted in Senate testimony, the "decline in subscriptions for traditional MVPDs, including cable, satellite, and telecom companies with a pay-TV business" is largely "the result of greedy programmers [and] greedy distributors unwilling to give consumers anything other than expensive bloated channel bundles full of stations that few want to watch."[17] Moreover, while it is true that people are changing how they choose to watch content, TV viewership remains high and Americans "still spend far more time watching traditional cable and broadcast TV than they do on social media and other computer and smartphone applications."[18]

Stats like that show that people are still watching traditional TV. And they are still watching content from traditional pay-TV providers too, even when watching it online, thanks to vertical mergers between MVPDs and content providers like Comcast/NBCUniversal and

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[16] *See Communications Marketplace Report*, GN Docket No. 18-231; WT Docket No. 18-203; MB Docket Nos. 17-214, 18-227; IB Docket No. 18-251, 33 FCC Rcd 12558, Figs. B-1, B-2 (rel. Dec. 26, 2018) ("Communications Marketplace Report").

[17] *See* Testimony of Craig Aaron, President and CEO, Free Press and Free Press Action, *The State of the Television and Video Marketplace*: *Hearing Before the U.S. Sen. Subcomm. on Communications, Technology, Innovation, and the Internet, 116th Cong.*, at 6 (June 5, 2019) ("Craig Aaron Testimony"); Communications Marketplace Report ¶ 63 ("MVPDs often offer better deals to consumers who purchase video services as part of a bundle that includes some combination of video, Internet, voice, and mobile wireless services. . . . [T]he strategy of bundling services to subscribers has a positive effect on customer retention as the household is reliant on the MVPD for multiple services . . . 56% of MVPD subscribers responded that a top reason for keeping the video service was because it was bundled with the Internet service.").

[18] *See id*. at 5; Comments of American Independent Media, Inc., MB Docket Nos. 07-42, 17-105, at 5-6 (filed July 30, 2018) ("AIM Comments") (reporting "[L]inear programming on pay-TV platforms remains a vital part of the media marketplace," with the average streamer aged aged 25-54 watching 4 hours and 20 minutes per day of cable and broadcast TV) (citing Nielsen, The Nielsen Local Watch Report: A Focus On Streaming Trends In Our Cities (Q4:2017) (2018), http://www.nielsen.com/us/en/insights/reports/2018/local-watch-report--q4-2017.html.

AT&T/Time Warner, as well as new virtual MVPD ("V-MVPD") and subscription video on demand ("SVOD") services from companies like AT&T (with its DirecTV Now and WarnerMedia services) and Dish (with its Sling TV service). All of this is an indication that the largest incumbent MVPDs are laying claim to the future of the video marketplace as well as holding on to their traditional provinces. None of this is reason to deregulate or weaken leased access any further.

For years, the most popular programmers increased programming fees charged to distributors. Now, the consolidation of multichannel distributors paired with growing trends of cord-cutting may have given distributors more leverage in those negotiations.[19] In turn, these trends have prompted content companies to consolidate as well.[20] This has led popular programmers like HBO to spin off individual SVOD services. The biggest media conglomerates have the resources to invest in the diversification and reach of their products. They also benefit when traditional MVPD, V-MVPD, and OVD providers diversify distribution outlets because they are the first to gain carriage on those services. Independent programmers have the most difficult time adjusting to these changes in the video marketplace.[21]

The Commission praises the supposedly limitless opportunities for independent programmers to reach audiences for free on OVD platforms like YouTube. This ignores the fact that not every cable subscriber subscribes to the internet, and that the leased access statute directs

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[19] Meg James, "Cable TV Upheaval Prompts a Wave of Media Merger Talks," *L.A. Times* (July 20, 2017), https://www.latimes.com/business/hollywood/la-fi-ct-discovery-scripps-talks-20170720-story.html.

[20] *Id.*

[21] *See* AIM Comments at 4-9. AIM explains that "massive consolidation on both the distribution and content sides of pay-TV market threatens the future viability of independent programmers" despite expanse in the video marketplace. Affiliation agreements will often prohibit independent programmers from distributing online and if a major cable operator drops one, other pay-TV providers follow suit, including OVDs and V-MVPDs. On the content side, consolidation among major conglomerates allows them to wield more leverage to demand expanded carriage at higher fees from cable operators, which results in less carriage and lower fees for independent programmers.

the Commission to promote a diversity of sources on cable TV systems. But whatever the subscriber experience online, as American Independent Media points out, "today's fragmented media environment makes it impossible to break through to reach an audience without massive investment" making leased access the "best way to access the traditional linear video market."[22]

Additionally, the Commission's myopic focus on the internet as providing sufficient opportunities for audiences interested in content and programmers looking for distribution does not account for trends that suggest traditional MVPDs are increasingly transitioning their business models to the internet market.[23] The agency's focus on the internet as the savior for independent video minimizes the needs of programmers dedicated to creating hyper-local content for audiences whose attention is predominantly directed at cable TV.[24]

It also does not address how leased access may be modified to serve the needs of programmers and audiences in an environment where traditional MVPDs are modifying existing wireline distribution to retain people interested primarily in internet services. Data shows the recent rise in their V-MVPD services has helped MVPDs make up for losses in traditional pay-TV subscriptions, meaning many users are not actually cutting the cord but merely changing how they pay the same cable operator.[25] Traditional MVPDs are still dominating viewership, while investing in digital distribution and skinny bundle options online. And while large media

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[22] *Id.* at 5.

[23] *See* Communications Marketplace Report ¶¶ 63, 116 ("Many MVPDs offer connected video services . . . which allow consumers to access cable and broadcast channels and VOD programming on a variety of Internet-connected devices both inside and outside the home. . . . MVPDs have begun offering OVD-like services including . . . virtual MVPD options of their own for consumers who have Internet access but have eschewed a traditional MVPD subscription.").

[24] *See* Comments of Jon C. Moon, Owner of Ridgeline TV Channel 99 in Northeast Georgia & Western North Carolina, MB Docket No. 07-42 (filed July 24, 2018) (noting that "in a time where huge national cable companies make decisions from far-away and myopic viewpoints, Leased Access gives small – even tiny programmers like Ridgeline TV – a reasonable chance to provide a much needed local voice for viewers").

[25] *See* Craig Aaron Testimony at 5-6.

companies unaffiliated with cable are investing in original content,[26] there are a growing number of legacy pay-TV incumbents in the V-MVPD market.[27] These trends indicate traditional pay-TV providers easily adapt to the internet age of the video marketplace. And whatever increased competition there is within that marketplace, cable industry revenues continue to increase.[28]

For the aforementioned reasons, the Commission should be alert to how changes in the video marketplace are actually threatening media diversity and competition. As American Independent Media noted, when the Commission approved the Comcast/NBCUniversal merger in 2010, it was concerned that the "combination of the nation's largest cable operator with a premiere content creator posed a direct threat to independent programmers."[29] In response, the Commission placed now expired or expiring special conditions on Comcast to protect independent programming.[30]

The largest traditional MVPDs and conglomerate media companies are taking steps to consolidate, maintain their audiences, and influence viewer choice in an age when digital

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[26] *See* Todd Spangler, "Netflix Spent $12 Billion on Content in 2018. Analysts Expect That to Grow to $15 Billion This Year," *Variety* (Jan. 18, 2019), https://variety.com/2019/digital/news/netflix-content-spending-2019-15-billion-1203112090/ (reporting Netflix's spending on content in 2018 was up 35% from the year before but is expected to record negative $3 billion in free cash flow in 2019, because"it's going to face serious new streaming competition from media giants Disney, WarnerMedia and NBCUniversal").

[27] *See* Communications Marketplace Report ¶ 82 (reporting that V-MVPDs that offer "similar packages of cable and broadcast channels may see themselves as potential substitutes to traditional cable, telco, or satellite delivered MVPDs).

[28] *See* Chloe Anagnos, "Cable Providers Are Rapidly Losing Customers. So Why Are Their Profits Up?" *FEE* (Nov. 8, 2018), https://fee.org/articles/cable-providers-are-rapidly-losing-customers-so-why-are-their-profits-up/. The article cites reports that Charter Spectrum lost 800,000 television subscribers in the last three years while increasing revenues by 6 percent, mainly attributed to consumers' need for high-speed internet when they unsubscribe from cable TV and to the fact that when consumers need broadband, they turn to cable providers. Cable survives by providing high-speed connections, and cable operators are also protected from new entrants by the high initial cost of building new systems and by the need to obtain franchises from local governments charge.

[29] *See* AIM Comments at 6.

[30] *Id.* at 7 n. 13 (conditions included requiring that Comcast not discriminate in video programming distribution on the basis of affiliation or non-affiliation with Comcast-NBCU; requiring Comcast to include unaffiliated news channels in the same "neighborhoods" on the cable dial with its own news offerings; and requiring Comcast to provide ten new independent channels within eight years on its digital tier).

technology has changed how people access information but not necessarily changed the sources of that content. The Commission characterizes the proliferation of new distribution platforms as vehicles for competition while overlooking how the most powerful players in that market continue exerting control. As discussed below, cable companies exert control over the online video marketplace thanks not only to their own vertically integrated online content offerings but their dominance over broadband internet access pathways as well. The Commission's narrow view is harmful to the needs of audiences and independent programmers who serve them, both of which rely on the Commission to advance policies that promote the public interest and the diversity of information sources on cable systems.

III. Cable Operators are Gatekeepers for Unaffiliated and Independent Online Video Programming Too.

The Commission claims cable no longer has monopoly power over the video programming marketplace because now there are "media platforms, including online platforms that programmers can utilize for free to distribute their content [and] . . . as a result, consumers are able to access video programming via means other than traditional broadcast and cable television, and the Internet is widely available for this purpose."[31]

In 1994, the Supreme Court commented on the nature of cable, recognizing its "gatekeeper control . . . by virtue of its ownership of the essential pathway for cable speech" that gives cable operators complete control over what subscribers can access.[32] This remains true in the internet age, and it is precisely what the Commission fails to recognize in its analysis: cable continues to maintain its gatekeeper status because cable operators are also broadband internet

[31] *See* Second FNPRM at 5.
[32] *See Turner Broad. Sys. v. FCC*, 512 U.S. at 656.

providers. Research shows that cable providers are gaining more control over American broadband with, for example, "the nation's biggest cable companies adding a whopping 83% of all net broadband subscribers" in the last quarter of 2017.[33] In conjunction with other research showing that "74% of U.S. TV households have at least one Internet-connected TV device,"[34] it is evident that cable operators hold tremendous market power over internet access and ultimately the online video marketplace that depends on the open internet to reach viewers.

Since the internet is such a driving factor in the Commission's alleged analysis of competition and diversity in the video marketplace, the Commission must take a harder look at who the competitors actually are and what aspects of the marketplace they already control – and which, in the absence of safeguards the Commission cast aside, they are seeking to control more.

An internet without Net Neutrality gives cable and telephone companies an advantage over online competitors by allowing these broadband providers to throttle the speeds of their online competitors or even charge customers when they use competitors' sites while keeping home-grown cable applications exempt from usage caps.[35] Even Netflix addressed these concerns in its 2018 Annual Report as a threat to the profitability of its business model.[36]

While multichannel distributors and programmers adjust to the changes in the marketplace, the Commission cannot lose sight of the reality that incumbent pay-TV providers

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[33] *See* Karl Bode, "The Cable Industry is Quietly Securing a Massive Monopoly Over American Broadband," *Techdirt* (Mar. 20, 2018), https://www.techdirt.com/articles/20180314/09251639423/cable-industry-is-quietly-securing-massive-monopoly-over-american-broadband.shtml.

[34] *See* Leichtman Research Group, "31% of Adults Watch Video Via a Connected TV Device Daily" (May 21, 2019), https://www.leichtmanresearch.com/31-of-adults-watch-video-via-a-connected-tv-device-daily/.

[35] *See* Alex Sherman, "How Netflix Sent the Biggest Media Companies into a Frenzy, and Why Netflix Thinks Some are Getting it Wrong," *CNBC* (June 13, 2018) https://www.cnbc.com/2018/06/13/netflix-why-att-bought-timewarner-and-comcast-and-disney-want-fox.html.

[36] *See* Netflix, Inc., Annual Report for the Fiscal Year Ended December 31, 2018, at 7, http://www.annualreports.com/HostedData/AnnualReports/PDF/NASDAQ_NFLX_2018.pdf.

still act as gatekeepers for online video content too. That is yet another reason that leased access remains necessary, to maintain competition and diversity on cable systems.

Conclusion

For the foregoing reasons, the Commission should not entertain its unfounded suggestion in the *Second FNPRM* that changes in the video marketplace either obviate the need for or undermine the constitutionality of its full-time leased access rules.

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