

**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.¹ 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.² 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.

¹ 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).

² *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).