CONCURRING STATEMENT OF
COMMISSIONER GEOFFREY STARKS

Re: *Amendment of Commission Rule Requiring Records of Cable Operator Interests in Video Programming, Modernization of Media Regulation Initiative*, MB Docket Nos. 20-35 and 17-105, Notice of Proposed Rulemaking.

I agree that, as a matter of good stewardship, the Commission should update and eliminate rules found to be clearly obsolete or unnecessary. Here, the Commission seeks comment on whether to eliminate or modify section 76.1710 of our rules, which requires cable providers to maintain records in their online public inspection files regarding the nature and extent of their attributable interests in video programming services, and the extent to which they carry such services on cable systems in which they have an attributable interest. At first blush, this seems to be a narrow inquiry about a reporting requirement that may be inconsequential, but a closer examination reveals that more is at stake here.

Let me begin by repeating the standard I have set for approaching these "Modernization of Media Regulation" items with a consistent framework. I have stated that no matter how narrow the proceeding or how minor the form or rule being eliminated, I will look into each item to make sure that the Commission is meeting its broader statutory obligations and key mission. This is to ensure that when we propose to eliminate a rule or regulation, the Commission's underlying statutory obligations are otherwise addressed, or we make a commitment to address any unmet requirements under the law. In the instance of an unmet statutory obligation, we should always seek concrete steps to make progress towards compliance with the law, or make a firm plan to engage, in short order, to demonstrate our commitment to addressing our obligations.

I first articulated this approach one year ago when we considered elimination of the requirement that certain broadcasters file mid-term Equal Employment Opportunity (EEO) data on Form 397. I only concurred with that action because I believed we did not adequately face our statutory obligation to ensure that broadcasters are seeking and attracting diverse employees.[1] I had engaged in good faith with the Chairman's office and with the Media Bureau, proposing a clear path forward to resolve the underlying rulemaking that had been pending for 15 years. And although Commissioner Rosenworcel and I were able to get a commitment to issue a further notice on our EEO rules more generally, the resulting notice of proposed rulemaking released in July of 2019[2] was disappointing, and inadequate to fully address the Commission's failure to comply with its statutory duty to collect EEO data. I remain hopeful that the record from that proceeding will produce enough of a groundswell to compel us to finally, and comprehensively, fix the EEO data collection regime, as Congress and the courts have directed us to do.

Today's item feels like déjà vu all over again, because we are considering the elimination of another reporting rule. In seeking to eliminate this rule, we are leaving unaddressed statutory obligations that require the Commission to prescribe a reasonable limit on the number of video programming channels on a cable system that can be occupied by the cable operator's own channels. Congress,

---

[1] *Elimination of Obligation to File Broadcast Mid-Term Report (Form 397) Under Section 73.2080(f)(2), Modernization of Media Regulation Initiative*, MB Docket Nos. 18-23 and 17-105, Report and Order, 34 FCC Rcd 668 (2019).

[2] *Review of EEO Compliance and Enforcement in Broadcast and Multichannel Video Programming Industries*, MB Docket No. 19-177, Notice of Proposed Rulemaking, 34 FCC Rcd 5358 (2019).

apparently concerned that cable operators might favor their own affiliate video programmers over others or otherwise impede consumer access to video programming, adopted this requirement "to enhance effective competition."[3]

The Commission did set a channel occupancy limit in 1992. Section 76.504 of the Commission's rules limits cable channel carriage of affiliated video programming to 40% of activated channels, applicable to channel capacity up to 75 channels. But that decision was reversed and remanded to the Commission in 2001, in part because the court found that the Commission "failed to justify its vertical limit as not burdening substantially more speech than necessary."[4] The Commission then sought comment on setting a new vertical limit three times: in 2001,[5] in 2005,[6] and in 2008.[7]

The reporting rule at issue today was at one time deemed necessary for the Commission and others to monitor compliance with the underlying channel occupancy limit rule. It is now targeted for elimination as outdated, in part because the underlying rule was reversed and remanded over eighteen years ago.

Clearly this reporting requirement does not stand alone—it is bound to the underlying statutory requirement, which has its roots in Congress's desire to enhance competition among video service providers. Perhaps one could argue that with so much video content competition available today from DBS and other MVPD providers, online video distributors, and streaming apps, video programming competition is well-enough established to no longer need reporting on this metric. But without revisiting the channel occupancy limit itself, how can we reasonably reach that conclusion?

As I've said before, true regulatory "modernization" means more than just getting rid of rules. If we make these decisions while leaving basic and foundational statutory obligations unmet, the rules and policies that are truly in need of "modernization" will remain unchanged or forgotten. This is particularly

---

[3] 47 U.S.C. § 533(f).

[4] *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1139 (DC Cir. 2001) (also stating that the Commission "seems to have plucked the 40% limit out of thin air." *Id.* at 1137).

[5] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, CS Docket Nos. 98-82 and 96-85, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312 (2001).

[6] *The Commission's Cable Horizontal and Vertical Ownership Limits,* MM Docket No. 92-264, Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 9374 (2005).

[7] *The Commission's Cable Horizontal and Vertical Ownership Limits; Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, CS Docket Nos. 98-82 and 96-85, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134 (2008) (noting that the Commission had previously rejected commenters' proposal not to set a new vertical limit because the statute expressly requires it. *Id.* at 2190).

true in the case of the channel occupancy limit rule, which has languished in a state of repeal without replacement for more than 18 years. In this instance, "modernization" seems more like sweeping under the rug. The item doesn't even attempt to explain what, if anything, the Commission will do about the underlying rule.

It sends the wrong signal to move forward on eliminating the reporting requirement without addressing the statutory requirement that made the reporting rule necessary. For that reason, I concur.

Thank you to the Media Bureau staff who prepared this item for our consideration.