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

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

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: June 7, 2018 **Released: June 8, 2018**

Comment Date: (30 days after date of publication in the Federal Register)
Reply Comment Date: (45 days after date of publication in the Federal Register)

By the Commission: Chairman Pai and Commissioners O'Rielly, Carr, and Rosenworcel issuing separate statements.

I. INTRODUCTION

1. In this Further Notice of Proposed Rulemaking (FNPRM), we seek to update our leased access rules as part of the Commission's Modernization of Media Regulation Initiative.[1] In response to the public notice initiating the media modernization proceeding, some commenters made proposals related to the Commission's leased access rules, which require cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.[2] By addressing these proposals in this FNPRM, we advance our efforts to modernize our media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.

2. First, we tentatively conclude that we should vacate the Commission's *2008 Leased Access Order*,[3] which the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) has stayed for a decade in conjunction with several judicial appeals of the order.[4] This action would provide the Commission with a clean starting point from which to consider specific proposals to modify the leased access rules. Second, we seek input on the state of the leased access marketplace generally and invite

[1] *See Commission Launches Modernization of Media Regulation Initiative,* Public Notice, 32 FCC Rcd 4406 (2017) (*Media Modernization Public Notice*).

[2] *See, e.g.,* NCTA Comments, MB Docket Nos. 17-105, 07-42, and 02-144, GN Docket No. 17-142, at 18-20 (Jul. 5, 2017) (NCTA Comments); Verizon Comments, MB Docket Nos. 17-105, 14-261, 14-127, 07-42, 12-217, 15-216, and 10-71, RM-11728, at 8-11 (Jul. 5, 2017) (Verizon Comments); American Cable Association (ACA) Reply, MB Docket Nos. 17-105, 14-127, 07-42, 12-217, and 12-68, at 15-16 (Aug. 4, 2017) (ACA Reply); Frontier Communications Corporation Reply, MB Docket Nos. 17-105, 07-42, 12-217, 14-127, 10-71, and 05-311, at 3-4 (Aug. 4, 2017) (Frontier Reply); Verizon Reply, MB Docket Nos. 17-105, 14-261, 14-127, 07-42, 12-217, 15-216, and 10-71, RM-11728, GN Docket No. 17-142, at 4-5 (Aug. 4, 2017) (Verizon Reply). *See also* 47 CFR § 76.970 *et seq.*; 47 U.S.C. § 532. The leased access rules are in Subpart N of Part 76, which was listed in the *Media Modernization Public Notice* as one of the principal rule parts that pertains to media entities and that is the subject of the media modernization review. *Media Modernization Public Notice*, 32 FCC Rcd at 4409 (Attachment).

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

[4] Separate from multiple petitions for judicial review pending before the Sixth Circuit, the Office of Management and Budget (OMB) has disapproved of the information collection requirements associated with the *2008 Leased Access Order*. *See infra* Section II.

comment on ways to modernize our existing leased access rules. As suggested by commenters in response to the *Media Modernization Public Notice*, we propose to require cable operators to respond only to bona fide requests from prospective leased access programmers. In addition, we seek comment on other suggested changes to leased access rules that were raised in the media modernization proceeding, including extending the timeframe for providing responses to leased access requests and permitting cable operators to require leased access programmers to pay a nominal application fee and/or a deposit. Finally, we seek comment on proposals to modify our procedures for addressing leased access disputes.

II. BACKGROUND

3. As part of the Cable Communications Policy Act of 1984, Congress first imposed leased access requirements by directing cable operators to set aside capacity for use by unaffiliated programmers.[5] Under a statutory provision that is now codified at Section 612 of the Communications Act of 1934, as amended, Congress provided that the leased access set-aside requirements would vary depending on the cable system's total activated channel capacity.[6] In other words, a cable operator that has more activated channels is required to set aside a greater number of channels for use by leased access programmers, while those with fewer activated channels must set aside fewer channels for such programmers.

4. As part of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Act), Congress gave the Commission authority to adopt maximum reasonable rates for commercial leased access, and the Commission accordingly adopted rate regulations governing commercial leased access on cable systems in 1993.[7] The Commission's implementing rules, which the D.C. Circuit upheld in 1998,[8] included a formula for calculating maximum carriage rates that cable operators could charge leased access programmers.[9] Congress also provided, in the 1992 Act, 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]

5. On February 1, 2008, the Commission released its *2008 Leased Access Order*, in which it revised its commercial leased access rules and procedures.[11] Specifically, the *2008 Leased Access Order* modified the leased access rate formula;[12] "adopt[ed] customer service obligations that require[d] minimal

[5] *See* Cable Communications Policy Act of 1984, Pub. L. 98-549, § 2, 98 Stat. 2779, 2782; 47 U.S.C. § 532.

[6] 47 U.S.C. § 532(b)(1) (directing cable operators to "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 Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5948, para. 512 *et seq.* (1993); 47 U.S.C. § 532(c)(4)(A)(i).

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

[9] *See* 47 CFR § 76.970(d)-(h).

[10] 47 U.S.C. § 532(c)(1).

[11] *2008 Leased Access Order*, 23 FCC Rcd 2909.

[12] *See id.* at 2925, para. 36 ("We harmonize the rate methodology for carriage on tiers with more than 50% subscriber penetration and carriage on tiers with lower levels of penetration by calculating the leased access rate based upon the characteristics of the tier on which the leased access programming will be placed. Cable operators will calculate a leased access rate for each cable system on a tier-by-tier basis which will adequately compensate the operator for the net revenue that is lost when a leased access programmer displaces an existing program channel on

standards and equal treatment of leased access programmers with other programmers," including requirements that shortened the deadline for cable operators to respond to leased access requests; "eliminate[d] the requirement for an independent accountant to review leased access rates; and require[d] annual reporting of leased access statistics."[13] It also directed the Media Bureau to "resolve all leased access complaints within 90 days of the close of the pleading cycle," and adopted more expansive discovery rules for leased access complaints.[14] While the Commission in the *2008 Leased Access Order* decided not to apply the revised rate methodology to programmers that predominantly transmit sales presentations or program length commercials, the Commission sought comment on whether to do so in a Further Notice of Proposed Rulemaking.[15] Three parties filed petitions for review of the *2008 Leased Access Order*: United Church of Christ, Office of Communication, Inc. (UCC) filed in the U.S. Court of Appeals for the Sixth Circuit; ValueVision Media, Inc. d/b/a ShopNBC filed in the Eighth Circuit; and NCTA – The Internet and Television Association (NCTA)[16] filed in the District of Columbia Circuit. All three petitions were consolidated into a single case that remains pending before the Sixth Circuit.[17] NCTA filed with the Sixth Circuit an Emergency Motion for a Stay on April 22, 2008, to which the Commission filed an opposition on May 2, 2008.[18] On May 22, 2008, the Sixth Circuit granted a stay of the *2008 Leased Access Order*.[19] This stay remains in effect today.

6. Separate from the judicial proceedings, some of the rules in the *2008 Leased Access Order* that contained new or modified information collection requirements could not go into effect until the Commission obtained OMB approval.[20] On July 9, 2008, OMB issued a Notice stating that it disapproved of the information collection requirements that had been submitted to it for approval because the Commission failed to comply with provisions of the Paperwork Reduction Act (PRA), and thus, the

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the cable system. In addition, the Order sets a maximum allowable leased access rate of $0.10 per subscriber per month to ensure that leased access remains a viable outlet for programmers").

[13] *See id.* at 2910, para. 2, and 2915, para. 14.

[14] *Id.* at 2931-32, paras. 55-57.

[15] *Id.* at 2940, paras. 74-75.

[16] At that time NCTA was known as the National Cable & Telecommunications Association.

[17] On July 24, 2012, UCC filed a motion for voluntary dismissal of its case (Case No. 08-3245), which the Sixth Circuit granted on July 31, 2012.

[18] On March 28, 2008, NCTA also filed a motion for a stay with the Commission. *See* Request of National Cable & Telecommunications Association for a Stay, MB Docket No. 07-42 (filed Mar. 28, 2008) (NCTA FCC Stay Request). On March 31, 2008, TVC Broadcasting filed a petition for reconsideration of the *2008 Leased Access Order*. *See* TVC Broadcasting LLC, Petition for Reconsideration, MB Docket No. 07-42 (filed Mar. 31, 2008) (TVC Recon Petition). The Commission has not acted upon either the NCTA FCC Stay Request or the TVC Recon Petition.

[19] *See* Order, United Church of Christ Office of Communications, Inc. *et al.* v. FCC, No. 08-3245 (and consolidated cases) (6th Cir., May 22, 2008) (Sixth Circuit Stay Order).

[20] *See 2008 Leased Access Order*, 23 FCC Rcd at 2944, para. 89. The Commission specified that the rules adopted in the order would have differing effective dates. Specifically, it stated that certain rules would be effective upon OMB approval, certain other rules would have a delayed effective date to correspond with the effective date for the rules that required OMB approval, and the remaining rules would have been effective 30 days after the *2008 Leased Access Order* was published in the *Federal Register*. The third category of rules, *i.e.*, those that could have gone into effect in the absence of OMB approval, include rules governing the Media Bureau's resolution of leased access complaints. *See id.* at 2944, para. 89, and 2950 (App. B). Rules that did not require OMB approval, but that the Commission provided would have a delayed effective date to correspond with the rules that required OMB approval, include rules governing commercial leased access rates, forfeitures for cable operator violations, petitions for relief of leased access violations, and Commission issuance of protective orders. *See id.* at 2944, para. 89, and 2946-2949 (App. B). As explained above, none of the rules adopted in the order have gone into effect to date due to the Sixth Circuit Stay Order.

previous rules would remain in effect.[21] OMB provided five specific reasons for its disapproval: (1) the Commission failed to demonstrate a need to reduce the timeframe within which cable operators must respond to leased access requests; (2) the Commission failed to demonstrate that it had taken reasonable steps to minimize the burden on cable operators that would need to hire new staff to comply with the reduced timeframe; (3) the Commission failed to demonstrate that there are reasonable mechanisms in place to protect cable operators' proprietary and confidential information; (4) the Commission failed to justify the increased number of non-bona fide inquiries and the related paperwork burden that cable operators would face as a result of the reduced leased access pricing; and (5) the Commission failed to demonstrate that it had taken reasonable steps to minimize the burden on cable operators that would need to hire new staff to respond to the increased number of leased access inquiries.[22] On July 24, 2008, the Commission filed a motion with the Sixth Circuit requesting that it hold the judicial proceeding in abeyance pending resolution of OMB's disapproval, which the Sixth Circuit granted on July 25, 2008.[23]

7. Today, due to the judicial stay and OMB Notice, the pre-*2008 Leased Access Order* rules, which were initially adopted nearly 25 years ago, remain in effect. We agree with commenters in the media modernization proceeding that, in light of the passage of time, it is appropriate for the Commission to resolve the matters that remain pending as a result of the *2008 Leased Access Order* and to re-evaluate the existing leased access rules.[24]

III. DISCUSSION

A. Proposal to Vacate the *2008 Leased Access Order*

8. We tentatively conclude that we should vacate the *2008 Leased Access Order*, including the Further Notice of Proposed Rulemaking issued in conjunction with that order. This action would enable the Commission to clean up a longstanding backlog and position us to freshly consider new revisions to the leased access rules.[25] As explained above, due to the Sixth Circuit proceedings as well as the OMB disapproval, the rule changes contained in the *2008 Leased Access Order* never went into effect.[26] The leased access rules that are currently in effect, and that currently appear in the Code of Federal Regulations, are those that were in existence prior to the *2008 Leased Access Order*.[27] Accordingly,

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[21] *See Notice of Office of Management and Budget Action*, OMB Control No. 3060-0568 (Jul. 9, 2008) (OMB Notice).

[22] *Id.* We note that the Commission has authority to override OMB's disapproval by a majority vote. 44 U.S.C. § 3507(f)(1)(A).

[23] *See* Order, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (6th Cir. July 25, 2008). On August 26, 2008, on behalf of UCC, the Media Access Project (MAP) filed a request that the Commission override the OMB Denial Notice, and that the Commission modify the *2008 Leased Access Order* by allowing cable operators to assign values to bundled programming where channels do not have individualized licensing fees. *See* MAP on behalf of UCC, Request to Override the Action of the Office of Management and Budget and to Modify the Commission's *Report and Order*, MB Docket No. 07-42 (filed Aug. 26, 2008) (UCC Request). *See also Media Bureau Seeks Comment on Request of United Church of Christ, Office of Communication, Inc., Media Access Project Regarding Leased Access Order*, Public Notice, 23 FCC Rcd 13417 (Sept. 10, 2008). By email dated April 6, 2018, UCC indicated that it sought to withdraw the UCC Request. Accordingly, the Media Bureau dismissed the UCC Request on April 19, 2018. *See Leased Commercial Access*, Order of Dismissal, DA 18-397 (Apr. 19, 2018).

[24] *See, e.g.,* Verizon Comments at 9-10; Frontier Reply at 3.

[25] If we vacate the *2008 Leased Access Order*, we will subsequently dismiss as moot the NCTA FCC Stay Request (asking the Commission to stay the *2008 Leased Access Order*) and the TVC Recon Petition (seeking reconsideration of the *2008 Leased Access Order*).

[26] *See supra* Section II.

[27] *See* Federal Communications Commission, Leased Commercial Access, 78 FR 20255 (Apr. 4, 2013) ("Some of the revised rules contained information collections that required approval by OMB. Some other revised rules were held in abeyance pending OMB approval. Finally, some rule revisions were effective without OMB approval. The

vacating the *2008 Leased Access Order* would not have any impact on any party's compliance with or expectations concerning the leased access requirements.

9. In making this tentative conclusion, we note the concerns the Sixth Circuit expressed in its Stay Order regarding the leased access rules that were adopted in the *2008 Leased Access Order*, including "that NCTA has raised some substantial appellate issues."[28] The Sixth Circuit determined that a stay of the *2008 Leased Access Order* was justified due to "[t]he balance of the harms and the public interest, as well as NCTA's potential of success on the merits."[29] The Sixth Circuit also noted NCTA's argument that cable operators would suffer irreparable harm absent a stay because the new leased access rate formula adopted in the order would set leased access rates at an unreasonably low level, which would lead to more leased access requests that would displace other programming, ultimately leading to dissatisfied cable customers.[30]

10. Further support for our tentative finding that we should vacate the *2008 Leased Access Order* arises from the concerns about the paperwork burden set forth in the OMB Notice. As discussed above, OMB detailed five ways in which certain requirements adopted in the order were inconsistent with the PRA.[31] OMB specifically cited the Commission's failure to demonstrate the need for the more burdensome requirements adopted, its failure to demonstrate that it had taken reasonable steps to minimize the burdens, and its failure to provide reasonable protection for proprietary and confidential information.[32] Some commenters in the media modernization proceeding agree with OMB that the *2008 Leased Access Order* failed to comply with the PRA.[33]

11. We also tentatively find that vacating the *2008 Leased Access Order* would be consistent with the goal of the Commission's Modernization of Media Regulation Initiative to remove rules that are

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entire order, FCC 07-208, was judicially stayed pending judicial review, which is being held in abeyance, and no rule revisions have become effective. Therefore, the previously published rules are still in effect. This document makes a technical amendment so that the rules that are published in the Federal Register reflect the Leased Commercial Access rules that have remained in effect continuously and are currently still in effect.").

[28] Sixth Circuit Stay Order at 4.

[29] *Id.* at 5.

[30] *Id.* at 4 ("NCTA argues that the cable operators will suffer irreparable harm in the absence of a stay because the new rate formula sets rates for leased access unreasonably low, which is likely to result in a large increase in requests for leased access. This influx of leased access users, it is argued, will destroy the cable operators' service tiers and require cable operators to replace other programming to accommodate the leased access users. The resulting disruption will cause customer dissatisfaction, resulting in some cable customers obtaining video programming from other sources, such as satellite and wireless services.").

[31] *See* OMB Notice at 1-2 (stating that the Commission "has not: demonstrated the need for reducing the timeframe operators have to provide information to potential programmers from 15 days to three in accordance with the information collection in Section 76.972(b) of the associated rulemaking; demonstrated they have taken reasonable steps to minimize the burden on respondents who will be required to hire new staff in order to maintain the capacity to comply with the reduced deadline for leased access requests in accordance with the information collection in Section 76.972(b) of the associated rulemaking; demonstrated there are reasonable mechanisms in place to protect proprietary and confidential information respondents will be required to provide potential programmers, regardless of the legitimacy of the request, in accordance with the information collection in Section 76.972(b) of the associated rulemaking; demonstrated the practical utility and need for an increased number of non-bona fide inquiries to respondents and the inherent paperwork burden, due to the reduced pricing, in accordance with the information collection in Section 76.972(b) of the associated rulemaking; and demonstrated they have taken reasonable steps to minimize the burden on respondents, who due to reduced pricing, will be required to hire new staff in order to maintain the capacity to respond to an increased number of inquiries in accordance with the information collection in Section 76.972(b) of the associated rulemaking") (extraneous bullet points omitted).

[32] OMB Notice.

[33] *See* NCTA Comments at 20; ACA Reply at 16.

outdated or no longer justified by market realities.[34] Because of the concerns raised in the Sixth Circuit Stay Order and the OMB Notice, the significant amount of time that has passed since the *2008 Leased Access Order* was adopted and became subject to a stay, the significant amount of time that the cable industry and programmers have remained subject to the pre-existing leased access rules during the pendency of the stay, and the very small number of leased access disputes brought before the Commission in recent years,[35] we tentatively find that there is no sound policy basis for the rules adopted in the 2008 order at this point. For all these reasons, rather than proceeding with the pending judicial review of the *2008 Leased Access Order* that has now been stayed for a decade, we tentatively conclude that a better approach would be for the Commission to vacate the *2008 Leased Access Order* and consider potential rule revisions anew.

12. We seek comment on our tentative conclusions. Is there any policy justification for not vacating the entire order? Is there any policy justification for retaining any particular rules adopted therein? Parties urging us not to vacate the entire order or particular rules should specify how the Commission should overcome both the judicial concerns noted in the Sixth Circuit Stay Order and those raised in the OMB Notice. We also ask parties to address any benefits associated with the 2008 rules and whether these benefits outweigh the costs.

B. Updated Leased Access Rules

13. We next seek comment on any updates and improvements we should make to our existing leased access rules. The stated purpose of the leased access statute "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."[36] As noted above, the statute also specifies that the price, terms, and conditions for commercial leased access should be "at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system."[37] We note that the video distribution marketplace has become much more competitive since Congress first established the leased access regime in 1984. For example, at that time, direct broadcast satellite (DBS) service was not available to consumers as an alternative to cable. While consumers previously had access to only one pay television service, today they have access to multiple pay television services as well as online video programming.[38] In addition, the number of channels offered by cable operators has increased.[39]

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[34] *See, e.g., Media Modernization Public Notice*, 32 FCC Rcd 4406 (opening the media modernization proceeding); *Elimination of Main Studio Rule*, Report and Order, 32 FCC Rcd 8158 (2017) (finding that the main studio rule was "outdated and unnecessarily burdensome for broadcast stations, and should therefore be eliminated").

[35] The Commission currently adjudicates an average of less than one leased access dispute per year.

[36] 47 U.S.C. § 532(a). *See also id.* § 532(c)(2) ("A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section").

[37] 47 U.S.C. § 532(c)(1). *See also* Frontier Reply at 4 (making certain updates to the leased access rules "would help alleviate the most significant burdens of the leased access rules while the industry awaits larger statutory changes to this outdated program").

[38] *See, e.g., Promoting the Availability of Diverse and Independent Sources of Video Programming*, Notice of Inquiry, 31 FCC Rcd 1610, para. 1 (2016) ("When Congress passed the 1992 Cable Act, the majority of American households had access to only one pay television service, and alternatives to that service were in their incipient stages. By contrast, consumers today can access video programming over multiple competing platforms, and the dominance of incumbent pay TV distributors has eroded") (footnotes omitted).

[39] *See, e.g., Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, DA 18-128, at para. 32 (MB, Feb. 8, 2018) ("The average number of channels offered by cable operators with expanded basic service grew annually by 7.8 percent over the last five years and by 7.0 percent

14. Against this backdrop, we invite comment on the current state of the leased access marketplace generally and on whether, and if so how, the prevalence of alternative means of video distribution should influence our actions in this proceeding. How many leased access programmers are currently in existence, and is that number increasing or decreasing? What portion of a cable system's programming consists of leased access? Do the leased access rules currently in effect facilitate the successful leasing of time by leased access programmers, and if not, what issues do programmers experience? To what extent do leased access programmers continue to rely on cable carriage versus alternative means of distribution? Does the widespread availability of DBS service today or the proliferation of online video distributors provide programmers, including leased access programmers, with more options for content distribution?[40]

15. As discussed below, we also seek comment on specific proposals raised in the media modernization proceeding to update and improve the Commission's existing leased access rules as well as on any other proposals we should consider.

16. *Bona Fide Requests*. First, as supported by several commenters in the media modernization proceeding,[41] we propose to revise Section 76.970(i) of our rules to provide that all cable operators, and not just those that qualify as "small systems" under that rule, are required to provide the information specified in paragraph (i)(1) only in response to a bona fide request for leased access information from a prospective leased access programmer.[42] For purposes of the leased access rules applicable to cable operators eligible for small system relief,[43] a bona fide request for information is defined as a request from a potential leased access programmer that includes: "(i) The desired length of a contract term; (ii) The time slot desired; (iii) The anticipated commencement date for carriage; and (iv) The nature of the programming."[44]

17. Section 76.970(i)(1) directs cable operators to provide prospective leased access programmers with the following information: "(i) How much of the operator's leased access set-aside capacity is available; (ii) A complete schedule of the operator's full-time and part-time leased access rates; (iii) Rates associated with technical and studio costs; and (iv) If specifically requested, a sample

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over the last ten years, more than the one-year increase of 1.7 percent . . . during the 12 months ending January 1, 2016").

[40] *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighteenth Report, 32 FCC Rcd 568, 641, para. 178 (MB 2017) ("SNL Kagan states that, while the majority of U.S. households will continue to subscribe to MVPDs, the increased availability of content via [online video distributors] – albeit sometimes with delayed distribution windows – combined with the increased availability of broadband service and Internet-enabled devices, will likely lead to fewer MVPD subscribers and more OVD usage over the long term") (*citing* SNL Kagan, State of Online Video Delivery at 6 (2016)). *See also id.* at 621, para. 132 ("The marketplace for the distribution of video programming over the Internet continues to grow, as technology advances, programmers license more content digitally, and both wireless and Internet speeds and capacity increase").

[41] *See* NCTA Comments at 19; ACA Reply at 16; Frontier Reply at 4; Verizon Reply at 4-5.

[42] The *2008 Leased Access Order* distinguished between "*requests* for information" and "*proposals* for leased access." Had that order gone into effect, it would have provided non-small cable systems with three days to respond to a request for information, whereas small cable systems would have had 30 days to respond to a bona fide request for information. All cable systems, regardless of size, would have been required to respond to bona fide leased access proposals within 10 days of receipt. *See 2008 Leased Access Order*, 23 FCC Rcd at 2948 (App. B).

[43] For purposes of the leased access rules, a small system is defined as either (i) a system that qualifies as small under Section 76.901(c) of the Commission's rules and is owned by a small cable company as defined in Section 76.901(e); or (ii) a system that has been granted special relief. 47 CFR § 76.970(i)(2).

[44] *Id.* § 76.970(i)(3).

leased access contract."[45] Current rules require operators of small cable systems to provide the information only in response to a bona fide request from a prospective leased access programmer, whereas other cable system operators must provide the information in response to any request for leased access information.[46] As a result, some operators of systems that do not qualify as small may spend a significant amount of time compiling information to respond to non-bona fide leased access inquiries.[47] These operators are not permitted to ask prospective leased access programmers for any information before responding to a leased access request, due to the Commission's concern that cable operators otherwise could use requests for information to discourage leasing access.[48]

18. We seek comment on our proposal to extend the bona fide request limitation to all leased access requests. Is there any reason not to provide all cable operators with the flexibility of responding only to a bona fide request? We ask commenters to provide information on the costs that cable operators currently face in responding to non-bona fide leased access requests. How often do cable operators receive non-bona fide leased access requests, and how much time does it take to provide the required information in response to such a request? Does the bona fide request limitation that currently applies to operators of small cable systems in any way discourage prospective leased access programmers, including small programmers, from seeking to lease access and if so, how? If we extend the bona fide request limitation to all leased access requests, should we adopt any modifications to the current definition of a bona fide request?

19. *Timeframe for Responding to Requests*. Second, we invite comment on whether we should extend the time within which cable operators must provide prospective leased access programmers with the information specified in Section 76.970(i)(1) of our rules. Current rules require cable system operators to provide the required information "within 15 calendar days of the date on which a request for leased access information is made," while operators of systems that are subject to small system relief must provide the required information "within 30 calendar days of a bona fide request from a prospective leased access programmer."[49] We invite comment on whether cable operators have found it difficult to comply with the current deadlines for providing the required information, and if so, why. What steps must cable operators take to compile the information listed in Section 76.970(i)(1) of the Commission's rules, and what costs do cable operators face in doing so under the current timeframe? Is the information readily available to cable operators? We also seek input on whether leased access programmers have found that the required information is generally provided on a timely basis in accordance with current rules. If, as discussed above, we revise our rules to provide that all cable operators, and not just those with small systems, are required to provide the listed information only in response to a bona fide request from a prospective leased access programmer, then is there any basis for extending the deadline to provide the information?

20. NCTA asks the Commission to provide cable operators with additional time, such as 45 days, within which "to respond to requests to lease time on multiple systems."[50] Is a 45-day response period reasonable for leased access requests covering multiple systems, and if not, what response time

[45] *Id.* § 76.970(i)(1).

[46] *See id.* § 76.970(i)(1)-(2). We propose to correct Section 76.970(i)(2) by replacing the reference to "paragraph (h)(1) of this section," which does not exist, with "paragraph (i)(1) of this section." All leased access requests are required to be in writing and to specify the date on which the request was sent to the cable operator. *Id.* § 76.970(i)(4).

[47] *See* NCTA Comments at 18-19; ACA Reply at 15.

[48] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Leased Commercial Access*, Second Report and Order and Second Order on Reconsideration of the First Report and Order, 12 FCC Rcd 5267, 5333, para. 133 (1997) (*1997 Leased Access Order*).

[49] 47 CFR § 76.970(i)(1), (2).

[50] NCTA Comments at 18, n.54. *See also* ACA Reply at 16 (agreeing with NCTA's proposal).

period is appropriate? Is it necessary to also provide additional response time for single cable systems? Do leased access requests typically involve multiple systems or are single-system requests often made? Would lengthening the deadline serve as a deterrent to or create a hardship for potential leased access programmers? Should we maintain a longer deadline for operators of small cable systems as compared to other cable operators?

21. *Application Fees and Deposits*. Third, as urged by several commenters in the media modernization proceeding,[51] we seek comment on whether we should permit cable operators to require leased access programmers to pay a nominal application fee[52] and/or a deposit,[53] which is currently prohibited.[54] Cable operators state that requiring a deposit or a nominal application fee would "help defray the costs of gathering the information necessary to calculate the leased access rate and to respond to any bona fide requests for leased access capacity that never lead to an actual leased access agreement."[55] In the past the Commission has not supported the collection of fees or deposits with respect to leased access.[56] In light of this history, how should we consider the impact of fees and deposits on interest, accessibility and diversity in leased access? Although the Commission previously found that such fees and deposits are not permissible, has anything changed that may persuade us that they are now a reasonable means of covering the costs of responding to leased access inquiries? If the Commission permits fees, what criteria should be used to determine whether an application fee is nominal? Rather than adopting rules governing what constitutes a "nominal" application fee, should the Commission evaluate such fees on a case-by-case basis when presented with a complaint that a particular fee is not nominal? Similarly, if we permit deposits, should we establish rules regarding an appropriate deposit amount, or alternatively, evaluate deposits on a case-by-case basis? If the Commission decides to adopt rules, how should it decide whether a deposit is reasonable? Should the cable operator refund all or part of the deposit if the leased access request does not result in carriage?

22. We seek comment on whether it would be preferable to permit a nominal application fee or a deposit, or both, and on the costs and benefits of each option. If we adopt our proposal to require all cable operators to respond only to bona fide leased access requests, is there any justification for requiring a deposit or application fee? Would requiring a deposit or application fee prior to obtaining the information set forth in Section 76.970(i)(1) dissuade potential leased access programmers, particularly small entities, from seeking to lease access? Finally, should the Commission permit all cable operators, or permit only small cable operators, to require a nominal application fee or deposit before the operator responds to a leased access request by providing the information set forth in Section 76.970(i)(1)? Any commenter advocating that we permit only small cable operators to require a nominal application fee or deposit should explain its rationale.

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[51] *See* NCTA Comments at 19; ACA Reply at 16; Frontier Reply at 4; Verizon Reply at 4-5.

[52] By "nominal application fee," we mean a processing fee that would be collected and retained by the cable operator regardless of whether the request results in leased access carriage.

[53] By "deposit," we mean a potentially more substantial fee that would be collected by the cable operator and used to offset future payments (*e.g.*, the first month's payment) if the leased access request results in carriage.

[54] *See 1997 Leased Access Order*, 12 FCC Rcd at 5333, para. 134 ("We agree with SCBA that certain operators of small systems should only be required to respond to 'bona fide' leased access requests. Therefore, we find that operators of systems subject to small system relief do not have to provide the required information until the leased access programmer supplies the following information: (a) desired length of contract term, (b) time slot desired, (c) anticipated commencement date for carriage, and (d) the nature of the programming. Because we believe that such information sufficiently demonstrates an intent to obtain access, we do not agree with SCBA that operators of small systems may require leased access programmers to pay a $500 deposit in order to defray operators' negotiation and rate computation expenses").

[55] *See* NCTA Comments at 19. *See also* ACA Reply at 16 (allowing operators, especially smaller operators, to require a deposit or application fee would "defray the costs needed to respond to leased access inquiries").

[56] *See 1997 Leased Access Order*, 12 FCC Rcd at 5333, para. 134.

23. *Dispute Procedures*. Fourth, we invite comment on modifications to our procedures for addressing leased access disputes. Congress has provided the Commission with authority to adjudicate leased access disputes.[57] Parties previously have contacted Commission staff to express confusion about inconsistencies between the leased access dispute resolution rule (Section 76.975) and the Commission's more general rule governing complaints (Section 76.7). Accordingly, to promote consistency between the two rules, we propose to revise section 76.975 of our rules as follows. First, we propose to revise our terminology by referencing an answer to a petition, rather than a response to a petition.[58] Second, we propose that the 30-day timeframe for filing an answer to a leased access petition should be calculated from the date of service of the petition, rather than the date on which the petition was filed.[59] Third, whereas Section 76.975 currently does not include any allowance for replies, we propose adding a provision stating that replies to answers must be filed within 15 days after submission of the answer.[60] Fourth, we propose adding a statement that Section 76.7 applies to petitions for relief filed under Section 76.975, unless otherwise provided in Section 76.975. We invite comment on these proposals, which we intend to alleviate any ongoing confusion about how both Section 76.7 and Section 76.975 govern leased access proceedings. Is 15 days the appropriate timeframe for submitting a reply to an answer to a leased access petition? We note that the general complaint-filing rule provides 10 days for filing replies, but it also provides only 20 days for filing an answer, whereas the leased access rule provides 30 days for an answer.[61] Are there any other changes we should make to our rules in order to make the adjudication of leased access disputes more efficient?

24. *Other Proposals*. Finally, we invite comment on any other ways in which we should modernize our leased access rules. For example, are any new rules needed to govern the relationship between leased access programmers and cable operators, such as a rule requiring cable operators to provide programmers with contact information for the person responsible for leased access matters? Should we adopt any new rules governing leased access rates or part-time leased access?[62] Commenters supporting additional rules governing leased access rates should explain why additional rate rules are needed and what issues the rules should address. We ask commenters to explain the relative costs and benefits of any additional proposals.

25. In seeking comment on updating the FCC's leased access rules, we also seek comment on whether our rules implicate First Amendment interests. If so, what level of First Amendment scrutiny is appropriate, and how does that analysis apply to our existing rules and the potential changes we seek comment on here, in light of the statutory obligations of Section 612? In this context, we also seek comment on whether there have been any changes in the video distribution market since Congress and the FCC first addressed these issues that are relevant to the First Amendment analysis. For instance, are there relevant changes in the distribution market that we should now consider? Is the FCC's 2015 decision regarding effective competition relevant to this analysis?[63]

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[57] *See* 47 U.S.C. § 532(c)(4)(A)(iii) (providing the Commission with the authority to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section").

[58] *See* 47 CFR § 76.7(b) (setting forth rules for answers to complaints).

[59] *See id.* § 76.7(b)(2)(ii) ("The answer shall be filed within 20 days of service of the complaint").

[60] *See id.* § 76.7(c)(3) ("Unless otherwise directed by the Commission or the relevant rule section, comments and replies to answers must be filed within ten (10) days after submission of the responsive pleading").

[61] *See id.* §§ 76.7(b)(2)(ii), (c)(3), 76.975(e).

[62] *See id.* §§ 76.970 (commercial leased access rates); 76.971(a)(4) (part-time leased access requests).

[63] *See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (adopting a rebuttable presumption that cable operators are subject to "Effective Competition" for purposes of rate regulation under Section 623(l)(1)(B) of the Communications Act, 47 U.S.C. § 543(l)(1)(B)).

IV. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Analysis

26. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[64] the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to the FNPRM. The IRFA is set forth in Appendix B.

B. Paperwork Reduction Act

27. This document contains proposed new or revised information collection requirements, including the proposal that all cable operators are required to provide the information specified in Section 76.970(i)(1) only in response to a bona fide request from a prospective leased access programmer, and the addition of a provision governing replies to answers to leased access complaints. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. §§ 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), the Commission seeks specific comment on how it might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Ex Parte Rules

28. Permit-But-Disclose. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[65] Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

D. Filing Requirements

29. Comments and Replies. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

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[64] 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).

[65] 47 CFR § 1.1200 *et seq.*

• Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/.

• Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington, DC 20554.

30. Availability of Documents. Comments, reply comments, and *ex parte* submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C., 20554. These documents will also be available via ECFS. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

31. People with Disabilities. To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

E. Additional Information

32. 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

33. **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 Further Notice of Proposed Rulemaking **IS ADOPTED**.

34. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Further Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Proposed Rules

For ease of review, the proposed rules set forth below show potential amendments in **bold/underline** (for additions) and ~~strikethrough~~ (for deletions).

The Federal Communications Commission proposes to amend 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. Revise § 76.970 paragraph (i)(1)-(2) to read as follows:

§ 76.970 Commercial leased access rates.

* * * * *

(i)(1) Cable system operators shall provide prospective leased access programmers with the following information within 15 calendar days of the date on which a **bona fide** request for leased access information is made:

(i) How much of the operator's leased access set-aside capacity is available;

(ii) A complete schedule of the operator's full-time and part-time leased access rates;

(iii) Rates associated with technical and studio costs; and

(iv) If specifically requested, a sample leased access contract.

(2) Operators of systems subject to small system relief shall provide the information required in paragraph (~~h~~**i**)(1) of this section within 30 calendar days of a bona fide request from a prospective leased access programmer. For these purposes, systems subject to small system relief are systems that either:

(i) Qualify as small systems under § 76.901(c) and are owned by a small cable company as defined under § 76.901(e); or

(ii) Have been granted special relief.

* * * * *

3. Revise § 76.975 by revising paragraph (e) and adding a new paragraph (i) to read as follows:

§ 76.975 Commercial leased access dispute resolution.

* * * * *

(e) The cable operator or other respondent will have 30 days from ~~the filing of the petition~~ **service of the petition** to file a**n answer** ~~response~~. If a leased access rate is disputed, the **answer** ~~response~~ must show that the rate charged is not higher than the maximum permitted rate for such leased access, and must be supported by the affidavit of a responsible company official. If, after a**n answer** ~~response~~ is submitted, the staff finds a prima facie violation of our rules, the staff may require a respondent to produce additional information, or specify other procedures necessary for resolution of the proceeding. **Replies to answers must be filed within fifteen (15) days after submission of the answer.**

* * * * *

(i) Section 76.7 applies to petitions for relief filed under this section, except as otherwise provided in this section.

APPENDIX B

Initial Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) concerning the possible significant economic impact on small entities by the policies and rules proposed in the Further Notice of Proposed Rulemaking (FNPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided on the first page of the FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2] In addition, the FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.[3]

A. Need for, and Objectives of, the Proposed Rules

2. In the FNPRM, we seek to update our leased access rules as part of the Commission's Modernization of Media Regulation Initiative.[4] In response to the public notice initiating the media modernization proceeding, some commenters made proposals related to the Commission's leased access rules, which require cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.[5] By addressing these proposals in this FNPRM, we advance our efforts to modernize our media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.

3. First, we tentatively conclude that we should vacate the Commission's *2008 Leased Access Order*,[6] which the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) has stayed for a decade in conjunction with several judicial appeals of the order.[7] This action would provide the Commission with a clean starting point from which to consider specific proposals to modify the leased

[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* 5 U.S.C. § 603(a).

[3] *See id*.

[4] *See Commission Launches Modernization of Media Regulation Initiative,* Public Notice, 32 FCC Rcd 4406 (2017) (*Media Modernization Public Notice*) ("The objective of this proceeding is to eliminate or modify regulations that are outdated, unnecessary or unduly burdensome. By initiating this review, the Commission takes another step to advance the public interest by reducing unnecessary regulations and undue regulatory burdens that can stand in the way of competition and innovation in media markets").

[5] *See, e.g.,* NCTA Comments, MB Docket Nos. 17-105, 07-42, and 02-144, GN Docket No. 17-142, at 18-20 (Jul. 5, 2017) (NCTA Comments); Verizon Comments, MB Docket Nos. 17-105, 14-261, 14-127, 07-42, 12-217, 15-216, and 10-71, RM-11728, at 8-11 (Jul. 5, 2017) (Verizon Comments); American Cable Association (ACA) Reply, MB Docket Nos. 17-105, 14-127, 07-42, 12-217, and 12-68, at 15-16 (Aug. 4, 2017) (ACA Reply); Frontier Communications Corporation Reply, MB Docket Nos. 17-105, 07-42, 12-217, 14-127, 10-71, and 05-311, at 3-4 (Aug. 4, 2017) (Frontier Reply); Verizon Reply, MB Docket Nos. 17-105, 14-261, 14-127, 07-42, 12-217, 15-216, and 10-71, RM-11728, GN Docket No. 17-142, at 4-5 (Aug. 4, 2017) (Verizon Reply). *See also* 47 CFR § 76.970 *et seq.*; 47 U.S.C. § 532. The leased access rules are in Subpart N of Part 76, which was listed in the *Media Modernization Public Notice* as one of the principal rule parts that pertains to media entities and that is the subject of the media modernization review. *Media Modernization Public Notice*, 32 FCC Rcd at 4409 (Attachment).

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

[7] Separate from multiple petitions for judicial review pending before the Sixth Circuit, the Office of Management and Budget (OMB) has disapproved of the information collection requirements associated with the *2008 Leased Access Order*. *See* FNPRM Section II.

access rules. Second, we seek input on the state of the leased access marketplace generally and invite comment on ways to modernize our existing leased access rules. As suggested by commenters in response to the *Media Modernization Public Notice*, we propose to require cable operators to respond only to bona fide requests from prospective leased access programmers.[8] In addition, we specifically seek comment on other suggested changes to leased access rules that were raised in the media modernization proceeding, including extending the timeframe for providing responses to leased access requests[9] and permitting cable operators to require leased access programmers to pay a nominal application fee and/or a deposit.[10] We also seek comment on proposals to modify our procedures for addressing leased access disputes.[11] Finally, the FNPRM also invites comment on any other ways in which we should modernize our leased access rules.[12]

B. Legal Basis

4. The proposed action is authorized pursuant to Sections 4(i), 303, and 612 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303, and 532.

C. Description and Estimate of the Number of Small Entities To Which the Proposed 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.[13] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[14] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[15] 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.[16] 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,

[8] *See* FNPRM paras. 16-18.

[9] *See id.* paras. 19-20.

[10] *See id.* paras. 21-22.

[11] *See id.* para. 23.

[12] *See id.* para. 24.

[13] 5 U.S.C. § 603(b)(3).

[14] *Id.* § 601(6).

[15] *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).

[16] 15 U.S.C. § 632.

establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry."[17] 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.[18] Of this total, 3,083 operated with fewer than 1,000 employees.[19] 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.[20] Industry data indicate that there are currently 4,600 active cable systems in the United States.[21] Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.[22] In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.[23] Current Commission records show 4,600 cable systems nationwide.[24] 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.[25] 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."[26] There are approximately 52,403,705 cable video subscribers in the United States today.[27] 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

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[17] 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.

[18] *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.

[19] *Id.*

[20] 47 CFR § 76.901(e)

[21] 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.

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

[23] 47 CFR § 76.901(c).

[24] 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.

[25] *Id.*

[26] 47 CFR § 76.901 (f) and notes ff. 1, 2, and 3.

[27] *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).

exceed $250 million in the aggregate.[28] Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.[29] 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.[30] 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 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.[31] The SBA size standard for this industry establishes as small, any company in this category which has annual receipts of $38.5 million or less.[32] According to 2012 U.S. Census Bureau data, 307 firms operated for the entire year.[33] Of that number, 294 operated with annual receipts of less than $25 million a year.[34] 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."[35] 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 $32.5 million or less in annual receipts.[36] Census data for 2012 shows that there were 8,203 firms in this category that operated for the entire year.[37] Of this total, 8,141 firms had annual receipts of fewer than $25 million. Therefore,

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[28] 47 CFR § 76.901(f).

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

[30] 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).

[31] S*ee* 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#.

[32] *See* 13 CFR § 121.201, NAICS Code 515210.

[33] *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.

[34] *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.

[35] U.S. Census Bureau, 2012 NAICS Definitions, "512110 Motion Picture and Video Production" at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[36] 13 CFR § 121.201, NAICS Code 512110.

[37] 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;"

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."[38] 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 $32.0 million or less in annual receipts.[39] Census data for 2012 shows that there were 307 firms in this category that operated for the entire year.[40] Of this total, 294 firms had annual receipts of fewer than $25 million.[41] Therefore, under this size standard, we conclude that the majority of such businesses can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

12. The FNPRM tentatively concludes that we should vacate the *2008 Leased Access Order*. As suggested by commenters in response to the *Media Modernization Public Notice*, the FNPRM proposes to require cable operators to respond only to bona fide requests from prospective leased access programmers. In addition, it also seeks comment on other suggested changes to leased access rules that were raised in the media modernization proceeding, including extending the timeframe for providing responses to leased access requests and permitting cable operators to require leased access programmers to pay a nominal application fee and/or a deposit. Finally, the FNPRM seeks comment on proposals to modify our procedures for addressing leased access disputes.

E. 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."[42]

14. As an initial matter, we note that the FNPRM tentatively finds that vacating the *2008 Leased Access Order* would be consistent with the goal of the Commission's Modernization of Media Regulation Initiative to remove rules that are outdated or no longer justified by market realities.[43] It is within this backdrop that the Commission tentatively concludes that it should vacate the *2008 Leased*

(Continued from previous page)
NAICS code 512110, Table EC0751SSSZ4; available at http://factfinder2.census.gov/faces/nav/jsf/pages/index.xhtml.

[38] U.S. Census Bureau, 2012 NAICS Definitions, "512120 Motion Picture and Video Distribution" at http://www.census.gov/cgi-bin/sssd/naics/naicsrch.

[39] 13 CFR § 121.201, NAICS Code 512120.

[40] 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.

[41] *Id*.

[42] 5 U.S.C. § 603(c)(1)-(4).

[43] FNPRM Section III.A.

Access Order. The FNPRM explains that further support for our tentative finding that we should vacate the *2008 Leased Access Order* arises from the concerns about the paperwork burden set forth in the OMB Notice, where OMB detailed five ways in which certain requirements adopted in the order were inconsistent with the PRA.[44]

15. Regarding specific proposals involving the leased access rules, the Commission is taking steps to minimize the impact on small entities. For example, the Commission proposes to extend the current bona fide request limitation, which only applies to operators of small cable systems, to all operators. The FNPRM seeks information on whether the current bona fide request limitation in any way discourages prospective leased access programmers, including small programmers, from seeking to lease access and if so, how. For example, if prospective leased access programmers indicate that they find it difficult to prepare a request that constitutes a "bona fide" request, the Commission will consider such difficulties in determining how to proceed. To the extent there is currently any negative impact on prospective leased access programmers, including small programmers, the Commission will weigh that impact in determining how to proceed. The FNPRM also considers the timeframe within which cable operators must provide prospective leased access programmers with the information specified in Section 76.970(i)(1) of the Commission's rules. The FNPRM considers whether, in the alternative to adopting a single deadline for all cable systems, it should instead maintain a longer deadline for operators of small cable systems. Such an approach could minimize the impact of the leased access rules on small cable system operators. Similarly, in the alternative to permitting all cable operators to require a nominal application fee or deposit before the operator responds to a leased access request by providing the information set forth in Section 76.970(i)(1), the FNPRM considers whether it should permit only small cable operators to do so. Such an approach could ease burdens on small cable operators.[45] The FNPRM also considers the impact of requiring a deposit or application fee on small programmers, by asking whether potential leased access programmers, particularly small entities, would be dissuaded from seeking to lease access if faced with a deposit or application fee. The Commission will consider responses to all of these issues in determining how to proceed.

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

16. None.

[44] *See id.*

[45] By "nominal application fee," we mean a processing fee that would be collected and retained by the cable operator regardless of whether the request results in leased access carriage. By "deposit," we mean a potentially more substantial fee that would be collected by the cable operator and used to offset future payments (*e.g.*, the first month's payment) if the leased access request results in carriage.

STATEMENT OF
CHAIRMAN AJIT PAI

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

Section 612 of the Communications Act requires cable operators to set aside channel capacity for commercial use by unaffiliated video programmers—a process that's commonly known as "leased access." The Commission's rules implementing this statutory provision have a muddled past, to say the least. The FCC last modified its leased access rules in 2008, but its order never went into effect due to a judicial stay and the Office of Management and Budget's refusal to approve the new rules under the Paperwork Reduction Act. As a result, the leased access rules currently in effect are the ones the FCC adopted almost a quarter-century ago.

Given this background, I'm pleased that we're proposing to vacate the troubled 2008 order and wipe the slate clean. In addition to beginning to turn the page on that order, we need to examine how to modernize our leased access rules to fit the media marketplace of today, not that of the early 1990s. And we're doing just that here, seeking input on the current state of the leased access marketplace—including the impact of alternative means of video distribution that simply didn't exist when our rules were created. I look forward to reviewing the record and eventually updating our regulations as appropriate.

As with all of our modernization initiatives, the laurels belong to our dedicated staff. Thank you to Steve Broeckaert, Michelle Carey, Katie Costello, Martha Heller, Tom Horan, Nancy Murphy, Holly Saurer, and Diana Sokolow from the Media Bureau, and Susan Aaron and David Konczal from the Office of General Counsel.

STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

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

This item vacates the 2008 leased access order, requests input on the state of the current leased access marketplace, and proposes several reforms to our rules, including requiring cable operators to respond only to bona fide requests, setting a timeframe for responses, and allowing application fees or deposits to cover the costs of responding to such inquiries.

It does not appear that many take advantage of leased access today. To me, this is a good thing, as it is a rule that has outlived its prime, if such a time ever existed. Leased access is a creation of statute, not Commission rule, so there is only so much we can do to modify our requirements. Perhaps, after we collect updated data on the current state of the leased access market, we can present Congress with a compelling reason to consider potentially changing or repealing the current statute. But that will have to be up to them.

Until then, this item at least clarifies the Commission's current position on leased access, which has been uncertain since our rules were stayed in May 2008. My hope is this item is not a hornet's nest that results in renewed interest in the service, adding further contention. I will vote to approve this item because I hope that it marks the beginning of the end for the current leased access rules, not a new chapter in its revitalization. I approve.

STATEMENT OF
COMMISSIONER BRENDAN CARR

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

Beverly Hills Cop. *Ghostbusters*. *Indiana Jones and the Temple of Doom*. *Karate Kid*. *Police Academy*. These films were all released in 1984, the same year that Congress passed the leased access provisions of the Communications Act that we apply today. Those provisions require cable operators to set aside channel capacity for use by unaffiliated programmers.

While those films have now aged into classics, the same can't be said for their sequels. And, unfortunately, the FCC's attempts to update our leased access rules have met a similarly notorious fate. Our 2008 leased access order has been stayed by the U.S. Court of Appeals for the Sixth Circuit for a decade. So, I welcome the chance to launch this proceeding and take a fresh look at our approach.

After all, a lot has changed since 1984. Back then, cable accounted for 98% of the pay TV market. Now, over 99% of homes have access to at least three competing video providers. Satellite providers alone now have around 30% of all subscribers. And these figures do not even account for the strong competition consumers are seeing from online streaming services like Sling, Netflix, and Amazon.

Given these marketplace changes, I asked my colleagues to add a new section to the item that seeks comment on the First Amendment implications of our leased access regime. With relatively lower barriers to distributing content, including through online platforms, and a greater number of distribution options, I am interested in hearing from commenters about whether our approach remains consistent with the First Amendment. I want to thank my colleagues for agreeing to seek comment on these issues.

I look forward to reviewing the record as it develops, and I want to thank the Media Bureau for its work on the item. It has my support.

STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL

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

It is rare that we get the opportunity to wipe the slate clean and start anew. But the FCC is doing just that with its leased access cable rules. With this rulemaking we begin the process of cleaning up a decade-old court decision that previously covered our leased access policies. We ask questions about the status of the leased access market, the way requests come in, and how new and diverse voices now seek "airtime."

As we proceed we must be mindful of our statutory responsibility 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." I look forward to the record that develops. This rulemaking has my full support.