

FCC FACT SHEET^{*}
Leased Commercial Access; Modernization of Media Regulation Initiative
Second Report and Order – MB Docket Nos. 07-42, 17-105

Background: The leased access rules, which implement statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers. The current leased access rate formula was adopted consistent with cable rate regulations which have not been in effect since 1999. In 2019, the Commission proposed to modify the leased access rate formula so that the rates would be calculated based on information specific to the tier of carriage. The Commission also sought comment on application of the First Amendment to the rules and statutory provisions governing full-time leased access, including in particular whether the leased access rules can continue to withstand First Amendment scrutiny in light of changes in the video programming marketplace since the U.S. Court of Appeals for the D.C. Circuit upheld the constitutionality of the leased access statute in 1996.

What the Second Report and Order Would Do:

- Adopt a tier-based leased access rate calculation that reflects the actual value of leased access channels and changes to cable rate regulation, while also reducing regulatory burdens on cable providers.
- Codify the determination set forth in the Commission’s *1993 Rate Regulation Order* that the average implicit fee (*i.e.*, the maximum fee that a cable operator may charge a leased access programmer) shall be calculated annually based on contracts in effect in the previous calendar year.
- Find that, although the video programming marketplace has changed significantly since the constitutionality of the leased access was upheld, and these changes cast doubt on the continued constitutionality of mandatory leased access, nonetheless, leased access requirements are contained in a specific statutory mandate from Congress, and therefore, the Commission will not eliminate its rules implementing the statute at this time.

^{*} This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in MB Docket Nos. 07-42 and 17-105, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>). Before filing, participants should familiarize themselves with the Commission’s *ex parte* rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR § 1.1200 *et seq.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Leased Commercial Access
Modernization of Media Regulation Initiative
MB Docket No. 07-42
MB Docket No. 17-105

SECOND REPORT AND ORDER*

Adopted: []

Released: []

By the Commission:

I. INTRODUCTION

1. In this Second Report and Order, we adopt a tier-based leased access rate calculation as part of the Commission’s Modernization of Media Regulation Initiative.1 The leased access rules, which implement statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.2 In 2019, we proposed to modify the leased access rate formula so that rates would be calculated based on information specific to the tier on which the programming is carried.3 Today, we adopt this proposal, finding that a simplified tier-specific rate calculation best reflects regulatory changes that have occurred in the last 20 years4 and will more accurately approximate the value of a particular channel, while alleviating burdens on cable operators.

* This document has been circulated for tentative consideration by the Commission at its July 2020 open meeting. The issues referenced in this document and the Commission’s ultimate resolutions of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public’s ability to understand the nature and scope of issues under consideration, the public interest would be served by making this document publicly available. The Commission’s ex parte rules apply and presentations are subject to “permit-but-disclose” ex parte rules. See, e.g., 47 CFR §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules, including the general prohibition on presentations (written and oral) on matters listed on the Sunshine Agenda, which is typically released a week prior to the Commission’s meeting. See 47 CFR §§ 1.1200(a), 1.1203.

1 See Commission Launches Modernization of Media Regulation Initiative, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017) (Media Modernization Public Notice).

2 See 47 U.S.C. § 532; 47 CFR § 76.970 et seq.

3 See Leased Commercial Access; Modernization of Media Regulation Initiative, MB Docket Nos. 07-42 and 17-105, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 4934 (2019) (2019 Leased Access Order and Second FNPRM).

4 Specifically, the current rate formula was adopted consistent with the “tier neutrality” principle, but the Commission has since ceased regulation of cable programming service tier (CPST) rates as of 1999, and that principle no longer applies. See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access, CS Docket No. 96-60, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267, 5290, para. 46 (1997) (1997 Leased Access Order) (“In addition, we note that our rate regulation rules generally are based on the principle of tier neutrality, which requires cable operators to charge the same per channel rate regardless of the programming costs incurred on a particular tier.”); Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(1), 110 Stat. 115 (1996) (codified as 47 U.S.C. § 543(c)(4) (providing for sunset of upper tier rate regulation after March 31, 1999)).

We also find that, although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so we do not eliminate our leased access rules.

II. BACKGROUND

2. Congress established commercial leased access as part of the Cable Communications Policy Act of 1984 (1984 Act).⁵ According to the 1984 Act, codified at section 612 of the Communications Act of 1934, as amended (the Act), cable operators are required to set aside capacity for use by unaffiliated programmers.⁶ Under these statutory provisions, the amount of channel capacity reserved for leased access programming depends on the cable system's total activated channel capacity.⁷ Cable operators with more activated channels are required to set aside a greater number of leased access channels than those cable operators with fewer activated channels. Congress created commercial leased access 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 from cable systems in a manner consistent with growth and development of cable systems."⁸

3. Congress further authorized the Commission to adopt maximum reasonable rates for commercial leased access as part of the Cable Television Consumer Protection and Competition Act of 1992,⁹ and also provided that the price, terms, and conditions for leased access must be "sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."¹⁰ The Commission accordingly adopted leased access rate regulations in 1993, and subsequently modified its leased access regulations in 1996 and 1997.¹¹ The Commission's implementing rules, which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld in 1998,¹² include a formula for calculating maximum rates that cable operators could charge leased access programmers.¹³ Specifically, to permit cable operators to recover their costs and earn a profit, the Commission adopted a maximum reasonable rate formula for full-time leased access channels

⁵ See Cable Communications Policy Act of 1984, Pub. L. 98-549, § 2, 98 Stat. 2779, 2782 (Oct. 30, 1984); 47 U.S.C. § 532.

⁶ 47 U.S.C. § 532(b)(1) ("A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements: (A) an operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation. (B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation. (C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.").

⁷ See *id.*

⁸ *Id.* § 532(a).

⁹ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 9, 106 Stat. 1460 (Oct. 5, 1992) (1992 Cable Act).

¹⁰ 47 U.S.C. § 532(c)(1).

¹¹ See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5948, para. 512 *et seq.* (1993) (*1993 Rate Regulation Order*); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933 (1996) (*1996 Rate Regulation Order*); *1997 Leased Access Order*; 47 U.S.C. § 532(c)(4)(A)(i).

¹² See *ValueVision, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

¹³ See 47 CFR § 76.970(d)-(h).

based on the “average implicit fee” that other programmers pay for carriage.¹⁴ Currently, for a full-time channel on a tier with a subscriber penetration over 50 percent, our rules require that an operator calculate the average implicit fee for all eligible tiers rather than just the individual tier where the channel will be placed.¹⁵ Although the Commission revised its commercial leased access rate rules in its *2008 Leased Access Order*,¹⁶ those rules never went into effect.¹⁷ Thus, the leased access rate rules adopted in the *1993 Rate Regulation Order*, as subsequently amended,¹⁸ remain in effect.

4. In the *2019 Leased Access Order*, we updated the leased access rules based on our determination that the video marketplace had changed significantly since the Commission initially adopted its leased access rules.¹⁹ We explained that the marketplace has become far more competitive than it was when leased access was first mandated in 1984, at which time consumers had access only to a single pay television service and cable had monopoly power.²⁰ In particular, we focused on the increased availability of media platforms, including online platforms that programmers can utilize at very low cost to distribute their video programming, as well as the low demand for commercial leased access.²¹ To further the Commission’s media modernization efforts, we vacated the *2008 Leased Access Order* and adopted updates and improvements to the existing leased access rules.²² A *Second Further Notice of Proposed Rulemaking (Second FNPRM)* proposed a tier-specific leased access rate formula and sought

¹⁴ *1997 Leased Access Order*, 12 FCC Rcd at 5283, paras. 32-33. To illustrate, “if subscribers pay an average of \$0.50 per channel for a particular tier, and the average programming or license fee on the tier is \$0.10, then, on average, programmers on the tier are implicitly ‘paying’ the operator \$0.40 for carriage.” *Id.* at 5283-84, para. 33 (“From the operator’s standpoint, the average implicit fee represents the average value of a channel after programming acquisition costs are paid.”).

¹⁵ See 47 CFR § 76.970(e) (“The average implicit fee identified in paragraph (c) of this section for a full-time channel on a tier with a subscriber penetration over 50 percent shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on all such tier(s), and then subtracting the total amount it pays in programming costs per month for such tier(s) (the ‘total implicit fee calculation’). A weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s) must be used to determine how much of the total implicit fee calculation will be recovered from any particular tier. The weighting scheme is determined in two steps. First, the number of subscribers is multiplied by the number of channels (the result is the number of ‘subscriber-channels’) on each tier with subscriber penetration over 50 percent. . . . Second, the subscriber-channels on each of these tiers is divided by the total subscriber-channels on all such tiers. Given the percent of subscriber-channels for the particular tier, the implicit fee for the tier is computed by multiplying the subscriber-channel percentage for the tier by the total implicit fee calculation. Finally, to calculate the average implicit fee per channel, the implicit fee for the tier must be divided by the corresponding number of channels on the tier.”).

¹⁶ *Leased Commercial Access*, MB Docket No. 07-42, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2008) (*2008 Leased Access Order*).

¹⁷ *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4938-40, paras. 11-14 (vacating the *2008 Leased Access Order*, which had not previously gone into effect due to a stay by the U.S. Court of Appeals for the Sixth Circuit and the Office of Management and Budget’s issuance of a notice of disapproval of the associated information collection requirements).

¹⁸ See *supra* n.11 (discussing the implementation of the 1992 Cable Act leased access rules and their subsequent modifications).

¹⁹ See *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4935, para. 2.

²⁰ See *id.* at 4938, para. 10.

²¹ See *id.* But see Free Press Comments at 5-6 (claiming that low demand is a result of cable operators having “created barriers to entry since leased access’s inception”).

²² See *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4938-53, paras. 11-40.

comment on whether existing leased access requirements can withstand First Amendment scrutiny in light of video programming market changes.²³

5. The *Second FNPRM* elicited seven comments and six replies, none of which opposed the proposed tier-specific rate formula.²⁴ Commenters largely reiterated arguments that the marketplace has changed in ways that lessen the governmental interest in leased access regulations. For example, Americans for Prosperity (AFP) explains that “great advances in technology allow households to readily access innumerable content from varied sources, as well as from Internet-delivered video programming services and over-the-air broadcasters.”²⁵ Similarly, the Free State Foundation (Free State) explains that “the video services landscape has been transformed dramatically by new technologies and other developments, so that choice among competing providers offering a diverse array of content is now prevalent.”²⁶ Regarding the First Amendment, the record reflects a lack of consensus regarding what level of scrutiny should apply and whether the leased access rules remain constitutional.

III. DISCUSSION

A. Tier-Based Fee Calculation

6. We adopt our unopposed proposal to implement a simplified tier-specific leased access fee calculation. This rule change will ease burdens on cable operators while also fulfilling our statutory obligation to establish rules for determining maximum reasonable leased access rates. We believe the modifications are warranted given the significant changes to the overall rate regulation regime that have occurred since our current leased access rate rules were adopted.²⁷ The “average implicit fee” will continue to reflect the maximum rate per month that a cable operator may charge a leased access programmer for a full-time channel.²⁸ Consistent with our proposal in the *Second FNPRM*, we revise our rules to provide that the average implicit fee will be calculated by first determining the total amount the operator receives in subscriber revenue per month for the programming on the tier on which the leased access channel will be placed. Next, the operator will subtract the total amount it pays in programming costs per month for that tier. Finally, the operator will divide that figure by the number of channels on that tier. The result of these calculations will be the maximum per channel rate that a cable operator can charge a leased access programmer for full-time carriage.

7. When the Commission adopted the average implicit fee calculation, it envisioned a simple scheme based on existing and easily verifiable data. Although the weighting scheme was intended to be a simple way to average the leased access rate across tiers, in practice it has proven to be confusing and time-consuming.²⁹ The weighting scheme incorporated the concept of tier neutrality, which is a

²³ See *id.* at 4953-55, paras. 41-47.

²⁴ The seven commenters were: ACA Connects – America’s Communications Association; Alliance for Communications Democracy; Americans for Prosperity; Free Press; Free State Foundation; International Center for Law & Economics; and NCTA – The Internet & Television Association. The six reply commenters were: Charter Communications, Inc.; Comcast Corporation; Leased Access Programmers Association; National Association of Broadcasters; National Association of Telecommunications Officers and Advisors and the Alliance for Community Media; and NCTA – The Internet & Television Association.

²⁵ AFP Comments at 2.

²⁶ Free State Comments at 2.

²⁷ See *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4954, para. 45. As noted above, the Commission ceased regulation of cable CPST rates as of 1999, and thus the “tier neutrality” principle pursuant to which the current rate formula was adopted no longer applies. See *supra* n.4.

²⁸ 47 CFR § 76.970(e).

²⁹ See *supra* n.15 (explaining the weighting scheme as part of the average implicit fee calculation).

vestige of CPST rate regulation, which no longer exists.³⁰ By now basing the average implicit fee solely on the programming revenue and costs for the tier on which a leased access programmer seeks carriage, we eliminate the need for a complicated weighting scheme that considers subscriber revenue and programming costs across all tiers with subscriber penetration over 50 percent.³¹ The rate formula will now be a tier-specific calculation, thus representing a more accurate assessment of the channel's value on that particular tier. This is the same rate calculation method that previously has been in place for channels placed on tiers with less than 50 percent subscriber penetration.³² Appendix C contains a mathematical representation of the revised leased access rate calculations. The revised rate formula should result in MVPDs using revenue and cost estimates that more closely reflect the value of the channel sought by the leased access applicant, and thus better serve the goals of the statute.³³ Rates are likely to decrease if leased access programmers request channel capacity on less profitable tiers, whereas rates are likely to rise if programmers request channel capacity on more profitable tiers.

8. We find that a tier-specific implicit fee calculation will mitigate unnecessary burdens on cable operators by simplifying the leased access fee calculation while also fulfilling our statutory obligation to establish rules for determining maximum reasonable leased access rates.³⁴ Although a few cable commenters suggest that the Commission could permit marketplace negotiations to establish the maximum reasonable rates, they also support the tier-specific implicit fee calculation that NCTA initially proposed.³⁵ Considering our statutory obligation to “establish rules for determining maximum reasonable [leased access] rates,”³⁶ we do not think Congress intended for us to rely on the marketplace to establish maximum reasonable leased access rates, even if doing so might be “less intrusive”³⁷ on cable operators.³⁸

³⁰ *1997 Leased Access Order*, 12 FCC Rcd at 5290-91. Tier neutrality requires cable operators to charge the same per channel rate regardless of the programming costs incurred on a specific tier, and that principle has no longer applied since the Commission ceased regulation of cable CPST rates in 1999. *See supra* n.4.

³¹ 47 CFR § 76.970(e) (setting forth a “total implicit fee calculation” followed by a “weighting scheme that accounts for differences in the number of subscribers and channels on all such tier(s)”).

³² *Id.* (“In the event of an agreement to lease capacity on a tier with less than 50 percent penetration, the average implicit fee should be determined on the basis of subscriber revenues and programming costs for that tier alone.”).

³³ 47 U.S.C. § 532(a) (“The purpose of this section is 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 from cable systems *in a manner consistent with growth and development of cable systems.*”) (emphasis added). *See also id.* § 532(c)(2) (“[T]he cable operator shall establish, consistent with the purpose of this section and with the rules prescribed by the Commission, . . . the price, terms and conditions of such use *which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.*”) (emphasis added).

³⁴ *Id.* § 532(c)(4)(B) (“Within 180 days after October 5, 1992, the Commission shall establish rules for determining maximum reasonable rates under subparagraph (A)(i), for establishing terms and conditions under subparagraph (A)(ii), and for providing procedures under subparagraph (A)(iii).”).

³⁵ *See* NCTA – The Internet & Television Association (NCTA) Comments at 21-22 (“[A]ssuming the Commission concludes that the statute requires it to establish a formula for setting maximum reasonable leased access rates, it should adopt NCTA’s proposal to modify the existing rate formula by substituting a tier-specific implicit fee calculation for the current cross-tier approach.”); Charter Communications Inc. (Charter) Reply at 2, 9-10; Comcast Corporation (Comcast) Reply at 7; Letter from Rick Chesson, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA, to Marlene H. Dortch, Secretary, FCC, at 2 (Feb. 21, 2020). *See also 2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4954, para. 45.

³⁶ 47 U.S.C. § 532(c)(4)(B).

³⁷ Comcast Reply at 8.

³⁸ *See* S.Rep. 102-92 at 31-32, 1992 USCCAN 1133, 1164-65 (explaining that “[t]o permit the operator to establish the leased access rates . . . makes little sense,” the FCC is required to establish maximum reasonable rates for access

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We agree with NCTA that “[t]ier-specific rates are the fairest approximation of the maximum reasonable rate,” given that such rates will be based on the actual programming revenue and costs associated with the tier on which the leased access programmer will be carried.³⁹ We note that no commenter disagrees. In addition, we expect that the tier-specific calculation will be much simpler than the current weighting scheme because it is focused solely on a specific tier, and not all tiers with subscriber penetration over 50 percent.⁴⁰

9. At this time, we decline to adopt any other changes to the leased access rate formula.⁴¹ ACA Connects is the only party that makes additional proposals in response to the *Second FNPRM*, asserting that “additional steps should be taken to reduce administrative burdens, particularly for smaller entities.”⁴² As explained further in Appendix B, we note that simplifying the rate formula to be based on the specific tier will benefit small cable operators, as well as other cable operators.⁴³ Accordingly, no additional relief for small cable operators is necessary at this time. More specifically, ACA Connects proposes that the Commission establish a universal per channel minimum leased access rate that is presumptively reasonable or modify the rate formula to make sure that the least profitable cable operators are not forced to offer leased access at extremely low rates or even for free, thus diverting capacity that would be better used for broadband.⁴⁴ Despite these arguments, the record does not contain any evidence to demonstrate the frequency with which the leased access rate might be extremely low or even free. With regard to a universal rate, we find that the average implicit fee is a more accurate representation of the actual value of the channel to the operator because it is based on the operator’s own data.⁴⁵ Indeed, the leased access rate calculation merely reflects each cable operator’s existing market conditions, it does not dictate them. Nevertheless, we note that our rules provide for waivers in unusual cases.⁴⁶ Consistent with our current approach, we will consider the need for special relief on an individual basis in instances

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to leased access channels, and “[b]y involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels”).

³⁹ NCTA Comments at 22. See also Comcast Reply at 8-9.

⁴⁰ See Leased Access Programmers Association (LAPA) Reply at 5 (“LAPA is all for the simplification of the leased access rates, so that the rate may be determined by the use of spreadsheet or other computerized program, so long as the rate is justifiable and in accordance with rates being charged to other programmers and not subject to the whim and fancies of the cable company that may unduly restrict or discriminate against the users of leased access in its intended manner.”).

⁴¹ In the *Second FNPRM*, the Commission sought comment on the varying rate proposals already in the record and on any other rate proposals. See *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4954-55, para. 46.

⁴² ACA Connects – America’s Communications Association (ACA Connects) Comments at 2.

⁴³ See Appendix B at para. 14 (stating that the “simplified calculation will mitigate unnecessary burdens on cable operators while also fulfilling the Commission’s statutory obligation to establish rules for determining maximum reasonable leased access rates,” and noting that no commenter responding to the *Second FNPRM* has opposed the tier-specific calculation).

⁴⁴ ACA Comments at 2-5. See also *id.* at 5, n.9 (safe harbor rates also could help make sure that the least profitable cable operators are not forced to offer leased access at rates that are too low).

⁴⁵ The fact that the Commission previously adopted an interim safe harbor percentage to be used in the unrelated context of calculating universal service contributions does not alter our analysis. See ACA Connects Comments at 3, n.5; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Memorandum Opinion and Order, 13 FCC Rcd 21252, para. 6 (1998). Universal service is an entirely separate regulatory regime with unrelated factual considerations.

⁴⁶ 47 CFR § 76.7 (requirements for petitions for waivers of part 76 rules).

where significant hardship has “adversely affect[ed] the operation, financial condition, or market development of the cable system.”⁴⁷

10. ACA Connects also requests that the Commission ease administrative burdens by permitting cable operators to use a single set of data to respond to leased access requests for a set period of time, such as three years, rather than having to obtain data and recalculate the formula for each request.⁴⁸ We find that using a single data set for three years would be less likely to result in calculations that accurately represent the current value of carriage. Accordingly, we do not adopt this proposal. We do, however, take the opportunity to codify the determination set forth in the *1993 Rate Regulation Order* that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year.⁴⁹ The Commission has previously stated that under its rules, cable operators are required to calculate the maximum rates annually based on the contracts in effect in the previous calendar year, rather than at the time of each request.⁵⁰ Thus, in response to the request from ACA, we find it is in the public interest to codify in our rules⁵¹ the Commission’s longstanding determination on this issue that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year.⁵²

B. The First Amendment

11. Although we agree with commenters that the constitutional foundation for the leased access regime is in substantial doubt, leased access rules are required pursuant to a specific statutory mandate from Congress.⁵³ For example, section 612(b) of the Act specifically states that a “cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements. . . .”⁵⁴ The Commission has long recognized that decisions about the constitutionality of Congressional enactments are generally outside the purview of administrative agencies.⁵⁵ As a result, we decline to eliminate our leased access requirements and leave it

⁴⁷ See 47 U.S.C. § 532(c)(1).

⁴⁸ ACA Connects Comments at 2-3. See also *id.* (explaining that the current leased access fee calculation can cost a cable operator “a thousand dollars or more in man-hours and consulting fees”).

⁴⁹ See Appendix A; Letter from Michael Nilsson, Counsel to ACA Connects – America’s Communications Association, to Marlene H. Dortch, Secretary, FCC, at 2 (May 29, 2020) (requesting that the Commission modify section 76.970(e) to state: “The average implicit fee must be calculated only upon request and need be calculated no more than once every twelve months. Such fee may be based on contracts and other data in effect in the previous calendar year.”).

⁵⁰ See *1993 Rate Regulation Order*, 8 FCC Rcd at 5951, para. 520 (“We are requiring cable operators to calculate the maximum reasonable rates for each rate classification annually based on the contracts in effect in the previous calendar year.”); *1997 Leased Access Order*, 12 FCC Rcd at 5276, para. 15 (“Under our rules, cable operators are required to calculate the maximum rates for each programmer category annually based on the contracts with unaffiliated programmers in effect in the previous calendar year.”).

⁵¹ Because this revision conforms our rules to the language set forth in the *1993 Rate Regulation Order*, we find this change to be editorial and non-substantive. As such, we find good cause to conclude that notice and comment are unnecessary for this revision. See 5 U.S.C. § 553(b)(B).

⁵² We assume, in response to ACA, that the annual calculation is performed in conjunction with an actual request.

⁵³ 47 U.S.C. § 532.

⁵⁴ *Id.* § 532(b)(1).

⁵⁵ See, e.g., *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, Second Report and Order, 12 FCC Rcd 3824, 3834, para. 24 (1997) (citations omitted). See also *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 16 (2012) (“This Court has also stated that ‘adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.’”) (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)); *id.* (“We need

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to the courts to address the current constitutional status of the leased access statute, particularly given that the D.C. Circuit has previously upheld the constitutionality of the leased access statute, albeit under different marketplace conditions.

12. The *Second FNPRM* sought comment on application of the First Amendment to the Commission's rules and statutory provisions concerning full-time leased access, including in particular whether the leased access rules can continue to withstand First Amendment scrutiny in light of marketplace changes.⁵⁶ Commenters disagree as to whether strict scrutiny or intermediate scrutiny should apply, and they also disagree as to whether the leased access rules would pass muster under the applicable level of scrutiny.⁵⁷ Strict scrutiny applies to content-based speech restrictions and requires that a statute be narrowly tailored to serve a compelling governmental interest.⁵⁸ When the D.C. Circuit previously upheld the constitutionality of the leased access statute, it determined that the statute is content-neutral and thus subject to intermediate scrutiny, which it passes if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."⁵⁹

13. An argument exists that marketplace changes – such as increased Internet usage and availability,⁶⁰ and competition from other multichannel video programming distributors (MVPDs) as well as online video distributors⁶¹ – appear to have eroded the original justification for the leased access rules:

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not, and do not, decide whether the MSPB's view of its power is correct, or whether the oft-stated principle that agencies cannot declare a statute unconstitutional is truly a matter of jurisdiction.").

⁵⁶ *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4955, para. 47.

⁵⁷ Some commenters contend that leased access no longer passes muster under intermediate scrutiny. *See, e.g.*, AFP Comments at 2-3. Other commenters argue that leased access does continue to pass muster under intermediate scrutiny. *See, e.g.*, Alliance for Communications Democracy (ACD) Comments at 3-6; National Association of Broadcasters (NAB) Reply at 1; Letter from Rick Kaplan, General Counsel and Executive Vice President, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 2-3 (June 3, 2020) (NAB June 3, 2020 *Ex Parte*) (asserting that the level of First Amendment scrutiny should be based on whether the rule is content-based or content neutral, and not on any marketplace changes). Still other commenters maintain that strict scrutiny should apply, and leased access would not pass muster under it. *See, e.g.*, Free State Comments at 3, 9; International Center for Law & Economics (ICLE) Comments at 11-12, 15-17 (but arguing that the leased access rules would survive First Amendment scrutiny if intermediate scrutiny applies); NCTA Comments at 14-16, 18, 20 (arguing that leased access would fail even if intermediate scrutiny applies); Charter Reply at 5; Comcast Reply at 3-6. NAB also states that the Commission "should avoid reaching constitutional questions unnecessarily." *See* Letter from Erin L. Dozier, Senior Vice President and Deputy General Counsel, Legal and Regulatory Affairs, National Association of Broadcasters, to Marlene H. Dortch, Secretary, FCC, at 1 (May 28, 2020) (NAB May 28, 2020 *Ex Parte*). *See also* NAB June 3, 2020 *Ex Parte* at 1-2; Letter from John R. Feore, Cooley LLP, Counsel to ION Media Networks, Inc., and Colby M. May, Colby M. May, Esq., P.C., Counsel to Trinity Broadcasting Network, to Marlene H. Dortch, Secretary, FCC, at 1-2 (June 11, 2020) (ION/Trinity June 11, 2020 *Ex Parte*); Letter from William Weber, Vice President, Government Affairs and Associate General Counsel, and Talia Rosen, Assistant General Counsel, Public Broadcasting Service, and Lonna Thompson, Executive Vice President, Chief Operating Officer, and General Counsel, America's Public Television Stations, to Marlene H. Dortch, Secretary, FCC, at 1 (June 11, 2020) (APTS/PBS June 11, 2020 *Ex Parte*).

⁵⁸ *See, e.g., Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

⁵⁹ *See Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968)); *Time Warner Entm't Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Circ. 1996) (upholding the leased access statute).

⁶⁰ *See* AFP Comments at 1; ICLE Comments at 9; Charter Reply at 6; Comcast Reply at 4.

⁶¹ Free State Comments at 2; ICLE Comments at 8; NCTA Comments at 3-6; Charter Reply at 4; Comcast Reply at 2; NCTA Reply at 1, 9.

to safeguard competition and diversity in the face of cable operators' monopoly power.⁶² The Free State Foundation explains that, whereas in the late 1980s and early 1990s consumers generally "had little choice for pay-TV services other than their local cable operator," today "choice among competing providers offering a diverse array of content is now prevalent" thanks to the availability of direct broadcast satellite (DBS) providers, telephone companies providing video services, and the availability of online video providers.⁶³ Commenters highlight the fact that MVPD subscribership losses are related to increased subscribership to online streaming services.⁶⁴ For example, NCTA explains that the Internet now "supports a broad array of platforms through which program networks and other content providers may distribute their content to viewers," including both streaming services and on-demand platforms.⁶⁵

14. Commenters assert that as a result of video marketplace changes, leased access is no longer needed to promote diversity or competition in the marketplace.⁶⁶ These marketplace changes may alter the evaluation of the relevant governmental interest, regardless of whether strict scrutiny or intermediate scrutiny applies. Although some commenters maintain that "cable operators do indeed still occupy a dominant position in the pay-TV marketplace,"⁶⁷ the record also indicates that the utility of cable leased access as a means of promoting diversity or competition in the marketplace has changed.⁶⁸ With respect to the burden placed on cable operators by leased access requirements, some commenters argue that leased access continues to place burdens on cable operators "by interfering with their speech; consuming capacity and resources that could be used for other purposes, content, and services that are much more highly valued by consumers; and placing cable operators at a competitive disadvantage."⁶⁹ On the other hand, NAB maintains that the changes in the video marketplace have actually reduced the burdens of leased access on cable operators, for example, because their channel capacity has increased.⁷⁰

15. Whatever the merits of these arguments, we agree with those commenters that maintain that it is not the role of the Commission to adjudicate in the first instance the constitutionality of leased access requirements that have been mandated by Congress.⁷¹ Thus, we have no need to opine on the appropriate level of scrutiny for a First Amendment analysis as is debated in the record or to decide whether leased access requirements survive any particular level of scrutiny. Finally, although the constitutionality of the leased access regime is in doubt, we express no opinion whatsoever as to the

⁶² 2019 *Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4952, para. 39.

⁶³ Free State Comments at 2-3.

⁶⁴ *See, e.g., id.* at 3 ("Whereas MVPD subscriptions totaled 94 million at year's-end 2017, in early 2019, Netflix had over 60 million U.S. subscribers to its streaming video service, while Amazon Prime and Hulu had 101 million and 28 million, respectively. Much of the MVPD subscriber losses has been attributed to the quick rise of online streaming services."); ICLE Comments at 9 ("Online video distributors (OVDs) like Netflix, Hulu, and Amazon Prime (as well as many others) have largely taken market share away from MVPDs by offering content consumers desire.") (footnote omitted).

⁶⁵ NCTA Comments at 6.

⁶⁶ *See* Free State Comments at 3, 6; NCTA Comments at 2, 18; Charter Reply at 1.

⁶⁷ *See* Free Press Comments at 5.

⁶⁸ *See, e.g.,* AFP Comments at 1-2; Free State Comments at 2-3; NCTA Comments at 4-5.

⁶⁹ NCTA Comments at 9.

⁷⁰ NAB Reply at 2, 6-8; NAB June 3, 2020 *Ex Parte* at 3-6. *See also* National Association of Telecommunications Officers and Advisors and the Alliance for Community Media (NATOA/ACM) Reply at 2. We need not make a conclusive determination on this issue given our finding that the question of the constitutionality of leased access is a matter generally outside the purview of the Commission. *See supra* para. 11

⁷¹ *See, e.g.,* ACD Comments at 2; Free Press Comments at 3. *See also* LAPA Reply at 3; NATOA/ACM Reply at 4. We thus disagree with commenters asserting that the Commission should decline to enforce the leased access rules because they would be found unconstitutional today. *See, e.g.,* Free State Comments at 1; ICLE Comments at 17.

constitutionality of other carriage-related obligations placed on cable operators under the Act.⁷² We are mindful that each carriage-related provision presents unique circumstances, and that those other provisions are not at issue in the instant proceeding.

IV. PROCEDURAL MATTERS

16. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),⁷³ the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) relating to the Second Report and Order. The FRFA is set forth in Appendix B.

17. *Paperwork Reduction Act.* This Second Report and Order does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).⁷⁴ In addition, therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002.⁷⁵

18. *Congressional Review Act.* [The Commission will submit this draft Second Report and Order to the Administrator of the Office of Information and Regulatory Affairs, Office of Management and Budget, for concurrence as to whether this rule is “major” or “non-major” under the Congressional Review Act, 5 U.S.C. § 804(2).] The Commission will send a copy of this Second Report and Order to Congress and the Government Accountability Office pursuant to 5 U.S.C. § 801(a)(1)(A).

19. *Additional Information.* For additional information on this proceeding, contact Diana Sokolow, Diana.Sokolow@fcc.gov, of the Policy Division, Media Bureau, (202) 418-2120.

V. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that, pursuant to the authority found in sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532, this Second Report and Order **IS HEREBY ADOPTED**.

⁷² See NAB May 28, 2020 *Ex Parte* at 2 (contending that “should the Commission determine that the leased access requirements present First Amendment issues, it should also make clear that the same issues are not implicated by all carriage-related regimes,” as “not all marketplace or technological developments militate toward a finding of constitutionality”); NAB June 3, 2020 *Ex Parte* at 7 (“[E]ven if the FCC believes that the opportunity for individual non-broadcast video content providers to distribute their programming via the internet has weakened the justifications for the leased access provisions, that finding is not applicable to requirements for MVPD carriage of local commercial and noncommercial broadcast television signals.”); *id.* at 7-11 (asserting that the congressional purpose behind non-leased access carriage requirements remains valid today); ION/Trinity June 11, 2020 *Ex Parte* at 3 (“Should the Commission nonetheless determine to address the changed circumstances/First Amendment arguments, any order should make absolutely clear that the Commission is not prejudging how those arguments would be received in proceedings addressing any other Commission rules.”); APTS/PBS June 11, 2020 *Ex Parte* at 1 (“[I]f the Commission does extend the scope of the proceeding to reach any constitutional First Amendment determinations, it should make explicit that the decision only applies to the narrow commercial leased access rules at issue in the docket, and does not extend in any way to other, broader, regulatory matters, including without limitation MVPD carriage of noncommercial broadcast stations.... [I]t is essential that the Commission recognize that changes to the marketplace do not change any of the underlying governmental interests in ensuring access to noncommercial educational public television stations.”).

⁷³ 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract with America Advancement Act of 1996 (CWAAA).

⁷⁴ Public Law 104-13.

⁷⁵ Public Law 107-198; *see* 44 U.S.C. § 3506(c)(4).

21. **IT IS FURTHER ORDERED** that part 76 of the Commission's rules, 47 CFR part 76, **IS AMENDED** as set forth in Appendix A, and such rule amendments shall be effective thirty (30) days after the date of publication in the Federal Register.

22. **IT IS FURTHER ORDERED** that, should no petitions for reconsideration or petitions for judicial review be timely filed, MB Docket No. 07-42 shall be **TERMINATED**, and its docket **CLOSED**.

23. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Second Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

24. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Second Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A
Final Rules

The Federal Communications Commission amends 47 CFR part 76 to read as follows:

PART 76 – MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE

1. The authority citation for part 76 continues to read as follows:

Authority: 47 U.S.C. 151, 152, 153, 154, 301, 302, 302a, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 338, 339, 340, 341, 503, 521, 522, 531, 532, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Amend § 76.970 by revising paragraphs (d) and (e) to read as follows:

§ 76.970 Commercial leased access rates.

* * * * *

(d) The maximum commercial leased access rate that a cable operator may charge for full-time channel placement on any tier is the average implicit fee for full-time channel placement on that tier.

(e) The average implicit fee identified in paragraph (d) of this section shall be calculated by first calculating the total amount the operator receives in subscriber revenue per month for the programming on the tier on which the channel will be placed, and then subtracting the total amount it pays in programming costs per month for that tier (the “total implicit fee calculation”). Next, the total implicit fee is divided by the number of channels on that tier (the “average implicit fee calculation”). The result, the average implicit fee, is the maximum rate per month that the operator may charge the leased access programmer for a full-time channel on that tier. The license fees for affiliated channels used in determining the average implicit fee shall reflect the prevailing company prices offered in the marketplace to third parties. If a prevailing company price does not exist, the license fee for that programming shall be priced at the programmer’s cost or the fair market value, whichever is lower. The average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year. The implicit fee for a contracted service may not include fees, stated or implied, for services other than the provision of channel capacity (e.g., billing and collection, marketing, or studio services).

* * * * *

APPENDIX B**Final Regulatory Flexibility Analysis**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Second Further Notice of Proposed Rulemaking (Second FNPRM) in this proceeding.² The Federal Communications Commission (Commission) sought written public comment on the proposals in the Second FNPRM, including comment on the IRFA. The Commission received no comments on the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Report and Order

2. In the Second Report and Order, we adopt a tier-based leased access rate calculation as part of the Commission's Modernization of Media Regulation Initiative.⁴ The leased access rules, which implement statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.⁵ In 2019, we proposed to modify the leased access rate formula so that rates would be calculated based on information specific to the tier on which the programming is carried.⁶ Today, we adopt this proposal, finding that a simplified tier-specific rate calculation best reflects regulatory changes that have occurred in the last 20 years⁷ and will more accurately approximate the value of a particular channel, while alleviating burdens on cable operators. We also find that, although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so we do not eliminate our leased access rules.

B. Legal Basis

3. The authority for the action taken in this rulemaking is contained in sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 (CWAAA).

² See *Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 and 17-105, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 4934, 4973-77 (2019) (*2019 Leased Access Order and Second FNPRM*).

³ See 5 U.S.C. § 604.

⁴ See *Commission Launches Modernization of Media Regulation Initiative*, MB Docket No. 17-105, Public Notice, 32 FCC Rcd 4406 (2017) (*Media Modernization Public Notice*).

⁵ See 47 U.S.C. § 532; 47 CFR § 76.970 *et seq.*

⁶ See *Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 and 17-105, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 4934 (2019) (*2019 Leased Access Order and Second FNPRM*).

⁷ Specifically, the current rate formula was adopted consistent with the "tier neutrality" principle, but the Commission has since ceased regulation of cable programming service tier (CPST) rates as of 1999, and that principle no longer applies. See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access*, CS Docket No. 96-60, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267, 5290, para. 46 (1997) (*1997 Leased Access Order*) ("In addition, we note that our rate regulation rules generally are based on the principle of tier neutrality, which requires cable operators to charge the same per channel rate regardless of the programming costs incurred on a particular tier."); Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(1), 110 Stat. 115 (1996) (codified as 47 U.S.C. § 543(c)(4) (providing for sunset of upper tier rate regulation after March 31, 1999)).

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

4. No comments were filed in response to the IRFA.

D. Description and Estimate of the Number of Small Entities To Which the Rules Will Apply

5. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”⁹ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.¹⁰ A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.¹¹ Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

6. *Cable Television Distribution Services.* Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”¹² The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. U.S. Census data for 2012 show that there were 3,117 firms that operated that year.¹³ Of this total, 3,083 operated with fewer than 1,000 employees.¹⁴ Thus, the majority of these firms can be considered small.

7. *Cable Companies and Systems (Rate Regulation).* The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide.¹⁵ Industry data

⁸ 5 U.S.C. § 603(b)(3).

⁹ *Id.* § 601(6).

¹⁰ *Id.* § 601(3) (incorporating by reference the definition of “small-business concern” in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.” 5 U.S.C. § 601(3).

¹¹ 15 U.S.C. § 632.

¹² U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Carriers” (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012>.

¹³ See U.S. Census Bureau, 2012 Economic Census of the United States, Table No. EC1251SSSZ5, *Information: Subject Series - Estab & Firm Size: Employment Size of Firms: 2012* (517110 Wired Telecommunications Carriers). https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110.

¹⁴ *Id.*

¹⁵ 47 CFR § 76.901(e).

indicate that there are currently 4,600 active cable systems in the United States.¹⁶ Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.¹⁷ In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.¹⁸ Current Commission records show 4,600 cable systems nationwide.¹⁹ Of this total, 3,900 cable systems have fewer than 15,000 subscribers, and 700 systems have 15,000 or more subscribers, based on the same records.²⁰ Thus, under this standard as well, we estimate that most cable systems are small entities.

8. *Cable System Operators (Telecom Act Standard)*. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000."²¹ There are approximately 52,403,705 cable video subscribers in the United States today.²² Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.²³ Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.²⁴ We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.²⁵ Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

9. *Cable and Other Subscription Programming*. This industry comprises establishments primarily engaged in operating studios and facilities for the broadcasting of programs on a subscription or

¹⁶ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

¹⁷ See SNL KAGAN at <https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8> (subscription required).

¹⁸ 47 CFR § 76.901(c).

¹⁹ Federal Communications Commission, Assessment and Collection of Regulatory Fees for Fiscal Year 2014; Assessment and Collection of Regulatory Fees for Fiscal Year 2013; and Procedures for Assessment and Collection of Regulatory Fees, 80 Fed. Reg. 66815 (Oct. 30, 2015) (citing August 15, 2015 Report from the Media Bureau based on data contained in the Commission's Cable Operations and Licensing System (COALS)). See www.fcc.gov/coals.

²⁰ *Id.*

²¹ 47 CFR § 76.901 (f) and notes ff. 1, 2, and 3.

²² *Assessment and Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016) (citing Office of Management and Budget (OMB) Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

²³ 47 CFR § 76.901(f).

²⁴ *Assessment & Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appx. E, para. 23 (2016).

²⁵ The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. See 47 CFR § 76.901(f).

fee basis. The broadcast programming is typically narrowcast in nature (e.g., limited format, such as news, sports, education, or youth-oriented). These establishments produce programming in their own facilities or acquire programming from external sources. The programming material is usually delivered to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.²⁶ The SBA size standard for this industry establishes as small, any company in this category which has annual receipts of \$41.5 million or less.²⁷ According to 2012 U.S. Census Bureau data, 367 firms operated for the entire year.²⁸ Of that number, 319 operated with annual receipts of less than \$25 million a year.²⁹ Based on this data, the Commission estimates that the majority of firms operating in this industry are small.

10. *Motion Picture and Video Production.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in producing, or producing and distributing motion pictures, videos, television programs, or television commercials.”³⁰ We note that firms in this category may be engaged in various industries, including cable programming. Specific figures are not available regarding how many of these firms produce programming for cable television. To gauge small business prevalence in the Motion Picture and Video Production industries, the Commission relies on data currently available from the U.S. Census for the year 2012. The SBA has developed a small business size standard for this category, which is: those having \$35.0 million or less in annual receipts.³¹ Census data for 2012 shows that there were 8,203 firms in this category that operated for the entire year.³² Of this total, 8,141 firms had annual receipts of fewer than \$25 million. Therefore, we conclude that a majority of businesses in this industry can be considered small.

11. *Motion Picture and Video Distribution.* The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in acquiring distribution rights and distributing film and video productions to motion picture theaters, television networks and stations, and exhibitors.”³³ We note that firms in this category may be engaged in various industries, including cable programming. To gauge small business prevalence in the Motion Picture and Video Distribution industries, the Commission relies on data currently available from the U.S. Census for the year 2012. The SBA has developed a small business size standard for this category, which is: those having \$34.5 million or less in annual receipts.³⁴ Census data for 2012 shows that there were 307 firms in this category that

²⁶ See U.S. Census Bureau, 2012 NAICS Definitions, “515210 Cable and other Subscription Programming”, <https://factfinder.census.gov/faces/affhelp/jsf/pages/metadata.xhtml?lang=en&type=ib&id=ib.en./ECN.NAICS2012.515210#>.

²⁷ See 13 CFR § 121.201, NAICS Code 515210.

²⁸ See U.S. Census Bureau, 2012 Economic Census of the United States, Tbl. EC1251SSSZ4, Information: Subject Series - Estab & Firm Size: Receipts Size of Firms for the U.S.: 2012, NAICS Code 515210, https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515210.

²⁹ *Id.* Available census data does not provide a more precise estimate of the number of firms that have receipts of \$38.5 million or less.

³⁰ U.S. Census Bureau, 2012 NAICS Definitions, “512110 Motion Picture and Video Production” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³¹ 13 CFR § 121.201, NAICS Code 512110.

³² U.S. Census Bureau, 2007 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2007 – 2007 Economic Census;” NAICS code 512110, Table EC0751SSSZ4; available at <http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml>.

³³ U.S. Census Bureau, 2012 NAICS Definitions, “512120 Motion Picture and Video Distribution” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

³⁴ 13 CFR § 121.201, NAICS Code 512120.

operated for the entire year.³⁵ Of this total, 294 firms had annual receipts of fewer than \$25 million.³⁶ Therefore, under this size standard, we conclude that the majority of such businesses can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

12. The rule changes discussed in the Second Report and Order would affect reporting, recordkeeping, or other compliance requirements. Specifically, the Commission adopts its proposal to modify the leased access rate formula so that rates will be specific to the tier on which the programming is carried, finding that a simplified tier-specific rate calculation is justified to ease burdens on cable operators, and due to the significant changes to the overall rate regulation regime that have occurred since our current leased access rate rules were adopted. The Commission also finds that although changes in the marketplace cast substantial doubt on the constitutionality of mandatory leased access, leased access requirements are contained in a specific statutory mandate from Congress, so we do not eliminate our leased access rules. The First Amendment discussion in the Second Report and Order would not affect any reporting, recordkeeping, or other compliance requirements.

F. Steps Taken to Minimize Significant Economic Impact on Small Entities and Significant Alternatives Considered

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance, rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.”³⁷

14. The Second Report and Order adopts a simplified, tier-based calculation for the average implicit fee. This simplified calculation will ease burdens on cable operators while also fulfilling the Commission’s statutory obligation to establish rules for determining maximum reasonable leased access rates. The Commission also believes the modifications are warranted given the significant changes to the overall rate regulation regime that have occurred since our current leased access rate rules were adopted. While one commenter on the initial Report and Order expressed concern that existing rates could act as a barrier to entry for some independent programmers,³⁸ not a single commenter has responded to the Second FNPRM by opposing the tier-specific calculation. Although a few cable commenters suggest that the Commission could permit marketplace negotiations to establish the maximum reasonable rates, they also support a tier-specific implicit fee calculation.³⁹ Considering the Commission’s statutory obligation to establish rules for determining maximum reasonable leased access rates, we conclude that adopting a tier-specific rate calculation is the best approach. As explained in the Second Report and Order, the Commission expects that the tier-specific calculation will be much simpler than the current weighting scheme. The Second Report and Order also considers alternate proposals from ACA Connects, but it concludes that ACA’s proposals are unsupported by the record and would be less accurate than the

³⁵ U.S. Census Bureau, 2012 Economic Census. See U.S. Census Bureau, American FactFinder, “Information: Subject Series – Estab and Firm Size: Receipts Size of Firms for the United States: 2012 – 2012 Economic Census,” available at <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>.

³⁶ *Id.*

³⁷ 5 U.S.C. § 603(c)(1)-(4).

³⁸ *2019 Leased Access Order and Second FNPRM*, 34 FCC Rcd at 4954, para. 46.

³⁹ See Second Report and Order at Section III.B.

adopted approach. The Second Report and Order additionally responds to a request from ACA by modifying the leased access rules to include the Commission's prior statements that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year.

G. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

15. None.

H. Report to Congress

16. The Commission will send a copy of the Second Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act.⁴⁰ In addition, the Commission will send a copy of the Second Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. The Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.⁴¹

⁴⁰ See 5 U.S.C. § 801(a)(1)(A).

⁴¹ See *id.* § 604(b).

APPENDIX C

Mathematical Representation of Leased Access Rate Formula

For clarity, the formula for the new tier-specific calculation is as follows:

Variables

T	=	Elected Tier
C	=	Channels
R	=	Total Tier Monthly Subscriber Revenue
K	=	Total Tier Monthly Programming Costs
A	=	Maximum Full-time Rate Per Month

Revised Tier-Specific Formula

$$A = (R_T - K_T) \left(\frac{1}{C_T} \right)$$