

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

REPORT AND ORDER AND SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Pai and Commissioners O’Rielly and Carr issuing separate statements;
Commissioners Rosenworcel and Starks approving in part, dissenting in part, and issuing separate
statements.

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## I. INTRODUCTION

1. In this Report and Order and Second Further Notice of Proposed Rulemaking, we update our leased access rules as part of the Commission's Modernization of Media Regulation Initiative and propose to modify the leased access rate formula.<sup>1</sup> The leased access rules, which implement the statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.<sup>2</sup> In 2018, the Commission adopted a Further Notice of Proposed Rulemaking (FNPRM) addressing leased access proposals filed in response to the *Media Modernization Public Notice*.<sup>3</sup> With this proceeding, we continue our efforts to modernize media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.<sup>4</sup>

2. The video marketplace has changed significantly since the Commission initially adopted its leased access rules. Specifically, today a wide variety of media platforms are available to programmers, including in particular online platforms that creators can use to distribute their content for free.<sup>5</sup> This change has reduced the importance of leased access and, thus, the justification for burdensome leased access requirements.

3. Below, first we adopt the FNPRM's tentative conclusion that we should vacate the Commission's *2008 Leased Access Order*.<sup>6</sup> That order never went into effect due to a stay by the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) and the Office of Management and Budget (OMB) issuance of a notice of disapproval of the associated information collection requirements.<sup>7</sup>

4. Second, we adopt certain updates and improvements to our existing leased access rules. Specifically, we:

- Eliminate the requirement that cable operators make leased access available on a part-time basis;
- 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 respond only to bona fide requests from prospective leased access programmers;
- Extend the timeframe within which cable operators must respond to prospective leased access programmers, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of systems subject to small system relief;

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

<sup>2</sup> See 47 U.S.C. § 532; 47 CFR § 76.970 *et seq.* 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).

<sup>3</sup> See *Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 and 17-105, Further Notice of Proposed Rulemaking, 33 FCC Rcd 5901 (2018) (FNPRM).

<sup>4</sup> *Id.* at 5901, para. 1.

<sup>5</sup> See *infra* section II.

<sup>6</sup> *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*), appeal pending, *United Church of Christ v. FCC*, No. 08-3245 (6th Cir.).

<sup>7</sup> See *infra* section II.

- Permit cable operators to impose a maximum leased access application fee of \$100 per system-specific bona fide request, and deem as reasonable under the Commission's rules a security deposit or prepayment equivalent of up to 60 days of the applicable lease fee;
- Require cable operators to provide potential leased access programmers with contact information for the person responsible for leased access matters; and
- Adopt common-sense modifications to our procedures for leased access disputes.

5. In the Second Further Notice of Proposed Rulemaking (Second FNPRM), we propose to modify the leased access rate formula so that rates will be specific to the tier on which the programming is carried. We also seek comment on whether we should make additional adjustments to the formula. Finally, we also seek comment on whether leased access requirements can withstand First Amendment scrutiny in light of video programming market changes.

## II. BACKGROUND

6. Congress established commercial leased access as part of the Cable Communications Policy Act of 1984 (1984 Act).<sup>8</sup> 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.<sup>9</sup> Under these statutory provisions, the amount of channel capacity reserved for leased access programming depends on the cable system's total activated channel capacity.<sup>10</sup> 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."<sup>11</sup>

7. In addition, Congress 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<sup>12</sup> 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."<sup>13</sup> The Commission accordingly adopted leased access rate regulations in 1993, and the Commission subsequently modified its leased access regulations in 1996 and 1997.<sup>14</sup> The Commission's

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<sup>8</sup> See Cable Communications Policy Act of 1984, Pub. L. 98-549, § 2, 98 Stat. 2779, 2782 (Oct. 30, 1984); 47 U.S.C. § 532.

<sup>9</sup> 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.").

<sup>10</sup> See *id.*

<sup>11</sup> *Id.* § 532(a); see also American Cable Association (ACA) Comments at 2.

<sup>12</sup> See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 9, 106 Stat. 1460 (Oct. 5, 1992).

<sup>13</sup> 47 U.S.C. § 532(c)(1).

<sup>14</sup> 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

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implementing rules, which the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) upheld in 1998,<sup>15</sup> included a formula for calculating maximum carriage rates that cable operators could charge leased access programmers.<sup>16</sup>

8. In 2008, the Commission revised its commercial leased access rules and procedures in its *2008 Leased Access Order*.<sup>17</sup> Among other changes to the leased access rules, that order (1) included a modified leased access rate formula;<sup>18</sup> (2) “adopt[ed] customer service obligations that require[d] minimal 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; and (3) “eliminate[d] the requirements for an independent accountant to review leased access rates; and require[d] annual reporting of leased access statistics.”<sup>19</sup> It also instructed the Media Bureau to “resolve all leased access complaints within 90 days of the close of the pleading cycle,” and changed the discovery rules for leased access complaints by expanding discovery procedures.<sup>20</sup> In the *2008 Leased Access Order*, the Commission decided to not apply the revised rate methodology to programmers that predominately transmit sales presentations or program length commercials, but it sought comment on whether it should do so in the future.<sup>21</sup>

9. As explained fully in the FNPRM, the implementation of the *2008 Leased Access Order* was stayed by the Sixth Circuit, and that stay remains in effect today.<sup>22</sup> Implementation of the *2008 Leased Access Order* was further complicated by OMB’s July 9, 2008 release of a Notice stating that it did not approve of the information collection requirements associated with the *2008 Leased Access Order* because the Commission failed to comply with provisions of the Paperwork Reduction Act (PRA).<sup>23</sup> 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.<sup>24</sup> As a result of the stay of the *2008 Leased Access Order*, the leased access rules adopted in the *1993 Rate Regulation Order*, as subsequently amended prior to 1998,<sup>25</sup> remain in effect.

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First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 16933 (1996) (*1996 Rate Regulation Order*); *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 (1997) (*1997 Leased Access Order*); 47 U.S.C. § 532(c)(4)(A)(i).

<sup>15</sup> See *ValueVision, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

<sup>16</sup> See 47 CFR § 76.970(d)-(h).

<sup>17</sup> *2008 Leased Access Order*, 23 FCC Rcd 2909.

<sup>18</sup> 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 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”).

<sup>19</sup> See *id.* at 2910, para. 2, and 2915, para. 14.

<sup>20</sup> *Id.* at 2931-32, paras. 55-57.

<sup>21</sup> *Id.* at 2940, paras. 74-75.

<sup>22</sup> FNPRM, 33 FCC Rcd at 5903, para. 5; 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). 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*

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10. In the FNPRM, the Commission explained that due to the passage of time, it is appropriate to re-evaluate the existing leased access rules.<sup>26</sup> When leased access was first mandated in 1984, consumers had access only to a single pay television service, and Congress<sup>27</sup> and the courts<sup>28</sup> recognized cable's monopoly power in this regard. Today, in contrast, the marketplace has become far more competitive.<sup>29</sup> Media platforms, including online platforms that programmers can utilize for free to distribute their content, have multiplied.<sup>30</sup> As a result, consumers are able to access video programming via means other than traditional broadcast and cable television, and the Internet is widely available for this purpose.<sup>31</sup> We agree with NCTA that "the Internet has evolved into a readily available and virtually unlimited platform for the distribution of free and subscription-based video services. As a result, and with the development of competition among cable operators and other multichannel video programming distributors ('MVPDs'), consumers now have a competitive choice of multiple delivery systems offering more programming options of more diverse types from more diverse sources than was imaginable a quarter century ago."<sup>32</sup> For example, as NCTA explains, content providers today can distribute their programming via online streaming services, on-demand platforms, and content providers' own video apps or websites.<sup>33</sup> At the same time, demand for commercial leased access has remained low<sup>34</sup> and most leased access inquiries do not result in carriage.<sup>35</sup> It is in this context that we seek to modify our leased access rules to best promote competition and diversity in the marketplace today, while taking into account the growth and development of cable systems and other platforms for delivering content.<sup>36</sup>

### III. REPORT AND ORDER

#### A. Vacating the 2008 Leased Access Order

11. We adopt the FNPRM's tentative conclusion that we should vacate the *2008 Leased Access Order*, including the Further Notice of Proposed Rulemaking issued in conjunction with that order.<sup>37</sup> We conclude that this approach, which cable operators support,<sup>38</sup> is consistent with our public

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*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.

<sup>23</sup> See *Notice of Office of Management and Budget Action*, OMB Control No. 3060-0568 (Jul. 9, 2008) (OMB Notice); FNPRM, 33 FCC Rcd at 5903-04, para. 6.

<sup>24</sup> See *Order*, *United Church of Christ Office of Communications, Inc. v. FCC*, No. 08-3245 (and consolidated cases) (6th Cir. July 25, 2008).

<sup>25</sup> See *supra* n.14.

<sup>26</sup> FNPRM, 33 FCC Rcd at 5904, para. 7.

<sup>27</sup> See S. Rep.102-92 at 1184 ("Evidence demonstrates that market factors, absent government regulation, are unable to cure cable's bottleneck problems and that the Committee's approach of regulating the cable industry—under the Committee's Commerce Clause authority—is directed to the least restrictive means necessary to ensure that the public interest is served.").

<sup>28</sup> See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 623-24 (1994) ("[D]ifferential treatment is justified by the special characteristics of the cable medium—namely, the cable operators' bottleneck monopoly and the dangers this power poses to the viability of broadcast television. . . .").

<sup>29</sup> See, e.g., FNPRM, 33 FCC Rcd at 5906, para. 13; *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, 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); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, Eighteenth Report, 32 FCC Rcd 568, 621, para. 132 (MB 2017) ("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"); ACA

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interest objectives and is the most practical and legally tenable option available to us. Specifically, vacating the prior order will clarify the status of our leased access regime, further the Commission's media modernization efforts, and obviate the need to address the significant legal concerns raised in the related Sixth Circuit proceeding and OMB Notice.<sup>39</sup>

12. By vacating the *2008 Leased Access Order*, we are resolving the longstanding challenges to the order that have been pending for more than a decade due to the stay of this order.<sup>40</sup> Vacating the *2008 Leased Access Order* will not have any impact on any party's compliance with or expectations concerning the leased access requirements, because the rule changes contained in that order never went into effect.<sup>41</sup> Accordingly, as a result of our decision today, except for the rule changes set forth below, parties simply will remain subject to the same leased access rules they were operating under prior to 2008.

13. Vacating the *2008 Leased Access Order* is consistent with the Commission's media modernization efforts, pursuant to which we seek to remove rules that are outdated or no longer justified by market realities.<sup>42</sup> As commenters point out, implementing the *2008 Leased Access Order* would have made leased access significantly more burdensome for cable operators, which would be contrary to the highly competitive marketplace in existence today.<sup>43</sup> For example, NCTA explains that implementing the 2008 order "would have changed the formula for establishing the maximum permissible rate for leased access in a manner that would have resulted in rates approaching zero."<sup>44</sup> We agree with commenters that in today's marketplace the appropriate course is to ease, rather than increase, regulatory burdens associated with leased access and that the Commission should not have leased access regulations where the maximum allowable rates approach zero.<sup>45</sup> Indeed, as discussed below, today we find that certain rule changes are needed to provide cable operators with relief from their existing leased access burdens because the burdens are no longer justified in today's marketplace, given the increased distribution alternatives for leased access programmers.<sup>46</sup> While we recognize that some leased access programmers have expressed a preference for leased access via cable as compared to alternatives such as online programming distribution,<sup>47</sup> we are persuaded that these alternatives have developed into a viable

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Comments at 2; NCTA – The Internet & Television Association (NCTA) Comments at 3-4, Mercatus Center at George Mason University (Mercatus Center) Reply at 1; *see also* NCTA Comments at 8 (explaining that vertical integration of program networks and cable systems has decreased, and today most channels are not affiliated with a cable operator). Some commenters note that four distributors represent about 75 percent of pay TV households, which can lead to unfair bargaining leverage against small and independent programmers. *See* American Independent Media, Inc. (AIM) Comments at 4; *see also* Leased Access Programmers Association (LAPA) Reply at 3. NCTA responds that this issue is inapplicable to leased access, where programmers pay cable operators for carriage at prescribed rates. NCTA Reply at 4-5.

<sup>30</sup> *See, e.g.*, ACA Comments at 2; NCTA Comments at 3-4, 8-10; Charter Communications, Inc. (Charter) Reply at 1; Mercatus Center Reply at 1; NCTA Reply at 1; Letter from Diane B. Burstein, Vice President & Deputy General Counsel, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-42 and 17-105, at 2 (NCTA Feb. 14, 2019 *Ex Parte*) (stating that YouTube has over a billion monthly active users, as reported in Alphabet, Annual Report (Form 10-K) (Feb. 4, 2019)); *Comcast Cable Communications, LLC v. FCC*, 717 F.3d 982, 988 (D.C. Cir. 2013) ("The Cable Act included numerous provisions designed to curb abuses of cable operator's bottleneck monopoly power and to promote competition in the cable television industry. When the Act was passed, however, the video programming market looked quite different than it looks today."). Leased access programmers assert that the Internet is not yet able to distribute local programming in the same targeted manner as cable. *See* Combonate Media Group (Combonate) Comments at 3; LAPA Comments at 13-14; LAPA Reply at 3. While that may be true, it does not change the fact that the Internet is available to independent programmers as a means of widespread distribution, and that leased access was not intended to favor certain types of programming (such as local programming) over others. *See* ACA Reply at 9.

<sup>31</sup> *See, e.g.*, *Petition for Rulemaking Seeking to Allow the Sole Use of Internet Sources for FCC EEO Recruitment Requirements*, MB Docket No. 16-410, Declaratory Ruling, 32 FCC Rcd 3685, 3687, para. 6 (2017) (recognizing that today "85 percent of American adults either have broadband Internet service at home or use smartphones")

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substitute for leased access today. In addition, we note that easing the regulatory burdens associated with leased access will effectuate the statutory requirement to implement rules “in a manner consistent with the growth and development of cable systems.”<sup>48</sup>

14. We disagree with commenters claiming that the Commission should “adopt the parts [of the *2008 Leased Access Order*] that are not subject to OMB or Sixth Circuit . . . scrutiny and either staff review or issue a FNPRM to address the issues of concern to the OMB and the Appeals Court.”<sup>49</sup> The FNPRM sought comment on whether there is “any policy justification for retaining any particular rules adopted” in the *2008 Leased Access Order*.<sup>50</sup> Commenters advocating the retention of all portions of the *2008 Leased Access Order* “that are not subject to OMB or Sixth Circuit . . . scrutiny” do not explain with sufficient specificity which rules from the *2008 Leased Access Order* should go into effect and why they are justified today. We believe that vacating the entire order and proceeding anew is preferable to commenters’ suggested piecemeal approach.

## **B. Modifying the Leased Access Rules**

15. We next adopt certain updates and improvements to our existing leased access rules. It is our goal to modernize our leased access regulations given the significant changes in the video marketplace, including specifically the availability of online media platforms. We stated in the FNPRM that this proceeding would “advance our efforts to modernize our media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.”<sup>51</sup> We find that the benefits of updating our leased access rules to reflect the current video marketplace outweigh the anticipated costs.

### **1. Part-Time Leased Access**

16. We eliminate the requirement that cable operators make leased access available on a part-time basis. Instead, our leased access rules will apply only to leased access programmers that purchase channel capacity on a full-time basis<sup>52</sup> for at least a one-year contract term. The Commission’s rules

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(footnote omitted). See also YouTube for Press, available at <https://www.youtube.com/yt/about/press/> (stating that every day people watch over a billion hours of video on YouTube); 11 Top Alternatives to Continue Making Money with Videos After New YouTube Monetization Rules, available at <https://staenz.com/alternatives-make-money-videos-youtube-monetization-rules/> (discussing other platforms that enable content providers to monetize their videos); Sahil Patel, *Surprise, Video Programmers Complain OTT Platforms Aren’t Sharing Enough Audience Data* (January 15, 2019), <https://digiday.com/media/black-box-data-ott-distributors-remains-limited/> (“Today, video app programmers have a growing number of third-party distribution options.”) These include options like Facebook Live, Periscope, Twitch, Dailymotion, and Vimeo, along with a growing number of Online Video Distributors (OVDs), like Pluto TV and STIRR, that are entering the streaming space and offer opportunities for video programmers to obtain distribution as part of a package of linear, streaming programming.

<sup>32</sup> NCTA Comments at 3-4.

<sup>33</sup> *Id.* at 9 (“Program networks and other content providers may gain carriage on the platforms of online streaming services, such as SlingTV, DirecTV Now, PlayStation Vue, Hulu with Live TV, YouTube TV, and others, or on an on-demand platform such as Netflix, Hulu, Amazon Prime, iTunes, Google Play, Vudu, Epix, Crackle, and others. Content providers can also create their own video apps or websites, which can be downloaded or accessed by viewers and viewed on a countless array of mobile devices, as well as television sets using devices such as Chromecast, Roku, Apple TV, Amazon FireTV, and others.”).

<sup>34</sup> See, e.g., ACA Comments at 2, 4 n.12. But see Baskin L. Jones, individually and on behalf of Jones Law P.A. (Jones) Comments at 2-3 (arguing that the reason demand for leased access is low is that cable systems create barriers for potential leased access programmers, such as charging them for Internet or requiring certain liability insurance).

<sup>35</sup> See ACA Comments at 5.

<sup>36</sup> See 47 U.S.C. 532(a).

currently direct “[c]able operators that have not satisfied their statutory leased access requirements [to] accommodate part-time leased access requests,”<sup>53</sup> but there is no statutory requirement for part-time leased access. And, contrary to SBN’s suggestion “that part-time access is the ‘genuine outlet’ Congress sought to promote with the leased access statute,”<sup>54</sup> the legislative history does not mention part-time leased access.<sup>55</sup> Further, we are persuaded by comments that because part-time leased access is regulatory, and not statutory, we should seek to avoid unnecessary burdens in light of possible First Amendment concerns.<sup>56</sup> In response to the FNPRM’s request for further comment on this topic,<sup>57</sup> cable operators support elimination of the part-time leased access requirement.<sup>58</sup>

17. We find that eliminating part-time leased access is consistent with marketplace changes. Since the Commission adopted the rule governing part-time leased access in 1993, the available platforms to distribute programming have multiplied, including in particular Internet options.<sup>59</sup> At the same time, the part-time leased access requirement has continued to apply to cable operators, and the record indicates that those operators do not usually generate enough revenue from part-time leased access programming to cover the administrative costs of providing such programming.<sup>60</sup> Even in the *1997 Leased Access Order*, the Commission “recognize[d] that part-time leasing is not expressly required by the statute, that it may impose additional administrative and other costs on cable operators, and that it may pose the risk of capacity being under-used.”<sup>61</sup> Unlike in 1997, when the Commission affirmed its rule requiring cable operators to lease time in 30-minute increments, however, our decision today reflects the fact that the Internet has developed into a flourishing means of distribution for short-form programming.<sup>62</sup> SBN claims that the focus of leased access should be providing diverse information sources to cable subscribers.<sup>63</sup> Eliminating part-time leased access, however, will not prevent leased access programmers from reaching all households with Internet access, including the households of cable subscribers.<sup>64</sup> We find that the costs of mandating part-time leased access to provide programming to the small portion of the population without Internet access but with cable television outweighs the benefits. While we recognize the interest of leased access programmers in maintaining part-time leased access,<sup>65</sup> we are

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<sup>37</sup> FNPRM, 33 FCC Rcd at 5904-06, paras. 8-12.

<sup>38</sup> See, e.g., NCTA Comments at 4, 15-16; ACA Reply at 8; Charter Reply at 8.

<sup>39</sup> Because we vacate the *2008 Leased Access Order*, we also dismiss as moot the related NCTA FCC Stay Request, which asked the Commission to stay the *2008 Leased Access Order*, and the TVC Recon Petition, which sought reconsideration of the *2008 Leased Access Order*.

<sup>40</sup> Vacating the *2008 Leased Access Order* eliminates the need to move forward with the judicial proceedings currently pending in the Sixth Circuit. The Sixth Circuit Stay Order, which has been in effect for over a decade, recognized “that NCTA has raised some substantial appellate issues” pertaining to the rules adopted in the *2008 Leased Access Order*. Sixth Circuit Stay Order at 4. Similarly, vacating the *2008 Leased Access Order* eliminates the need to overcome OMB’s denial of the information collection requirements associated with major portions of the *2008 Leased Access Order*. OMB detailed the ways in which certain requirements adopted in the *2008 Leased Access Order* were inconsistent with the PRA, including 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. See OMB Notice at 1-2.

<sup>41</sup> See *supra* section II. We need not make any modifications to our rules to reflect our vacating of the *2008 Leased Access Order* because 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*. 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 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

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persuaded that the costs to cable providers associated with accommodating part-time leased access outweigh any countervailing benefits, especially given the plethora of alternative distribution options for such programming and the applicable First Amendment concerns.<sup>66</sup> To the extent that any cable operator wishes to carry programming on a part-time basis, it may negotiate such carriage as a private contractual matter, outside the scope of the leased access statute.

18. Because leased access will only occur on a full-time basis going forward, we delete section 76.970(h) of our rules, which currently addresses the maximum commercial leased access rate for part-time channel placement.<sup>67</sup> Current sections 76.970(i) and (j) will be redesignated as sections 76.970(h) and (i). We also delete the reference to part-time leased access rates in current section 76.970(i)(1)(ii) (redesignated section 76.970(h)(1)(ii)),<sup>68</sup> and we delete section 76.971(a)(4), which sets forth the current requirements for accommodating part-time leased access.<sup>69</sup>

## 2. Bona Fide Requests

19. We adopt the proposal set out in the FNPRM to ease burdens on cable operators by revising section 76.970(i) of our rules to provide that all cable operators, and not just those that qualify as “small systems”<sup>70</sup> under that rule, are required to respond to a request for leased access information only if the request is bona fide.<sup>71</sup> Larger cable systems currently must respond to all written leased access requests, which can be inefficient, difficult, and costly.<sup>72</sup> We also make one change to our existing definition of a “bona fide request” for information, which currently 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.”<sup>73</sup> Specifically, we delete the second criteria (the time slot desired), because as explained above we eliminate part-time leased access and time slot thus will be irrelevant for programming that occupies a channel on a full-time basis. As proposed in the FNPRM, the criteria for a bona fide request

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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.”).

<sup>42</sup> See, e.g., *Media Modernization Public Notice*, 32 FCC Rcd 4406 (opening the media modernization proceeding); *Elimination of Main Studio Rule*, MB Docket No. 17-106, 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”).

<sup>43</sup> See, e.g., ACA Reply at 8 (“Implementing those misguided rules now, after ten years of incredible growth in diversity and competition, would undermine the Commission’s ongoing efforts to modernize its media regulations.”).

<sup>44</sup> NCTA Comments at 16.

<sup>45</sup> See, e.g., ACA Reply at 2; Charter Reply at 8.

<sup>46</sup> See *infra* section III.B.

<sup>47</sup> See, e.g., AIM Comments at 5-6, 10; LAPA Reply at 3.

<sup>48</sup> 47 U.S.C. § 532(a).

<sup>49</sup> See Combonate Comments at 2, 4; see also Jones Comments at 2; LAPA Comments at 2, 12; Charles Stogner, LAPA President, and StogMedia (Stogner) Comments at 11-12. We also reject LAPA’s request that the Commission adopt customer service standards akin to those in the *2008 Leased Access Order*, finding instead that the contact information requirement we adopt below is sufficient at this time and appropriately balances the burdens on cable operators with the needs of leased access programmers. See LAPA Comments at 9-10; see also Small Business Network (SBN) Comments at 6.

<sup>50</sup> FNPRM, 33 FCC Rcd at 5906, para. 12.

<sup>51</sup> *Id.* at 5901, para. 1.

<sup>52</sup> Leasing of a channel on a full-time basis will require that the channel is under the exclusive use of the

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must be met before a cable system will be required to provide the information specified in section 76.970(i)(1).

20. Adoption of this bona fide request provision will expand relief afforded small systems to all cable operators.<sup>74</sup> Section 76.970(i)(1) currently 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 leased access contract.”<sup>75</sup> Even with the other modifications to section 76.970(i) that we adopt below,<sup>76</sup> we are persuaded that, absent this change to our rules, some operators of systems that do not qualify as “small” would continue to spend a significant amount of time responding to non-bona fide leased access inquiries.<sup>77</sup>

21. We recognize that this is a change from the Commission’s previous decision to limit the flexibility to respond only to bona fide requests to small cable operators.<sup>78</sup> However, based on the record evidence that both small and large cable operators face significant burdens in responding to leased access requests,<sup>79</sup> we find that there is no longer a reason to limit this flexibility to small cable operators. We further conclude that it does not serve the public interest to require cable operators to continue responding to requests that are not considered bona fide under our rules. We see no evidence that cable operators will use the bona fide request requirement to discourage leasing access, whereas there is clear evidence that cable operators currently are required to undertake the expense of responding to all requests for leased access information even though most such requests do not result in a leased access programming contract.<sup>80</sup> We recognize that some commenters claim that it is difficult for potential leased access programmers to provide the information required for a bona fide leased access request.<sup>81</sup> We find,

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programmer for the term of the contract.

<sup>53</sup> 47 CFR § 76.971(a)(4); *see also supra* n.9.

<sup>54</sup> Letter from Nicholas Mastrorilli, President, Small Business Network, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-42 and 17-105, at 2 (May 29, 2019) (SBN *Ex Parte*).

<sup>55</sup> *See* Letter from Rick Chessen, Chief Legal Officer, Senior Vice President, Legal & Regulatory Affairs, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket Nos. 07-42 and 17-105, at 1 (May 30, 2019) (NCTA May 30, 2019 *Ex Parte*) (“there is no evidence that Congress ever intended cable operators to be in the business of leasing time on a program-by-program basis.”).

<sup>56</sup> *See* NCTA Comments at 22 (“part-time leased access is a regulatory, not statutory, obligation, so the First Amendment concerns [discussed below] are particularly relevant”) (footnote omitted); *infra* paras. 39-40 (discussing application of the First Amendment to the leased access rules). SBN argues that there is no speech-related distinction between part-time access and full-time access, and thus the First Amendment concerns cannot be used to ban the former but not the latter. SBN *Ex Parte* at 2. As an initial matter, as described above, our elimination of part-time leased access is sufficiently supported by policy justifications that are independent of our First Amendment concerns. *See also infra* paras. 39-40 (discussing our First Amendment concerns, including the applicable standard of review, but noting that our rule changes are independently and sufficiently supported by policy justifications). In addition, we proceed here incrementally by eliminating the part-time leased access rules that impose speech burdens that are not required by statute. In the Second FNPRM below, we seek further comment on whether the statutory leased access requirements continue to withstand First Amendment scrutiny. *See Sorenson Comm’ns, Inc. v. FCC*, 567 F.3d 1215, 1222 (10th Cir. 2009) (“the FCC is not required to address all problems ‘in

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however, that providing this very basic information is necessary to demonstrate that a leased access programmer is serious about its inquiry. We believe it is reasonable to expect basic information such as the desired contract term, anticipated start date, and nature of programming to be developed prior to submitting a leased access request. To the extent that the responsive information from the cable operator presents a concern for the programmer, for example regarding the rate schedule, nothing in this change would prevent the programmer from further modifying its request and continuing to negotiate with the cable operator on the terms of an agreement.

22. Contrary to the suggestion of NCTA, we will not permit cable operators to seek further information from potential leased access programmers before responding to a leased access request, such as: (1) how the potential leased access programmer would deliver its programming to the cable system; and (2) an affidavit identifying all of the programmer's owners and declaring that all are in compliance with applicable trade sanctions.<sup>82</sup> We must balance between the competing interests of potential leased access programmers who should be able to obtain basic information that will enable them to determine whether they wish to proceed with a leased access programming contract, and cable operators who should not be required to incur costs in providing information to a programmer that is not seriously committed to securing a leased access contract. We find that the approach we adopt herein strikes an appropriate balance, but we will continue monitoring the marketplace to determine whether any further modifications are needed in the future.<sup>83</sup>

### 3. Timeframe for Responding to Requests

23. To ease burdens on cable operators, we extend the timeframe within which they must provide prospective leased access programmers with the information specified in section 76.970(i)(1) of our rules, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of systems subject to small system relief.<sup>84</sup> These timeframes

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 one fell swoop”) (citing *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984)).

<sup>57</sup> FNPRM, 33 FCC Rcd at 5910, para. 24 (asking if the Commission should “adopt any new rules governing . . . part-time leased access”). SBN is incorrect when it claims that the FNPRM did not provide sufficient notice of the elimination of part-time leased access. SBN *Ex Parte* at 2-3. First, the FNPRM specifically sought comment on new rules governing part-time leased access. FNPRM, 33 FCC Rcd at 5910, para. 24. In response, commenters urged the Commission to adopt new rules that would no longer require cable operators to make leased access available on a part-time basis. *See* NCTA Comments at 22-25; Charter Reply at 8-9. We adopt such rules today, but permit existing part-time commercial leased access agreements to remain in place under their current terms. *See* NCTA May 30, 2019 *Ex Parte* at 4 (stating that “existing commercial leased access agreements would remain in place under their current terms, and consistent with the elimination of the mandate, any renewals would be at the discretion of the cable operator”). Cable operators have the discretion to negotiate future part-time agreements as a private contractual matter. Second, our new rules regarding part-time leased access are a logical outgrowth of the Commission's request for comment on “whether our rules implicate First Amendment interests.” FNPRM, 33 FCC Rcd at 5910, paras. 24-25. Finally, any argument regarding lack of notice is refuted by the fact that leased access programmers themselves opposed the elimination of part-time leased access in their initial comments. *See* Combonate Comments at 3; LAPA Comments at 13.

<sup>58</sup> *See* NCTA Comments at 5-6; ACA Reply at 7.

<sup>59</sup> *See* NCTA Comments at 5-6, 22-23; ACA Reply at 5-7; Charter Reply at 9.

<sup>60</sup> *See* NCTA Comments at 23-24 (also stating that part-time leased access leads to an “inefficient use of channel capacity”); ACA Reply at 5, 7; Charter Reply at 9; Letter from Mary C. Lovejoy, Vice President of Regulatory Affairs, ACA, to Marlene H. Dortch, Secretary, FCC, at 4 (Dec. 21, 2018). These administrative costs include such matters as negotiating contracts and sending invoices, which cost the same for part-time leased access as for full-

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apply only to bona fide requests for information pursuant to section 76.970(i), and not to simple requests for contact information.

24. The record demonstrates that cable operators, especially those with multiple systems, would benefit from having additional time to gather the information specified in section 76.970(i)(1), as is required in response to a request for leased access information.<sup>85</sup> First, section 76.970(i)(1)(i) currently requires the provision of “[h]ow much of the operator’s leased access set-aside capacity is available.”<sup>86</sup> Although as explained in section III.B.1 above we clarify that cable operators may comply with that requirement by confirming whether there is sufficient capacity for the prospective leased access programmer,<sup>87</sup> operators still will need to analyze current system capacity to make that determination, given that capacity is constantly changing “as cable operators add and drop channels, and repurpose system bandwidth from video to broadband services.”<sup>88</sup>

25. Second, section 76.970(i)(1)(ii) requires the provision of “[a] complete schedule of the operator’s full-time and part-time leased access rates.”<sup>89</sup> ACA explains that, because the rate formula utilizes data points that are constantly changing, a cable operator must complete this calculation anew in response to every leased access request for information.<sup>90</sup> ACA further claims the cost of determining the rates can be one thousand dollars or more per request.<sup>91</sup> Third, section 76.970(i)(1)(iii) requires the provision of “[r]ates associated with technical and studio costs.”<sup>92</sup> ACA explains that cable operators may not have standardized technical and studio costs, because these costs must be calculated based on the specific types of services the programmer seeks.<sup>93</sup> Finally, section 76.970(i)(1)(iv) requires, if specifically requested, the provision of “a sample leased access contract.”<sup>94</sup> While some cable operators may have a contract readily available, the record indicates that others may only have an out-of-date contract in their files.<sup>95</sup> For all of these reasons, we find that the current deadlines for providing the information required in response to leased access requests for information are insufficient.<sup>96</sup> Our new requirement that all cable operators need only provide the listed information in response to a bona fide

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time leased access. SBN asserts that rather than eliminating part-time leased access, we should “revise the pricing rules in accordance with Section 612(c)(1) to cover the[] costs” that part-time leased access imposes on cable operators. SBN *Ex Parte* at 2. We disagree that this is the appropriate course. We find that in light of the other platforms now available to distribute part-time programming, there is no longer a sufficient policy justification for part-time leased access. We also are mindful that simply adjusting the price that cable operators may charge for part-time leased access would not address the First Amendment concerns that it presents.

<sup>61</sup> 1997 *Leased Access Order*, 12 FCC Rcd at 5298, para. 62.

<sup>62</sup> See ACA Reply at 5 (“In today’s market, there is simply no reason to expect cable operators to continue incurring losses from part-time leased access agreements, especially when there are even cheaper distribution alternatives available for independent content creators.”); *supra* Section II (providing examples of online video programming distribution).

<sup>63</sup> SBN *Ex Parte* at 2.

<sup>64</sup> See, e.g., *Internet/Broadband Fact Sheet*, Pew Research Center, February 5, 2018, <https://www.pewinternet.org/fact-sheet/internet-broadband/>. See also Monica Anderson, Andrew Perrin, Jingjing Jiang, and Madhumitha Kumar, *10% of Americans don’t use the internet. Who are they?*, Pew Research Center, April 22, 2019, <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>; Deloitte Insights, *Digital media trends survey*, a report by the Center for Technology, Media & Telecommunications, 12th edition, at 8, <https://www2.deloitte.com/content/dam/Deloitte/br/Documents/technology-media-telecommunications/Digital-Media-Trends-Report.pdf> (“Fifty-six percent of current pay TV subscribers say they keep their pay TV simply because it’s bundled with their home Internet access”).

<sup>65</sup> See LAPA Comments at 13; LAPA Reply at 7. SBN states that the “Report and Order does not address the effect of the abandonment of the part-time leasing regime on part-time programmers, most of whom (like SBN) are small businesses.” SBN *Ex Parte* at 3. In Appendix B below, we analyze the potential impact of the rule changes adopted herein on small entities. We recognize that the changes in the Report and Order that ease burdens on cable operators, such as the elimination of part-time leased access, may also impact leased access programmers, including

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request does not alter this analysis, because it may not make it any easier to provide the required information; rather, it could lead to less frequent provision of the information since cable operators will not need to provide it if a request is not bona fide.<sup>97</sup> We see no indication in the record that increasing the timeframe within which cable operators must provide the required information will prejudice programmers seeking to lease access. Rather, programmers seeking to lease access can simply take the longer timeframe into account in deciding when to submit a bona fide request.

26. We extend each deadline by 15 calendar days, such that the general deadline will be 30 days, and the small system deadline will be 45 days. Although NCTA seeks a 45-day response period for all cable operators,<sup>98</sup> we think that tripling the current deadline is excessive.<sup>99</sup> Rather, we find it appropriate to extend each deadline by 15 calendar days, thus maintaining the longer deadline for small cable systems that may lack the resources to gather information as quickly as larger systems.<sup>100</sup> Although one commenter posits that lengthening the deadline could deter potential leased access programmers from seeking access, particularly if their programming is time-sensitive,<sup>101</sup> we see no evidence supporting this concern.

#### 4. Application Fees and Deposits

27. As proposed by NCTA and supported by others,<sup>102</sup> we permit cable operators to impose a maximum leased access application fee of \$100 per system-specific bona fide request,<sup>103</sup> and we deem as reasonable under the Commission's rules a security deposit or prepayment requirement equivalent to up to 60 days of the applicable lease fee.<sup>104</sup> We agree with commenters that application fees and deposits are justified to help reimburse cable operators for their leased access costs,<sup>105</sup> to discourage frivolous leased access requests, and to reimburse cable operators for situations in which a leased access programmer only leases access for a brief time before the arrangement is terminated due to non-payment.<sup>106</sup> We acknowledge leased access programmers' concerns that any application fee or deposit could dissuade potential leased access programmers, particularly small entities, from seeking to lease access.<sup>107</sup>

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small programmers. This outcome, however, is justified by marketplace changes, including in particular the availability of online platforms for these small programmers to distribute their content. SBN also claims that we have not examined the effect of the elimination of part-time leased access on barriers to market entry and the promotion of a diversity of media voices, which SBN contends is required by section 257 of the Act. SBN *Ex Parte* at 3. In fact, we find, based on evidence in the record, that any entry barriers that existed for part-time programmers have been largely overtaken by the plethora of alternative distribution options for such programmers. Furthermore, in light of these alternative distribution options, elimination of part-time leased access should have at most a minimal adverse effect on the promotion of a diversity of media voices, and that effect is outweighed by the costs to cable operators of part-time leased access.

<sup>66</sup> Cable commenters provide that if we decline to eliminate part-time leased access entirely, we could adopt an alternative approach pursuant to which we could require a cable system to carry a leased access programmer only if the programmer provides a set minimum amount of leased access programming. See NCTA Comments at 24-25 (“the Commission should not require operators to open up even the first part-time leased access channels unless the lessee (or collective of part-time lessees) commits to providing at least 12 contiguous hours of programming daily for one year”); ACA Reply at 4, 7 (the Commission should “permit cable operators to establish minimum per day purchase requirements,” such as eight hours). Based on the record before us, we conclude that eliminating part-time leased access entirely is a preferable approach, given the alternative means of distribution available to programmers today and the costs that part-time leased access imposes on cable operators.

<sup>67</sup> 47 CFR § 76.970(h).

<sup>68</sup> *Id.* § 76.970(i)(1)(ii); see also App. A.

<sup>69</sup> *Id.* § 76.971(a)(4). Section 76.970(i)(1)(i) of our rules requires a cable operator's response to a leased access request to include “[h]ow much of the operator's leased access set-aside capacity is available.” *Id.* § 76.970(i)(1)(i). ACA proposed that cable operators should be required to inform a potential leased access programmer only whether

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Accordingly, rather than permitting “nominal” application fees and deposits as proposed in the FNPRM, we establish maximum application fees and deposits at levels that we do not expect will be unduly burdensome for leased access programmers.<sup>108</sup> Cable operators may require leased access programmers to pay any application fee before the cable operator provides the information set forth in section 76.970(i)(1) in response to a leased access request,<sup>109</sup> whereas a deposit may be assessed as part of the execution of a leased access agreement.

28. We revise section 76.970(i)(1) of our rules to provide that cable operators are required to provide leased access programmers with the information set forth in that section only if the programmer has remitted any application fee that the cable system operator requires up to a maximum of \$100 per system-specific bona fide leased access request for information.<sup>110</sup> The maximum leased access application fee applies to an entire system-specific bona fide request, as defined above. If a programmer amends such a request, the cable operator cannot use the amendment as an opportunity to assess a second application fee. We recognize that permitting a leased access application fee is a departure from past Commission practice.<sup>111</sup> That past practice was based on an expectation that cable operators would be sufficiently protected by the “bona fide” request requirement that then applied only to small cable operators, but “experience has shown that even bona fide applicants may opt to walk away without signing [an] agreement” which “can leave cable operators with unreimbursed costs”<sup>112</sup> which we do not believe Congress intended cable operators to absorb.<sup>113</sup>

29. Section 76.971(d) of our rules already permits cable operators to “require reasonable security deposits or other assurances from users who are unable to prepay in full for access to leased commercial channels.”<sup>114</sup> We hereby deem as reasonable under the Commission’s rules a security deposit or prepayment equivalent to up to 60 days of the applicable lease fee, and we agree with NCTA that 60 days is a reasonable timeframe to enable cable operators to protect themselves against lessees that fail to pay after launching.<sup>115</sup> This approach will address concerns that the current case-by-case determination of what constitutes a “reasonable” deposit leads to marketplace uncertainty.<sup>116</sup> A cable operator may choose

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the specific time slot it requests is available, “rather than indicating the total amount of available leased access set-aside capacity.” ACA Comments at 8. Because we eliminate the part-time leased access requirement, ACA’s time slot proposal is no longer relevant. We clarify that going forward, we will permit cable operators to comply with section 76.970(i)(1)(i) by confirming whether there is a channel available for the prospective leased access programmer.

<sup>70</sup> The leased access rules define a small system 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).

<sup>71</sup> As stated in the FNPRM, “[t]he 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).” FNPRM, 33 FCC Rcd at 5907, n.42; see also LAPA Comments at 13.

<sup>72</sup> See, e.g., ACA Comments at 3-5; NCTA Comments at 5, 16-19; SBN Comments at 2.

<sup>73</sup> 47 CFR § 76.970(i)(3).

<sup>74</sup> 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. See 47 CFR § 76.970(i)(1)-(2).

<sup>75</sup> 47 CFR § 76.970(i)(1).

<sup>76</sup> See *infra* App. A (Final Rules).

to assess either a security deposit or prepayment that exceeds 60 days of the applicable lease fee, but such an assessment would remain subject to the current case-by-case review process if the programmer asserts that it is not reasonable. While one leased access programmer advocates a maximum deposit equivalent to the cost of a single day of airtime,<sup>117</sup> we find that such an amount would be insufficient to protect cable operators from a leased access programmer that ceases paying for access prior to the completion of its agreement's term, which will now be a minimum of one year.<sup>118</sup> Because a deposit is assessed as part of the execution of a leased access agreement, it will either be applied to payments due under the agreement, or it will be retained by the cable operator to compensate it for the leased access programmer's failure to remit payments required by the agreement. We see no reason to modify the existing requirement of section 76.971(d) that reasonable security deposits are permitted only if the leased access user does not prepay in full because if the leased access user prepays in full, the cable operator does not need protection against nonpayment.

30. We reject requests by cable operators to impose additional new financial requirements on leased access programmers aside from application fees and deposits. Specifically, ACA proposes that the Commission permit cable operators to assess a "closing fee" upon finalization of a leased access agreement.<sup>119</sup> We find that giving cable operators this flexibility is not necessary because it is intended to address the same cable operator concerns as the application fee and security deposit. NCTA proposes that cable operators "should be permitted to require an acknowledgement in the application that certain ordinary commercial protections will apply, including that a lessee must provide proof of insurance . . . and pass a credit check prior to entering into a lease."<sup>120</sup> In addition, NCTA requests that the rules "provide that if a leased access user has previously been dropped for non-payment, an operator can refuse to enter into a leasing agreement with that entity or its principals in the future."<sup>121</sup> We note that our rules already permit cable operators to "impose reasonable insurance requirements on leased access programmers,"<sup>122</sup> and we decline to adopt further protections for cable operators against non-payment by

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<sup>77</sup> See, e.g., NCTA Comments at 16-17; NCTA Feb. 14, 2019 *Ex Parte* at 2 (stating that the cable industry collectively spends millions of dollars per year addressing leased access programmers' needs, and "[m]any more unreimbursed costs are incurred in providing leased access information to entities that ultimately choose not to lease time").

<sup>78</sup> See *1997 Leased Access Order*, 12 FCC Rcd at 5333, para. 133-34.

<sup>79</sup> See, e.g., NCTA Comments at 16-17.

<sup>80</sup> See, e.g., ACA Comments at 5; see also *infra* section III.B.3 (explaining the difficulties in compiling the information required by section 76.970(i)(1)). We thus are not persuaded by one commenter's assertion that there is no evidence that cable companies are overwhelmed by the volume of requests by leased access programmers. Jones Comments at 3.

<sup>81</sup> See Jones Comments at 3; Stogner Comments at 5-6; Stogner Reply at 3.

<sup>82</sup> NCTA Comments at 18-19 (stating that this would include "sanctions established under the Office of Foreign Assets Control ('OFAC')").

<sup>83</sup> In addition, we note that section 76.970(i)(2) currently references "paragraph (h)(1) of this section," which does not exist. Instead the rule should have cited current paragraph (i)(1), but given that herein we redesignate paragraph (i) as paragraph (h), no corrective action is needed. See FNPRM, 33 FCC Rcd at 5908, n.46.

<sup>84</sup> See *id.* at 5908-09, paras. 19-20; 47 CFR § 76.970(i)(1), (2) (requiring 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").

leased access programmers given the expected sufficiency of the application fees and deposits that we authorize today.

## 5. Contact Information

31. We adopt a requirement that cable operators provide potential leased access programmers with contact information for the person responsible for leased access matters.<sup>123</sup> Multiple commenters support a leased access contact information requirement,<sup>124</sup> and none oppose it. We provide flexibility for cable operators in complying with this requirement by permitting them to disclose on their own websites, or through alternate means if they do not have their own websites,<sup>125</sup> basic contact information including the name or title, telephone number, and email address for the person responsible for responding to requests for information about leased access channels. This information is necessary for potential leased access programmers to initiate productive contact with cable systems,<sup>126</sup> which is vital to the leased access process, and our approach is consistent with the contact information requirements the Commission has adopted in other contexts.<sup>127</sup> We provide further flexibility by requiring cable operators to provide either a contact person's name or title.<sup>128</sup> This approach eliminates the need to update the website due to personnel changes, and it is permissible so long as the provided telephone number and email address reach the appropriate person. However, a cable operator provides the required contact information, it should be reasonably identifiable, though it need not appear on a cable operator's main webpage.<sup>129</sup>

## 6. Dispute Procedures

32. As proposed in the FNPRM,<sup>130</sup> we adopt common-sense modifications to the procedures for leased access disputes, which no commenter opposed. These modifications resolve inconsistencies between the leased access dispute resolution rule (section 76.975) and the Commission's more general rule governing complaints (section 76.7). First, we adopt the proposal to revise the terminology in section 76.975 by referencing an answer to a petition, rather than a response to a petition.<sup>131</sup> Second, we adopt the proposal to modify section 76.975 by calculating the 30-day timeframe for filing an answer to a leased

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<sup>85</sup> See ACA Comments at 3-7; NCTA Comments at 5, 19.

<sup>86</sup> 47 CFR § 76.970(i)(1)(i).

<sup>87</sup> See *supra* n.69.

<sup>88</sup> ACA Comments at 4.

<sup>89</sup> 47 CFR § 76.970(i)(1)(ii). Above we explain the need to eliminate the reference to part-time leased access rates in this rule. See *supra* section III.B.1.

<sup>90</sup> See ACA Comments at 4-5.

<sup>91</sup> See *id.* at 5.

<sup>92</sup> 47 CFR § 76.970(i)(1)(iii).

<sup>93</sup> See ACA Comments at 5.

<sup>94</sup> 47 CFR § 76.970(i)(1)(iv).

<sup>95</sup> See ACA Comments at 5.

<sup>96</sup> Some commenters claim that the current deadlines are sufficient, and that cable operators should have the required information readily available. See, e.g., Jones Comments at 3-4; SBN Comments at 3; Stogner Comments at 4-5; LAPA Reply at 7; Stogner Reply at 3. We are not persuaded by these comments; instead we recognize the specific difficulties flagged by cable operators including, in particular, ACA.

<sup>97</sup> See *supra* section III.B.2. Given that many of the difficulties discussed in this paragraph apply to operators of single cable systems as well as to operators of multiple cable systems, we will not distinguish between those categories of operators.

<sup>98</sup> See NCTA Comments at 19.

access petition from the date of service of the petition, rather than from the date on which the petition was filed.<sup>132</sup> Third, whereas section 76.975 currently does not include any allowance for replies, we adopt the proposal to add a provision stating that replies to answers must be filed within 15 days after submission of the answer.<sup>133</sup> Fourth, we adopt the proposal to add to section 76.975 a statement that section 76.7 applies to petitions for relief filed under section 76.975, unless otherwise provided in section 76.975. We expect that these modifications will make dispute procedures clearer both for the parties to a leased access dispute and for the Commission.<sup>134</sup>

## 7. Other Issues

33. Commenters put forth several additional proposals in response to the FNPRM, and we reject the proposals at this time as follows.

34. *HD leased access.* We will not require cable systems to carry leased access programming in high definition (HD).<sup>135</sup> Rather, HD carriage is at the discretion of the cable operator. This approach is consistent with the Act, which does not require cable systems to carry leased access programming in HD. Carrying leased access programming in HD expands the use of spectrum without increasing the volume of leased access programming distributed. Further, we note that cable operators negotiate to carry even some commercial programming in standard definition (SD).<sup>136</sup>

35. *Insurance requirements.* We decline to adopt new limits on the insurance requirements that cable operators may impose on leased access programmers. We find that this proposal is inconsistent with the Cable Services Bureau's prior conclusion that a cable operator has the "right to require reasonable liability insurance coverage for leased access programming."<sup>137</sup> We are not persuaded that this conclusion was in error, and leased access programmers have provided no compelling evidence that the Commission should adopt limits on the reasonable insurance requirements that cable operators may impose on leased access programmers, including limits on naming cable affiliates as additional insureds.<sup>138</sup>

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<sup>99</sup> See LAPA Reply at 7 (seeking a shorter, rather than a longer, deadline).

<sup>100</sup> But see Jones Comments at 4 (arguing, without explanation, that small cable systems should not have a longer response deadline).

<sup>101</sup> See *id.*

<sup>102</sup> See, e.g., ACA Comments at 3; NCTA Comments at 5, 18; Charter Reply at 10.

<sup>103</sup> We will consider one "system-specific bona fide request" to be a request covering a system that is served by a primary headend. If a leased access programmer wishes to provide its leased access programming on the cable operator's system that is served by a different primary headend, then it would be subject to another \$100 application fee.

<sup>104</sup> A cable operator may assess both an application fee and a deposit or prepayment. By "application fee," we mean a processing fee that the cable operator collects and retains regardless of whether the leased access request ultimately results in carriage. See FNPRM, 33 FCC Rcd at 5909, n.52. By "deposit" or "prepayment," we mean a fee that the cable operator collects as part of the execution of a leased access agreement and then applies to offset future payments due under the agreement. The FNPRM applied a different definition of "deposit," which would have made a deposit part of the leased access request process. See *id.* at 5909, n.53. We have determined that this approach is not logical, given that the Commission's rules currently refer to leased access security deposits in the context of section 76.971 (addressing leased access terms and conditions) rather than section 76.970 (addressing leased access requests for information).

<sup>105</sup> A cable operator's leased access costs include "processing the application, negotiating terms, and making arrangements for the delivery of programming to the cable headend. Negotiating a leased access agreement can be time consuming, and for small operators often requires the assistance of outside counsel." ACA Comments at 5.

<sup>106</sup> See, e.g., NCTA Comments at 5. While the FNPRM sought comment on whether the Commission should permit  
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36. *Limited carriage areas.* We will not prohibit cable operators from refusing to carry leased access programmers on only a portion of the operator's system, even if the programmer is willing to pay the reasonable cost of a modulator or other piece of equipment that would be needed to limit the carriage area.<sup>139</sup> Rather, consistent with past practice, we will continue evaluating any programmer complaints regarding cable operator denials of leased access carriage on a case-by-case basis.<sup>140</sup> We agree with Charter that the Act "does *not* require that leased access be accommodated in this piece-meal fashion."<sup>141</sup> Customers depend on a consistent channel lineup in a given geographic area,<sup>142</sup> and cable operators should not be required to reconfigure their systems to make leased access programming available only on a portion of the system.<sup>143</sup> Indeed, if the Commission permitted every leased access programmer to provide a modulator and request a custom service area, the ensuing technical and operational burdens on cable operators easily could become unmanageable.

37. *Disclosure requirements.* We decline to modify the information that cable system operators must provide prospective leased access programmers, as set forth in section 76.970(i)(1) of our rules, except for the elimination of the reference to part-time rates discussed in section III.B.1 above. ACA proposes that we could ease burdens on cable operators by: (1) permitting them to provide ACA's proposed safe harbor rates, or a rate estimate, rather than a complete rate schedule; (2) eliminating the requirement that they provide rates associated with technical and studio costs; and (3) eliminating the requirement that they provide sample contracts, or permitting them to provide term sheets instead of sample contracts.<sup>144</sup> We find that a leased access programmer may need to review the rate schedule, technical and studio costs, and a sample contract before deciding whether to proceed in leasing access under our current rules. We therefore decline to adopt ACA's proposals at this time.<sup>145</sup>

38. *Other proposals.* We note that commenters responding to the FNPRM raised several additional proposals on a variety of topics, which are not fully developed in the record or are outside the scope of this proceeding.<sup>146</sup> We decline to address any of these proposals at this time because we find

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only small cable operators to require an application fee or deposit, commenters did not address that issue. *See* FNPRM, 33 FCC Rcd at 5910, para. 22. We conclude that the rationale for permitting an application fee or deposit discussed herein applies to cable operators of all sizes.

<sup>107</sup> *See* Jones Comments at 4-5; SBN Comments at 4.

<sup>108</sup> Establishing a maximum for application fees and deposits also addresses concerns that an approach of permitting "nominal" fees and deposits would "engender deal-killing controversies over what fees and deposits are 'nominal.'" SBN Comments at 4.

<sup>109</sup> Leased access programmers assert that they should not be treated any differently than potential commercial advertisers, to which cable system operators provide information such as rates without requiring any payment. *See* LAPA Comments at 13. We disagree because, as Charter states, "most leased access programmers lack the performance record and financial resources of commercial programmers with whom the operator would customarily engage." Charter Reply at 10. Cable operators thus are justified in assessing fees before the cable operator undertakes the expense of providing the information set forth in section 76.970(i)(1). In addition, cable operators have a different relationship with leased access programmers than with commercial programmers insofar as cable operators are required by statute to engage with leased access programmers, whereas cable operators make a voluntary business decision to engage with commercial programmers.

<sup>110</sup> *See supra* n.103 (explaining the meaning of a system-specific bona fide request).

<sup>111</sup> *See, e.g., 1997 Leased Access Order*, 12 FCC Rcd at 5333, para. 134 ("Because we believe that [providing the information that constitutes a bona fide leased access request] 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").

that it is preferable to monitor the impact of the rule changes we adopt today before deciding if any of these modifications are needed.

39. *The First Amendment.* The changes in the video marketplace described above call into question whether our leased access rules are consistent with the First Amendment. Specifically, while the leased access rules were originally justified as safeguarding competition and diversity in the face of cable operators' monopoly power, the growth in available platforms to distribute programming seems to have eroded this justification. We sought comment on this issue in the FNPRM.<sup>147</sup> Some commenters argue that changes in the marketplace mean that strict scrutiny may be the appropriate standard of review for the leased access statute today.<sup>148</sup> Some commenters further claim that even under intermediate scrutiny, which is the standard the D.C. Circuit applied when it upheld the leased access statute in 1996, marketplace changes would dictate a finding that the leased access regime is no longer consistent with the First Amendment.<sup>149</sup> Because changes in the marketplace have dramatically increased diversity and competition in the video programming market, these commenters argue, the leased access rules are no longer necessary to further the government's interest in promoting these goals.<sup>150</sup>

40. We agree that dramatic changes in technology and the marketplace for the distribution of programming cast substantial doubt on the constitutional foundation for our leased access rules. We recognize that we rejected similar constitutional arguments in the *2008 Leased Access Order*, which we vacate today.<sup>151</sup> Our analysis has changed because the facts have changed: as explained above, the growth in alternative outlets for programmers—particularly on the Internet—has exploded in the decade since the adoption of the *2008 Leased Access Order*.<sup>152</sup> Given this proliferation of new distribution platforms, we now find that the First Amendment concerns raised by commenters provide additional reason to interpret the statutory obligations of section 612 in a manner that reduces burdens on the speech of cable operators. We do so here by, among other things, eliminating the Commission rule requiring that

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<sup>112</sup> NCTA Comments at 20, n.29. We thus conclude that, even given the adoption of the proposal to require all cable operators to respond only to bona fide leased access requests, permitting application fees remains reasonable and justified. *See, e.g., id.* at 20 (“While limiting responses to ‘bona fide’ prospective lessees is a good first step toward protecting operators against wasting time on frivolous requests, it will not fully protect operators against these unreimbursed expenditures,” which include the costs of processing and accommodating leased access requests).

<sup>113</sup> *See* 47 U.S.C. § 532(c)(1) (“If a person unaffiliated with the cable operator seeks to use channel capacity designated [for leased access], the cable operator shall establish . . . 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”).

<sup>114</sup> 47 CFR § 76.971(d).

<sup>115</sup> *See* NCTA Comments at 20-21.

<sup>116</sup> *See, e.g., id.*

<sup>117</sup> *See* Jones Comments at 4.

<sup>118</sup> *See supra* section III.B.1.

<sup>119</sup> ACA Comments at 10 (“the Commission should also permit cable operators to charge a closing fee once a leased access agreement has been finalized in order to cover administrative costs incurred from the time the operator receives a written request for leased access to the actual completion of the agreement. The closing fee set by the cable operator should be reasonable, uniform, and non-discriminatory, and can be based on the average administrative costs of processing an application and negotiating terms of an agreement.”).

<sup>120</sup> NCTA Comments at 18-19.

<sup>121</sup> *Id.* at 19, n.27.

<sup>122</sup> 47 CFR § 76.971(d).

<sup>123</sup> *See* FNPRM, 33 FCC Rcd at 5910, para. 24 (asking if the Commission should adopt “a rule requiring cable

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cable operators make leased access available on a part-time basis. While our rule changes are independently and sufficiently supported by the policy justifications above, we note that constitutional concerns rely on the same premise: that changes in the video marketplace have substantially weakened the justifications for leased access.<sup>153</sup>

#### IV. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

41. In this Second Further Notice of Proposed Rulemaking, we address the leased access rate formula. Specifically, as discussed below, we propose one modification to the formula that would permit cable operators to calculate the “average implicit fee” for leased access based on the tier on which the leased access programming actually will be carried.<sup>154</sup> In addition, we seek comment on whether to make other modifications to the existing rate formula. Finally, we seek comment on whether leased access requirements can withstand First Amendment scrutiny in light of video programming market changes.

42. *Background.* As stated above, Congress 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<sup>155</sup> 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.”<sup>156</sup> The Commission adopted leased access rate regulations in 1993, and the Commission subsequently modified its leased access regulations in 1996 and 1997.<sup>157</sup> The Commission’s implementing rules, which the D.C. Circuit upheld in 1998,<sup>158</sup> included a formula for calculating maximum carriage rates that cable operators could charge leased access programmers.<sup>159</sup>

43. Specifically, in order 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 carriage based on the “average implicit fee” that other programmers implicitly charge for carriage.<sup>160</sup> The Commission then

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operators to provide programmers with contact information for the person responsible for leased access matters”); *see also id.* at 5906, para. 12 (asking if there is “any policy justification for retaining any particular rules adopted” in the *2008 Leased Access Order*).

<sup>124</sup> *See* Jones Comments at 5; LAPA Comments at 9; SBN Comments at 3.

<sup>125</sup> For example, a cable operator that does not have its own website could post its contact information on a third-party website, such as the website of a cable or programmer trade association, and it could train employees to provide that website to callers inquiring about leased access matters.

<sup>126</sup> *See* Stogner Comments at 8 (explaining that potential leased access programmers are often unable to make inquiries of cable operators because they cannot determine who to contact, or because uninformed employees tell them that the cable system does not have any leased access).

<sup>127</sup> *See, e.g.*, 47 CFR §§ 79.1(i)(1) (requiring video programming distributors to disclose contact information for the receipt and handling of immediate closed captioning concerns raised by consumers while they are watching a television program), 79.4(c)(2)(iii) (imposing a similar contact information disclosure requirement on online video programming distributors and providers).

<sup>128</sup> For example, rather than specifying the contact person’s name, Cox has opted to provide that communications should be directed to the “Leased Access Coordinator” and it lists an email address for this person.

<sup>129</sup> Although the Commission adopted a comparable requirement in the *2008 Leased Access Order*, that requirement never went into effect because OMB disapproved of the information collection requirements contained in that order. *See 2008 Leased Access Order*, 23 FCC Rcd at 2915, para. 13 (“We require every cable system operator to maintain, on its website, a contact name, telephone number, and e-mail of an individual designated by the cable system operator to respond to requests for information about leased access channels. One of the more basic elements necessary to permit potential programmers reasonable access to cable systems is ready availability of a contact name, telephone number, and e-mail address of a cable system operator that the programmer can use to reach the appropriate person in the cable system to begin the process for requesting access to the system.”); OMB Notice. The reasons for the disapproval, however, were not specifically related to the contact information requirement, and as explained above we have minimized burdens of the new contact information requirement by providing cable

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prorated that formula for part-time programming. Thus, these rate 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. The Commission reasoned that “because the Communications Act requires cable operators to transmit must-carry and PEG access channels on the basic service tier, the average programming cost on that tier will tend to be lower.”<sup>161</sup>

44. Although the Commission revised its commercial leased access rate rules in its *2008 Leased Access Order*, these rules never went into effect. Thus, the leased access rate rules adopted in the *1993 Rate Regulation Order*, as subsequently amended,<sup>162</sup> remain in effect.

45. *Discussion.* As suggested by commenters, we propose to make leased access fee calculations specific to the tier on which the programming will be carried. In this regard, we propose to permit cable operators that carry leased access programming on the basic service tier<sup>163</sup> “to calculate the average implicit fee based on a basic tier-specific calculation, rather than based on the blended calculation required under the existing formula.”<sup>164</sup> NCTA avers that it would “be much simpler to calculate the leased access rate for basic tier placement on a tier-specific basis, rather than on a blended tier basis.”<sup>165</sup> We similarly propose that the rate formula should be a tier-specific calculation even if the leased access programming is carried on a tier other than the basic service tier. We seek comment on these proposals. Are there other advantages or disadvantages to this approach that we should consider?

46. We also seek comment on whether there are other changes we should make to our rate formula. In response to the FNPRM’s request for information on whether the Commission should adopt any new rules governing leased access rates,<sup>166</sup> commenters put forth a wide range of proposals to address their concerns.<sup>167</sup> The record indicates that the current rate formula may be insufficient to compensate cable operators for their leased access administrative costs, particularly for small cable systems,<sup>168</sup> and that the current method for calculating rates is unduly complex.<sup>169</sup> On the other hand, AIM indicates that current rates are “a de facto barrier to entry for a significant number of independent programmers.”<sup>170</sup> We seek comment on the pros and cons of the varying rate proposals in the record,<sup>171</sup> and on any other rate

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operators with flexibility in complying.

<sup>130</sup> FNPRM, 33 FCC Rcd at 5910, para. 23. The Commission has statutory authority to adjudicate leased access disputes. See 47 U.S.C. § 532(c)(4)(A)(iii).

<sup>131</sup> See 47 CFR § 76.7(b)(2) (setting forth rules for answers to complaints); Jones Comments at 5 (supporting this proposal).

<sup>132</sup> See 47 CFR § 76.7(b)(2)(ii) (“The answer shall be filed within 20 days of service of the complaint”).

<sup>133</sup> 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”); Jones Comments at 5 (supporting this proposal). The FNPRM sought comment on whether 15 days is the appropriate timeframe for submitting a reply to an answer to a leased access petition. FNPRM, 33 FCC Rcd at 5910, para. 23. Commenters did not address this issue, with the exception of Jones’s support of the Commission’s 15-day proposal. To be consistent with the answer filing deadline, which is 20 days under the general complaint-filing rule but 30 days under the leased access rule, we find that it is appropriate for the reply filing deadline to be 10 days under the general complaint-filing rule but 15 days under the leased access rule. See 47 CFR §§ 76.7(b)(2)(ii), (c)(3), 76.975(e).

<sup>134</sup> Although some commenters argue that we should make additional changes to make the dispute resolution process faster and more efficient, we find insufficient justification for such changes at this time. See AIM Comments at 12 (proposing that the Commission require cable operators “to respond to leased access programmers in a timely and substantive fashion,” looking for guidance to “the myriad examples of ‘rocket docket’ procedures used by courts of law and administrative agencies to achieve rapid results, as well as arbitration services used to quickly resolve commercial disputes”); LAPA Comments at 11 (requesting that the Commission “adopt the expedited time frames for resolution of complaints and improve the discovery process as what was called for in the 2008 Leased Access Order”). We will revisit these issues in the future if we determine that further modifications to the leased access

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proposals we should consider. Should we adopt any of these suggestions if we adopt our proposal to make the rate formula tier-specific? Even with this change, would the rate formula yield rates that are unduly low? For example, is there basis for concern that the current rate formula yields rates that are so low that it encourages a programmer with limited content to lease a channel and then air its programming on repeat? Alternatively, we seek comment on whether we should retain our existing rate formula. We seek input on the potential costs and benefits of the various proposals in the record.

47. We also seek comment today on whether the First Amendment concerns identified above in paragraphs 39 and 40 apply to the Commission's rules and statutory provisions concerning full-time leased access requirements. In this regard, one commenter opines that "[t]hese matters have already been addressed by the courts and they have upheld the leased access provisions enacted by Congress. Only the courts and Congress can change these provisions. In the meantime, the Commission is obligated to carry out the directions given to them by Congress."<sup>172</sup> On the other hand, we note that the D.C. Circuit decision upholding the constitutionality of the statutory leased-access provisions largely antedates the market developments described in this order and arguably turned on the facts that existed at that time.<sup>173</sup> We seek comment on this analysis. Can the statutory leased access requirements or the Commission's other leased-access rules continue to withstand First Amendment scrutiny in light of the market changes discussed in this order? If not, what discretion does the Commission have to reduce the burdens that those provisions impose on protected speech?

## V. PROCEDURAL MATTERS

### A. Regulatory Flexibility Act

48. *Final Regulatory Flexibility Analysis.* As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>174</sup> the Commission has prepared a Final Regulatory Flexibility Analysis

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dispute resolution procedures are needed.

<sup>135</sup> While some leased access programmers support a requirement that cable systems carry leased access programming in HD (*see* John C. Moon, owner and operator of Ridgeline TV, Comments at 3; Stogner Comments at 6; Stogner Reply at 2), cable operators object to such a requirement (*see* Charter Reply at 12; NCTA Reply at 4).

<sup>136</sup> *See* NCTA Reply at 4.

<sup>137</sup> *Church of New Bedford v. MediaOne*, CSR 5091-L, Order on Reconsideration, 14 FCC Rcd 2863 (CSB 1999) (concluding that MediaOne had justified the reasonableness of the insurance coverage it requested, which required the leased access programmer to name MediaOne as an additional insured); *see also* NCTA Reply at 3.

<sup>138</sup> *See* LAPA Comments at 14-15; Stogner Comments at 11. We note that last year the Media Bureau dismissed in part and otherwise denied a petition alleging that a cable operator failed to demonstrate that its insurance requirement was reasonable. *StogMedia v. Cox Communications Las Vegas, Inc. d/b/a Cox*, MB Docket No. 17-314, Order, 33 FCC Rcd 1765 (MB 2018). The Bureau concluded that "[t]he threshold issue of whether a cable operator may require insurance coverage for leased access programming is settled," and the cable operator "was reasonable to require insurance coverage in this instance." *Id.* at 1767, paras. 5-6.

<sup>139</sup> LAPA proposed that we impose such a prohibition. *See* LAPA Comments at 11; *see also* Combonate Comments at 1-2 (explaining that Combonate cannot afford to provide leased access covering the large area required by the local cable operator and serving that area also would make it "very difficult to provide locally focused programming" as Combonate intended).

<sup>140</sup> *See, e.g., Kathleen Ballanfant Roberts and Sidney T. Roberts v. The Houston Division of Time Warner Entertainment Company, L.P.*, CSR 4276-L, Memorandum Opinion and Order, 11 FCC Rcd 5999 (CSB 1996);

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(FRFA) relating to the Report and Order. The FRFA is set forth in Appendix B.

49. *Initial Regulatory Flexibility Analysis.* As required by the RFA, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) relating to the Second FNPRM. The IRFA is set forth in Appendix C.

## B. Paperwork Reduction Act

50. The Report and Order contains proposed new or revised information collection requirements, as reflected in Appendix A, sections 76.970(h) and 76.975(e). 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.”

51. The Second FNPRM may result in new or revised information collection requirements. If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the *Federal Register* inviting the public to comment on the requirement, 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.”

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*King Kong Broadcasting, Inc. v. Cox Communications Las Vegas, Inc. d/b/a Cox*, CSR 5388-L, Order, 28 FCC Rcd 15618 (MB 2013).

<sup>141</sup> Charter Reply at 11-12 (emphasis in original).

<sup>142</sup> *See id.* at 12, n.41.

<sup>143</sup> *See* NCTA Reply at 3 (“compelling operators to reconfigure their system operations to satisfy leased access users is directly at odds with the statutory protection against leased access adversely affecting system operations”) (footnote omitted).

<sup>144</sup> ACA Comments at 8-10; 47 CFR § 76.970(i)(1)(ii)-(iv).

<sup>145</sup> Similarly, we find that the costs to cable operators of providing potential leased access programmers with extensive additional information would outweigh the potential benefits of providing that additional information to prospective leased access programmers. Accordingly, we decline to adopt such requirements. *See* SBN Comments at 3 (arguing that before a leased access programmer decides to pursue leased access on a particular system, it needs access to: “the price for the channel (or channel day part), how many channels (or channel day parts) are available for leased access, the channel numbers that are available, the name and contact information for the employee of the cable operator who is tasked with handling leased access requests and negotiations, and the count of subscribers on that channel tier (which cable operators do not have to reveal)”) (footnote omitted). We note, however, that we do adopt leased access contact information requirements. *See supra* section III.B.5. In addition, current rules require disclosure of “[a] complete schedule of the operator’s full-time and part-time leased access rates.” 47 CFR § 76.970(i)(1)(ii).

<sup>146</sup> *See, e.g.*, LAPA Comments at 11, 15 (reporting on leased access statistics; tier placement requirements); NCTA Comments at 4, 19 (FCC recommendation to Congress that leased access be repealed); SBN Comments at 5 (sale of local promotional commercial time); Stogner Comments at 9 (broadband use in signal delivery); LAPA Reply at 8 (“There should be clear policies with regards to signal delivery, geographic distribution, insurance needs, contracts, equipment usage, assorted fees, etc.”). In addition, SBN asks the Commission to “clarify that independent programmers have the same right of access to multichannel video systems owned by telephone companies as they have to other cable systems.” SBN Comments at 6. To the extent there is any doubt, we clarify that a telephone company that is acting as a “cable operator” is subject to the leased access requirements in the same manner as any other cable operator.

**C. Congressional Review Act**

52. The Commission will send a copy of the 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).

**D. Ex Parte Rules**

53. Permit-But-Disclose. This proceeding shall be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.<sup>175</sup> Persons making *ex parte* presentations

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<sup>147</sup> FNPRM, 33 FCC Rcd at 5910-11, para. 25.

<sup>148</sup> *See* NCTA Comments at 11-12; Charter Reply at 4-5; Mercatus Center Reply at 1, 3, 5.

<sup>149</sup> *See* NCTA Comments at 4-5, 12-14; Charter Reply at 1-6.

<sup>150</sup> *See, e.g.*, NCTA Comments at 11-12.

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<sup>151</sup> *2008 Leased Access Order*, 23 FCC Rcd at 2939-40, para. 72 (“While MVPDs argue that there are more outlets today for independent programmers, such as the Internet, they fail to demonstrate that these alternative outlets can be considered sufficient to conclude that Congress’s goals of promoting competition and diversity in passing the leased access provisions of the 1992 Cable Act have been achieved.”).

<sup>152</sup> *See supra* paras. 10-13.

<sup>153</sup> In section IV of this item, we seek further comment on the constitutionality of the Commission’s overall leased access regime, which the Commission adopted pursuant to express Congressional authorization.

<sup>154</sup> *See* 47 CFR § 76.970 (Commercial leased access rates); *see also 2008 Leased Access Order*, 23 FCC Rcd at 2911-12, para. 6 (“In implementing the statutory directive to determine maximum reasonable rates for leased access, the Commission adopted a maximum rate formula for full-time carriage on programming tiers based on the ‘average implicit fee’ that other programmers are implicitly charged for carriage to permit the operator to recover its costs and earn a profit. The Commission also adopted a maximum rate for a la carte services based on the ‘highest implicit fee’ that other a la carte services implicitly pay, and a prorated rate for part-time programming.”) (footnotes omitted).

<sup>155</sup> *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, § 9, 106 Stat. 1460 (Oct. 5, 1992).

<sup>156</sup> 47 U.S.C. § 532(c)(1).

<sup>157</sup> *See 1993 Rate Regulation Order*, 8 FCC Rcd at 5948, para. 512 *et seq.*; *1996 Rate Regulation Order*; *1997 Leased Access Order*; 47 U.S.C. § 532(c)(4)(A)(i).

<sup>158</sup> *See ValueVision, Inc. v. FCC*.

<sup>159</sup> *See* 47 CFR § 76.970(d)-(h).

<sup>160</sup> *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.”).

<sup>161</sup> *Id.* at 5291, para. 46.

<sup>162</sup> *See supra* n.14.

<sup>163</sup> The basic service tier “includes, at a minimum, the broadcast signals distributed by the cable operator (except for superstations), along with any public, educational, and government (PEG) access channels that the local franchise authority requires the system operator to carry on the basic tier.” *1993 Rate Regulation Order*, 8 FCC Rcd at 5637, para. 3.

<sup>164</sup> *See* NCTA Feb. 14, 2019 *Ex Parte* at 2-3. The “average implicit fee” is the maximum commercial leased access rate that a cable operator may charge. *See* 47 CFR § 76.970. The current fee calculation is “blended” insofar as it utilizes a “weighting scheme that accounts for differences in the number of subscribers and channels” on multiple tiers, and not just on the basic service tier. *See id.* § 76.970(e)

<sup>165</sup> NCTA Feb. 14, 2019 *Ex Parte* at 3.

<sup>166</sup> FNPRM, 33 FCC Rcd at 5910, para. 24.

<sup>167</sup> *See, e.g.,* ACA Comments at 7-8 (advocating “a uniform, non-discriminatory ‘safe harbor’ per channel rate”); LAPA Comments at 11-12 (proposing that the Commission seek further comment on how to modify the rate methodology); AIM Comments at 12 (supporting a lower rate to foster carriage of independent programming); Jones Comments at 5-6 (asserting that lower rates would make leased access more available to programmers as Congress intended); NCTA Comments at 26-27 (proposing (1) limiting the rate calculation to the basic service tier if the operator will place the leased access programmer on that tier; and (2) giving cable “operators the discretion to aggregate system-specific calculations and establish a regional or national leased access rate that would be applied on a ‘per subscriber’ basis”); SBN Comments at 4-5 (proposing that the Commission establish a per subscriber rate cap, at a fixed amount to be revisited every five years); ACA Reply at 3-4 (in the alternative to a safe harbor rate,

(continued....)

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.

#### E. Filing Requirements

54. **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).

- 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

(Continued from previous page) \_\_\_\_\_  
proposing that cable operators be permitted to calculate the leased access rate once and use that rate for the next three years).

<sup>168</sup> See ACA Reply at 2 ("small cable systems' profit margins for multichannel video programming distribution ('MVPD') services have been steadily decreasing, bringing the maximum per channel rate that small systems are permitted to charge closer and closer to zero").

<sup>169</sup> See, e.g., *id.* at 4-5 ("The formula for calculating the 'average implicit fee' for a particular channel is extremely complex...").

<sup>170</sup> AIM Comments at 12.

<sup>171</sup> See *supra* n.167.

<sup>172</sup> LAPA Reply at 5; see also Combonate Comments at 3; LAPA Comments at 15; Stogner Reply at 1.

<sup>173</sup> *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

<sup>174</sup> 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).

<sup>175</sup> 47 CFR § 1.1200 *et seq.*

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 12<sup>th</sup> 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.

55. 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 12<sup>th</sup> 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.

56. 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](mailto:fcc504@fcc.gov) or call the FCC's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

#### F. Additional Information

57. For additional information on this proceeding, contact Diana Sokolow, [Diana.Sokolow@fcc.gov](mailto:Diana.Sokolow@fcc.gov), of the Policy Division, Media Bureau, (202) 418-2120.

### VI. ORDERING CLAUSES

58. 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 Report and Order and Second Further Notice of Proposed Rulemaking **IS HEREBY ADOPTED**.

59. **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, except for sections 76.970(h) and 76.975(e) that contain new or modified information collection requirements, which shall become effective after the Commission publishes a notice in the Federal Register announcing OMB approval and the relevant effective date.

60. **IT IS FURTHER ORDERED** that the Commission's Report and Order and Further Notice of Proposed Rulemaking in the *Leased Commercial Access* proceeding, MB Docket No. 07-42, FCC 07-208, **IS HEREBY VACATED**.

61. **IT IS FURTHER ORDERED** that the March 28, 2008 Request of National Cable & Telecommunications Association for a Stay, MB Docket No. 07-42, **IS DISMISSED AS MOOT**.

62. **IT IS FURTHER ORDERED** that the March 31, 2008 TVC Broadcasting LLC Petition for Reconsideration, MB Docket No. 07-42, **IS DISMISSED AS MOOT**.

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

64. **IT IS FURTHER ORDERED** that the Commission **SHALL SEND** a copy of this Report and Order and Second Further Notice of Proposed Rulemaking 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. Revise § 76.970 paragraph (a), delete paragraph (h), redesignate paragraphs (i) and (j) as paragraphs (h) and (i) respectively, revise redesignated paragraph (h)(1)-(3), and add a new paragraph (h)(6), to read as follows:

**§ 76.970 Commercial leased access rates.**

(a) Cable operators shall designate channel capacity for commercial use by persons unaffiliated with the operator, and that seek to lease a programming channel on a full-time basis, in accordance with the requirement of 47 U.S.C. 532. For purposes of 47 U.S.C. 532(b)(1)(A) and (B), only those channels that must be carried pursuant to 47 U.S.C. 534 and 535 qualify as channels that are required for use by Federal law or regulation. For cable systems with 100 or fewer channels, channels that cannot be used due to technical and safety regulations of the Federal Government (e.g., aeronautical channels) shall be excluded when calculating the set-aside requirement.

\* \* \* \* \*

(h)(1) Cable system operators shall provide prospective leased access programmers with the following information within 30 calendar days of the date on which a bona fide request for leased access information is made, provided that the programmer has remitted any application fee that the cable system operator requires up to a maximum of \$100 per system-specific bona fide request:

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

(ii) A complete schedule of the operator's full-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)(1) of this section within 45 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) Bona fide requests, as used in this section, are defined as requests from potential leased access programmers that have provided the following information:

- (i) The desired length of a contract term;
- (ii) The anticipated commencement date for carriage; and
- (iii) The nature of the programming,

(4) All requests for leased access must be made in writing and must specify the date on which the request was sent to the operator.

(5) Operators shall maintain, for Commission inspection, sufficient supporting documentation to justify the scheduled rates, including supporting contracts, calculations of the implicit fees, and justifications for all adjustments.

(6) Cable system operators shall disclose on their own websites, or through alternate means if they do not have their own websites, a contact name or title, telephone number, and email address for the person responsible for responding to requests for information about leased access channels.

(i) Cable operators are permitted to negotiate rates below the maximum rates permitted in paragraphs (c) through (g) of this section.

3. Revise § 76.971 by deleting paragraph (a)(4).

4. 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 service of the petition to file an answer. If a leased access rate is disputed, the answer 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 an answer 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

## Final Regulatory Flexibility Analysis for the Report and Order

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Further Notice of Proposed Rulemaking (FNPRM) in this proceeding.<sup>2</sup> The Federal Communications Commission (Commission) sought written public comment on the proposals in the 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.<sup>3</sup>

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

2. In the Report and Order, we update our leased access rules as part of the Commission's Modernization of Media Regulation Initiative.<sup>4</sup> The leased access rules, which implement the statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.<sup>5</sup> In 2018, the Commission adopted the FNPRM addressing leased access proposals filed in response to the *Media Modernization Public Notice*.<sup>6</sup> With this proceeding, we continue our efforts to modernize media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.<sup>7</sup>

3. The video marketplace has changed significantly since the Commission initially adopted its leased access rules. Specifically, today a wide variety of media platforms are available to programmers, including in particular online platforms that creators can use to distribute their content for free.<sup>8</sup> This change has reduced the importance of leased access and, thus, the justification for burdensome leased access requirements.

4. In the Report and Order, first we adopt the FNPRM's tentative conclusion that we should vacate the Commission's *2008 Leased Access Order*.<sup>9</sup> That order never went into effect due to a stay by the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) and the Office of Management and Budget (OMB) issuance of a notice of disapproval of the associated information collection requirements.<sup>10</sup>

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<sup>1</sup> 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).

<sup>2</sup> See *Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 and 17-105, Further Notice of Proposed Rulemaking, 33 FCC Rcd 5901 (2018) (FNPRM).

<sup>3</sup> See 5 U.S.C. § 604.

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

<sup>5</sup> See 47 U.S.C. § 532; 47 CFR § 76.970 *et seq.* 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).

<sup>6</sup> See FNPRM.

<sup>7</sup> *Id.* at 5901, para. 1.

<sup>8</sup> See Report and Order section II.

<sup>9</sup> *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*), *appeal pending*, *United Church of Christ v. FCC*, No. 08-3245 (6th Cir.).

<sup>10</sup> See Report and Order section II.

5. Second, we adopt certain updates and improvements to our existing leased access rules. Specifically, we:

- Eliminate the requirement that cable operators make leased access available on a part-time basis;
- 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 respond only to bona fide requests<sup>11</sup> from prospective leased access programmers;
- Extend the timeframe within which cable operators must respond to prospective leased access programmers, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of systems subject to small system relief;<sup>12</sup>
- Permit cable operators to impose a maximum leased access application fee of \$100 per system-specific bona fide request, and deem as reasonable under the Commission’s rules a security deposit or prepayment equivalent of up to 60 days of the applicable lease fee;
- Require cable operators to provide potential leased access programmers with contact information for the person responsible for leased access matters; and
- Adopt common-sense modifications to our procedures for leased access disputes.<sup>13</sup>

**B. Legal Basis**

6. 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.

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

7. 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**

8. 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.<sup>14</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>15</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>16</sup> A small business

<sup>11</sup> For the definition of a bona fide request, *see* Report and Order section III.B.2.

<sup>12</sup> For an explanation of the systems that are subject to small system relief, *see id.* section III.B.3.

<sup>13</sup> First, we adopt the proposal to revise the terminology in section 76.975 by referencing an answer to a petition, rather than a response to a petition. Second, we adopt the proposal to modify section 76.975 by calculating the 30-day timeframe for filing an answer to a leased access petition from the date of service of the petition, rather than from the date on which the petition was filed. Third, whereas section 76.975 currently does not include any allowance for replies, we adopt the proposal to add a provision stating that replies to answers must be filed within 15 days after submission of the answer. Fourth, we adopt the proposal to add to section 76.975 a statement that section 76.7 applies to petitions for relief filed under section 76.975, unless otherwise provided in section 76.975. *See id.* section III.B.6.

<sup>14</sup> 5 U.S.C. § 603(b)(3).

<sup>15</sup> *Id.* § 601(6).

<sup>16</sup> *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

(continued....)

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.<sup>17</sup> Below, we provide a description of such small entities, as well as an estimate of the number of such small entities, where feasible.

9. *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.”<sup>18</sup> 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.<sup>19</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>20</sup> Thus, the majority of these firms can be considered small.

10. *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.<sup>21</sup> Industry data indicate that there are currently 4,600 active cable systems in the United States.<sup>22</sup> Of this total, all but nine cable operators nationwide are small under the 400,000-subscriber size standard.<sup>23</sup> In addition, under the Commission’s rate regulation rules, a “small system” is a cable system serving 15,000 or fewer

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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).

<sup>17</sup> 15 U.S.C. § 632.

<sup>18</sup> 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>.

<sup>19</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110).

<sup>20</sup> *Id.*

<sup>21</sup> 47 CFR § 76.901(e)

<sup>22</sup> 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](http://www.fcc.gov/coals).

<sup>23</sup> See SNL KAGAN at <https://www.snl.com/interactiveX/MyInteractive.aspx?mode=4&CDID=A-821-38606&KLPT=8> (subscription required).

subscribers.<sup>24</sup> Current Commission records show 4,600 cable systems nationwide.<sup>25</sup> 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.<sup>26</sup> Thus, under this standard as well, we estimate that most cable systems are small entities.

11. *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.”<sup>27</sup> There are approximately 52,403,705 cable video subscribers in the United States today.<sup>28</sup> 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.<sup>29</sup> Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.<sup>30</sup> 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.<sup>31</sup> 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.

12. *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.<sup>32</sup> 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.<sup>33</sup> According to 2012 U.S. Census Bureau data, 367 firms

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<sup>24</sup> 47 CFR § 76.901(c).

<sup>25</sup> 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](http://www.fcc.gov/coals).

<sup>26</sup> *Id.*

<sup>27</sup> 47 CFR § 76.901 (f) and notes ff. 1, 2, and 3.

<sup>28</sup> *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).

<sup>29</sup> 47 CFR § 76.901(f).

<sup>30</sup> *Assessment & Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appx. E, para. 23 (2016).

<sup>31</sup> 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).

<sup>32</sup> 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#>.

<sup>33</sup> See 13 CFR § 121.201, NAICS Code 515210.

operated for the entire year.<sup>34</sup> Of that number, 319 operated with annual receipts of less than \$25 million a year.<sup>35</sup> Based on this data, the Commission estimates that the majority of firms operating in this industry are small.

13. *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.”<sup>36</sup> 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.<sup>37</sup> Census data for 2012 shows that there were 8,203 firms in this category that operated for the entire year.<sup>38</sup> 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.

14. *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.”<sup>39</sup> 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.<sup>40</sup> Census data for 2012 shows that there were 307 firms in this category that operated for the entire year.<sup>41</sup> Of this total, 294 firms had annual receipts of fewer than \$25 million.<sup>42</sup> Therefore, under this size standard, we conclude that the majority of such businesses can be considered small.

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<sup>34</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515210).

<sup>35</sup> *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.

<sup>36</sup> U.S. Census Bureau, 2012 NAICS Definitions, “512110 Motion Picture and Video Production” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>37</sup> 13 CFR § 121.201, NAICS Code 512110.

<sup>38</sup> 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>.

<sup>39</sup> U.S. Census Bureau, 2012 NAICS Definitions, “512120 Motion Picture and Video Distribution” at <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>40</sup> 13 CFR § 121.201, NAICS Code 512120.

<sup>41</sup> 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>.

<sup>42</sup> *Id.*

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

15. Certain rule changes discussed in the Report and Order would affect reporting, recordkeeping, or other compliance requirements. First, we adopt the FNPRM's tentative conclusion that we should vacate the *2008 Leased Access Order*, including the Further Notice of Proposed Rulemaking issued in conjunction with that order. Second, we adopt certain updates and improvements to our existing leased access rules. We take the following specific steps:

- We eliminate the requirement that cable operators make leased access available on a part-time basis.
- We adopt the proposal set out in the FNPRM to ease burdens on cable operators by revising 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 respond to a request for leased access information only if the request is bona fide.<sup>43</sup>
- To ease burdens on cable operators, we extend the timeframe within which they must provide prospective leased access programmers with the information specified in section 76.970(i)(1) of our rules, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of systems subject to small system relief.
- We permit cable operators to impose a maximum leased access application fee of \$100 per system-specific bona fide request,<sup>44</sup> and we deem as reasonable under the Commission's rules a security deposit or prepayment requirement equivalent to up to 60 days of the applicable lease fee.<sup>45</sup>
- We adopt a requirement that cable operators provide potential leased access programmers with contact information for the person responsible for leased access matters.
- As proposed in the FNPRM,<sup>46</sup> we adopt common-sense modifications to the procedures for leased access disputes, which no commenter opposed. These modifications, described in footnote 13 above, resolve inconsistencies between the leased access dispute resolution rule (section 76.975) and the Commission's more general rule governing complaints (section 76.7).

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<sup>43</sup> For the definition of a bona fide request, see Report and Order section III.B.2.

<sup>44</sup> We will consider one "system-specific bona fide request" to be a request covering a system that is served by a primary headend. If a leased access programmer wishes to provide its leased access programming on the cable operator's system that is served by a different primary headend, then it would be subject to another \$100 application fee.

<sup>45</sup> A cable operator may assess both an application fee and a deposit or prepayment. By "application fee," we mean a processing fee that the cable operator collects and retains regardless of whether the leased access request ultimately results in carriage. See FNPRM, 33 FCC Rcd at 5909, n.52. By "deposit" or "prepayment," we mean a fee that the cable operator collects as part of the execution of a leased access agreement and then applies to offset future payments due under the agreement. The FNPRM applied a different definition of "deposit," which would have made a deposit part of the leased access request process. See *id.* at 5909, n.53. We have determined that this approach is not logical, given that the Commission's rules currently refer to leased access security deposits in the context of section 76.971 (addressing leased access terms and conditions) rather than section 76.970 (addressing leased access requests for information).

<sup>46</sup> FNPRM, 33 FCC Rcd at 5910, para. 23. The Commission has statutory authority to adjudicate leased access disputes. See 47 U.S.C. § 532(c)(4)(A)(iii).

16. Finally, commenters put forth several additional proposals in response to the FNPRM, and we reject the proposals at this time.<sup>47</sup>

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

17. 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.”<sup>48</sup>

18. At the outset, we note the Commission’s statement in the Report and Order that it seeks to modify its leased access rules to best promote competition and diversity in the marketplace today, while taking into account the growth and development of cable systems and other platforms for delivering content.<sup>49</sup> Many of the actions taken in the Report and Order will ease burdens, including economic burdens, on cable operators of all sizes. More specifically, implementing the *2008 Leased Access Order* would have made leased access significantly more burdensome for cable operators, including small cable operators.<sup>50</sup> Vacating the *2008 Leased Access Order* thus will be beneficial to these entities. Below we discuss specific ways in which the updates and improvements to the existing leased access rules will ease burdens on entities, including small entities, along with specific alternatives we have considered. The changes in the Report and Order that ease burdens on cable operators, such as the elimination of part-time leased access, may also impact leased access programmers, including small programmers. We find that the marketplace changes discussed above, including in particular the availability of online platforms for these small programmers to distribute their content, justify this approach.

19. First, eliminating part-time leased access will ease burdens on cable operators, including small cable operators, given that the record indicates that those operators do not usually generate enough revenue from part-time leased access to cover the administrative costs of providing such programming.<sup>51</sup> Part-time leased access programmers today have other distribution options available to them, including in particular Internet options.<sup>52</sup> The Report and Order concludes that eliminating part-time leased access entirely is a preferable approach to the alternative of establishing a set minimum amount of leased access programming, given the alternative means of distribution available to programmers today and the costs that part-time leased access imposes on cable operators.<sup>53</sup>

20. Second, adoption of the bona fide request provision will expand relief afforded small systems to all cable operators by easing the current requirement that larger systems respond to all written leased access requests, which can be inefficient, difficult and costly.<sup>54</sup>

21. Third, we ease burdens on cable operators by extending the timeframe within which they must provide prospective leased access programmers with the information specified in section

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<sup>47</sup> See Report and Order section III.B.7.

<sup>48</sup> 5 U.S.C. § 603(c)(1)-(4).

<sup>49</sup> Report and Order section II.

<sup>50</sup> *Id.* section III.A.

<sup>51</sup> *Id.* section III.B.1.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* section III.B.2.

76.970(i)(1) of our rules, from 15 calendar days to 30 calendar days for cable operators generally, and from 30 calendar days to 45 calendar days for operators of systems subject to small system relief.<sup>55</sup> These differing timetables take into account the resources available to small cable systems, which may not be able to gather information as quickly as larger cable systems. While we consider one commenter's alternative proposal of a 45-day response period for all cable operators, we conclude that tripling the current deadline is excessive.<sup>56</sup>

22. Fourth, in adopting a maximum application fee and deposit, we acknowledge leased access programmers' concerns that any application fee or deposit could dissuade potential leased access programmers, particularly small entities, from seeking to lease access.<sup>57</sup> Accordingly, rather than permitting "nominal" application fees and deposits as proposed in the FNPRM, we establish maximum application fees and deposits at levels that we do not expect will be unduly burdensome for leased access programmers.<sup>58</sup> We agree with commenters that application fees and deposits are justified to help reimburse cable operators for their leased access costs, to discourage frivolous leased access requests, and to reimburse cable operators for situations in which a leased access programmer only leases access for a brief time before the arrangement is terminated due to non-payment.<sup>59</sup>

23. Fifth, in adopting a contact information requirement, we take steps to minimize the burden on cable operators by permitting them to disclose the contact information either on their own websites, or through alternate means if they do not have their own websites.<sup>60</sup>

24. Sixth, the common-sense modifications to our procedures for leased access disputes, which no commenter opposed, will clarify the required procedures for all entities, including small entities.<sup>61</sup>

25. Finally, in rejecting certain proposals at this time, we decline to adopt proposals that would have imposed additional burdens on cable operators. These proposals include requiring cable systems to carry leased access programming in high definition (HD), adopting new limits on the insurance requirements that cable operators may impose on leased access programmers, and prohibiting cable operators from refusing to carry leased access programmers on only a portion of the operator's system.<sup>62</sup> In addition, we decline to adopt proposals that would further modify the information that cable system operators must provide prospective leased access programmers, which could make it too difficult for leased access programmers, including small leased access programmers, to decide whether to proceed in leasing access.<sup>63</sup>

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

26. None.

#### **H. Report to Congress**

27. The Commission will send a copy of the Report and Order, including this FRFA, in a

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<sup>55</sup> *Id.* section III.B.3.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* section III.B.4.

<sup>58</sup> *Id.* While the FNPRM sought comment on whether the Commission should permit only small cable operators to require an application fee or deposit, commenters did not address that issue. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* section III.B.5.

<sup>61</sup> *Id.* section III.B.6.

<sup>62</sup> *Id.* section III.B.7.

<sup>63</sup> *Id.*

report to be sent to Congress pursuant to the Congressional Review Act.<sup>64</sup> In addition, the Commission will send a copy of the 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.<sup>65</sup>

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<sup>64</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>65</sup> See *id.* § 604(b).

## APPENDIX C

**Initial Regulatory Flexibility Analysis for the Second Further Notice of Proposed Rulemaking**

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> 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 Second Further Notice of Proposed Rulemaking (Second 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 Second FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>2</sup> In addition, the Second FNPRM and IRFA (or summaries thereof) will be published in the Federal Register.<sup>3</sup>

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

2. In the Report and Order and Second Further Notice of Proposed Rulemaking, we update our leased access rules as part of the Commission's Modernization of Media Regulation Initiative and propose to modify the leased access rate formula.<sup>4</sup> The leased access rules, which implement the statutory leased access requirements, direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers.<sup>5</sup> In 2018, the Commission adopted a Further Notice of Proposed Rulemaking (FNPRM) addressing leased access proposals filed in response to the *Media Modernization Public Notice*.<sup>6</sup> With this proceeding, we continue our efforts to modernize media regulations and remove unnecessary requirements that can impede competition and innovation in the media marketplace.<sup>7</sup>

3. In addition to the new rules adopted in the Report and Order, we issue a Second Further Notice of Proposed Rulemaking (Second FNPRM) in which we propose to modify the leased access rate formula so that rates will be specific to the tier on which the programming is carried. We also seek comment on whether we should make additional adjustments to the formula. Finally, we also seek comment on whether leased access requirements can withstand First Amendment scrutiny in light of video programming market changes.

**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.

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<sup>1</sup> 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).

<sup>2</sup> See 5 U.S.C. § 603(a).

<sup>3</sup> See *id.*

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

<sup>5</sup> See 47 U.S.C. § 532; 47 CFR § 76.970 *et seq.* 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).

<sup>6</sup> See *Leased Commercial Access; Modernization of Media Regulation Initiative*, MB Docket Nos. 07-42 and 17-105, Further Notice of Proposed Rulemaking, 33 FCC Rcd 5901 (2018) (FNPRM).

<sup>7</sup> *Id.* at 5901, para. 1.

**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.<sup>8</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>9</sup> In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.<sup>10</sup> 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.<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> Of this total, 3,083 operated with fewer than 1,000 employees.<sup>14</sup> 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.<sup>15</sup> Industry data indicate that there are currently 4,600 active cable systems in the United States.<sup>16</sup> Of this total, all but

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<sup>8</sup> 5 U.S.C. § 603(b)(3).

<sup>9</sup> *Id.* § 601(6).

<sup>10</sup> *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).

<sup>11</sup> 15 U.S.C. § 632.

<sup>12</sup> 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>.

<sup>13</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ5//naics~517110).

<sup>14</sup> *Id.*

<sup>15</sup> 47 CFR § 76.901(e)

<sup>16</sup> 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

(continued....)

nine cable operators nationwide are small under the 400,000-subscriber size standard.<sup>17</sup> In addition, under the Commission's rate regulation rules, a “small system” is a cable system serving 15,000 or fewer subscribers.<sup>18</sup> Current Commission records show 4,600 cable systems nationwide.<sup>19</sup> 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.<sup>20</sup> 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.”<sup>21</sup> There are approximately 52,403,705 cable video subscribers in the United States today.<sup>22</sup> 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.<sup>23</sup> Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.<sup>24</sup> 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.<sup>25</sup> 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

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based on data contained in the Commission’s Cable Operations and Licensing System (COALS). See [www.fcc.gov/coals](http://www.fcc.gov/coals).

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

<sup>18</sup> 47 CFR § 76.901(c).

<sup>19</sup> 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](http://www.fcc.gov/coals).

<sup>20</sup> *Id.*

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

<sup>22</sup> *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).

<sup>23</sup> 47 CFR § 76.901(f).

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

<sup>25</sup> 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).

to a third party, such as cable systems or direct-to-home satellite systems, for transmission to viewers.<sup>26</sup> 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.<sup>27</sup> According to 2012 U.S. Census Bureau data, 367 firms operated for the entire year.<sup>28</sup> Of that number, 319 operated with annual receipts of less than \$25 million a year.<sup>29</sup> 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.”<sup>30</sup> 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.<sup>31</sup> Census data for 2012 shows that there were 8,203 firms in this category that operated for the entire year.<sup>32</sup> 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.”<sup>33</sup> 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.<sup>34</sup> Census data for 2012 shows that there were 307 firms in this category that

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<sup>26</sup> 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#>.

<sup>27</sup> See 13 CFR § 121.201, NAICS Code 515210.

<sup>28</sup> 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](https://factfinder.census.gov/bkmk/table/1.0/en/ECN/2012_US/51SSSZ4//naics~515210).

<sup>29</sup> *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.

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

<sup>31</sup> 13 CFR § 121.201, NAICS Code 512110.

<sup>32</sup> 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>.

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

<sup>34</sup> 13 CFR § 121.201, NAICS Code 512120.

operated for the entire year.<sup>35</sup> Of this total, 294 firms had annual receipts of fewer than \$25 million.<sup>36</sup> 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 Second FNPRM propose one modification to the leased access rate formula that would permit cable operators to calculate the “average implicit fee” for leased access to be based on the tier on which the leased access programming actually will be carried. In addition, it seeks comment on whether to make other modifications to the existing rate formula.

**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.”<sup>37</sup>

14. The record indicates that the current rate formula may be insufficient to compensate cable operators (including small operators) for their leased access administrative costs, and that the current method for calculating rates is unduly complex.<sup>38</sup> Modifying the rate formula could address these concerns, thus easing the burdens of leased access on cable operators, including small entities. The Second FNPRM proposes a rate calculation on a tier-specific basis, and it asks whether there are advantages or disadvantages to this approach that the Commission should consider. Cable operators responding to the FNPRM indicate that they are undercompensated by the current rate formula, and they put forth a wide range of proposals to address their concerns.<sup>39</sup> The Second FNPRM also acknowledges that one commenter indicates that current rates may act as a barrier to entry for some independent programmers, which may be small entities.<sup>40</sup> The Second FNPRM thus seeks comment on the pros and cons of the varying rate proposals in the record, and on any other rate proposals the Commission should consider.

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

15. None.

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<sup>35</sup> 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>.

<sup>36</sup> *Id.*

<sup>37</sup> 5 U.S.C. § 603(c)(1)-(4).

<sup>38</sup> See Second FNPRM.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

**STATEMENT OF  
CHAIRMAN AJIT PAI**

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

1984 saw many great and enduring contributions to our cultural heritage. *Gremlins*, *The Terminator*, *This Is Spinal Tap*, and *Footloose* hit the silver screen. On TV, *Happy Days* aired its season finale while *Jeopardy!* returned to the airwaves as a syndicated program. And 35 years ago this month, arguably the greatest album of all time was released, with Prince appealing to legions with “Purple Rain,” “Let’s Go Crazy,” and “When Doves Cry.”

That same year, Congress mandated that cable operators provide independent video programmers “leased commercial access”—essentially, to set aside channel capacity for unaffiliated programmers. Unlike the entertainment milestones just discussed, leased access has not aged well.

The video programming marketplace of 1984 is virtually unrecognizable today. Most Americans then only had access to a few broadcast stations and a single cable operator. At that time, leased access was intended to give independent programmers a unique chance to reach consumers.

Today, our leased access regime is basically the Betamax or New Coke of FCC video regulation. Today, programmers can and do create and share all sorts of video content online to a worldwide audience. More outlets exist to distribute programming than ever before. And content creators can even distribute their own programming. Indeed, as we speak, the FCC is distributing its own video programming online through a livestream.

It’s long past time to sync our leased access rules with the times. So today, we vacate the *2008 Leased Access Order*, a troubled decision which never went into effect because of a judicial stay and disapproval by the Office of Management and Budget. We eliminate the requirement that cable operators provide part-time leased access, a mandate that is legally unnecessary. We decide that only bona fide requests from leased access programmers trigger obligations to respond from cable systems. And finally, we seek public input on a proposal to simplify the maddeningly-complex leased access rate formula. This is real progress, even against the backdrop of serious concerns that have been raised (concerns that I share) about the constitutionality of this entire regime.

For their efforts, I’d like to thank Steven Broecker, Michelle Carey, Katie Costello, Nancy Murphy, Holly Saurer, and Diana Sokolow from the Media Bureau, and Susan Aaron, James Carr, and David Konczal from the Office of General Counsel for their work on this item. And I look forward to seeing our staff’s upcoming work on modernizing media regulations. In the 1984 *Dallas* season-ending cliffhanger, Bobby Ewing was shot, and fans had to wait the entire summer to find out if he had survived. Thankfully, fans of our modernization efforts will only have to wait a couple of weeks to discover which media regulations we will update next at our July meeting.

**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 Order vacates the Commission's 2008 *Leased Access Order*, updates the existing leased access rules, and expresses the Commission's view that the video marketplace has changed dramatically in recent years, with a wide variety of media platforms available for content creators to utilize for program distribution. In particular, I am pleased to see the Commission affirm that over-the-top providers and other digital avenues are substitutes for traditional video distribution. This is a viewpoint I have long advocated, and one that I expect to inform the Commission's media regulations going forward.

Regarding the specifics of the item, I believe eliminating part-time access and requiring that cable operators only respond to bona fide requests will go a long way in cleaning up the operation of this statutory mandate and may provide the Congress with a compelling reason to revisit, or even repeal, the current statute. At a minimum, the rules adopted today will help cover the costs borne by operators that must respond to requests. As I've noted before, I'm not sure there ever was a golden age of leased access, but the Commission did regulate in this arena pursuant to Congressional direction. Today, we are at least moving the needle in the right direction by helping to relieve the administrative burden of rules that have certainly outlived their usefulness.

Finally, as we continue to solicit feedback in the Second FNPRM, I will be particularly interested in reviewing the record that is developed around the question of whether leased access can further withstand First Amendment scrutiny. While there were questions over the constitutionality of the original mandate at its inception, certainly the state of today's video programming marketplace raises heightened constitutional concerns. This is additionally relevant in the broader context of video regulation, beyond just leased access. In sum, I appreciate the substantial portions of the Order dedicated to discussing the current video marketplace and expect continued conversation on this point with corresponding further action.

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.

The Supreme Court and D.C. Circuit have long recognized that leased access and related rules impinge on free speech.<sup>1</sup> They do so by requiring cable providers to carry speech they might not otherwise choose to distribute. As a result, courts have consistently applied heightened First Amendment scrutiny to these types of provisions.<sup>2</sup> And in the past, courts upheld the requirements against constitutional challenges based, in no small part, on the market conditions that prevailed in the 1980s and 1990s when Congress passed its leased access laws. Back then, cable providers accounted for 98 percent of the pay-TV market. If you wanted to distribute video content, you had virtually no choice other than to go through a local cable provider. So Congress enacted these laws to disrupt cable's bottleneck monopoly.

Flash forward to today, and the market is drastically different. The monopoly conditions that courts relied on to uphold leased access and its intrusion on free speech have completely eroded. That's why last June, when the FCC proposed to modernize our leased access rules, I asked my colleagues to seek comment on the First Amendment implications of our approach. I am glad that we did.

As the record here shows, over 99 percent of U.S. households now have access to at least three pay-TV options. The Commission recognized this in 2015 when it adopted a presumption that all pay-TV markets are competitive. And consumers now see robust video competition not just from MVPDs and broadcasters, but from online streaming services like Sling, Hulu, and Amazon. Not to mention a nearly unlimited number of platforms like YouTube and Vimeo that enable virtually anyone to distribute programming to billions of potential viewers at little to no cost. There are now far more options for distributing content and reaching U.S. households than paying cable for carriage on their networks.

All of this undermines the constitutional foundation of our leased access regime. And as the Order lays out, these First Amendment concerns provide an additional basis for eliminating our part-time leased access rules. So I am glad that we are taking this step today.

But the competitive marketplace we now see also casts substantial doubt on whether the remaining rules and requirements could withstand First Amendment scrutiny. So I'm glad we seek additional comment in today's Further Notice on whether the broader leased access regime remains consistent with the First Amendment.

So I support today's Order and look forward to the record developing on the Further Notice. I want to thank the Media Bureau for its work on the item. It has my support.

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<sup>1</sup> See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."); see also *Time Warner v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) (applying *Turner* in a case bringing a facial challenge to the leased access provisions of the 1992 Cable Act).

<sup>2</sup> *Turner*, 512 U.S. at 641 ("some measure of heightened First Amendment scrutiny is demanded"); *Time Warner*, 93 F.3d at 967-971 (applying *Turner*'s First Amendment framework to leased access requirements).

**STATEMENT OF  
COMMISSIONER JESSICA ROSENWORCEL  
APPROVING IN PART AND DISSENTING IN PART**

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

In the Cable Communications Policy Act, Congress charged the Federal Communications Commission with promoting “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.” These are the values that this agency has a duty to uphold and protect. They are the ones that inspired our leased access policies. But those leased access policies have long been stuck in regulatory limbo. For more than a decade, they have been stayed by the courts and stymied by data collection at the Office of Management and Budget.

It is time for a reboot. So I support our effort to do so today. But I have some concern about how we proceed, because we have set the bar for leased access in a higher place and have loaded it down with new requirements like deposits and full-time capacity channel purchases. Going forward, we will need to monitor how this new set of policies work in practice so that we can be sure they are living up to our statutory responsibilities.

Moreover, on the way to this outcome, I think this decision fundamentally misinterprets the First Amendment values that support our leased access rules. In fact, I think the language in this order dismissing the constitutional foundation of our rules is overbroad and wrong—and I dissent in this respect.

The First Amendment does more than protect the interests of corporations. As courts have long recognized, it is a force to support individual interest in self-expression and the right of the public to receive information and ideas. As Justice Black so eloquently put it, “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” Our leased access rules provide opportunity for civic participation. They enhance the marketplace of ideas by increasing the number of speakers and the variety of viewpoints. They help preserve the possibility of a diverse, pluralistic medium—just as Congress called for the Cable Communications Policy Act.

The proper inquiry then, is not simply whether corporations providing channel capacity have First Amendment rights, but whether this law abridges expression that the First Amendment was meant to protect. Here, our leased access rules are not content-based and their purpose and effect is to promote free speech. Moreover, they accomplish this in a narrowly-tailored way that does not substantially burden more speech than is necessary to further important interests. In other words, they are not at odds with the First Amendment, but instead help effectuate its purpose for all of us.

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

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

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

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

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

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

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<sup>1</sup> Report and Order and Second Further Notice of Proposed Rulemaking at para. 40.

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

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

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

(continued....)

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

For these reasons, I approve in part and dissent in part.

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

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

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

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

<sup>7</sup> Report and Order and Second Further Notice of Proposed Rulemaking at para. 40.