

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS
APPROVING IN PART AND DISSENTING IN PART**

Re: *Leased Commercial Access*, MB Docket No. 07-42; *Modernization of Media Regulation Initiative*, MB Docket No. 17-105.

In this item, the Commission considers our rules governing leased access, a statutory requirement that allows independent programmers to purchase carriage on certain channels offered by cable providers. These rules have been in stasis since 2008 when rule changes made at the time were stayed by the D.C. Circuit Court of Appeals. For 11 years, this proceeding has remained stuck. I support the Commission's efforts to extricate itself from the morass and take a fresh look, and on that account, I approve, in part, of this item.

However, I must dissent, in part, because I think that the First Amendment analysis offered by the majority goes too far and will put at risk important and well-established cable carriage obligations in other parts of our telecommunications framework.

Specifically, I am concerned with language in the Report and Order opining on whether our leased access rules are consistent with the First Amendment. The majority here offers that there is "substantial doubt on the foundation for our leased access rules" for one reason: the explosion of the Internet has "changed" everything.¹ I disagree. First, and most basically, it doesn't change our fundamental duty to act according to the directives of Congress wherever it has spoken on a matter in question. Indeed, leased access requirements have already withstood a facial First Amendment challenge with the court noting that rules requiring cable operators to carry leased access channels were supported by an important government interest in promoting diversity and competition in the video programming marketplace.² The fact that members of this Commission may disagree with a statute or judicial decision does not give us the authority to rewrite a statute or ignore the courts.

Second, the constitutional reasoning and analysis advanced by the majority is not, in any way, limited to the rules at issue here today, and I believe will have a far-reaching impact. I would urge my colleagues to proceed with caution and take a closer look. That the internet provides an alternative outlet for some Americans to view content is undeniable. But that, alone, should not result in a re-interpretation of our First Amendment principles with respect to cable. If it does, it will have a sweeping impact that will upend long-standing programming that Americans have come to rely on: public, educational, and government (PEG) channels;³ "must carry" elections of local broadcasters;⁴ our program carriage regime;⁵ and, even, children's programming.⁶

¹ Report and Order and Second Further Notice of Proposed Rulemaking at para. 40.

² See *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 969 (D.C. Cir. 1996). As the item itself recognizes: "[t]hese matters have already been addressed by the courts and they have upheld the leased access provisions enacted by Congress. Only the courts and Congress can change these provisions. In the meantime, the Commission is obligated to carry out the directions given to them by Congress." Report and Order and Second Further Notice of Proposed Rulemaking at para. 47 (*quoting* LAPA Reply at 5).

³ 47 U.S.C. § 531. Cable providers have raised the specter of the First Amendment to unsuccessfully target PEG carriage requirements. As noted by Senator Markey and other U.S. Senators, people across the country rely on PEG channels to "monitor local government proceedings, hear the latest news from nearby college campuses, and consume other locally produced programming including emergency alerts and directives." Letter from Senator Edward Markey et al., to Chairman Ajit Pai, FCC (Oct. 29, 2018).

⁴ 47 U.S.C. §§ 534, 535. Cable providers could and, undoubtedly, will use this reasoning to argue for long sought

Finally, it is worth mentioning that the majority indicates that today's rule changes are "independently and sufficiently supported by [] policy justifications."⁷ The constitutional analysis advanced here, then, seems to me to be extraneous language that does not animate on our action here today. To that extent, it appears to me to be, essentially, dicta and not germane to the issues at hand. For these reasons, I approve in part and dissent in part.

Thank you to the staff of the Media Bureau for preparing this item for our consideration.

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relief from having to honor the "must carry" elections of local broadcasters, which are important to ensuring the local stations can reach consumers.

⁵ 47 U.S.C. § 536. Providers mounted an unsuccessful First Amendment challenge on statutory requirements undergirding the Commission's program carriage regime, which prohibits anti-competitive behavior by cable operators against unaffiliated and, potentially, competing programmers. *Time Warner Cable Inc. v. FCC*, 729 F.3d 137 (2nd Cir. 2013).

⁶ 47 U.S.C. § 303b; 47 CFR § 73.671. This re-interpretation could also, ultimately, be used to reconsider whether broadcasters should continue to be required to air the children's programming that so many across this county value. Broadcasters have in the past, and could, again, argue that requirements to air children's television place an unreasonable burden on their speech. Indeed, the Commission's recent children's television notice of proposed rulemaking asked this very question. *Children's Television Programming Rules; Modernization of Media Regulation Initiative*, MB Docket Nos. 18-202 and 17-105, Notice of Proposed Rulemaking, 33 FCC Rcd 7041, 7060 (2018).

⁷ Report and Order and Second Further Notice of Proposed Rulemaking at para. 40.